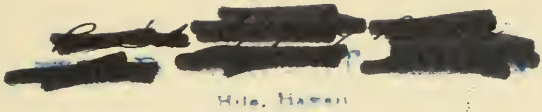

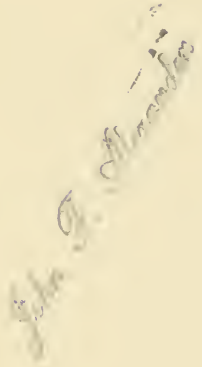

English Ruling Cases

CITED "E. R. C."

CONTINUED BY

British Ruling Cases

CITED "B. R. C."

The Extra Annotations following this volume should invariably be examined. They give every citation of the cases reported in this volume of E.R.C. in the decisions of this country and Canada, also in the more important English decisions, indicating which citation the exact point involved and the disposition made by the Court. An additional feature is the analysis and citation of these cases in the leading text books and Annotated Reports.

English Ruling Cases

ARRANGED, ANNOTATED AND EDITED
BY
ROBERT CAMPBELL, M. A.
OF LINCOLN'S INN
ASSISTED BY OTHER MEMBERS OF THE BAR

WITH AMERICAN NOTES
BY
IRVING BROWNE

VOL. III.
ANCIENT LIGHT—BANKER

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PREFACE TO VOLUME III.

THE editor has to acknowledge the continued assistance in this volume of Mr. A. E. RANDALL.

It will be observed that the original paging of the reports of the Ruling Cases is now noted as mentioned in the preface to Volume II.

Readers are again reminded that any suggestions for correction or addition sent either to the publishers or the editor will be carefully considered.

R. CAMPBELL.

January, 1895.

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RULING CASES.

ANCIENT LIGHT.

No. 1. — TAPLING *v.* JONES.

(H. L. 1865.)

No. 2. — AYNSLEY *v.* GLOVER.

(CH. 1875.)

RULE.

THE absolute right to the enjoyment of light may (by the Statute 2 & 3 Will. IV. c. 71 § 3) be acquired by twenty years' uninterrupted enjoyment.

But the right to ancient light may also still be established by proof of enjoyment from time immemorial, although the proof of the twenty years' enjoyment under the Statute is interfered with by a temporary unity of possession during that time.

In either case, the fact that the windows in a new building are larger than, or that there are other windows besides, those through which the ancient light was enjoyed, does not destroy the right to enjoy the ancient light.

Tapling v. Jones.

34 L. J. C. P. 342-352 (s. c. 11 H. L. Cas. 290; 20 C. B. N. S. 1; 12 L. T. 555; 13 W. R. 617).

This action was commenced in the Court of Common Pleas on the 24th of February, 1858, and was brought for an alleged obstruction of the access of light and air to certain windows in the west side of a warehouse, No. 107 Wood Street, Cheapside, in the city of London, the property of the respondent, the defendant in error, and the plaintiff below.

No. 1. — Tapling v. Jones, 34 L. J. C. P. 342, 343.

The declaration consisted of two counts. The first count alleged a right on the part of the defendant in error to the access of light and air to certain ancient windows of a messuage and building in that count mentioned, and stated, by way of breach, that the plaintiff in error, by wrongfully building and continuing a wall near to such windows, prevented the light and air from coming to or entering the same. The second count alleged a right to the unobstructed access of light and air to the said windows, and averred as a breach that such access was obstructed by the wrongful continuance of a wall, on a close opposite and near to such windows.

The defendant pleaded, first, not guilty; secondly, a traverse of the right alleged in the first count; and, thirdly, a traverse of the right alleged in the second count.

There was a replication joining issue on these pleas.

Upon these issues the cause came on to be tried, at the Sittings at the Guildhall of the city of London, on the 16th of February, 1859, when a verdict was entered for the defendant in error, for the damages claimed in the declaration, subject to a special case. A special case was afterwards stated which, so far as it is material, was to the following effect:

"The plaintiff is a wholesale dealer in silk, and now carries on his business at Nos. 107, 108, and 109 Wood Street. The plaintiff had for several years prior to 1857 carried on his business at Nos. 108 and 109 Wood Street, but he acquired possession of the premises No. 107 Wood Street, for the first time in the year 1857, having become the purchaser of them in the month of July in that year. Up to the time when the plaintiff acquired possession of the said premises No. 107, they were used and occupied as a public-house, known by the sign of the 'Magpie and Pewter Platter,' and were, and are, in a line with and next adjoining Nos. 108 and 109. The said premises, Nos. 107, 108, and 109, abut, on the rear or west side thereof, upon the east side of certain premises fronting in Gresham Street West, and therein numbered 1 to 8, hereinafter called the Gresham Street property. In the year 1852 the plaintiff pulled down his premises Nos. 108 and 109 Wood Street, which were then old and dilapidated houses, and [* 343] erected on their site new warehouses. In doing *so he altered the position and enlarged the dimensions of the windows previously existing, increased the height of the building, and set back the rear or back line of those warehouses.

No. 1. — Tapling v. Jones, 34 L. J. C. P. 343.

"The defendant, who is a carpet-warehouseman, on the 23rd of July, 1852, was tenant of the said Gresham Street property, and now holds the same under a lease for a term of eighty-one years since granted to him. In and about the year 1856 the defendant pulled down the buildings then standing on the Gresham Street property in order to erect thereon a warehouse.

"The plaintiff, in July, 1857, immediately after his purchase of No. 107 Wood Street, made alterations in it by lowering the first and second floors so as to make them correspond with his adjoining new warehouses, Nos. 108 and 109, and by lowering two of the windows in such floors so as to suit the new position of the floors. One of the lowered windows was about one foot longer than before, and the other about the same size as the old one, and both occupied parts of the old apertures. A small window on the first floor was blocked up. He also built two additional stories to No. 107, in the first of which, viz. the fourth story of the premises, he put out a new window, and in the fifth or attic story he placed a window extending across the entire width of the building. These new windows and lights were so situated that it was impossible for the owners of the said Gresham Street property to obstruct or block them without also obstructing or blocking, to an equal or greater extent, that portion of the said windows and lights which occupied the site of the said ancient windows in No. 107.

"The said alterations and additions in No. 107 Wood Street, so far as the windows are concerned, were completed by the plaintiff in the month of August, 1857.

"After the alterations and additions to No. 107 Wood Street had been so completed, the defendant proceeded to erect his said intended warehouse and premises on the Gresham Street property, and built up the eastern wall thereof to such a height as to obstruct the whole of the windows and lights of No. 107 Wood Street.

"The defendant refused to remove the said eastern wall of his warehouse and premises or any part of it.

"The question for the opinion of the Court is, whether the plaintiff is entitled to recover in respect of the obstruction of light and air complained of. If they are of opinion that he is so entitled, then the verdict entered for the plaintiff is to stand and the damages to be reduced to 40*s.*; if they think the plaintiff is not so entitled, then the verdict entered for the plaintiff is to be set aside and a verdict entered for the defendant."

No. 1. — Tapling v. Jones, 34 L. J. C. P. 343, 344.

The Judges of the Court of Common Pleas were equally divided in opinion, the Lord Chief Justice and Mr. Justice Williams being in favour of the plaintiff below, Mr. Justice Keating and Mr. Justice Byles being in favour of the defendant below. Mr. Justice Keating thereupon withdrew his opinion, and judgment was given in favour of the plaintiff below. 11 C. B. (N. S.) 283; 31 L. J. C. P. 110.

The defendant below brought error upon that judgment, and the Court of Exchequer Chamber affirmed the judgment. There was a difference of opinion among the Judges; Mr. Justice Wightman, Mr. Justice Crompton, Mr. Baron Bramwell, and Mr. Justice Blackburn being in favour of the plaintiff below, and the Lord Chief Baron and Mr. Baron Martin being in favour of the defendant below. 12 C. B. (N. S.) 826; 31 L. J. C. P. 342.

The Attorney-General and Archibald, for the appellant. The right to an easement must rest on some presumed grant, and the extent of the grant is always to be referred to and measured by the user and the effect of it. The cases show that whatever may be the origin of the right, such right is measured by usage. So, if the effect on the property subject to the right is varied, the party having the right cannot claim the benefit of the right as to the old part which has remained unaltered, so as to shield the user of the new part. Such an alteration sets the owner of the servient tenement free to protect himself. As to the origin of the right being presumed to be in grant before the Prescription Act,
[*344] —* *Daniel* v. *North*, 11 East, 372; *Barker* v. *Richardson*, 4 B. & Ald. 579, — the old theory of the law still remains. *Bright* v. *Walker*, 1 Cr. M. & R. 211; 3 L. J. (N. S.) Exch. 250. The effect of material alterations which, if acquiesced in, would increase the servitude of the servient tenement, is to destroy the servitude, unless the new encroachment can be shut out without affecting the old right. The consent is to a different thing. The old right cannot be used as a shield for fresh encroachment. The continuance of what the servient tenant has done to protect himself from such encroachment cannot be prevented by the owner of the dominant tenement restoring the property to its original state. The servient tenant consented only to something of which the dominant tenant has deprived himself of the right to insist upon by altering the state of circumstances. *Luttrell's Case*, 4 Co. Rep. 87 a. The first case having direct application to the present

is *Cherrington* v. *Abney*, 2 Vern. 646; and see *Com. Dig.*, page 421, 5th ed., and *Martin* v. *Goble*, 1 Camp. 320. The cases of *Dougall* v. *Wilson*, 2 Wms. Saund. 175 a; *Cotterell* v. *Griffiths*, 4 Esp. 69; *Chandler* v. *Thompson*, 3 Camp. 80; 13 R. R. 756, and *Thomas* v. *Thomas*, 5 Tyrw. 810; 4 L. J. (N. S.) Ex. 179, are not relied upon, but merely mentioned in their order of date. The later cases on which reliance is placed are *Garritt* v. *Sharp*, 3 Ad. & E. 325; 4 Nev. & M. 834; *Blanchard* v. *Bridge*, 4 Ad. & E. 176; 5 L. J. K. B. 78; *Renshaw* v. *Bean*, 18 Q. B. R. 112; 21 L. J. Q. B. 219; *Wilson* v. *Townend*, 1 Dr. & Sm. 324; 30 L. J. Ch. 25; *Davies* v. *Marshall*, 4 L. T. (N. S.) 105; *Cooper* v. *Hubbuck*, 30 Beav. 160; 31 L. J. Ch. 123; and *Hutchinson* v. *Copestake*, 9 C. B. (N. S.) 863; 31 L. J. C. P. 19. The opinion of the majority of the Judges in the present case has been approved of by Vice-Chancellor Wood in *Weatherly* v. *Ross*, 1 H. & M. 349; 32 L. J. Ch. 128. The respondent abandoned his old rights; he had no intention of resuming them when he made the alterations, and he cannot resume them now. *Liggens* v. *Inge*, 7 Bing. 632; 9 L. J. C. P. 202; *Stokoe* v. *Singers*, 8 El. & B. 31; 26 L. J. Q. B. 257; *Gale on Easements*, pp. 500, 483–4; and *Martin* v. *Hendon*, 11 L. T. (N. S.) 590.

Sir H. Cairns and Cleasby, for the respondent, were not called upon.

The Lord Chancellor. By the 3rd section of the Act 2 & 3 Wm. IV. c. 71, intituled "An Act for shortening the time of prescription in certain cases," it is enacted, "that when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

Upon this section it is material to observe, with reference to the present appeal, that the right to what is called "an ancient light" now depends upon positive enactment. It is matter *juris positivi*, and does not require, and therefore ought not to be vested on any presumption of grant or fiction of a license having been obtained from the adjoining proprietor. Written consent or agreement may be used for the purpose of accounting for the enjoyment of the servitude, and thereby preventing the title which would otherwise

No. 1. — Tapling v. Jones, 34 L. J. C. P. 344, 345.

arise from uninterrupted user or possession during the requisite period. This observation is material, because I think it will be found that error in some decided cases has arisen from the fact of the Courts treating the right as originating in a presumed grant or license.

It must also be observed, that after an enjoyment of an access of light for twenty years without interruption, the right is declared by the Statute to be absolute and indefeasible; and it would [* 345] seem therefore, that it cannot be lost or defeated by a *subsequent temporary intermission of enjoyment not amounting to abandonment. Moreover, this absolute and indefeasible right, which is the creation of the Statute, is not subjected to any condition or qualification; nor is it made liable to be affected or prejudiced by any attempt to extend the access or use of light beyond that which, having been enjoyed uninterruptedly during the required period, is declared to be not liable to be defeated.

Before dealing with the present appeal, it may be useful to point out some expressions which are found in the decided cases, and which seem to have a tendency to mislead. One of these expressions is the phrase, "right to obstruct." If my adjoining neighbour builds upon his land, and opens numerous windows which look over my gardens or my pleasure-grounds, I do not acquire from this act of my neighbour any new or other right than I before possessed. I have simply the same right that I before possessed, — I have simply the same right of building or raising any erection I please on my own land, unless that right has been, by some antecedent matter, either lost or impaired, and I gain no new or enlarged right by the act of my neighbour.

Again, there is another form of words which is often found in the cases on this subject, namely, the phrase, "invasion of privacy, by opening windows." That is not treated by the law as a wrong for which any remedy is given. If A. be the owner of beautiful gardens and pleasure-grounds, and B. is the owner of an adjoining piece of land, B. may build upon it a manufactory with a hundred windows overlooking the pleasure-grounds, and A. has neither more nor less than the right which he previously had, of erecting on his land a building of such height and extent as will shut out the windows of the newly erected manufactory.

If in lieu of the words, "the access and use of light to and for any dwelling-house," in the 3rd section of the Statute, there be

read, as there well may, "any window of any dwelling-house," the enactment (omitting immaterial words) will run thus, "when any window of a dwelling-house shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right to such window shall be deemed absolute and indefeasible."

Suppose then that the owner of a dwelling-house with such a window, that is, with an absolute and indefeasible right to a certain access of light, opens two other windows, one on each side of the old window, does the indefeasible right become thereby defeasible? By opening the new windows he does no injury or wrong in the eye of the law to his neighbour, who is at liberty to build up against them, so far as he possesses the right of building on his land; but it must be remembered that he possesses no right of building so as to obstruct the ancient window; for to that extent his right of building is gone by the indefeasible right which the Statute has conferred.

Believing this to be the sound principle, I cannot accept the reasoning on which the decisions in *Renshaw* v. *Bean*, 18 Q. B. 112, 21 L. J. Q. B. 219, and *Hutchinson* v. *Copestake*, 9 C. B. (N. S.) 863, 31 L. J. C. P. 19, were founded. The facts of those two cases were not exactly the same as in the present; for in neither was any ancient window preserved unaltered, but the old windows had been enlarged and new ones added; in which state of things it was held, that inasmuch as it was not possible for the adjoining proprietor to obstruct the new windows, and the access of the ancient lights, without at the same time obstructing the original apertures, the owner of the house must be considered as having lost his right to the ancient lights, at all events until he restored his house to its original condition.

According to these cases, the law must be thus stated; namely, if the owner of a dwelling-house with ancient lights, opens new windows in such a position as that the new windows cannot be conveniently obstructed by an adjoining proprietor without obstructing the old, he, the adjoining proprietor, is entitled so to do, at all events so long as the new windows remain. Upon examining the judgments, it will be seen that the opening of the new windows is treated as a wrongful act done by the owner of the ancient lights, which occasions the loss of the old right he possessed; and the Court asks whether he can complain of the natural consequence of his own act.

I think two erroneous assumptions are involved in or underlie this reasoning: first, that the act of opening the new win-
[*346] dows *was a wrongful one; and, secondly, that such wrongful act is sufficient in law to deprive the party of his right under the Statute. But, as I have already observed, the opening of the new windows is in law an innocent act, and no innocent act can destroy the existing right of the one party, or give any enlarged right to the other, namely, the adjoining proprietor.

In the present case, an ancient window in the plaintiff's house has been preserved, and remained unaltered during all the alterations of the building, and the access of light to that window is now obstructed by the appellant's wall. A majority of the Court below have held, that the obstruction was justified whilst the new windows which the plaintiff some time since opened remained, but was not justifiable when those new windows were closed, and the house, so far as regards the access of light, was restored to its original state; but, on the plain and simple principles I have stated, my opinion is, that the appellant's wall, so far as it obstructed the access of light to the respondent's ancient unaltered window, was an illegal obstruction from the beginning; and I have great difficulty in acceding to the reasoning that this permanent building of the appellant was a legal act when begun and completed, but has subsequently become illegal through a change of purpose on the part of the respondent. On such a principle the person who opens new lights might allow them to remain until his neighbour, acting legally according to these judgments, has at great expense erected a dwelling-house, and then by abandoning and closing the new lights, might require his neighbour's house to be pulled down. I think the judgment ought to be affirmed, but not on the ground or for the reasons given by the majority of the Judges in the Courts below. I therefore move, your Lordships, that the judgment of the Court below be affirmed.

Lord Cranworth. My Lords, the question raised by the special case is, whether the plaintiff in error was justified in erecting, opposite and near to the house of the defendant in error, a building which prevented the access of light and air through several ancient windows, through which light and air had been accustomed to pass to the house in question without interruption.

Previously to the erection by the plaintiff in error, of the buildings complained of, the defendant in error made extensive altera-

tions in his house, and in so doing, opened new — and enlarged several of the old — windows; and it was not disputed that the plaintiff in error was justified in obstructing the new and the enlargements of the old windows. He effected this obstruction by erecting a permanent building on his own land, so near to the house of the defendant in error as to obstruct the whole of his lights, the old as well as the new. The special case finds as a fact, that it was impossible for him to obstruct or block the new windows without at the same time obstructing or blocking that portion of the windows and lights which occupied the site of the ancient windows; and his counsel argued, on the authority of *Renshaw* v. *Bean*, that under these circumstances he had a right to erect the building in question. After it had been so erected, the defendant in error caused the altered windows to be restored to their original state, and he also filled up with brick-work the spaces occupied by the new windows, and having done this, he called on the plaintiff in error to remove the building which thus blocked up the ancient, and only the ancient windows. This application was not complied with, and thereupon the defendant in error brought his action in the Court of Common Pleas against the plaintiff in error for obstructing his ancient lights.

At the trial, a verdict was found for the plaintiff in error, subject to a special case; which was afterwards argued before the Court of Common Pleas; and the Court being equally divided in opinion, the junior Judge, following the usual practice, withdrew his opinion, and judgment was there given for the now defendant in error, according to the opinions of what was then the majority of the Court. The case was then brought to the Court of Error, where the judgment below was affirmed, four of the six learned Judges who heard the case concurring in opinion with the Court of Common Pleas in favour of the defendant in error, and two dissenting. The case was then brought by writ of error to this House, and the plaintiff in *error was heard at the [*347] bar. We did not call on the defendant in error to support his case, being of opinion that the plaintiff in error had laid no ground for disturbing the judgment below; though our opinion was not founded on the same ground as that on which the majority of the Judges below seem to have proceeded.

The case raised two questions: First, whether the plaintiff in error was justified in erecting the building whereby the access of

light and air to the house of the defendant in error was obstructed; and secondly, if he was, then whether he was bound to remove it after the windows of the defendant's house had been restored to their ancient condition. The second question does not arise, and I will therefore proceed to state shortly the grounds on which my opinion rests.

The right to enjoy light through a window looking on a neighbour's land, on whatever foundation it might have rested previously to the passing of the 2 & 3 Wm. 4 c. 71, depends now on the provisions of that Statute.

The special case finds that the windows of the house of the defendant in error, previously to the alterations made by him in 1857, were ancient windows; by which we must understand windows through which he had enjoyed access of light without interruption for twenty years. His right, therefore, to that light was by the express provision of the Statute absolute and indefeasible. It is not disputed that when the plaintiff in error erected his wall, he obstructed the light to which the defendant in error was so entitled, and that so he prevented him from enjoying what the Statute declares was his absolute and indefeasible right. The plaintiff in error, in justification of the course he took, relies on the fact that, before he raised his wall and so caused the obstruction complained of, the defendant in error had made material alterations in his house, enlarging the old windows and adding new ones. There was nothing to make it unlawful for the plaintiff in error to obstruct the access of light to these new windows, and to so much of the altered old windows as did not occupy the old site through which light had formerly passed; and as it was impossible to do this without at the same time obstructing the light which had previously passed through the old windows (so at least we must take the fact to be), the plaintiff in error contends that he had a right to obstruct the whole.

I am unable to comprehend the principle on which such a claim can rest, where a person has wrongfully obstructed another in the enjoyment of an easement, as, for instance, by building a wall across a path over which there is a right of way, public or private, any person so unlawfully obstructed may remove the obstruction; and if any damage thereby arises to him who wrongfully set it up, he has no right to complain. His own wrongful act justified what would otherwise have been a trespass. But this depends entirely

on the circumstance that the act of erecting the wall was a wrongful act; whereas the opening of a window is not an unlawful act; every man may open any number of windows looking over his neighbour's land; and on the other hand, the neighbour may, by building on his own land within twenty years after the opening of the window, obstruct the light which would otherwise reach it. Some confusion seems to have arisen from speaking of the right of the neighbour in such a case, as a right to obstruct the new lights. His right is a right to use his own land by building on it as he thinks most to his interest, and if by so doing he obstructs the access of light to the new windows he is doing that which affords no ground of complaint. He has a right to build, and if thereby he obstructs the new lights he is not committing a wrong. But what ground is there for contending that, because his building so as to obstruct a new light would afford no ground of complaint, therefore, if he cannot so build without committing a trespass, he may commit a trespass? I can discover no principle to warrant any such inference.

I will put this case. — Suppose the owner in fee simple of close A. were to build a house at the edge of close A. with windows overlooking close B., held by himself, as tenant for life, or by a tenant for life, who, from feelings of kindness, would not object to the opening of the windows of the new house: at the end of twenty years he would, *according to the 3rd and 7th [*348] sections of the Act, have acquired an absolute and indefeasible right to the access of light across close B. It surely cannot be contended that the remainderman, because he could not otherwise prevent the owner of the house from acquiring this right, might, before the expiration of twenty years, come on the land of the tenant for life, and there erect a building to obstruct the light of the new windows. And yet the argument of the plaintiff in error must go this length, for there is no difference in principle between a trespass on the soil and any other trespass.

In the case under discussion the new windows were opened by the same person who had a right to access of light through the old windows; but this might have been otherwise. Suppose the owner of an ancient window on a first floor not to be the owner of the second floor, and that the owner of that floor should open a window which the owner of the adjoining land could not obstruct without at the same time obstructing the ancient light; no one.

I suppose, would argue that in such a case the owner of the land overlooked could obstruct the ancient light, and yet I can see no difference in principle between the two cases. It may be said that, in the case I have just put, the owner of the ancient light was in no default, and could not be affected by the act of a stranger. But neither is he in any default when he opens a new window himself. He does what he lawfully may do, and if the act done is lawful, I do not understand how the consequence can be different when it is the act of the party himself and when it is the act of a stranger. If after the owner of the second floor had opened a new window, and within twenty years the owner of the first floor had purchased the second floor, would the continuance by him of the new window authorise the neighbour in obstructing the old light if he could not otherwise obstruct the new one? This will hardly be contended. So, again, suppose the owner of the first floor to have demised the second floor to a tenant, and that he, without the license of his landlord, put out the new window; this might entitle the landlord to complain of his tenant as having been guilty of waste, but it can hardly be contended that it would justify the neighbour in obstructing the ancient light enjoyed by the landlord. So, again, if the landlord had given his permission to the tenant to open the window, I cannot see any difference which this would make; the tenant would, *quoad hoc*, be unimpeachable of waste; but it would be lawful to the landlord to make such a demise, which could not in any respect affect the relative rights of the landlord and his neighbour.

Suppose the owner of a house has a right of way to the door of his house over his neighbour's land, a case put by Mr. Justice Blackburn in his judgment, the argument of the plaintiff in error would go to show that if the owner of the house should put a pane of glass in his door, his right of way would or might be at an end. For it would be lawful for the neighbour to obstruct it if he could not otherwise obstruct the light.

I will not, however, multiply illustrations. The plain principle seems to me to be, that no one can interfere with the absolute and indefeasible right of another, unless where such interference is made necessary by the wrongful act of the party possessing the right.

I do not attempt to disguise from myself that, unless the facts of this case can be distinguished from those in *Renshaw* v. *Bean*,

the conclusion at which I have arrived is directly at variance with the decision of the Court of Queen's Bench in that case. But I own I think that the facts there were substantially the same as those now before us, and the Court decided there that the obstruction of the ancient light was in such a case justifiable. Lord CAMPBELL, in delivering the judgment of the Court in that case, stated that the Court did not proceed on the ground that the plaintiff, whose ancient lights were obstructed, had lost the right which he had previously enjoyed of having light and air through such portions of the new windows as had formed portions of the ancient windows; but his Lordship added, "If, by the alterations which the plaintiff made, he exceeded the limits of that right, and so put himself into such a position that the access could not be obstructed by the defendant without * at the same [* 349] time obstructing the former right of the plaintiff, he has only himself to blame." The observations I have already made, sufficiently indicate the reasons on which I cannot assent to this reasoning; and unless that reasoning be sound, the judgment cannot be supported.

The case of *Renshaw* v. *Bean* was followed by that of *Hutchinson* v. *Copestake,* not only in the Court of Common Pleas, where the decision of the Court of Queen's Bench was considered to be binding, but also in the Exchequer Chamber, though there some of the Judges seem to have proceeded on the special facts of that case. It is, however, the duty of this house, as the ultimate Court of Appeal, to lay down the law on what they consider to be correct principles, and though we should be slow to decide contrary to the decisions of the Courts of Westminster Hall, where they have been long received and acted on, even if we see cause to question the grounds on which they were supposed to rest, yet no such principle ought to restrain us from correcting what we consider to have been an erroneous decision pronounced only thirteen years ago; more especially when we have, as in this case, the opinions of two very learned Judges, expressing their very decided dissent from it, and when we think we can discover in the judgments of the CHIEF JUSTICE of the Common Pleas and of Mr. Justice WILLIAMS great doubts, to put it no higher, of the soundness of the decision which we are overruling.

My clear opinion is that the judgment below ought to be affirmed.

No. 1. — Tapling v. Jones, 34 L. J. C. P. 349.

Lord CHELMSFORD. My Lords, I agree with the judgment of the Court of Exchequer Chamber, but on different grounds from those on which it proceeded.

The only facts of the special case which are necessary to be noticed are, That in making the alterations in his house, which originally consisted of three stories with one window in each story, the respondent altered the windows in the two lower stories, but so as to make them both occupy part of the old apertures, and retained the window in the third story unaltered, and built two additional stories, in each of which he put out a new window. That after these alterations were completed, the appellant, who had previously made preparations for erecting a warehouse on the site of some old buildings which he had pulled down, built up a wall to such a height as to obscure the whole of the lights in the respondent's buildings; it being impossible (as the special case states) for the appellant to obstruct or block up the upper windows without obstructing or blocking up the portion of the windows or lights which occupied the site of the ancient windows. The special case also states that the new upper windows could not have been obstructed in a more convenient manner (by which I understand more convenient for the appellant) than by building up a wall of sufficient height on his premises. After the appellant's wall was finished, the respondent caused the altered windows in his building to be restored to their original state, and the new windows in the upper stories to be blocked up, and then called upon the appellant to pull down his wall and restore to the respondent's premises their former light and air. The appellant refused, and thereupon the action was brought.

Upon this state of facts two questions have been raised: First, whether the appellant can justify the obstruction of the ancient lights in the respondent's house, on the ground that it was otherwise impossible for him to obstruct the new lights. Secondly, supposing him to have this right, whether it continued after the necessity for its exercise ceased, by the discontinuance of the new lights.

The first question brings directly into review before this house the decision of the Court of Queen's Bench in the case of *Renshaw* v. *Bean*, which in its circumstances (as stated by Lord CAMPBELL in his judgment) closely resembled the present case. The Court there held that "the plaintiff having, by the alterations which he made, exceeded the limits of his former rights and put himself

into such a position that the access could not be obstructed by the defendant in the exercise of his lawful rights, on his own land, without at the same time obstructing the former right of the plaintiff, he had only himself to blame for the existence of such a state of things, and must be considered to lose the former
* right which he had, at all events until he should, by him- [* 350]
self doing away with the access, and restoring his windows to their former state, throw upon the defendant the necessity for so arranging his buildings as not to interfere with the admitted right."

In this statement of the grounds of decision the word "right" does not appear to be used with appropriate precision and accuracy. It is not correct to say that the plaintiff, by putting new windows into his house, or altering the dimensions of the old ones, "exceeded the limits of his right," because the owner of a house has a right at all times (apart, of course, from any agreement to the contrary) to open as many windows in his house as he pleases. By the exercise of the right he may materially interfere with the comfort and enjoyment of his neighbour, but of this species of injury the law takes no cognisance. It leaves every one to his self-defence against an annoyance of this description, and the only remedy in the power of the adjoining owner is to build on his own ground, and so to shut out the offensive windows. But as it would be hard upon the owner of a house to which the free access of light and air had been permitted for a long period to continue forever indebted to the forbearance of his neighbour for its enjoyment, the courts of law, upon the principle of quieting possession, formerly held that where there had been an uninterrupted use of lights for twenty years, it was to be presumed that there was some grant of them by the neighbouring owner, or, in other words, that he had by some agreement restricted himself in the otherwise lawful employment of his own land. The Prescription Act (2 & 3 Will. IV. c. 71) turned this presumption into an absolute right, founded upon user on one side, and acquiescence on the other.

It was argued, on behalf of the appellant, that under this Act the right to the enjoyment of lights was still made to rest on the footing of a grant. I do not see what benefit his case would derive from the establishment of this position; but it appears to me to be contrary to the express words of the Statute. By the Prescription Act, after twenty years' user of lights, the owner of them acquires an absolute and indefeasible right, which so far restricts

the adjoining owner in the use of his own property, that he can do nothing upon his premises which may have the effect of obstructing them. The right thus acquired must, necessarily, be confined to the exact dimensions of the opening through which the access of light and air has been permitted. As to everything beyond, the parties possess exactly the same relative rights which they had before. The owner of the privileged window does nothing unlawful if he enlarges it, or if he makes a new window in a different situation. The adjoining owner is at liberty to build upon his own ground so as to obstruct the addition to the old window, or to shut out the new one; but he does not regain his former right of obstructing the old window, which he had lost by acquiescence, nor does the owner of the old window lose his former absolute and indefeasible right to it, which he had gained by length of user. The right continues uninterruptedly until some unequivocal act of intentional abandonment is done by the person who has acquired it, which will remit the adjoining owner to the unrestricted use of his own premises.

It will, of course, be a question in each case whether the circumstances satisfactorily establish an intention to abandon altogether the future enjoyment and exercise of the right. If such an intention is clearly manifested, the adjoining owner may build as he pleases upon his own land; and should the owner of the previously existing window restore the former state of things, he could not compel the removal of any building which had been placed upon the ground during the interval; for a right once abandoned, is abandoned forever. But the counsel for the appellant carried their argument far beyond this point. The part of the case which was the most difficult for them to encounter, was that which relates to the unaltered window in the third floor. As to this, they contended that the alteration of the windows below, and the addition of the windows above, so changed the character of the previously acquired right to light and air as entirely to destroy it. But it is not easy to comprehend how this effect can [* 351] be produced by acts wholly unconnected with an * ancient window, which the owner has carefully retained in its original state. And the learned counsel did not seem to expect much success from their argument in its application to the unaltered window, but directed it, with more plausibility, to the alterations of the windows on the lower floors. As to these, they contended that the

owner of ancient windows is bound to keep himself within their original dimensions; and that if he changes or enlarges them in any way, although he retains the old openings, in whole or in part, he must either be taken to have relinquished his right or to have lost it. But upon what principle can it be said that a person, by endeavouring to extend a right, must be held to have abandoned it, when, so far from manifesting any such intention, he evinces his determination to retain it, and to acquire something beyond it? If, under such circumstances, abandonment of the right cannot be assumed, as little can it be said that it is a cause of forfeiture.

It must always be borne in mind that it is no unlawful act for the owner of a house to break out a window, or to enlarge an ancient window, although in the latter case some difficulty may be thrown upon an adjoining owner to distinguish the old part from the new, and so to ascertain which part he has a right to obstruct, and which is privileged from his obstruction. The alterations may be of such a nature (as in the present case) as to make it impossible for him to prevent the further restriction of his liberty to build on his own premises, without at the same time interfering with the right previously acquired against him. Yet it would be a very strange extension of the law of forfeiture, to hold that the owner of an ancient window, doing nothing but what he may lawfully do, loses his existing right, because it stands in the way of the means of interfering with an act against which the owner of the adjoining land would otherwise have been able, and would have been entitled to defend his property. Even supposing what was done by the respondent amounted to an unlawful encroachment, the question put by Mr. Baron ALDERSON in *Thomas* v. *Thomas*, appears to be unanswerable, — "How does the plaintiff, by claiming more than he lawfully may, destroy his title to that which he lawfully may claim?" But the Court of Queen's Bench, in the case of *Renshaw* v. *Bean*, held, that "because the respondent, in the exercise of his lawful rights on his own land, could not obstruct (what they called) the excess of the plaintiff's former right, without obstructing that former right, he had only himself to blame for the existence of such a state of things, and must be considered to lose the former right which he had." This doctrine appears to me to be founded neither upon principle nor upon authority. It amounts to this. The plaintiff having acquired an absolute right to ancient windows against the defendant, does an

act which it was lawful for him to do, subject to the right of the defendant to render it useless; but because he has contrived his measures so as to prevent the defendant hindering the attempt to obtain a new right without destroying or at least suspending the exercise of the old, therefore the old right may be lawfully interrupted, if indeed it is not altogether lost.

It may be said (and this was urged in argument at the bar), that unless such is the law, a person who has an ancient window may acquire a right to any number of additional windows by so contriving their position as to place them completely under the protection of the ancient window, and thus effectually prevent the adjoining owner's interference with them. Undoubtedly, this is a very possible case; and yet there does not appear to be anything unreasonable or unjust in denying, even under such circumstances, a power over the ancient lights which did not previously exist; for consider the case upon the presumption of a grant as it stood before the Prescription Act. The rights of the parties would, of course, be taken to be regulated by such grant, and it would have been contrary to principle to permit the grantor to derogate from his own grant, merely because he could not otherwise prevent an act which might prejudicially affect him, but which the grantee was not prohibited from doing by law. And precisely the same consequences seem to follow from the right being now acquired by user and acquiescence — while the user is ripening into a [* 352] right the adjoining owner has the power completely * in his own hands. If he has no objection to the particular window, but is desirous of preventing any enlargement or alteration of it, or any new window being opened, he may inform his neighbour of his determination to build up against the window unless he will enter into an agreement not to enlarge or alter it, nor to open any new one without his permission.

The adjoining owner can therefore always protect himself by a little vigilance, and if he allows rights to be acquired under shelter of which he is prevented using his land for the purpose of defence against the acts of his neighbour, he must blame his own want of foresight and precaution, and not the law, which will not permit an ancient right to be invaded upon any such assumed ground of necessity.

I am, therefore, of opinion that the case of *Renshaw* v. *Bean* cannot be supported, and that the appellant cannot justify the

erection of his wall and the consequent obstruction of the ancient lights on the respondent's building.

The determination of the first question in the respondent's favour renders it unnecessary to consider whether the respondent had a right to insist upon the removal of the appellant's wall, after he had restored his windows to their original state. In the view which I have taken, it is impossible for me to deal with the second question in the way in which it has been treated in the Court of Common Pleas and in the Exchequer Chamber. If I had been of opinion that the acts of the respondent conferred upon the appellant the power of interfering, for however short a time, with the right of the respondent, I should have been compelled, as a consequence, to hold that the obstruction could not be rendered temporary by any subsequent act of the respondent, because a right once lost can never be revived. But it is unnecessary to dwell upon this point, because it is obvious that after the decision of this case, the question can never again be raised. I am of opinion that the judgment of the Court of Exchequer Chamber ought to be affirmed. *Judgment affirmed.*

Aynsley v. Glover.

43 L. J. Ch. 777–783, 44 L. J. Ch. 523–526 (s. c. L. R., 18 Eq. 544, 10 Ch. 283, 31 L. T. 219, 23 W. R. 147, 32 L. T. 345, 23 W. R. 459).

On this case coming on, upon a motion for an interlocutory injunction —

The Master of the Rolls (Sir G. Jessel), after hear- [777] ing arguments for the defendants, said: —

It is very greatly to be lamented that the views of the various branches of the Court of Equity have differed so immensely upon this question of ancient lights.

I wish to state my own views clearly, so that if they are wrong they can be corrected elsewhere, and if they are right they may serve as a guide for the future.

Now first of all this case is a simple one as regards the facts. The defendant is about to build opposite some windows * of the plaintiffs, which for this purpose at the moment I [* 778] will assume are ancient lights, a wall at a distance of three feet, which will be thirty-six feet high. The sills of the windows in question, or at least the most important of them, being eleven feet above the ground, of course it is obvious, and it has not been

denied by counsel for the defendants, that such a wall as that must seriously and materially impede the access of light to these windows. Upon that point we are fortunately in this case not subject to any conflict of evidence or to any dispute whatever.

The next point that is raised by the defendant is this, that the title of the plaintiffs to these ancient windows, or alleged ancient windows, is not clearly proved. I think it is sufficiently proved for the purpose of an interlocutory injunction, that is, I do not hold it to be as conclusively proved as that the defendants may not be able to disprove it hereafter; but upon the present evidence it is proved to my mind, and if no further evidence is adduced at the hearing I shall hold it clearly proved at the hearing. That is what I mean by saying it is sufficiently proved for the purposes of an interlocutory injunction. As regards the smaller windows, the ones below, they appear to be ancient windows, but they appear to have been severally enlarged, I should think nearly doubled in size. The question remains whether the material portion of them, about half, is not ancient lights. Upon this there is the evidence of a man who proves most conclusively, if he is worthy of credit, that they are. The only objection raised by the defendant is that from some period, from 1842, giving them the earliest time, there has been a joint occupation of a piece of land, upon which the defendant is about to build, with the public-house or inn belonging to the plaintiffs. That is disputed. The plaintiffs say that that joint occupation only began in 1861. Whether it began in 1861 or in 1842, there is an old witness on the part of the plaintiffs who says that these windows were there before that. Therefore the antiquity of the lights does not depend upon this disputed question of joint occupation.

That being so, I hold it proved that the plaintiffs have ancient lights, but altered no doubt as regards the material lights in a very substantial manner.

Now the first question I have to decide is whether by reason of this alteration the plaintiffs are deprived of their right to an injunction.

No doubt if the case of *Heath* v. *Bucknall*, L. R., 8 Eq. 1, 38 L. J. Ch. 372, were well decided, and there were no other cases upon the subject, I should still have great difficulty in holding that the plaintiffs are not so entitled. The principle of that case appears to me to be this, that when the plaintiff has altered his ancient lights

materially and in such a manner that the defendant cannot obstruct the additional or new lights without to some extent obstructing the ancient lights, so that by reason of the alteration the plaintiff must in time, that is, in twenty years, gain a right to the new lights or additional lights similar to that which he enjoyed as regards the ancient lights, then it is said the Court of Equity will not interfere at the instance of the plaintiff to grant an injunction which will in effect not only preserve the ancient lights, but enable him to acquire a title to the new lights. That is the principle as I understand it of *Heath* v. *Bucknall*. But *Heath* v. *Bucknall* was in my view of the case overruled by the case, which came before Lord Justice GIFFARD, of *Staight* v. *Burn*, L. R., 5 Ch. 163, 39 L. J. Ch. 289. In the case of *Staight* v. *Burn*, Lord Justice GIFFARD says this: "But if this case," that is, *Heath* v. *Bucknall*, "is supposed to lay down the proposition that a plaintiff, who according to *Tapling* v. *Jones*, 11 H. L. Cas. 290, 34 L. J. C. P. 342 (*ante*, p. 1), has clear legal rights, cannot come to this Court and get protection for those rights, I entirely demur to such a conclusion. If, for instance, there is a house with these ancient windows, and it is desirable to add at no great distance from those three ancient windows two other windows, is it to be said that because those two other windows are to be placed in that position, the plaintiff is not to come into Court to preserve what has been decided in *Tapling* v. *Jones* to be his clear legal right? Such a conclusion would not be * either [* 779] according to principle or to the course of this Court. I take the course of this Court to be that when there is a material injury to that which is a clear legal right, and it appears that damages from the nature of the case would not be a complete compensation, this Court will interfere by injunction." (L. R., 5 Ch. 167.) That amounts in my view of the case to a decision to this effect, that although by alteration of the windows themselves, that is, by adding new lights close to the old windows, the plaintiff has altered the quantity of access of light, yet according to the decision in *Tapling* v. *Jones*, he is still entitled to damages at law for any injury done to the ancient lights; and being so entitled, if his case is otherwise one in which a Court of Equity would grant an injunction, his title to that injunction is not affected by the circumstance either that he has added to the windows, that is, the ancient lights themselves, or made new windows in close proximity to the ancient windows. Therefore following the decision of the Lord Justice, which indeed

I am bound to follow, and considering, whatever he said, that he meant to overrule *Heath* v. *Bucknall*, and that the principle which he has enunciated is not reconcilable with the principle upon which I consider *Heath* v. *Bucknall*, to be decided, I consider the defence which has been urged upon me, arising from the case of *Heath* v. *Bucknall*, cannot be sustained. That disposes of the first objection.

The next objection is one which does not, I think, arise upon the evidence as it stands. It may arise hereafter. The only evidence I have got really is the description on the plan which calls it a "smoke room," which I am told means a smoking-room, but there is no distinct evidence as to the use to which the room has been put. It is said, however, that if it is used as a smoking-room the injury to the light, great and material though it be, will not be such as to interfere with the comfort of those who use the room as a smoking-room. That may or may not be the case; as I said before, there is no distinct evidence upon the subject; but even if there were, I do not think it would make any difference. Here again we have a great conflict of authority. There is no doubt that in the case of *Jackson* v. *The Duke of Newcastle*, 33 L. J. Ch. 698, Lord WESTBURY decided, upon an interlocutory application, that if you did not interfere with the use of the room for the purpose for which it was then being used, that is, did not interfere materially, no injunction ought to be granted by this Court, and that the Court could not look at any future use to which the room might be applied. That, I may observe, was a case of a tenant; the reversioner does not seem to have been a defendant to the suit. If *Jackson* v. *The Duke of Newcastle* were law, and if it had been proved satisfactorily in this case that this room was used as a smoking-room, and the comfort of those using it would not be materially interfered with, then I should not be able to grant an injunction. But I must express my decided opinion that *Jackson* v. *The Duke of Newcastle* is not law. Of course I should have no right to say so if there had been no other decision of equal jurisdiction, but there is such a decision, and it is a decision of Lord CRANWORTH subsequent in point of date. *Yates* v. *Jack*, L. R., 1 Ch. 295, 35 L. J. Ch. 539, *post*, p. 37, was entirely in conflict with the decision of Lord WESTBURY in *Jackson* v. *The Duke of Newcastle*. What Lord CRANWORTH says is this: "The right conferred or recognised by the Statute 2 & 3 Will. IV. c. 71, is an absolute indefeasible right to the enjoyment of the light without reference

to the purpose for which it has been used. Therefore, even if the evidence satisfied me, which it does not, that for the purpose of their present business a strong light is not necessary, and that the plaintiffs will still have sufficient light remaining, I should not think the defendant had established his defence, unless he had shown that for whatever purpose the plaintiffs might wish to employ the light there would be no material interference with it."

That, I think, is a correct interpretation of the law, and, if indeed I thought otherwise, it being a later decision of the LORD CHANCELLOR, I should be bound * to follow the later de- [* 780] cision. I may mention, although it is not conclusive, that Lord HATHERLEY, when Vice-Chancellor, had occasion to consider the decisions both of *Jackson* v. *The Duke of Newcastle* and of *Yates* v. *Jack*, and he certainly adhered, and so far of course as Vice-Chancellor he was bound to adhere, but he expressed an opinion in favour of the view taken by Lord CRANWORTH in *Yates* v. *Jack*, *Dent* v. *The Auction Mart Company*, L. R., 2 Eq. 238, 35 L. J. Ch. 555. If the authority wanted to be strengthened in order to be binding upon me, which it does not, I might refer to the view expressed by Vice-Chancellor WOOD. That disposes of the second ground.

I might mention that that very point of *Jackson* v. *The Duke of Newcastle* is actually in Coke's Reports. It is *Luttrel's Case*, 4 Co. Rep. 87 A, and there are some remarks in it upon easements generally, and upon the mode of their destruction, which bear upon all these cases. The real point there was that fulling-mills could be altered so that they would retain the same rights, whether it was a fulling-mill or a grist-mill or anything else. "So that the mill is the substance and thing to be demanded, and the addition of grist or fulling are but to show the quality or nature of the mill, and therefore if the plaintiff had prescribed to have said watercourse to his mill generally (as he well might), then the case would be without question that he might alter the mill into what nature of a mill he pleases, provided always that no prejudice should thereby arise either by diverting or stopping of the water as it was before; and it should be intended that the grant to have the watercourse was before the building of the mills, for nobody would build a mill before he is sure to have water, and then the grant of a watercourse being generally to his mill, he may alter the quality of the mill at his pleasure as is aforesaid; so if a man has estovers either

by grant or prescription to his house, although he alter the rooms and chambers of his house as to make a parlour where it was the hall, or the hall where the parlour was, and the like alteration of the qualities and not of the house itself — that means the qualities of the rooms and not of the house itself — and without making new chimneys by which no prejudice occurs to the owner of the wood, it is not any destruction of the prescription, for then many prescriptions will be destroyed; and although he builds a new chimney or makes a new addition to his old house, by that he shall not lose his prescription, but he cannot employ or spend any of his estovers in the new chimneys or in the part newly added; the same law of conduit and water pipes, and the like; so if a man has an old window to his hall and afterwards he converts the hall into a parlour or any other use, yet it is not lawful for his neighbour to stop it, for he shall prescribe to have the light in such part of his house." It appears, therefore, in Coke's time that they took that view of the alteration of a room. Now in the case of *Dent* v. *The Auction Mart Company*, the VICE-CHANCELLOR had to consider what might possibly be the result of that, and he says this at p. 249 (L. R., 2 Eq.): "I observe also that in *Yates* v. *Jack* the LORD CHANCELLOR considered that it was no answer to a plaintiff complaining that his light had been obstructed to show that other persons had been able to carry on trade successfully with less light than would remain to the complaining party after the obstruction had been set up. Further than that, he says (which, perhaps, if I may be allowed to say so, is going a little beyond what, as far as I am aware, any previous case has decided) that the plaintiff's right to an injunction does not depend on the obstruction being injurious to them in the trade for which they actually used the premises, but is an absolute indefeasible right to the enjoyment of the light without reference to the purpose for which it had been used. Now that observation certainly goes further than any case has gone since it was decided in *Martin* v. *Goble*, 1 Camp. 320, that property which has been used for a malt-house could not claim the same privilege as if it had been used for a dwelling-house. But the two authorities may be easily reconciled by saying that the [*781] LORD *CHANCELLOR'S observations may apply to the user of a house as it stands for any purpose for which it may be used in that condition, not to the user of a house when its whole character has been changed, and it has been rebuilt leaving the old

windows untouched as in the malt-house case." So that without going into it, the VICE-CHANCELLOR has taken the same view as was taken in Coke's Reports, that you may certainly alter the use of the rooms. He then continues: "But the doctrine has an application to the case before me on the contested question of the sample room. Although I think upon the evidence there is very little doubt that the room in Messrs. Dent's case has been occasionally used as a sample room, the observations of the LORD CHANCELLOR would apply to this, that if the Messrs. Dent were minded to use it as a sample room it is immaterial whether they have been so using it for the last several years or not." Therefore I think it must be settled, or considered settled, at all events in a case when the reversioner is a party, that the change of use of a room will not deprive the party complaining of his right to the access of light, and conversely, in considering the injury to the light, the Court is bound to consider that the room may be used for some other purpose than that for which it is used at the moment when the injunction is applied for.

Now the next point is a serious one — In what cases is the Court to grant an injunction at all? It has been argued before me that no case of irremediable damage has been shown, and nothing for which pecuniary compensation will not be sufficient. That of course is a very important point. I have upon previous occasions, and I shall for the future, unless my decision upon this point is reversed by the Court of Appeal, follow the decision of Vice-Chancellor WOOD in *Dent* v. *The Auction Mart Company.*

It must not be forgotten that whatever observations fell from Lord ELDON in the case of *The Attorney-General* v. *Nichol*, 16 Ves. 338, 10 R. R. 186, or from Lord WESTBURY in *Jackson* v. *The Duke of Newcastle*, it is now settled law, as laid down in *Back* v. *Stacey*, 2 C. & P. 465, with the slight alteration of the single word "or" into "and." "In order to give a right of action and sustain the issue, there must be a substantial privation of light sufficient to render the occupation of the house uncomfortable, *and* to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done." Now that is necessary in order to get damages at law. Whether it was always so I am by no means sure. If that is necessary to get damages at law, those are the very circumstances which entitle the plaintiff to an injunction in equity, subject to this, that the

damages must be substantial, though one can hardly conceive a case in which, if the doctrine of *Back* v. *Stacey* is well founded, — and I believe it is, and it has been followed, — the tenant in possession would not get substantial damages. The only case in which I conceive there would be damages not substantial would be the case of a reversioner, who would not sustain any immediate damage, and who might bring an action to try the right. Then Vice-Chancellor WOOD says (L. R., 2 Eq. 246): "Having arrived at this conclusion with regard to the remedy which would exist at law, we are met with the further difficulty that in equity we must not always give relief (it was so laid down by Lord ELDON and by Lord WESTBURY) when there would be relief given at law. Having considered it in every possible way, I cannot myself arrive at any other conclusion than this, — that where substantial damages would be given at law, as distinguished from some small sum of £5, £10, or £20, this Court will interfere; and on this ground, that it cannot be contended that those who are minded to erect a building that will inflict an injury upon their neighbour, have a right to purchase him out, without any Act of Parliament for that purpose having been obtained."

Therefore it seems to me that that gives you a reasonable rule, and that rule is reasonable whatever the law may have been in former times. An action could have been maintained at [*782] law for a bare obstruction, but since the case of *Back* *v. *Stacey* it can no longer be maintainable, as I understand it now. I shall so decide, unless their Lordships ultimately decide differently, that whenever an action can be maintained at law, and really substantial damages — considerable damages; some people may say that £20 is substantial damages — can be recovered at law, then the injunction ought to follow, generally, in equity; not universally, because I have something to add upon that subject. In this case I do not think that anybody would doubt the damages would be substantial. It would, in fact, destroy the use of the room altogether; it would so darken it that perhaps it might be used for a cellar or a similar purpose, where no light was required, but for ordinary purposes it would destroy the ordinary use of the room.

The next point urged by the defendants was this: they said, "At all events, this being an interlocutory application, let us continue our building, and we will undertake to pull down, if the Court shall so think fit." That is a very specious argument to

address to the Court, but we must have regard to the effect of allowing such a proceeding. Supposing a defendant erects a building at great cost; when he comes to the hearing he will say to this Court, "Compare the injury to me in pulling down the building with the injury to the plaintiff in allowing the building to remain." Ought or ought not the Court to give weight to such a suggestion? I think upon this point the observations of Vice-Chancellor KINDERSLEY, in the case of *The Curriers' Company* v. *Corbett*, 2 Dr. & Sm. 355; s. c. on appeal, 13 L. J. (N. S.) 154, are very important. The VICE-CHANCELLOR says: "If the defendants' buildings had not been completed, there would have been ground for interference by injunction; but as they have been completed, the question is whether the Court ought to or would order the pulling down of the buildings, or give compensation in damages. The defendants' new buildings are of considerable magnitude and importance, while the two houses of the plaintiffs are comparatively of small value and importance; and it has been decided that in such a case the Court will not, as a matter of course, order the defendant to pull down his new buildings, but will give to the party injured by the erection of those buildings compensation in damages. It appears to me that this is precisely one of such cases." Consequently the learned VICE-CHANCELLOR considered that the buildings being erected, the difference of the comparative value of the defendants' buildings and the plaintiffs' was sufficient to induce him to refrain from granting an injunction in a case where, if the buildings had not been erected, he would have granted the injunction.

Well now, if that is so, and if those considerations are to weigh with the Court upon the question of damages or injunction, I ought not to allow the defendant to proceed with his building, which will put him in such an advantageous position as regards the plaintiffs when the case comes to a hearing. I may mention that in this particular case I have an additional reason; the plaintiffs gave notice to the defendant in October of last year, but he chose, for some reason or other, to begin building on the 18th of July of this year. Therefore, if he can wait from October to July before he commences to build, he can very well wait till November before he goes on with the buildings.

There is only one other point remaining, — that is this: I was strongly urged by the defendant to say that this was a case of injury of such a nature that the Court would at the hearing (I

No. 2. — Aynsley v. Glover, 43 L. J. Ch. 782, 783.

suppose that is what he meant) not grant an injunction, but give damages. It is necessary to consider a point which I have previously considered, and on which I know I have expressed previously an opinion ; namely, the effect of the Act commonly called Lord Cairns's Act as to the jurisdiction of this Court. Now it appears to me that the second section of that Act gave a new power to the Court of Chancery. The words are these: "In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction, it shall be lawful for the said Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction."

[* 783] Now the first remark upon that is this: it only * arises when the Court of Chancery has jurisdiction to grant an injunction. It can only apply to those cases in which the Court could have granted an injunction at all events, at the time of the passing the Act; and if the Court could have granted an injunction, it ought to have granted the injunction. Therefore it must apply to cases in which, before the passing of the Act, the Court would have granted an injunction ; and it gives, therefore, a new power to the Court, purely discretionary. The words are, "if it shall think fit," to substitute damages in some one or more cases in which, before the passing of the Act, this Court would grant an injunction. No doubt this power was only to be exercised at the hearing, and not upon interlocutory application, from the nature of the case; and it will deserve the most serious consideration hereafter as to what class or classes of cases this enactment is to be held to apply. Although in terms so wide and so large, it never could have been meant, and I do not suppose it will be ever held to mean, that in all cases the Court, of its own will and pleasure, at its own mere caprice, will substitute damages for injury sustained. That cannot be. It must be for the Court to decide, upon consideration, to what cases the enactment should be held to apply. In the case of *The Curriers' Company* v. *Corbett*, we have an instance in which a Judge has said the Act ought to apply. In some cases — I had one before me in which, there being a very comparatively trifling injury, although sufficient, perhaps, to maintain an injunction, comparing the injury inflicted upon the defendant, I thought, under the special circumstances of the case, damages should be given, instead of granting an injunction. I am not now going, and I do not suppose that any Judge will ever do so, to lay down a

rule which, so to say, will bind the hands of the Court. The discretion being a reasonable discretion, I think it should be reasonably exercised; and it must depend upon the special circumstances of each case whether it ought to be exercised. The power has been conferred, no doubt usefully, to avoid the oppression which is sometimes exerted, and the purpose to which suits are put, by which a plaintiff is enabled, I do not like to use the word "extort," but to obtain a very large sum of money from the defendant, merely because the plaintiff has a legal right to an injunction. I think it was meant, in some sense or another, to prevent that course being successfully adopted. But there may be some other special cases, in addition to those mentioned by Vice-Chancellor KINDERSLEY, and those I have myself mentioned, to which the Act may be safely applied. I do not intend to lay down any rule upon the subject. If I had found by the evidence that there was in this case a clear instance of a very slight damage to the plaintiff, that is something over £20, £30, or £40, but still very slight, and a very large material substantial damage to the defendants, I should be disposed to hold that that was a case in which this Court would decline to interfere by injunction, having regard to the new power conferred upon me by Lord Cairns's Act to substitute damages for it. As I do not, however, consider such a case proved now, whatever may happen at the hearing, I shall simply grant an injunction in the usual terms until the hearing or further order, and I will, upon the application of either party on or after November, advance the hearing of the cause.

Afterwards, at the hearing, the MASTER OF THE [44 L. J. Ch. 524] ROLLS granted a perpetual injunction in accordance with his former decision; and the defendants appealed.

Counsel for the appellant contended that the plaintiffs' premises and the land on which the defendant's building was proposed to be erected having been from the year 1849 till a short time before the filing of the bill in the same occupation, the plaintiffs' right to the easement was defeated by unity of possession. *Olney* v. *Gardiner*, 4 M. & W. 496, 8 L. J. (N. S.) Ex. 102; 2 & 3 Will. IV. c. 71 § 3.

The plaintiffs had altered the dominant tenement by increasing the size of some of the windows, and they must reduce those windows to their original size before they could complain of the light being obstructed. *Staight* v. *Burn*, L. R., 5 Ch. 163; 39 L. J. Ch. 289; *Weatherly* v. *Ross*, 1 Hem. & M. 349; 32 L. J. Ch. 128.

They commented on *Tapling* v. *Jones*, 11 H. L. Cas. 290; 34 L. J. C. P. 342.

They further contended that the case was not one for an injunction, but for damages. *Jackson* v. *The Duke of Newcastle*, 3 De Gex, J. & S. 275; 33 L. J. Ch. 698; *Heath* v. *Bucknall*, L. R., 8 Eq. 1; 38 L. J. Ch. 372.

The counsel for the plaintiffs were not called upon to support the decree.

Mellish, L. J. This is an appeal from a decree of the Master of the Rolls in a suit for the interruption of ancient lights.

The suit appears to have been brought originally by a bill for the interruption of eight ancient lights, but the plaintiffs have only succeeded in getting a decree as to four of them. The first question is, whether the plaintiffs have made out their right to the light in respect of those four windows. The objection that is made to them is that, although they have been erected more than twenty years, yet there has been a unity of possession at any rate from the year 1849, if not before, up to within a very short time of the time when the bill was filed. In my opinion it is not necessary to consider whether the plaintiffs could have made out their right under the Prescription Act, because I am of opinion that, under the circumstances of the case, the plaintiffs have clearly made out a right from time immemorial. The Statute 2 & 3 Will. IV. c. 71, has not, as I apprehend, taken away any of the modes of acquiring easements which existed before that Statute. Indeed, as the Statute requires the proof of twenty years' or forty years' enjoyment (whichever is necessary to give the right) to be a proof of enjoyment for the twenty years or forty years next immediately before some suit or action is brought with respect to the easement, there would be a variety of valuable easements altogether destroyed if the plaintiffs were not entitled to resort to those means of acquiring an easement which were in existence before the Act passed.

Now, in this case there is an old man about eighty years [* 525] old, who says that he * recollects these windows all his life; that before the cottages, in which the windows in question are, became part of the inn to which they now belong, they were occupied as separate cottages; that he was born in one of them, and as far as he knows there always were lights, subject to this, that two of them had been considerably enlarged in the year 1846. It

also appears that the cottages were in existence in the year 1808; because in that year they are recited in a deed as being in existence; and I quite agree with the MASTER OF THE ROLLS that it must be inferred that the windows were also then in existence. Beyond that we know nothing about them, and therefore the proof is that the cottages, with the lights in them, have existed as far back as living memory goes, and we have no evidence as to when they were not in existence; and although there is clear evidence of unity of possession certainly in the year 1849, and there is a question as to whether it did not begin earlier, yet it is quite clear that before that unity of possession commenced there were a great number of years during which there was no unity of possession, and during which the windows existed, and there is no evidence that there ever was any unity of title at all. Under those circumstances there is, I apprehend, clear evidence, independently of the Statute, of a right to the light from time immemorial, which is not in any way taken away by the Statute. I am, therefore, of opinion that the plaintiffs have proved their right to these four lights.

Then the next question is, whether the plaintiffs are bound to reduce the two lights out of the four which were enlarged by the roof being raised and the windows being raised with it, whether they are obliged to bring those old windows to their old size as a condition for obtaining the injunction. I am of opinion that they are not. That appears to me to be clearly decided by the case of *Tapling* v. *Jones*, which I think governs the Courts of Equity quite as much as Courts of law. The principle of that case is perfectly plain, that opening a new window, or the enlargement of an old window in the wall of your house, is no injury or wrong at all to your neighbour. It is one of the natural rights of property which any man is entitled to exercise, and he cannot by exercising that right lose any other right he may have acquired. Therefore, having got a right to the entry of light into a window of certain size, he does not by making that window larger lose that right which he has acquired. I do not understand upon what principle this Court can say, "We will not give you relief in Equity against what is a wrongful act, inasmuch as it deprives you of the right to which you are entitled, unless you do something which you are not bound to do, or block up windows which you are perfectly entitled to open if you please." That result appears to me to follow necessarily from the case of *Tapling* v. *Jones*. I

do not think there is any authority against it. The only case cited was the case of *Staight* v. *Burn*, before GIFFARD, L. J., which appears, I think, to have depended upon its own circumstances; at any rate, it is a case on an interlocutory injunction which cannot bind this Court in determining what is the final decree to be made. I am of opinion that the plaintiffs cannot be put under terms to reduce their windows to their old size.

Then the next point that was raised is this. It is said that this Court ought not to grant an injunction, but ought merely to give damages. Now I am of opinion that this is a case for an injunction. I think that the plaintiffs have proved their right to the ancient windows. Here are rooms in an inn which is used and enjoyed for the purposes of an inn, and the defendant proposes to erect a building within five feet of them. Of course that would altogether obstruct the light coming to them. The defendant proposes to build on a waste piece of ground, and the plaintiffs have filed their bill before the building is even actually commenced. It is fortunate that the building proposed to be erected is so near to the plaintiffs' house that they are not in the difficulty in which ordinary plaintiffs are; namely, as to its being doubtful whether [*526] the proposed building would block the lights or * not. It is so near that it is absolutely certain that it would block the lights, and therefore the plaintiffs very properly filed their bill at once. I cannot understand why the defendant is to be allowed to build upon a mere bit of waste land so as altogether to block up the rooms which are necessary to the enjoyment of this public-house. It appears to me that this is properly a case for the interference of this Court by injunction.

The only other point which was raised was about costs. I do not see any reason to object to the decision of the MASTER OF THE ROLLS about the costs, because practically the whole case as to the four windows and the eight windows all depended upon the same evidence, and in my opinion the costs would not have been materially lessened if the bill had been filed respecting the four windows only. I do not think that there is any reason to suppose that the defendant would have yielded respecting the four windows, because he has fought it all out respecting the four windows as well as the others. He might have made an offer to do it. I am of opinion that the decision of the MASTER OF THE ROLLS is right, and that this appeal should be dismissed with costs.

JAMES, L. J., concurred.

ENGLISH NOTES.

Prior to the passing of the Prescription Act, 1832 (2 & 3 Will. IV. c. 71), it was customary to rest the case of the person claiming an ancient light upon the ground of prescription; or by having recourse to the fiction of a lost grant. Prescription theoretically required proof of enjoyment during legal memory, which was fixed by the Statute of Westminster (3 Edw. I. c. 39) at the commencement of the reign of Richard I.; and of enjoyment during this period, enjoyment during actual living memory afforded sufficient *primâ facie* evidence. Per PARKE, B. *Jenkins* v. *Harvey* (1835), 1 Cr. M. & R. 877, 894; 5 L. J. Ex. 17, 20. The owner of the servient tenement could defeat any claim on the ground of prescription, if he could show that the easement did not or could not exist since the commencement of legal memory. *Bury* v. *Pope* (1568), Cro. Eli. 118; *Duke of Norfolk* v. *Arbuthnot* (C. A. 1880), 5 C. P. D. 390, 49 L. J. C. P. 782, or that there had been unity of possession and title of the dominant and servient tenement. *Morris* v. *Edgington* (1810), 12 R. R. 579, 3 Taunt. 24; *Aynsley* v. *Glover* (the second principal case, p. 19, *supra*).

The fiction of a lost grant was supported by evidence of 20 years' enjoyment, which was held to justify the jury in presuming a grant. *Campbell* v. *Wilson* (1803), 3 East, 294, 7 R. R. 462. In that case the grant of a right of way must have been made within 26 years, as all former ways were at that time extinguished by the operation of an Inclosure Act. The Court has allowed, upon proper evidence, a presumption of enfranchisement of a copyhold to be made against the Crown. *Roe* d. *Johnson* v. *Ireland* (1809), 11 East, 280, 10 R. R. 504.

The right to light and air could not be gained in respect of an open space of ground. *Roberts* v. *Macord* (N. P. 1832), 1 M. & Rob. 230. In that case to an action of trespass for breaking down a wall erected by the plaintiff the defendant sought to justify under a claim to a right to light and air in respect of an open space which he had used as a sawpit and timber yard. PATTERSON, J., before whom the case was tried, intimated his opinion that such a plea was one which could not be supported in point of law, but that the question in the then stage of the proceedings was whether the plea was proved in point of fact; and he left it to the jury to say whether the defendant had in fact used the sawpit and timber yard for 20 years; and whether during that time the light and air had been *really necessary* for the purpose stated in the defendant's plea. See a recent decision upon a claim of this nature in *Harris* v. *De Pinna* (C. A. 1886), 33 Ch. D. 238, 56 L. J. Ch. 344, and referred to under "Air," 2 R. C. 566.

The presumption can only be made against the owner of the fee, and will not, without proof of knowledge and acquiescence, be made against the owner of the fee, where the servient tenement was in lease, *Daniel* v. *North* (1809), 11 East, 372; or against a remainderman, *Barker* v. *Richardson* (1821), 4 B. & Ald. 579. The easement must be absolute, and cannot be acquired for a term of years. *Wheaton* v. *Maple & Co.* (C. A. 1893), 1893, 3 Ch. 48, 62 L. J. Ch. 963.

The right is lost by discontinuance of the enjoyment, unless the party who ceased to enjoy the same does some act to show an intention to resume the enjoyment within a reasonable time. *Moore* v. *Rawson* (1824), 3 B. & C. 332.

It has been said that an easement may be abandoned, and that abandonment is a question of intention to be decided upon the facts of each case. *Crossley & Sons (Limited)* v. *Lightowler* (C. A. 1867), L. R., 2 Ch. App. 478, 36 L. J. Ch. 584; *James* v. *Stevenson* (P. C. 1893), 1893, A. C. 162, 62 L. J. P. C. 51. In neither of these cases did the plea of abandonment succeed; and in *Ecclesiastical Commissioners for England* v. *Kino* (C. A. 1880), 14 Ch. D. 213, 49 L. J. Ch. 529, the lapse of about 18 months was not considered a sufficient objection to the granting of an interlocutory injunction, by reason of abandonment. In *Neil* v. *Duke of Devonshire* (H. L. 1882), 8 App. Cas. 135, 31 W. R. 622, it was held by the House of Lords that an incorporeal hereditament, such as a several fishery, which could only pass by deed, cannot be abandoned.

Where the right is rested upon the Prescription Act (2 & 3 Will. IV. c. 71), it is governed exclusively by section 3 and the subsequent ancillary sections. *Perry* v. *Eames* (1891), 1891, 1 Ch. 658, 60 L. J. Ch. 345; *Wheaton* v. *Maple & Co.* (C. A. 1893), 1893, 3 Ch. 48, 62 L. J. Ch. 963. Section 3 is as follows: Where the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of 20 years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement, expressly made by some deed or writing. By section 4 it is in effect enacted that the period of 20 years shall be deemed and taken to be the period next before some suit or action wherein the claim or matter shall have been or shall be brought into question, and no Act or other matter shall be deemed to be an interruption, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made. Section 5, in effect, provides that a party may allege his right generally

as he could before the Act; and that if the other party shall intend to rely on any matter of fact or of law not consistent with the simple fact of enjoyment, the same shall be specially pleaded, and shall not be received in evidence on any general traverse or denial. Section 6, in effect, provides that no less period shall be sufficient to support a claim provided for by the Act.

In order to obtain the right to the access of light under the Act, it is only essential that there should be a building in existence in respect of which it can be claimed; and it is not essential that there should have been actual daily enjoyment of the light by some person. Thus in *Courtauld* v. *Legh* (1869), L. R., 4 Ex. 126, 38 L. J. Ex. 45, the owner was allowed to maintain an action for the obstruction of light claimed under the Act in respect of a house structurally completed, with the roof finished, floors laid, and windows put in; but which was not internally completed, nor fit for habitation, and so remained until within a period of 20 years before action brought. Again in *Cooper* v. *Straker* (1888), 40 Ch. D. 21, 58 L. J. Ch. 26, the plaintiff claimed the right in respect of a house with windows, fitted with shutters which were only opened from time to time as he required light for the purpose of his business; and he succeeded in obtaining an injunction.

It has been said that the right cannot be acquired in respect of a church under the Act. Per Bramwell, L. J. *Duke of Norfolk* v. *Arbuthnot* (C. A. 1880), 5 C. P. D. 390, at p. 392; 49 L. J. C. P. 782. But such a right could be maintained upon the fiction of a lost grant. *Ecclesiastical Commissioners for England* v. *Kino* (C. A. 1880), 14 Ch. D. 213, 49 L. J. Ch. 529. A timber stage or structure for storing timber is not an "other building" within sect. 3 of the Act. *Harris* v. *De Pinna* (1885), 33 Ch. D. 238. Per Chitty, J.

In the case of the Guards' Memorial Chapel which was unconsecrated, and used as a lecture hall and picture gallery, it was decided by Kekewich, J., that the building was within the protection of the Act. *Attorney-General* v. *Queen Anne Mansions* (1889), 60 L. T. 759.

The right acquired under the Act is a right to the access and use of the whole or a substantial part of the particular "cone" (scil. bundle of parallel rays) of light which has passed for the statutory period over the servient to the dominant tenement. *Scott* v. *Pape* (C. A. 1886), 31 Ch. D. 554, 55 L. J. Ch. 426; *Harris* v. *De Pinna* (C. A. 1886), 33 Ch. D. 238, 56 L. J. Ch. 344.

The right thus obtained may be claimed in respect of a new building substituted for a former one, provided the same "cone" of light, wholly or in part, strike the openings in the new building. This condition being fulfilled, it is not necessary that the position of the old and new windows should coincide, or that the buildings should be structurally

identical, or that the windows of the two buildings should be in the same plane. *Scott* v. *Pape*, *supra*. The onus of showing that the "cones" wholly or in part strike the windows in the new building is on the person asserting that they do. *Pendarves* v. *Munro* (1892), 1892, 1 Ch. 611, 61 L. J. Ch. 494.

In the case of *Presland* v. *Bingham* (C. A. 1889), 41 Ch. D. 268, the defendant pleaded and proved that he had been in the habit of obstructing the plaintiff's lights by means of packing cases piled up against and rising above the defendant's wall, the raising of which was complained of. The height of this obstruction varied from time to time, and it was held that an obstruction of such a fluctuating character could not be set up so as to defeat the plaintiff's right under the Act.

In order to negative submission to an interruption within the exception contained in sect. 4 of the Act, it is not necessary to bring an action, or actively to interfere to remove the obstruction. *Glover* v. *Coleman* (1874), L. R., 10 C. P. 108, 44 L. J. C. P. 66. The question of acquiescence is for the jury. *Bennison* v. *Cartwright* (1864), 5 B. & S. 1, 33 L. J. Q. B. 137; *Glover* v. *Coleman*, *supra*. And it is necessary that the owner of the alleged dominant tenement should have notice who the person is who is obstructing the light. *Seddon* v. *Bank of Bolton* (1882), 19 Ch. D. 462, 51 L. J. Ch. 542.

The right cannot be claimed under the Act as against the Crown, which not being named in the Act is not bound. *Perry* v. *Eames* (1891), 1891, 1 Ch. 658, 60 L. J. Ch. 345; *Wheaton* v. *Maple & Co.* (C. A. 1893), 1893, 3 Ch. 48, 62 L. J. Ch. 963.

The right cannot be obtained under the Act for a term of years. *Wheaton* v. *Maple & Co.*, *supra*.

AMERICAN NOTES.

The doctrine of ancient lights does not prevail generally in the United States. See notes under Air, Vol. II., *ante*, p. 567.

No. 3. — YATES *v.* JACK.

(CH. 1866.)

RULE.

THE owner of ancient light is entitled not only to sufficient light for the purposes of the business carried on by him at the time of complaint; but to all the light which he has anciently enjoyed.

No. 3. — Yates v. Jack, 35 L. J. Ch. 539.

Yates v. Jack.

35 L. J. Ch. 539–544 (s. c. L. R., 1 Ch. 295); 12 Jur. N. S. 305; 14 L. T. 151, 14 W. R. 618.

In this case the plaintiffs were bonded store merchants and [539] wholesale export merchants, carrying on business in copartnership, under the style or firm of G. B. Yates & Son, at and upon a messuage and warehouse Nos. 3 and 4 Lower East Smithfield, in the city of London, of which the plaintiff G. B. Yates was the owner in fee. These premises were on the north side of the street, to which they had a frontage of 29 feet 3 inches, and were rebuilt in their present condition about the year 1837, since which time the external elevation thereof had remained unaltered. Lower East Smithfield was a narrow street, 25 feet 2 inches wide in the place where the premises of the plaintiffs were situated, and on the opposite side of the street were certain premises known as Downe's Wharf, having a frontage to the street of 90 feet 8 inches. Upon one end of this wharf, and adjoining the street, formerly stood a building 53 feet 10 inches wide, of the height of 31 feet 6 inches as alleged by the plaintiffs, but according to the evidence of the defendant 34 feet 6 inches to the top of the parapet, and then sloping backwards to the height of 40 feet 9 inches to the top of the roof. A part of this last-mentioned building was immediately opposite the greater part of Nos. 3 and 4 Lower East Smithfield, and opposite the residue of the plaintiffs' premises was an open way 12 feet 3 inches wide, dividing the last-described building from another building, which was 24 feet 7 inches wide, and only 19 feet 5 inches high to the top of the parapet on each side; but the front sloped upwards from each side towards the centre until it attained an additional central height of 5 feet 6 inches.

The defendant, having recently become possessed of Downe's Wharf, had pulled down these buildings and begun to erect on the site thereof, and of the open way, a new building, which he intended to build to the height of 68 feet, immediately opposite the premises of the plaintiffs, but placed back so as to leave the width of the street 30 feet instead of 25 feet 2 inches. The plaintiffs thereupon filed their bill for an injunction to restrain the defendant, his agents, &c., from proceeding with his said works, and from erecting any building upon the site of the open way described, and from erecting any buildings upon the other part of Downe's

Wharf of a greater height respectively than that of the ancient buildings respectively which formerly stood thereon, and from erecting any building whatsoever in Lower East Smithfield aforesaid, so or in such manner as to darken, injure or obstruct any of the ancient lights or windows of the said messuage and warehouse, Nos. 3 and 4 in the same street, as the same ancient lights and windows were enjoyed previously to the taking down of the said ancient buildings which formerly stood opposite the same messuage and warehouse, or some part thereof, and from erecting any building whatsoever in Lower East Smithfield aforesaid whereby the free access of light and air to the said messuage and warehouse, Nos. 3 and 4 in such street, as enjoyed previously to the taking down of the said ancient buildings, might be in any way [*540] *obstructed or prejudiced. And, further, that if the defendant should, before the granting of such injunction, have erected any such buildings, he might be ordered to take them down.

The defence was, that no material injury would be done to the business of the plaintiffs by the proposed new buildings.

The case came before Wood, V. C., upon motion for a decree when his Honour declared that the plaintiffs were entitled to the free access of light and air to the windows of their messuage and premises to such an extent as would enable them to use and enjoy the said messuage and premises for the purposes of their business without any material diminution of the use and enjoyment which the plaintiffs had thereof for the same purposes immediately before the pulling down of the ancient buildings opposite to the said messuage and premises. And, it appearing to his Honour that the building proposed to be erected by the defendant would materially affect such use and enjoyment, the defendant was to be at liberty to adduce further evidence as to the possibility of altering his proposed erections so as not to interfere with the rights of the plaintiffs. And he directed an inquiry in chambers whether any and what alterations in the designs proposed by the architect of the defendant were necessary or proper and sufficient for the purpose of preventing the buildings proposed to be erected by the defendant from interfering with any right of the plaintiffs. And, in the mean time, and until the further order of the Court, he granted an injunction to restrain the defendant from erecting any building to a greater height than 35 feet opposite the plaintiffs' premises.

The plaintiffs appealed from this decree, as not giving them all the relief to which they were entitled.

No. 3. — Yates v. Jack, 35 L. J. Ch. 540, 541.

A great deal of evidence was gone into on both sides as to the interception of the direct rays of the sun by the proposed new buildings, and the compensation that would be afforded by the widening of the street, and also as to the amount of light and air necessary for the purposes of the plaintiffs' business. The effect of this evidence is stated in the judgment of the LORD CHANCELLOR.

Mr. Rolt and Mr. G. N. Colt, for the plaintiffs. The declaration of the VICE-CHANCELLOR does not go far enough. We are entitled to as much light and air as we enjoyed before, without reference to what our present business requires. We also object to so much of the decree as gives liberty to the defendant to adduce further evidence. *Jackson* v. *The Duke of Newcastle*, 33 L. J. Ch. 698; *Tapling* v. *Jones*, 34 L. J. C. P. 342; *Clarke* v. *Clark*, 35 L. J. Ch. 151, L. R., 1 Ch. 16; *Stokes* v. *The City Offices Company*, 11 Jur. (N. S.) 560.

The Attorney-General (Sir R. Palmer), Mr. G. M. Giffard, and Mr. Horton Smith, for the defendant, referred to *The Attorney-General* v. *Nichol*, 16 Ves. 338, 10 R. R. 186.

Mr. Rolt, in reply. *Johnson* v. *Wyatt*, 2 De Gex, J. & Sm. 18, 33 L. J. Ch. 394.

The LORD CHANCELLOR (Lord CRANWORTH, March 24), after stating the position of the premises and the alterations proposed to be made by the defendants, proceeded as follows: There has been a great deal of evidence adduced on both sides. The plaintiffs were bound to make out that the proposed new buildings would materially interfere with them in the enjoyment of the light and air which they had previously enjoyed. Part of the evidence consisted of plans and drawings made to a scale, showing the width of the street and the height, as well of the old as of the intended new building. The plans of the plaintiffs do not in all respects accurately agree with those of the defendant, but the differences are not important. Both sides agree that the width of the street, while the old buildings were standing, was only 25 feet 2 inches, and that the new buildings are to be carried back so as to make the street 30 feet wide. There was a parapet running along the top of the old building, and projecting over the street, so as to narrow the street for the purpose of the access of light. The defendant represents the height of this parapet *to have been [*541] 34 feet 6 inches, and its width such as to reduce, for the purpose of light, the width of the street from 25 feet 2 inches to 22 feet 5 inches. The plaintiffs say the height was only 31 feet

6 inches, but the defendant may have had better means of knowing the dimensions, and I shall assume his measurement to be correct. It appears from the evidence and the plans, which are made on scales stated on the face of them, that the shop or ground-floor room of the plaintiffs is 11 feet high, and the window occupies the whole front from the height of 3 feet 9 inches from the ground to the ceiling. A line drawn from the centre of this window, *i. e.* from a point about 7 feet from the ground to the top of the parapet, if it had remained in existence, would cut the intended new building at a height of 44 feet from the ground. If, therefore, the new building did not exceed 44 feet in height, exactly the same quantity of direct rays of light would reach the centre of the plaintiffs' ground-floor windows as reached it during the existence of the old buildings. In other words, a building 44 feet high, at a distance of 30 feet, would obstruct direct light at the same angle as a building of 34 feet 6 inches at a distance of 22 feet 5 inches. All this, though not stated in words, is manifest from the diagrams in evidence. The proposal of the defendant, however, is to erect a building not 44 feet, but 67 feet high, and the first question therefore is, whether the addition of 23 feet in height to a building 44 feet high, opposite the plaintiffs' shop at a distance of 30 feet, will cause such an obstruction of the light previously enjoyed as materially to interfere with their comfort and enjoyment of light, either for domestic purposes or for the purposes of their business.

Numerous witnesses were examined on both sides, and it is on a comparison of their testimony, corrected or modified by common observation and common sense, that the case must be decided. On the part of the plaintiffs seven architects were examined, and on the part of the defendant five. Those examined on the part of the plaintiffs say confidently that the erection of a building 67 feet high at a distance of 30 feet from the plaintiffs' shop will cause very serious diminution of light as compared with what they previously enjoyed. Those examined for the defendant deny this, and say that the proposed new building will cause no injury at all to the plaintiffs. I pay no attention to the circumstance that the number of witnesses thus examined for the plaintiffs is somewhat more than that of those who were examined for the defendant. It is a rule of common sense, which commends itself to the understandings of all, that witnesses *ponderandi sunt, non numerandi.* I will assume that these gentlemen are all equally experienced in

the profession, and are speaking with no other bias than that which experience shows us always operates on the minds of professional or scientific persons, when called on to give evidence in the way of opinion as to matters relating to subjects in which they are skilled.

What, then, so far as we can collect, are the data on which the opinions on the one side and on the other are founded? And first, as to the plaintiffs, Mr. Hesketh, an architect and surveyor, tells us that the whole depth of the plaintiffs' shop is 22 feet, and that where the old building stood direct light entered over it into the plaintiffs' shop to the depth of 13 feet on the floor, whereas when the proposed new buildings are erected it will only enter to the depth of 6 feet. But, further, it is to be observed that, though the height of a great part of the old building was, as I assume, 34 feet 6 inches, yet this certainly was not true as to the whole of it. The extreme east portion was separated from the west by an open passage 12 feet 8 inches in width, and had a frontage towards the street of 24 feet 7 inches, the height of the roof being only 25 feet. The whole of the open passage was directly opposite to the extreme east part of the plaintiffs' premises, and though the low building to which I have referred was not directly opposite to any part of the plaintiffs' premises, yet a great deal of direct light reached the shop diagonally over it, and the evidence of the plaintiffs' architects goes to show that the raising of the new building over this eastern portion of the old premises will intercept a great deal of valuable direct light. These are the principal grounds on which the architects examined by the plaintiffs formed their opinions.

The architects who gave * evidence for the defendant do [* 542] not dispute the allegations as to the direct light being intercepted to the extent stated by the witnesses for the plaintiffs. Indeed, that was impossible. The facts spoken to were mathematically demonstrable. But they say that the setting back of the face of the building so as to widen the street from 25 feet 2 inches, or, taking the parapet into account, from 22 feet to 30 feet, will be of immense advantage to the plaintiffs, and one of them, Henry Baker, is of opinion that it will more than compensate the loss of light from the increased height of the new building. They seem to think that the increased width of the street will give a large increase of reflected light, more than in proportion to the increased width; and one of them, Arthur S. Newman, says that the open space to the east on the opposite side of the street, will afford a large supply of light.

Now, contrasting this evidence on the one side and on the other, I cannot hesitate to say that the evidence for the plaintiffs greatly preponderates. The comparison of the extent to which direct light will reach the floor of the plaintiffs' shop after the erection of the new building, with that which they have heretofore enjoyed, is evidence of very great force, and cannot be treated as mere evidence of opinion. Besides, I must remark that on such a question as this every one must be allowed to bring his own observation and experience to bear. And I own that, even if there had not been a single witness examined, I should almost be inclined to say it required no proof to satisfy me that in a narrow street, only 30 feet wide, when the opposite building was already 44 feet high, the raising of that building by rather more than half its former height must cause a serious diminution of light to the opposite side of the street. *Res ipsa loquitur.* Still more obvious is it, that this injurious consequence must result from the proposed erection of the new building at its eastern extremity, when, instead of a building 25 feet high, and an open passage on which there was no building, there is to be a uniform obstruction of light by a building 67 feet high.

With respect to the evidence of Mr. Newman, as to the light which will be supplied diagonally from the east side of the street, it is to be observed that there are, in that direction, private buildings over which light to the same extent certainly reaches the plaintiffs' shop. But if it is lawful to the defendant to raise his buildings to the height of 67 feet, the plaintiffs can have no security that the same thing may not be done by their neighbour to the east. The evidence as to the value of this light to the plaintiffs shows forcibly how much they are likely to suffer from the building over the eastern extremity of the defendant's premises. On the whole, therefore, the evidence of the architects called on behalf of the plaintiffs appears to me far to outweigh that adduced by the defendant.

But there was a great deal of evidence besides that of the architects, consisting mainly of persons engaged in trade the same as that of the plaintiffs, or in which there is the same necessity for light. The object of this evidence was to show that, even after the erection of the new building, there will still be ample light to enable the plaintiffs conveniently to carry on their trade. The plaintiffs are bonded store merchants and wholesale export merchants, engaged principally in the colonial trade, and they say

that, for such a trade, a good supply of light is indispensable, particularly for the purpose of sampling; and they say that the former condition of the defendant's buildings permitted the access of sufficient light, enabling them conveniently to sample their goods, but that this will not be the case if the new buildings are carried to the height proposed, and on this point they are confirmed by several witnesses engaged in the same or similar trades, who give it as their opinion that if the new buildings are carried up to the height proposed, the plaintiffs will no longer be able to carry on their business with advantage. On the other hand, on behalf of the defendant, there are a great number of witnesses, merchants and traders engaged in business similar to that of the plaintiffs, who give it as their decided opinion that even after the erection of the proposed new buildings there will be ample light for enabling the plaintiffs to conduct their business as well as they did formerly. Some of them go so far as to say, that, for the purpose of sampling, a strong direct light is not desirable, and that the erection of the new building, by screening the sun's rays, will improve the quality of the light * admitted to the plaintiffs' windows. [* 543]

The evidence satisfies me that, for some purposes of trade, it is necessary at times to exclude the direct rays of the sun; that, in what is called sampling, a subdued light, if sufficient, may be better than direct sunlight. But this is not the question. It is comparatively an easy thing to shade off a too powerful glare of sunshine, but no adequate substitute can be found for a deficient supply of daylight. And an attentive consideration of the evidence of the witnesses, whom I will call trade-witnesses, on the one side and on the other, has led me to the conclusion, as did the evidence of the architects, that the erection of the new buildings will materially interfere with the quantity of light necessary or desirable for the plaintiffs in the conduct of their business.

I desire, however, not to be understood as saying that the plaintiffs would have no right to an injunction unless the obstruction of light is such as to be injurious to them in the trade in which they are now engaged. The right conferred or recognised by the statute is an absolute and indefeasible right to the enjoyment of the light, without reference to the purpose for which it has been used; and, therefore, even if the evidence satisfied me, which it does not, that for the purpose of their present business a strong light is not necessary, and that the plaintiffs will still have sufficient light remain-

ing, I should not think the defendant had established his defence, unless he had shown that for whatever purpose the plaintiffs might wish to employ the light, there would be no material interference with it.

The defendant examined several witnesses to show that in other shops and warehouses in the crowded streets of the metropolis there is sufficient light for carrying on such a business as that of the plaintiffs, where the obstruction to the light is equal to or greater than that which will be occasioned by the buildings of the defendant, particularly in two houses, Nos. 25 and 26, in the same street (Lower East Smithfield), in which the shop of the plaintiffs is situate, and in the shop of a house-decorator, No. 51 Tooley Street, the back of which opens on Counter Street. The two shops, Nos. 25 and 26, in Lower East Smithfield, were unoccupied when visited by the witnesses who spoke as to their condition in point of light. But there are many witnesses who visited them, and who say that, comparing the obstruction from the opposite buildings to the light of these shops with that which will be occasioned to the plaintiffs by the proposed buildings of the defendant, they are satisfied these proposed new buildings will not injuriously affect the plaintiffs' premises for the purposes of their trade. These witnesses say that they brought with them samples of sugar and other articles of commerce, and that, in spite of the obstructions caused by the opposite buildings, there was ample light to enable them to judge of the quality of the samples; and so they came to the conclusion that the defendant's new buildings will cause no practical evil to the plaintiffs. With respect to the Tooley Street shop, Mr. Brighton, the house-decorator who occupied it for twenty years and upwards, says that for the purpose of examining colours he was in the habit of resorting to the window at the back of his premises opening to the north upon Counter Street, though that street is under 25 feet wide, and though the building on the opposite side of the street is 72 feet high. He adds that, until about ten years ago, the opposite building was only about 22 feet high; but it was then pulled down, and a new building was erected 72 feet high; but he did not find that this new building at all injuriously affected him with reference to his trade.

To all this evidence I can only say that, even if it is perfectly accurate, still it proves no more than that for many purposes, even where a good supply of light is desired, yet experience has taught

persons engaged in trade to do with much less than by those who reason *a priori* on the subject would have been thought essential. It is, however, to be observed that the witnesses, except Mr. Brighton, who speak to this part of the evidence all form their opinions on observations made at the end of May or beginning of June; and therefore, though some of them say their visits were made on very dull days, yet I cannot think the conclusions at which they arrived would enable any one to form a correct judgment as to what would be the supply of light in the dark months of winter. I do not, however, feel it necessary to prosecute any inquiry on this point, for I am clearly * of opinion that it is no answer to a [* 544] plaintiff complaining that his light has been obstructed to show that other persons have been able to carry on trade successfully even with less light than will remain to the complaining party after the obstruction has been set up.

I need not further investigate the evidence. The result of it is to convince me that the new building proposed to be erected by the defendant cannot fail to inflict a serious injury on the plaintiffs by materially obstructing the light which they have heretofore enjoyed. The consequence is, that they are entitled to an injunction restraining the defendant from erecting any building so as to darken, injure, or obstruct any of the ancient lights of the plaintiffs in their messuage and warehouse numbered 3 and 4 in Lower East Smithfield, as the same lights were enjoyed previously to the taking down by the defendant of his buildings on the opposite side of the street, and also from permitting to remain any buildings already erected which will cause any such obstruction.

Whether the buildings already erected not actually opposite to the plaintiffs' messuage will have that effect when the whole of the defendant's buildings are finished, is a matter on which the evidence does not enable me to come to any satisfactory conclusion; and I am therefore obliged to frame the decree in this general form, leaving it to the plaintiffs to apply by motion in case the terms of the injunction are violated. I shall, however, be willing to introduce a proviso into the order similar to that adopted in the case of *Stokes* v. *The City Offices Company*, enabling the parties to come before the Chief Clerk in order to have it ascertained whether any proposed addition to the building will or will not be a violation of the injunction; and it must also in like manner be left open to the plaintiffs to show, if they can, that the buildings already erected materially interfere with the light heretofore enjoyed by them.

No. 3. — Yates v. Jack, 35 L. J. Ch. 544.

In deciding that what the defendant proposed to do would cause material injury to the plaintiffs, I am only arriving at the same conclusion at which the VICE-CHANCELLOR arrived. But I cannot concur with him in thinking that the Court ought to make any declaration narrowing, or appearing to narrow, the right of the plaintiffs to the quantity of light heretofore used by them for the purpose of their business. Nor can I think that the state of the evidence was such as to make it proper, instead of finally disposing of the case, to authorise the parties to go into further evidence. The case was, I think, ripe for a decree in the terms which I have indicated. The issue raised on the pleadings is, whether the defendant by raising his new buildings to the height of 67 feet will or will not cause material injury to the plaintiffs. On that point the VICE-CHANCELLOR thought, as I think, that the anticipated injury certainly would result. In such circumstances I do not think it open to the Court to refuse to make a decree, leaving it to the parties to raise what would be substantially a new issue, *i. e.* whether, by altering his original intention, the defendant may not be able to take a course not likely to cause injury to the plaintiffs. That would in truth be a new suit. The defendant must pay the costs of the cause up to and including the motion for decree. I cannot part with this case without saying that I have come to the conclusion at which I have arrived with great reluctance. It was stated at the bar, and I believe correctly stated, that up to the passing of the Act of 2 & 3 Wm. IV. c. 71, there was a local custom in the city of London, according to which the owner of a house in any street was permitted to raise it to whatever height he might think fit. All such local customs were abolished by the Act I have alluded to. I suppose, therefore, that the legislature thought that the custom was one which was productive of inconvenience. But considering that, assuming the existence of the custom, all persons who were owners of houses in narrow streets must have known when they purchased them to what liabilities they were exposed from the buildings of their opposite neighbours, I cannot but think the advantages derived from the custom probably exceeded its evils. The growing necessity for lofty buildings is shown by the great multiplication of them in all parts of the metropolis; and I cannot but fear that serious inconvenience may be felt by the abolition of the alleged custom, assuming that I am rightly informed as to its existence prior to the Statute. With all this, however, sitting here to administer the law, I have no concern.

No. 3. — Yates v. Jack. — Notes.

ENGLISH NOTES.

The principle, of which the ruling case is an illustration, has been recognised in many subsequent cases, among which may be cited the following: *Dent* v. *Auction Mart Company* (1866), L. R., 2 Eq. 238, 35 L. J. Ch. 555; *Martin* v. *Headon* (1866), L. R., 2 Eq. 425, 35 L. J. Ch. 602; *Kelk* v. *Pearson* (C. A. 1871), L. R. 6 Ch. App. 809; *Post*, p. 48; *City of London Brewery Co.* v. *Tennant* (C. A. 1873), L. R., 9 Ch. App. 212, 43 L. J. Ch. 457; *Theed* v. *Debenham* (1876), 2 Ch. D. 165; *Moore* v. *Hall* (1878), 3 Q. B. D. 178, 47 L. J. Q. B. 334; *Parker* v. *First Avenue Hotel Co.* (C. A. 1883), 24 Ch. D. 289; *Attorney General* v. *Queen Anne's Mansions* (1889), 60 L. T. 759; *Dicker* v. *Popham* (1890), 63 L. T. 379.

Of these cases that of *Moore* v. *Hall* is worthy of separate notice, as the Court had to specially consider the direction of the judge at the trial. Cockburn, L. C. J., left it to the jury to say whether any sensible diminution of light to the plaintiff's premises had been occasioned by the erection of the defendant's premises so as to make them less available either for the purposes of occupation or business to which they were then or might thereafter be made applicable. If so, he directed them that the plaintiff was entitled to the verdict; but if they should be of opinion that there was no probability that the premises would ever be applied to other than their present purpose, and that consequently there was not, practically, any diminution in their value, the damages should be nominal only. If the jury were of opinion that there had been any sensible diminution of light sufficient to lessen or interfere with the use of the premises, or any part of them, for the purpose of occupation or business, then the damage should be substantial according to the estimate of the jury of the diminution in value of the premises. The jury found for the plaintiff with substantial damages; and a rule *nisi* having been obtained for a new trial on the ground that the ruling amounted to a misdirection, it was argued in support of the rule that the Lord Chief Justice was wrong in telling the jury that they might take into consideration the purposes for which the premises might be thereafter made available; and that the true measure of damages must be the actual enjoyment that there had been of the light. The Court (Cockburn, L. C. J., Mellor and Manisty, JJ.) rejected this contention and discharged the rule.

The doctrine that there is a difference between town and country houses in considering the question of the quantum of light to which the dominant tenement is entitled is now exploded. *Dent* v. *Auction Mart Co.* (V. C. Wood, 1866), L. R. 2 Eq. 238, 35 L. J. Ch. 555; *Martin* v. *Headon* (V. C. Kindersley, 1866), L. R. 2 Eq. 425, 35 L. J. Ch. 602.

In connection with the subject of obscuration is the much vexed question of the 45 degree angle, *i.e.*, Whether a straight line drawn from the sill of a window enjoying a right to an ancient light, at an angle of 45 degrees with the perpendicular does or does not intersect a point in the new building immediately opposite the window. There is a *dictum* of Lord Selborne, L. C., in the *City of London Brewery Co.* v. *Tennant* (1873), L. R., 9 Ch. App. 212, 220, 43 L. J. Ch. 459, that "if the buildings to be erected opposite to them (*i.e.*, the ancient windows) have not a greater angular elevation than forty-five degrees, the fact that forty-five degrees of sky are left unobstructed may, under ordinary circumstances, be considered *primâ facie* evidence that there is not likely to be material injury; and of course that evidence applies more strongly where only a lateral light is partially affected and all the lights are not obscured."

In *Hackett* v. *Baiss* (1875), L. R., 20 Eq. 495, 45 L. J. Ch. 13, where the new building already exceeded a height which would allow of a 45 degree clear uninterrupted sky, the Master of the Rolls (Sir George Jessel), holding this to be *primâ facie* evidence of undue interference with the light, granted an injunction. Upon Lord Selborne's *dictum* and this decision of the Master of the Rolls it has been frequently argued that the owner of the dominant tenement in order to obtain an injunction must show that there would be less than 45 degrees of sky left him; but since the decision of Bacon, V. C., in *Theed* v. *Debenham* (1876), 2 Ch. D. 165, and that of the Court of Appeal in *Parker* v. *First Avenue Hotel Co.* (1883), 24 Ch. D. 282, such a contention can be no longer supported.

No. 4. — KELK *v.* PEARSON.

(ch. 1871.)

RULE.

The owner of an ancient light is entitled to restrain his neighbour by injunction from obstructing the access of light so as to render the house which enjoyed the ancient light substantially less fit for occupation.

Kelk v. Pearson.

L. R., 6 Ch. 809–814 (s. c. 24 L. T. 890; 19 W. R. 655).

[809] G. Kelk, the plaintiff in this case, was the owner and occupier of a leasehold house called *Ness Cottage*, situate

at Notting Hill, and built soon after the year 1829. The principal windows of the plaintiff's house were to the north; and the plaintiff's house had a garden to the north, bounded on the east by a wall six feet high. To the east of the plaintiff's house and garden was open garden-ground. The defendants, in September, 1870, began to build on the garden-ground to the east of the plaintiff's house a row of houses, one of which was oblique to the east side of the plaintiff's house, almost touching it at one end, and would, when finished, show a dead wall about forty feet high, being higher than the roof of the plaintiff's house. The plaintiff, as soon as the ground was laid out for building, wrote to complain to the defendants, who answered that they should not affect the adjoining property. Much correspondence passed, and the defendants began to build. On the 5th of October, 1870, the plaintiff filed his bill to restrain the defendants from building, and from allowing the buildings to remain, so as to interfere with the access of light and air to the plaintiff's house. The defendants, however, proceeded with their building, and completed the side of their house.

There was contradictory evidence as to the amount of interference. The plaintiff and his family deposed that a scullery was made quite dark, that the light to the kitchen and dining-room was materially diminished, and that the principal bedrooms were made dark, gloomy, and uncomfortable. The defendants' witnesses deposed that the rooms in the plaintiff's house were low
*and naturally badly lighted, all facing to the north; but [*810]
that, having the garden open, they had still such an amount
of exposed sky area as was seldom seen in the suburbs of London, and that the light was not substantially or perceptibly interfered with.

The Vice Chancellor BACON granted an injunction, and the defendants appealed.

Mr. Amphlett, Q. C., and Mr. Crossley, for the defendants. The damage is too slight to justify the interference of the Court. *Clarke* v. *Clark*, L. R., 1 Ch. 16, 35 L. J. Ch. 151: *Robson* v. *Whittingham*, L. R., 1 Ch. 442; *Johnson* v. *Wyatt*, 2 D. J. & S. 18.

Moreover, the obstruction here is lateral, and the Court in such case interferes with great reluctance. *Staight* v. *Burn*, L. R., 5 Ch. 163, 39 L. J. Ch. 289; *Beadel* v. *Perry*, L. R., 3 Eq. 465. The rooms are sufficiently lighted for the purposes for which they are used, and the plaintiff has no right to more than sufficient light.

Mr. Kay, Q. C., and Mr. Nalder, for the plaintiff. The injury

is material. *Tapling* v. *Jones*, 11 H. L. C. 290; *Jackson* v. *Duke of Newcastle*, 10 Jur. (N. S.) 688, 810, 33 L. J. Ch. 698; *Yates* v. *Jack*, L. R., 1 Ch. 295, 35 L. J. Ch. 539. *Martin* v. *Goble*, 1 Camp. 320, is not now law. The plaintiff has had the enjoyment of free light and air for more than twenty years, and has now an absolute right under 2 & 3 Will. IV. c. 71 §§ 3, 7; *Harbridge* v. *Warwick*, 3 Ex. 552.

The Lords Justices said that they found great difficulty in ascertaining from the evidence the amount of injury, and wished a surveyor to be agreed upon, who should report to the Court; if the parties could not agree on the surveyor, then the Court would appoint one; and the motion was to come on again as a motion for decree.

A surveyor accordingly was appointed, and made a report. The motion for decree then came on, and the surveyor was examined by the Court and by counsel for each side. The effect of his report and evidence appears in the judgments of the Lords Justices.

[*811] * Sir W. M. James, L. J.: This bill is based upon the power which is possessed by every man, who has by sufficiently long use acquired a right to the access of light and air, to ask this Court in a sufficiently grave case to prevent any new building being made which will obstruct that light and air.

On the part of the plaintiff it was argued before us that this was an absolute right, — that now, under the Statute 2 & 3 Will. IV. c. 71, he had an absolute and indefeasible right by way of property to the whole amount of light and air which came through the windows into his house; and that he could maintain an action at law or a suit in equity upon that absolute legal right; and the only question as to the effect or extent of his right would be with regard to the discretion of this Court in considering whether it was a case for damages, or to be interfered with by way of injunction.

Now I am of opinion that the statute has in no degree whatever altered the pre-existing law as to the nature and extent of this right. The nature and extent of the right before that statute was to have that amount of light through the windows of a house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it were a dwelling-house, or for the beneficial use and occupation of the house, if it were a warehouse, a shop, or other place of business. That was the extent of the easement, — a right

to prevent your neighbour from building upon his land so as to obstruct the access of sufficient light and air, to such an extent as to render the house substantially less comfortable and enjoyable.

Since the statute, as before the statute, it resolves itself simply into the same question, a question of degree, which would be for a jury, if this were an action at law, to determine, but which it is for us, as judges of fact as well as law, to determine for ourselves as best we may, when we are determining it in Chancery.

That being the law which really appears to me to have been laid down in all the cases since the Act, whatever expressions may be found in one or the other of them comparatively enlarging or exaggerating it, — that being the law, we have to apply it to this case. The plaintiff says: "I have a house which did enjoy a considerable amount of light to several of the rooms before the defendants * erected this building. That light is now [* 812] substantially and materially diminished and affected, so as substantially and materially to affect my comfort as an inhabitant of that house." [His Lordship then said that with regard to the plaintiff's bedroom, which might be taken as a test room, being an important part of the dwelling-house, those who lived in the house stated that it was formerly a light and cheerful room, and that the light had been taken from it to such an extent as to make it not only less light, but to make it substantially gloomy and uncomfortable; and the scientific witnesses agreed with them in that statement. There had been also scientific evidence on the other side, and the evidence of the surveyor appointed by the Court.] I am bound to say that, as a question of fact, the evidence to my mind on behalf of the plaintiff predominates far over the evidence, such as it is, on the part of the defendants; and that there is in this case a material diminution of light, and such a material diminution of light as substantially to affect the comfort of the residents in the house.

With regard to the interference of this Court, I am not at all prepared to say that a good deal of what is said in *Clarke* v. *Clark*, L. R., 1 Ch. 16, is not very good sound sense, which we may have occasion to apply, that is to say, if there be the right interfered with so as to give a ground for an action at law, and an action at law which could be repeated, I think it is very fit for this Court, taking into consideration all the surrounding circumstances, to consider whether the interference of the Court will be productive of more or less inconvenience to the parties. It may be that we should

interfere more readily in a case of this kind than if it had been a case of a street in London, where a person was employing his house for city purposes. But in this case I cannot help noticing that to the defendants it is the mere loss of a piece of building-land, the site of one house, which they will have to convert into a garden or keep as a piece of pasture-land, instead of making it the site of a house; whereas on the part of the plaintiff it is a very serious deprivation of the comfort of his house, and a very serious diminution of the lettable value of his house as a residence.

That being so, I have no hesitation in saying that I think it is a case in which the legal right ought to be enforced by the [* 813] equitable * remedy, and that this Court ought to interfere and grant an injunction; and there must now be a mandatory order to restore that which now exists in the shape of a brick wall, or building of bricks and mortar, to the height at which it stood before the building was commenced.

Sir G. Mellish, L. J. I am of the same opinion. I entirely agree with the opinion expressed by the Lord Justice, that the Prescription Act, 2 & 3 Will. IV. c. 71, has not altered the nature of the right to light and air. It has altered most materially the mode in which that right can be gained, but I am of opinion that it has not altered the right itself. Besides the words of the 3rd section, which point to the enjoyment and use of the house, there is a consideration which appears to me almost conclusive, namely, that the right to light and air at the present time by no means depends exclusively upon the statute. A right to light and air may be gained, and in many instances is gained, by implied grants from persons who were the owners of houses upon land adjoining. Before a house had been erected twenty years, or even if it had been erected twenty years, no right could be gained so long as the land on which any obstruction could be occasioned to the house was the property of the same owner; but it is perfectly settled that if the owner of a house sells land on which an obstruction might be erected, or sells the house and reserves to himself the land on which the obstruction may be erected, the right to light and air is gained by implied grant from what is called the disposition of the owner of the two tenements. It would be most inconvenient if the right to light so gained were different from the right which is gained under the statute, and I am of opinion that there is not the least reason to suppose that the Legislature intended to make those rights different.

No. 4. — Kelk v. Pearson, L. R. 6 Ch. 813, 814.

Now, what the right to light was previously to the statute, and is still at common law, I apprehend to be perfectly well established. No doubt it is principally in Nisi Prius cases that we find the rules laid down, but they all substantially agree. The first rule stated by Mr. Gale (Gale on Easements, 3rd ed. p. 575) is, that "to maintain an action for * obstructing light it is sufficient [* 814] to show that the easement cannot be enjoyed in so full and ample a manner as before, or that the premises are to a sensible degree less fit for the purposes of business or occupation," and he cites the case of *Parker* v. *Smith*, 5 C. & P. 438. That was, I presume, a case where the light was used for the purposes of business. When it is used for the purposes of residence I apprehend the rule to be the same. The question is, whether the house is rendered substantially less fit for the purposes of occupation than it was before. That is the right at law.

Now, no doubt, when you come into equity, the cases appear to show that it must be a diminution of a substantial amount of light, so as substantially to make the house less comfortable. But I cannot think that it is possible for the law to say that there is a certain quantity of light which a man is entitled to, and which is sufficient for him, and that the question is, whether he has been deprived of that quantity of light. It appears to me that it is utterly impossible to make any rule or adopt any measure of that kind. It is essentially a question of comparison, whether by reason of deprivation of light the house is substantially less comfortable than it was before.

Much of the evidence of the scientific witnesses was given in support of what I think to be a mistaken view of the law, supposing that there is a certain quantity of light to which a man was entitled, and no more; and the witnesses seem to have made comparisons with what would be enough light in London, and to have considered that that was sufficient. But, in my opinion, there is no such rule.

[His Lordship then stated that the evidence showed a substantial diminution of comfort to the plaintiff, and expressed his opinion that the Court ought to interfere, instead of leaving the plaintiff to bring action after action, and that it would be wrong to attempt merely to assess damages.] The defendants had notice from the first, and all they would have been deprived of would be the ground-rent of the land.

There would be a mandatory injunction to pull the building down to the level of the plaintiff's garden-wall.

ENGLISH NOTES.

The provisions of section 2 of 21 & 22 Vict. c. 27 (commonly called Lord Cairns' Act) are frequently, and sometimes successfully, invoked in opposition to an application for an injunction. The material words of the section are as follows: "In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction . . . against the commission or continuance of any wrongful act . . . it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction, . . . and such damages may be assessed in such manner as the Court shall direct." In the recent case of *Dreyfus* v. *Peruvian Guano Co.* (C. A. 1889), 43 Ch. 316, the Lord Justices of Appeal, Cotton, Bowen, and Fry were unanimously of opinion that this jurisdiction to substitute damages for an injunction only arises where an actual wrong has been committed, and that it cannot be invoked in *quia timet* actions.

When the case of *Aynsley* v. *Glover* (No. 2 *ante*) was before the Master of the Rolls upon an application for an interlocutory injunction, he entered fully into the circumstances under which the Court would give damages in lieu of granting an injunction (see *ante*, pp. 25 *et seq.*). The same learned Judge had occasion to consider the question again in a right of way case, *Krehl* v. *Burrell* (1877), 7 Ch. D. 551, 47 L. J. Ch. 353. At 7 Ch. D. p. 554, he is reported, "The question I have to consider is, whether the Court ought to exercise the discretion given by the statute, by enabling the rich man to buy the poor man's property without his consent; for that is really what it comes to. If with notice of the right belonging to the plaintiff, and in defiance of that notice, without any reasonable ground, and after action brought, the rich defendant is to be entitled to build up a house of enormous proportions, at an enormous expense, and then to say in effect to the Court, 'You will injure me a great deal more by pulling it down than you will benefit the poor man by restoring his right,' — of course that simply means that the Court in every case, at the instance of the rich man, is to compel the poor man to sell him his property at a valuation. . . . It could never have been meant to invest the Court of Chancery with a new statutory power, somewhat similar to that with which railway companies have been invested for the public benefit under the *Lands Clauses Act*, to compel people to sell their property without their consent at a valuation." This case came twice before

the Court of Appeal, but it was only on the second occasion that the effect of Lord Cairns' Act had to be considered. The Lord Justices then held, that where the right was clear, the Court had no power under the statute to oblige the owner of the dominant tenement to accept damages in lieu of an injunction, especially in those cases where the defendant had proceeded to do the wrong after action brought. *Krehl* v. *Burrell* (C. A. 1879), 11 Ch. D. 146, 48 L. J. Ch. 252. Where a defendant has given an undertaking to abide by what is conventionally termed a "pulling down" order, the Court will only in an extreme case substitute damages for an injunction: *Greenwood* v. *Hornsey* (1886), 33 Ch. D. 471, 55 L. J. Ch. 917. A very recent case in which the Court refused to exercise the discretion vested in it under Lord Cairns' Act is *Dicker* v. *Popham* (1890), 63 L. T. (N. S.) 379, a case which contains a review of the authorities. It is no objection to the granting of a "pulling down" order that the building which obstructs ancient lights was completed before the writ was issued, the material point for the Court to consider is what is the state of the new building when the plaintiff first complains: *Smith* v. *Day* (C. A. 1880), 13 Ch. D. 651; *Lawrence* v. *Horton* (1890), 59 L. J. Ch. 440. In the latter case Mr. Justice Chitty treated a defendant, who had run up a building in a hurry, with wholesome severity.

Where the Court grants an injunction at the hearing, it is generally in the form conventionally known as a "pulling down" order, an object which is attained by granting an injunction, restraining the defendant from permitting the obstruction to remain so as to darken, injure, or obstruct the ancient lights. The words "*so as to darken, injure, or obstruct*" were settled as a correct expression by the Master of the Rolls (Sir G. Jessel) in *Willoughby* v. *Hicks*, 25 Nov. 1875, Reg. Min. The plaintiff is entitled, where an injunction is the proper remedy, to have the order made without any qualification. *Parker* v. *First Avenue Hotel Co.* (C. A. 1883), 24 Ch. D. 282. In that case North, J., had granted an injunction against the raising of a new building above a named height; with the additions, that the injunction was not to prevent the defendant from putting on a sloping roof of greater height, so long as the angle of incidence of light over such sloping roof to the centre part of the plaintiffs' windows should be not less than 45° from the perpendicular at the point of incidence. The Court of Appeal determined that such a qualification must be struck out, and still further varied the order by adding the words: "And it being alleged that the defendants have since the judgment . . . erected buildings, which are in violation of the judgment as now varied, grant an injunction to restrain the defendants from continuing or permitting to remain any buildings erected in violation of the judgment as now varied."

No. 4. — Kelk v. Pearson. — Notes.

There are four reported cases in which the Court held that damages should be given in lieu of an injunction. The first is *National Provincial Plate Glass Insurance, &c. Co.* v. *Prudential Assurance Co.* (1877), 6 Ch. D. 757, 762, 46 L. J. Ch. 871. In that case Fry, J., awarded substantial damages (£200) in lieu of an injunction, and considered it material that the room lighted by means of the ancient light was, before the obstruction complained of, dark; that the building scheme in some respects benefited the plaintiffs; and that there had been delay on the part of the plaintiffs although not such as to afford a defence against the claim to an injunction.

In *Holland* v. *Worley* (1884), 26 Ch. D. 578, 54 L. J. Ch. 268, Pearson, J., took into consideration the facts that the injury would not be so great as to render the property useless, even for the purpose for which it was employed; and that it was situate in the heart of a great city (London). These he considered sufficient reasons for awarding £150 damages in lieu of an injunction. And in the later case of *Allen* v. *Ayres*, W. N. (1884) 242, Pearson, J., following his former decision in *Holland* v. *Worley* (*supra* cit.), referred the matter to Chambers to assess the damages. The grounds upon which he proceeded were that if, after taking all the circumstances into consideration, the Court arrived at the conclusion that a money payment would be adequate compensation to the plaintiff, the Court ought to be very slow in granting an injunction. And upon the evidence he came to the conclusion that the obstruction would not be such as to prevent the plaintiff from carrying on his trade, with the aid of gas light, substantially as he was then doing. These decisions, however, of Mr. Justice Pearson seem contrary to the principles laid down by the Master of the Rolls and the Court of Appeal in *Krehl* v. *Burrell*, and they are adversely commented upon in the more recent cases of *Greenwood* v. *Hornsey* and *Dicker* v. *Popham* (p. 55, *supra*). The present bearing of the Courts is in favour of allowing the plaintiff to enjoy his rights and to protect his enjoyment by injunction.

Where a sole plaintiff died pending action for an injunction and damages, Mr. Justice Chitty held, upon motion to discharge an order substituting B., the sole executor and devisee, that although in his character of executor he could only recover damages limited in respect of the wrong committed six months before the late plaintiff's death, yet in his character of devisee he was entitled to the remedy by injunction to the same extent as the testatrix, and dismissed the application: *Jones* v. *Simes* (1890), 43 Ch. D. 607, 59 L. J. Ch. 351.

No. 5. — NEWSON *v.* PENDER.

(C. A. 1884.)

RULE.

WHERE upon an interlocutory application the Court, upon the materials before them, form the opinion that the plaintiff has shown a *primâ facie* case of right to ancient light, and that the works of the defendant, if carried out, will unduly obstruct the light, it is a question, on the balance of convenience, whether to grant the injunction until the hearing (upon the plaintiff's undertaking as to damages), or to allow the defendant to proceed with his building upon his undertaking to pull it down, if required. Where the defendant has commenced his operations after fair warning, and the injury to the plaintiff's property would be considerable, the former course appears preferable.

Newson v. Pender.

27 Ch. D. 43–65 (s. c. 52 L. T. 9, 33 W. R. 243.)

THE plaintiffs in this action were lessees, for a long term [43] of years, of a block of buildings four stories high, known as Great Winchester Street Buildings, in the city of London. A portion of the buildings faced Little Winchester Street towards the east, and were let to bankers, merchants, solicitors, and others.

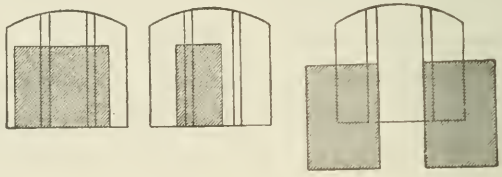
In the front, facing Little Winchester Street, were numerous * windows, some being on the ground floor, some on the [* 44] first floor, and some on the second floor.

Little Winchester Street is a narrow street, only about twelve feet wide, and the plaintiffs complained that the defendants threatened and intended to build a lofty pile of buildings on the opposite side of the street, which would obstruct the light coming to the above-mentioned windows in the plaintiffs' building.

The plaintiffs' building had been recently erected, not having been constructed till the year 1867, but the building on the site of which it was erected had ancient windows looking into Little Winchester Street. There were forty-four windows in the old building, and forty-two in the three lower floors of the new build-

ing. Photographs had been taken of the old building before it was pulled down, as well as of the present building, from which it appeared that a few of the new windows on the ground floor were substantially in the same position as the old windows, although they covered a larger space; but by far the greater number of the new windows occupied only part of the spaces covered by the old windows, and extended considerably beyond them on one side or the other. Some of the new windows were in entirely different positions from any of the old ones, and some of the old windows were altogether built up.

Annexed is a sketch of two of the new windows most nearly identical with the old windows, and one of the others, the position of the old windows being shaded.



The foundations of the defendants' proposed building had been laid, but the walls had not been raised above the surface.

The plaintiffs moved, on the 8th of February, 1884, before Vice Chancellor Bacon, for an injunction till the hearing.

Hemming, Q. C., Byrne, and C. J. H. Corbett, for the plaintiffs.

Upon the plaintiffs' premises there used to stand a number of buildings of very various heights, to which there was a [*45] large *access of light: and some of these lights, and parts of many others, are preserved in the plaintiffs' new buildings. The defendants mean to raise their new buildings to the height of the highest of the plaintiffs' old buildings.

The defence is practically this: "No doubt we are darkening your lights, but as you have enlarged your windows you are getting a great deal more light than you had in 1867–1870; and the old light of yours which we are obstructing is more than compensated for by the new light you are getting." The defendants also say that when we, the plaintiffs, pulled down in 1867, the houses, opposite to the sites of which the defendants are now building, a gentleman named Gregg, an architect employed as a surveyor by the defendants' predecessors in title, looked over the plaintiffs' premises, and "concluded" that the plaintiffs meant to abandon

their ancient lights. This the plaintiffs deny, and say that so far from abandoning, they did their utmost to preserve plans showing the position and size of those ancient lights. *Tapling* v. *Jones*, 11 H. L. C. 290, 34 L. J. C. P. 342.

Marten, Q. C., and Joseph Beaumont, for the defendants.

This is not a case for an interlocutory injunction.

What the plaintiffs have done amounts, as a matter of law and fact, to an abandonment of their ancient lights. Of the old light area, only a small portion is coincident with the new light area. The character of the plaintiffs' building has been totally changed. Having themselves blocked out many of their old lights, though they have opened new ones, and having made their building of a uniform height, they could not have intended to rely on their old lights.

Tapling v. *Jones*, 11 H. L. C. 290, 319, merely decided that the opening out of new lights did not take away the right to old lights. *Renshaw* v. *Bean*, 18 Q. B. 112, 21 L. J. Q. B. 219, was rectified to this extent, but only to this extent. The doctrine as to abandonment still remains, and was supported in *Stokoe* v. *Singers*, 8 E. & B. 31, 26 L. J. Q. B. 257. *Hutchinson* v. *Copestake*, 9 C. B. (N. S.) 863, 31 L. J. C. P. 19, was not overruled by *Tapling* v. *Jones*.

* *Fowlers* v. *Walker*, 49 L. J. Ch. 598; S. C. on app. 51 [* 46] L. J. Ch. 443, shows not only that there must be sufficient evidence of what the alleged ancient lights were, but also evidence that the plaintiffs have sustained substantial damage. That is to say, the Court has refused to act on the circumstance that a fragmentary portion of the new light was old, when it cannot be proved that the new erection will seriously interfere with that portion of the plaintiffs' light which is privileged. *Clarke* v. *Clark*, L. R., 1 Ch. 16, 35 L. J. Ch. 151.

Bacon, V. C. The question before me is simply one of law; there is no difference between the witnesses as to the facts.

The owners of a building having certain windows looking into a narrow street, pull them down and erect a very much larger building; but they take care to preserve the evidence of that which was perhaps of more value to them than the building which they pulled down, namely, the access of light; and they preserve and adduce this day evidence of the fact that upon the eastern wall looking into Little Winchester Street they had certain win-

dows, the enjoyment of which they retain, and will continue to retain, unless the defendants block them out, as long as they remain the owners of the property. When they cease to be the owners, then somebody else will be the owner of similar rights. Mr. Gregg no doubt says that when he inspected the plaintiffs' building, he looked it all over very carefully, measured it, corrected the measurements, added to the drawing the roof, and what was above the parapet; and no doubt he did his duty like an ingenious, clever, scientific man, but he does not say one word about any agreement between the parties about the lights. He says he "concluded," but it is impossible that he could have concluded anything in point of right reason. I do not mean to contradict his statement that he did conclude, but when a man is rebuilding an external wall in place of one which had windows in it, can anybody safely "conclude" that because he is going to deal with that wall he means to give up his right to the window lights? It [*47] is out of the question. If there had been any agreement * at that time, Mr. Gregg would not have been slow to say so. If there had been any suggestion that new windows were to take the place of the old ones, that would have been stated; but nothing of the kind is said, and the evidence is all one way. The maps and plans before me have been used as freely by the defendants as they were used by the plaintiffs. They are referred to in the statements in the affidavits and in the arguments of counsel; and there is no dispute that the plaintiffs were entitled to many windows in their old house, although in the erection of their new house they acquired a much greater degree of light. But how does that lead to the conclusion that they meant to part with what they had? Could the defendants at any time have supposed that if no new building of the plaintiffs had been erected, and the old building had remained, they could then do what they propose to do? They could not. Enjoyment for more than twenty years of the old windows is proved, and not disputed. Can the defendants build up a wall which will exclude the light in the old windows? On the facts before me with which I have to deal here, I come to the clear conclusion that the plaintiffs are entitled, by means of an injunction, to be quieted in the possession they have had for so many years. The injunction goes no farther. I am told that there may be other questions raised. If they are raised they will be discussed. If the good sense of the parties had pre-

vailed, instead of wasting their time, and something besides, in discussing the question of the injunction, they should have agreed to make this motion the hearing of the cause, and at once had a judicial decision on the point which is said to remain for disposition when the case is heard.

Then as to the abandonment, as it is called, I have dealt with the first part of the case; and I am happy to say since the case of *Tapling* v. *Jones,* 11 H. L. C. 290, that which was a disgrace to English law has been abolished, and now good sense prevails, and a man who is entitled to a certain light does not lose his right to enjoy it, because he makes the opening bigger. The notion of the plaintiff's giving up any right rests solely on Mr. Gregg's statement. Mr. Gregg says he "concluded" without mentioning any one fact * on which I can say he concluded rightly, [* 48] or that that was the whole transaction. I am bound, therefore, to grant the injunction. I am told, if I were to balance the injury which will be done to the defendants by an injunction, it will be greater than that suffered by the plaintiffs, if no injunction is granted. I do not think so. I think if I were to refuse the injunction, and the defendants were to go on and build, and if at the hearing it was found they had gone on in their own wrong, it would be a much greater injury to them to have to pull down their new house, than it is now to be asked to stay their hands (for that is all the injunction does) until the question of law — for there is no question of fact — can be decided between the parties.

I grant the injunction.

From this order the defendants appealed. The appeal came on for hearing on the 30th of April, 1884, and was argued by Sir F. Herschell, S. G., Marten, Q. C., and Joseph Beaumont, for the appellants, and by * Hemming, Q. C., and Byrne [* 51] (C. J. H. Corbett with them), for the plaintiffs: —

The following judgments were delivered: —

* Baggallay, L. J. In this case the plaintiffs and the [* 52] defendants are owners, for unexpired terms of different lengths, of properties on the opposite sides of a narrow street, about twelve feet wide, in the city of London, known as Little Winchester Street. The street runs in a direction north and south, and the plaintiffs' property is upon the western side and the defendants' property on the eastern side of this narrow street. At the present time the plaintiffs' property consists of a very fine range of build-

ings approaching 200 feet in length, of fifty feet or thereabouts in height, with good architectural proportions, and uniform throughout as far as the *façade* is concerned. The defendants' property is upon the other side of the street, opposite the plaintiffs' premises, facing about 120 feet of them. At the southern end of the street, and for about twenty-four feet from the southern end of the defendants' property, as it existed before it was recently pulled down, it was about the same height from the ground as the plaintiffs', and for a space of about forty feet of the defendants' property, only stood at a height of something like twenty feet. The defendants are about to rebuild their property according to the proposed plans to a uniform height quite as high as, or higher than, the existing buildings of the plaintiffs; and the plaintiffs have commenced this action for the purpose of obtaining an injunction to restrain the erection of the buildings so as to interfere with what they have alleged to be the ancient lights of the plaintiffs. The plaintiffs' buildings as they at present exist were constructed in the year 1867, and prior to their reconstruction there were certain windows in the building which were acknowledged to be windows in respect of which they were entitled to protection as ancient lights.

[* 53] Upon the reconstruction of the building, when put into * its existing form, the position of the windows in the building was very materially altered, but at the same time to a certain extent the existing windows comprise portions of what I may call the area of the old windows. In one or two instances it would appear that the new windows to a great extent correspond with the ancient windows, but in other cases the area of the ancient windows was more or less blocked up, but nevertheless in several windows the area of the ancient windows forms part of the present windows, and it is in respect of the portions of the said windows (using a term not strictly correct, but sufficient to express my meaning), which are comprised in the area of the new windows that the plaintiffs claim their right to protection. If this case ever comes to be heard upon a trial of the action, it appears to me that there will be properly three questions to be determined by the Court. The first will be whether the alterations which were made by the plaintiffs in 1867 amounted to an abandonment of their right to the ancient lights of which they were then possessed, or whether they continued after that period of time to retain those rights to any appreciable extent. Of course if the latter question is answered in the nega-

tive upon the hearing of the cause, the plaintiffs' case is gone, but assuming that this question is answered in the affirmative, then the next question will be whether, if the building which the defendants purpose to erect, is erected in accordance with its present scheme and design, there will be a substantial interference with the access of light through their windows; and the third question will be, assuming that the Court should arrive at that conclusion, that is to say, that there was no abandonment of the ancient lights, and that what is proposed to be done by the defendants will interfere with the access to ancient lights to which the plaintiffs are still entitled, then whether the injury which will be occasioned to the plaintiffs should be compensated by damages, or whether there should be a perpetual injunction restraining the defendants from interfering with the plaintiffs. Those will be the three questions to be determined at the hearing if nothing be done in the meantime. But now we have to deal with the question of an application for an *interim* injunction. When the action was commenced and an application made to Vice Chancellor BACON for an *interim* injunction, the Vice * Chancellor thought it right [* 54] to grant that injunction, and this appeal has been brought and has been supported and opposed by able arguments.

The argument in support of the appeal amounts substantially to this. In the first place, it was said that the case is so clear that there was an abandonment of the right to ancient lights in 1867, that the plaintiffs have no right whatever to come into this Court at all, and therefore the injunction ought to be discharged and nothing else done. The practical result of that view would be that at the hearing of the action the plaintiffs' claim must be dismissed. Then it was argued, in the second place, that if there was no abandonment of right, and if the right to light still remained, it would not be interfered with by the defendants' building to any substantial extent, and certainly not to such an extent as would authorize the interposition of the Court to prevent the continuance of such interference. Then the third argument is that upon the hearing of the cause the only remedy to which the plaintiffs would be properly held entitled to even if they succeeded upon the other points, would be a right to damages and not a perpetual injunction restraining the erection of the building. Upon that view of the case, of course, as regarded the first two portions of the argument, if well founded, we ought simply to discharge

the order which was made by the Vice Chancellor; but supposing we should be adverse to taking that view, then there would remain the question whether we ought to accede to the suggestion of the defendants, that instead of granting the *interim* injunction we should discharge the order of the Vice Chancellor, allowing the defendants to go on with their buildings, upon an undertaking by them to take them down again to such an extent, if any, as the Court should direct at the hearing of the cause, and that they would be answerable for any damage caused to the plaintiffs by reason of the works going on until such time as they should be removed.

Now, I do not think it necessary to state in anything like detail my views upon the several points to which I have adverted, as the matter will be for the consideration of the Court upon the hearing; but if I were satisfied upon the evidence now before us [* 55] * that there had been in 1867 an abandonment of the right of the plaintiffs to the lights, which down to that period they had possessed, I should have felt it my duty to act upon the opinion so formed; but I cannot say I have arrived at that conclusion. Certainly, the balance of my mind at present, although there may be additional materials brought before the Court at the hearing of the action, is that there was not an abandonment, and I am very much influenced in arriving at that conclusion by the great care that seems to have been taken at the time of erecting the new buildings to make a record of the exact position occupied by all the ancient lights before the alteration was made, and to show to what extent they would be interfered with or modified by the new windows; and evidently, to some extent, the efforts which were then made to secure a correct record of what the ancient lights were, were communicated to the other side, though not to an extent from which it could be inferred that there was a recognition of the right of the plaintiffs to retain such lights as they previously possessed. However, as I said before, there may be additional materials before the Court when the cause comes on for final hearing, which may induce the Court to come to the conclusion that there was an abandonment of the right. Upon this point I will make an observation upon the cases of *Renshaw* v. *Bean*, *supra*, and *Hutchinson* v. *Copestake*, *supra*, which have been adverted to in the course of the argument, and without going so far as to say that the decision in *Hutchinson* v. *Copestake* was at variance

with the decision in the House of Lords in *Tapling* v. *Jones*, *supra*, I am bound to say that if the true construction of *Hutchinson* v. *Copestake* is such as the Solicitor-General contended for here (which I do not think it is), namely, that in no case unless you preserve the old windows unaltered, can there be any right retained to the access of light, then such a decision has been interfered with and overruled by *Tapling* v. *Jones*. In *Hutchinson* v. *Copestake* in the Exchequer Chamber, Mr. Justice CROMPTON and Mr. Justice HILL had previously given their judgments, entirely basing them upon the decision in *Renshaw* v. *Bean*, but Mr. Justice BLACKBURN, speaking for himself and Mr. Baron CHANNELL, said, 9 C. B. (N. S.) at pp. 870, 871: "We * consider this a [*56] very different question, on which, if it was raised by the facts, we should be bound to deliver an opinion. As it is, without doing so, we rest our concurrence in affirming the judgment on the ground that, comparing the tracings, which are part of the case, we find that no one of the plaintiff's present windows substantially corresponds with an ancient window; and we draw the inference of fact that no one of the present lights claimed is a continuation of one of the ancient lights. We perfectly concur in the reasoning of my Brother CROMPTON, by which he shows that the new and the old window may occupy in part the same space, without the right to light claimed through the new window being the same right as that enjoyed for twenty years without interruption through the old one." That being the view of Mr. Justice BLACKBURN and Mr. Baron CHANNELL, Mr. Baron BRAMWELL added these words: "I concur in this judgment, solely on the ground that no one of the existing windows occupies the same position as any one of the ancient windows did, and consequently that by no one of them have the light and air been enjoyed for twenty years, and so no right has been acquired in respect of any of them against the plaintiffs." In the course of the argument the Solicitor-General drew our attention to the sketch of the old and new windows as they existed in that case of *Hutchinson* v. *Copestake*, and certainly it would be quite accurate, as Mr. Baron BRAMWELL put it, to say that no one of the existing windows exactly coincided with one of the ancient windows. There were some very closely approximating, but some of those most closely approximating to the ancient windows were slightly added to in the new windows, and that to some extent, no doubt, supported the argument of the

Solicitor-General as regards the true effect of the decision in *Tapling* v. *Jones*, *supra*.

Well, then, the next question that would appear to come under the consideration of the Court upon the hearing of this action, would be whether, assuming there has been no abandonment of the right in regard to such portions of the ancient windows as now form a portion of the area of the new windows, there will be by the construction of the proposed building of the defend-
[* 57] ants, a substantial * interference with the access of light, and in point of fact, a deprivation of that light which unless such addition were made to the buildings the plaintiffs would otherwise enjoy. No doubt we have had evidence given by a gentleman of very considerable experience, as regards experiments he has made, and from which he has come to the conclusion that there will not be a substantial deprivation of light, but, as I observed before, in cases of this kind you really hardly want the assistance of expert evidence to tell you what will be the effect of raising a wall immediately opposite a window. The upper portions of the windows of the ground floor are very nearly ten feet above the level of the floor, and at present there is an existing wall twenty feet high opposite, and if you raise that wall and make it fifty feet instead of twenty feet, it appears to me very difficult to say that these windows upon the ground floor will not be interfered with to a substantial extent by the raising of the opposite wall. That will apply so far as there is any right to ancient lights in respect of the windows upon the ground floor to a greater extent, because as the building at present exists there will be a horizontal access of light which will be interfered with by the raising of the wall; nor am I at present certain what will be the effect upon the lateral access of light, because there are windows both upon the right hand and upon the left, and it would appear that at the later part of the day a considerable amount of light must come to these windows. But however, that is a question to be discussed more fully at the hearing of the cause. At any rate, it appears to me that there is a question to be tried as far as regards the alleged abandonment of the ancient lights, and a question to be tried as far as regards the substantial interference with the ancient lights, if they do exist, to the present day.

Then comes the question whether now, at the present time, the plaintiffs shall be protected by a continuance of the injunction

which the Vice Chancellor granted, or whether the real justice of the case would not be sufficiently met by ordering the injunction to be discharged, and allowing the defendants to go on with their building upon giving an undertaking to pull it down again if the Court should direct that it should be pulled down again to such an extent as the Court should think fit. At one time I
* must say I was disposed to think an undertaking of that [* 58]
kind on the part of the defendants would sufficiently meet the merits of this case, and more especially so when the defendants offered to give in addition to that an undertaking not to raise any portion of their building higher than the existing buildings of the plaintiffs. But upon a more mature consideration of the case, having had the advantage of the arguments which have been addressed to us upon the part of the plaintiffs, I have arrived at a different view, and in my opinion I think the balance of convenience shows that the best course to pursue will be to allow the injunction to continue. If the defendants should ultimately turn out to be right, they will be damaged by the continuance of the injunction, but there is an undertaking on the part of the plaintiffs to meet any damages which the defendants may sustain to such an extent as the Court may direct; and it appears to me that it will be a less inconvenience to the defendants than that they should be allowed to continue their building upon an undertaking to pull it down again, because there would be always a considerable doubt hanging over them which might materially interfere with the dealing with the property. And I do not altogether disregard the argument which has been addressed to us, that though probably if the present Court had thought it right to impose such an undertaking upon the defendants it would have enforced that undertaking if the ultimate result of the decision should be against the defendants; yet one cannot feel with confidence that upon the facts coming before the Court the result might not happen which has happened upon other occasions where the Court has felt the destruction of property very undesirable, and a view has been taken, which the plaintiff has been unable to resist, that he should accept compensation in the form of damages instead of the pulling down of the premises. Nor do I forget the last argument addressed to us by Mr. Byrne, that it is really the defendants who have brought the matter about, and have done that which has given rise to the litigation; therefore, bearing all these circumstances in mind, I

think that the order of Vice Chancellor BACON was right, and that the appeal should be dismissed, and I see no reason why being dismissed it should not be dismissed with costs.

[*59] *COTTON, L. J. In this case the Vice Chancellor has granted an injunction to restrain the defendants, whose building was opposite the building of the plaintiffs, from raising their building so as to obstruct or interfere with the lights of the plaintiffs. The case has been fully argued, although only an interlocutory injunction was granted, and I must confess I regret that we are unable to do now that which might have been done with consent by the Court of Appeal in former days; namely, to turn the motion for an injunction into the hearing of the action and to decide it with, if necessary, such additional evidence as either party might have desired to bring. But that we cannot do, and therefore we can only deal with this which is an appeal against an *interim* injunction. What we have to consider is this, whether the materials that are before us show a probability that at the hearing the plaintiffs will get an injunction, and the balance of convenience or inconvenience of granting or refusing an injunction. One point, and a very material question, involving a matter of law, and one which must very much influence our decision upon the question whether an injunction should be granted, was in respect of what windows, or rather in respect of what parts of windows, the plaintiffs are entitled to any protection, and whether they are entitled to protection in the way of injunction. That is the material question. Upon the one hand it was contended upon the part of the defendants that the plaintiffs had, when they rebuilt their premises, entirely abandoned all their ancient lights, and some communications that had taken place between the surveyors of the plaintiffs and the surveyors of the owners of the defendants' property were relied upon. Whether the defendants have any fresh evidence and will be able to make out an intention on the part of the plaintiffs to abandon their old lights is a question not to be determined now, and all I will say is that, upon the evidence before us, in my opinion, there is no probability that the plaintiffs intentionally abandoned their right to the ancient lights, but as far as one can see upon the evidence they did their best, whether successfully or not, to construct the building so as to retain the protection which the use of the light through the old windows would give them. Of course it is an entirely different question

whether by what the * plaintiffs have done they have lost [*60] in respect of any or all of the windows the right to ancient light. I may state this generally; it is a building of four floors, and as regards the different floors there are portions of the area occupied by the new windows which comprise the area of the old lights, and in some cases in very insignificant dimensions. As regards the second and first floors, there are undoubtedly windows which do contain portions of the area occupied by ancient windows, and with respect to those upon the ground floor it is shown that although none of the new windows are coincident in area with the ancient lights in the old building, yet there are windows which include the whole of the area occupied by windows in the old building, and some others which contain a more or less substantial portion of the area of the ancient windows in the old house. It was contended on behalf of the defendants, as I understand the argument, that there was authority which showed that in respect to all these windows which were not coincident with the windows in the old house, the plaintiffs had lost their right, and *Hutchinson* v. *Copestake*, was the case relied upon; whereas, upon the other hand, the plaintiffs contended that *Tapling* v. *Jones*, 12 C. B. (N. S.) 826, 11 H. L. C. 290, in the House of Lords, overruled altogether what was laid down in *Hutchinson* v. *Copestake*, and that according to the decision of the House of Lords in *Tapling* v. *Jones* the plaintiffs remained entitled to their legal right, and to the protection of an injunction in respect of all those portions of their present windows which were coincident with any portion of the old lights in the old house and corresponded with any portion of the old lights. In my opinion *Tapling* v. *Jones* did not decide that. That case is reported both in the House of Lords and in the Court of Exchequer Chamber; and it was remarked by the Judges that there the plaintiff had one window in his new building which was entirely coincident with — except that it had been reconstructed — the ancient light in the ancient building, and in my opinion all that *Tapling* v. *Jones* decided was this, that where there is a modern light in a reconstructed building coincident with an old light there, the right to be protected was not lost by putting other lights in the building which were not entitled to any protection from being ancient lights, — that is to say, * a neighbour could not under the guise of these [*61] new lights having been added claim to obstruct the win-

dows in respect to which the right to an ancient light could be claimed. But that was not overruling the principle to be found in *Hutchinson* v. *Copestake*, as laid down by Lord BLACKBURN and Lord BRAMWELL. In that case, what they decided was — the passages have been read by Lord Justice BAGGALLAY, and I will not repeat them — that there was no window in the new building which was coincident with the old windows, and therefore there was no light in the new building which could be considered as a continuation of any ancient light. *Tapling* v. *Jones*, decided that by constructing new windows, either by the side of or above or below the ancient light in a reconstructed building, the right in respect of it was not lost, and I can see no reason why, when a window is reconstructed, which has within its area the entire area of an old ancient light entitled to protection, if the building is reconstructed, with that in its exactly former position, the addition to the area of a new window which included the area of the old would destroy the right which would have existed if instead of being within the same mullions it had been an addition of a window just by the side of the old window. I understand the ruling to be that although there is a portion of the ancient light coincident with a portion of the new light, yet if the new light does not include the area of the old light, or if there is not substantially the area of the ancient light included in the new, it cannot be said to be a continuance of the ancient light, and a plaintiff cannot seek protection in respect of the existing windows simply because he has got a little bit of the area of the ancient light included in the area of the new, which is not a continuance of the ancient light. There would be a question as to whether the plaintiffs here have at law a right in respect of a great many of these windows, but undoubtedly there are some of their windows which do include the entire area of the old lights, and in my opinion, having regard to *Tapling* v. *Jones*, they are entitled in respect of the area of the old ancient lights included, substantially, in the area of the new lights, to protection.

I do not think it necessary, as regards this case, to decide
[*62] * whether or no the right at law may or may not exist in respect of a good many of these windows. The plaintiffs have contended that they are entitled to legal protection and protection in equity in respect of all these windows, which include any portion of the area of the ancient windows, and at any rate to pro-

tection as regards the portions of their windows which do include or coincide with any portion of the area of his ancient windows. But it is a very difficult question, to my mind, whether, although they may have their legal right of action in respect of windows which include in their area any substantial portion of their ancient lights, they are entitled to an injunction; because an injunction is only granted where there is a substantial interference with the access of light; and where the portion of the ancient window area which is retained in the area of the new windows is comparatively small, it may well be, and in my opinion would be the case, that even if the plaintiffs were entitled to maintain an action at law, the damage to them by blocking up the only portion of the new window in regard to which they would be entitled to protection at all, must be so immaterial as not to entitle them to the protection of a Court of Equity by injunction in respect of that portion of the window, even although it may be legally considered as an ancient light. That was apparently the view taken by Lord Justice GIFFARD in *Staight* v. *Burn*, L. R., 5 Ch. 163, 166, when referring to the case of *Heath* v. *Bucknall*, L. R., 8 Eq. 1, he says: "I cannot take it as having been decided otherwise than upon its particular circumstances; those particular circumstances, as I gather them, being, that a very small and almost inappreciable proportion of the ancient window was preserved, and the rest was new; so that there would have been no material damages at law." Therefore, in my opinion, we must disregard those windows in the first and second floors, when one comes to consider what probability there is of the plaintiffs establishing at the hearing a right to an injunction. But there are certainly some which do contain the entire or substantial area of the old lights, and as the plaintiffs press that there should be a continuation of the injunction, I think we ought not to disturb the order. That is my view, not because I doubt the efficacy of undertakings to pull down; for *in my opinion it ought to be at least as advantageous [* 63] to the plaintiffs to have such an undertaking as for the defendants to give it; and I repeat again what I have said before in other cases, that where the defendant says that his building when completed will do no damage, and if he is not restrained he will undertake to pull it down, if it is found at the hearing that it will, I think it would be wrong if the Court were to take such an undertaking, and then when it comes to a hearing not to enforce it, just

as much as it would grant an injunction if the building had not been put up. I therefore do not decide in favour of granting a continuance of the injunction upon the ground that the Judge upon the hearing would decline to enforce the undertaking offered by the defendants in order to avoid an interlocutory injunction, but because upon the whole I think it is better here to continue the injunction. Of course if it turns out that the defendants are right, loss may be occasioned to them, and as to that the plaintiffs have given an undertaking for which they will be answerable. It certainly would be more difficult to ascertain what was the injury to the plaintiffs, if during the continuance of this action the defendants were allowed to go on with their building, and therefore, having regard to the fact that the plaintiffs will have to account to the defendants if they are wrong for whatever damages they may have sustained, I think, as I have said, the proper thing is to grant a continuance of the injunction. Of course the defendants may go on and put up their building to the height of their ancient building, so as not to interfere with the plaintiffs' lights, and the plaintiffs will be answerable in damages to the defendants if they are wrong, and the amount can be ascertained without more difficulty than usually occurs in most questions of damages.

Then as we continue the injunction, of course the defendants will be anxious that the case should be brought on as speedily as possible, and that is not without influence upon my mind in considering what ought to be done. The injunction being continued, I think the plaintiffs ought to undertake to speed the action, that is, to prosecute the action with due diligence, and if there be no delay on either side, probably the action will be decided, and judgment obtained one way or the other without any very great delay.

[* 64] * Lindley, L. J. I am of the same opinion as to the result. The case to my mind presents several questions of difficulty which will have to be encountered, but we cannot upon the present materials go the length of saying that the plaintiffs have lost all their rights and are entitled to no relief — that would certainly be going too far upon such materials as we have got before us. I do not propose to discuss with any exactness or in any detail what their rights may be; I will merely mention that in respect to the cases of *Renshaw* v. *Bean*, 18 Q. B. 112, and *Hutchinson* v. *Cope-*

stake, 9 C. B. (N. S.) 863, it appears to me that the Courts ought to be careful not to reinstate and revive *Renshaw* v. *Bean* by inferring abandonment, upon the method of reasoning which was condemned by the House of Lords in *Tapling* v. *Jones*, 11 H. L. C. 290. *Renshaw* v. *Bean* was not decided upon the ground that the rights were abandoned, but upon another ground; and it would be only to revive that which the House of Lords condemned to shift the ground, and say that a plaintiff conducting himself as in *Renshaw* v. *Bean* had lost his rights by abandonment instead of by the more circuitous process, as pointed out by the Court of Queen's Bench. With regard to the greater part of these windows, I must say I do not see very strong evidence of abandonment — there is evidence from which I should think no Court or Judge would say that the great bulk of the lights had been abandoned, but as to some there is very considerable evidence the other way. I do not at all take the view that the preservation of the lower lights was accidental, I take it that it was intentional, and done on purpose to preserve if possible the right to the old lights, and by preserving the right to the old lights to in fact gain a right of access of light to all the new ones. That is what the plaintiffs were intent upon doing, but whether they succeeded in doing it is another matter. As regards the old lights there will be and must be a considerable diminution of light if the defendants' building is carried up as intended — that is tolerably obvious, but whether that will enable the plaintiffs to maintain or obtain an injunction, or whether, on the other hand, at the hearing the proper method of dealing with the case will not be to refuse to grant the injunction and let the
* defendants complete their building without prejudice to the [* 65]
plaintiffs' right to damages, or to have compensation, is another matter. We do not decide that now. What we have to decide is what ought to be done under the circumstances as they exist. The circumstances as they exist are these: the defendants have pulled down their old building but not begun to erect their new building, and they will if they choose, notwithstanding the injunction, still be at liberty to do a great deal; they can go on building up to the extent to which they had the building before without any risk, and if they go higher of course they do so at their peril — if they go higher they must take precautions not to interfere with the ancient lights, but at all events the injunction will not prevent them from restoring their building in the new form in

accordance with the old height if that suits their convenience. Upon the whole it seems to me to be best that we should give them liberty to do no more than that. One can see plainly enough that if the building is completed before the trial, and if the question of abandonment should then go before a jury, the jury would be very apt — I do not say they ought — to infer an abandonment in order to avoid the consequences of pulling down handsome buildings, such as the defendants propose to build. I do not think that that risk ought to be run. The defendants have the option to build up to the original height of their old building or leave it alone, and considering the really serious questions that arise, and the extreme difficulty of doing justice if the buildings are put up, it appears to me upon the whole that the best thing to do is to maintain the injunction.

Cotton, L. J. I should have added that I thought upon the evidence that there was at least a probability that the plaintiffs would show substantial injury to those lights, in regard to which they were entitled to protection, but I do not think it necessary to go into that.

The injunction was continued accordingly.

ENGLISH NOTES.

The observations of the Master of the Rolls in *Aynsley* v. *Glover* as to the circumstances under which the Court will grant an interlocutory injunction, will be found, *ante*, pp. 25 *et seq.*

There was formerly a prevailing impression (not without some ground) that the Courts entertained a strong disinclination to grant a mandatory injunction upon an interlocutory application. The case of *Daniel* v. *Ferguson* (C. A. 1891), 1891, 2 Ch. 27, is a salutary example of the power and will of the Courts to defeat any high-handed attempt to take advantage of this supposed disinclination. The defendant in this case was about to build upon land, adjoining that of the plaintiff. The plaintiff caused the plans to be inspected on his behalf, and came to the conclusion that the proposed erection would materially affect the access of light to his houses. The plaintiff, on Saturday, 29th November, 1890, served a writ, and, by special leave, notice of motion for an injunction for the 5th December. About an hour after being served, the defendant put on a large gang of men, who went on working all through the night and until 2 P. M. on Sunday. On Monday they resumed work, and ran up the wall about thirty-nine feet. On the Monday an *ex parte interim* injunction until the 5th December

was obtained, and notice of it served on the defendant, who thereupon ceased building. Upon the hearing of the motion, which took place on the 19th December, it appeared doubtful whether the plaintiff's lights were ancient. Mr. Justice STIRLING granted an *interim* injunction against further building; and from permitting the wall which the defendant had erected to remain on his land. From this order the defendant appealed; and, with respect to the second point, it was urged that it was against the practice of the Court to make a "pulling down" order upon an interlocutory application. The Court of Appeal, without calling upon the counsel for the respondent, affirmed the order in both particulars upon the grounds that the plaintiff had made out a case entitling him to an injunction to keep matters *in statu quo* till the trial; and that a building, run up under the circumstances stated above, could not be allowed to remain.

An interlocutory injunction should only be granted upon an undertaking as to damages: *Graham* v. *Campbell* (C. A. 1878), 7 Ch. D. 490, 47 L. J. Ch. 593. The defendants, in whose favour the undertaking is given, will be entitled to the benefit of it, even if the injunction did not extend to them, and although the undertaking was *per incuriam* omitted in the order as drawn up: *Tucker* v. *New Brunswick Trading Co.* (C. A. 1890), 44 Ch. D. 249, 59 L. J. Ch. 551. But if the injunction has been granted, in the presence of a defendant or those representing him, without an undertaking having been given, the Court has no further jurisdiction to compel the plaintiff to give the undertaking (S. C.).

If the undertaking has been given, and if the plaintiff fails at the hearing, the defendant is entitled to an inquiry as to damages; and it is immaterial that the plaintiff has not been guilty of any misrepresentation, suppression, or other default in obtaining the interlocutory injunction: *Griffith* v. *Blake* (C. A. 1884), 27 Ch. D. 474, 53 L. J. Ch. 965. Where, however, it is obvious what the amount of damage is, the Court will assess the damages without directing an inquiry: *Graham* v. *Campbell* (C. A. 1878), 7 Ch. D. 490, 47 L. J. Ch. 593.

ANIMAL.

No. 1. — BLADES *v.* HIGGS.

(H. L. 1865.)

RULE.

If a trespasser starts game in the land of A. and hunts it and kills it there, the property in the game so killed vests in A., and not in the trespasser.

Opinion expressed by Lord Westbury, C., and by Lord Chelmsford, that the property vests in the owner of the land where the game is killed, although it is started by a trespasser on the land of a third person.

Blades v. Higgs.

11 H. L. Cas. 621-641 (s. c. 34 L. J. C. P. 286-292, 11 Jur. N. S. 701, 12 L. T. 615.)

[621] This was an appeal under the Common Law Procedure Act, 1854. The case stated the following facts: —

In October 1850, the appellant brought an action against the respondents for converting the plaintiff's goods, that is to say, rabbits and dead rabbits. A second count charged them with assaulting him, and taking from him his goods, that is to say, rabbits and dead rabbits. The defendants pleaded, first, not guilty. Secondly, that the goods were not the plaintiff's as alleged. Thirdly, that the plaintiff, at the time when &c., had wrongfully in his possession certain dead rabbits of and belonging to the Marquis of Exeter, without the leave and license, [* 622] and against the will of the said marquis,* that the plaintiff was about to carry them away, and convert them to his own use, whereupon the defendants, as servants of the said marquis, after request and refusal, took them. The plaintiff took issue on all the pleas, and also demurred to the third plea. The third plea having been held good, the case came on for trial

before Mr. Justice WILLES, at the summer assizes for Leicester, in 1861. It was then proved that the plaintiff was a licensed dealer in game at Stamford; the defendants were in the service of the Marquis of Exeter. On the 16th October, 1860, the plaintiff bought of a man named Yates, two bags containing about ninety rabbits, and ordered them to be conveyed to him at the Midland Station at Stamford. These rabbits had been started, chased, and killed, on the land of the Marquis of Exeter, by persons who were strangers to him, and who, on killing the rabbits, at once put them into bags and carried them to the railway station at Ketton. They were sent thence to Stamford, and on their arrival at the latter place, the plaintiff paid the carriage, and was about to take away the rabbits, when they were claimed by the defendants as the property of the Marquis of Exeter, and were forcibly taken from the plaintiff. In his charge to the jury, Mr. Justice WILLES said that property in the land did not give a man property in animals of a wild nature upon it, after they had become old enough to escape from it. A verdict was found for the plaintiff. A rule was afterwards obtained for a new trial, on the ground of misdirection, the learned judge having told the jury that, assuming the facts stated by the plaintiff to be proved by the evidence, there was nothing to show that the right of possession of the rabbits was in the Marquis of Exeter. This rule was made absolute; and on appeal to the Exchequer Chamber the * decision was affirmed (12 Com. B. N. S. 501, 13 Com. [* 623] B. N. S. 844). The present appeal was then brought.

The case having been argued,

The LORD CHANCELLOR (Lord WESTBURY): [631]

My Lords, when it is said by writers on the common law of England, that there is a qualified or special right of property in game, that is, in animals *feræ naturæ*, which are fit for the food of man, whilst they continue in their wild state, I apprehend that the word "property" can mean no more than the exclusive right to catch, kill, and appropriate such animals, which is sometimes called by the law a reduction of them into possession.

This right is said in law to exist *ratione soli* or *ratione privilegii*, for I omit the two other heads of property in game which are stated by Lord Coke, namely, *propter industriam*, and *ratione impotentiæ*, for these grounds apply to animals which are not in the

proper sense *feræ naturæ*. Property *ratione soli* is the common-law right which every owner of land has to kill and take all such animals *feræ naturæ* as may from time to time be found on his land, and as soon as this right is exercised, the animal so killed or caught becomes the absolute property of the owner of the soil.

Property *ratione privilegii* is the right which, by a peculiar franchise anciently granted by the Crown, by virtue of its prerogative, one man had of killing and taking animals *feræ naturæ* on the land of another, and in like manner the game when killed or taken by virtue of the privilege, becomes the absolute property of the owner of the franchise, just as in the other case it becomes the absolute property of the owner of the soil.

The question in the present case is, whether game
[* 632] * found, killed, and taken upon my land by a trespasser becomes my property as much as if it had been killed and taken by myself, or my servant by my authority.

Upon principle there cannot, I conceive, be much difficulty. If property in game be made absolute by reduction into possession, such reduction must not be a wrongful act, for it would be unreasonable to hold that the act of the trespasser, that is of a wrong-doer, should divest the owner of the soil of his qualified property in the game, and give the wrong-doer an absolute right of property, to the exclusion of the rightful owner.

But in game when killed and taken, there is absolute property in some one, and therefore the property in game found and taken by a trespasser on the land of A., must vest either in A. or the trespasser, and if it be unreasonable to hold that the property vests in the trespasser or wrong-doer, it must of necessity be vested in A., the owner of the soil.

This view of the case is supported by a series of decisions. In the case of *Sutton* v. *Moody*, 1 Lord Raym. 250, Lord Chief Justice Holt deduced several conclusions from the Year Books on the subject of property in game. Among these are the following propositions: "If A. starts a hare in the ground of B., and hunts it and kills it there, the property continues all the while in B."

In the case thus put, it must, of course, be taken that A. has hunted and killed the hare without the leave or license of B., and therefore that it is a wrongful act by A. which enures for the benefit of the true owner, viz. B. the owner of the soil.

Another proposition is, that if A. starts game in the forest

or warren of B., and hunts it into the ground of * C., and [* 633] there kills it, the property is in B., the proprietor of the chase or warren, because the privilege continues; and consequently B. is entitled to the absolute property in the dead game so chased and killed by A., who from the statement of the case must be taken to have acted without the license of B., and therefore to have been a trespasser.

A third proposition is, that if A. starts a hare in the ground of B. (who is entitled *ratione soli* only, for that is plainly implied), and hunts it into the ground of C., and there kills it, the property is in the hunter; for it cannot be in B., who is entitled *ratione soli* only, and not *ratione privilegii*, for the hare is not killed upon his land; and it cannot be in C., for the game was not originally found in his possession, but was only driven upon his ground by the chase and pursuit of the hunter.

These propositions appear to me to prove clearly that game, found killed by a trespasser under such circumstances as that it would be the absolute property of the owner of the soil, or of the owner of right of free warren, if it had been found and killed by such owner instead of by the trespasser, does in law become the absolute property of the proprietor of the soil or privilege, immediately on its being so caught and killed by the trespasser.

The law, so laid down in *Sutton* v. *Moody*, is consistent with several earlier cases decided subsequently to the Year Books, of which I will mention one, *The Coneys' case*, Godb. 122, which has been recognized and acted upon in several subsequent decisions. Of these I may mention *Churchward* v. *Studdy*, 14 East, 249, 12 R. R. 513; *Graham* v. *Ewart*, 11 Ex. 326, 25 L. J. Ex. 42; and, lastly, *The* * *Earl of Lonsdale* v. *Rigg*, in the [* 634] Court of Exchequer, 11 Ex. 669, 25 L. J. Ex. 73, and Exchequer Chamber, 1 Hurl. & N. 923, 26 L. J. Ex. 196, on which so much reliance was placed by the Courts of Common Pleas and Exchequer Chamber in their decision of the present case.

With respect to this case of *Lonsdale* v. *Rigg*, I entirely concur in the observations of Mr. Justice BLACKBURN, and consider that case as a conclusive authority upon the point before us, which it is not desirable to question or disturb.

The case when properly considered amounts to this; grouse were shot and taken away by a trespasser upon and from the land of the plaintiff, who brought trover for the dead grouse, and it was

clearly held by the Judges of the Court of Exchequer, and afterwards by all the Judges in the Court of Error, that the grouse, as soon as they were killed and fell upon the land of the plaintiff, became and were his absolute property, in respect of his ownership of the soil.

This conclusion would not be affected, even though it be true that an indictment at common law will not lie against the trespasser for killing and carrying away of game, if it be one continuous act, inasmuch as the ownership of the game is considered as incident to the property in the land. But this consequence is the result of a peculiarity in the law of larceny, which holds that the act of severing and taking away things attached to the freehold is not a felonious taking, — a result which does not affect the existence of the rights of property.

I am therefore of opinion that the learned counsel for the defendants on the trial at Nisi Prius were right in requiring the evidence to be admitted, which they proposed to give, in order [* 635] to prove that the property in the rabbits was * in Lord Exeter; and that the learned Judge was wrong in his direction to the jury that such evidence was immaterial.

I am therefore of opinion, that the order making the rule *nisi* for a new trial absolute was right, and that the present appeal ought to be dismissed with costs.

Lord Cranworth.

My Lords, I think it is safe and just to adhere to the law as laid down by Lord Holt. He had evidently considered the subject carefully, and according to his view of the law, the rabbits killed by a trespasser on the lands of Lord Exeter certainly belonged to his Lordship.

Lord Holt's opinion was followed in *Churchward* v. *Studdy*, 14 East, 249, 12 R. R. 513. There the hunter (who was a poacher) was eventually held to be entitled to the hare, but that was because he had started in on the land of a third person, and followed it on to the ground of the defendant, and there caught and killed it. It was in strict conformity with Lord Holt's view of the law to hold that, in these circumstances the hare belonged to the hunter. The rule *nisi* was granted by the Court of King's Bench, on the supposition that the hare had been caught on the land of the defendant by his servant, acting as his agent, in which case the Court clearly thought it would have been the property of the defendant,

whereas in fact the defendant's servant was assisting the hunter and his dogs.

This case was followed by that of *Lord Lonsdale* v. *Rigg*, afterwards affirmed in the Exchequer Chamber, where the subject was carefully considered. It was there decided that grouse killed by a poacher belong to the * owner of the soil on [* 636] which they are killed, strictly applying Lord Holt's doctrine. There was not a formal plea in that case traversing the property in the birds; but it was agreed to waive that objection in point of form, and to dispose of the case as if such an issue had been expressly raised.

It was argued before the House that if game killed by a poacher is the property of the owner of the soil, then every poacher is guilty of larceny. But that is a fallacy. Wild animals, whilst living, though they are, according to Lord Holt, the property of the owner of the soil on which they are living, are not his personal chattels so as to be the subject of larceny. They partake, while living, of the quality of the soil, and are, as growing fruit was, considered as part of the realty. If a man entered my orchard, and fills a wheelbarrow with apples which he gathered from my trees, he is not guilty of larceny,[1] though he had certainly possessed himself of my property; and the same principle is applicable to wild animals.

It was further said, that the late Game Act, which authorizes the stopping of a poacher having game in his possession, and the selling of the game for the benefit of the parish, shows that the Legislature could not have understood the game to be the property of the person on whose land it was killed, for in that case, it was said, it would have been an unjust appropriation of the property of another; but this provision in the statute was probably made because it might often be impossible to know on whose land every particular head of game had been killed, and was considered to be on the whole an arrangement beneficial to the landowner.

On the whole, I see no reason for disturbing the * decision of the Court below, and think that there ought to be [* 637] a new trial.

Lord Chelmsford.

My Lords, the question to be determined on this appeal is, whether animals *ferœ naturæ* killed or reduced into possession

[1] See now the Statutes 24 & 25 Vict., c. 96, s. 36.

by a trespasser on the land of another become the property of the owner of the land.

The case was very learnedly argued on both sides, and all the authorities with respect to property in wild animals, either in a state of nature or reclaimed, were fully examined, and both the civil and the common law were referred to for doctrine on the subject.

By the civil law the person who took or reduced into possession any animal *feræ naturæ*, although he might be a trespasser in so doing, acquired the property in it. This appears clearly from the following passage in the Institutes (lib. II. tit. 1, s. 12) cited in the argument: "Feræ igitur bestiæ et volucres et pisces, et omnia animalia quæ mari, cœlo et terrâ nascuntur, simulatque ab aliquo capta fuerint, jure gentium, statim illius esse incipiunt; quod enim ante nullius est id naturali ratione occupanti conceditur; nec interest feras bestias et volucres utrum in suo fundo quisque capiat an in alieno." If the same rule prevails in our law, then the rabbits in question were not the property of Lord Exeter, but of the poacher who took and killed them upon his lordship's land.

This doctrine, however, as to the right of property in wild animals captured seems never to have prevailed in our law to its full extent. With respect only to live animals in a wild and unreclaimed state there seems to be no difference between the Roman and the common law.

A distinction was suggested in argument between wild animals which are unprofitable, and regarded as vermin, and those which are fit for food, and therefore profitable; and it was said of the latter, that by the law of England there is always a property in game, whether alive or dead, in somebody.

[*638] But this is not reconcileable with the authorities. In * the *Case of Swans*, 7 Co. Rep. 86, 90, Lord Coke says, "A man hath not absolute property in anything which is *feræ naturæ*. Property qualified and possessory a man may have in those which are *feræ naturæ*; and to such property a man may attain by two ways, by industry, or *ratione impotentiæ et loci*." . . . "But when a man hath savage beasts *ratione privilegii*, as by reason of a park, warren, &c., he hath not any property in the deer, or conies, or pheasants, or partridges, and, therefore, in an action, quare parcum warrennum, &c. fregit et intravit et tres damas lepores cuniculos

phasianos, perdices cepit et asportavit, he shall not say *suos*, for he hath no property in them, but they do belong to him *ratione privilegii* for his game and pleasure, so long as they remain in the privileged place;" *à fortiori*, therefore, where a person is merely the owner of land without any other privilege attached to it than that which the ownership confers, he can have no property in the wild animals upon the land so long as they are in a state of nature and unreclaimed. Indeed, this notion of the existence of property in wild animals is inconsistent with the whole current of the authorities from the Year Books downwards, which almost invariably show that no action lies merely for taking away hares, conies, pheasants, and partridges; and that where the taking animals of this description is stated in the writ, in addition to the trespass upon the land, the plaintiff shall not say "*lepores*, *&c. suos*."

With respect to wild and unreclaimed animals, therefore, there can be no doubt that no property exists in them so long as they remain in the state of nature. It is also equally certain that when killed or reclaimed by the owner of the land on which they are found, or by his authority, they become at once his property absolutely * when they are killed, and in a quali- [*639] fied manner when they are reclaimed.

So far everything is clear, and the only difficulty which arises upon the subject of property in wild animals is that which the present case presents.

As animals *feræ naturæ*, when killed or reduced into possession by the owner of the land where they are found, or by his authority, become instantly his property, does the unauthorized act of a trespasser by the very fact of killing them convert them at once to the use of the owner of the land?

To this question Lord Holt, according to the case which he puts in *Sutton* v. *Moody*, would have given a distinct answer, that provided the game was both started and killed on the ground of the same owner, the property would be in him.

I think Lord Holt must have been of opinion that as long as the game continued upon the land there was a species of property, or rather, perhaps, a right to take it, existing in the owner of the land which was sufficient to make it his, the instant, by being killed or taken, it became the subject of property. But I cannot so easily discover the principle upon which he proceeds when he

said that, "If A. starts a hare in the ground of B., and hunts it into the ground of C., and kills it there, the property is in A., the hunter, but A. is liable to an action of trespass for hunting in the grounds as well of B. as of C."

I have some difficulty in understanding why the wrong-doer is to acquire a property in the game under the circumstances here supposed. If the animal had left the land of B. and passed into the land of C. of its own will, and had been, immediately it crossed the boundary, killed by C., it would unquestionably have [* 640] been his property. * Why then should not the act of a trespasser, to which C. was no party, have the same effect as to his right to the animal as if it had voluntarily quitted the neighbouring land? And why, not only should B. lose his right to the game, and C. acquire none, but the property by this accident of the place where it happened to be killed be transferred to the trespasser? It would appear to me to be more in accordance with principle to hold, that if the trespasser deprived the owner of the land where the game was started of his right to claim the property, unlawfully killing it on the land of another to which he had driven it, he converted it into a subject of property for that owner and not for himself.

But the first proposition stated by Lord Holt with respect to game started and killed on the land of the same owner is free from all difficulty, and is sufficient to dispose of the present question. The case of *Sutton* v. *Moody*, has always been regarded as an authority upon this point, and as far as I can ascertain has never been questioned. It was recognized in *Churchward* v. *Studdy*, 14 East, 249, 12 R. R. 513, in *Graham* v. *Ewart*, 11 Ex. 326; 1 Hurl. & N. 550, 7 H. L. Cas. 331, 25 L. J. Ex. 42; by Baron Martin in *Lord Lonsdale* v. *Rigg*, 11 Ex. 654, 25 L. J. Ex. 73; and in this last case, when before the Court of Error, 1 Hurl. & N. 923, 937, 26 L. J. Ex. 196, Mr. Justice Coleridge said, "The grouse shot (*i. e.* shot by the defendant, a wrong-doer)" on the land of the plaintiff belonged to him according to all the authorities."

It certainly would not be right to disturb a principle of law so long established unless it could be clearly shown to be erroneous. And it appears to me not only to be well founded, but that very strange consequences would follow from adopting the [* 641] view contended for by the * appellant. If he is right in saying that the owner of the land has no property in game,

unless it is killed by him or by his authority, it will necessarily follow that a poacher reducing the game into possession, and thereby as possessor, though a wrong-doer, having a right to it against all the world, there being no one entitled as owner to challenge his possession, might maintain an action against the owner of the land for taking the game from him, even upon the land itself where it was killed. It is much more reasonable to hold that the trespasser having no right at all to kill the game, he can give himself no property in it by his wrongful act; and that as game killed or reduced into possession, is the subject of property, and must belong to somebody, there can be no other owner of it, under these circumstances, but the person on whose ground it is taken or killed.

This view of the case will render the distinction suggested in the course of the argument, between killing and carrying away the rabbits, as parts of one and the same continuous act, and killing them and leaving them upon the land, and coming back for them, wholly immaterial. For the act of killing being at once that which made the rabbits the subject of property, and reduced them into possession, whether they were for an instant, or for hours upon the land, they equally belonged to the owner of the land.

For these reasons I think that the judgment of the Court of Exchequer Chamber, affirming the judgment of the Court of Common Pleas, was right, and ought to be affirmed.

Judgment affirmed, and appeal dismissed with costs.

Lords' Journals, 13 June, 1865.

ENGLISH NOTES.

The case of *Sutton* v. *Moody* so much commented on in the above judgment was an action of trespass brought by the owner of the ground for hunting and killing his rabbits. The question turned upon the word *his* (*suos*), it being argued for the defence that the rabbits being wild by nature could not be his, although they might be his if he had the franchise or privilege of a warren. This argument did not prevail: "for (per HOLT, Chief Justice, as reported by Lord Raymond, p. 250) a warren is a privilege to use his land to such a purpose; and a man may have warren in his own land, and he may alien the land and retain the privilege of warren. But this gives no greater property in the conies to the warrener, for the property arises to the party from the possession; and therefore if a man keeps conies in his close (as he

may), he has a possessory property in them so long as they abide there; but if they run into the land of his neighbour, he (*scil.*, the owner of the former close) may kill them, for then he has the possessory property. If A. starts a hare in the ground of B. and hunts it, and kills it there, the property continues all the while in B. But if A. starts a hare in the ground of B., and hunts it into the ground of C., and kills it there, the property is in A., the hunter, but A. is liable to an action of trespass for hunting in the ground of B. as well as of C. But if A. starts a hare, &c. in a forest or warren of B., and hunts it into the ground of C., and there kills it, the property remains all the while in B., the proprietor of the warren, because the privilege continues. And these distinctions Holt, Chief Justice, took upon the authority of 12 Hen. 8, c. 9. And by the whole Court judgment was given for the plaintiff, because he had a property by the possession." The propositions of C. J. Holt are stated in the report of Comyns (p. 33) somewhat differently: "If a man start a hare in his own ground, and course it to the close of another person, and there takes it, the hare belongs to the owner of the ground where it was first started; but if it was started in the close of another man and there killed, it is the hare of the owner of the close where it was killed; but if the hare starts in another man's ground, and is coursed out of it, it is the hare of the captor, for the property rests in the owner of the soil, *ratione loci;* but if she runs beyond his (the captor's) ground (being *feræ naturæ*), he loseth the property; thus during the time they are in his soil the plaintiff may call them his conies; and it is the same thing where conies are in a warren, or deer in a park, as where they are in a man's field or close; for warrens and parks are privileges, but do not give any property."

It is not very easy to gather from the above reports what was Lord Holt's exact view in each of the cases supposed. But the judgment of the Court is quite clear, and is in accordance with that of the House of Lords in the principal case. It is also to be noted that if it was Lord Holt's view that the right of a captor, being a trespasser, is to prevail against the right of the owner of the ground into which the animal has run, this view is not countenanced by the House of Lords in the principal case, and is expressly questioned, if not repudiated, by Lord Westbury and Lord Chelmsford. The decision therefore of *Churchward* v. *Studdy* (K. B. 1811), 14 East, 249, 12 R. R. 513, which carries that view into effect, must now be regarded as of doubtful authority.

Upon the point that the taking of a thing which is *nullius in bonis* may vest the property in the owner of the soil where it is taken, the principal case is followed (in regard to wrongful removal of sea-weed) by the Irish Court of Exchequer and Exchequer Chamber in *Brew* v. *Haren* (1874, 1877), Ir. Rep. 9 C. L. 29, and 11 C. L. 198.

No. 2. — Gundry v. Feltham. — Rule.

AMERICAN NOTES.

The doctrine of the principal case has been held in this country in respect to bees. Thus in the recent case of *Rexroth* v. *Coon*, 15 Rhode Island, 35; 2 Am. St. Rep. 863, it was held that a trepasser who puts in a tree on another's land a box for bees to hive in, cannot maintain trover against a third person for taking bees and honey from the box. The Court said: "Bees are *feræ naturæ*, and the only ownership in them until reclaimed and hived is *ratione soli*. This qualified ownership, however, although exceedingly precarious, cannot be changed or terminated by the act of a mere trespasser. That is to say, the act of reducing a thing *feræ naturæ* into possession, where title is created, must not be wrongful. And if such an act is effected by one who is at the moment a trespasser, no title to the property is created;" citing the principal case. "We understand that the law in this country with regard to property in animals *feræ naturæ* is substantially in accord with that of England, excepting of course all game laws and statutory regulations, which are now very numerous upon this subject. See *Idol* v. *Jones*, 2 Devereux, 162."

This is also the doctrine of *Goff* v. *Kilts*, 15 Wendell (New York), 550, a bee case. The Court say: "The natural right to the enjoyment of the sport of hunting and fowling, wherever animals *feræ naturæ* could be found, has given way in the progress of society to the establishment of rights of property better defined and of a more durable character. Hence no one has a right to invade the inclosure of another for that purpose. He would be a trespasser, and as such liable for the game taken."

So in *Ferguson* v. *Miller*, 1 Cowen (New York), 243; 13 Am. Dec. 519, it was held that wild bees in a bee tree belong to the owner of the soil where the tree stands; and in *Gillet* v. *Mason*, 7 Johnson (New York), 16, it was held that finding such a tree on another's land, and marking it with the finder's initials, does not work a reclamation. See note, 70 Am. Dec. 260; 18 id. 553.

In *Sterling* v. *Jackson*, 69 Michigan, 488; 13 Am. St. Rep. 405, the court said: "Since every person has the right of exclusive dominion as to the lawful use of the soil owned by him, no man can hunt or sport upon another's land but by consent of the owner." Citing the principal case. This was a case of shooting wild duck from a boat in a bay, the soil of which was in private ownership, and it was held that the navigability of the water made no difference. Two judges dissented.

No 2. — GUNDRY *v.* FELTHAM.

(K. B. 1786.)

RULE.

If a person finds a noxious animal on his land; and, in order to kill it, *and as the only means and way of so doing*, hunts it out of his land and follows it over land of others,

doing as little damage as possible, he is not liable for the trespass.

Gundry v. Feltham.

1 T. R. 334-338 (s.c. 1 R. R. 215-219).

[334] Trespass for breaking and entering the plaintiff's closes, with horses, dogs, &c., and for beating and hunting for game therein, and for breaking down, trampling down, and destroying the hedges of the plaintiff.

Pleas. 1st, The general issue, on which issue was taken; 2dly, And for a further plea in this behalf, as to the breaking and entering the said closes of the said plaintiff, in the said declaration mentioned, at one of the said several days and times when, &c. in the said declaration mentioned, and with feet in walking, and with the said horses in the said declaration mentioned, and with the said hounds, greyhounds, and other dogs, in the said declaration mentioned, treading down, consuming, and spoiling a little of the grass then and there growing and being; and as to the breaking down, trampling down, treading down, prostrating, and destroying, a little of the hedges and fences in the said declaration mentioned, there then standing, growing, and being, in and upon the [*335] said closes in the said *declaration mentioned, by the said defendant above supposed to have been done, he the said defendant, by leave of the Court, &c. says, that he the said plaintiff ought not to have or maintain his aforesaid action thereof against him the said defendant, because he says that before and at the said several days and times when, &c. the said hounds, greyhounds, and dogs, in the said declaration mentioned, were the hounds, greyhounds, and dogs, of one Humphry Sturt, Esq., and that the said Humphry Sturt was then a person qualified by the laws and statutes of this realm to keep and use the said hounds, greyhounds, and dogs, in the said declaration mentioned. And that the said H. Sturt, before the said several days and times when, &c. to wit, on the first day of September, 1785, aforesaid, at the parish aforesaid, in the said county of Dorset, had retained and employed the said defendant as his huntsman and servant, to hunt and take care of the said hounds, greyhounds, and dogs, in the said declaration mentioned; and that the said defendant, from that time until and at the said several days and times when, &c. had remained and continued, and then was such huntsman and servant of the said H.

Sturt as aforesaid ; and that just before each of the said several days and times, when, &c., he the said defendant had started and found one of those destructive and hurtful vermin and beasts of prey naturally inclined to do mischief, called foxes, in and upon certain lands near to the said closes in which, &c., to wit, at the parish aforesaid in the said county of Dorset ; and that he the said defendant, being such huntsman and servant of the said H. Sturt as aforesaid, a little before each of the said days and times when, &c. by the leave and license of the said H. Sturt, in order to hunt, pursue, take, kill, and destroy, the several respective foxes so started and found as aforesaid, and to hinder and prevent the said foxes from doing any mischief in the neighbourhood, had caused the said hounds, greyhounds, and other dogs, in the said declaration mentioned, being the hounds, greyhounds, and dogs, of the said H. Sturt, to hunt, follow, and pursue the said foxes ; and that because each respective fox of the said foxes so respectively started and found as aforesaid, a little before each and every one of the said several respective days and times when, &c. had, during the said pursuits, fled and run out of and from the said lands where they had been so as aforesaid respectively started and found, into and over the said closes in which, &c. in the said declaration mentioned, he *the said defendant, being such huntsman and servant of [* 336] the said H. Sturt as aforesaid, did, at the said days and times when, &c. in the pursuit of, and to hunt, take, kill, and destroy, the said several and respective foxes, and as the only way and mean for so doing, with one of the said horses in the said declaration mentioned, at each time when, &c. and with the said hounds, greyhounds, and other dogs, in the said declaration mentioned, follow and go after the said respective foxes into the said closes in which, &c. with an intent to kill and destroy the same, and did take, kill, and destroy the same ; and, in so doing, he the said defendant, at the said days and times when, &c. did break and enter the said closes of the said plaintiff in the said declaration mentioned, and with his feet in walking, and with the said horses in the said declaration mentioned, and with the said hounds, greyhounds, and other dogs, in the said declaration mentioned, did tread down, consume, and spoil a little of the grass then and there growing and being, and did a little break down, trample down, prostrate, and destroy the said hedges and fences in the said declaration mentioned, then and there standing, growing, and being in

and upon the said closes in the said declaration mentioned, as he lawfully might for the cause aforesaid, doing as little damage to the said plaintiff as he the said defendant possibly could; which are the said several trepasses in the introduction to this plea mentioned, and whereof the said plaintiff hath above complained against him the said defendant; and this he the said defendant is ready to verify; wherefore he prays judgment, &c.

To this there was a general demurrer, and joinder in demurrer.

Lawrence, for the plaintiff. The question upon this record is, whether a person hunting has a right to follow foxes upon the ground of another? The qualification of the person is entirely out of the question. By the general law, no person can go over the land of another without his permission; and in *Sutton* v. *Moody*, 1 Lord Raym. 250, Lord Holt said, "If A. start a hare in the ground of B. and hunt it into the ground of C. and kill it there, the property is in A. the hunter; but A. is liable to an action of trespass for hunting in the grounds as well of B. as of C." But the distinction which may be attempted to be taken between that case and the present is, that a fox is a noxious animal, and [* 337] therefore that every person is at liberty to * pursue and kill it wherever it is found. If it is so determined, it must be upon the principle, that it is for the public good to destroy the animal, and that the convenience and rights of individuals must give way: but this will equally give a right to destroy fences, to go into standing corn, or gardens and nurseries, let the mischief to the owner be ever so considerable. The principle applies as well to searching for those animals in the grounds of another, as to the pursuit of them: but such a right is denied by every law-book on the subject.

In the case of *Gedge* v. *Minne*, 2 Bulstr. 60, it was determined that the defendant could not justify digging for a badger. And though Croke, J., said in that case, that, upon a pursuit, the defendant might follow and kill noxious animals over the grounds of a third person, without being subject to an action of trespass, yet that did not form a part of the case, and was merely founded on a *dictum* of Brooke J., in 12 Hen. 8, 10, where he said, a man might justify entering into the lands of another to kill a fox, gray, or an otter, because they are beasts injurious to the commonwealth. But the principal question there arose concerning the property of a stag, which had been killed in hunting. And upon this have all

the subsequent decisions been made, without regarding the occasion which gave rise to it. So that this *dictum* in Bulstrode was merely founded on a *dictum*.

But in 2 Rol. Abr. 558, there is an express authority against such a doctrine; for it is there said, "that the defendant could not justify the trespass on account of hunting a fox;" and in the same case, as reported in Brownl. 224, FENNER, J., held, "that it was not lawful to break hedges in the pursuit." And breaking hedges in the present case constitutes a part of the trespass, which is confessed by this plea. These authorities are recognized in Com. Dig. title, Pleader, 3 M. 37, where it is said, the defendant cannot justify either entering or digging for a fox.

Gibbs, for the defendant, was stopped by the Court.

Lord MANSFIELD, Ch. J. By all the cases as far back as in the reign of Henry 8th, it is settled that a man may follow a fox into the grounds of another. It is not necessary in this case to enter into the exceptions which have been made to that general rule, because this demurrer disputes the general proposition.

WILLES, J., said, that the case in Popham 162 was much stronger than the present.

* BULLER, J. The question on this record is, whether the [* 338] defendant be justified in following the fox at all over another man's grounds. The demurrer admits that which is averred in the plea, namely, that this was the only means of killing the fox. This case does not determine that a person may unnecessarily trample down another person's hedges, or maliciously ride over his grounds: if he do more than is absolutely necessary, he cannot justify it; and such circumstances are a proper subject for a new assignment.

Judgment for the defendant.

ENGLISH NOTES.

A person is not, for the purpose of fox-hunting, as the sport is now carried on in England, justified in entering the land of another against his will. *Paul* v. *Summerhayes* (1878), 4 Q. B. D. 9, 48 L. J. M. C. 33.

It is obvious that there is nothing in the last mentioned case to detract from the authority of *Gundry* v. *Feltham*, which was decided on demurrer, and where the judgment was rested on the essential averment that what was done *was the only means of killing the fox*.

AMERICAN NOTES.

Judge Cooley says (Torts, p. 328): "The very general acquiescence of owners of lands in the pursuit by others of wild beasts and game upon them establishes no law, and is to be looked upon rather as a waiver of a right to complain of a trespass than as a license to make use of their lands for this purpose." It would seem that having got rid of the noxious animal from his own land the pursuer should leave the pursuit to the choice of the owner of the lands to which he had chased it.

The principal case is not cited by Bigelow, Cooley, or Waterman in their respective treatises on Trespass. Mr. Bigelow however says an entry on another's land may be justified (citing Year Books) to succour a beast, or to escape a savage animal or those in pursuit of him.

The only American case in point which we have been able to find is *Glenn* v. *Kays*, 1 Bradwell (Illinois Appellate Court — intermediate the trial Court and the Supreme Court), 479. The plaintiff was a farmer and dealer in cattle, and the defendant, who kept hounds "and frequently indulged in the sport of hunting," chased a wolf on the lands of the plaintiff, in spite of his objection. In an action of trespass there was a verdict for the defendant, but this was reversed on the appeal. The Court observed: "We shall not enter upon the assumed difficult task proposed by appellees to the opposite counsel, of producing 'some authority against the right of any person to pursue wolves or other animals *feræ naturæ*, and dangerous to mankind, for the purpose of their destruction, across the enclosed fields of another,' — although it is said to have been 'one of the main legal questions mooted before the jury,' and it appears was the idea acted upon by the defendants in their treatment of the plaintiff's possessions; but shall rest content with a single observation upon the subject, that whenever the law shall be so construed as to permit parties to trespass with impunity on the enclosures of their neighbours under such a plea, the fundamental principles upon which it is based should be so changed as to read that every man shall be protected in the enjoyment of his property, except in cases where hunters, with their hounds, may desire to make use of it in the pursuit of game that is considered dangerous." The principal case was not cited by counsel nor by the Court, nor were any others strictly in point cited.

No. 3. — ABERDEEN ARCTIC Co. *v.* SUTTER.

(H. L., FROM SCOTLAND, 1862.)

RULE.

By the general custom of the Northern Whale Fishery, the rule is that of "fast and loose" — that is to say, the person who first harpoons a fish and retains his hold until the fish is finally captured, is regarded as the proprietor,

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although the fish is actually killed by the assistance of other persons.

A local custom alleged to exist in Cumberland Inlet, — whereby, a fish having been harpooned, and a drog (or large float) attached to the harpoon line and all let go, the fish while followed up is regarded as if it were a fast fish — held not established by any general assent so as to be binding on persons not having agreed to be bound by it.

Aberdeen Arctic Co. (Appellants) **v. Sutter** (Respondent).

4 Macqueen, 355–373; s. c. 6 L. T. 229, 10 W. R. 516. (The report of the case in the Court below will be found in the 2nd series of Court of Session Cases (Scotland), vol. 23, p. 470.)

On the 13th October, 1856, in Cumberland Inlet, an Esqui- [355] maux fisher named Bullygar, employed by the respondents, owners of the ship *Clara* of Peterhead, harpooned a whale; letting go the line with an inflated sealskin attached to it. The wounded animal dived instantly, and reappeared at a distance of some miles; but, before the *Clara* could come up, the men of another vessel, the *Alibi* of Aberdeen belonging to the appellants, harpooned and secured it.

Under these circumstances the sole question was one of property, namely, who became entitled to the whale, — the owners of the *Clara*, or the owners of the *Alibi?*

* The owners of the *Clara* brought their action in the [* 356] Court of Session against the owners of the *Alibi* for payment of £1,200, "in name of compensation and damages," which they attributed to this, as they alleged, illegal seizure and subsequent retention of the whale. Insisting in this action, the owners of the *Clara*, by their pleas in law, maintained that the whale had become their property from the moment it was first struck.

The owners of the *Alibi*, on the other hand, by their defence and pleas in law relied on the general laws of whale fishing in the Greenland seas, which give the property not to the first harpooner of the whale, but to the owners of the boat which finally secures it.

The Lord Ordinary (Lord Kinloch) decided in favour of the ultimate captors, in other words, in favour of the *Alibi;* but the First Division of the Court of Session, on the 8th of February, 1861,

altered the Lord Ordinary's Interlocutor, and gave judgment in favour of the first harpooner, that is to say, in favour of the *Clara*.

Against this judgment the owners of the *Alibi* appealed to the House, and were represented at the bar by the Solicitor-General (Sir Roundell Palmer) and Mr. Monro, who cited Scoresby's Arctic Regions, edit. 1820, p. 518; *Addison* v. *Rowe*, 3 Paton, 334, and *Fennings* v. *Grenville* (1808), 1 Taunton, 241 (also in 9 R. R. 760).

[* 357] * Sir Hugh Cairns and Mr. John Skelton appeared for the respondents.

On the motion for judgment, the following opinions were expressed by the Law Peers: —

The Lord Chancellor (Lord WESTBURY). My Lords, in this appeal a question has been raised and argued, both in the Court below and in this House, at a degree of length very disproportionate either to the value of the subject or to the difficulty of the question.

There has prevailed in the northern whale fishery for a considerable period of time, probably ever since the time when these fisheries came into the possession of this country, a rule with regard to the property in whales that are harpooned and captured, which rule has received the technical denomination of "fast and loose" among the parties engaged in the fishery, and has become the subject of various decisions in English Courts of justice. The object of the rule was to prevent disputes and quarrels among persons engaged in the capture of whales. The rule is that the person who first harpoons a fish and retains his hold of that fish until it is finally captured, is to be regarded as the proprietor of the fish, although the actual capture and killing of the whale may be accomplished by the assistance of other persons.

But the rule also involves this condition, that if the fish, after it has been harpooned, breaks away from the person who first harpoons it, or if the fish is subsequently abandoned, that fish, though dying in consequence of the wound originally inflicted by the harpoon, is a "loose" fish, and becomes the property of

[* 358] the person who first finds it and takes possession of * it.

Nay, to such an extent has the rule been carried, that supposing a whale or any number of whales to be killed, and the captors of those whales are driven by stress of weather to abandon them, and to moor them to the ice, or (as the evidence here goes)

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even to the land, if another ship which has had no part in the capture, comes up and finds the whales in that position, that other ship's party may take possession of them, and appropriate them as the captors.

The area of the fishing grounds in the Northern seas, has of course varied from time to time with the progress of the Arctic discoveries, and according as the whales disturbed by being pursued in one particular part of the sea have abandoned that portion of the sea or coast, and taken refuge in other parts, whither of course the ships pursue them.

A little to the south of Davis's Straits there is an inlet, a large piece of water, sometimes called Cumberland Inlet, sometimes Cumberland Sound, lying on the south side of Cumberland Island. The first question that arises in this cause is whether that portion of the sea called Cumberland Inlet is or is not included within the area of the northern whale fishery,

I see no reason whatever for arriving at the conclusion that that portion of the Northern Sea is not comprehended within the area of the northern whale fishery. It was incumbent on the plaintiffs in the Court below to prove that it was not; but I find nothing leading to the conclusion that that ought not to be considered as part of the northern fishing ground to which of course the rule that I have mentioned of "fast and loose" would be *primâ facie* applicable.

The next point is, whether ships resorting for the purpose of whale fishing to Cumberland Inlet have or have not by any kind of common consent among * themselves abandoned [* 359] the rule of "fast and loose" in order to adopt some different rule.

Now it was contended on the part of the respondent that the rule of "fast and loose" was applicable only to that peculiar mode of fishing which is adopted in the other portions of the northern whale fishery, namely, the practice of fishing by the harpoon and line. And it is asserted that in Cumberland Inlet another and a different mode of fishing has prevailed by common consent, which has been adopted from the native Esquimaux either dwelling there or resorting to that district, that this different mode of fishing has superseded the fishing by harpoon and line, and that as a necessary consequence the rule of "fast and loose" introduced to govern the practice of harpoon and line fishing is not applicable to the differ-

ent mode of fishing which it is asserted has prevailed in Cumberland Inlet.

That mode of fishing is commonly called "drog" fishing. Your Lordships have had it described to you several times in the course of the argument. It appears to be a mode of fishing used in capturing seals by the Esquimaux, who, after they have harpooned a seal, attach to the end of a short line which is fastened to the harpoon an inflated seal skin which is called a "drog," in the nature of a large bladder. This is intended to weary the fish, and consequently to facilitate its being afterwards captured. It is asserted that a similar practice has prevailed among the natives with regard to whale fishing; and the case of the respondent depends upon the allegation that this peculiar mode of native fishing has been adopted and used by the English ships resorting for the purpose of whale fishing to the Cumberland Inlet.

I have examined with great care the great mass of evi-
[* 360] dence which has been taken in this case with * reference to several allegations, and I am unable to find any satisfactory proof that whale fishing prevailed among the native Esquimaux in this locality through the medium of this drog fishing. It is, I think, abundantly shown that the weapons, the implements, and the boats of the natives were utterly inadequate for the purposes of whale fishing previously to the arrival of the European ships in Cumberland Inlet. I have also examined the evidence for the purpose of testing the accuracy of the allegation that the English ships resorting to Cumberland Inlet, by express or tacit agreement or understanding among themselves, abandoned the practice of harpoon and line fishing in order to adopt this drog mode of fishing in capturing whales.

The present action arose out of the taking of a whale at a time when there were three English ships in Cumberland Inlet. The three ships were the *Clara*, which is the ship of the respondents; the *Alibi*, which is the ship of the appellants, and another ship called the *Sophia*. I do not find it anywhere alleged, much less do I find it proved, that there was anything like an agreement between those three ships when they entered Cumberland Inlet, or that there was any such agreement among other ships that preceded them in Cumberland Inlet, to abandon the mode of harpoon and line fishing in order to adopt this other and different mode of fishing. If there was not, then I think it follows of necessity that

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the ships going to the Cumberland Inlet for the purpose of engaging in the northern whale fishery are bound by this custom of "fast and loose."

But upon the subject of the mode of fishing adopted in Cumberland Inlet, it is further alleged on the part of the respondents, that if the ships themselves did not by their own crew practise this new * and different mode of fishing, yet that [* 361] they practised it through the medium of the native Esquimaux, who were engaged by the ships for that work. If that allegation were supported by the evidence it would still be very difficult to say that because they employed native fishermen to fish in that manner, they thereby intended by that employment to abandon the rule which bound themselves as to their own mode of fishing, and to adopt or establish *inter se* any rule or custom that might prevail among the native Esquimaux in fishing which they themselves for their own benefit might carry on.

But upon an examination of the evidence, I find that these things are put, I think, beyond the possibility of doubt. I find it established that the *Clara* is the only ship which, according to the evidence now before us, appears to have engaged a boat's crew of native Esquimaux. The *Clara* appears to have employed a boat's crew of five or six natives, and the principal man among them, the harpooner, was a man of the name of Bullygar.

The first question that arises upon the evidence is whether Bullygar and his crew were employed by the *Clara* for the purpose of drog fishing. The decision of that question depends upon the inquiry what is the distinctive characteristic of drog fishing. Upon that point I will confine myself entirely to the evidence adduced on behalf of the *Clara*. It appears upon that evidence that the peculiar characteristic of drog fishing was to attach a short line with the drog to the harpoon, and the moment the fish was struck the line was thrown overboard with the drog attached to it. But so far from its being proved that that mode of fishing was the mode which Bullygar and his crew were engaged to use, I find it distinctly stated in his testimony by the captain of the *Clara* * himself, that Bullygar had a boat which he had [* 362] obtained from some American whalers, and that this boat was wholly provided with fishing tackle according to the European practice of whale fishing with harpoon and line. I find that Bullygar was provided with three lines, each of which is described

as being one hundred fathoms long; whereas, according to the testimony of Captain Penny and other witnesses for the respondent, the ordinary line used by the Esquimaux in drog fishing was about thirty-five feet, or six fathoms long. I find it clearly established by the evidence that Bullygar went out with the other boats of the *Clara* for the purpose of fishing in the ordinary European manner, and that Bullygar, having struck the whale in question, ran out the whole of his three lines and held fast to the fish, expecting the assistance of the other boats, until (in the language of the log-book of the *Clara*) he was obliged to cut away his lines.

Now it is established by the evidence that when the European fishers became acquainted with the use of the drog, it occurred to them that the drog might be employed for another purpose, peculiar to the harpoon and line fishing, and which might obviate one of the inconveniences that sometimes occurred in that mode of fishing. It appears that in the bay in Cumberland Inlet the water is very deep. It is said that in some places the water exceeds four hundred fathoms in depth. It frequently, therefore, happened, when fishing in that bay, that the whale, in descending or sinking down almost perpendicularly to very near the bottom, ran out the whole line, and that the fishermen were compelled, either to cut the line, or to submit to the boat being dragged under water. It seems therefore to have occurred to Captain Penny, and to other persons engaged in the fishing that whenever they were reduced to that extremity, and compelled to cut
[* 363] * the line, it would be a good thing to attach one of the drogs to the end of the line, which would facilitate the observation of the place where the fish afterwards appeared. The use of the drog by Bullygar and his crew appears to have been in conformity with that suggestion, and the drog does not appear to have been used by Bullygar at all for the primary and original purpose of drog fishing, as it is described by the respondents.

I am therefore obliged to answer the several inquiries in the negative. I mean by inquiries the following questions: Did the vessels, in resorting to Cumberland Inlet, arrive at an understanding among themselves that the rule of "fast and loose" should not be applicable? I answer that question, upon the evidence in the cause, decidedly in the negative. Next, I inquire, whether the ships resorting to Cumberland Inlet have been in the habit of adopting a different mode of fishing, to which the rule of "fast and loose" was

never applicable? I am obliged to answer that question also in the negative. There appears to be no indication that, so far as Europeans were concerned, any other mode of fishing was practised by them in Cumberland Inlet than the old mode of harpoon and line fishing. I ask, in the third place, whether there is any evidence that the English and Scotch ships resorting to Cumberland Inlet were in the habit of employing native Esquimaux to fish for them according to the alleged native custom, that is, the usage of drog fishing? And I answer that question by observing that the *Clara* alone, in the present case, appears to have employed an Esquimaux boat's crew, but to have furnished that crew with English implements for the purpose of pursuing the general mode of fishing by harpoon and line which had been commonly practised. * I answer it further by observing that it does not [* 364] appear from the evidence that either the *Alibi* or the *Sophia* had any native boat's crew in the employment of either vessel. One Esquimaux, a man of the name of Tessuin, appears to have been in the employment of the *Alibi*, but he seems to have been employed in his character of harpooner, as the Esquimaux are more expert in the practice of harpooning than the English fishermen generally are considered to be.

I find, therefore, that the answers to these questions entirely exclude the possibility of this action being maintained. There is nothing at all to warrant the notion which was entertained in the Court below, either that in the whale fishing practised in the Cumberland Inlet the English and Scotch ships have adopted a different mode of fishing from that which is practised in other parts of the northern whale fishery, or that these particular ships were in the practice of another mode of fishing, or that this whale was killed by the operation of a mode of fishing subject to a different rule from that which regulates the mode of fishing adopted in other portions of the northern whale fishery.

Upon these grounds, therefore, I must advise your Lordships to concur with the conclusion of the LORD ORDINARY, and with the reasoning of the LORD ORDINARY, rather than with the reasoning of the majority of the Judges of the Inner House.

There is a further question in this case which this view of the subject renders it unnecessary to consider, namely, supposing the rule of fast and loose to be superseded by the peculiar practice prevailing in Cumberland Inlet, whether the right of property in

the whale would not be governed by the ordinary rule of law,
[* 365] namely, the law of occupancy. It would * become a matter of inquiry whether, according to the expression of that law as found in the best Scotch institutional writers, the fish should be considered to have been so far captured by what Bullygar had done in wounding and entangling it as to give a right to Bullygar's employers to pursue and claim the fish, although the actual death was attributable to the harpoons from the boats of the *Alibi*.

If it were necessary to decide that question, I should be of opinion that there is not enough to show that by the law of occupancy, as interpreted in the law of Scotland, this fish belonged to the *Clara;* but I think it unnecessary to decide or enter into that, because I have arrived at the conclusion, which I submit to your Lordships as the proper one, that there is nothing to exempt these ships fishing in the Cumberland Inlet from the application of the ordinary rule of fast and loose. And if that be so, there is hardly an attempt to dispute that this was a loose fish at the time when it was taken possession of by the boats of the *Alibi*. I must therefore advise your Lordships to reverse the judgment of the Inner House, and to affirm the Interlocutor which was pronounced by the Lord Ordinary.

Lord Chelmsford: —

My Lords, a majority of the Judges of the First Division of the Court of Session agreed upon three points in this case. First, that the custom in whale fishing, commonly called the law of "fast and loose," must be excluded. Secondly, that there is no settled usage prevailing in Cumberland Inlet which can take the place of this custom. And, therefore, thirdly, that the only law applicable to the dispute which has arisen is the law of occupancy prevailing in Scotland.

[* 366] The importance of having a settled rule, and of * adhering to it in all cases where it can properly be applied, is obvious. It governs the rights, not of whalers from one country only, but of rival nations upon fishing ground common to them all; and it prevents the violent collisions and contests which would inevitably arise out of conflicting claims to the possession of the same object of pursuit. Perhaps a better illustration of the danger of permitting a doubt to break in upon this general rule of the northern whale fisheries could not be afforded than by the present case, in which the question whether it had not been superseded by an

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usage peculiar to a limited part of the seas in which it prevailed, produced imminent danger of a fierce struggle between the crews of the two vessels claiming the prize, and led, though to a slight extent, to bloodshed.

The custom which regulates the rights of parties engaged in whale fishing in the North Seas is one which has been long established, and which has been recognized in decisions of the highest authority. A majority of the Judges of the First Division, however, whilst admitting the existence of the custom throughout the North Seas generally, held that it was inapplicable to the present case, because in Cumberland Inlet where the dispute arose, a new and peculiar kind of fishing is carried on which was employed in the capture of the whale in question. This mode of fishing, which is shortly described as "drog fishing," was derived by the whalers from the Esquimaux who, when the intercourse between them and Europeans commenced, appear to have applied it almost entirely to seal fishing. This they carried on in their light boats, capable of holding only one man, using lines of about thirty-five feet long, with drogs at the end, consisting of inflated seal skins of about five or six feet in length, and about three feet in circumference. The object of using drogs * is to impede the [* 367] way of the fish after it has been struck, and, probably, also to indicate its position when it rises to the surface during the pursuit. It is obvious that the Esquimaux could not with the boats and gear which they employed in fishing even for seals, keep their lines attached to the boat. The small extent of their lines would be insufficient to give scope to the fish to exhaust itself before the whole length was run out, and their light boats would have been instantly upset if the lines had been retained on board. This species of fishing by the natives was, therefore, almost a matter of necessity; and there is no reason to suppose (to use the words of one of the witnesses) that they were ever in the habit "of fishing with long lines, and keeping the lines attached to the boat."

The Esquimaux were first employed by the whalers in 1844. Captain Penny, who has longer experience in these seas than any of the other witnesses, says that originally he did not engage them as seamen, but merely put them on board the boats to instruct his seamen in the habits of the whale. He first employed them as seamen in 1853, but never anywhere else than in Cumberland

Inlet. From that time the practice of making use of the services of the natives became so well established that the whaling vessels proceeded on their outward voyages shorthanded, reckoning upon being able to fill up the complement of their crew from the natives in the event of their fishing in Cumberland Inlet. In this manner drog fishing was first introduced amongst the whalers resorting to this inlet.

The usage of the Esquimaux with regard to the property in a captured fish appears to have been that the first person whose harpoon struck, and remained in the fish, with the lines and
[* 368] drogs attached, was *entitled to it, although it might be afterwards killed and taken possession of by another. I do not find any proof that this native rule was ever accepted by the whalers visiting Cumberland Inlet. The time during which drog fishing has been practised was, of course, much too short to admit of any new usage tacitly growing up and supplanting the old-established one; but there was nothing to prevent the adoption of the native rule or of any other, by a general agreement amongst the persons engaged in fishing in this part of the North Seas. An agreement of this kind might have been expressly entered into, or it might be implied from circumstances. That no agreement can be implied is evident from the fact that the witnesses differ amongst themselves as to the period during which the use of drogs secures the right to the first harpooner. One witness thinks that the fish would continue a "fast" fish so long as there was a pursuit of it, but that it would be a "loose" fish after the crew had lost sight of it for two hours; another, that it would remain a fast fish for any length of time so long as the drogs were attached to it, although the pursuit had been abandoned; and a third, that even if the drogs had been detached from the coil of the lines, the fish would belong to the party who first drogged it.

The existence of an express agreement on the subject is distinctly negatived, for it is stated by one of the witnesses that "an attempt was made by the masters of some vessels, other than British, to have the Esquimaux custom agreed to by the British whalers, as the law or usage for fishing in those seas:" that Captain Stewart of the *Alibi* was the only person who opposed it and no agreement of the kind was ever entered into. The law of "fast and loose" must therefore prevail in Cumberland
[* 369] Inlet, as in the *rest of the North Seas, unless the fishing

carried on there is so peculiar and so essentially different from the mode of fishing previously practised as to render the custom altogether inapplicable.

This is the opinion of the majority of the Judges of the First Division, and holding, as they do, that no other usage has been substituted, they consider (to use the words of the LORD PRESIDENT) "that the question must be solved by the principles of their own laws of occupancy." I cannot forbear the remark, that although the application of the Scotch law of occupancy created no difficulty in this case, as both the contending parties belonged to Scotland, yet if the fishery in Cumberland Inlet is governed by no usage, but is left to the general law, many perplexing questions may hereafter arise between the natives of different countries, in which different principles as to rights acquired by occupancy may prevail.

But I think it may be fairly questioned whether the drog fishing carried on in Cumberland Inlet is so essentially different from the former method of fishing as necessarily to exclude the established custom. The respondents not only assert this to be the case, but also endeavour to distinguish Cumberland Inlet from the rest of the North Seas, as an entirely separate and distinct fishing ground. To a certain extent they have succeeded in giving it something of a distinctive character from the rest of the fishings. It appears from the evidence that when it first became known to the whalers it was not resorted to, except at the end of the season when they had failed to make a good fishing in the north. And "that it is so distinct that some regular whaling vessels have written orders not to go there, and others with a smaller crew go to that fishing alone to obtain the assistance of the natives." The drog fishing carried on in Cumberland Inlet, *and [*370] apparently not in other parts of the North Seas, is also alleged to be a totally different mode of fishing from that previously employed, because the object of the old method is, if possible, to keep the whale fast, and the essence of drog fishing is to part with the lines and drogs, leaving the fish, after being struck, to carry them off for the purpose of retarding its flight.

Had the whalers, resorting to this fishing-ground, which is nominally at least distinguished from Davis's Straits and the rest of the North Seas, confined themselves exclusively to the peculiar mode of fishing which they learned from the natives, there might

have been some opening for a presumption that a new usage was to prevail amongst them. But this is not the case. For it clearly appears that drog fishing has not excluded the old method of fishing in Cumberland Inlet, but that both are carried on together at the same time. Now it is hardly possible to conceive anything much more inconvenient or more likely to lead to endless disputes than in a comparatively narrow range of fishing-ground to have two modes of fishing going on simultaneously, and subject to two different rules which must be continually conflicting with each other. But happily the two methods of fishing are not separate and independent of each other; but the drog fishing carried on in Cumberland Inlet only forms part of the general fishing operations there. The ordinary method is employed, but drog fishing with the assistance of the natives is added to it. The natives appear to be retained not merely for drog fishing, but for whale fishing generally, and no distinction can be made between them and the other seamen engaged in the service.

The evidence in this case clearly shows the general em-
[* 371] ployments of the natives, and that their services * were not confined to their own peculiar mode of fishing. The boat used by Bullygar, the native employed by the captain of the *Clara* was supplied with long lines similar to those in the other boats, lines of a length never used by the Esquimaux in their fishing, nor capable of being used together with their boats. The whale in question having been harpooned by Bullygar, the lines were paid out for about ten minutes before they were parted with. The entry in the log-book of the *Clara* gives in a few words the description of Bullygar's proceedings. This log-book, it must be remembered, was made up on the very day on which the whale was killed, and no doubt after the dispute had arisen as to the property in it. It is in these words: "Bullygar was OBLIGED to drog his lines according to native custom." Now, I collect from this entry and from the evidence, that Bullygar intended, if possible, to keep the whale fast, and paid off his lines with that intention; but when they were entirely run out he could no longer safely retain them in the boat, and he was therefore compelled to part with them and throw them overboard with the drogs at the end. If Bullygar's boat was engaged solely in drog fishing there would have been no more occasion to mention the necessity of using his drogs than to state that he struck the whale with his harpoon.

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These circumstances appear to me to conclude the question, and to render any further observations unnecessary. But I must add that assuming drog fishing to be essentially different from the former method of fishing (upon which a doubt may be fairly entertained) it must be remembered that when the whalers a very few years ago adopted it from the natives and introduced it as a part of their operations, they were * governed by the [* 372] established custom of whale-fishing in the North Seas. They knew that according to that custom a drogged fish would be a loose fish, and the prize of anyone who could afterwards secure it. They carried with them into Cumberland Inlet their old method of fishing, and with it the custom which attached upon it. They might, if they pleased, have excluded, by common consent, this custom from the novel mode of fishing which they introduced, or have substituted some other rule for it within the inlet, and an endeavour seems to have been made to regulate their rights by an agreement confined to that part of the seas. This having failed, and it being admitted that there is no local usage to take the place of the general custom, there seems to me to be nothing in the character of Cumberland Inlet, or in the peculiar nature of drog fishing which is necessarily incompatible with the prevalence of the custom within these limits, and that it must therefore attach upon the fishery operations carried on there in the same manner as throughout the whole fisheries in the rest of the North Seas.

For these reasons I agree in the opinions of the Lord Ordinary 23 Sec., Ser. 470, and Lord Curriehill, ib., and differ with the Interlocutor of the First Division of the Court of Session, which I think ought to be reversed.

Lord Kingsdown:

My Lords, I agree with the noble and learned lords who have addressed your Lordships, that the Interlocutor complained of should be reversed. I think it due to the Lord Ordinary to state that the real question to be decided and the true grounds of the * decision are stated by him with perfect clearness [* 373] and accuracy in his very able Note appended to the Interlocutor which he pronounced.

The Interlocutor (or judgment) of the Inner House (or Appellate Court) in Scotland was accordingly reversed, and that of the Lord Ordinary (or Judge of first instance) affirmed, with consequential directions.

ENGLISH NOTES.

The general custom of the Greenland whale fishery appears to have been established as a custom recognised in the English Courts by a number of cases tried at Guildhall in the time of Lord Mansfield. The custom is described in the note of a case of *Littledale* v. *Scaith*, York Lent Assizes, 1788, Thursday, March 13, printed in a note to *Fennings* v. *Grenville* (1808), 1 Taunt. 243 *n.*, 9 R. R. 762 *n.*, as follows: —

"In an action of trover for a whale, which had been struck first by an harpooner of the plaintiff's ship, and afterwards by an harpooner of the defendant's, the counsel on both sides, and all the parties concerned, agreed the law to be, both by the custom of Greenland, and as settled by former determinations at Guildhall, London, as follows: While the harpoon remains in the fish, and the line continues attached to it, and also continues in the power or management of the striker, the whale is a fast fish; and though during that time struck by a harpooner of another ship, and though she afterwards breaks from the first harpoon, but continues fast to the second, the second harpoon is called a friendly harpoon, and the fish is the property of the first striker, and of him alone. But if the first harpoon or line breaks, or the line attached to the harpoon is not in the power of the striker, the fish is a loose fish, and will become the property of any other person who strikes and obtains it."

The same custom was proved in the evidence in the Scotch case of *Addison* v. *Rowe* (1794, cited in the argument of the principal case), which went to the House of Lords. The Lords appear to have treated it as a custom of which the Courts might take judicial notice. Lord Thurlow said (3 Paton, 339): "It is a settled point that a whale being struck, and afterwards getting loose, it is the property of the next striker who continues fast till she is killed." And the Lord Chancellor (Lord Loughborough) concurred in this judgment.

In the case of *Fennings* v. *Grenville* (1808), 1 Taunt. 241, 9 R. R. 760, mentioned in the arguments of the principal case, a custom was alleged, and appears to have been established by the evidence, relating to whale fishing in the Southern seas, similar to that unsuccessfully attempted to be set up in the principal case, as the local custom of Cumberland's inlet. Numerous witnesses deposed that a custom had universally prevailed in the Southern seas, from the origin of the fishery until within a few years then past, that the party who first struck the fish with the drog should receive one half of it from the party who killed it. But it also appeared that since the year 1792 many captains of ships employed amongst the Gallipagos Islands (including one

American) had usually agreed that the striking a fish with the drog should not entitle the striker to a share. The jury had found for the plaintiff, but the Court directed a non-suit on the technical ground that one tenant in common could not maintain trover for a chattel, or for the produce into which it is reduced, according to the usual methods of treating it. The only judge who deals specifically with the question of the custom was CHAMBRE, J., who said: "I should have been very unwilling to grant a new trial (which had been moved for on the ground that this was not such a custom as was binding in law, and that the finding of the jury was against evidence), if the only question had been on the custom. There must of necessity be a custom in these things to govern the subjects of England, as well amongst themselves as in their intercourse with the subjects of other countries. The usage of Greenland is held to be obligatory not only as between British subjects, but as between them and all other nations. I remember the first case upon that usage, which was tried before Lord MANSFIELD, who was clear that every person was bound by it, and said that, were it not for such a custom, there must be a sort of warfare perpetually subsisting between the adventurers; and he held it strongly binding from the circumstance of its extending to different nations. The same necessity must prevail in the South seas, although the fishery has not been so long in use, in order to regulate our intercourse with the French, Americans, and others who resort thither. A few persons may by compact among themselves for a particular season, renounce any advantages, and subject themselves to any disadvantages that they please; and this would bind all those who assented to it; but Luce [the captain of the plaintiff's ship] was no party to this compact."

AMERICAN NOTES.

It was held in *Pierson* v. *Post*, 3 Caines (New York), 175; 2 Am. Dec. 264, that pursuit alone gives no right of property in animals *feræ naturæ*, and so no action lay against one who killed and took a fox, pursued by and in view of the starter. So of merely wounding a deer. *Buster* v. *Newkirk*, 20 Johnson (New York), 75.

But the doctrine of the principal case obtains here. In *Ghen* v. *Rich*, 8 Federal Reporter, 159, it appeared that in the early spring months the eastern part of Massachusetts bay is frequented by finback whale. Fishermen from Provincetown pursue them in open boats from the shore, and shoot them with bomb-lances fired from guns made expressly for the purpose. When killed they sink at once to the bottom, but in the course of from one to three days they rise and float on the surface. The person who happens to find them on the beach usually sends word to Provincetown, and he receives a small salvage for his services. The business is of considerable extent, but is engaged in but by few people. Each boat's crew engaged in the business has its peculiar mark

or device on its lances, and thus it is known by whom a whale is killed. The usage on Cape Cod for many years has been that the person who kills a whale, in the manner and circumstances described, owns it. Held, that the usage is reasonable and valid. The Court also queried, whether "without regard to usage, the common law would not reach the same result." "If the fisherman does all that is possible to make the animal his own, that would seem to be sufficient."

In *Taber* v. *Jenny*, 1 Sprague (U. S. Circ. Ct.), 315, it was held that when a whale has been killed, and is anchored and left with marks of appropriation, it is the property of the captors; and if it is afterward found, still anchored, by another ship, there is no usage or principle of law by which the property of the original captors is diverted, even though the whale may have been dragged from its anchorage.

In *Bartlett* v. *Budd*, 1 Lowell (U. S. Circ. Ct.), 223, the first officer of the libellant's ship killed a whale in the Okhotsk sea, anchored it, attached a waif to the body, and then left it and went ashore at some distance for the night. The next morning the boats of the respondent's ship found the whale adrift, the anchor not holding, the cable coiled round the body, and no waif or irons attached to it. *Held*, that as the libellants had killed and taken actual possession of the whale, the ownership vested in them.

In *Swift* v. *Gifford*, 2 Lowell, 110, it was held that a custom among whalemen in the Arctic seas, that the iron holds the whale, was reasonable and valid. In that case, a boat's crew from the respondent's ship pursued and struck a whale in the Arctic Ocean, and the harpoon with the line attached to it remained in the whale, but did not remain fast to the boat. A boat's crew from the libellant's ship continued the pursuit and captured the whale, and the master of the respondent's ship claimed it on the spot. *Held*, that the whale belonged to the respondent.

No. 4. — MAY *v.* BURDETT.

(Q. B. 1846.)

RULE.

A PERSON who keeps a mischievous animal with knowledge of its propensities, is bound to keep it secure *at his peril*; and if it does mischief, negligence is presumed without express averment. The negligence is in keeping such an animal after notice.

May v. Burdett.

9 Q. B (Ad. & El. N. S.) 101–113 (s. c. 16 L. J. Q. B. 64–67, 10 Jur. 692)

[101] Case. The declaration stated that defendant, "before and at the time of the damage and injury hereinafter men-

tioned to the said Sophia, the wife of the said Stephen May, wrongfully and injuriously kept a certain monkey, he the defendant well knowing that the said monkey was of a mischievous and ferocious nature and was used and accustomed to attack and bite mankind, and that it was dangerous and improper to allow the said monkey to be at large and unconfined: which said monkey, whilst the defendant kept the same as aforesaid, heretofore and before the commencement of this suit, to wit, on the 2nd of September 1844, did attack, bite, wound, lacerate and injure the said Sophia, then and still being the wife of said Stephen May, whereby the said Sophia became and was greatly terrified and alarmed, and became and was sick, sore, lame and disordered, and so remained and continued for a long time, to wit from the day and year last aforesaid to the time of the commencement of this suit; whereby, and in consequence of the alarm and fright occasioned by the said monkey so attacking, biting, wounding, lacerating and injuring her as aforesaid, the said Sophia has been greatly injured in her health," &c.

Plea, Not guilty. Issue thereon.

On the trial, before WIGHTMAN, J., at the sittings in [102] Middlesex after Hilary term, 1845, a verdict was found for the plaintiff with £50 damages. Cockburn, in the ensuing term, obtained a rule to show cause why judgment should not be arrested.

The rule having been argued,

Lord DENMAN, C. J., delivered the judgment of the [110] Court.

This was a motion to arrest the judgment in an action on the case for keeping a monkey which the defendant knew to be accustomed to bite people, and which bit the female plaintiff. The declaration stated that the defendant wrongfully kept a monkey, well knowing that it was of a mischievous and ferocious nature, and used and accustomed to attack and bite mankind, and that it was dangerous to allow it to be at large; and that the monkey, whilst the defendant kept the same as aforesaid, did attack, bite, and injure the female plaintiff, whereby &c.

It was objected, on the part of the defendant, that the declaration was bad for not alleging negligence or some default of the defendant in not properly or securely keeping the animal; and it was said that, consistently with this declaration, the monkey might have been kept with due and proper caution, and that the

injury might have been entirely occasioned by the carelessness and want of caution of the plaintiff herself.

A great many cases and precedents were cited upon the argument: and the conclusion to be drawn from them appears to us to be that the declaration is good upon the face of it; and that whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *primâ facie* liable in an action on the case at the suit of any person attacked and [* 111] injured * by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities.

The precedents, both ancient and modern, with scarcely an exception, merely state the ferocity of the animal and the knowledge of the defendant, without any allegation of negligence or want of care. A great many were referred to upon the argument, commencing with the Register Brev. and ending with *Thomas* v. *Morgan*, 2 C. M. & R. 496; 5 Tyr. 1085, and all in the same form, or nearly so. In the Register, 110, 111, two precedents of writs are given, one for keeping a dog accustomed to bite sheep, and the other for keeping a boar accustomed to attack and wound other animals. The cause of action, as stated in both these precedents, is the propensity of the animals, the knowledge of the defendant, and the injury to the plaintiff; but there is no allegation of negligence or want of care. In the case of *Mason* v. *Keeling* (12 Mod. 332; 1 Ld. Ray. 606), reported in 1 Ld. Ray. and 12 Mod., and much relied upon on the part of the defendant, want of due care was alleged, but the scienter was omitted; and the question was, not whether the declaration would be good without the allegation of want of care, but whether it was good without the allegation of knowledge, which it was held that it was not. No case was cited in which it had been decided that a declaration stating the ferocity of the animal and the knowledge of the defendant was bad for not averring negligence also: but various dicta in the books were cited to show that this is an action founded on negligence, and therefore [* 112] not * maintainable unless some negligence or want of care is alleged.

In Comyns's Digest, tit. Action upon the case for Negligence (A 5.), it is said that "an action upon the case lies for a neglect in taking care of his cattle, dog, &c.;" and passages were cited from

the older authorities, and also from some cases at nisi prius, in which expressions were used showing that, if persons suffered animals to go at large, knowing them to be disposed to do mischief, they were liable in case any mischief actually was done ; and it was attempted to be inferred from this that the liability only attached in case they were suffered to go at large or to be otherwise ill secured. But the conclusion to be drawn from an examination of all the authorities appears to us to be this: that a person keeping a mischievous animal with knowledge of its propensities is bound to keep it secure at his peril, and that, if it does mischief, negligence is presumed, without express averment. The precedents as well as the authorities fully warrant this conclusion. The negligence is in keeping such an animal after notice. The case of *Smith* v. *Pelah* 2 Stra. 1264, and a passage in 1 Hale's Pleas of the Crown, 430,[1] put the liability on the true ground. It may
* be that, if the injury was solely occasioned by the wilful- [* 113]
ness of the plaintiff after warning, that may be a ground of defence, by plea in confession and avoidance: but it is unnecessary to give an opinion as to this; for we think that the declaration is good upon the face of it, and shows a *primâ facie* liability in the defendant.

It was said, indeed, further, on the part of the defendant, that, the monkey being an animal *feræ naturæ*, he would be answerable for injuries committed by it, if it escaped and went at large without any default on the part of the defendant, during the time it had so escaped and was at large, because at that time it would not be in his keeping nor under his control: but we cannot allow any weight to this objection: for, in the first place, there is no statement in the declaration that the monkey had escaped, and it is

[1] After stating that "if a man have a beast, as a bull, cow, horse, or dog, used to hurt people, if the owner know not his quality, he is not punishable," &c., *Hale* adds (citing authorities) that "these things seem to be agreeable to law.

"1. If the owner have notice of the quality of his beast, and it doth any body hurt, he is chargeable with an action for it.

"2. Though he have no particular notice that he did any such thing before, yet if it be a beast, that is *feræ naturæ*, as a lion, a bear, a wolf, yea an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I knew it adjudged in *Andrew Baker's case*, cited in Keble's report of *Michael* v. *Alestree*, 3 Keble, 650, whose child was bit by a monkey that broke his chain and got loose.

"3. And therefore in case of such a wild beast, or in case of a bull or cow, that doth damage, where the owner knows of it, he must at his peril keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages." 1 Hale's P. C. 430, Part 1, c. 33.

expressly averred that the injury occurred whilst the defendant kept it: we are besides of opinion, as already stated, that the defendant, if he would keep it, was bound to keep it secure at all events.

The rule therefore will be discharged. *Rule discharged.*

ENGLISH NOTES.

In *Jackson* v. *Smithson* (1846), 15 M. & W. 565, 15 L. J. Ex. 311, a case of injury to plaintiff's wife by a ram, a declaration alleging that the defendant wrongfully and injuriously kept the animal, knowing it to be prone and used to attack mankind, was after verdict held good, although there was no averment that the defendant negligently kept the ram. Alderson, B., observed: "I can see no distinction between the case of an animal which breaks through the tameness of its nature, and one that is *feræ naturæ*." The same principle is applied in the case of a dog known to be ferocious: *Card* v. *Case* (1848), 5 C. B. 622, 17 L. J. C. P. 124.

In *Filburn* v. *People's Palace, &c. Aquarium Co.* (C. A. 1890), 25 Q. B. D. 258, 59 L. J. Q. B. 471, it was held by the Court of Appeal that an elephant does not come within the class of animals known to be harmless by nature or found by experience to be harmless in this country; and consequently falls within the class of animals that a man keeps at his peril. Consequently the Court confirmed a judgment for injury to the plaintiff by an elephant exhibited by the defendants, although the jury found that the defendants did not know the elephant to be dangerous.

In *Mason* v. *Keeling*, 12 Mod. 332, 1 Ld. Raym. 606, Holt, C. J., draws the following distinction: "The difference is between things in which the party has a valuable property, for he shall answer for all damage done by them; but of things in which he has no valuable property, if they are such as are naturally mischievous in their kind, he shall answer for any hurt done by them without notice; but if they are of a tame nature, there must be notice of the ill quality, and the law takes notice that a dog is not of a fierce nature, but rather the contrary."

It is difficult to see the reason for any distinction on the ground of the animal being "valuable property," unless it means that where the value of the animal is sustained by the land on which it feeds, the owner is bound at all events to restrain his animals from trespassing on the land of another; and that the person damaged by the trespass is not bound, as against the owner of the animal, to go into evidence of the motive or occasion of the trespass which is (or might be) so obviously

to his advantage. In the case of *Cox* v. *Burbridge* (C. P. 1863), 13 C. B. (N. S.) 830, 32 L. J. C. P. 89, 92, WILLES, J., suggests that what Lord HOLT meant was "control," and not property. This was the case of a horse (not known to be vicious) straying on a highway and kicking a child, for which the owner of the horse was held not responsible. At all events (as WILLES, J., there observes), the *dictum* of Lord HOLT "exhausts itself in the case of an animal straying upon lands in pursuit of its ordinary instincts." This liability of the owner of the animal for an ordinary trespass is stretched to a great extent in *Lee* v. *Riley* (1865), 18 C. B. (N. S.) 722, 34 L. J. C. P. 212, where a horse trespassed in a neighbour's field, — through defect of fences which the owner of the horse was bound to repair, — and kicked and killed a horse belonging to the owner of the field; and this damage was held not too remote a consequence of the trespass. And an extreme case perhaps is that of *Ellis* v. *Loftus Iron Co.* (1874), L. R., 10 C. P. 10, 44 L. J. C. P. 24, where the defendant's horse (a stallion) had injured the plaintiff's mare by kicking and biting through the fence separating the plaintiff's land from the defendant's, and the defendant was held liable apart from any question of negligence. But where the damage complained of was that the defendant's sheep which had got into the plaintiff's field were infected with scab, and communicated the disease to the plaintiff's sheep, it was held that, this not being the natural consequence of a mere trespass, it was necessary to prove that the defendant had notice of the condition of his sheep. *Cooke* v. *Waring* (1863), 2 H. & C. 332, 32 L. J. Exch. 262.

In *Tillett* v. *Ward* (1882), 10 Q. B. D. 17, 52 L. J. Q. B. 61, an ox of the defendant driven by his servants through the streets of a country town, entered the plaintiff's shop through the open doorway, and damaged his goods. No negligence was proved against the drovers either in not preventing the beast entering, or in getting him out. The Court held the defendant not liable.

The bull, being a tame animal with certain very commonly known occasional dangerous propensities, has given rise to peculiar questions as to the evidence necessary to bring home to a defendant the knowledge of such propensities.

In *Hudson* v. *Roberts* (1851), 6 Ex. 697, 20 L. J. Ex. 299, the plaintiff, while walking along the public street wearing a red handkerchief, was attacked and injured by the defendant's bull, which was being driven along the street. The defendant stated, after the accident, that the red handkerchief was the cause of the injury, for he knew that the bull would run at anything red; and on another occasion that he knew that a bull would run at anything red. By the judgment of the Court, delivered by POLLOCK, C. B., it was held that either

expression was some evidence to go to the jury that this animal was a dangerous one. An interlocutory remark of Alderson, B., indicates that he might have been disposed to put the case on a wider ground. "If all bulls (he said) have a propensity to run at red objects, I am not prepared to say that an action would not lie in respect of an injury done by a bull driven through the public streets." The remark however is hardly supported by the general tenour of the English authorities. In the Scotch case of *Harper* v. *North of Scotland Railway Co.* (1886), 23 Scottish Law Reporter, p. 814, 817, the Lord Justice Clerk expressed an opinion carrying the imputation of common knowledge, and its consequences, still further. "When the animal is a bull, which is always known to be subject to paroxysms of sudden fury, and when furious so much more dangerous than the animals in these cases (referring to Scotch cases in which damages were recovered for injuries by a dog and a cow respectively known to be vicious), I am of opinion that, when allowed to go into the streets and crowded thoroughfares, it can be considered in no other light than that of a wild animal, and that the person who brings it there is responsible that the conditions under which it is so brought shall render it absolutely safe." This view was however overborne by the majority of the Court, who held that the facts in the case were evidence of such care as to avoid imputability. The facts were that the bull was led secured by a ring in its nose attached to a rope, and by a halter upon its head. The bull, being irritated by boys, struggled and escaped, — the ring having broken through a latent defect. There is another case of damage by a bull in *Smith* v. *Cook* (1875), 1 Q. B. D. 79, 45 L. J. Q. B. 122; but this turned upon a question of contract. See No. 3 of "Agistment," R. C. Vol. 2, p. 551.

The natural disposition of the dog has given rise to some controversy. *Mason* v. *Keeling* (1710), 12 Mod. 332, 1 Ld. Raym. 601, — in which Holt, C. J., makes the observation already cited, that "the law takes notice that a dog is not of a fierce nature, but rather the contrary" — was an action on the case for injury by the defendant's dog biting the plaintiff; and the majority of the Court, consisting of Holt, C. J., and Turton, J. (against Gould, J., who at first had agreed with the majority, but afterwards changed his mind), decided in favour of the defendant on the ground that the plaintiff had failed to show that the defendant knew the dog to be ferocious. It appears from the report of Lord Raymond that the case was adjourned without any formal judgment being given, and that afterwards the parties agreed. But the principle has since been treated as settled law in England.

The principle was pushed to an extreme length by the House of Lords in a Scotch case (*Fleming* v. *Orr*), 1855, 2 Macq. 14, arising out

of a claim of damage against the owner of a foxhound for sheep worried by the dog at night. The sheriff who tried the case found that the sheep had been worried by dogs, and that one of them was the foxhound in question; and on this bare ground they held the owner liable. In the Court of Session, Lord COCKBURN considered that the tendency to worry sheep was a natural tendency in such dogs; and that for neglecting to guard against it the owner was responsible. The Court in Scotland so decided. The House of Lords, on the advice of the LORD CHANCELLOR (Lord CRANWORTH), reversed the decision, on the ground that negligence on the part of the defendant was not expressly or by necessary implication to be inferred from anything in the Sheriff's findings of fact. Stripped of verbiage, this is Lord HOLT's proposition applied to the natural propensity of a fox-hound towards sheep; and seems to justify the remark afterwards made by Lord COCKBURN that, on this decision, "every dog is entitled to one worry." But this was intolerable to the Scotch sheep-farmers, who had an important voice in the legislature; and in 1863 an Act was passed for Scotland (26 & 27 Vict. c. 100), declaring it unnecessary, in an action against the owner of a dog for damages in consequence of injury by the dog to any sheep or cattle, to prove a previous propensity in the dog to injure sheep or cattle. In 1865, a similar Act (28 & 29 Vict. c. 60) was passed for England, in language which expressly negatived the necessity of proving *scienter* or neglect on the part of the owner. These statutes also contained a provision for a presumptive liability of the occupier of premises where a dog is usually kept or permitted to remain. It has been held that horses are "cattle" within the protection of the last-mentioned Act. *Wright* v. *Pearson* (1869), L. R., 4 Q. B. 582, 38 L. J. Q. B. 312. The occupier has been held to discharge himself from liability under the latter provision of the Act, by proving that his servant used reasonable efforts to drive the dog (a strange one) off the premises. *Smith* v. *Great Eastern Ry. Co.* (Nov., 1866), L. R., 2 C. P. 4, 36 L. J. C. P. 22.

In an action for negligently keeping a ferocious dog, it is sufficient to show that the disposition has been evinced by attempts to bite, and that the owner knew it; although it is not shown that the dog had actually bitten anyone. *Worth* v. *Gilling* (Nov., 1866), L. R., 2 C. P. 1. In *Judge* v. *Cox* (1816), 1 Stark. 285, ABBOTT, J., left it to the jury to say whether a caution not to go near a dog was sufficient to infer knowledge of its ferocious disposition, and in *Thomas* v. *Morgan* (1835), 2 Cr. M. & R. 496, 4 L. J. (N. S.) Exch. 362, PARKE, B., held an offer of a compromise was evidence to be left to a jury. As to whether the keeping of a dog usually tied up is evidence of its previous disposition, there is a ruling of Lord ELLENBOROUGH at *nisi prius* in

Beck v. *Dyson* (1815), 4 Camp. 198, 16 R. R. 774, that it was not. This may be compared with the ruling of Lord Kenyon in *Jones* v. *Perry* (1796), 2 Esp. 482, holding that, coupled with a general report of the dog being mad, it was evidence. In the former case also Lord Ellenborough held that a promise of compensation after the bite was not evidence for the jury.

In a Scotch case it has been held evidence that the dog was of a ferocious disposition, and that the owner knew it, where — the dog (a Spanish bloodhound) being tied up in a place accessible to the public — the defendant (the owner) said to some one, "You need not be afraid of the dog, *if you call him by his name* he will not harm anybody." *Renwick* v. *Von Rothberg* (1875), Court of Session, 4th series, vol. II. 855.

A formal complaint of a dog having bitten a person made to a wife for the purpose of being communicated to the husband, has been held evidence to go to a jury of the husband's knowledge of the dog's propensity to bite. *Gladman* v. *Johnson* (1867), 36 L. J. C. P. 153.

The knowledge of a servant employed by the master to keep a dog has been held imputable to the master. *Baldwin* v. *Casella* (1872), L. R., 7 Ex. 325, 41 L. J. Ex. 167. And complaints to the barmen in a public house were held by Lord Coleridge, C. J., and Keating, J. (Brett, J., dissenting), evidence of *scienter* by the master. *Applebee* v. *Percy* (1874), L. R., 9 C. P. 647, 43 L. J. C. P. 365. With these may be compared the case of *Stiles* v. *Cardiff Steam Navigation Co.* (1864), 33 L. J. Q. B. 310, where there was evidence that some of the servants of the company had on a former occasion seen the dog bite a person; but there was nothing to show any duty of these servants in relation to the dog, or anything in the position of the servants or in the former complaints from which a duty could be inferred to inform the responsible officials of the company; and a verdict for the plaintiff was accordingly set aside. In *Colget* v. *Norrish* (C. A. 1886), 2 Times L. R. 471, where a dog had bit the postman, notice to a domestic servant was held insufficient.

Where a dog is known by his owner to have a particularly mischievous disposition — as for hunting game — the owner, allowing the dog to go at large, is responsible for any mischief of that kind which he does. *Read* v. *Edwards* (1864), 17 C. B. (N. S.) 245, 260, 34 L. J. C. P. 31.

As to the right of a person to keep a ferocious dog for the protection of his premises, the ruling of Tindal, C. J., at *nisi prius* in *Sarch* v. *Blackburn* (1830), 4 C. & P. 297, 300, is as follows: "If a man puts a dog in a garden, walled all round, and a wrong-doer goes into that garden, and is bitten, he cannot complain in a Court of Justice of that

which was brought upon him by his own act. . . . Undoubtedly, a man has a right to keep a fierce dog for the protection of his property; but he has no right to put the dog in such a situation, in the way of access to his house, that a person innocently coming for a lawful purpose may be injured by it. I think he has no right to place a dog so near to the door of his house that any person coming to ask for money, or on other business, may be bitten. And so with respect to a foot-path, though it be a private one, a man has no right to put a dog with such a length of chain, and so near that path, that he could bite a person going along it."

The burden of proof may be quite different where there is a relation of contract. See *Smith* v. *Cook* (1875), 1 Q. B. D. 79, 45 L. J. Q. B. 122, R. C., Vol. II., p. 551, No. 3 of "Agistment." And see *Simpson* v. *London General Omnibus Co.* (1873), L. R., 8 C. P. 390, 42 L. J. C. P. 112.

"The circumstance of a dog being of a ferocious disposition, and being at large, is not sufficient to justify shooting him; to justify such a course, the animal must be actually attacking the party at the time." Ruling of Lord Denman, C. J., in *Morris* v. *Nugent* (1836), 7 Car. & P. 572. On this ruling the jury found a verdict for the plaintiff the owner of the dog which the defendant had shot, the evidence being that the dog had attacked him, but was running away as the defendant shot him.

In *Janson* v. *Brown* (1807), 1 Camp. 41, 10 R. R. 626, the defence to shooting a dog had been that the dog was worrying the defendant's fowl. The evidence offered was that the dog was accustomed to chase the defendant's fowls, and that just before he was shot he was worrying the fowl in question, and had not dropped it from his mouth an instant when the defendant shot him. Lord Ellenborough said this would not make out the justification; to which it was necessary that when the dog was shot he should have been in the act of killing the fowl, and could not be prevented from effecting his purpose by any other means. The reporter (afterwards Lord Campbell) in his note to the case cites *Wright* v. *Ramscot* (1668), 1 Saund. 84, where the defendant killed the plaintiff's mastiff, and pleaded that the mastiff was attacking his master's dog, and that he killed him to prevent further mischief, and the plea was held bad for want of showing that he could not otherwise take off the mastiff from worrying the other dog. The reporter, as to the case of *Janson* v. *Brown*, proceeds: "It seems that if the transaction had taken place in the defendant's poultry-yard, it would have been enough to have stated in the plea that the dog was pursuing the fowl; as it is not necessary to allege that the defendant could not otherwise prevent the dog from killing conies in a warren;

but it is sufficient to state that the dog was in the warren pursuing the conies there, and therefore he killed him. *Wadhurst* v. *Damme*, Cro. Jac. 44. And it is the same if a dog runs after deer in a park. *Barrington* v. *Summers*, 3 Lev. 28; 1 Sid. 336; Com. Dig., tit. Pleader (3 M. 33)." In *Vere* v. *Cawdor* (1809), 11 East, 568, 11 R. R. 268, it was pointed out that these latter cases depended upon the circumstance that the rabbits in a warren or deer in a park were subjects of property. And it was held that a gamekeeper was not justified in shooting a dog merely because it was running after a hare in his master's ground.

In the case of *Deane* v. *Clayton* (1816), 7 Taunt. 489, 2 Marshall, 577, there was an elaborate argument as to whether a landowner in an action for the death of a dog could justify the act of placing dog-spears in his covers; and the Court of Common Pleas were equally divided upon the question.

AMERICAN NOTES.

The "monkey case" has been frequently cited in the United States, and its doctrine has been universally accepted there. See *Pickering* v. *Orange*, 1 Scammon (Illinois), 492; 32 Am. Dec. 35, *Hinckley* v. *Emerson*, 4 Cowen (New York), 351; 15 Am. Dec. 383 (dog); *Coggswell* v. *Baldwin*, 15 Vermont, 404; 40 Am. Dec. 686 (cow); *Kittredge* v. *Elliott*, 16 New Hampshire, 77; 41 Am. Dec. 717; *Laverone* v. *Mangianti*, 41 California, 138; 10 Am. Rep. 269, and note, 270, citing principal case; *Meibus* v. *Dodge*, 38 Wisconsin, 300; 20 Am. Rep. 6, citing principal case (dog); *Moulton* v. *Scarborough*, 71 Maine, 267; 36 Am. Rep. 308; *Oakes* v. *Spaulding*, 40 Vermont, 347; 94 Am. Dec. 404 (ram); *Glidden* v. *Moore*, 14 Nebraska, 84; 45 Am. Rep. 98 (bull); *McCaskell* v. *Elliott*, 5 Strobhart Law (South Carolina), 196; 53 Am. Dec. 706; *Woolf* v. *Chalker*, 31 Connecticut, 121; 81 Am. Dec. 175, citing principal case, and note, 183; *Brice* v *Bauer*, 108 New York, 428; 2 Am. St. Rep. 454; *Fake* v. *Addicks*, 45 Minnesota, 37; 22 Am. St. Rep. 716; *Dockerty* v. *Hutson*, 125 Indiana, 102; *Newton* v. *Gordon*, 72 Michigan, 642; *Reynolds* v. *Hussey*, 64 New Hampshire, 64 (horse); *Klenberg* v. *Russell*, 125 Indiana, 532; *Meier* v. *Shrunk*, 79 Iowa, 17 (bull); *Linnehan* v. *Sampson*, 126 Massachusetts, 506; 30 Am. Rep. 692 (bull led through street); *Glidden* v. *Moore*, 14 Nebraska, 84; 45 Am. Rep. 98 (bull tied within reach of a public pathway).

It appears from the cases above that the *scienter* is implied from the intrinsic natural propensity of the animal, even though not vicious, without proof that it has actually injured any one previously. As in *Dickson* v. *McCoy*, 39 New York, 400, where the owner of a horse in a city allowed it to run out on the sidewalk, temporarily loose, and it playfully kicked, and in so doing injured a boy, the owner was held liable without other proof. Precisely so in *Goodman* v. *Gay*, 15 Penn. St. 188; 53 Am. Dec. 589. So of a stallion in a field near a highway: *McIlvaine* v. *Lantz*, 100 Penn. St. 586; 45 Am. Rep. 400; and of a straying hog: *Van Leuven* v. *Lyke*, 1 New York, 515; 49 Am. Dec. 316; and a straying horse, *Decker* v. *Gammon*, 44 Maine, 322; 69 Am. Dec. 99;

and of a horse left unfastened in a public street, *Phillips* v. *Dewald*, 79 Georgia, 732; 11 Am. St. Rep. 458. See *Hathaway* v. *Pinkham*, 148 Massachusetts, 35, where the injury was done by a dog in mere play; and to the same effect, *Evans* v. *McDermott*, 49 New Jersey Law, 163; 60 Am. Rep. 602. The necessary knowledge of viciousness may be implied from precautions taken by the owner, as where he chains up a watch-dog by day and looses him at night. *Montgomery* v. *Koester*, 35 Louisiana Annual, 1091; 48 Am. Rep. 253, citing the principal case; *Goode* v. *Martin*, 57 Maryland, 606; 40 Am. Rep. 448; *Godeau* v. *Blood*, 52 Vermont, 251; 36 Am. Rep. 751; *Muller* v. *McKesson*, 73 New York, 195; 29 Am. Rep. 123; *Rider* v. *White*, 65 New York, 54; 22 Am. Rep. 600. In *Godeau* v. *Blood*, the Court said: "The formula used in text-books and in forms given for pleadings in such cases, 'accustomed to bite,' does not mean that the keeper of a ferocious dog is exempt from all duty of restraint until the dog has effectually mangled or killed at least one person. . . . The savage and vicious nature of the dog, and the fact that he was kept chained and muzzled by his keeper, are evidence," etc. The owner of a domestic animal, such as a dog, may be chargeable with notice of its viciousness through his neglect to take notice of its vicious habits. *Knowles* v. *Muhler*, 74 Mich. 202; 16 Am. St. Rep. 627, and note, 631. The keeper is an insurer against harm that might reasonably be expected to ensue from such viciousness. Ibid. See *Conway* v. *Grant*, 88 Georgia, 40; 30 Am. St. Rep. 145; 14 Lawyers' Rep. Annotated, 196.

But knowledge will not be implied unless there is some implication or some previous exhibition of vice. *Smith* v. *Donohue*, 49 New Jersey Law, 548; 60 Am. Rep. 652, case of a dog lying on a sidewalk, and not shown vicious.

The owner or keeper is answerable in these cases even to a trespasser. *Sherfey* v. *Bartley*, 4 Sneed, 58; 67 Am. Dec. 597; *Woolf* v. *Chalker*, 31 Connecticut, 121; 81 Am. Dec. 175; *Conway* v. *Grant*, *supra*, and note; 14 Lawyers' Rep. Annotated, 196.

The agent's knowledge of the vicious propensity is attributable to the principal. *Brice* v. *Bauer*, 108 New York, 428; 2 Am. St. Rep. 454; but not unless the animal is put in the charge and keeping of the agent. *Twigg* v. *Ryland*, 62 Maryland, 380; 50 Am. Rep. 226.

The liability attaches to one who merely harbours and does not own the vicious or dangerous animal. *Burnham* v. *Strother*, 66 Michigan, 519. Even where the animal was owned by the husband and kept by him on the wife's premises, it was held that it was a question of fact whether she was not liable as harbouring it. *Shaw* v. *McCreary*, 19 Ontario, 39; *Quilty* v. *Battie*, 135 New York, 201; 17 Lawyers' Rep. Annotated, 521. But *contra*, *Stronse* v. *Leipf* (Alabama), 23 Lawyers' Rep. Annotated.

Of the principal case Judge Cooley (Cooley on Torts, p. 349) remarks: "In Connecticut this case has been cited to the point that the keeping of a vicious dog, after notice of his evil disposition, is wrongful and at the peril of the owners, 'and therefore *primâ facie* the owner is liable to any person injured by such a dog, without any averment or proof of negligence in securing or taking care of it.' (*Woolf* v. *Chalker*, *supra*.) But admitting the *primâ facie* case, may not the keeper show that the animal was kept by him with due care and for some commendable purpose, and that he escaped under circumstances

free from fault in him? The keeping of wild animals for many purposes has come to be recognized as proper and useful; they are exhibited through the country with the public license and approval; governments and municipal corporations expend large sums in obtaining and providing for them; and the idea of legal wrong in keeping and exhibiting them is never indulged. It seems therefore safe to say that the liability of any owner or keeper for any injury done by them to the person or property of others must rest on the doctrine of negligence. A very high degree of case is demanded of those who have them in charge; but if notwithstanding such care they are enabled to commit mischief, the case should be referred to the category of accidental injuries, for which a civil action will not lie." Citing *Earl* v. *Van Alstine*, 8 Barbour (New York Supreme Court), 630, an action against the owner of bees which stung the plaintiff's horses as they were passing along a highway, and where it was held that no action would lie without proof that the owner knew that they were accustomed to do such mischief. But the distinction between such a useful domestic animal not innately vicious and that of a useless and indomitable wild beast is manifest, and in the case last cited the Court laid it down "that proof that the animal is of a savage and ferocious nature is equivalent to proof of express notice. In such cases notice is presumed;" citing the principal case with approval.

Judge Cooley continues (note, p. 349): "As to the law respecting the keeping of wild beasts, we should say that the higher cultivation of the intellect of the mass of the people as compared with two or three centuries ago, and the recognition of wants in human nature then ignored, must have worked some changes, and that we must take up the common law of that period, in this as in many other particulars, more to locate accurately our point of departure than to fix definitely a stake to which we must tie and adhere. When wild animals are kept for some purpose recognized as not censurable, all we can demand of the keeper is that he shall take that superior precaution to prevent their doing mischief which their propensities in that direction justly demand of him." Citing *Scribner* v. *Kelley*, 38 Barbour (New York Supreme Court), 14, holding that where a horse is frightened by the mere appearance of an elephant in a caravan on a highway, and mischief ensues, his owner is not responsible. But in that case the Court conceded that the owner or keeper of fierce wild beasts "is required to exercise such a degree of care in regard to them as will *absolutely prevent* the occurrence of an injury to others through such *vicious acts* of the animal as he is naturally inclined to commit," and that though "the elephant is of a savage and ferocious nature, it does not necessarily follow that his appearance inspires horses with terror," and in short, that the injury which resulted from the horse's fright "is more fairly attributable to a lack of ordinary courage and discipline in himself than to the fact that the object which he saw was an elephant."

Waterman (2 Trespass, § 866) cites the principal case with approval.

A case very much in point is *Vredenburg* v. *Behan*, 33 Louisiana Annual, 627. There members of an unincorporated club kept a bear on their premises, and it slipped its collar and fatally injured a man. All the members of the club were held liable, including one who was absent, and knew nothing of the bear.

No. 4. — May v. Burdett. — Notes.

In this country the question of the responsibility of the owner of animals for injuries done by them while straying, and his duty to maintain fences on enclosures sufficient to confine them, has been greatly mooted.

The English rule is declared in *Lee* v. *Riley* (see p. 113, *ante*), and may be expressed as follows: If through neglect of the owner to maintain proper fences, a horse strays into the field of a neighbour and there kicks the neighbour's horse, the owner is liable for the damage.

This doctrine prevails in some of the United States. The owner of an animal is liable for an injury done by it while trespassing, without regard to his knowledge of its propensities. *Van Leuven* v. *Lyke*, 1 New York, 515; 49 Am. Dec. 346 (straying hog killing a lying-in cow and her newborn calf); *Woolf* v. *Chalker*, 31 Connecticut, 121; 81 Am. Dec. 173; *Dolph* v. *Ferris*, 7 Watts & Sergeant (Penn.), 367; 42 Am. Dec. 246 (bull escaping and killing horse). This extends to the case of a defective partition fence which both parties are equally bound to maintain, *Myers* v. *Dodd*, 9 Indiana, 290; 68 Am. Dec. 624, the Court observing: "The common-law rule, in the absence of any statute controlling it, is that the owner of cattle is bound to confine them upon his own lands." It is said, however, in *Woolf* v. *Chalker*, *supra*, that "a *dog* cannot, by entering *alone* on the land of another and doing mischief, subject his owner to the action of trespass *quare clausum*, as cattle and other animals which are naturally inclined to rove."

Where a young stallion was put in a lot surrounded by a fence such as was "considered among farmers and usually considered safe," and leaped the fence and injured a person driving on the highway, his owner was held to be liable if the jury considered the fence insufficient. *McIlvaine* v. *Lantz*, 100 Penn. St. 586; 45 Am. Rep. 400. And where a stallion broke a fence and got with foal a mare in the lot of an adjoining premises, an action was sustained. *Cate* v. *Cate*, 50 New Hampshire, 144; 9 Am. Rep. 179.

But in most if not all of the Western and Southern States the common-law rule has been so far modified or abrogated as to allow cattle to range at will, without liability of their owners to actions of trespass unless the lands trespassed on were enclosed by good fences. *Morris* v. *Fraker*, 5 Colorado, 425; *Comerford* v. *Dupuy*, 17 California, 308; *Seeley* v. *Peters*, 10 Illinois, 130; *Frazier* v. *Nortinus*, 34 Iowa, 82; *Wells* v. *Beal*, 9 Kansas, 597; *Runyan* v. *Patterson*, 87 North Carolina, 343; *Mann* v. *Williamson*, 70 Missouri, 661; *Chase* v. *Chase*, 15 Nevada, 259; *Hinshaw* v. *Gilpin*, 64 Indiana, 116; *Little Rock, &c. R. Co.* v. *Finley*, 37 Arkansas, 562; *Montgomery* v. *Handy*, 62 Mississippi, 16; *Marietta, &c. R. Co.* v. *Stephenson*, 24 Ohio St. 24; *Danner* v. *So. Car. R. Co.*, 4 Richardson Law (So. Car.), 329; 55 Am. Dec. 678; *Studwell* v. *Rich*, 14 Connecticut, 292; *Baylor* v. *Baltimore, &c. R. Co.*, 9 West Virginia, 270; *Delaney* v. *Errickson*, 11 Nebraska, 533; *State* v. *Council*, 1 Tennessee, 305; *Mobile, &c. R. Co.* v. *Williams*, 53 Alabama, 595. In *Macon, &c. R. Co.* v. *Lester*, 30 Georgia, 914, the Court said: "Such a law as this would require a revolution in our people's habits of thought and action. A man could not walk across his neighbour's unenclosed land, nor allow his horse or his hog or

his cow to range in the woods nor to graze on the old fields or the 'wire grass,' without subjecting himself to damages for a trespass. Our whole people with their present habits would be converted into a set of trespassers."

A very extreme case, illustrating the common-law rule, is *Lyons* v. *Merrick*, 105 Massachusetts, 71. The mule of the defendant escaped from his field through an insufficient fence into the field of A., thence into the field of B., and thence into the field of plaintiff, and injured his mare. Defendant was held liable, although A. was bound to keep in repair the fence between him and defendant, and the fence between B. and the plaintiff was insufficient, and defendant did not know that his mule was vicious. The Court said: "At common law the tenant must keep his cattle upon his own land at his peril. The defendant, as against the plaintiff, is subject to this common-law duty, the parties are not adjoining owners, and their obligations are not affected by the Statute in this respect. It was negligence to turn the animals into a lot insecurely fenced, for which the defendant is responsible if any injury ensued, without regard to the obligations existing between the defendant and the tenant of the next lot. It may be that the defendant would not be liable in trespass for their escape into that lot, if the tenant of it was in fault, for no one can recover for an injury to which his own negligence contributed. And yet as to the plaintiff, while the animals were in that lot they were unlawfully there, and no obligation rested upon him to fence his lot against them. It was therefore immaterial what the condition of the fence around the plaintiff's pasture was."

In *Clarendon, &c. Co.* v. *McClelland* (Texas Ct. Civ. App.), it was held that where defendant's animals entered on plaintiff's lands, which were enclosed with a fence sufficient to exclude ordinary cattle, and communicated a dangerous disease to plaintiff's cattle, defendant is liable for the damages, though he did not know that his cattle were infected with such disease. The Court said: "In such case the negligence of the owner in permitting his animal to thus trespass upon his neighbour is sufficient to create the liability. Bish. Noncont. Law, 1220–1227; 1 Thomp. Neg. 206; id. 189; Cooley Torts (2d ed.), 400. If however in such case the owner of the land is also guilty of negligence, which proximately contributes in causing the injury, he cannot recover. *Walker* v. *Herron*, 22 Tex. 55; Cooley Torts (2d ed.), 399; id. 62. There is however great diversity in the decisions in this country as to when a domestic animal is to be considered a trespasser upon land that does not belong to its owner. Perhaps in a majority of the States, unless changed by statute, the rule of the common law which requires the owner of animals to fence them in, and makes any entry by them upon the land of another without consent a trespass, even though it be not enclosed, will be found to be in force. Cooley, Torts (2d ed.), 397. In several of the States, and by the Supreme Court of the United States, however — as we think with better reason — it has been held that this rule of the common law is so ill adapted to our condition, and is so in conflict with the practice of our people, indulged for time immemorial, that it should not be considered as adopted by us, even in the absence of statutory provisions abrogating it. *Buford* v. *Houtz*, 133 U. S. 320;

Davis v. *Davis*, 70 Tex. 123. It must be considered as settled in this State that the failure of the owner of land to construct around it the exact kind of fence prescribed by the statute does not throw it open to whosoever sees proper to drive his cattle thereon; these statutes being regarded as intended to prescribe an easy remedy for those who do so enclose their land, leaving those who do not to settle their rights independently of the statute. *Davis* v. *Davis*, *supra*; *Worthington* v. *Wade*, 82 Tex. 26. What then is the law applicable to such cases in this country, in the absence of a statute? We, having decided that the common law upon this subject is not applicable in this State, believe it follows that the owner of an animal is not guilty of negligence simply by permitting it to run at large, unrestrained, unless he has notice of the danger attending this; and if such animal strays upon the unenclosed land of another, it is not to be considered a trespass. If however the owner has notice that his animal is liable to communicate disease, or inflict injury upon others, it would be actionable negligence for him to allow it upon the commons. See authorities above cited, especially *Walker* v. *Herron*, 22 Tex. 55. We also believe that if the owner of land evidences a desire to exclude others therefrom, by erecting a fence around it, his enclosure should be respected; but unless his fence be such as is reasonably sufficient to exclude ordinary animals of the kind complained of, his contributory negligence in failing to provide and keep in repair a proper fence will be a bar to his recovering for damages caused by animals entering thereon through such insufficient enclosure. Cooley Torts, and *Davis* v. *Davis*, *supra*. The Court below made the liability of appellant dependent entirely upon the finding of the jury that its cattle were trespassers upon the land of appellees, and while so trespassing communicated the disease complained of to their cattle; and it will therefore not be necessary for us to consider the law applicable to a case where the owner of an animal has notice of its liability to communicate disease, and does not restrain it."

In *Bulpit* v. *Matthews*, 145 Illinois, 345; 22 Lawyers' Rep. Ann. 55, it was held that the owners of domestic animals are liable at common law for damages committed by them in trespassing, without regard to the negligence of the owner in permitting them to escape, or to the fact of enclosure, or lack of enclosure, of premises on which they are trespassing, and that the common-law rule as to the duty of the owners of domestic animals to keep them from trespassing exists in Illinois, under the Act of 1874, except in districts where a vote taken under the statute has established the contrary rule, although for a long period of time the common-law rule was rejected in that State as inapplicable to its conditions. See note on the general subject, 22 Laywers' Rep Ann. 55.

The wide statutory departure in this country from the common law on this subject is illustrated in *Clarendon Land, Investment, and Agency Co., Limited*, v. *McClelland Bros.*, Texas Supreme Court, 22 Lawyers' Reports Annotated, 105, holding that the exceptionally small size of young cattle, such as calves and yearlings, on account of which they are able to pass through or under barbed wire fence, will not excuse the owner of the fence for its insufficiency, where the statutes allow cattle to run at large, so as to give him a right of action for their trespass, although when the fence was built all cattle in the

neighbourhood were of a larger kind, against which the fence was sufficient. The Court observed: "If the fact that all the cattle in the neighbourhood of his pasture were of large breeds when his fence was constructed would relieve the owner of the necessity of making his fence sufficiently close to keep out small cattle that might be brought into the country, why should he be not relieved of the necessity of fencing against hogs, provided there were no hogs within reach when he made his enclosure? The owner of the little 'dogies' (as the witness calls them), such as crawled or walked so freely under the wires of plaintiff's fence, had precisely the same right to permit them to go at large as his neighbours had who owned Herefords or Shorthorns; and it could make no difference who came first with his cattle in the neighbourhood. It is equally unimportant whether others in the same section or neighbourhood kept the same kind of cattle or not. It is the right of every owner of domestic animals in this State, not known to be diseased, vicious, or 'breachy,' to allow them to run at large, and this without reference to the size or class of such animals kept by others in the same neighbourhood." (See same case on appeal, *supra*, p. 122.)

No. 5. — WARD *v.* HOBBS.

(H. L. 1878.)

RULE.

If a person sends pigs to a public market, and there sells them stating that no warranty is given, and that the lots are taken with all faults; there is no implied warranty or representation that they are, so far as the vendor knows, free from infectious disease.

So that although the animals were, to the vendor's knowledge, suffering from an infectious disease, and although the vendor incurred statutory penalties by so bringing them to market; he is not liable to the purchaser for the loss, either of the pigs so bought, or of other pigs which became infected by those pigs after they had been taken away from the market.

Quaere whether, if the pigs had been sold without any express conditions, there would not have been an implied representation by conduct of the vendor in bringing them to market, that the pigs were, so far as he knew, free from infection.

No. 5. — Ward v. Hobbs, 4 App. Cas. 14, 15.

Ward v. Hobbs.

4 App. Cas. 13–29 (s. c. 48 L. J. Q. B. 281–289, 40 L. T. 73, 27 W. R. 114).

In this case the Court of Appeal had reversed a judgment [14] given by the Queen's Bench in favour of the plaintiff in the action, now the appellant here.

In August, 1875, Hobbs was possessed of a herd of about ninety pigs, forty of which were sold to a Mr. Farmer, a miller, residing near Thatcham in Berkshire. Farmer afterwards, on the 9th of September, complained to Hobbs that the pigs purchased from him scoured, and it was alleged that scour and want of appetite were symptoms of typhoid fever in pigs; Hobbs denied that he knew anything about the pigs being ill or affected in any way. On the 9th of September Hobbs sent to the Newbury market thirty-two of his pigs, to be there sold by auction: Hobbs would not give any warranty with them. Among the conditions of sale were the following: —

"4. The lots, with all faults and errors of description (if any), to be paid for and removed at the buyer's expense immediately after the sale.

"6. No warranty will be given by the auctioneer with any lot, and, as all lots are open for inspection previous to the commencement of the sale, no compensation shall be made in respect of any fault, or error of description, of any lot in the catalogue.

"7. If the purchaser shall neglect or fail to comply with the above conditions his deposit money shall be forfeited, and any lot or lots that may be unclaimed by the time limited shall be resold by public or private sale, and the deficiency (if any), together with the charges attending such resale, shall be made good by the defaulter at this sale."

There was an inspector of the market at Newbury, whose duty it was to report to the justices of the borough the state of the animals brought into the market. The inspector made his report in the usual way, saying that he had not observed anything objectionable in the pigs. Ward bought the thirty-two pigs at the auction, and paid £44 for them, which was a fair price at that *time and place for healthy pigs. They exhibited [*15] symptoms of illness on being driven to the plaintiff's farm, and all but one of them afterwards died of typhoid fever, and the

plaintiff also lost some other pigs which he had bought of other people, and which he asserted had been infected with disease from Hobbs' pigs. He thereupon brought an action for damages to recover compensation for the loss he had thus suffered, and in his statement of claim suggested a warranty,[1] and alleged that the pigs had been sent for sale at an open and public market at Newbury.

The cause came on for trial before Mr. Justice BRETT at the Berkshire Summer Assizes in 1876, when the above facts were proved in evidence, and it was also proved that the pigs showed symptoms of disease as they were being driven from the market to Ward's farm. On the part of the defendant Hobbs there was the most positive denial that he knew or even suspected that the pigs were tainted with disease, and the sickness of the pigs shewn on the way from Newbury market to the plaintiff's farm, was attributed to their being driven a considerable distance without food being supplied to them on the road. It was also urged that no veterinary surgeon had been called in to attend the pigs, nor had seen them until after death, so that he could form no idea as to the time at which the disease had first attacked them. Some evidence was given with a view to show that the defendant had been aware, before he sent the pigs to Newbury on the 9th of September, that they were infected with the disease. On the other hand the defendant's son was called as a witness, and swore that it was his duty to look after these pigs, that he had done so, and that he never had any reason to believe that they were suffering from any disease. The defendant's counsel relied upon the absence of any evidence of warranty, or of fraud, or deceit, or of false representation, or of the fact that the pigs were diseased at the time of the sale. The learned Judge left the whole evidence to the jury, stating that in his opinion there was some evidence that the pigs had a disease at the time of the sale by auction, and that the defendant knew it; that he must take the ver-
[* 16] dict of * the jury as to the cause of the death of the thirty-one pigs, and of the other pigs which died on the plaintiff's premises; and he asked the jury whether the defendant knew that his pigs had a dangerous and infectious disease. The jurors

[1] The words were: "The plaintiff says, that by warranting certain pigs to be free from any infectious disease, the defendant sold thirty-two of such pigs to the plaintiff at and for the sum of £44."

returned a verdict for the plaintiff, and assessed damages in respect of the loss of the thirty-one pigs and of the sixteen other pigs at £66. Leave to move to enter a verdict and judgment for the defendant was reserved. The motion was made in the Queen's Bench and the rule discharged. 2 Q. B. D. 331; 46 L. J. Q. B. 473. The case was taken to the Court of Appeal, where the decision of the Court below was reversed and judgment entered for the defendant. 3 Q. B. D. 150; 47 L. J. Q. B. 90. This appeal was then brought.

After argument for the appellant, counsel for the respondent were not called on.

THE LORD CHANCELLOR (Earl Cairns): — [19]

My Lords, in this case the respondent sold a certain number of pigs by auction at Newbury market, and the appellant became the purchaser of those pigs at the auction. There were conditions of sale under which the pigs were sold, and the fourth and sixth of those conditions ran in these words: [His Lordship read them, see *ante*, p. 122.] My Lords, it turned out that almost immediately after the sale the pigs, in the hands of the purchaser, showed unmistakable symptoms of being affected with a contagious and infectious disease, viz., typhoid fever; they rapidly died off, and nearly all * of them ultimately died. Your Lordships [*20] have not heard the counsel for the respondent in this case, and therefore all that I shall say upon this head is this: that if the finding of the jury is a correct inference from the facts of the case, that the pigs were infected with this disease at the time of the sale, and the respondent knew it, then beyond all doubt the respondent was, both morally and legally, highly culpable.

But the question is: Is there a right of action on the part of the appellant?

Now the appellant in his claim puts the case in this way: he says that by warranting the pigs to be free from any infectious disease the defendant induced him to buy them; and then he alleges that "even if the defendant did not warrant the pigs, the plaintiff says that the defendant either knowingly, or having good reason for believing that the pigs were suffering from an infectious disease, offered them for sale at a certain open and public market held at Newbury, and sold thirty-two of them to the plaintiff for £44;" then he says that "the defendant knew that the plaintiff

was a farmer, and that the pigs would be placed with other pigs, and would also be turned into certain stubble fields."

Now with regard to the allegations in the statement of claim, undoubtedly there was no warranty, and the case in that respect is unsupported. As to the other allegation in the claim that, *simpliciter*, from the fact of his sending the pigs when they were in this state to the market, a right of action arises, that was not mainly, if at all, the ground upon which the case was rested at your Lordships' Bar. The counsel for the appellant contended that from what took place at the trial, and afterwards, any technicality founded upon the claim was out of the question, and that the appellant might succeed, if he could, by shewing that on the facts as they were proved there was any right of action on his part on any ground whatever.

The great contest at your Lordships' Bar was this: the appellant contended that the respondent had made a representation which was untrue in point of fact, and that the action lay as in the nature of an action for deceit. Now, my Lords, there can, I apprehend, be no doubt of this proposition, that if a man expressly states upon a sale, that he gives no warranty, and that the [* 21] goods *sold must be taken with all their faults, but if he goes on expressly to say, in addition to that, that so far as he knows, or believes, or has reason to believe, the goods are free from any particular fault, and that the animals (if it be animals that are sold) are free from any disease, if I say he expressly states that, and if it can afterwards be proved that to his knowledge the animals were tainted with the disease to which he referred, then there can be no doubt, that notwithstanding the negation of warranty, an action would lie for deceit for the false representation. There is no difficulty in reconciling these two express statements, viz., the one express statement that he does not warrant, and that the property must be taken with its faults, and the other express statement that so far as he knows or believes, the article sold is free from a particular fault. Upon that part of the case, even if your Lordships had heard the counsel for the respondent, there would, I think, have been no controversy.

But, my Lords, the question here is, not how two express statements of the kind that I have described are to be made to stand together, but whether in addition to the express negation of war-

ranty which I have described, there was any other representation at all.

Now, my Lords, any representation in words there clearly was not in this case. The statement, and the only statement, actually made was the one contained in the two conditions of sale which I have read. Beyond that not a word was said or is alleged to have been said on the part of the auctioneer, and the respondent never, in any way, came in contact with the appellant. But what was contended at your Lordships' Bar was this, that although there was no express representation made in words, yet there was conduct on the part of the respondent which amounted to a representation, and it was endeavoured to make that out in this way: It was said, There is an Act of Parliament, the Contagious Diseases (Animals) Act, which enacts that any person (I am stating the effect of the clause) who sends an animal having, at the time, upon it an infectious or contagious disease, to any public or open place, shall be guilty of an offence under the Act, unless he shall prove that he was not aware that the animal was so tainted with disease; and it was said, therefore, that the respondent here from the mere fact of sending his pigs into a public market must be * taken, [* 22] being of course held to be aware of the law upon the subject, to be representing that he was complying with, or at all events not infringing the law, and that the animals were not tainted with any infectious or contagious disease.

Now, my Lords, I think it always desirable to abstain as far as possible from expressing an opinion upon a case which is not actually the case under consideration, and I desire here to be held free from expressing any opinion as to what, in a case in which, there being no negation of warranty, no statement such as I have read from the two conditions of sale in this case, ought to be the law as to a man who sent his pigs to a public market knowing them at the time to be tainted with disease. I observe that in a case in the Court of Queen's Bench, *Bodger* v. *Nichols*, 28 L. T. 441, coming on appeal I think from a decision of a County Court Judge, my noble and learned friend Lord BLACKBURN (or, as he then was, Mr. Justice BLACKBURN), seems to have thrown out an opinion that in a case of that kind, there being nothing upon one side in the shape of statement or negation, and there being simply the fact of a man sending diseased animals to a public market to be sold, that must be held to be a representation by conduct that the

animals were free from disease, and that the person so sending them might be liable for the consequences of that representation, if it turned out to be untrue. My Lords, I repeat that I desire, so far as I am concerned, to hold myself unpledged if such a case had to be considered. But that, as it seems to me, is not the case which your Lordships have now to consider. Your Lordships have here to consider an actual, clear, unqualified statement, in writing, on the one hand, and no statement whatever, even in mere words upon the other hand, but an attempt to raise a conclusion as to an implied statement from conduct. The words of the statement on the one side are perfectly clear; they are that the vendor will not warrant the goods, — that they are open to inspection, that the purchaser might inspect them, and that the purchaser must take them with all their faults. Now, my Lords, I hold that in order to countervail or qualify that, and to cut it down, there must be something as clear in statement in an opposite direction.

If there had been that representation in words which I began [*23] by supposing, namely, that notwithstanding that * negation of warranty the vendor said that he believed the animals were free from disease, that might be the foundation of an action for deceit; but it seems to me that there is no authority and no principle upon which, in the face of a clear and unqualified statement on the one hand, such as I have described, that the purchaser must take the articles with all their faults, you are to raise, from the mere circumstance of his sending the animals to the market, the implication of a representation on the other hand that the animals were in the belief of the vendor free from disease.

I, therefore, my Lords, on this part of the case entirely agree with that which was the unanimous conclusion of the Court of Appeal in this case.

But, my Lords, there were some minor points in the case suggested as arguments upon which the appeal might be sustained, and I will refer to them very shortly. Your Lordships have not heard the counsel for the respondents, and possibly there might be some question whether some of those points were open, but I will take them as they were urged.

The first of these, which I call the subsidiary points in the case, was this: it was said that there was here a breach of a statutory duty, and that wherever you have a breach of a statutory duty

and any person wronged by it, the person wronged has a right of action. Now I do not stop to consider how far that proposition can be supported as a general proposition; a good deal might be said upon that subject; but it is sufficient in the present case to point out to your Lordships that the statutory duty here is of this kind; it is a duty not to send infected animals into a public place; for an obvious reason, lest they should by contact or neighbourhood taint other animals and thereby occasion injury to the public. If in that state of things some person had come forward and said, "You" [the respondent] "sent tainted animals into this public place, and my animals, in that public place, by contact or neighbourbood were infected, and I suffered a loss," then I could understand the argument. But that is not what occurred here. What occurred in the public place was the buying and the selling, and no tainting of other animals, although it is said that after the pigs became the property of the purchaser and were taken to his farm they tainted other animals which were * there. But that is not the gist of the enact- [*24] ment, and therefore it appears to me that this argument altogether fails.

The next of the subsidiary points was this: it was said that that which was sold here (this I think was rather a figurative expression than a serious argument) was not really a lot of pigs but a mass of disease — of typhoid fever. My Lords, to that all I can say is, that a pig having typhoid fever appears to me not to lose its identity any more than a man having typhoid fever ceases to be a man; and therefore the thing sold was that which it was professed to sell.

Then again it was said, and this was the last of the minor points, that what was sold here was not merely infected by disease, but was a noxious and dangerous thing, certain not only to be useless in itself but to be a source of evil and danger wherever it might be carried, and it was likened to the case of a person selling explosive substances without any warning being given to the purchaser, and without its being known or being made clear that the possession of the substances was attended with danger. My Lords, there again I should not wish to express any opinion as to how far that argument might be urged in a case where there was no express statement upon the subject of the thing sold; it is sufficient to say that it seems to me that where you have an article

sold with a statement, not merely that the vendor does not warrant it, but that the purchaser must take it with all its faults, this point really becomes a branch of the first point to which I have referred; and you cannot therefore contend that the purchaser is afterwards to be at liberty to turn round and say, "There was this fault in the article which I bought which makes it a dangerous article for me to become the possessor of."

My Lords, those were the arguments which your Lordships heard urged with great skill and ingenuity by the learned counsel on the part of the Appellant, but it appears to me that they all failed, and that the decision of the Court below ought to be affirmed. I move your Lordships, therefore, that the appeal be dismissed with costs.

Lord O'Hagan: —

My Lords, I do not regard this case as free from difficulty,
[* 25] * That it is not, the conflicting judgments we are required to consider make that very plain; but, on the whole, I see no sufficient reason for declining to concur with the Court of Appeal.

The matter, as presented for the appellant, is of the first impression. No authority supports his contention. And its success would involve the establishment of a new principle, and the recognition of a legal presumption heretofore unknown.

The statement of claim relies upon a warranty, but makes no case of deceit or fraud, or failure of consideration, and contains no averment that the plaintiff was misled by any representation of the defendant. Warranty there was none; but, on the contrary, the conditions of sale expressly declined the giving of any; and purchasers were informed that they might make what inspection they pleased before the commencement of the sale, and that no compensation would be given "in respect of any fault or error of description of any lot in the catalogue." The very ingenious and exhaustive argument of Mr. Mathews addressed itself to several points which, as I observe, were not made in the pleadings, and with which the Lord Chancellor has dealt sufficiently: but the real question is that which alone seems to have been raised and considered in the Courts below, whether the offer for sale in open market, of itself, under the circumstances proved in evidence, amounted to a representation of soundness, imposing responsibility on the defendant for the loss which the plaintiff undoubtedly

incurred? I assume, for the purpose of the argument — according to the verdict of the jury — that the defendant knew of the diseased condition of the pigs when he sent them to market; although, for my own part, having looked through the report of the trial, I am more than doubtful of the correctness of the finding in that respect. The positive testimony of the defendant to the contrary has strong corroboration in that of the inspector (a veterinary surgeon) under the Contagious Diseases (Animals) Act. He examined the pigs in the discharge of his official duty, and believed them to be perfectly sound. But taking it as proved that the animals were known by the respondent to have disease, I should not be prepared to say, even in the absence of the conditions of sale on which he relies, that the non-disclosure of the fact would, without more, have cast liability for loss upon him.

* We must deal with the law as we find it, even though [* 26] we might desire, in cases of bargain and sale, to compel more full and candid statements on peril of grave responsibility; and that law is stated thus by Judge STORY in his book on Contracts, p. 511: "The general rule both of Law and Equity, in respect to concealment is, that mere silence with regard to a material fact which there is no legal obligation to divulge, will not avoid a contract, although it may operate as an injury to the party from whom it is concealed." And again, at p. 551: "Although a vendor is bound to employ no artifice or disguise for the purpose of concealing defects in the article sold, since that would amount to a positive fraud on the vendee; yet, under the general doctrine of *caveat emptor*, he is not ordinarily bound to disclose every defect of which he may be cognisant, although his silence may operate virtually to deceive the vendee."

I take it that this is a correct statement; and, if so, as there was not in the present case any "legal obligation" to divulge the knowledge assumed to belong to the defendant, his simple failure to divulge it did not nullify the contract; and could not be taken, as the appellant insists, either as a representation of the soundness of the animals, or as a representation that he did not know them to be unsound. If the vendee bought at his own risk and in reliance on his own inspection without requiring a warranty, which he might have made the condition of his purchase, and if there was not — and no one says there was — any artifice or disguise on the part of the vendor, for the purpose of concealment, then I should be dis-

posed to hold, if it were necessary to decide upon such a state of facts, that the mere silence, which he was not asked to break, did not impose responsibility. However, the case of the respondent is different and stronger, and we are not required to pronounce such a decision.

The argument of the appellant rests upon implication and inference arising from conduct; and, no doubt, conduct may amount to representation as clearly as any form of words. But the express declaration made in the conditions of sale, in my opinion, forbade the implication and repelled the inference. The purchaser was informed that he would have no warranty, and that he was not to expect compensation for any fault. He was told to inspect [* 27] for * himself and to judge for himself, and warned that he must take the consequences of any error he might commit in making a bad bargain. He had the clearest intimation that the vendor, whatever might be his state of knowledge, expressly refused to give any help to a right decision or make any disclosure of any kind.

The legal result is stated very plainly by Lord ELLENBOROUGH in the familiar case of *Baglehole* v. *Walters*, 3 Camp. 154, 13 R. R. 778, the authority of which has never, so far as I know, been called in question: "Where an article is sold with all faults I think it is quite immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser. The very object of introducing such a stipulation is to put the purchaser on his guard, and to throw upon him the burden of examining all faults, both secret and apparent. I may be possessed of a horse I know to have many faults, and I wish to get rid of him for whatever sum he will fetch. I desire my servant to dispose of him, and instead of giving a warranty of soundness, to sell him with all faults. Having thus laboriously freed myself from responsibility, am I to be liable if it be afterwards discovered that the horse was unsound?" Now the defendant in this case did precisely what was held by Lord ELLENBOROUGH to protect a vendor against liability for all faults, "secret or apparent." And I repeat, it has not been pretended that he was guilty of any contrivance to conceal or to deceive. The condition of sale, by declining to compensate, suggested that there existed, or might exist, a state of things which, but for it, would entitle to compensation.

It at once challenged inspection, and aroused attention to the probable necessity of making it, and so left the purchaser without reason to complain.

How is the force of this authority sought to be evaded? Only, so far as I understand the argument, by reliance on the Contagious Diseases (Animals) Act. It is said that this Act, making the exposure in a market of animals affected by contagious disease a criminal offence, warrants purchasers in presuming that persons so exposing them intend to represent them, and represent them in fact, as free from such disease; and that, therefore, responsibility attaches as on a warranty created through a representation by * conduct. This is very subtle and not very tangible [*28] reasoning, and it has failed to satisfy my mind.

In the first place, the condition of sale, by its express refusal of warranty or compensation appears to me to negative the existence of any representation of the kind. It is distinct notice to all the world that there may be faults which the vendor does not choose to disclose, and for which he will not be accountable. Next, the assumption, and the gratuitous assumption is, that vendors and purchasers generally know not merely of the existence, but also of the terms of the Act, and of its penal operation, and of its effect in probably deterring the owners of unsound cattle from bringing them to sale. There may be no such knowledge, and even if it exists, what reason have we for supposing that men will not violate the law and brave its penalties, taking the risk of discovery and the chance of escape? What right or reason has anybody to presume that the dealer, by the fact of his offers to sell, demonstrates, or intends to demonstrate, his compliance with the Act, and consequently affirms the soundness of the animal?

In this case, if the jury's finding was correct, the defendant, knowing he would be guilty of a breach of the statute, subjecting him to punishment, ventured on it notwithstanding, and got off scot-free, for his pigs passed the inspector, and were pronounced to be without disease. Many similar transactions may and must take place, for obedience to the law cannot always be expected when evasion of it may be the source of profit; and I find it impossible to hold that the mere appearance of animals in a market can be reasonably presumed to imply their immunity from contagious illness in any case, and certainly not in a case in which

the owner negatives any such implication by refusing to warrant and insisting on an acceptance "with all faults."

I cannot see any real relation between the penal statute and the contract we are considering, and I agree with Lord Justice Brett that the attempt to connect them is "illusory." The Act was passed for the benefit of the general public; it has nothing to do with the bargains of particular persons.

Under such circumstances as are now before us, the presumption on which the appellant rests his claim to recover the compensation which the condition of sale forbade him to expect,
[*29] seems to me to *have no foundation in fact or law, and I concur with my noble and learned friend that the appeal should be dismissed with costs.

Lord Selborne: —

My Lords, I feel compelled to agree in the judgment moved by my noble and learned friend on the woolsack, though I confess I do so with some reluctance.

Upon the question of implied representation I have never felt any doubt. Such an implication should never be made without facts to warrant it, and here I find none, except that in sending for sale (though not in selling) these animals, a penal statute was violated. To say that every man is always to be taken to represent, in his dealings with other men, that he is not, to his knowledge, violating any statute, is a refinement which (except for the purpose of producing some particular consequence) would not I think appear reasonable to any man.

The argument which, for some time, most weighed with me was, that for a man to sell to another, without disclosing the fact, an article which he knows to be positively noxious, and which the other man does not know to be so (even though he expressly negatives warranty, and says that the purchaser must take his bargain with all faults) is an actionable wrong. I confess I should not be sorry if the law were so; but I know no authority for the proposition that such is the law, even with respect to the particular case of infectious disease in animals sold. The very nature of the condition that the buyer is to take the animals with all faults implies that they may be diseased, without any distinction between infectious and non-infectious disease; and I cannot think that the legislation, which has recently taken place in the public interest, against particular acts tending to propagate such disease, can make

that an actionable wrong, as between the parties to a private contract, which would not be so without it.

Judgment of the Court below affirmed, and appeal dismissed with costs.

Lords' Journal, 12th November, 1878.

ENGLISH NOTES.

The case of *Cooke* v. *Waring*, where sheep trespassed and communicated scab — the defendant not being proved to have knowledge of their condition — has been mentioned under No. 4, p. 113, *supra*. There the defendant clearly would have been liable for any ordinary consequence of the trespass, but he was not liable for this special damage without notice.

It does not follow from the principal case that, if the result of the sending the pigs to market had been that pigs of the plaintiff in the market were then and there infected, he would not have been entitled to a remedy on the presumed intentional injury. See per Lord Cairns, p. 126, *supra*. And in the case of *Earp* v. *Faulkner*, where the defendant placed infected sheep, *with knowledge of their condition*, in a field the fences of which were out of repair, he was held liable for the damage by infection to the plaintiff's sheep in an adjoining field into which the former sheep had strayed. *Earp* v. *Faulkner* (1876), 34 L. T. 284.

And where the defendant on the sale of a cow had warranted it sound and (as the jury found) fraudulently represented it to be free from infectious disease, though he knew at the time that it was suffering from an infectious disease; he was held liable for the death of five other cows of the plaintiff, to which the disease had been communicated, as the direct and natural consequence of his act. *Mullett* v. *Mason* (1866), L. R., 1 C. P. 559, 35 L. J. C. P. 299.

AMERICAN NOTES.

The American rule as to implied warranty of provisions is that a warranty of wholesomeness is implied on a sale for immediate consumption as food by the purchaser himself, but not so where the sale is to a dealer, either at wholesale or retail, to sell again. Benjamin on Sales, 6th Am. ed., Bennett's notes, p. 647; Browne on Sales, p. 144; *Howard* v. *Emerson*, 110 Mass. 321; 14 Am. Rep. 608; *Moses* v. *Mead*, 5 Denio (New York), 617; 43 Am. Dec. 676; *Humphreys* v. *Comline*, 8 Blackford (Indiana), 516; *Ryder* v. *Neitge*, 21 Minnesota, 70; *Sinclair* v. *Hathaway*, 57 Michigan, 60; 58 Am. Rep. 327. See note, 73 Am. Dec. 165, citing principal case.

There seem to be no American decisions exactly parallel with the principal case, but there can be no doubt of the soundness of its doctrine. There could

not be a clearer case not only of the applicability of the maxim *caveat emptor*, but of putting the buyer on his guard by a refusal to warrant and the announcement that the animals are sold "with all faults."

Two cases in inferior courts of this country may however be referred to. In *Greenly* v. *Brooks* (Kentucky Superior Court, 1892), 13 Ky. Law Reporter, 207, it was held that one who sells animals affected with a contagious disease, knowing the fact, but failing to disclose it to the buyer, is liable for the consequent infection of other animals of the buyer. And in *Court* v. *Snyder*, 2 Indiana Appeals, 440, it was held that the seller's mere concealment of the existence of the disease will not amount to fraud unless he made some statement or did some act calculated to suppress inquiry or deceive the buyer.

Mr. Bennett says (note to Benjamin on Sales, 6th Am. ed., p. 452): "If the sale is 'with all faults,' the vendor is not bound to disclose any defects, hidden or otherwise, though he must not resort to artifice to conceal them." Citing *Smith* v. *Andrews*, 8 Iredell (North Car.), 6; *Pearce* v. *Blackwell*, 12 id. 49; *Whitney* v. *Boardman*, 118 Massachusetts, 242.

No. 6. — BLOWER *v.* GREAT WESTERN RY. CO.

(C. P. 1872.)

RULE.

THE carrier of an animal, though generally subject to the liabilities of a common carrier, is excused for injury caused by the inherent vice of the animal, without negligence, or want of fitness in the means of conveyance furnished, on the part of the carrier.

Blower v. Great Western Ry. Co.

L. R., 7 C. P. 655–665 (s. c. 41 L. J. C. P. 268–272).

The points of the case sufficiently appear from the judgments which were as follows: —

[*662] *WILLES, J. This was an action brought in the county court of Monmouthshire against the Great Western Railway Company for the non-delivery of a bullock which was delivered to them at Dingestow Station to be carried by them to Northampton. The bullock was received by the company under the terms of a notice which is assailed by the plaintiff. It is unnecessary to consider whether or not the notice was a reasonable one. The question for our decision is whether the defendants, upon the facts and

No. 6. — Blower v. Great Western Ry. Co., L. R. 7 C. P. 662, 663.

findings of the county court judge, are liable as common carriers for the loss of this animal. Whether a railway company are common carriers of animals is a question upon which there has been much conflict of opinion, and although there may be difficulties in determining that question, such as induced Lord WENSLEYDALE, in *Carr* v. *Lancashire and Yorkshire Railway Co.*, 7 Ex. at pp. 712, 713; 21 L. J. Ex. 261, to make the observations which have elicited remarks from some learned judges apparently to the contrary, it may turn out after all to be a mere controversy of words. The question as to their liability may turn on the distinction between accidents which happen by reason of some vice inherent in the animals themselves or disposition producing unruliness or phrensy, and accidents which are not the result of inherent vice or unruliness of the animals themselves. It comes to much the same thing whether we say that one who carries live animals is not liable in the one event but is liable in the other, or that he is not a common carrier of them at all, because there are some accidents other than those falling within the exception of the act of God and the Queen's enemies, for which he is not responsible. By the expression "vice," I do not, of course mean moral vice in the thing itself or its owner, but only that sort of vice which by its internal development tends to the destruction or the injury of the animal or thing to be carried, and which is likely to lead to * such a result. If [*663] such a cause of destruction exists and produces that result in the course of the journey, the liability of the carrier is necessarily excluded from the contract between the parties. This becomes more clear when we consider the reason why a common carrier is liable for a loss though happening without any negligence at all on his part, unless in the case of the act of God or the Queen's enemies. The reason is so well known and so well explained by Lord WENSLEYDALE in *Wyld* v *Pickford*, 8 M. & W. 443, that it is unnecessary to add anything, or to heap up authorities on the subject. A common carrier is liable as an ordinary bailee for negligence; and he is liable for a loss occasioned by negligence, even though the act of God or of the Queen's enemies conduce to the loss. But he is further liable as an insurer for losses which occur through no negligence on his own part. It is only necessary, therefore, to observe that an insurer is not liable for accidents happening through the inherent vice of the thing insured, but only for such as happen through adventitious causes. This is well

explained in Smith's Mercantile Law, 8th ed. 354, where it is said: "The underwriters are not liable for a loss which is necessarily incidental to the property rather than occasioned by adventitious causes, such as loss by worms, *Rohl* v. *Parr*, 1 Esp. 444; 5 R. R. 741; or rats, *Hunter* v. *Potts*, 4 Camp. 203, 16 R. R. 776; or the self-ignition of damaged hemp." *Boyd* v. *Dubois*, 3 Camp. 133. So, in *Brass* v. *Maitland*, 6 E. & B. 470; 26 L. J. Q. B. 49, goods of a dangerous nature were delivered to a ship-owner to be carried, but were so packed as to conceal their real character, and in consequence of the insufficiency of the packages, other parts of the cargo were injured, and it was held by a majority of the Court of Queen's Bench that an action lay against the shippers. That case was followed by *Hutchinson* v. *Guion* 5 C. B. (N. S.) 149; 28 L. J. C. P. 63, and *Hearne* v. *Garton*, 2 E. & E. 66; 28 L. J. M. C. 216, and the same law was laid down in *Alston* v. *Herring*, 11 Ex. 822; 25 L. J. Ex. 177, with regard to goods causing corruption to themselves. The rule is very accurately laid down to the same effect in Story on Bailments, § 492 *a*, where the authorities are all collected: "Although the rule is thus laid down in general terms at the common law, that the carrier is responsible for all losses [*664] not occasioned by the * act of God or the King's enemies; yet it is to be understood in all cases that the rule does not cover any losses not within the exception which arise from the ordinary wear and tear and chafing of the goods in the course of their transportation, or from their ordinary loss, deterioration in quantity or quality in the course of the voyage, or from their inherent natural infirmity and tendency to damage, or which arise from the personal neglect, or wrong, or misconduct of the owner or shipper thereof. Thus, for example, the carrier is not liable for any loss or damage from the ordinary decay or deterioration of oranges or other fruits in the course of the voyage, from their inherent infirmity or nature, or from the ordinary diminution or evaporation of liquids, or the ordinary leakage from the casks in which the liquors are put, in the course of the voyage, or from the spontaneous combustion of goods, or from their tendency to effervescence or acidity, or from their not being properly put up and packed by the owner or shipper; for, the carrier's implied obligations do not extend to such cases." It is clear, therefore, that the key to the correct decision of the question raised in this case is given by considering the defendants as insurers who have not been guilty of

negligence. And see Angell on Carriers, § 214 *a*; Redfield on Railways 3rd ed. 129.

Was, then, what happened in the course of the journey the result of negligence on the part of the company's servants? or was it attributable to some inherent vice in the bullock which led to its own destruction? The facts found in the case seem to me to be conclusive in favour of the latter view. It is found that the bullock in question was put into a proper and sufficient truck ordinarily used by the company for the conveyance of similar cattle along their railway, and was loaded in the proper and usual way. That could not have been found unless the truck was sufficient to secure the cattle from injury from the ordinary incidents of a railway journey, including fright occasioned by their novel position and passing objects. The company are clearly bound to provide trucks that are sufficient to retain cattle under the ordinary incidents of a railway journey; but their liability in this respect extends no further: *Amies* v. *Stevens*. 1 Stra. 128. The case expressly finds that "the truck was in every respect proper and reasonably sufficient for the * conveyance of the bullock and cattle [*665] loaded therein," and that "there was no actual negligence whatever on the part of the company or their servants with reference to the bullock, or in the receiving or forwarding the same by them." Mr. Bosanquet says it is not found that the company might not have provided such trucks that no bullock *could* escape under any circumstances during the journey. The judge finds that the truck was reasonably fit for the conveyance of the animal. We cannot be led away from that finding by a suggestion that some possible form of truck might be devised which would prevent the recurrence of such an accident. I think the finding excludes the notion of negligence on the part of the company, or of the escape of the bullock arising from any other cause than its own inherent vice or restiveness or phrensy; and for such an injury the company are not responsible. I think, therefore, that the judgment should be in favour of the plaintiff for 10*s*. only.

Keating, J. I am quite of the same opinion. It is found in the strongest terms that the escape of the bullock was wholly attributable to the efforts and exertions of the animal itself, and that its escape was not occasioned by or attributable to the negligence of the company; and, further, that the truck was in every respect proper and reasonably fit for the conveyance of the bullock. It

would be extremely difficult, upon that finding, to say that the escape of the animal could fairly be attributable to anything but its own inherent vice, which induced it to make violent exertions to free itself, such as no care or vigilance on the part of the company could have guarded against.

Judgment accordingly, without costs.

ENGLISH NOTES.

A similar result was arrived at by the decision of a majority of the Court of Exchequer (Bramwell, B., and Martin, B., against Pigott, B.,) in the case of *Kendall* v. *London and South Western Railway Co.* (1872), L. R., 7 Ex. 373, 41 L. J. Ex. 184, where a saddled horse properly placed in a horse-box in the usual manner was found at the end of the journey to be injured in the forearm and fetlock. There was a condition in the contract that if any injury happened to the horse by kicking or plunging, the company were not to be liable. The evidence given on the one side was that the horse was free from vice and accustomed to travel quietly on a railway journey; and, on the other, that the train travelled without disturbance or interruption, and that there was nothing to excite the horse. Bramwell, B., and Martin, B., thought the plaintiff on this evidence not entitled to recover; Pigott, B., thought he was, on the ground that it lay upon the defendants, in order to excuse themselves, to give affirmative evidence that the damage occurred through the proper vice of the horse.

The last-mentioned judgment, as well as that in the principal case, is mentioned with approval in the judgments of Mellish, L. J., and Mellor, J., in the Court of Appeal in *Nugent* v. *Smith* (C. A. 1876), R. C., Vol. I. p. 218, No. 4 of "Accident." (1 C. P. D. 423, 45 L. J. Q. B. D. 697.)

In connection with these cases may be mentioned the case of *North Eastern Railway Co.* v. *Richardson*, or *Richardson* v. *North Eastern Railway Co.* (1872), L. R., 7 C. P. 75, 41 L. J. C. P. 60, where a valuable greyhound was delivered to the company with a collar and strap, and during a change of trains a servant of the company secured that strap to a fixture on the platform. The dog slipped the collar, and was run over by a train. It was held that, as the owner by delivering the dog with the collar and strap had indicated them as the proper means of securing him, the company were not responsible.

AMERICAN NOTES.

The rule of the principal case undoubtedly obtains in this country universally. *Agnew* v. *Steamer Contra Costa*, 27 California, 425 ; 87 Am. Dec. 87 ; *Clarke* v. *Rochester, &c. R. Co.*, 14 New York, 570 ; 67 Am. Dec. 205, and note,

208; *Maynard* v. *Syracuse, &c. R. Co.*, 71 New York, 180; 27 Am. Rep. 28; *Michigan, &c. R. Co.* v. *McDonough*, 21 Mich. 165; 4 Am. Rep. 466; *Kansas, &c. Ry. Co.* v. *Nichols*, 9 Kansas, 235; 12 Am. Rep. 494; *Louisville, &c. R. Co.* v. *Hedger*, 9 Bush (Kentucky), 645; 15 Am. Rep. 740; *Bamberg* v. *South Car. &c. R. Co.*, 9 S. C. 61; 30 Am. Rep. 13; *Evans* v. *Fitchburg R. Co.*, 111 Massachusetts, 142; 15 Am. Rep. 19; *Lindsley* v. *Chicago, &c. Ry. Co.*, 36 Minnesota, 539; 1 Am. St. Rep. 692; *Rixford* v. *Smith*, 52 New Hampshire, 355; 13 Am. Rep. 42; citing and largely quoting from the principal case. See note, 13 Am. Rep. 53. In *Clarke* v. *Rochester, &c. R. Co., supra*, Denio, Ch. J., observed: —

"But the carrier of animals, by a mode of conveyance opposed to their habits and instincts, has no such means of securing absolute safety" — as in the case of inanimate freight — "they may die of fright, or by refusing to eat, or they may, notwithstanding every precaution, destroy themselves in attempting to break away from the fastenings by which they are secured in the vehicle used to transport them, or they may kill each other. In such cases, supposing all proper care and foresight to have been exercised by the carrier, it would be unreasonable in a high degree to charge him with the loss. The reasons stated by Marshall, Ch. J., in pronouncing the judgment of the Supreme Court of the United States, in *Boyce* v. *Anderson* (2 Peters, 150), have considerable application to this case. It was held that the carrier of slaves was not an insurer of their safety, but was liable only for ordinary neglect; and this was put mainly upon the ground that he could not have the same absolute control over them that he has over inanimate matter."

No. 7. — MURPHY *v.* MANNING.

(Ex. D. 1877.)

RULE.

The cutting of cocks' combs for the purpose of exhibiting the birds as fighting-cocks — cock-fighting being unlawful, and the operation not tending to make the animal more serviceable to man — is cruel ill-treatment and torture within the Act for prevention of cruelty to animals, 12 & 13 Vict. c. 92, s. 2.

Murphy v. Manning.

2 Ex. D. 307–314 (s. c. 46 L. J. M. C. 211–214, 36 L. T. 592, 25 W. R. 540).

Case stated under 20 & 21 Vict. c. 43. [307]

At a petty sessions at Sittingbourne, in Kent, on the 17th of *January, 1876, two informations were preferred [*308] by the appellant Murphy, inspector to the Rochester and

No. 7. — Murphy v. Manning, 2 Ex. D. 308, 309.

Chatham Branch of the Royal Society for the Prevention of Cruelty to Animals. First, against Manning, veterinary surgeon, for having, on the 20th of November, 1875, at Rainham, unlawfully and cruelly illtreated three cocks; and, second, against Sayer, the owner of the cocks, for unlawfully causing them to be so ill-treated, contrary to 12 & 13 Vict. c. 92, s. 2.[1]

The appellant stated that on the 27th of November he went to Sayer's house, and saw three bantam cocks. Their combs had been cut off as closely as it could be done, and there were unhealed scabs, the effect of a wound, on their heads. Sayer said he had been told at the Crystal Palace that unless the combs were off he could obtain no prizes, which was the only reason for having it done. The next day the appellant saw Manning, and asked him as to the cutting of the combs, and he said he did it at Sayer's request for the purpose of exhibition. The appellant asked Manning if he did not consider it caused pain. Manning replied that there was a measure of pain, but he did not think it very great, it was soon over; the birds winced their heads during the cutting, and bobbed them two or three times when cut. He mentioned that he had been in the habit of doing it more or less for forty years past. On cross-examination, appellant said he could not say whether the birds were cocks or cockerels; he took them to be full-grown birds.

The police-constable stated that they looked as though they had been just recently cut. They were full-grown birds, duck-winged.

James Broad, a member of the Council of the Royal College of Veterinary Surgeons, stated that in his opinion great pain was caused to cocks in cutting their combs. The removal did not prevent the cock from suffering disease; the only object was for fighting purposes, he knew of no other cause for cutting [*309] them. * On cross-examination, he admitted that he had never done it himself nor seen it done; that it might be done in a minute. There was no portion of the comb without a nerve which communicated with the spinal cord; it was a tissue of blood-vessels.

W. H. Jones, a member of the College of Veterinary Surgeons,

[1] 12 & 13 Vict. c. 92, s. 2: "If any person shall, from and after the passing of this Act, cruelly beat, ill-treat, overdrive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal, every such offender shall, for every such offence, forfeit and pay a penalty not exceeding five pounds.

stated that in his opinion the cutting would cause pain. There were nerves separated in the cutting off the comb. The fact of their wincing showed this. On cross-examination he admitted that he had never cut a comb or seen it done, and that blood was no proof of pain. He had studied the habits of fowls.

Frederick Crook, one of the judges of the Crystal Palace poultry show, stated that it was detrimental to a cock to cut its comb. It depended upon the class in which a bird was entered, whether or no it would disqualify the bird. There were exhibition classes in which it was the practice to "dub" birds, and there were also classes in which it was the practice not to have them "dubbed."

Harrison Weir, an animal painter and artist, said he had spent a good deal of time in studying the habits of birds and animals, and, in his opinion, "dubbing" spoiled the look of the bird, and must be very painful. He would not interfere with nature.

For the respondents it was contended that the combs were cut for the purpose of the birds being exhibited, and that it was clear, from the evidence of Mr. Crook, that the practice was for game-cocks to be dubbed; that so far from the operation of dubbing being cruel, it was for the real benefit of the birds themselves, inasmuch as in case they quarrelled or fought in the fowl-pen or yard they could not pull one another by the comb, in which way they often injured themselves; and that such an act did not come within the statute.

George Barker, who was a veterinary inspector to the corporation of Gravesend, and had had sixteen years' experience in veterinary matters, said, that cutting the comb of a game-cock would decidedly not create much pain. He called a comb a fleshy excrescence, and said it had never been proved that it contained nerves communicating with the brain. He considered it an advantage to game birds to have their combs cut, as it prevented their fighting with one another. He said it was an ordinary * practice to do it in farmyards in Lincolnshire, where [*310] he had cut hundreds; it took a quarter of a minute, and the bird would eat directly, and did not appear to suffer. The comb, in his opinion, did not contain a nerve-vein, there were blood-vessels. In frosty weather the comb gets frost-bitten. He did not consider it cruelty.

The justices being of opinion that the offences charged were not of the class contemplated by the statute, dismissed the informations.

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The question for the Court is, whether their decision was right.

[After argument,]

[* 312] * Kelly, C. B. I do not hesitate to say that I am most clearly of opinion that the decision of the magistrates was wholly incorrect, and that the respondents ought to have been convicted. The first question is — Is it cruel to cut the combs of these cocks? Now I admit there are some acts which are cruel in the extreme, and no legislation can make them otherwise, yet they are perfectly lawful and not within the Act, because they are done for some lawful purpose, — as, for instance, the cutting of horses. The purpose and object may be such as to legalize acts which would otherwise be within the statute. So as to the much milder operations upon sheep and dogs, and many other cases which might be put. But I do not enter into those questions now. It is enough to deal with cases when they arise.

[* 313] The present case, with which alone * I deal, is one which causes not only pain, but torture. No one can doubt that to do it is to "cruelly abuse, torture and illtreat the animal." One witness treats it as a light matter. I disregard his evidence altogether. I entirely believe the evidence of the member of the Royal College of Veterinary Surgeons, who said it gave great pain. In cross-examination he asserted, and, I should say, was proud to assert, that he had never himself done it. The excision of the nerves from the animal's head must cause harrowing pain. We cannot define the measure, but it must be very severe. There is the obvious and visible effect of the operation on the bird. He winces, and throws his head up and down. The fact that it is quickly done does not make any difference. Let anyone try to hold his hand over a flame for two seconds, and I think he would say that half a minute, not to say a minute, was a long time for an operation of this kind. Then the question is, Is there any purpose or reason which can legalize or justify an act of such extreme barbarity? To my mind the object, as shown by the whole of the evidence, is that the animal may be used for cock-fighting. This, which was once legal, is now illegal. Taking off the combs makes them more fit for fighting. It is cruelty, and an abuse and ill-treatment, the very words in the Act. As it does not better fit the animal for the use of man, or for any other lawful or proper purpose, it is wholly unjustifiable, and is a criminal act which comes within the statute.

No. 7. — Murphy v. Manning, 3 Ex. D., 313, 314. — Notes.

Cleasby, B. The magistrates have, as I understand, found the facts and referred to us as a matter of law whether the case is within the statute. If, instead of stating the case in that way, they had found as their conclusion of fact that pain was not inflicted under such circumstances, or to such an extent as to amount to cruelty, there would have been no case for us to consider. But they have not so stated the case; therefore I think they have not drawn that conclusion. They thought, however, that the purpose for which the act was done, was such that it was one of a class of cases not within the statute, and upon this they ask our opinion. I did not agree in that conclusion.

Undoubtedly every treatment of an animal which inflicts pain, even the great pain of mutilation, and which is cruel in the * ordinary sense of the word, is not necessarily within the [*314] Act. Many cases were put in the course of the argument in which it is clearly not so. Whenever the purpose for which the act is done is to make the animal more serviceable for the use of man, the statute ought not to be held to apply. As was said by Wightman, J., in *Bridge* v. *Parsons*, 3 B. & S. 382 at p. 385; 32 L. J. M. C. 95, "the cruelty intended by the statute is the unnecessary abuse of the animal." Neither cock-fighting nor the chance of prizes at a show, nor a prize at an exhibition, is such a purpose as prevents the word "cruel" as used in the Act, from applying.

Case remitted to the magistrates with this opinion.

ENGLISH NOTES.

Both in Scotland and in Ireland the question has been raised as to whether the practice of dishorning cattle, as commonly done in certain districts, is cruelty within the Statute; and in both countries it has been held that the operation if performed with due skill and care is not cruelty within the statute. The Scotch cases are: *Renton* v. *Wilson* (1888), White Justiciary Rep. Vol. II. p. 43, and *Todrick* v. *Wilson* (1891), p. 636 of the same volume. The Irish cases are: *Callaghan* v. *Society for Prevention of Cruelty to Animals* (1885), 16 L. R., Ir. 325, — in which a similar decision was arrived at, notwithstanding a former case of *Brady* v. *McArgle* (1884), 14 L. R. Ir. 174, — and *The Queen* v. *McDonagh* (1891), 28 L. R. Ir. 204. In the former Scotch case (*Renton* v. *Wilson*) Lord Maclaren says (White Justiciary Rep. Vol. II., at p. 51 of the report): "The case here is that of a customary operation, — customary as to a considerable district of the country, and

performed with a view to a rational purpose, and under the belief that it is necessary for the well-being and control of the animals. A case combining these features cannot be regarded as one of cruelty within the Act." In the Irish case of *Callaghan* v. *Society for Prevention of Cruelty to Animals*, Morris, C. J., quotes (16 L. R. Ir. at p. 330) the language of Baron Cleasby in the principal case, as well as the remark of Mr. Justice Wightman in *Bridge* v. *Parsons* (1863), 3 B. & S. 382, 385, 32 L. J. M. C. 95: "The cruelty intended by the statute is the unnecessary abuse of any animal," and of Mr. Justice Grove in *Swan* v. *Saunders* (1881), 14 Cox Crim. Cas. 566, "unnecessary ill-usage by which the animal suffers;" and prefers the latter definition. He thought in the operation in question the pain, though temporary, was substantial, but that it could not be considered unnecessary; for the object was reasonable and adequate.

In England, however, it was held by a Divisional Court of the Queen's Bench Division (Coleridge, C. J., and Hawkins, J.,) on a case stated by Justices in Norfolk, that the practice is inexcusable. *Ford* v. *Wiley* (1889), 23 Q. B. D. 203, 58 L. J. M. C. 145. The evidence in that case was very strong and detailed as to the amount of suffering inflicted; and it was stated that the practice had been generally discontinued in Norfolk, and was not practised in other counties in England. It was further pointed out that the purpose might be substantially attained by other means which inflicted much less suffering.

The question was again (in 1891) raised in Scotland in the above-mentioned case of *Todrick* v. *Wilson* by an appeal from a judgment of acquittal pronounced by the Sheriff-Substitute at Haddington, on the ground of the conflict of opinions in Scotland and England. The case was heard by a full Court. It is reported in 2 White Justiciary Rep., p. 636. The case described the operation with minuteness, — the mode not substantially differing from that adopted in the English case. But it also found that the operation was skilfully performed; that it effectually prevents the animals from injuring each other, and is for the benefit of the cattle; and that the other remedies suggested do not so effectually prevent cattle from injuring each other. On these findings the Court unanimously affirmed the acquittal. The question was also (and subsequently to the last-mentioned Scotch case) considered in the above-mentioned case of *The Queen* v. *McDonagh* (May 4th, 1891, 28 L. R., Ir. 204) by a full Divisional Court in Ireland consisting of O'Brien, C. J., O'Brien, J., Johnson, J., Holmes, J., and Gibson, J.; and on a review of all the cases, the Court followed the case of *Callaghan* v. *Society for Prevention of Cruelty to Animals*, *supra*, and the Scotch cases of *Renton* v. *Wilson*, *supra*, and *Todrick* v. *Wilson*, *supra*, and

not those of *Brady* v. *McArgle*, *supra*, and *Ford* v. *Wiley*, *supra*. It is suggested in some of the judgments that the requirements of the Irish cattle trade may make some difference; and O'Brien, C. J., particularly observed that the circumstance of the practice having been discontinued, or not being used, in England might be evidence that it did not serve any useful purpose there; whereas there was evidence that its suppression in Ireland would cost the country half a million of money.

AMERICAN NOTES.

It was held in *Commonwealth* v. *Tilton*, 8 Metcalf (Mass.), 232, that cock-fighting is an unlawful game or sport. The court declined to pass on the contention that game-cocks are not "implements" used in gaming, but they said: "The game or sport of cock-fighting is unlawful because it is a violation alike of the prohibitions of a statute" (against "unlawful games or sports") "and of the plain dictates of the law of humanity, which is at the basis of the common law, and specially recognised in the Constitution, which makes it the duty of the legislature to 'countenance and inculcate the principles of humanity.'" "The Revised Statutes have prohibited cruelty to animals, under penalty of fine and imprisonment. But we think it is prohibited by the principles of the common law as a cruel and barbarous sport," citing *Squires* v. *Whisken*, 3 Camp. 141; *Rex* v. *Howel*, 3 Keb. 510. "As being barbarous and cruel, and tending to deaden the feelings of humanity, both in those who participate in it and those who witness it, it appears to us to stand on the same footing with bull-fighting, bear-baiting, and prize-fighting with fists or dangerous weapons, all of which, we think, would be considered as unlawful games or sports." In the same State it was held that loosing a captive fox to be hunted by dogs is "cruelty to animals." *Commonwealth* v. *Turner*, 145 Massachusetts, 296.

Many of the United States have statutes against cruelty to animals, among which is one in Massachusetts against mutilating live lobsters by severing their tails; one in Illinois against docking horses; one in Vermont against trap-shooting of live pigeons. On the other hand, in New York it is a misdemeanour to feed sparrows! See "Have Animals Rights?" 38 Cent. Law Journ. 160, citing the principal case; "The Animal Kingdom in Court," Browne's "Humorous Phases of the Law," 84; *Stephens* v. *State*, 65 Mississippi, 329. Some of the statutes prohibit cruelty to "any living creature;" and in considering a case of needlessly killing a trespassing hog (*Grise* v. *State*, 37 Arkansas, 456), the court said: These statutes "are the outgrowth of modern sentiment. They spring originally from tentative efforts of the New England colonies to enforce imperfect but well-recognised moral obligations. . . . Society could not long tolerate a system of laws which might drag to the criminal bar every lady who might impale a butterfly, or every man who might drown a litter of kittens."

There does not seem to be any American adjudication directly in point. As to shooting pigeons from a trap for sport, it was held in *Paine* v. *Bergh*,

No. 7. — Murphy v. Manning. — Notes.

1 City Ct. Rep. (N. Y.) 160, to be within the statute against cruelty to animals; but the contrary was held in *State* v. *Bogardus*, 4 Missouri Appeals, 215, and very recently in *Commonwealth* v. *Lewis*, 140 Penn. St. 261. In the last case the court said that if the defendant had killed instead of merely wounding the bird, there would have been no doubt that he would not be liable; and as he was convicted he was "punished merely for his want of skill;" and they continued: "Skill in shooting upon the wing can only be gained by practice. It is not so with inanimate objects. There accuracy of aim can be acquired by shooting at a mark. It is conceded that the sportsman in the woods may test his skill by shooting at wild birds. Why then may he not do the same with a bird confined in a cage and let out for that purpose? Is the bird in the cage any better, or has it any higher rights than the bird in the woods? Both were placed here by the Almighty for the use of man." The Court seemed to forget that the purpose can be and is often answered by shooting at glass balls flung or shot into the air.

The use of a dog on a treadmill (it does not appear for what purpose) was held not cruel. *People ex rel. Walker* v. *Special Sessions*, 4 Hun (New York Supreme Court), 441.

ANNUITY.

SECTION I. — *Duration.*

No. 1. — HOUGHTON *v.* FRANKLIN.

(CH. 1823).

RULE.

AN annuity given by will begins to run from the death of the testator; and, ordinarily, the first yearly payment is due at the end of the year from the death. But, if the annuity is directed to be paid monthly, the first monthly payment is to be made at the expiration of a month after the testator's death.

Houghton v. Franklin.

1 Sim. & St. 390–392.

Admiral Graves made two codicils to his will. In the [* 390] second codicil was contained the following bequest: —

"I give and bequeath unto Rebecca Houghton and her mother, the sum of £160 per annum, clear of all expenses; they are to be paid £13 6*s.* 8*d.* monthly. In case her mother should die first, the same to be continued to the daughter; provided that she remains single." The testator bequeathed the residue of his personal estate to the defendants, Maria Franklin and Elizabeth Edwards.

The bill was filed by Rebecca Houghton and her mother, for the usual accounts of the testator's personal estate; and to have a sufficient part of the residue appropriated for securing the annuity of £160.

In the course of the cause, a question was made as to the time from which the annuity was to commence; and that question now came on to be argued.

Mr. Pemberton for the defendants: —

An annuity given by will does not become payable until the end of a year after the testator's death. In *Gibson* v. *Bott*, (1802) 7 Ves. 89; 6 R. R. 87, the Lord Chancellor says: "If an annuity is given, the first payment is paid at the end of the year [*391] from the death." The same point came on *again before the Lord Chancellor in *Fearns* v. *Young*, 9 Ves. 549. See p. 553, in which case the Lord Chancellor states, that it was not very well settled whether the tenant for life was entitled to interest from the death, or from a year afterwards; but that, at that time, the opinion of several of the masters was, that it was not to be paid until two years. Your Honour decided the point in *Stott* v. *Hollingworth*, 3 Madd. 161; and from what your Honour says in the beginning of your judgment in *Storer* v. *Prestage*, 3 Madd. 167, it must be inferred, that unless there are express directions for the commencement of the annuity, it is not to commence until the end of one year after the testator's death.

Mr. Heald, and Mr. Swanston, for the plaintiffs: —

There is something in the report of *Fearns* v. *Young* which did not fall from the Lord Chancellor; for his Lordship is made to say, that an annuitant is no more than tenant for life. But the contrary was decided in *Bayley* v. *Bishop*, 9 Ves. 6; 7 R. R. 132. There it was held that the direction to lay out £500 in the purchase of an Annuity for the life of the testator's son, was a gift of the £500; and that, upon a bill filed, he might have received the money, and the court would not have compelled the trustees to lay it out in the purchase of an annuity. The cases cited on the other side are cases of annuities charged upon the residue; but here the annuity is prior to the residue. The expressions of the will manifest an intention of immediate payment. The direction that the annuity is to be paid by monthly payments, means [*392] *that the annuitant is to receive the first payment at the end of the first month after the testator's death; and it is impossible that the testator could mean that the first payment was to be deferred until the end of thirteen months after the testator's decease.

Mr. Pemberton, in reply, said, that there was no difference be-

tween an annuity and a legacy; for that it was as difficult to provide a fund for the payment of an annuity as it was for the payment of a legacy.

The Vice Chancellor: —

As a will speaks at the death of a testator, it must be intended that the payment of an annual sum given by it is to commence from that period, unless there be some circumstances or expression in the will to control that intention. In this will there is no such circumstance or expression; and I am, therefore, of opinion, that the payment of this annuity ought to commence from the testator's death.

ENGLISH NOTES.

In the case of *Gibson* v. *Bott*, 7 Ves. 89, 6 R. R. 87, cited in the argument, there was a bequest of residue, which included a leasehold farm and stock to be converted into money as soon as conveniently might be, upon trust to pay the interest to J. D. for life, and after her death to pay the capital to her children. The farm and stock were sold within a reasonable time (about six months from the death, during which time the value had increased). As to the other premises a sale could not be effected, from a defect of title. It was held that the tenant for life should have interest on the proceeds of the farm and stock from the date of conversion; and, it being for the benefit of all that the other property should not be sold, a value should be put on it, and the tenant for life should have interest upon that value from the death.

In *Williams* v. *Wilson* (1865), 5 New Rep. 267, where a testator gave an annuity payable by four equal quarterly payments on the usual quarter days; V. C. Stuart held that a proportional part only of the annuity was payable on the first quarter day after the decease.

In *Irvin* v. *Ironmonger* (1831), 2 Russ. & My. 531, the testator gave an annuity of £300 to his wife, "the first year's annuity to be paid within one month after my death." He gave other annuities "payable quarterly, the first quarterly payment to be made within eighteen calendar months after my death." It was held by Sir J. Leach, M. R., that the annuity to the widow was to commence from the death, and that she was to have the payment for one year made in advance at the end of one month from the death, but that she was not entitled to have the payments for subsequent years made in advance; and that the other annuities did not commence to run until fifteen months from the testator's death, so that one quarter's payment only became due at the end of the eighteen months.

In *Astley* v. *Earl of Essex* (1871), L. R., 8 Ch. 898, a testator de

vised real estate in trust to pay an annuity of £6000 to his daughter, and subject thereto directed the accumulation of rents to pay off incumbrances, and subject thereto directed a strict settlement of his estates, and directed that, as soon as the incumbrances were paid off, the annuity of £6000 should be increased to £8000. He gave his residuary personal estate in trust for payment off of the incumbrances, and to apply the surplus in the same way as the accumulated rents. He died leaving personalty amply sufficient to pay off the incumbrances. The Lords Justices James and Mellish, reversing the judgment of Lord Romilly, M. R., held that, although the trustees did not in fact for several years pay off all the incumbrances, the annuitant was entitled to £8000 a year from the testator's death.

An annuitant is not, as a rule, entitled to interest upon arrears of his annuity. *Torre* v. *Browne* (1855), 5 H. L. C. 555, 577. The claim for arrears has been refused in a suit where the payment was suspended during the progress of the suit, and although the income of the fund out of which the annuity was payable was brought into Court, and made productive: *Taylor* v. *Taylor* (1849), 8 Hare, 120. In this case the Vice Chancellor observed that the annuitant, as soon as his right was established by verdict, might have applied to have the sums accruing due in respect of the annuity set apart and accumulated pending the decree.

AMERICAN NOTES.

In *Waring* v. *Purcell*, 1 Hill Ch. (So. Carolina), 193, a testator gave to A. $500 annually to be paid out of the income of the estate on the first of March during her life. The testator died in September. Held, that "it accorded best with the intention that she should be paid on the first day of March next after his death a proportion of the annuity equal to the time that had run after his death." Followed in *M'Lemore* v. *Blocker*, Harper Ch. 272.

In *Griswold* v. *Griswold*, 4 Bradford (N. Y. Surrogate Ct.), 216, the testator directed the payment to his wife of a certain sum, during life, in equal quarterly payments on the first Mondays of January, April, July, and October, such payments to commence immediately after his death. Held, that "in the absence of any specific direction, the first payment would be at the end of a year, and according to the intention of the testator no payment was to be made on any day except those named, that they were required to be equal," and this excludes apportionment of the first instalment, and on the first Monday of October a full quarter is due.

See *Booth* v. *Ammerman*, 4 Bradford, 216, sustaining the general rule: also *Craig* v. *Craig*, 3 Barbour Chancery (New York), 76; 5 N. Y. Ch. Rep. (Lawy. Co-op. Ed. 824).

When an annuity is given by will, with a direction for payment quarterly, the first payment is to be at the end of three months from the testator's death. *Wiggin* v. *Swett*, 6 Metc. (Mass.) 194; *Phelps* v. *Culver*, 6 Vermont, 430.

No. 2. — BLEWITT *v.* ROBERTS.

(CH. 1841.)

No. 3. — STOKES *v.* HERON. (HERON *v.* STOKES.)

(H. L. 1845.)

RULE.

AN annuity given to a person by will is presumably (and apart from other indications of intention) intended to be an annuity for the life of that person.

But from the mode of gift, or context, the intention may be inferred that an annuity is to be perpetual. Such an inference may be drawn from the circumstance (*a*) that there is a gift of property to produce a certain annuity; or (*b*) that the annuity is to be enjoyed longer than the lifetime of the person to whom it is, in the first instance, given.

No. 2. — Blewitt v. Roberts.

1 Cr. & Phillips, 274–284 (s. c. 10, L. J. Ch. 342, 344).

The will of Edward Blewitt, dated the 12th of October, 1830, was partly as follows: "I give to my wife Rachael Blewitt, all my plate, linen, and furniture; and I appoint my said wife and my son Edmund Blewitt and Wightwick Roberts executors and trustees of this my will. And I give to my said wife £600 per annum for her life; but not to be liable to the control of any future husband; but to be paid quarterly, from time to time, to her, on her receipt only, and not to be subject to any debts or assignment; and after her death, the said annuity to be equally divided between Ann Rogers Blewitt, Thomas Rogers Blewitt, Henry Blewitt, Georgiana Blewitt, Byron Blewitt, and Oscar Blewitt, or the survivors or survivor. I also give to each of them, the said Ann Rogers Blewitt, Thomas Rogers Blewitt, Henry Blewitt, Georgiana Blewitt, Byron Blewitt, and Oscar Blewitt £100 per annum during their lives, to be paid quarterly, with power to leave their said respective annuities at their deaths to any persons they may marry, or any child or children they may leave; but in case of any of them dying without

exercising such power, then to the survivors or survivor. I give also to each of them, the said Thomas Rogers Blewitt, Henry Blewitt, Byron Blewitt, and Oscar Blewitt, as they arrive at twenty-one years of age, or before, if my said trustees shall think fit, £400 to put them out in life. But if either of the said last-named
[* 275] legatees * die before twenty-one years of age, or before such money be paid to him, to the survivors or survivor. All the residue of my property I give to my son Edmund Blewitt, if he should survive me. But in case of his death, to my son Reginald James Blewitt; and in case of his death also before me, to my daughter Frances Mary Ann Blewitt.

The testator died on the 8th of March, 1832, leaving his widow, Rachael, and the six other annuitants mentioned in his will, who were his illegitimate children by Rachael before their marriage, surviving him.

Shortly after the testator's death, his son Edmund having died in his lifetime, this suit was instituted by Reginald James Blewitt, as residuary legatee, against the defendant Roberts and the widow, who had proved the will, and the six illegitimate children, for the purpose of having the rights of all parties declared, and the trusts of the will administered under the direction of Court.

Pending the suit, Henry Blewitt died, unmarried; then Rachael died; and afterwards Oscar Blewitt died, also unmarried; and Ann Rogers Blewitt married Robert Stauffer. These circumstances were stated in a supplemental bill.

Upon the hearing of the cause for further directions, before the Vice Chancellor, his Honour declared, that upon the death of Rachael Blewitt an amount of stock in the three per cents. sufficient to produce the annual sum of £600, bequeathed to her during her life, became absolutely vested in and divisible in equal shares between and amongst Ann Rogers Stauffer, Thomas Rogers Blewitt,
[* 276] Georgiana Blewitt, Byron Blewitt, and Oscar * Blewitt, as being the survivors of themselves and Henry Blewitt, living at the death of Rachael Blewitt: and that, upon the death of Henry Blewitt, an amount of like stock sufficient to produce his annuity of £100, became absolutely vested in the same parties, as joint tenants: and that, upon the death of Oscar Blewitt, he not having done any act to sever the joint tenancy, his share of the last-mentioned amount of stock, as well as the amount of like stock sufficient to produce his original annuity of £100, became abso-

No. 2. — Blewitt v. Roberts, 1 Cr. & Phillips, 276–280.

lutely vested in Ann Rogers Stauffer, Thomas Rogers Blewitt, Georgiana Blewitt, and Byron Blewitt, as joint tenants.

An appeal, presented by the plaintiff, from this decree, now came on to be heard.

The appeal having been argued, —

The Lord Chancellor (Lord Cottenham): — [279]

The first gift is £600 per annum to the testator's wife, for her life; and, after her death, the said annuity to be equally divided between six persons named, or the survivors or survivor. The Vice Chancellor has decided that these six persons are entitled after the death of the widow, to so much three per cent. stock as would produce £600 per annum. His Honour has decided the same point in *Tweedale* v. *Tweedale*, 10 Sim. 453; 9 L. J. 147, and is there made to express his opinion thus: "I have always thought, that if there be a gift simply of £100 a year to A., it is a gift of that sum which shall be sufficient to produce £100 a year." The cases referred to in the argument before me of this case, do not support that proposition. In *Clough* v. *Wynne*, 2 Madd. 188, the gift was of the interest of the residue to A. for life, and at her decease to the plaintiff; and Sir Thomas Plumer held, that the *corpus* of the residue passed. Giving the interest of personalty without limitation, passes the whole interest, unless there are * words to confine it to a life interest. *Stretch* v. [*280] *Watkins*, 1 Madd. 253, decided by the same judge, was an unlimited gift of the produce of stock. A very different principle applies to that case; for as the public funds consist only of perpetual annuities an unlimited gift of the produce of stock necessarily exhausts the whole subject-matter. In *Philipps* v. *Chamberlaine*, 4 Ves. 51, Lord Alvanley thought that the terms used in the residuary clause were sufficient to carry the principal as well as the interest. In *Rawlings* v. *Jennings*, 13 Ves. 39; 9 R. R. 137, Sir W. Grant relied upon expressions showing an intention to give the capital. Those decisions are founded upon the general principle, that a gift, without limit as to time, of the produce of the fund, amounts to a gift of the fund itself; and when it is clear that the gift of the produce of the fund is without limit as to time, it is impossible not to adopt the conclusion that the fund itself is given; but if expressions are to be found showing an intention that the gift of the produce should be limited as to time, such limit will be the measure of the gift.

No. 2. — Blewitt v. Roberts, 1 Cr. & Phillips, 280, 281.

There is a marked distinction between the gift of the produce of a fund without limit as to time, and a simple gift of an annuity. An annuity may be perpetual, or for life, or for any period of years; but, in the ordinary acceptation of the term used, if it should be said that a testator had left another an annuity of £100 per annum, no doubt would occur of the gift being an annuity for the life of the donee. It is the gift of an annual sum of £100; that is, of as many sums of £100 as the donee shall live years. In *Savery* v. *Dyer*, Amb. 139, Lord HARDWICKE, says: "If one give by will an annuity not existing before, to A., A. shall have it only for life." In that [*281] case, the gift was of an annuity to A. during the *life of B., and B. having survived A., the question was, whether the annuity had ceased, notwithstanding the express provision that it should be during the life of B.

It is singular that no other case has been referred to, in which this question distinctly arose; but in *Innes* v. *Mitchell*, 6 Ves. 464; 5 R. R. 360, before Sir W. GRANT, and before Lord ELDON,[1] upon appeal, the annuity was held to be for life only, although there were provisions leading more strongly than any thing in this case to an inference that the capital was intended to be given, such as the direction as to the £5000; without that direction the gift would be of an annuity of £200 to the use of a mother and her children, for her and their use, and the longest liver of her and her children, subject to an equal division of the interest while more than one of them should live, a gift not very dissimilar from the present; and both those very able judges held that the annuity determined with the life of the survivor. If the gift simply of an annuity of £100 to A. is a gift of that sum which shall be sufficient to produce £100 a year, there was sufficient in *Innes* v. *Mitchell* to give to the mother and her children such a sum as would be sufficient to produce £200 per annum, without reference to the provision as to the £5000; and yet, notwithstanding that provision, it was held that there was no gift of any principal sum. It seems to have been supposed, that the direction that there should be an equal division of the annuity, implied that the principal

[1] 9 Ves. 212; 7 R. R. 163. The bequest in that case was as follows: "I give to Mrs. Janet Innes, relict of my late nephew Alexander Innes, £200 per annum for the use of herself and children; which annuity is to be paid out of my general effects until it is convenient to my executors to invest £5000 in the funds, in lieu thereof, for her and their use, and to the longest liver of her and her children, subject to an equal division of the interest while more than one of them alive."

* producing the annuity was to be the subject-matter of [*282] the division; but there was a similar direction in *Innes* v. *Mitchell*, and in *Jones* v. *Randall*, 1 Jac. & Walker, 100; and yet, in neither of those cases, was there any gift of the principal.

It does not appear to me that there is any inconsistency in the cases. To hold that a simple gift of an annuity to A. does not give an annuity beyond the life of A., is not inconsistent with holding that a gift of the produce of a fund without limit as to time gives the fund itself. In the former case, there is no allusion to any principal sum. It is, indeed, the course of this court to secure an annuity by investing a capital sum; but a testator with an income much exceeding the annuity given is not very likely to contemplate any such investment. He may, indeed, be without the immediate means of making it; as, for instance, if his whole property consisted of long leaseholds. If a testator were minded to give £10,000, can it be supposed that he would set about effecting this object by giving £500 per annum to the intended legatee, without making any mention of the £10,000, or of any other capital sum? To carry into effect the gift of an annuity of £500 by raising £10,000 out of the estate, would, probably, be very foreign from the testator's intention. I feel no disposition to question the doctrine laid down by Lord HARDWICKE, and followed in the cases I have referred to; and if I did, I should not feel at liberty to depart from a rule established upon such authority.

The petition of appeal contains a claim, on the part of the residuary legatee, to the sixth part of the annuities given to Henry Blewitt, who died in the lifetime of the tenant for life; but it appears to me that as to the £600 per annum, the five survivors are entitled to the * whole as tenants in common. [*283] The gift is to the mother for life, and after her death, to the six children, equally to be divided between them, or the survivors or survivor. The subject-matter of the gift is an annuity of £600, and the period of division was the death of the mother, and to that period the survivorship refers, and at that time there were but five living. The same result attaches to the £100 per annum given to Henry, although for a different reason, for in that gift there was no prior estate for life, but the survivorship is between the annuitants, in case of any of them dying without exercising the power given.

The VICE CHANCELLOR'S decree must be reversed, and a declaration to the above effect substituted.

No. 3. — Stokes v. Heron.

12 Cl. & Fin. 161–203.

[161] William Heron, late of Dublin, Esq., deceased, on the 8th of June, 1815, made his will, which was throughout in his own handwriting (executed so as to pass personal
[* 162] * estate), and which contained, among others, the following clauses: —

"My will is, that whatever I die possessed of, or any way entitled to, together with whatever property my wife may be any way entitled to, shall produce to my wife an annuity of £100 per annum, — to each of my daughters £100 per annum, for themselves and their children, — to my wife's mother an addition to any property she may possess, so as to make up to her during her life an annuity of £100 per annum, — said annuities, after the decease of my wife and her mother, to be equally divided among my three children, William, Mary, and Julia Louisa, but my will is that my wife and her mother shall enjoy their annuities as above for their lives and the life of the survivor of them, so that the survivor of them shall possess an annuity of £200 per annum, to be after the decease of both equally divided between my three children; all the rest and residue of my property or possessions I give and bequeath to my son William."

Mary Heron, one of the children of the testator, having died after the making of this will, unmarried and without issue, the testator, after her death, on the 24th May, 1817, made a codicil in the following words: —

"It having pleased Almighty Providence to take away my daughter Mary, it becomes necessary to alter the disposition of my property, after my decease, as far as relates to her. I therefore now declare it to be my will, and I hereby direct that the £100 per annum, &c., provided as within directed for my daughter Mary, shall be divided equally between my daughter Julia Louisa, and my son William, and that my will as within expressed shall remain in all other respects unaltered."

The mother of the testator's wife having died in the year 1822, the testator, on the 4th of July, 1829, made another codicil in the words following: —

"And in case my son William shall die without leaving
[* 163] * issue male, lawfully begotten, my will is, that, after the

No. 3. — Stokes v. Heron, 12 Cl. & Fin. 163, 164.

decease of my wife Mary, and my daughter Julia Louisa, my remaining property shall then be equally divided between my sister Anne Owen, and any daughters by George Taylor Owen, her present husband, she may have then living, and my sister-in-law Charlotte Heron, widow of my late brother Edward, and any children she may have by my late brother Edward, then living, share and share alike."

On the 15th July, 1829, the testator made a third codicil in the words following:—

"If under any circumstances the whole of the property I leave should fail to produce to my son William an annuity equivalent to that bequeathed to my daughter Julia Louisa,— viz., £150 per year, it is my will that the actual amount of income, whatever that may be, shall then be divided into ten equal parts, four of which parts shall be paid to my wife Mary, and three parts to my daughter Julia Louisa, and the remaining three parts to my son William, this arrangement to continue until the income shall afford the full annuities of £200 to my wife Mary, £150 per year to my daughter Julia Lousia, and at least £150 per year to my son William."

The testator died in October, 1831, without having altered or revoked his will or codicils, leaving Mary Heron, his widow, and William, and Julia Louisa Heron, his only children and next of kin him surviving, and leaving only personal property which exceeded in value £10,000.

Mary Heron, the widow of the testator, shortly after his death proved his will and codicils in the Court of Prerogative in Ireland, obtained probate, and possessed herself of all the personal estate and effects of the testator.

In November, 1832, his son William died intestate, unmarried, and without issue, and Mary Heron, the testator's
* widow, obtained administration of his goods and chattels. [* 164]

Anne Owen, the sister of the testator, and named in the codicil of the 4th day of July, 1829, died in July, 1832, intestate, leaving two children, Charlotte Owen, and Julia Owen, her surviving, by George Taylor Owen, in the codicil named.

After the death of the testator William Heron, his daughter, Julia Louisa Heron, intermarried with the appellant John Stokes, previously to which a settlement, dated 11th November, 1831, was executed, whereby the annuity devised to Julia Louisa Heron, by

the testator, and all properties which she could have or claim under the testator's will, were vested in trustees for her own and her husband's use for life, and then to the issue of the marriage. The appellant, Louisa Stokes, was the only issue of this marriage. Mary Heron, the testator's widow, and Julia Louisa, his daughter and the wife of John Stokes, both died in October, 1834.

A bill was filed in the Court of Chancery in Ireland, by the respondents against the appellants, to carry into effect the trusts of the will, the object of this suit being (among other things) to obtain the opinion of the court on the question, whether the annuities were to be considered, under the terms of the will and codicils taken together, as perpetual or only as life annuities. In February, 1841, Lord PLUNKET pronounced a decree, 3 Ir. Eq. Rep. 163, to the effect that they should be considered perpetual annuities. The cause was afterwards reheard before Lord Chancellor SUGDEN, and on the 4th Feb., 1842, his Lordship pronounced a decree, 4 Ir. Eq., Rep. 284; 1 Connor and Lawson, 270; 2 Drury and War. 89, reversing the decree of Lord PLUNKET, and declaring that the several annuities ceased and determined on the death of Julia Louisa Stokes, and that the several
[* 165] chattels and other properties * of the testator had, by the deaths of Julia Louisa Stokes and her mother, Mary Heron, and the death of her brother, William Heron, without leaving issue male, become distributable as part of the residuary property of the testator. This was the decree appealed against.

The appeal having been argued,

[* 176] * Lord BROUGHAM. — My Lords, in this case, which arises upon the construction of a will not very artificially framed, — apparently drawn without professional assistance, — the question, and the only question before your Lordships, brought here by appeal from the decision of the present LORD CHANCELLOR of Ireland, reversing a decree of the late LORD CHANCELLOR of Ireland, arises upon the interests taken by certain legatees, annuitants under that will, with three codicils thereunto annexed. The question is, whether or not the annuities taken under those gifts in the will and codicils are in perpetuity, or for the lives of the grantees (legatees) only.

My Lords, this case appears to have undergone great consideration below; to have been fully argued in the first place at the Bar, upon the two several occasions in 1839 and 1841, when it

came before the Court; and to have received also great consideration from the two learned Judges, — Lord PLUNKET in the first instance, and Lord Chancellor SUGDEN in the last. It therefore became your Lordships (and accordingly your Lordships took that course) to pause before giving your opinion, placed as you found yourselves, which way soever you should decide, in the predicament of negativing the conclusion at which one learned Judge below, in very high station, had arrived. *If you [*177] affirmed the decision, and gave judgment for the respondents, you concurred in a judgment negativing the doctrine laid down, and refusing to adopt the conclusion arrived at by Lord PLUNKET: if, upon the other hand, you reversed the decision, and gave your decision for the appellants, you equally (though affirming the decision of Lord PLUNKET) reversed the decision of a learned Judge of high station in the Court below, the present LORD CHANCELLOR. For these reasons the judgment to be given became matter of anxious deliberation with your Lordships, both during the argument and subsequently at its close; and your Lordships naturally took time to consider which of the two decrees you should pronounce, beset as each course was with considerable difficulty.

I must say, however, that the difficulty which I have now stated is the only one which, upon a full consideration of the matter, I have been able to find embarrassing our proceedings; for when you come to construe this will, with its codicils, — when you examine the instrument itself, and the authorities which have been appealed to, — I really do not consider that it is a doubtful matter which way the testator intended, and which way you must conclude and decree, that the annuities should be enjoyed by the legatees.

My Lords, when you look to the first position laid down in both the judgments below, you find additional reason for holding that it is clear and free from all reasonable doubt, which conclusion you should adopt. Here there is no difference between those learned Judges, except as to the grounds of their opinion; for both have arrived at the same conclusion upon that which I hold to lie at the foundation of this case, and to be most important, indeed to be decisive of the question, — namely, the interest given by the will itself, which here, as in all such cases, is more or less to be taken as the primary and governing *instru- [*178]

ment. Both the learned Judges agree as to the interest given by the will itself, and which would most undeniably have been admitted to be taken by the legatees if the will had stood alone, no codicils being annexed to it. It is very material to find, and very comfortable to those who have now to decide the case, that both those learned Judges held that the will by its constitution gave a perpetuity in the annuities; both agree that this perpetuity must have been taken under the will had there been no codicil afterwards to alter or explain it. It is true that the two learned Judges arrived at this conclusion by different paths. Lord PLUNKET held that it rests mainly upon the rule in *Wild's Case*, 6 Co. Rep. 17; whereas Lord Chancellor SUGDEN, from whom the appeal immediately comes, though agreeing in the conclusion, will not rest it upon the rule in *Wild's Case*, but upon the first portion of the will, which lays down the constitution, according to him, of this annuity. The will says, "That whatever I die possessed of, or in any way entitled to, together with whatever property my wife may be any way entitled to, shall produce to my wife an annuity of £100 per annum, — to each of my daughters £100 per annum, for themselves and their children, — to my wife's mother, in addition to any property she may possess, so as to make up to her during her life an annuity of £100 per annum, — said annuities, after the decease of my wife and her mother, to be equally divided among my three children, William, Mary, and Julia Louisa; but my will is, that my wife and her mother shall enjoy their annuities as above for their lives and the life of the survivor of them, so that the survivor of them shall possess an annuity of £200 per annum." And then he disposes of the residue.

Now this which I have read includes both the ground taken by Lord PLUNKET and that taken by Sir EDWARD SUGDEN;
[*179] *Sir EDWARD SUGDEN, rejecting that which is founded upon these words, "to each of my daughters £100 per annum for themselves and their children." Lord PLUNKET upon these words applies the rule in *Wild's Case*. Sir EDWARD SUGDEN rejecting that rule in its application to personalty, or feeling so strong an inclination to refuse such application that he will not rely upon it, rests his opinion in favour of the perpetuity upon the words, "My will is, that whatever I die possessed of, or any way entitled to, shall produce to my wife £100 a year, and to each of

my daughters and their children £100 a year." My Lords, this makes it the less necessary to inquire which of the two grounds is the safer whereupon to rest this inference, because *quaecunque ria data* there is the conclusion in favour of a perpetuity adopted by both those learned Judges. But I think it right to state, that having much considered this question, and looked into the grounds of Lord Chancellor SUGDEN'S refusal to extend the rule in *Wild's Case* to personalty, I have not been able to follow him in that opinion. In his very able judgment, — I mean the second part of it, — that which he gave upon the 4th of February, after he had more thoroughly considered the cases, — he says, 2 Dru. & War. 106, "I should have felt a strong disinclination to apply the rule in *Wild's Case* without necessity, to personal estate. In later times, in the case of *Knight* v. *Ellis*, an example has been set of a similar disinclination" Now when you look to *Knight* v. *Ellis*, 2 Brown's Ch. Cas. 570, you find no such evidence of any disinclination to extend the rule in *Wild's Case*. I have read it with very great care; I have spelt every part of the judgment. I will not say that either that which is decided by Lord THURLOW, or the words he uses in giving that decision, are inconsistent with the supposition of his having felt the disinclination ascribed to him, nor will I say that the case does extend the rule in *Wild's Case* to personalty; but I cannot find, *from first [*180] to last, in Lord THURLOW'S judgment, — either in the thing decided or the language used in deciding it, — anything betokening a disinclination to apply the rule in *Wild's Case* to personalty. On the contrary, *Wild's Case* is never actually referred to in *Knight* v. *Ellis;* it is not mentioned; nor is any reference made to the rule. The case may be consistent with such a disinclination; but the report in Brown, which is fuller perhaps than is usual with that meagre and unsatisfactory reporter, gives no such indication. In the argument at the Bar, undoubtedly, there is a remark thrown out, with reference rather to *Sonday's Case*, 9 Co. Rep. 127, than to *Wild's Case*, for *Wild's Case* is not even mentioned at the Bar; there is something thrown out by the counsel of a difference between real and personal property, but not a word is to be found in the judgment, nor in the several interruptions of the counsel by the Court during the progress of the argument.

It is then said by Lord Chancellor SUGDEN that Lord PLUNKET

had laboured under a misapprehension of *Wild's Case*. I must really, in justice to that learned person, state that this is altogether a mistake; for he laboured under no misapprehension whatever. Sir EDWARD SUGDEN states the mistake to be this, that Lord PLUNKET appeared to have considered the cases to be perfectly analogous, while there is really a great distinction between them. Here, says Sir EDWARD, the gift is to them and their children, all in one sentence; but in *Wild's Case*, he says, the gift was to one and his wife, and after their decease to their children. The mistake is Lord Chancellor SUGDEN'S, and not Lord Chancellor PLUNKET'S. The rule in *Wild's Case*, — not that part which is the case then at bar, namely, where the children are alive at the time, which is the only point actually decided, — but the rule in *Wild's Case*, or what is called the rule in *Wild's Case*, as regards unborn issue, is the resolution stated, not
[* 181] * respecting the case then at Bar, but respecting a case which is put by the Court.

Now upon looking at that case so put, and to which alone the rule applies, your Lordships will find that Lord PLUNKET is perfectly accurate, — as accurate as it is possible to be, — in his reference to the case. Sir EDWARD SUGDEN thinks that the resolution respecting unborn issue (which is all we have to do with here) was with respect to a gift to one and his wife, and after their decease to their children. It is no such thing; and I will read to your Lordships what the rule in *Wild's Case* is. "It was resolved for good law," — this is the rule in question as regards unborn issue, — "that if A. devise his lands to B. and to his children or issues." That is exactly the case now at Bar; it is not to B. first, and then to the children. It is perfectly true that if you look to the margin, which goes upon the case before the Court, and not upon the second resolution, it says, "devise to A. for life, remainder to B. and the heirs of his body, remainder to W. and his wife, and after their decease to their children." That was the case then before the Court; but it was not the case upon which the rule respecting unborn issue was laid down. Lord PLUNKET, not confining himself to the margin, which is the work, not of Lord COKE, but of his editor, goes to the words of Lord COKE himself, and finds it said, "It was resolved for good law, that if A. devise his lands to B." — not to his children after his decease, but to B., — "and his children or issues," then so

and so. Therefore it is quite clear that Lord PLUNKET is perfectly right in his statement of the rule in *Wild's Case*, and that Sir EDWARD SUGDEN thought him wrong, probably by looking to the margin instead of the case. Be the cause of his mistake, however, what it may, it is he that has fallen into an error, and not Lord PLUNKET; nevertheless, it may very well be that the rule is confined to land, because undeniably *Wild's Case* is one arising upon real estate. But all I wished to add was, that there * is no authority, either for saying that Lord [* 182] PLUNKET mistook *Wild's Case*, or that *Knight* v. *Ellis*, 2 Brow. Ch. Cas. 510, betokened a disinclination of Lord THURLOW to apply *Wild's Case* to personalty.

And, my Lords, it is remarkable, that not only the second resolution in *Wild's Case*, but the case cited by Serjeant Bendloes, Bendl., Case 124, p. 30, which is quoted by the Court in *Wild's Case* almost as an authority for the rule then laid down, is exactly of the same kind with the one now before us, except as regards the nature of the property; for the Serjeant's case was that of one devising land " to husband and wife, and to the men children of their bodies begotten; " not after their decease, as Sir EDWARD SUGDEN supposed *Wild's Case* to be, but precisely as in the present will; and this fortifies my statement of Lord PLUNKET having been quite correct in his statement of that old case.

It is remarkable that in those other cases, to which your Lordships may refer, you will find that there is no disinclination expressed to extend the rule; nay, I should say, that, taking the cases altogether, — and I have carefully gone through them, as it was my duty to do, out of respect for the learned Judge below, and the great importance of the question generally, — I can find no reason to doubt that they seem to have assumed, both at the Bar and upon the Bench, generally speaking, — I will not say in every instance, but generally, — they seem to have assumed that the rule in *Wild's Case* was not confined to real estate. Your Lordships will find, — for instance, in *Ex parte Williams*, 1 Jac. & W. 89, — that no distinction is taken between real and personal estate as to the application of *Wild's Case*. So in *Royale* v. *Hamilton*, 4 Ves. 437, no distinction is taken. The MASTER OF THE ROLLS argues there much in the same way as we have argued here, though personalty was in question, * on the [* 183] application of the rule, — that is to say, upon the prin-

ciple of the rule, — I don't recollect whether or not he mentions the rule, but he argues much in the same way as we do here, upon the absurd and unjust consequences that would follow from not giving the absolute interest in personalty or the estate tail in land.

My Lords, another case, of *Crone* v. *Odell*, 1 Ball & B. 449; 3 Dow, 61, 15 R. R. 20, appears to have been much considered in the Court below, where a bill was filed to establish the rights of legatees to both real and personal property, and where the Lord Chancellor, in 1811, had the assistance of the learned Lord Chief Justice (Downes), who went very fully into the question, and gave a very distinct abstract, — and, I should say, an authoritative abstract, — of the doctrine referring to *Wild's Case;* and in the whole of that argument I observe that no distinction whatever is taken between realty and personalty; it is true the attention of the Court was mainly directed to a disputed real succession; but no such distinction whatever was taken.

Then, my Lords, we were told that in the case of *Buffar* v. *Bradford*, 2 Atk. 220, Lord Hardwicke inclined to deny the application of *Wild's Case* to personal estate; and that, I find in one or two text writers, is the prevailing opinion, sanctioning Sir Edward Sugden's notion that such a doctrine is to be extracted from that case. When I look to that case itself, however, I really cannot say that I think Lord Chancellor Hardwicke has there clearly laid down any such thing. In the 3d paragraph of the 222d page, no doubt, there are words that look like an indication of such opinion being held by his Lordship; but the remarkable part of it is what follows in the next paragraph. "It is the time of possession," says his Lordship, "in the present case, which takes it out of the reasoning in *Wild's Case;* [*184] for here Mrs. Buffar and her children are to have *four-eighths, and are to take at the same time as joint tenants." Now, if Lord Hardwicke had been of opinion that the rule in *Wild's Case* did not apply to personalty, he would not have given this reason at all, but he would have said at once, "Why, this case has no application here, because I am of opinion that it does not apply to personalty." Instead of which he says, "It is the time of possession in the present case" (a totally different consideration) "which takes it out of the reasoning in *Wild's Case.*"

My Lords, I ought also to add, that there is a case of *Doe* d. *Gigg* v. *Bradley*, 16 East, 399, which arose upon leasehold. It

was upon the limitation of a term to S. K.'s children, "share and share alike, and the survivor thereof" (of those children) "and their children," which are just the words now in question. It was held "that the children took an absolute interest in the term," — a chattel interest, — share and share alike, subject to survivorship for lives. That does not, therefore, go at all against the application of the rule; on the contrary, it rather favours it; and I find that in one of the arguments at the Bar, *Wild's Case* is referred to, though it is not referred to in the judgment given by Lord ELLENBOROUGH. It is therefore quite clear that *Wild's Case* was brought before the Court; and I see nothing whatever in the course of the argument upon the Bench to distinguish it, and to take the case of personalty, or chattel interest, out of the application of the rule; and the decision was in accordance with the rule. There was cited also *Oates* v. *Jackson*, 2 Str. 1172, which is another case upon the same point.

My Lords, with respect to *Blewitt* v. *Roberts*, 10 Sim. 491; 1 Craig & Ph. 274, 10 L. J. Ch. 342, *ante*, p. 151, there were two matters in that case disposed of. It does not at all decide the question of the application of *Wild's Case*; but *there [*185] were two matters disposed of. The VICE CHANCELLOR had taken a view of the subject which appeared to the LORD CHANCELLOR, my noble and learned friend near me, to be untenable, namely, that without those words an annuity was a perpetual interest. Now that is a very different thing from applying the rule in *Wild's Case*, where the words exist, and the LORD CHANCELLOR (in which I should have entirely agreed) says, "I do not see how this could be a perpetuity;" but then the rest of the decision, though it does not bear immediately and decisively upon the present question, is much more in favour of the application of the rule than against it. It certainly cannot be said that in reversing that decision of the VICE CHANCELLOR his Lordship at all broke in upon the principle, that the rule in *Wild's Case* is of a general application.

For these reasons, therefore, I certainly agree with Lord Chancellor PLUNKET, that the rule in *Wild's Case* of itself, is applicable to personalty; and this is enough to support his decision as to the two daughters. But the terms of the will being sufficient, independent of the rule, to support the conclusion that, had the will stood alone, it would have given a perpetuity, and not a life

interest, it becomes unnecessary for your Lordships to decide whether the rule in *Wild's Case* applies to the present case or not. I have thought it my duty, from the sincere and unfeigned respect which I feel for that most eminent person Lord PLUNKET, to state that my opinion agrees with his. But I agree also with Sir EDWARD SUGDEN entirely, that even if the rule in *Wild's Case* was out of the question, the words are sufficient in that which forms the constitution of the annuity, — the first words of the will, — to give a perpetuity of themselves.

Then, that being the case, we have made a very material step, and we have by means of that step put our foot upon a ground of great importance in disposing of the whole construction; [* 186] because our position amounts to this, that * but for something in the codicil the whole would be clear; and we have the concurrence of both learned Judges, — conflicting upon the ultimate conclusion they arrived at after construing the codicils, — differing in the route by which they came at this first or intermediate conclusion, — we, nevertheless, have them agreeing in the proposition, that the will standing alone gives a perpetuity, and not a life interest.

Then I take leave to make another step. My opinion is, that if you find the will so clear by itself, and the perpetuity so irrefragably established by that will, in order to restrict that perpetuity to a life estate, — in order to alter the will, — in order to revoke the gift of the perpetuity, the codicil must be found to be clear and unincumbered with doubt, because the will, standing clear and unincumbered with doubt, cannot otherwise be altered, — cannot otherwise be revoked. The interest by the will given cannot be cut down to a life interest, unless by clear and undoubted matter in the codicil, — " by indication plain," as was said by the Court in a celebrated case, — " by indication plain " of a contrary intention to what prevailed at the time of making the will. There must appear clearly to have been in the mind of the testator, when he made the codicil, an intention opposite to that which he had when he made the will. For I am entitled to deny that the will is doubtful, when both those learned Judges, though upon different grounds, held it clear. Moreover, even if I admit that there is a doubt on the gift in the will, before I can hold the decision below to be right, I must see that the codicil quite clearly explains that doubt; otherwise we are

still in the doubt that the will left us in. But in truth no one says there is a doubt; all agree that, standing by itself, a perpetuity was constituted by the will; consequently the codicil must be undeniably sufficient to alter that original gift, and cut it down to a life interest, else the gift as originally made must stand. This is quite plain and undeniable.

* We come now, therefore, to the codicil. He had given [* 187] William his annuity and the residue by the will. Then, passing over the first codicil, you come to the second, upon which the decree below mainly rests. "And in case my son William shall die without leaving issue male lawfully begotten, my will is, that after the decease of my wife Mary and my daughter Julia Louisa, my remaining property shall then be equally divided between my sister Anne Owen and any daughters by George Taylor Owen, her present husband, she may have then living, and my sister-in-law Charlotte Heron." In short, he gives it away from his issue to his sisters. At first I thought there was very little in the argument, and that it savoured of refinement, which was raised upon the use of the word "and;" but upon further consideration I incline to go along with that view. I do not think it necessary for the case; but still I think it aids it. No doubt, having given a perpetuity in the will, if he meant to alter and revoke it, cutting a perpetuity down to a life interest, he would much more naturally, be he a learned or be he an unlearned maker of an instrument, have begun with any other word rather than the word "and;" for "and" means besides — in addition to — add this — not except this, or nevertheless, but add what is to follow; such is the use of the word in common parlance; it is, "and moreover," "over and above this," or, "besides;" I mean to give something more. It savours much more of an intention to add to than to take away, — to enlarge rather than to cut down, — to extend rather than to contract what had been given before. If a man had given at first a large estate, and then meant to give a much less one, — if, having first given an absolute interest, he afterwards chose to make it an interest for life, he would be much more likely to say, "Whereas I have given so and so by my will, observe, I only now mean to give so much less." I therefore think the * observation [* 188] upon the connecting word "and" aids the argument; I think that it was properly made.

But, my Lords, the thing does not rest upon that, because it is not necessary to show, — and it is not upon those who maintain the appellant's contention in this case to show, — that the codicil meant to add or meant to confirm what was given in the will; for unless the codicil revokes, — unless the codicil retracts, unless the codicil alters the will, the will shall stand: that is perfectly clear. Now does it alter or retract? It seems to me the most forced construction that can be put upon it, the one which does the greatest possible violence to the words used, and to the manifest intention which they show forth, is to hold, as was done below, that this is an alteration or a revocation of the will, and changes the estate first given into a life estate. "After the decease of my wife, if my son William shall die without issue male lawfully begotten, and my daughter Julia Louisa shall also die, my remaining property shall be equally divided between my nieces." Can anything be conceived less likely than that a person, having given a perpetuity to provide for his own issue and their descendants, should all at once cut it down to a life interest, upon what event? — the death of one of the takers without issue male. Why was the death of William, with issue male or without issue male, — above all things without issue male, which makes it still more inconceivable, — why was that event to make an alteration in the gift already made to the others? The things are totally unconnected. One does not see any possibility of even coupling them, much less connecting them together; they are events foreign to each other; they are interests utterly unconnected one with another; and yet the construction is, that having given a perpetuity to A. and B., two of his children, he cuts that down to a life interest, because C., a third child, dies [*189] without leaving issue male. It is a *thing perfectly unintelligible; and that seems to have struck the Lord Chancellor, for in going over it he refers to it, and says, "then upon a certain contingency" (which he does not name, but it is plainly the one I have mentioned, namely, the son William dying without issue male), — "then upon a certain contingency, not perhaps a very wise one." That is an error of the reporter, because of a contingency you cannot predicate wisdom or foolishness; but it means not a very wisely considered contingency. His Lordship, in all probability, said, "upon the view of a certain contingency, not perhaps a very wise view;" and that

is quite intelligible. No doubt he might very well say that, because it is very far from being a wise view, that I should give my two daughters a perpetuity, but declare that it shall be cut down to a life interest *in pœnam*, not of anything they shall do, but in *in pœnam* of my son William, to whom I also give a perpetuity, dying without issue male. This is really so far from being wise, that it seems to be perfectly unintelligible. Now observe, the whole argument of the LORD CHANCELLOR of Ireland proceeds, and must of necessity proceed, upon the assumption, that "my remaining property" means one thing, and one thing only, namely, all that I have given, except what I have given William; all the rest of my estate already given; because nothing else will take it out of Julia Louisa and the other. Upon the death of my wife and Julia Louisa all my property shall be equally divided, including the residue, subject to their life interest and that which I have given by my will to the two daughters. If you can believe that the words "remaining property" mean "everything beyond the life interest that I have given in my will,"— if you can supply all those words, and say that he means thereby to give that excess to the collaterals, to the nephews and nieces, — then you can understand that this revokes the grant in the will. But if you do not believe that, you do not advance a hair's * breadth towards the conclusion at which [* 190] the Court below arrived, namely, an alteration and revoking of the gift in the will. Moreover, you must be quite sure that such is the meaning, and that the words "my remaining property" can have none other; because the will is clear, and you cannot revoke or alter it unless the codicil is a clear alteration. Sir EDWARD SUGDEN considers "remaining property" to include, not merely the residue given to William, for whose death without issue male he was providing, but all that he had before given in the will to the other children beyond their life interest. How can the words "remaining property" possibly mean any such thing? How can words clearly residuary dispose of particular gifts made, and made before you have any right to talk of a residue at all? Can anything be more clear than that, having given a residue to William, when he is providing for the event of William's decease, he disposes of that residue by the not inappropriate words "remaining property"?

My Lords, I ought to have mentioned, before I dismissed the

consideration of *Wild's Case*, that the rule (which nobody disputes, which Sir EDWARD SUGDEN expressly acknowledges himself, and which every lawyer must admit), the rule that words which would give an estate tail in real property, if applied to personalty, give an absolute interest, has always gone upon the assumption that such words as are used in *Wild's Case*, and such words as are used in this case, if they would convey an estate in realty, would pass an absolute interest in personalty. That is the common rule; it is admitted upon all hands to be an undeniable principle of law; none of the cases will ever be found to go against it, and Sir EDWARD SUGDEN himself admits it to be the law; yet this rule really appears to assume that *Wild's Case* applies to personal as well as to real estate. I have here stepped aside merely to add that which I had omitted to mention in its right place; nor was it necessary to the argument.

[*191] *But now there is the third codicil. It is needless to go into it further, because I am quite clearly of opinion, that unless the second codicil cuts down the perpetuity to a life estate which is given by the will, there is an end of the question, and the will must stand giving a perpetuity. But the third codicil appears to me materially to support the same conclusion. It appears to me to be quite clear, that the testator meant not to cut down what he had given, but to increase it. Upon the death of William without issue male, he gives over — not very rationally, I admit — the part become vacant, from the daughters to the collaterals; but to carry that irrational provision one inch further than he carried it, and to add the absurdity of cutting down the perpetuity, which is given by the will, to a life interest on account of those words in the codicil, is, in my humble apprehension, a course utterly impossible for your Lordships to pursue.

My Lords, upon the whole, therefore, I am of opinion, — and my high respect for both the learned Judges below is my reason for trespassing so long upon your Lordships' attention in giving that opinion, — I am of opinion, upon the grounds which I have stated, that the codicils do not vary, except indeed they may be thought rather to extend, the gift of the will, and consequently that that gift is a perpetuity; that the decree of Lord PLUNKET being right, ought not to have been reversed upon rehearing; and that, consequently, your Lordships ought to reverse the reversing

decree, which will have the effect — and only the effect — of setting up the original decree in the cause.

Lord COTTENHAM. Both Lord PLUNKET and SIR EDWARD SUGDEN were of opinion that the annuities are perpetuities. The different annuities, however, stand upon a somewhat different footing. The two annuities given to the daughters have the addition to them which raised the question in *Wild's Case*, because the gift to them is to them "and *their [*192] children." The gifts to the wife, and to the mother of the wife, are for life; but there are two grounds applicable to them all, which seem to me to leave no doubt as to all amounting to a perpetuity. Now those two grounds are, first, that which is relied on by Sir EDWARD SUGDEN, of this being a gift of property producing the amount of the annuity. The expression is, that his property shall produce three several sums. The other ground, which is equally effective for the purpose of showing that these annuities are to be considered in their extent as perpetuities, is that the testator deals with them as being in existence, and operative beyond the period of the lives of those who are first to enjoy them. Take the case of the daughters; the gift is of an annuity to themselves and their children, there being no children in existence. Now, in what way the law would operate so as to protect as far as possible the interests of the children might become a question; but it is quite obvious that the testator did not intend the extent of the gift so given to be limited to the lives of the daughters. Again, he gives to his wife an annuity during her life of £100 a year, and to the mother of his wife another annuity of £100 a year; but were those annuities, those annual payments, to be terminated by the death of the two persons who were thus to take? So far from it, he says, "The said annuities, after the decease of my wife and her mother, to be equally divided between my three children." Well then, whatever it might be, it cannot be that the duration of the subject-matter of the gift was to be measured by the life of the first taker; because he actually provides who shall enjoy this property after the expiration of those lives. We have, therefore, not only the property directed to produce the annuities, which annuities are clearly to last longer than the lives of those who are first to enjoy them, but we have a disposition of the interest in the subject-matter of the gift more extensive than the duration of those lives.

[*193] *Now, both those circumstances occurred in a case which has been referred to, of *Philipps* v. *Chamberlaine*, 4 Ves. 51; see p. 58. In that case the MASTER OF THE ROLLS, Lord ALVANLEY, thus expressed himself: "Upon the residuary clause, it is said, the legal import is to give nothing but the dividends and interest of the surplus for the respective lives of these four persons; for there are words of severance. I am not prepared to say that I ever heard, that, where a testator gives forever and without limitation the dividends and interest to accure upon the residue of his personal property, that would not carry the whole interest. If the words 'for ever' were added, I suppose it would not be contended that it would not carry the principal also, though without the word 'executors,' for there would be nobody who could ever claim the capital; and if I was to rest upon the first part of the clause only, I should apprehend that where the dividends and interest of the residue are given absolutely to the trustee and his heirs, upon trust to pay the interest and dividends to A. from time to time without any limitation of duration, it would carry the whole interest, even without the aid of the subsequent part of this clause directing the shares to be paid at the age of twenty-one, with benefit of survivorship in case of the death of any of them before that age; from which I think a fair inference arises. It is impossible to suppose such an absurdity as would result from the contrary construction. An absurdity may be so great as to raise a necessary implication. A Judge must divest himself of common sense to impute such an absurdity to a testator as to suppose that he gives the interest to them for their respective lives only, and that if any one shall die under the age of twenty-one then that share given for life only shall survive to the others; and so if more than one die under that age; but if any of them should live to attain twenty-
[*194] one, in that *case it should not go over to the survivors, but be undisposed of. That part of the clause is perfectly satisfactory to show that he did intend to give them the absolute interest. If they were only to have an interest for life, of what consequence would their deaths before the age of twenty-one be? If they had it only for their lives, there would be no part or share for the survivor to have. It would be gone with their deaths. Their living to the age of twenty-one would have no effect. It is clear he meant to give an interest that would survive, even

independent of the circumstance that it is given as a residue; and it must always be remembered, that when the residue is given, every presumption is to be made that he did not intend to die intestate. Add to that the concluding part, that if three out of the four shall die during their minority, the survivor is to be entitled 'to the whole residue and surplus aforesaid.' It is said those words must be restrained to the whole surplus dividends; but that is not the usual sense."

Now this is a distinct decision upon a case very similar to the present, so far as there is a gift of the interest of a fund to certain persons, and a direction that after the death of those persons it should go to some other person. In the case before Lord ALVANLEY, it was to go amongst the survivors, and here it is to different individuals; both showing that the duration of the subject-matter of the gift was not to be confined to the life of the person who was to take, but that it was to have some further duration, and if it was to have some further duration, no other period can be fixed for that duration short of making it perpetual.

Upon the face of the will, therefore, no doubt, I think, can arise, that all these annuities were perpetual annuities; that is to say, they were gifts of so much property as should produce the income which he prescribed as the amount of the gifts that he intended for these individuals.

*Now, in the events which have happened, of the death [*195] of Mary, and the death of the widow of the testator and her mother, Julia Louisa had her own annuity of £100 a year, and she had one-half of the annuity which Mary was intended to have — making £150 a year — and she had one-half of the two annuities given to the widow of the testator and to the mother of that widow, so that she had £250 a year, in perpetuity; or, in other words, she had property producing £250 a year, and that in perpetuity. That was the provision which the testator very anxiously provided for her by his will. He gives that as a provision which he intended that his daughter Julia Louisa should possess. To the son he gives the residue; and he provides by the will, in certain events, that the son shall have also some part of the annuity which he had before given. He was to take one-half of the annuity of Mary on Mary's death, and he was also to partake of the annuities given to the widow and the widow's mother; but as he was also entitled to the residue, the annuities

payable out of the residue would of course in his hands fall into the residue, because he would be entitled to the fund out of which those annuities were to be paid.

Then the testator makes the codicil upon which the decision of Sir Edward Sugden is made to turn. He had given the residue, he had given property producing a certain income, in the events which have happened, to his daughter Julia Louisa; having provided in the first codicil for the disposition of Mary's annuity, she having died; and here I think the word "and" is of extreme importance, because it does necessarily connect the provision which he made on the actual death of Mary with the prospective provision which he thinks proper to make on the possible death of the son. Now, reading those two codicils together, which I think is essentially necessary for the purpose of seeing what is the meaning of the testator in the codicil upon which the [* 196] question turns, we find that he says, "It * having pleased Almighty Providence to take away my daughter Mary, it becomes necessary to alter the disposition of my property after my decease as far as relates to her. I therefore now declare it to be my will, and I hereby direct, that the £100 per annum, &c., provided as within directed for my daughter Mary" (and that "*et cætera*" must clearly mean the interest she was to take in the other annuities, in the event of the death of those who are first to enjoy them), "shall be divided equally between my daughter Julia Louisa and my son William, and that my will, as within expressed, shall remain in all other respects unaltered." He then clearly, up to that period at least (for he so states in express terms), did not mean that any other provision in the will should be altered; but he did mean that upon Mary's death, and her annuity therefore being released, it should be divided equally between the two other children, namely, the son, and the daughter Julia Louisa. "And in case" — (I now take up the words the testator has used in the next codicil, which was made a considerable period of time after the first, and seeing what he had done in the event of Mary's death, it is quite clear he intended to carry on the same provision, and to provide for another event which he thought might happen) — "And in case my son William shall die without leaving issue male lawfully begotten, my will is, that after the decease of my wife Mary and my daughter Julia Louisa, my remaining property shall then be equally divided

between" the persons named. What is the natural and obvious meaning of that provision? What is the event which is to make it necessary, — and which alone is to make it necessary, — for him to alter the disposition of his property? It is not an alteration of the intention as expressed in the will, and which continues to operate if William shall not die without issue male. It is a provision to take place only if William shall die without issue male; that is, according to the intention expressed in the * codicil, if William should die without issue male [*197] he would not become the object of his annuity. Then he has to dispose of the part of his property which in that event, and according to the intention he then entertained, would remain to be disposed of. Why then he uses a word, though not identical, of the same meaning. The event in which this disposition was to take place was the death of William. The death of William would obviously make it necessary to dispose of that which he had provided for William, because the death of William had nothing to do with that which he had given to his daughter Julia Louisa. But then is there any ambiguity in the expression? The event he expressly refers to is the death of William as the release of the property given to William. What is the property given to William? Why, in the will it is the residue of his property, and in the codicil it is "remaining property." What is the meaning of "remaining property"? That which the testator has not before disposed of. That is the technical meaning. Nobody speaks of a residue in a will in any other sense than as that which he has not specifically given. What he has before disposed of forms no part of the residue. Now, can a gift of a money legacy in a will be revoked or altered by a subsequent gift of the residue? and if it cannot be revoked in a will by a subsequent gift of the residue, how can it be revoked by a codicil, all which constitute one testamentary disposition, and are to be considered with reference one to the other? With all the deference I feel for the opinion of a very learned and very distinguished Judge, I cannot entertain a doubt upon the construction. I consider it perfectly plain that he was alluding only to that portion of his property which on the death of William would, according to his view of the interests of his children, be to be disposed of, and that he is disposing of that, and of nothing else; that he is disposing of that which is residue, which residue he

had given to William, and which residue in the event of William's death he intended to dispose of in a different manner. [*198]

If there was more ambiguity in this codicil, no doubt it might require more consideration; but in the view I take of it, it is perfectly plain what the testator meant. We have the description of the property and the event all corresponding; and the question is, whether he meant by this codicil to revoke what he had given to Julia Louisa, and to cut down that, which before by all the authorities was to be a perpetuity, to a life estate; or whether he merely meant to dispose of that which he had before given to William. I consider, according to the natural and obvious construction of this codicil, he meant only to dispose of that which he had before given to William, and that the annuities to Julia Louisa remain just as they were on the face of the will.

Lord Campbell. My Lords, I am likewise of opinion that the decree of Lord Chancellor Sugden ought to be reversed. I consider that the will gives perpetual annuities to the testator's children, and that they are not afterwards cut down to a life interest by any codicil.

Both the Lord Chancellors whose decrees are under consideration agree, although on different grounds, that under the will perpetual annuities are taken by the children. It is not now necessary to give any opinion upon the question whether the rule in *Wild's Case* applies to a bequest of personalty; and I content myself with observing, that I do not consider myself bound by Lord Chancellor Sugden's doctrine on this subject.[1] The *rule* in *Wild's Case* (to be distinguished from the *decision*, for in truth the question did not there arise) seems to proceed on this principle: that if there be a devise to the parent and unborn children, as they can neither take as joint tenants or in remainder, the law will do all it can for their benefit, by construing this an estate tail in the parent; so that if the estate tail be not barred, the children may successively take. I am not [*199]

[1] In *Audsley* v. *Horn* (1859), 6 Jur. N. S. 205, Lord Campbell, as Chancellor, gave his decision on the footing that the rule in *Wild's Case* did not apply to personalty. He said: "In *Heron* v. *Stokes* there was no necessity for deciding that question, and I forbore giving any opinion upon it; and, along with Lord Cottenham, I wished the question still to be considered as open. Now, I am prepared deliberately to say that in my opinion the rule in *Wild's Case* does not apply to personal property."

clear that this principle may not be applied to a bequest of personalty; for it would certainly be a benefit to the children, to hold that the parent takes an absolute interest instead of a mere life interest, although there is no certainty that the children will take any part of the property on the death of the parent, and if they do it is by the Statute of Distributions, and not by the form of the gift. You would do great violence to the expressed will of the testator by entirely striking out from the will the words in favour of the children; and it is possible you may best effectuate his intentions by holding that the parent takes a *quasi* estate tail in the personalty, which would give him the absolute disposal of it, but which may lead to its being distributed among the children at his death.

But on the ground taken by Lord Chancellor Sugden, that this will dedicates the *corpus* of a fund to the purchase of annuities, the annuities in question must be considered as granted in perpetuity, and not merely for the life of the first takers.

Agreeing, then, with both Lord Chancellors as to the effect of the will, taken by itself, I have only to see whether the perpetual annuities thereby granted are cut down to a life interest by any of the codicils.

It is admitted that the first codicil has no such operation, as it merely provides for an equal division between the testator's son and daughter Julia, of the interest which would have been taken under the will by his deceased daughter Mary.

But it is the second codicil which is relied upon by the respondents. If that codicil disposed of the property which the will gives to the daughters, I think a powerful argument might be deduced from it, as it directs that if his son should die without leaving issue male, on the death of his wife and his daughter Julia, his "remaining *property" shall be divided [*200] among certain collateral relations; but the foundation of this argument is, that in the "remaining property" is included the property given by the will to the daughters. This is not the natural construction of the codicil, and I have heard no reason assigned to prove that it is the true construction. The words "after the decease of my wife Mary and my daughter Julia" only indicate the time at which the gift to the collateral relations was to take effect, and not what was meant to be given to them. I conceive that the second codicil only deals with the residue left

to the son by the will, and that by "remaining property" in the codicil the testator means exactly the same thing as by the "residue of his property" in the will. If the codicil does not deal with the annuities granted to the children, of course it can have no effect in cutting down these annuities from a perpetuity to a life interest.

I must say that the construction contended for by the respondents unnecessarily imputes to the testator the gross injustice and absurdity of depriving the children of his daughter of the provision he had made for them, and leaving the whole of his property to collateral relations, upon the contingency of his son dying without issue male; I therefore clearly think that there is nothing in the second codicil to affect the interest which Julia took in the annuities under the will.

The third codicil is only brought forward by the appellants for the purpose of disproving the contradiction sought by the respondents to be put upon the second, and, therefore, need not be further considered.

I agree with Lord Chancellor PLUNKET as to the reversionary annuities, as well as to the annuity of £100 given to each of the testator's daughters for themselves and their children; because, although the rule in *Wild's Case* cannot probably be applied to the former, yet the reason given by Lord Chancellor SUGDEN [*201] is equally *applicable to them all; and the division directed between the three children is more suitable to the *corpus* of the fund from which annuities were to be paid than to life annuities.

I would observe that I should rather deprecate the application of any technical rule to the construction of a will of personalty. By this course of proceeding the law of Scotland has got into such a preposterous state, that we were yesterday obliged to hold that a disposition of a sum of money, which was expressly to the parent for life, remainder to unborn children in fee, gave the fee to the parent. Here it is a pure question of intention, to be gathered from the language of the will. It is admitted that the intention of the testator was to give perpetual annuities; and I see nothing to prevent that intention from being carried into effect.

Upon the points brought by appeal before us in this case, I therefore think that the decree of Lord Chancellor SUGDEN should be reversed, and that of Lord Chancellor PLUNKET affirmed.

No. 3. — Stokes v. Heron, 12 Cl. & Fin. 201–203. — Notes.

The order eventually made by the House (after some discussion as to the form of the order) was as follows —

* It is hereby ordered, declared, and adjudged, that the [* 203] several annuities of £150 and £100, making together £250, be deemed perpetual annuities; and that the appellant John Stokes, is entitled during his life to receive and be paid the amount of the said annuities, and that the appellant Louisa Stokes, the minor, is entitled thereto, in perpetuity, after the decease of the said John Stokes; and it is further declared, that the said annuity of £250 is well charged on all the chattels real and other the personal estate of the said testator William Heron, the elder, deceased. And after the payment of the costs decreed to be paid, and setting apart a fund for payment of the costs of this appeal as hereinafter adjudged, it is ordered that a sufficient portion of the said personal estate be allocated and set apart by the master as a fund for the payment of the said annuities, and also for payment of arrears of the same. And it is further ordered, that the costs of this appeal be paid out of the funds in Court to the credit of this cause, said costs to be certified, &c. And it is further ordered, that all such other parts of the said decree of the 4th February, 1842, as are inconsistent with or at variance with the decree and directions hereby made and given, be, and the same are hereby reversed. And it is further ordered, that the cause be remitted back to the Court of Chancery in Ireland, to proceed and do therein as shall be just and consistent with these declarations, directions, and orders.

ENGLISH NOTES.

In *Yates* v. *Maddan* (1851), 3 M. & G. 532, 21 L. J. Ch. 24, the testator gave to a son "one clear annuity of £100 per annum for and during his natural life, and should he die, leaving a child him surviving, I continue the same annuity for such child's use and benefit to be paid to his or her mother." The question arose as to the nature of this survivorship annuity. The Lord Chancellor (Lord Truro) expresses a doubt whether Lord Cottenham was right in reversing the decision of the Vice Chancellor in the former of the principal cases, having regard to the special terms in which the annuities were there given. But he confirms the general principle of Lord Cottenham's decision, and applies it to the case in point. "On the principle of antecedent improbability," he says, "adverted to by Lord Cottenham in *Blewitt* v. *Roberts*, the rule is that an annuity given indefinitely is an annuity for

life only, and an annuitant claiming a perpetual annuity must establish an exception in his favour: This the annuitant in the present case has in my opinion failed in doing. On the authority then of the cases which I have mentioned (namely, *Blewitt* v. *Roberts*, *Hedges* v. *Harpur*, 9 Beav. 479, and *Innes* v. *Mitchell*, 6 Ves. 464, 5 R. R. 360; 9 Ves. 212, 7 R. R. 163), and on principle, I am of opinion that the annuity in this case is not perpetual, and is of no longer duration than the life of the annuitant."

The same principle has been followed in the Irish cases of *Whitten* v. *Hanlon* (1885), 16 L. R., Ir. 298, and *In re Forster's Estate* (1889), 23 L. R., Ir. 269, in both of which there was a simple gift of an annual sum.

The decision in *Hedges* v. *Harpur*, referred to by Lord TRURO in *Yates* v. *Maddan*, was a decision of Lord LANGDALE, M. R., in 1846, reported in 9 Beav. 479. This was, many years afterwards (in 1858), reversed on appeal by the Lords Justices TURNER and KNIGHT BRUCE, as reported 3 De G. & J. 129, 27 L. J. Ch. 742. The testator in that case had bequeathed as follows: "to each of my five daughters £400 per annum to be payable half-yearly, during the term of their natural lives, and after their respective decease, I give the same to their children respectively, share and share alike, such children not to be entitled to more than their deceased parents' share; and in case any or either of my said daughters shall die without issue, then I direct such annuity to cease and fall into the residue of my estate." The Lords Justices came to the conclusion that the annuities so given were perpetual annuities. Lord Justice TURNER, upon the whole language of the gift, and particularly the clause directing that the annuities should cease in a certain event, came to the conclusion that the primary intention was that they should be perpetual annuities. He concludes: "Upon the whole, therefore, with all possible deference to the judgment of the late Lord LANGDALE, I dissent from the conclusion at which he arrived, and am of opinion that upon the true construction of this will the children of the daughter took perpetual annuities. I have the less hesitation in thus differing from Lord LANGDALE, because I observe that the case of *Heron* v. *Stokes* (see No. 3, p. 156, *ante*) was not cited in the argument before him, and, as the case stood before Lord LANGDALE, *Blewitt* v. *Roberts* was the governing authority; but that case, as to the only part of it material to the present, has since been considerably shaken. There may, indeed, be some grounds for supporting even that part of the case, but they were not referred to in the judgment, and certainly the case cannot be considered to have the same authority as it had when this case was decided." Lord Justice KNIGHT BRUCE said: "I agree in my learned brother's conclusion as to the

effect of the will under consideration, nor perhaps should I have thought the point one of difficulty but for the opinion of Lord Langdale expressed in the year 1846. Respectfully dissenting from that opinion, I am not persuaded that his Lordship's determination would have been as it was, if all that has been discussed and decided since had been discussed and decided before that year. I do not however say that in the year 1846 I should not have interpreted the will before us as I now interpret it."

Upon the whole therefore the former of the two principal cases above given (*Blewitt* v. *Roberts*) must be regarded with caution. So far as it supports the general principle stated in the former branch of the rule it appears to be unshaken; and it is directly applied in the Irish cases above cited. But whether Lord Cottenham was right in applying the rule and in not finding in the context reasons for making an exception is at least doubtful. And the actual decision in *Blewitt* v. *Roberts* must be scrutinised in the light of the principles established by the higher authority of the House of Lords in *Stokes* v. *Heron*, and having regard to the comments of the Lords Justices Turner and Knight Bruce on the appeal in *Hedges* v. *Harpur*.

AMERICAN NOTES.

In *Morgan* v. *Pope*, an annuity of $500, to be paid out of the income of the whole estate, for the support of the testator's daughter and her children, was held not to be a perpetual annuity, but an aggregate fund for the support of the daughter and her children "so long as they may live, and in case of the death of one or more, it goes to the survivor or survivors."

But in *Hewson's Appeal*, 102 Penn. St. 55, where A. by will directed B. to take charge of his children, B. "to receive annually" from his estate, "for her services," $500, it was held that "as the care of the children ceased upon their attaining majority," the annuity then also ceased.

Section II. — *Abatement.*

No. 4. — LONG *v.* HUGHES.

(1831.)

RULE.

Where a testator's estate is insufficient for payment of legacies and annuities, the practice of the Court is to value the annuities, and direct that legacies and annuities abate proportionately. If, after such order, one of the annuit-

No. 4. — Long v. Hughes, 1 De. G. & Sm. 364, 365.

ants dies, his personal representatives receive the whole of the estimated value of the annuity subject to the abatement.

Long v. Hughes.

1 De G. & Sm. 364–365 (there placed as an appendix to *Wroughton* v. *Colquhoun*, 1847, 1 De G. & Sm. 357).

[364] * In this case the testatrix Sarah Evans, by her will, dated the 3rd of April, 1822, after giving several pecuniary legacies, bequeathed unto William Messiter and his assigns, during his life, an annuity of £30, and unto Mr. James Draper and his assigns, during his life, an annuity of £20, and bequeathed several other annuities in the same form, all which said thereinbefore mentioned annuities she directed should be paid to the respective annuitants thereof by equal half-yearly payments, without deduction for taxes or otherwise; and that the first half-yearly payment of the said annuities respectively should be made at the end of six months next after her decease.

On the cause coming on to be heard on this day (Feb. 26th 1829) for further directions on the Master's report, —

It was ordered, that the other legacies bequeathed by the said testatrix were not entitled to any preference over the annuities bequeathed by her, and that the said other legacies and the said annuities ought to abate proportionably; and for the purpose of such proportional abatement, it was ordered, that it should be referred to the Master to ascertain the value of the said annuities respectively, as at the death of the testatrix; and in so doing he was to have regard to the circumstance that the said annuities were given free from legacy duty; and he was to compute inter-

[*365] est, at the rate of £4 * per cent per annum on such estimated value of the said annuities respectively from the death of the testatrix down to the time to which interest should be computed on the legacies. And it was ordered, that it should be referred to the Master to compute subsequent interest on the legacies bequeathed by the will of the said testatrix from the foot of his said Report.

The cause coming on again on this day (Dec. 9th, 1831) for further directions, —

It was ordered, that the Master should apportion the remainder of the said several sums of £2674 1*s.* 5*d.* and £85 13*s.* 11*d.* cash

and the said residue of the said balance, after payment of costs, as among the annuitants and legatees rateably; and in so doing, the Master was to take the annuities at the value mentioned in his Report, dated the 12th of August, 1829, and to add to the apportionment of each annuitant the legacy duty that would be payable in respect of the sum so apportioned.

And it was ordered, that the Master should compute interest at the rate of £4 per cent per annum on the balance remaining due on such estimated value of the annuities respectively, and on the balance remaining due in respect of the legacies from the foot of his last Report.

And if the said Master, in making such apportionment, should find that any of the annuitants or legatees had not received the sums apportioned to them by his said Report he was to add the same to the sums to be apportioned to them respectively.

And it was ordered, that what should be so apportioned to the said legatees and annuitants respectively, should be paid by the said Accountant-General, out of the funds therein mentioned, to the several persons to whom the said Master should report the same to be due, or to their respective legal personal representatives, in case any of them were or should be dead before the same was paid, except in respect of certain pecuniary legacies therein mentioned.

ENGLISH NOTES

The precedent laid down in the principal case was acted on by Vice Chancellor KNIGHT BRUCE in the case of *Wroughton* v. *Colquhoun* (1847), 1 De G. & Sm. 357. It was there stated to the Court that an annuitant whose annuity had been valued under the order made in the principal case having died, the whole fund was transferred to the annuitant's personal representatives. And the Registrar concurred in representing this to be the usual course in such a case. The VICE CHANCELLOR, in giving his decision, said: "I understand the course to be settled; and that it is to give the annuitant the benefit of the chance of dying before the payment of the annuity in full has exhausted the fund set apart at its reduced value. Nothing could try the question better than the case mentioned by Mr. Russell (*viz.* the principal case above), where the annuitant had died, and her representatives were allowed the full value of the annuity."

Where a testator, who was under a covenant to pay an annuity, had left the annuity in arrear, and his assets were insufficient for the payment of this and other debts, — on an application by the executor for directions

Mr. Justice Pearson directed that, in the apportionment of assets, the value of the annuity should be taken as the amount of the arrears *plus* the present value (as at the date of the order) of the annuity according to the government tables. *Delves* v. *Newington* (1885), 52 L. T. 512. This is consistent in principle with the decision of the same Judge in *Re Wilkins*, *Wilkins* v. *Rotherham* (1884), 27 Ch. D. 703, 54 L. J. Ch. 188; and the decision of Lord Romilly in *Heath* v. *Nugent* (1860), 29 Beav. 226.

The principle underlying the latter part of the rule is similar to that on which *Palmer* v. *Crauford* (1819), 2 Wils. 79, was decided by Sir T. Plumer, M. R. The testator had directed his trustees to invest £3000 in the purchase of a government life annuity which they were to pay to C. during his life. C. having died without the investment having been made, his executors were held entitled to the £3000. For C. might have elected to take the money.

AMERICAN NOTES.

"An annuity charged on the personal estate is a general legacy, and in cases of deficiency, all annuities and legacies abate ratably, for since they cannot all be paid in full, they shall all abate ratably, on the principle of the maxim, 'equality is equity,' or 'equity delighteth in equality.' This rule is subject to some exceptions, for there are cases where some annuities and legacies are to be paid in priority to others; but the onus lies on the party seeking priority to make out that such priority was intended, by clear and conclusive proof." Appeal of Trustees, 97 Penn. St. 200.

"It is always a question of intention, and the relations of the several legatees, in respect to their legal claims upon the testator for support, should be taken into account in determining whether the general rule of abatement should be departed from. As between legacies which are in their nature mere bounties, the presumption of intended equality will prevail unless there is unequivocal evidence to the contrary." In this case a legacy of the income of $10,000 to the widow for life was preferred. *Towle* v. *Swasey*, 106 Massachusetts, 100.

"The object of inquiry in all the cases is the same. It is to ascertain and fulfil the wish and intention of the testator. In view of the condition and parties and estates in this country, we are satisfied that this is best done in cases like *Orr* v. *Moses*, 52 Maine, 287, where the testator has evidently contemplated the setting apart of a sum sufficient to provide for the annuity, by following the rule laid down in that case, subjecting the estate once for all to the appropriation of a sum apparently sufficient to meet all, except remote and unforeseen contingencies, and holding the annuitant to abide the result. . . . But when as in the will under consideration there is nothing to indicate that the testator contemplates any such appropriation or segregation of a part of the property to provide for the annuity, and only a naked remainder is given to collateral kindred as residuary legatees, the right of the annuitant is clearly

paramount, and we think a present distribution among the residuary legatees can only be ordered when an appropriation is made with the consent and approbation of the annuitant, or upon condition that each residuary legatee shall give security, satisfactory to the Judge of probate, to refund so much of the share he receives as may hereafter be found necessary to make good the annual payment required from the estate."

Section III. — *Devolution by Descent.*

No. 5. — EARL OF STAFFORD v. BUCKLEY.

(CH. LORD HARDWICKE, 1750.)

RULE.

An annuity, although issuing out of personal estate, may be granted with words of inheritance, and will be descendible accordingly. But such an annuity is not affected by the Statute of Frauds concerning wills of "lands and tenements," nor is it within the Statute *De donis:* so that if given by will to "A, and the heirs of his body" the gift will operate as creating a fee simple conditional.

Earl of Stafford v. Buckley.

2 Ves. Sen. 170–181.

Richard Cantillon, in 1734, made his will;[1]* first, reciting [*171] the provision made for his wife on their marriage, he says, if there should be any deficiency in that, it should be satisfied out of his other effects: then, after giving several annuities and legacies, he says, "I hereby constitute and appoint S. and G. joint executors of this will; praying them to see the said jointure and legacies paid;" and directs them to take care of the education of his daughter, to whom he gives £200 *per annum*, until she is married with their consent, or come of age; then directs them to intail on his daughter and her issue all the estate and effects, which should belong to him, after payment of the aforesaid jointure, annuities and legacies: but in case of her death and failure

[1] Annuity charged on the Post-office, (until a sum should be paid to be laid out in land) continues a personal annuity, and as such to pass by grant or transfer 1 Brown, 377.

of her issue he desired them to divide moietively between his two nephews: "My intention being that the capital be laid out and secured and the interest be made good to my daughter for life and to her lawful heirs for ever, but in case of her and their failure, the same shall go to my said nephews moietively."

This will was not executed according to the Statute of Frauds: it was made in London, but having gone to the Indies, and sent for back again, it was very much damaged, and several blanks in it.

Lord Stafford having married the daughter with the consent of the executors, he and his wife brought this bill for the general purpose of carrying into execution the articles made precedent to their marriage, so far as they relate to the estate of the testator, in which Lady Stafford was interested; to have an account of that estate so far as it came to the hands of any of the defendants; and to have that and the real estate of testator settled, conveyed, and disposed of according to the will and articles, and for that purpose to have several questions, made doubts between the parties, determined.

[After argument,]

[* 177] * Lord Chancellor: —

The first question made is whether this annuity is to be considered as in nature of a rent and to partake of the realty [1] or as a mere personal thing to a man and his heirs inheritable according to such rules of descent as the law allows to such personal things? And that in order to introduce another question, whether or no it could pass by a will not executed according to the Statute of Frauds? I am clearly of opinion, it is a mere personal annuity, having no relation to lands or tenements, or partaking of the nature of a rent by any means. First, this would be so, if the fact was, as the plaintiff's counsel endeavoured to represent as to this duty of four and a half per cent, but the fact fails them. Suppose it had been in the strongest manner for the plaintiff, *viz.* that King Charles I. had granted these islands to Lord Carlisle with a reservation of a strict rent of four and a half per cent, in specie on the product of the islands, and afterward King Charles II. had granted £1000 *per ann.* in money out of the produce of that rent to Lord Kinnoul and his heirs: this would have been

[1] Money secured by turnpike tolls is within the Mortmain Act. See *Knapp* v. *Williams*, 4 Ves. 430 n., 4 R. R. 252. Also *Howse* v. *Chapman*, 4 Ves. 542; 4 R. R. 292. See also *Finch* v. *Squire*, 10 Ves. 41; 7 R. R. 337

a mere annuity, even supposing that had been the case, because a rent cannot be reserved or granted out of a rent. Part of a rent may be granted indeed: but a new rent cannot be reserved or granted thereout, because no distress can be or assize taken of it, as there is nothing to be put in view of recognisors of the assize; which, the rule is, is necessary, and has been so determined. Consequently if the four and a half per cent in specie had been a rent like a corn-rent, this would not have been a rent; for this money to be paid out of that produce is another thing, and cannot be taken to be part of the old original rent, which was reserved in specie: but this is not like it. Consider the laws of Barbadoes (which is the principal, and I believe, the rest of the Leeward Islands fall under the same rule) and, the act of assembly, by which this is granted. It is in the express words of the grant a custom or impost, a duty on exports from the island, and no reservation out of the island, though it arises out of the produce: so that it has no relation to the case endeavoured to be made of it. Consequently this annuity in fee is a personal inheritance, what the law suffers to descend to the heir, but had nothing to do with the realty, as appears from Co. Lit. 20, and so not within the Statute of Frauds; for lands and tenements only are within it. An advowson comes indeed under that description; for it may be held under knight service; and rents partake of the nature of land, following that, and consequently are all within that statute; but nothing is within it which is not a real right or interest, or partaking of the realty; as this annuity is not, though granted in fee.

The first remaining consideration is whether this which appears to be a personal annuity in fee, and consequently a personal inheritance descendible to the heir, is concluded or comprised in the will so that the executors have an interest in or power over it; for it may be either way. The second consideration is as to the limitations to be made: how far by this will they may take effect, or are too remote.

As to the first, I think, it is a question of some doubt: and yet I do not know that it will be of consequence between the parties. * There are to be sure no words describing or [*178] giving it: nor has testator given any part of the real estate; nor could it be devised, if named; because not executed according to the Statute of Frauds. As to his personal estate, he has made no particular legacy of the residue of the personal so as to include

No. 5. — Earl of Stafford v. Buckley, 2 Ves. Sen. 178.

personal things which would go to the executors: much less personal things which would not go to executors, but are descendible to heirs according to a course of descent the law allows of as to that: but here are words that point that way, viz. estate and effects, which are made use of more than once in the will. Where he intends to make a satisfaction to his wife for the deficiency of her provision on her marriage, he does it out of all his other effects; which words would have been sufficient to have charged any estate of his, that could pass by this will; whether such as is strictly personal and assets in the executors, or such personal as was descendible to the heir; therefore sufficient to have charged this annuity to have made satisfaction to the wife, if occasion to resort thereto; because there was a clear intent to provide a fund for that purpose, and that annuity would have passed by this will, if especially named This is only an observation, not conclusive, on the nature of the will and use of the word "effects." In the clause creating the present question he has given nothing to the executors, nor made them residuary legatees in trust: and therefore nothing vests in them but what properly does so by naming them executors. All the rest of the personal estate that could pass to executors, would go to them: but this is a kind of personalty, which according to Doctor and Student would not be assets in executors, and consequently will not go to them by being named executors. The question is, whether on these words "to entail on her," &c. compared with the former part, there is sufficient to pass by words or implication this annuity to the executors, or whether there are not words sufficient to give them power to convey. See *Williams* v. *Jekyll*, 2 Ves. Sen 681, 683, &c. It is too much perhaps to say, that these latter words are sufficient to pass any interest to them, provided that did not pass by naming them executors; which it did not: but why should it not give them a power to convey? For one may give a naked power to executors to sell or convey, &c. without giving anything to them. Consider the words. The word "estate" is the most general that can be used: and according to all the cases sufficiently comprised all kind of estates, 2 Ves. Sen. 48; especially when by saying "estate and effects" he points at both real and personal, and therefore I do not see in point of law or reason, why, if this will had been executed according to the Statute of Frauds, these words would not have enabled these executors to have settled his lands in England; for

it was his intent, these executors should be his trustees for that, and make a settlement of his whole estate; especially when it is said, after payment of the aforesaid jointure, &c. which carries me back to the observation of the direction to make good the jointure; and therefore this direction to the executors is as large as that charge before. If then, within this power lands would have been included, provided the will had been executed according to the statute (for at this day a man cannot give a power to his executors * to sell his lands by a will not executed [*179] according to the statute) I see no reason why this annuity is not comprised; the words being general enough to take it in; and nothing in the nature of the estate preventing its operating upon it. I incline therefore, that the executors have power to settle this annuity.

Which leads to the next question: supposing this annuity is included, and it is not doubted but the residue vests in the executors *eo nomine*, in what manner that is to be settled, and how far the limitation is to take effect? I will consider this in two lights: first, as to the annuity, which is not a personal thing to vest in executors *eo nomine*; next as to the surplus, which is merely personal, and would vest in them by virtue of making them executors.

As to the annuity, I think, it will fall under a different consideration from the rest of the personal estate. If estates of a different nature are comprised in this clause, *Forth* v. *Chapman*, 1 Will. 663, is an express authority for me, that the words shall receive a different construction according to the nature of these estates. Supposing therefore land was comprised in the direction of the trust, and the will so executed as to have affected lands, the Court could not possibly have directed any other settlement of the land but to the daughter in tail. Undoubtedly so, if it had stood on the first words to entail on her, &c., 3 Atk. 288. How is it explained by the subsequent clause, wherein the testator has declared his own intent, and made the construction himself? There it would have been a direction the settlement should be on her for life: but saying her lawful heirs forever will be construed by the preceding word *issue*, which will make an estate tail in her. So it would be as to land: the question then arises as to this particular instance of annuity;[1] which is not real, but an inheritance

[1] An annuity, when granted with words of inheritance, is descendible, but as to its security is personal only. 1 Brown, 325.

No. 5. — Earl of Stafford v. Buckley, 2 Ves. Sen. 179, 180.

of a personal thing descendible to the heir. The proper kind of limitation that is capable of it is distinct from mere personal goods and chattels. The testator, having purchased it, was seised in fee of it at the time of making the will;[1] and might direct it to be settled as far as by law allowed to be so; not by way of strict intail; because not within the statute *de donis* according to Lord Coke. No writ of entry could be brought of it: nor is it real estate: and the very statute itself shows it in the beginning of it, nothing being included therein but lands and tenements and what partakes of their nature; and Co. Lit. 20 says, in all these cases grantee has a fee conditional as before the statute. The settlement then to be made of it, supposing the first question that it is included in this power in the will, is in this manner; to the daughter for life and the heirs of her body; which is in her a fee-simple conditional. The executors then clearly could not carry it over in remainder to the nephews; for no remainder could be created of any estate not within the statute *de donis;* for before it was a possibility of reverter, out of which a remainder [*180] could not be, upon this notion, that being but a * possibility it could not be grantable over; and if before the statute *de donis* a man had granted lands to another and the heirs of his body, and said in default of such issue over to B. and his heirs, that grant over had been void, and on the having issue the condition had been performed, and the grantee himself might have aliened so as to have barred the possibility of reverter. So here as this annuity is not within the statute *de donis*, if settled according to this will to her for life and the heirs of her body, if carried over in default of such issue to the nephews, that would have been void: as soon as issue had, the condition is performed; she might have aliened, and barred the possibility of reverter to the donor: Here issue has been had; and consequently an absolute fee must be, if a settlement is made according to this will. This I take to be the legal construction of this devise according to the different nature of these estates: and this (for I would not be misunderstood) will not affect those grants to which this has been compared, which have been frequent, of annuities by the crown of this kind with remainders over; for though a common person cannot grant a possibility, the crown can; as it may grant a *chose in*

[1] As it may be granted in fee, it may, of course, as a qualified or conditional fee, but cannot be entailed. 1 Brown, 325.

action; and according to *Miles* v. *Williams*, 1 Wil. 252, (which is truly reported) his grantee may sue for it in his own name; although a common person cannot grant a *chose in action* so as to enable grantee to bring an action in his own name. I do not take it, that before the statute *de donis* the possibility of reverter in the crown could be barred; which differs all these grants of the crown from cases of common persons. Therefore on the directions in this clause, if a settlement had been made, the executors must have settled it to the daughter, and the heirs of her body, so as to be a fee conditional with a power after issue had to alien, and to prevent possibility of reverter.

As the residue, which is merely personal, it is different, Prec. Chan. 421. 1 Wms. 290; for according to *Forth* v. *Chapman*, a different construction may be put on the same words in respect of estates capable of such a limitation in tail, and of those not capable of it: and I am of opinion, that the limitation contended for by the nephews is not so, nor was that the testator's intent, nor are the words capable of that construction, viz., that the daughter should have an usufructuary interest for life, &c. This must be considered of personal effects merely. The first words, taken with the explanation afterwards made, show "issue" meant in the same sense as "heirs," and has the same construction in wills, according to all the cases, and that of *Miss Dormer;* in which I held, that even where the first limitation was not for life, but to A. and if A. dies without issue, over to B., that was too remote, because it was a failure of issue *in infinitum*, 2 Atk. 313, 314, 376,[1] and that I could not be warranted to say, these words must be tied up to a dying without such issue or without heirs at time of the death. Here are not any words to change "issue" from the common and legal construction; for I do not see even in the subsequent words, which are insisted on, anything to restrain the failure of issue to the time of her death: but let them fail at any time, the meaning was, it should go over. Here it is expressly given to the daughter for life; which words must be taken into construction of the first part, and explain them. In the former part he has explained his own meaning to be * to make a settlement of [* 181] this money to the line of heirs of the body of his daughter

[1] In 1 Wms. 198, where a legacy was left to one if he died without issue, it was held to mean issue living at his death; 1 Wms. 432, 565. 2 Vern. 686. 3 Wms. 262. 2 Ves. Sen. 120.

in perpetuity; which intent, or of the limitation over afterward, the law will certainly not admit: nor was anything farther from his intent than to confine it to a dying without issue at the time of her death. Consequently it is too remote, and the nephews can take nothing. But though bad as to the nephews, it may be good as to the issue to vest the property in them; but reserve that question (which however does not concern the annuity) till after the report.

The only remaining question is as to the profits contended to be accumulated. I am of opinion, the true construction is, that it is subject to the aforesaid annuities, &c. one of which was in fee. Nor does testator import, that the £200 was all she should have; and there are several instances, where a particular sum is directed for maintenance, and afterward a settlement to be made notwithstanding; the £200 being only directed by her father to restrain what should be for her maintenance. The profits therefore over and above the maintenance, go and belong to the plaintiff.

The £1000 annuity and the surplus of the personal estate are subject to the power given to the executors; and the annuity, being capable of a limitation to the daughter and the heirs of her body, did by virtue of the will vest in her as a fee simple conditional at common law; and she, having had issue, is capable of aliening or settling the same; and the limitation over is void.

ENGLISH NOTES.

The principal case is cited in the argument in *Turner* v. *Turner* (1783), Ambl. 776, 1 Bro. C. C. 315, and followed in the judgment of Lord Loughborough in that case. He deduces the rule (p. 324 of Brown's reports): "An annuity when granted with words of inheritance is descendible, but as to its security is personal only; it may be granted in fee; of course it may as a qualified or conditional fee. But it cannot be entailed."

In *Taylor* v. *Martindale* (1841), 12 Sim. 158, a testator gave all his real and personal estate to his wife subject to (*inter alia*) a bequest to his brother of "£50 a year for ever." The Vice Chancellor (Sir L. Shadwell) decided that the annuity on the death of the brother passed (as a perpetual annuity) to his personal representative. He observes: "There is no doubt that an annuity, though personal in its nature, may be granted to a man and his heirs." He then cites Lord Coke's description of an annuity and the passage of Lord Loughborough's judgment (above cited) in *Turner* v. *Turner*. "In this case

however," he says "the testator has not used words of inheritance, and it is not imperative on me to construe the words 'for ever,' when used with reference to an annuity to signify 'heirs.' In my opinion the question is, which construction is most beneficial to the annuitant; and it seems to me to be most beneficial to him that the gift should be construed as a gift to him and his executors; as he might die without heirs, but might appoint executors. It is by no means a matter of necessity that a gift to A. B. 'for ever' must be construed as a gift 'to him and his heirs for ever.'"

AMERICAN NOTES.

If an annuity is given to a man and the heirs of his body, it is in the nature of an estate tail, and to prevent a perpetuity the common law gives him an absolute interest in the annuity. *Bradhurst* v. *Bradhurst*, 1 Paige Chancery (New York), 331; 2 Lawy. Co.-Op. ed. 668.

SECTION IV. — *Whether charged on* Corpus *or not.*

No. 6. — PHILLIPS v. GUTTERIDGE.

(CH. 1862.)

RULE.

WHERE an annuity is charged indefinitely on the income of a fund, and the income is insufficient to meet the annuity as it becomes due, the deficiency is charged upon the *corpus*.

Phillips v. Gutteridge.

32 L. J. Ch. 1-2 (s. c. 3 De G. J. & S. 332-338).

*In this, which was a creditors' suit, the question [*1] whether an annuity was to be paid out of *corpus* or out of income alone, was decided by STUART, V. C., on further consideration, in favour of the annuitant. From this decision the plaintiffs appealed. James Gutteridge, the testator in the cause, by his will, dated in 1827, gave to William Probert certain leasehold land and ground-rents "upon trust to receive and take the rents, issues and profits thereof, and after payment of the ground-rent, &c. and the interest of any money secured or to be secured thereon, to pay the annual sum of £60 to my daughter Harriet for her life,

&c. ; and in case of the death of my said daughter, leaving any child, then upon trust to continue the payment of the said annual sum of £60 for the benefit of such child; and upon further trust, in case of the death of my said daughter leaving any child or children, when and so soon as the youngest of such child or children shall attain the age of twenty-one years, to raise out of the land, ground-rents and premises, by sale or mortgage, the sum of £400, and divide the said sum, &c.; and upon further trust, during the lifetime of my said daughter, and until the youngest child (if any) shall attain the age of twenty-one years, to pay the residue of the said rents, issues and profits (after payment thereout of the said ground-rents, interest, &c. and the said annual sum of £60) unto my son, Thomas Gutteridge; and upon further trust, after the decease of my said daughter, in case she shall die without leaving any child, &c., or in case she shall leave any child or children, after the attainment by the youngest of such child or children of the age of twenty-one, and the raising and payment of the said sum of £400, and after the performance of all the beforementioned trusts, upon trust that the said William Probert shall assign the said land, ground-rents and premises, or such part thereof as shall remain undisposed of, unto my said son absolutely." The plaintiffs held a mortgage on the testator's
[* 2] * leasehold property; which after the testator's will had been transferred to them on their making a further advance. The property had been sold, and after paying off the original mortgage a sum of £700 remained; and the income being insufficient to keep down the annuity, the Vice Chancellor declared that the annuitant was entitled to resort to the *corpus*.

Mr. Malins and Mr. W. Rudall, for the appellants, contended that the annuitant here could not be in a better position than a tenant for life. *Foster* v. *Smith*, 1 Ph. 629; 2 You. & Col. C. C. 213.

The Lord Chancellor: —

There the testator contemplated the property remaining in its entirety. Here the direction for payment of the residue contemplates the full satisfaction of the annuity.

Mr. Malins. — The words "undisposed of" referred to the sum of £400 and the raising of that sum. The testator had as much an intention to benefit the children as his daughter.

The Lord Chancellor: —

No. 6. — Phillips v. Gutteridge, 32 L. J. Ch. 2.

If the daughter received less than the £60 during her life, would not her representatives be entitled after her death to continue the receipt of the dividends until the deficiency was made up?

Mr. Malins and Mr. Rudall referred to *The Attorney-General* v. *Poulden*, 3 Hare, 555; *Earle* v. *Bellingham*, 24 Beav. 445; 27 L. J. Ch. 545; *Mills* v. *Drewitt*, 20 Ibid. 632.

Mr. Greene and Mr. Beavan, for the annuitant, were not called upon.

The Lord Chancellor said that the decree was right. The general rule was, that an unlimited indefinite charge upon "rents and profits" was a charge upon the *corpus*. Here the charge was "out of the rents and profits" to pay the annuity to his daughter for her life; it was not out of the rents and profits during her life. The right of the trustees was general and indefinite. The charge, therefore, on the rents and profits continued until the annuity was satisfied. The decision in *Foster* v. *Smith* went upon this, that the effect of the gift over was to reduce the charge on the rents and profits to a charge during the life of the annuitant; but on the death of the annuitant, the trustees were to convey over the estate to the testator's sisters; and the right, therefore, to receive the rents and profits ceased on the death of the annuitant. Of necessity, therefore, in *Foster* v. *Smith* the trust to receive the rents and profits was construed to be a right to receive them during the life of the annuitant. In *Earle* v. *Bellingham*, the Master of the Rolls followed *Foster* v. *Smith*, and there the trust was, after the death of the annuitant, to transfer a specified sum; and there was, therefore, an intention to have the *corpus* kept in its entirety for the benefit of those who came afterwards, and who were intended to have the *corpus* in its integrity. But here there were no such words; but the gift over was in terms made subject to what was necessary for the legal operation of the antecedent gift, and the party claiming the residue could only claim what remained after the effect of the antecedent gift was exhausted. Did, then, this charge upon the rents and profits constitute a charge upon *corpus?* and his Lordship was of opinion that it did, and he found nothing to rebut that in the terms of this will. He could not, therefore, alter the decree, as he considered that the Vice-Chancellor had put a proper interpretation upon the will; and the annuitant must, therefore, continue to receive the annuity out of the *corpus*.

ENGLISH NOTES.

Where the testator directed his trustees to pay to his widow £100 a year out of a certain fund consisting of the residue, after paying debts, of the proceeds of his estate, and then directed that during the lifetime of his wife the trustees should pay the residue of the income of the fund to other persons, and after her death directed the residue of the fund to be divided amongst a class, Vice-Chancellor Sir W. Page Wood decided that the intermediate gift of the surplus income during the life of the annuitant, together with a discretionary direction for postponing the conversion, indicated an intention that the residue of the fund which was to be divided at the annuitant's death meant the residuary fund out of which the income was payable; and that although the income of that fund was not sufficient to pay the annuity, the arrears were not chargeable upon the *corpus*: *Stelfox* v. *Sugden* (1859), Johnson, 234.

But in *Hickman* v. *Upsall* (1860), 2 Giff. 124, where the testator bequeathed a debt or sum of £1000 which was due to him, to trustees upon trust (when called in or paid) to invest the same upon securities, and to stand possessed of the debt and of the interest to accrue due thereon from his decease, and also of the securities, upon trust thereout to pay the yearly sum of £30 to the plaintiff (a daughter), and to pay to other persons during the life of the daughter certain aliquot parts of the residue of the interest or dividends, and from and after the decease of the plaintiff, he gave the said debt (in aliquot parts) to others, — the Vice Chancellor, Sir J. Stuart, on the ground that the securities as well as the interest were expressly given in trust to pay the annuity, decided that the capital was liable to make good the annuity.

In an Irish case, in 1887, *Re Moore's Estate*, 19 L. R., Ir. 365, there was a bequest of leasehold lands of S. "Upon trust, out of the rents and profits of said lands, to pay my just debts, . . . and subject thereto, out of the rents and profits of my said lands, to my wife J. M., during her life, an annuity or yearly rent-charge of £150 per annum, and subject thereto I bequeath the said lands of S. upon trust to receive the rents and profits, and to apply the same for the maintenance, &c. of my son," and upon his attaining 21, to assign him the lands and accumulations (if any) of the said rents and profits, &c., — it was held by Monroe, J., on the authority of the principal case, and distinguishing *Stelfox* v. *Sugden*, that the annuity was a charge upon the *corpus* of the leaseholds.

Where an annuity charged on the rents and profits of land is in arrear, the person entitled to the arrears is entitled in equity to have them raised by sale or mortgage of the estate; and the Court will

make a decree accordingly, although the person claiming relief is entitled to legal remedies by distress and perception of rents. *Cupit* v. *Jackson* (1824), 13 Price, 721; *Scottish Widows' Fund* v. *Craig* (1882), 20 Ch. D. 208; 51 L. J. Ch. 363.

Where the owner of land liable to pay annuities for lives charges the inheritance to secure them, and then by his will gives the land to a tenant for life and remainderman, the annuities must be capitalized, and the burden shared by the tenant for life and remainderman in proportion to the value of their respective interests: *In re Muffett, Jones* v. *Mason* (1888), 39 Ch. D. 534, 57 L. J. Ch. 1017, — a decision of CHITTY, J., following *Bulwer* v. *Astley* (1843), 1 Phil. 422, 13 L. J. Ch. 329; *Yonge* v. *Furse* (1855), 20 Beav. 380, 24 L. J. Ch. 643; and *Yates* v. *Yates* (1860), 28 Beav. 637, 29 L. J. Ch. 872.

AMERICAN NOTES.

It has been held to the contrary of the principal case in this country. In *Delaney* v. *Van Aulen*, 84 New York, 16, the testatrix gave the residuum of her estate in trust, "to receive the rents and profits of the real estate, to invest the personal estate, and to apply the rents and profits, and the income of the personal estate," to the use of her husband B. for life, except to pay an annuity to C. There was no devise on bequest over after C.'s death. The rents and profits proved insufficient to pay the annuity. *Held*, that only the rents and profits were chargeable. The Court distinguished the principal case on the ground that here, unlike that case, "the right to receive the profits is not general and indefinite; it has a limitation of time." The Court cited *Heneage* v. *Lord Andover*, 3 Y. & J. 360; *Allan* v. *Backhouse*, 2 V. & B. 65; *Forbes* v. *Richardson*, 11 Hare, 351; *Bootle* v. *Blundell*, 1 Mer. 192; *Green* v. *Belchier*, 1 Atk. 505; *Wilson* v. *Halliley*, 1 R. & M. 590; *Small* v. *Wing*, 5 Bro. P. C. 66; *Baker* v. *Baker*, 6 H. L. 616; *Birch* v. *Sherratt*, L. R., 2 Ch. App. 642. Each case, the Court say, is to be considered on its own circumstances, and the testator's intention derivable from the whole will and the circumstances is to prevail. "We cannot fail to perceive that the rigid rule stated in *Allan* v. *Backhouse* (*supra*), has been relaxed, and that the Courts may now exercise their judgment." The Court queried whether deficiencies in payments might be supplied from increased avails in subsequent years; but in *Pierce's Estate*, 56 Wisconsin, 560, it was held that this could not be done where the annuity was payable out of the proceeds of the testator's farm, "each and every year," and was payable quarterly — the will makes no provision for any possible deficiency.

In *Nudd* v. *Powers*, 136 Massachusetts, 273, the testator bequeathed to his daughter, for life, a certain sum of money a month, "out of the rents" of certain houses, the land being devised to others, subject thereto, and after their death and that of the daughter, the same were given over forever, with the statement that "said legacy conveys a fee simple in all my said real property" to the last taker. *Held*, that the *corpus* was not charged, and that this

or the life estate could not be sold to provide a fund for her. Citing *Wilson* v. *Halliley*, 1 R. & M. 590; *Foster* v. *Smith*, 1 Phil. 629; *Philipps* v. *Philipps*, 8 Beav. 193; *Earle* v. *Bellingham*, 24 Beav. 445. There was also a condition against selling intoxicating drinks on the premises, and an absence of any power to sell. "The intention expressed is clear, and the question is purely one of intention. *Baker* v. *Baker*, 6 H. L. Cas. 616," etc.

So in *Stephens* v. *Milnor*, 24 New Jersey Equity, 358, it was held that "an annuity or yearly sum of $200, to be paid yearly and every year for fifteen years from and after any decease," out of certain income, is not chargeable on the *corpus*.

The *corpus* will be charged with the annuity, if the intention appears. *Degraw* v. *Clason*, 11 Paige (New York), 136; *Davis' Appeal*, 83 Penn. St. 348; *Nash* v. *Taylor*, 83 Indiana, 349; *Owens* v. *Claytor*, 56 Maryland, 129; *Hawley* v. *James*, 5 Paige Chancery (New York), 318; 3 Lawy. Co-Op. ed. 734.

No. 7. — CARMICHAEL *v.* GEE.

(H L. 1880.)

RULE.

WHERE a testator directs such a sum of money to be invested as will produce a certain annuity, and gives that annuity to A., and the residue of his estate to others, without anything to show that the fund invested should remain in its integrity for ultimate distribution; then the direction to invest is presumed to be merely ancillary to the gift of the annuity: and if the amount originally invested becomes insufficient — or if the estate is insufficient — to answer the annuity, the deficiency must be made good out of the capital.

Carmichael v. Gee.

5 App. Cas. 588–598 (s. c. 49, L. J. Ch. 829–833).

[588] Appeal from an order of the Court of Appeal which had reversed a previous order of Vice Chancellor HALL in an administration suit of *Gee* v. *Mahood*, 9 Ch. D. 151.

Robert Gee, by a will dated the 5th of November, 1868, appointed his then wife, Elizabeth Gee (now respondent), the Rev. W. P. Trevelyan, and Samuel Mahood, his executrix [* 589] and executors * and trustees, and he gave by his will some

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specific and pecuniary legacies, and an annuity of £20 to one M. T. Dribble, for her life, payable quarterly. He then proceeded as follows: "I give, devise, appoint, and bequeath all other the real estate to which I shall be entitled at my decease; and I bequeath the residue of my personal estate to which I shall be entitled, to my said wife and W. P. T. and Samuel Mahood, and the survivor and survivors of them, their heirs, executors, &c., according to the nature and quality thereof respectively: Upon trust that my said wife and W. P. T. and S. M., their heirs, executors, &c., do and shall from time to time, and at all times hereafter, receive and take the rents, &c., upon the trusts hereinafter declared." The first trust was to grant building leases not exceeding 1000 years "of all or any part of my said real estate," and, when they should think fit, "to sell and dispose of all my real and personal estate," or parts thereof, as therein mentioned. And they were to stand possessed "of the moneys arising from the sales," in trust to invest in the stocks of Great Britain or India, or on mortgages of copyhold or freehold estates, "with liberty for the trustees with the consent in writing of my said wife during her life," to vary the investments. "And upon farther trust to set apart a sufficient portion of such investments as will produce the annuity of £1200 a year which I bequeath to my said wife for her life, payable quarterly on" the usual quarter days, "the first payment to be made and become due on the first of such days as shall happen after my decease, such annuity, in case of my said wife's second marriage, to be reduced to the annual sum of £150 [which was to be paid as the other would have been]. . . . And, subject to such investment in favour of my said wife, in trust to set apart £5000 other part thereof for my dear daughter Zara on her attainment to the age of twenty-one years, or marriage, which shall first happen, to be settled on her and her children as the trustees shall, by deed, declare. And as to the entire residue of my said trust estate, and as to that part thereof set apart in favour of my said wife, after her death, and as to such part thereof as shall be no longer required to be set aside, in consequence of her second marriage, in trust as to one moiety for all and every the three children of my late dear daughter Jane Theophila Carmichael, in equal shares." *The [*590] other moiety was to go to Zara. If the children of Theophila should die before a vested interest was acquired, the

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whole was to go to his daughter Zara. And no sale was to be made during the life of his wife, without her previous consent in writing; but the unsold real estate and the outstanding personal estate were to be subject to the trusts thereinbefore contained concerning the moneys and funds, and the rents and produce thereof were "to be deemed annual income for the purposes of such trusts," and the real estate was to be transmissible as personal estate under the ultimate trusts thereinbefore contained.

The testator died on the 6th of July, 1869, and the will was proved by the widow and Samuel Mahood. No change had been made in the investments. The widow had created certain incumbrances on her interest. The estate of the testator proved to be insufficient to meet the widow's annuity. No part of the estate, or of his investments in stocks, &c., had been set aside for that purpose. An administration suit was instituted (*Gee* v. *Mahood*,) and in that suit Elizabeth Gee, the widow, presented on the 1st of July, 1876, a petition asking, among other things, to have the arrears of the annuity raised out of the *corpus* of the estate. The cause came on, for hearing and farther consideration, before Vice Chancellor HALL, who declared that Elizabeth Gee was not entitled to have recourse to the *corpus* of the estate, nor to the income of subsequent years, to provide for the deficiency in former years of her annuity of £1200. 9 Ch. D. 151. On appeal this order was varied, and it was declared that Elizabeth Gee was entitled to have recourse to the *corpus* of the estate, and to the income of subsequent years, to supply the deficiency of former years. 11 Ch. D. 891: 48 L. J. Ch. 657. The incumbrancers on the widow's interest in the estate were, as such, parties to the suit, and had joined in the appeal against the VICE CHANCELLOR'S order, and were now respondents with the widow to maintain the decision of the Court of Appeal. The three children of Theophila appealed against the decision of that Court.

Mr. W. Pearson, Q. C., and Mr. Vaughan Hawkins for the appellants: —

[*591] The will here has been misconstrued in the Court of Appeal, *and a benefit has been conferred on the widow which was never intended by the testator to be given to her. He believed that the income of his property would be sufficient to satisfy her annuity, and he gave her that income, but he

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never meant that she should come upon the *corpus* of the estate, and so absolutely take away all provision for the children of his daughter Theophila. The gift of £1200 a year was not an indefeasible gift of an annuity of that amount. It might, on a second marriage, be cut down to £150, and it was directed to come out of investments which, of course, might from time to time vary in productiveness. The testator believed that those investments would be sufficient to satisfy the annuity to the wife, and to provide a sum of money for his daughter Zara, and therefore could not have meant that that provision for Zara should be liable to be wholly defeated, by the *corpus* of the estate being rendered liable to make good the deficiencies of the investments. There was not an expression in the will which showed that the investments themselves were to be applied in that way, and the general purport of the will was opposed to such a supposition. The testator had made all his dispositions on the assumption that the income from the investments would be sufficient to provide for the annuity, and it was not because it turned out that he was mistaken as to the value of his property, that the general scheme of his will was to be defeated, and his surviving daughter and the children of his other daughter were to be left unprovided for, in order to satisfy the wife's life interest alone. The intention of the testator was plain, and was plainly expressed, and being so, ought to decide the case. The authorities too were clear upon the subject. In *Baker* v. *Baker*, 6 H. L. C. 616; 27 L. J. Ch. 417, in a will almost exactly like this, it was held that the widow was not entitled to have the deficiency of the annual income made good out of the *corpus*. And the question put by the Lord Chancellor there applied exactly to this case, namely, how would the *corpus* have been affected by every deficiency if the money had, as might have been the case, been lent out on mortgage? *Wright* v. *Callender*, 2 De G. M. & G. 652; 21 L. J. Ch. 787, in which a different result was arrived at, was distinguishable from the present in the form of the trust, which was a specific direction to pay the weekly amount to the son out of *the general estate. Besides which it was to [*592] be remembered that *Wright* v. *Callender*, was decided before *Baker* v. *Baker*, where *Wright* v. *Callender*, was noticed, and was expressly distinguished from the case then under consideration. It was a gift of income to be paid at all events.

Tarbottom v. *Earle*, 11 W. R. 680, favours the construction now contended for.

Birch v. *Sherratt*, L. R., 2 Ch. 644, 36 L. J. Ch. 925, was a case where the residue was to be subject to the payment of the annuity, and "from and after the payment of the annual sum of £100, and subject thereto," the trustees were to stand possessed of the investments for other purposes, which made the payment of the annual sum the primary object of the will; here there was nothing of the kind.

In a case like this, where there was a general deficiency, the principle was that there should be a general abatement: *Page* v. *Leapingwell*, 18 Ves. 463: 11 R. R. 234; not that specific legatees should alone be sacrificed in order to make good a particular life interest. As in *Baker* v. *Baker*, it was "apparent from the language of the will that the testator intended that the fund should be continued in its integrity during the life of the annuitant, and in that state should go over." The real question is whether what is given is given as an annuity to be paid at all events out of the general estate, or is the interest of a particular fund devoted to that special purpose? It is submitted that in this case the interest of a particular fund is all that the testator intended to give. In *Miller* v. *Huddleston*, 3 Macn. & G. 513; 21 L. J. Ch. 1, the annuities were held not to be payable out of the *corpus*, but, there being a deficiency, all the interests were held to be affected ratably.

Foster v. *Smith*, 1 Ph. 629; 15 L. J. Ch. 183, carried out the principles now contended for. There the devise was of real estate in trust to receive the rent, &c., and thereout to pay to the testator's widow an annuity, and from and after her death to convey the estates to the testator's three sisters. The Vice Chancellor had held that a deficiency might be made good out of the *corpus*, but the Lord Chancellor Lyndhurst, reversing that deci-
[*593] sion, held that the annuity was a *charge only on the rents which had accrued during the life of the widow. There was nothing in this will which made the annuity payable at all events, so as to defeat the gifts intended by the testator for the benefit of his children.

Mr. Graham Hastings, Q. C., and Mr. Warmington, appeared for the widow, and Mr. Farwell, for the incumbrancers, but were not called on to address the House.

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The Lord Chancellor (Lord SELBORNE): —

My Lords, this case has been very ably argued, but your Lordships, I believe, do not think it necessary to hear the counsel in support of the judgment appealed from. Your Lordships, I believe, are all agreed in thinking that that judgment is right.

The question may be stated very nearly in the terms used by Lord GIFFORD in the case of *May* v. *Bennett*, 1 Russ. 370. It is, "whether the bequest in favour of the widow is to be considered as a bequest of an annuity or as a bequest of the income" (I interpolate the words "or part of the income") "of a sum of money, which is directed to be set apart." It appears to me to be reasonably clear, upon the will, that it is the bequest of an annuity, and of an annuity not so restricted or limited as to make it payable exclusively out of the income of a particular fund arising during the widow's lifetime.

I do not think that the early part of the will, which precedes the trust, is of any importance in the case. In that portion of the will the testator, as he has himself said, appears to have been fulfilling what he considered a moral obligation, to dispose, probably, in a way agreed upon between himself and his wife, of the fortune which he had received, in right of his wife, since their marriage. He treats that part of the will as equivalent to the restoration of her fortune. It appears to me that we may set that entirely aside; and, so doing, we come to the trust of his whole estate, after that part which he received from his wife has been so taken out and disposed of.

The particular order in which he declares his will concerning that trust estate is not, I think, to be regarded as affording any *clue to the effect of the will upon the point now in [*594] controversy. The testator was constituting a general trust of all his real and personal estate; and nothing was more natural, than that clauses of administration and management should immediately follow the constitution of that trust.

Towards the end of those clauses, which I have called clauses of administration and management, occurs the direction to invest and set apart out of the estate, when converted, a sufficient sum for the purpose of paying the annuity now in question. But, my Lords, although it is in this way that the annuity is first mentioned, it appears to me to be reasonably clear that you can disengage from that context a clear gift of an annuity; which

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annuity was not, in the mind of the testator, and in truth could not have been, dependent upon the fulfilment of the course of administration up to that point, as a condition precedent to the vesting of the annuity itself.

The words in which the testator first mentions the annuity are these (I do not read those about the investment): "The annuity of £1200 a year which" (that is, "which annuity") "I bequeath to my said wife for her life, payable quarterly on every 25th day of March, 24th day of June, 29th day of September, and 25th day of December; the first payment to be made and become due on the first of such days as shall happen after my decease." Then he provides, that such annuity is to be reduced in the case of his wife's second marriage to the annual sum of £150 instead of £1200, and he directs how that reduced annuity is to be paid.

In my opinion, the true effect of that portion of the will is precisely, and to all intents and purposes, the same as if he had said, disengaged from anything as to investment: "I bequeath to my wife an annuity of £1200 a year;" followed by the other directions, which I have read to your Lordships.

The fact that this annuity was to be paid quarterly, and that the first quarterly payment was to be made and become due on the first of the days mentioned which should happen after the testator's decease, proves conclusively that the gift of the annuity, and the vesting of the title of the widow, were, in his mind, independent of the execution of those preliminary trusts in the course of administration, of which the final result was to [* 595] be an * investment for the purpose of that annuity. Looking farther into the will, we see that he also contemplated, and made provision to the effect, that the sale of the real estate, and the getting in of the personalty, which must necessarily precede any such particular investment for the purpose of the annuity, might be delayed if the widow chose, during the whole of her life. She was one of the trustees; and, therefore, the power to delay the conversion of the personal estate into money was vested in her jointly with her co-trustee; and, as to the real estate, the power was given to her absolutely. In that state of things, while the property remained unconverted, I apprehend it to be clear that the annuity was an absolute charge upon the whole estate, and of course upon the whole income of that estate.

I agree with what was said by Mr. Vaughan Hawkins, that equity considers that done which ought to be done; and, therefore, that this clause, authorizing the postponement of the conversion, would not be allowed to defeat any rights which ought to have accrued if the conversion had taken place immediately. That is quite true; but, on the other hand, it would be difficult to reconcile with the intention thus appearing any construction of the earlier part of the will, which would represent the annuity as a mere life interest in the whole or part of a separated fund.

So far, there would be no doubt; and I beg your Lordships to observe, with regard to the argument founded upon the context, that if there had been no conversion in the lifetime of the widow, and no particular investment, there would have been no particular fund to go over to the residuary legatees, and the residuary legatees would simply have taken the whole estate, charged in its entirety during the widow's life with this annuity, and they would have taken it all as residuary legatees after her death.

It is said, that the part of the general estate, which is ordered to be thus invested for the purpose of securing the annuity, is made, after the completion of that investment, a specific fund, of which she is thenceforth to be tenant for life, at all events to the extent of £1200 a year, payable out of the income of that fund, and that the *corpus* of the same fund is given over afterwards to the persons who are the residuary legatees. My Lords, that construction appears to me to have been truly described by Lord Justice JAMES * as "sticking in the bark." I appre- [* 596] hend it to be clear, that the separation from the residue of this particular sum, as one which would come in after the death of the wife or after her re-marriage, was formal only, and not substantial. It is given *uno flatu* with the residue, to the same persons, and in the same manner. The testator, no doubt, anticipated that it would not come in with the free residue, or at the same time; and therefore he mentioned it as something additional, — using a form of expression which distinguished it from that which was residue in the sense of immediate surplus, after making (among other things) proper provision for the payment of the annuity.

But, though thus distinguished as a separated and postponed part of the residue, the whole context shows that those who are ultimately to take it are to take as residuary legatees.

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I find, therefore, nothing here, except a testator giving an annuity to his wife; desiring her to enter into the immediate enjoyment of it, contemplating that during the whole of her life it may be a charge upon his general estate; but at the same time providing that, if the estate is converted into money, there shall be a sufficient investment to secure this annuity, so as to release the rest of the estate, and to enable that to be paid over immediately to the residuary legatees.

I will not trouble your Lordships with any observations upon authorities, except to say that this case seems to me to fall within the principles of *May* v. *Bennett*, 1 Russ. 370, and *Wright* v. *Callender*, 2 De G. M. & G. 652; 21 L. J. Ch. 787, and to be quite different from *Baker* v. *Baker*, 6 H. L. C. 616; 27 L. J. Ch. 417. With regard to the last case cited by Mr. Vaughan Hawkins, *Miller* v. *Huddleston*, 3 Macn. & G. 514; 21 L. J. Ch. 1, that appears to me to have depended upon the special language of a very special will; and, assuming it to have been rightly decided, I find in it nothing applicable to the present case.

I therefore propose to your Lordships to dismiss the present appeal with costs, giving only one set of costs to the respondents.

Lord HATHERLEY: —

My Lords, I am of the same opinion; and the point is really so short, and has been so clearly presented in the address [* 597] which * you have heard from my noble and learned friend on the woolsack, that it would be unbecoming in me to occupy any farther time in this discussion. I would simply say it appears to me clear that if you take into your view the two different classes of cases, the one *Baker* v. *Baker*, and the other *Wright* v. *Callender*, which have been discussed before us this morning, in the one class there is a general trust fund which is partitioned between two parties, the one taking a life interest and the other taking an interest in the remainder. That is the case of *Baker* v. *Baker*, and there, of course, the person entitled to the life interest in that fund only, has not any right to do more than receive the income accruing from that fund. But, on the other hand, if you find it to be the gift of an annuity, in which I concur entirely with my noble and learned friend, and, for the same reasons, if I say you find it the gift of an annuity, in this case made to the wife, of £1200 a year, and

if you find that that is the character of the gift, those who take subject to that gift, and those who take another portion of the residue of the estate (that gift having been previously directed to be taken out of it), must submit to any loss or inconvenience which may be occasioned by the fact that the estate of the testator has fallen short of what he, and everybody else, had expected would be the condition of the residue. But that will not convert this gift, which was a gift out and out, into a gift which was a life-tenancy only in a portion of the residuary estate, which is the argument that has been presented to us on the present occasion.

Therefore, when one comes to look carefully at the wording of this will, it really seems to me a sufficiently clear one, and that it does not require much exposition or much discussion on the part of your Lordships.

Lord BLACKBURN: —

My Lords, I am of the same opinion. I take it that the whole question turns upon the construction of the will. I do not think there is anything illegal or improper, or that could not in any way be enforced in a bequest by which an annuity was left, which was made payable entirely and exclusively out of the income of *any particular fund. Of course that [*598] might be done, but that, I think, is not done here; and upon that point, and upon the construction of the will, I so thoroughly agree with what has been said by the noble and learned Lord on the woolsack, that I do not think it necessary to add anything farther.

Lord WATSON: —

My Lords, I have no hesitation whatever in agreeing with the views which have been expressed by your Lordships and by the Judges of the Court of Appeal below. I think, according to the true construction of its terms, this will imports a direct bequest of an annuity of £1200 to the testator's widow, followed by a direction, for the purpose of administration, to his trustees to set apart a sum sufficient to yield an income that would make up that amount, before paying away any part of the residue. I cannot find any words indicative of an intention on the part of the testator to limit the fund out of which it was to be paid, to the income of the sum so set apart, or even, as has been contended in another way by the counsel for the Appellant, out of

the income of the estate. I cannot read the terms of what I venture to call the clause disposing of the residue in this case, as a gift to the residuary legatee, not in the nature of a residuary gift, but importing the specific bequest of a sum after that set apart to meet the wife's annuity, accompanied by an expression of his intention that that sum should pass intact to the legatee. I therefore entirely concur with the views already expressed by your Lordships.

Order appealed from affirmed, and appeal dismissed, with costs; one set of costs only being allowed to the respondents.

Lords' Journals, 1st June, 1880.

ENGLISH NOTES.

The decision by Lord Gifford, M. R., in *May* v. *Bennett*, which is confirmed in the principal case, was in 1826 reported in 1 Russ. 370. The testator had given all his property to trustees, in trust, after payment of debts to lay out in government security, "as much money as would produce the annual interest of £54 12*s.* per year," his wife to have the interest during life if she did not marry, but if she married the annuity was to cease, and the trustees were to sell out so much stock as would produce £300 and pay it to her on her marriage, "and the remainder of the stock, that was put in trust for the produce of the £54 12*s.* a year, was to become part of the residue of his estate in like manner as if she did not marry." He then, after giving some legacies, bequeathed the residue to W. M. After the death of the testator, the investment was made in an amount of Navy £5 per cent securities sufficient to produce the income of £54 12*s.* In 1822, when the stock was converted into new £4 per cents, the income of the fund set apart became insufficient. It was decreed that so much of the stock as should from time to time be necessary should be sold to make up the deficiency.

In a Scotch case in 1850, *Berry's Trustees* v. *Cox's Trustees* (Court of Session, 2nd series, Vol. 12, p. 1037), there was a decision in conformity with the above rule. The testator directed his trustees 1st to pay his debts; 2ndly he gave a provision of £5000 each to his children; 3rdly "the interest of £6000 to my sister" during her life; and the trustees were directed to place at interest in the public funds, or with adequate security, £6000 sterling for this purpose. After making a gift of the residue the testator lastly directed that the different provisions should be paid in the order in which they were enumer-

ated. The residue of the trust fund, after paying the debts and the portions of £5000 each to his children, did not amount to £6000. The Court of Session decided that an annuity equal to the interest of £6000 must be made good out of capital preferably to any claim of the residuary legatees.

Wright v. *Callender*, also confirmed by the principal case, was a decision of the Lords Justices Cranworth and Knight Bruce (reversing a judgment of V. C. Kindersley) in 1852. It is reported in 2 De G. M. & G. 652, and 21 L. J. Ch. 787. The testator, after bequeathing a legacy and giving a direction to pay debts, directed his executors to get in his personal estate, and to stand possessed thereof upon trust to invest a sufficient portion in government securities to produce an income of £2 a week to be paid to his son J. And after directing a division of his residuary estate amongst his children other than his son J., he "in like manner" directed "that upon the decease of my son J., the sum to be invested to produce and pay his annuity of £2 a week, shall be divided" amongst his other children *who should be then living*. The assets available after payment of debts were only sufficient to purchase £2200 17*s.* 6*d.* £3 per cent Consols, which was of course insufficient to produce dividends to pay the annuity of £104. The Vice-Chancellor Kindersley distinguished the case from *May* v. *Bennett* by the circumstance that there was a fund given to secure the annuity, with a limitation of the fund over after the annuitant's death. But the Lords Justices agreed in considering that there was no ground for the distinction. "If," Lord Justice Cranworth says, "there had been anything in the terms of that gift over, showing that the testator intended the fund to be continued in its integrity during the life of the annuitant, and in that state to go over, the argument might be well founded. But the direction to set apart the fund does not denote the object of the testator, but merely the means by which that object was to be secured."

In the case of *Baker* v. *Baker* (1858), 6 H. L. C. 616, 27 L. J. Ch. 417, which was distinguished in the principal case, the testator directed his trustees to stand possessed of the produce of the sale of his property on trust to invest in stocks, etc. such a sum of money as, when invested should realize the clear annual income of £200, and to pay the same to his wife during widowhood; and after her death or second marriage (in the event, which happened, of his dying without issue), to stand possessed of the said principal sum or stocks, etc., in trust for [certain persons]; and as to the residue of the trust moneys arising from the sale of his property after raising thereout the money sufficient to realize the annuity for his said wife, the trustees should stand possessed thereof in trust for [the same persons] in like manner as was

thereinbefore expressed and declared concerning the said trust moneys therein bequeathed to them. The estate was insufficient to provide a fund producing £200 a year income. The House of Lords (Lord CHELMSFORD, C., Lords BROUGHAM, CRANWORTH, and WENSLEYDALE) reversing the judgment of Sir JOHN ROMILLY, M. R. (which had been formally affirmed by the Lords Justices TURNER and KNIGHT BRUCE, who differed in opinion), decided that the widow was not entitled to have the deficiency made good out of the *corpus* of the fund. Lord CHELMSFORD, C., cited the above-quoted observation of Lord CRANWORTH in *Wright* v. *Callender*, and considered that there was language to show that the testator did intend "the gift to be continued in its integrity during the life of the annuitant and in that state to go over." And all the learned lords concurred in this opinion.

In the case of *Re Parry, Scott* v. *Leak* (1889), 42 Ch. D. 570, where a testator gave a number of annuities, and left estate mainly consisting of two freehold theatres and two leasehold theatres, it was held by NORTH, J., that the annuitants were not, as against a proposal of the residuary legatees to secure the annuities by means of a first mortgage of the freehold theatres, entitled to have the leasehold theatres sold and the proceeds after payment of debts invested in investments in which cash under the control of the Court might be invested, and the whole income of the estate then applied in payment of the annuities. It was observed that if the latter proposal had been carried out, the presumable object of getting rid of the liability on the leasehold property would not have been entirely effected.

ANTICIPATION (RESTRAINT ON).

TULLETT *v.* ARMSTRONG.

(CH. 1838, 1840.)

RULE.

A RESTRAINT against anticipation is valid only as a modification of the separate estate conferred upon a married woman.

If a gift of income is made to a woman, who is unmarried, expressed to be for her separate use without power of

anticipation; then, since the separate use cannot while she is unmarried have any effect, the restraint on anticipation is likewise suspended. But if she marries without having alienated the future payments; both the separate use and the restraint attach during the coverture. On becoming discovert she again becomes free to alienate.

Tullett v. Armstrong,

1 Beav. 1–33; 4 My. & Cr. 390–407; (s. c. 8 L. J. N. S. Ch. 19–22; 9 L. J. N. S. Ch. 41–48).

The plaintiff in the case claimed under certain securities created by William Armstrong and Mary, his wife, which purported to charge certain interests in property under the will of one Nathaniel Bradford.

Nathaniel Bradford's will gave all his property to trustees in trust for his wife for life, and at her death gave certain property between certain persons including his granddaughter Mary Augusta Tilt (who afterwards became Mrs. Armstrong) during their joint and several lives, with directions that they should not dispose of their several life estates by way of anticipation, and so that no husband should acquire any control over the life estate. And in the latter part of the will certain copyhold and leasehold property was given to the said Mary Augusta Tilt and her assigns during her life (with no mention of restraint against anticipation): and there was a further declaration in the will that the devises and bequests made to his granddaughters (Mary Augusta Tilt and another) were given to them free from the rights, control, contracts, or debts of any husband.

Mary Augusta Tilt was unmarried at the date of the will and of the testator's death. She afterwards married William Armstrong, and they together executed the securities purporting to charge the interests in question.

The securities also purported to include the interest which Mrs. Armstrong took under the will of Ann Bradford, dated 25th August, 1826. These interests were expressly given by this will to Mary Augusta Tilt with restraint on anticipation, and so that they should not be subject to the control of any husband. The marriage of Mary Augusta Tilt to William Armstrong

took place after the making of Ann Bradford's will, but before her death.

At the time of the execution of the securities in question, the life interests had vested in possession, the widow of the testator, Nathaniel Bradford, having previously died.

The question as to the validity and effect of the securities having been argued,—

The MASTER OF THE ROLLS (Lord LANGDALE), after stating the effect of the wills and the position of the title, laid down the principles of the law and their bearing on the case as follows:—

[21] In this Court a married woman has, for more than a century, been considered as capable of possessing property to her own use, independently of her husband; such property is called her separate estate, and, in respect of it, she is considered as a *feme sole*, enjoying, and capable of exercising, her rights as such.

[*22] The property may be acquired, either by contract with the husband before the marriage, or by gift from *him, or from any stranger wholly independent of such contract; so far as his legal rights as husband may interfere, the Court will treat him as a trustee; and property held by or for the wife to her separate use, if unaccompanied by any restraint, is subject to her power of alienation, and the other incidents of property held by men or single women.

The estate for separate use, as sanctioned by courts of equity, has its peculiar existence only in the married state. It operates as a protection to a married woman, against the legal power over the wife's property which is vested in her husband. It acts in contravention and control of the legal right of the husband, and as against his legal power it is a sufficient protection; but the power of alienation remaining in the wife, the separate estate, unfettered, is no protection against the moral influence of the husband, and many instances have occurred and daily occur in which the wife, under the persuasion or influence of her husband, has been and is induced to exercise her power of alienation in his favour or for his benefit, and thus defeat the protection intended for her.

But as the separate estate itself owed its origin and support to the courts of equity, it was understood, that the same courts might so modify it as to secure the protection which was

intended; and accordingly it was intimated by Lord THURLOW, that if a gift clearly expressed, that the separate estate should be incapable of assignment in anticipation or of alienation, that intention would be carried into effect, and his Lordship, being of that opinion, himself set the example in a case in which he personally took an interest; and from that time, now nearly half a century ago, it has been usual to introduce into wills and settlements a clause giving to women real and personal estate for their separate use, * independently of their husbands, [*23] without power of assignment, by way of anticipation or of alienation; and such clauses, though their operation has been considered to be, as undoubtedly it is, anomalous, and irreconcilable with the ordinary legal rules affecting the limitations of estates, and the legal incidents of property, have been repeatedly approved and carried into effect by this Court, and settlements and provisions for families to a very great extent have been framed in reliance upon them. And in *Jackson* v. *Hobhouse*, 2 Mer. 488, Lord ELDON emphatically declared, that it was too late to contend against the validity of a clause in restraint of anticipation.

I apprehend that the restrictive clause or fetter (as it has been called) has in this Court always been considered as effecting a modification of the separate estate, and consequently, to have its operation only in the married state. It is said, indeed, that before the case of *Brandon* v. *Robinson*, 18 Ves. 429; 1 Rose 197; 11 R. R. 226, there were some eminent lawyers, who considered that a similar fetter might be imposed by this Court, on property enjoyed by men and without relation to the married state; but Lord ELDON, in deciding that case, after referring to Lord THURLOW'S reasoning, that this Court, having by its doctrine of separate estate enabled a woman, though married, to alien, might limit her power over it, thought it proper to state distinctly, that the case of a disposition to a man, who, if he has property, has the power of aliening, was quite different; and I conceive, that the validity of a clause in restraint of alienation, when clearly expressed, in connection with a clause giving the estate for the separate use of a married woman, also clearly expressed, has not till lately been doubted.

*As the clauses conferring the separate estate, and [*24] annexing the fetter, have both of them their effective operation, only in the state of marriage, and are intended for

the protection of married women, and not to restrain the incidents of property vested in persons under no legal incompetency, it has been determined, that neither of them has any practical operation whilst the donee is single; it has been considered that, as an unmarried woman is as capable of enjoying and exercising the rights of property as a man is, the property must in her, whilst unmarried, be accompanied by its ordinary incidents, and upon this principle would seem to be founded the several cases of *Jones* v. *Salter*, 2 Russ. & M. 208, *Barton* v. *Briscoe*, Jac. 603, *Woodmeston* v. *Walker*, 2 Russ. & M. 197, *Brown* v. *Pocock*, 2 Russ. & M. 210; 2 M. & K. 189; 5 Sim. 663.

In the three first of these cases, the alienation took place during widowhood, *i. e.*, after the termination of a coverture. In the last the alienation took place before coverture. In the cases of *Woodmeston* v. *Walker* and *Brown* v. *Pocock*, the LORD CHANCELLOR reversed orders of Sir JOHN LEACH, who was of opinion, that an estate given to the separate use of a woman independent of any husband she might marry, and accompanied by the fetter, prevented her from alienation when single, the intention having been, to secure to her the enjoyment of separate property during coverture, and coverture having therefore been in the contemplation of the donor, and being possible on the part of the donee, Sir JOHN LEACH considered, that she was not at liberty to defeat that intention, by any act of her own when single; his opinion was overruled, and the point does not arise in any of the cases before me. Supposing it to be satisfactorily established, that a woman may, when single, dispose of property given to her for her separate use without power of alienation, none of these cases would be affected by it.

[* 25] * But it has been argued, that if the gift of property for the separate use of a woman, whether intended to be thus fettered or not, becomes vested in the woman whilst single, she then possesses immediately the faculty of disposition or the power of alienation; and that, if she afterwards marries, she by the fact of marriage subjects this, like any other property, to the marital power of the husband, and in that way, loses all the protection she was intended to have; and in the arguments which have been used on this subject, a desultory or shifting privilege or fetter attaching on the marriage, and of no practical operation when the woman is discovert, has been treated as a sort of absurdity not to be endured.

I confess, however, that I see no absurdity, but considerable convenience, in a law affording peculiar protection to the property of married women; which affords to women protection, or imposes upon them restraint, for their protection, only when they want it; which enables a woman when single and adult, upon deliberation, to settle her property according to her convenience, or, if most to her advantage, to forego her protection altogether; and yet, guarding against infancy or improvidence, secures her the protection when married, if she has not deliberately and designedly renounced it before the marriage took effect.

And it appears to me, that this Court has not considered, that the woman by the fact of marriage subjects an estate given to her for her separate use, to the marital power of her husband.

In *Lady Strathmore* v. *Bowes*, 1 Ves. jun. 27; 1 R. R. 77, Lord THURLOW puts this case: "Suppose a relation had given her £10,000 for *her sole and separate use; if she [*26] had represented it as her own absolutely, so that upon a marriage it would have gone to her husband, this Court would have compelled the trustees to give it to her husband, but not otherwise." It is therefore clear, that Lord THURLOW did not think, that the woman by her marriage gave her separate estate to the husband; for looking at her situation before marriage, he distinguished between property given to her sole and separate use, which the Court would protect from the marital power. Moreover, many cases have occurred, in which property has been given to women, for their sole use, independent of any husband, and in which the Court has had to declare the rights of such women to the property, when they were single, and, consequently, whilst they had the power of alienation; if in such circumstances, the separate estate meant nothing, all that would have been proper would have been, to declare the woman entitled to the property without more; but the declarations have been that the women though single at the time were entitled to their sole and separate use, see *Clayton* v. *Gresham*, 10 Ves. 287, and on the marriage of a ward, the Court has ordered the property to be settled for her separate use during life, which would have been useless, if a widowhood put an end to that species of estate.

But the question came directly under the consideration of the Court in *Anderson* v. *Anderson*, 2 Myl. & K. 427. Leasehold property was given by will to a woman, then single, to her own

sole use, free of the control of any present husband, or any husband to come. The woman was single at the testator's death, and for several years afterwards. Before she married, she desired to have this property settled to her separate use; the intended husband refused, and the marriage took place without a [*27] settlement. *After the marriage, the wife claimed the same property for her separate use; and, although the husband insisted, not only, that a gift to the separate use of an unmarried woman was insensible, as an attempt to limit her power of disposition, but that in this case there was an agreement to waive her claim, it was determined, that she was entitled to the leasehold, for her sole and separate use. This was the decree of Sir JOHN LEACH, who had, in a previous stage of the cause, granted an injunction, to restrain the husband from receiving the rents, and his order, in that respect, was confirmed by Lord ELDON, before whom a motion to dissolve the injunction was made.

Unfortunately, this case was not reported till the orders upon which the questions now arise had been made; but up to November, 1822, when the decree in *Anderson* v. *Anderson*, was pronounced, it seems to have been considered as quite clear, that a gift to a woman for her sole and separate use, independent of any husband, conferred upon her a separate estate during her marriage, although she might be single when the gift vested in interest or in possession. The separate estate was considered simply as an estate vested in a woman, which this Court would protect against the marital power of her husband, and no question had been raised as to the validity of a restraint upon alienation affecting the separate estate. And according to the law, thus understood, has been the constant practice of the profession, and there are very many cases in which married women, and through them their families, owe their sole support to provisions made for them on this understanding.

If the gift were so limited as to confer a separate estate [*28] during a particular coverture only, this Court did *not extend it further; and the case of *Benson* v. *Benson*, 6 Sim. 126, is in conformity with that principle.

The cases which have raised the question are *Newton* v. *Reid*, 4 Simons, 141, *Massey* v. *Parker*, 2 Myl. & K. 174, and *Brown* v. *Pocock*.

The orders in *Newton* v. *Reid* and *Brown* v. *Pocock* (which is the second case of the same name) were made by the VICE CHANCELLOR, as it would seem, without any argument. In each case, property was given to the woman for her separate use, without power of assignment by way of anticipation; and alienations were made during coverture. In the first case, the VICE CHANCELLOR is reported to have said, at the time, that the restrictions were void, because the annuity was not given over upon alienation; and subsequently, 6 Sim. 131, "that the restriction on alienation was rendered ineffectual by the context of the will." In the other case, no reason whatever is assigned by the judge, though the reporter has transferred an observation of counsel to his marginal note, 5 Sim. 663; but, on a subsequent occasion, 6 Sim. 423, the VICE CHANCELLOR is reported to have said the cases of *Barton* v. *Briscoe* and *Newton* v. *Reid*, proceeded on this, "that the policy of the law being in favour of the power to assign, the Courts will not permit that power to be restrained by a fetter which is to take effect on a subsequent marriage." Upon this, it is necessary to observe that in *Barton* v. *Briscoe*, the alienation was made during widowhood, whilst in *Newton* v. *Reid*, the alienation was made during coverture.

In the case of *Massey* v. *Parker*, it was a question whether the property was given to the separate use of * the [* 29] wife; if it were so given, no fetter was imposed upon it, and in that respect it differs from this case; and the LORD CHANCELLOR, then MASTER OF THE ROLLS, having determined, that the estate was not given to the woman for her separate use, the case might there have ended, but his Lordship proceeded to declare his opinion, that if the property had been given to the woman's separate use, it would, upon the marriage, have become the property of the husband.

As the validity of the restraint upon alienation appears to me to depend upon the existence of the separate estate, it is not to be disguised that the case of *Massey* v. *Parker*, if considered as an established decision, whilst it negatived the existence of the separate estate in such a case as the present, would also put an end to the restraint on alienation; and it must be admitted, that the case of *Newton* v. *Reid*, though the order was made without argument or opposition, has been more than once referred to without any disapprobation.

In the subsequent case of *Davies* v. *Thornycroft*, 6 Sim. 420, the VICE CHANCELLOR has expressed himself to have always understood that property might be given to the separate use of a woman married or unmarried, and has stated, I conceive correctly, that the practice of the profession has been, according to that opinion, without any variation; and in the same case he has stated, also I conceive correctly, that the cases of *Newton* v. *Reid*, *Barton* v. *Briscoe*, *Jones* v. *Salter*, *Woodmeston* v. *Walker*, and *Brown* v. *Pocock*, were all cases in which the question was whether, if the Court admits property to be settled to the [* 30] separate use of a woman, it will also admit * of her being restrained from disposing of it; but to this statement it is most important to add, that the cases of *Jones* v. *Salter*, *Barton* v. *Briscoe*, *Woodmeston* v. *Walker*, and the first case of *Brown* v. *Pocock*, only show, that the Court does not admit of such restraint whilst the woman is single; whilst the case of *Newton* v. *Reid*, and the second case of *Brown* v. *Pocock*, are the only reported cases, in which, notwithstanding the fetter annexed to the separate estate, the Court has permitted alienation during coverture.

In the result of the cases to which I have last adverted, it appears to have been the opinion of the LORD CHANCELLOR, when MASTER OF THE ROLLS, that the separate estate could not arise upon coverture, if the subject of it vested in the woman when single; and it appears to be the opinion of the VICE CHANCELLOR, that the separate estate would arise upon coverture, although the subject of it vested in the woman when single, but that the Court would not sanction any restraint upon alienation annexed to such separate estate.

In this state of the authorities, I own that I have found myself greatly embarrassed, and I could have wished to have this case re-argued, before the LORD CHANCELLOR and in the presence of the VICE CHANCELLOR; not finding that course approved of, I have given the subject the best attention in my power, and though, after what has passed, I must hold my opinion with great distrust, yet as it does appear to me that the opinion expressed in *Massey* v. *Parker* is not consistent with the decision in *Anderson* v. *Anderson*, and that the orders in *Newton* v. *Reid*, and the second case of *Brown* v. *Pocock*, are not warranted by the former practice and doctrines of the Court, I cannot

refuse * to the parties the statement of my opinion, such [* 31] as it is.

I have considered all the cases which I have been able to find on the subject, and I am unable to find any authority prior to those which I have mentioned, or any satisfactory principle for the proposition, that a gift to a woman for her separate use is nugatory, if she chances to be single at the time when the subject of the gift becomes vested in her; or for the proposition, that the restraint upon alienation of separate estate is nugatory, if not accompanied by a gift over upon an attempt to alienate.

To sanction either of these propositions would, as it appears to me, defeat the object and purpose which were contemplated by this Court, when it applied its principles of equity to the support of the separate estate of married women.

As this subject has given occasion to considerable discussion, and as a decision pronounced here cannot settle the question, which is of very great importance, I am desirous that the case should be brought under the consideration of a higher tribunal, without any unnecessary delay, and to afford every facility in my power for the correction of any error into which I may have fallen.

I therefore think it right to state, that it appears to me, as the result of the authorities, and of the constant practice of conveyancers, which great and eminent judges have considered to be no mean evidence of the law:—

* That property given to a woman for her separate use, [* 32] independent of any husband, may, under the authority of this Court, be enjoyed by her during her coverture as her separate estate, although the property originally, or at any subsequent period or periods of time, became vested in her when discovert.

That, in respect of such separate estate, she is by this Court considered as a *feme sole*, although covert. Her faculties as such, and the nature and extent of them, are to be collected from the terms in which the gift is made to her, and will be supported by this Court for her protection.

The words "independent of a husband," whether expressed or implied in the terms of the gift, mean no more than that this Court will not permit the marital power of the husband to be

used in contravention of the enjoyment of the property, according to the terms of the gift.

If the gift be made for her sole and separate use, without more, she has, during the coverture, an alienable estate independent of her husband.

If the gift be made for her sole and separate use, without power to alienate, she has, during the coverture, the present enjoyment of an unalienable estate, independent of her husband.

In either of these cases she has when discovert a power of alienation: the restraint is annexed to the separate estate only, and the separate estate has its existence only during coverture; whilst the woman is discovert, the separate estate, whether [*33] modified by *restraint or not, is suspended, and has no operation, though it is capable of arising upon the happening of a marriage.

The restriction cannot be considered distinctly from the separate estate of which it is only a modification; to say that the restriction exists, is saying no more than that the separate estate is so modified; the donor, in giving the woman when married some of the faculties of a *feme sole*, has withheld the power of alienation; under the terms of the gift, and by the aid of this Court, the woman is a *feme sole*, as to the present enjoyment of the property, but no further: measuring her faculty by the terms of the gift, she is not a *feme sole* as to the disposition of her property in anticipation of her intended provision. If there be no separate estate, there can be no such restriction as that which is now under consideration. The separate estate may, and often does exist without the restriction, but the restriction has no independent existence; when found, it is as a modification of the separate estate, and inseparable from it.

And applying these principles to the present case, I am of opinion, that as to those estates, which by the wills of the testator, Nathaniel Bradford, and the testatrix, Ann Bradford, were given to the defendant, Mrs. Armstrong, for her separate use, without power of alienation, the plaintiff has acquired no right under his securities. As to the estates given by the will of Nathaniel Bradford to Mrs. Armstrong for her separate use, without any clause to restrain alienation, I think the plaintiff is entitled to the relief he prays, and the accounts and inquiries must be directed accordingly.

Tullett v. Armstrong, 1 Beav. 33, 4 My. & Cr. 392, 393.

The case having been argued on appeal before Lord COTTENHAM, as LORD CHANCELLOR, he on 22d January, 1840, gave judgment as follows: —

The LORD CHANCELLOR [4 My. & Cr. 392]: —

The question raised in this case is as to the clause against anticipation; but I agree with the MASTER OF THE ROLLS in thinking, not only that it necessarily involves the question of separate estate, which has been the subject of much discussion in the profession, but that these two questions are identical as to the principle which must regulate the decision upon them; by which I mean, that if the case be of a separate estate without power of anticipation, it must exist with that qualification or fetter, if it exist at all, and that there is no principle upon which it can be held that the separate estate operates during a coverture subsequent to the gift, but that the provision against anticipation, with which the gift was qualified, does not. It is obvious that such a rule would, * in practice, defeat the [* 393] intention of the donor, and in many cases render the provision which he had made for the protection of the object of his bounty the means and instrument of depriving her of it.

When once it was established that the separate estate of a married woman was to be so far enjoyed by her as a *feme sole*, as to bring with it all the incidents of property, and that she might therefore dispose of it as a *feme sole* might do, it was found that, to secure to her the desired protection against the marital rights, it was necessary to qualify and fetter the gift of the separate estate by prohibiting anticipation. The power to do this was established by authority, not now to be questioned, but which could only have been founded upon the power of this Court to model and qualify an interest in property which it had itself created, without regard to those rules which the law has established for regulating the enjoyment of property in other cases.

If any rule, therefore, were now to be adopted, by which the separate estate should, in any cases, be divested of the protection of the clause against anticipation, it would, in such cases, defeat the object of the power so assumed.

A *feme covert*, with separate estate, not protected by a clause against anticipation, is, in most cases, in a less secure situation than if the property had been held for her simply upon trust. In the latter case, this Court, with the assistance of her trustees,

can effectually protect her: in the other, her sole dependence must be upon her husband not exercising that influence or control, which, if exercised, would, in all probability, procure the destruction of her separate estate. In the case of a gift of separate estate with a clause against anticipation, the [* 394] * author of the gift supposes that he has effectually protected the wife against such influence or control. Upon what principle can it be that this Court should subject her to it, and by so doing defeat his purpose and completely alter the character and security of his gift? The separate estate and the prohibition of anticipation are equally creatures of equity, and equally inconsistent with the ordinary rules of property. The one is only a restriction and qualification of the other. The two must stand or fall together. Indeed, I do not find any allusion, in any case, to the possibility of the one surviving the other, until after the discussion as to the continuing of the separate estate through a subsequent coverture had commenced. In the consideration of the cases upon which I am about to enter, I shall assume that there is no ground whatever for the attempt which has been made in argument to separate the two. Every authority, therefore, which bears upon the one, will bear equally upon the other.

In a case of so much importance, and which has excited so much interest, I have thought it my duty not only to consider every case which has been referred to in argument, but to endeavour to obtain all other information which was within my reach. I will first examine the cases which are supposed to support the proposition, that the absolute interest of the woman which she unquestionably possesses in property given for her separate use, though with a prohibition against anticipation, up to the moment of her subsequent marriage, becomes subject to all the qualifications and restrictions of the gift, upon such marriage.

If *Sir Edward Turner's* case be correctly stated in *Tudor* v. *Samyne*, 2 Vern. 270, which differs from the report in [* 395] * 1 Vern. 7, and if *Tudor* v. *Samyne*, be itself accurately reported, they would be instances of property settled to the separate use of a woman being alienable by an after-taken husband. I do not, however, think that either is of any value upon the present question. They are of too early a date; the accuracy of the report upon this subject cannot be depended

upon, and the point was not raised or argued, and cannot be said to have been decided.

Although no cases appear to have occurred until very late times in which the question was directly raised, yet decisions took place which necessarily led to the consideration of it. *Brandon* v. *Robinson*, 18 Ves. 429; 1 Rose, 197; 11 R. R. 226, and other cases having brought to view the rule that all restrictions inconsistent with the nature of the estate given are void in gifts to men, the case of similar gifts to females soon occurred. Sir WILLIAM GRANT, in *Jones* v. *Salter*, 2 R. & M. 208, and Sir THOMAS PLUMER, in *Barton* v. *Briscoe*, Jac. 603, held that property settled upon a married woman with a clause against anticipation, was, upon her becoming discovert by the death of her husband, absolutely disposable by her. *Woodmeston* v. *Walker*, 2 R. & M. 197, proceeded upon the same principle; but it has a more imperfect application to the present case, because Sir JOHN LEACH had refused to consider a single woman to whom an annuity had been given for her separate use, with a prohibition against anticipation, as having the dominion over the fund, because the provision contemplated a future marriage. Against this judgment, Sir EDWARD SUGDEN, upon an appeal to Lord BROUGHAM, argued, "that it might be said, that as the words of the proviso point to a future coverture, the restriction would attach upon *the plaintiff the instant [*396] she married, and that the Court looking to that contingency would protect the executors in their refusal to transfer the fund, but that for such a proposition no authority would be adduced: that the language of the judgment in *Barton* v. *Briscoe* was directly opposed to it, and that the existence of a desultory and shifting fetter of that description was repugnant to legal principle, and would be attended with much practical inconvenience." Against this, the practice of conveyancers and the necessity of affording to parents the means of securing property for their daughters in the event of their subsequent marriage was urged in vain. Lord BROUGHAM declared the plaintiff entitled to an absolute interest in the property, after thus expressing himself: "It was said that the woman might have the property at her own disposal till she married, and that when that event happened, a sort of postponed fetter might attach, a fetter which would fall off upon her husband's death, and be again

imposed should she enter into a second marriage. That would be a strange and anomalous species of estate; nor is it very easy to conceive by what process or contrivance it could be effectually created, unless perhaps by annexing to the gift a limitation over to trustees, to preserve it for the woman during the successive covertures." The decision in that case only confirmed the judgment of Sir THOMAS PLUMER in *Barton* v. *Briscoe*, because the party claiming the fund was discovert; but the observations of Lord BROUGHAM assume that a marriage would not bring what he calls the postponed fetter into operation, except possibly by the means he suggests. This case was decided in August, 1831. It does not appear from the report that *Newton* v. *Reid*, 4 Sim. 141, was cited, although it had been decided in December, [*397] 1830, which may be accounted for by what is *stated in *Brown* v. *Pocock*, 2 Russ. & Mylne, 210; see p. 212, that *Newton* v. *Reid* had been then recently reported. In that case a father had directed his trustees to purchase an annuity for his daughter for her separate use, with a prohibition against anticipation. The daughter was unmarried at her father's death; but having afterwards married, she and her husband joined in assigning the fund to creditors of his, and both joined in a petition for the transfer of the fund according to the assignment; which the VICE CHANCELLOR ordered, saying, the annuity not being given over upon alienation, the restrictions are void. This order was made without argument; and it would not be reasonable, therefore, to consider it as an expression of the deliberate opinion of the Judge if it had not afterwards been recognized and approved.

In *Brown* v. *Pocock*, 2 Russ. & Mylne, 210; and 2 Mylne & Keen, 189, Sir JOHN LEACH and Lord BROUGHAM took the same view of the question they had respectively done in *Woodmeston* v. *Walker*, the case being the same; and Lord BROUGHAM commented upon *Newton* v. *Reid*, saying it was a stronger case than that before him, but did not express any disapprobation of it. The second case of *Brown* v. *Pocock*, 5 Sim. 663, was the same as *Newton* v. *Reid*, the assignment having been after the marriage.

I now come to the case of *Massey* v. *Parker*, 2 Mylne & Keen, 174, which excited an interest to which it was very little entitled, either from the authority of the Judge or any novelty in the doctrine. What was said upon this subject in that case

has been represented as extrajudicial by some, and as a decision upon the point by *others. It certainly was not [*398] extrajudicial; because it was one of the questions directly in issue, and upon which the decision might have been rested. But it is, at the same time, true that there being another point in the case sufficient, in my opinion, to support the judgment I pronounced, it cannot be said that the point in question was that upon which the judgment was founded; and, for that reason, less attention was, perhaps, paid to the various considerations belonging to it than it was entitled to, and less than it probably would have received if the rights of the parties had depended upon the determination of it; and I must observe that, although the cases favourable to the proposition of which approbation was expressed were very fully brought before me in the argument, none of those which are most important on the other side were referred to. It had, at that time, been decided that it was equally incompetent to affix to a gift to a single woman, as to a man, restrictions inconsistent with the estate given, and that in such cases the woman, before marriage, or upon becoming discovert by the death of her husband, had the absolute property in the fund; not, in the case of either a male or a female, that there was a power of relieving the property from the qualification and restriction imposed upon it; but that such qualification and restriction were void, and the title to the property absolute: and in *Woodmeston* v. *Walker*, it had been assumed that such qualification and restriction would be equally void after a subsequent marriage; which assumption had, in *Newton* v. *Reid*, been carried into effect, by directing a transfer of the fund upon the application of the husband and wife. It certainly did not occur to me, as it does not appear at that time to have occurred to any one else, that the separate estate could survive into a subsequent coverture, stripped of the protection which the prohibition against anticipation gives to it, and which alone, in *many [*399] cases, prevents it from being an evil rather than a benefit to the wife. I cannot, therefore, think that there was any inaccuracy in saying that I must consider the point as settled. Whether the expression of approbation of the doctrine so established was well founded is what I have to consider in the present case. That the expressions used in that case were not considered as promulgating any new doctrine may be inferred from the case

of *Malcolm* v. *O'Callaghan*, 5 L. J. N. S. Ch. 137. In that case property had been settled to the separate use of a married woman as against the then existing and any future husband, with a prohibition against anticipation. Her husband died, and she married a second husband, and they together applied for payment of the fund. *Barton* v. *Briscoe*, *Newton* v. *Reid*, *Woodmeston* v. *Walker*, and *Massey* v. *Parker* were cited; and the VICE CHANCELLOR ordered the payment, saying that the general rule of law to be deduced from those cases was, that where a settlement to the separate use of the wife was made, with a view to an existing marriage or a marriage then in contemplation, it was competent for the wife, when she became discovert from that marriage, to rid the fund from the fetters imposed upon it, and if such a limitation were made by a will or otherwise in favour of a *feme sole*, who had not taken upon herself a state of coverture, but who was come of full age and able to act for herself prior to coverture, she was entitled to call for a transfer of the settled fund, and that the only means of preventing such party from a right to have the fund paid over was to insert in the settlement or will which created such a trust, a gift over in the event of alienation. No distinction is here taken between the separate estate and the prohibition against anticipation, or be-
[*400] tween the doctrine of *Massey* v. *Parker*, and the *other cases. The decision in *Johnson* v. *Freeth*, 5 L. J. N. S. Ch 143, and 6 Sim. 423 *n*, is even more pointed, because *Massey* v. *Parker* does not appear to have been referred to; but, upon the authority of *Newton* v. *Reid*, sanctioned by Lord BROUGHAM, the VICE CHANCELLOR directed payment of the fund to an assignee of the husband and wife, saying, that except as to the marriage, with reference to which the settlement containing the clause against anticipation was made, that clause was to be taken as a nullity: that if such a clause applied to a woman before coverture, it was bad altogether, and if to a woman under coverture, it was void when the coverture ceased. It is, indeed, true that in *Benson* v. *Benson*, 6 Sim. 126, although there was no decision upon the subject, there were some observations of the VICE CHANCELLOR, which seem to aim at a distinction between the separate estate and the clause against anticipation; and in *Davies* v. *Thornycroft*, 6 Sim. 420, the VICE CHANCELLOR expresses a distinct opinion, that although the prohibition against anticipa-

tion cannot operate during a subsequent coverture, the property may maintain its quality of separate estate. I have before said that I concur with the MASTER OF THE ROLLS in thinking that this doctrine cannot be maintained.

In tracing the fluctuations of opinion which have existed upon questions relating to the separate estate of married women, it cannot but be observed that so late as the cases of *Woodmeston* v. *Walker*, and *Brown* v. *Pocock*, 2 Russ. & Mylne 210, Sir JOHN LEACH was of opinion that in order to preserve to a woman the benefit of a gift to her separate use without anticipation, she ought not to be enabled to dispose of the property whilst single or discovert. The * contrary is now clearly estab- [* 401] lished; but the power of providing for daughters and guarding them against the chance of future want is thereby greatly impaired. Observations, therefore, which may have fallen from Judges before it was made apparent that the separate use of a married woman in her property, being only a creature of equity created for the protection of married women, cannot exist so as to affect the power of a single woman, must be received with some qualification.

The case of *Beable* v. *Dodd*, 1 T. R. 193; 1 R. R. 182, was much relied upon by the respondents; and, strange as it may appear that a decision of common-law judges in an action of replevin should be applicable in a case of separate estate, which is said to be a creature of equity, it is certainly entitled to much consideration. It is, however, to be observed, that the whole of the argument and judgment turned upon the construction of the instruments, and that there was an express power reserved to the woman; and Mr. Justice LAWRENCE in his argument for the defendant, said, cases of trusts created by a husband for the separate use of his wife are very different from the present case of a devise, generally, to a woman, notwithstanding her coverture. In the earlier case of *Carleton* v. *The Earl of Dorset*, 2 Vern. 17. there was an express power; and in *Edmonds* v. *Dennington* there cited, it does not appear by what means the power of the wife was secured to her. In *Bennet* v. *Davis*, 2 P. W. 316, the devisee was married at the time of the gift, and the only question arose from there being no trustee appointed. Lady *Strathmore* v. *Bowes*, 1 Ves. jun. 22; 6 Bro. P. C. 427; 1 R. R. 76, has been cited as conclusive of Lord THURLOW'S opinion; but upon refer-

ring to the report of the same case in 2 Bro. C. C. 345, it
[* 402] will be found that the * settlement was upon trust to pay the rent, &c., to such uses as she should, whether sole or covert, appoint. In *Acton* v. *White*, 1 S. & S. 429, the only question was, whether the words used amounted to a prohibition against alienation. The expression of Sir JOHN LEACH, therefore, that the intention was only to exclude the marital claims of any present or after-taken husband, cannot be considered as of any weight upon this subject, which was not before him.

The VICE CHANCELLOR, in *Davies* v. *Thornycroft*, considers the case of *Simson* v. *Jones*, 2 R. & M. 365, as decisive; but, upon examining that case, it will be observed that the wife never had any power of disposing of the property. She was an infant when she married, and the property was to vest in her upon marriage under twenty-one, and then to be for her separate use. The estate and the provision for the separate use took effect at the same moment and by the same act. If the observations of Sir JOHN LEACH are construed with reference to the case before him, they do not appear to have any application to the present case.

Anderson v. *Anderson*, 2 Mylne & Keen, 427, may from its circumstances be the most important of all the cases in favour of the separate estate being in force through a subsequent coverture; but unfortunately there is no report of the grounds of the judgments of either Sir JOHN LEACH or Lord ELDON; and there were facts in that case which may have been relied upon by those learned Judges which have no application to the general question. There had been a negotiation before the marriage respecting the property; the husband admitted that he had promised
[* 403] not to sell it. It was also part of the * wife's case that the husband had refused to maintain her. Sir JOHN LEACH's decree is the only important part of that case, because there were upon the answer sufficient admissions for an injunction till the hearing, without any decision upon the general question. The decree, however, must be considered as entitled to great weight; but it occurred in 1822, and before those cases which have created the difficulty and raised the doubt; for it must not be forgotten that Sir JOHN LEACH always maintained that the separate estate with all its qualifications and restrictions continued in operation during the time the woman was not under coverture. It is the establishment of the principle that this is

not so which has created the difficulty of supporting it during the subsequent coverture.

The case of *Cox* v. *Lyne*, 1 Yo. 562, has been often referred to for the purpose of introducing the authority of Lord LYNDHURST into this discussion. From the report of that case it is not possible to ascertain what was the point in discussion. I have therefore examined the papers in the cause. The plaintiffs were holders of a promissory note of the married woman, under which they demanded payment out of her separate estate, and the bill stated distinctly, as a fact, that the property was held upon trust for the separate use of the wife, which, upon the demurrer, must have been taken as a fact, and so it really was, for the plaintiff afterwards amended the bill, and stated a settlement upon the marriage, by which the property was resettled to the separate use of the wife. The demurrer was very properly overruled, and this question did not arise in that case.

*Such is the state of the authorities upon this very [*404] important question. It is said to have been very generally understood in the profession that the separate estate would continue to operate during a subsequent coverture, and that conveyancers have acted so extensively upon that supposition, that very many families are interested in the decision of this question. That circumstance ought to have great attention paid to it. For the future it would not probably be found difficult to obtain the desired security for the future wife by other means, consistent with the well-established rules of property; but the existing arrangements must depend upon the decision of this case.

I have over and over again considered this subject, with a great anxiety to find some principle of property consistent with the existing decisions, upon which the preservation of the separate estate during a subsequent coverture could be supported. I have been anxious to find means of preserving it, not only to maintain those existing arrangements which have proceeded upon the ground of its validity, but because I think it desirable that the rule should, if possible, be established for the future, believing, as I do, that when a marriage takes place, the wife having property settled to her separate use, all the parties in general suppose that it will so continue during the coverture. To permit the husband, therefore, to break through such a settlement, and

himself to receive the fund, would, in general, be contrary to the intention of the parties, and unjust towards the wife. This view of the case has led to a suggestion which has often been made in argument, by which the object might be attained without violating any rule of property, namely, by supposing the husband, marrying a woman with a property so settled, tacitly to assent to such settlement, or at least to be bound by an [*405] equity not to dispute it. *I was for some time much disposed to adopt this view of the subject; and in all cases in which the husband was cognizant of the fact, there would be much of equitable principle to support the gift or settlement against him; but putting the title of the wife upon such assent of the husband assumes that, but for such assent, it would not exist. It abandons the idea of the old separate estate continuing through the subsequent coverture, and supposes a new separate estate to arise from the act of the husband. If the title of the wife were to rest upon that supposition, I fear that the remedy would be very inadequate, and that questions would constantly arise as to how far the circumstances of each case would afford evidence of assent, or raise this equity against the husband.

After the most anxious consideration, I have come to the conclusion that the jurisdiction which this Court has assumed in similar cases, justifies it in extending it to the protection of the separate estate, with its qualification and restrictions attached to it, throughout a subsequent coverture; and resting such jurisdiction upon the broadest foundation, and that the interests of society require that this should be done. When this Court first established the separate estate, it violated the laws of property as between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a *feme sole*, the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property supported the validity of the prohibition against alienation.

[*406] *In the case now under consideration, if the after-taken husband be permitted to interfere with the property given or settled before the marriage to the separate use of the wife, much of the benefit and security of the rules which have been so

established will be lost. Why then should not equity in this case also interfere, and if it cannot protect the wife consistently with the ordinary rules of property, extend its own rules with respect to the separate estate, so as to secure to her the enjoyment of that estate which has been so invented for her benefit? It is, no doubt, doing violence to the rules of property, to say that property which, being given with qualifications and restrictions which are held to be void, belonged absolutely to the woman up to the moment of her marriage, shall not be subject to the ordinary rules of law as to the interest which the husband is to take in it (and that is the sense, and the only sense in which the expression used in *Massey* v. *Parker*, "why may she not by the act of marriage give it to her husband," is to be understood); but it is not a stronger act to prevent the husband from interfering with such property, than it was originally to establish the separate estate, or to mantain the prohibition against alienation. In doing this I feel that I have much to overcome, of which the observations thrown out by myself, in *Massey* v. *Parker*, is the only part of which I do not feel the important weight. I have to contend with Lord BROUGHAM'S observations in *Woodmeston* v. *Walker*, and the VICE CHANCELLOR'S decisions in *Newton* v. *Reid*, *Brown* v. *Pocock*, *Malcolm* v. *O'Callaghan*, *Johnson* v. *Freeth*, and *Davies* v. *Thornycroft*, to which I have before adverted, and the doctrine now established, though denied by Sir JOHN LEACH in *Brown* v. *Pocock*, and *Woodmeston* v. *Walker*, that before marriage, or after the coverture has determined by the death of the husband, the settlement or gift to the * separate use, and the prohibition against anticipa- [*407] tion, are wholly inoperative and void.

In establishing the validity of the separate estate with its qualification, which constitutes its value, that is, the prohibition against anticipation, I am not doing more than my predecessors have done for similar purposes, and I have much satisfaction in finding myself justified, upon the grounds I have stated, in doing what in me lies to dissipate the alarm which has prevailed lest the separate estate should be held not to exist at all during a subsequent coverture, or, what would in many cases be a greater evil, that it should exist without the protection of the clause against alienation.

I therefore affirm the decree appealed from.

Deposit returned. No costs.

ENGLISH NOTES.

The Scotch law also recognizes the validity of a restraint upon alienation, in the case of an alimentary provision for a married woman, which it is declared shall be enjoyed by her exclusive of the *jus mariti*. *Rennie* v. *Ritchie* (H. L. 1845), 12 Cl. & Fin. 204. But the Scotch law is peculiar in giving a certain effect, by way of restraint, to an alimentary trust, independently (where the gift is by a stranger) of the *status* of marriage or even of sex.

A restraint upon alienation or anticipation cannot exist independently of a separate use, and a gift for the separate use of a married woman cannot be implied from the mere existence of an expression that a woman shall not anticipate. *Baggett* v. *Meux* (1844), 1 Coll. 138, 13 L. J. Ch. 228 (L. C. 1846), 1 Phillips, 627, 15 L. J. Ch. 262; *Stogden* v. *Lee* (C. A. 1891), 1891, 1 Q. B. 661, 60 L. J. Q. B. 669.

No special words are necessary to create the restraint. *Baker* v. *Bradley* (L. JJ. 1855), 7 De G. M. & G. 597; *Goulder* v. *Camm* (L. JJ. 1859), 1 De G. F. & J. 146; *Harrison* v. *Harrison* (C. A. 1888), 13 P. D. 180. Nor is it necessary that the expressions sufficient to create the separate use and the restraint should be contained in the same clause, or if contained in two clauses, that the one should follow the other; but provisions totally unconnected may intervene, if upon the construction of the whole document, it is apparent that a separate use and a restraint upon alienation were intended. *Brown* v. *Bamford* (L. C. 1846), 1 Phillips, 620, 15 L. J. Ch. 361; *Goulder* v. *Camm*, *supra cit.* There must however be some clear expression that the property is to be inalienable; thus a direction to pay dividends "as the same shall become due and payable" into the hands of "a married woman and not otherwise," is insufficient. *Acton* v. *White* (1823), 1 Sim. & St. 429. Again in *Re Ross's Trust*, *Ex parte Collins* (1851), 1 Sim. N. S. 196, 20 L. J. Ch. 293, the testator bequeathed a sum of stock to his trustees in trust for his widow for her separate use, and directed that the capital should remain during his said wife's life and be, under the orders of the said trustees, made a duly administered provision for her, and the interest of it given to her on her personal appearance and receipt; this direction was held by Lord Cranworth, V. C., not to be a restriction on her power of alienation.

Effect will be given to a restraint upon alienation whether the subject-matter of the gift be real or personal estate, and whether the married woman takes an estate in fee or an absolute interest or only a limited estate or interest. *Baggett* v. *Meux* (1844), 1 Coll. 138, 13 L. J. Ch. 228 (L. C. 1846), 1 Phillips, 627, 15 L. J. Ch. 262. As regards personalty, a distinction is drawn between the case where there is

a clear direction that a sum of money is to be paid to a married woman for her separate use without power of anticipation, — in which case the capital must be paid over to the married woman (*Re Grey's Settlements, Acason* v. *Greenwood* [1886, C. A. 1887], 34 Ch. D. 85, 712, 56 L. J. Ch. 511), — and the cases where the provisions of a gift are satisfied by the retention of the capital in the hands of trustees and the payment to a married woman of the income only during the coverture. *Re Bown, O'Halloran* v. *King* (C. A. 1884), 27 Ch. D. 411, 53 L. J. Ch. 881; *Re Tippett's & Newbolt's Contract* (C. A. 1888), 37 Ch. D. 444. It is immaterial for the purpose of determining this question whether the gift is of an income-bearing fund, or of a sum of cash. *Re Bown, O'Halloran* v. *King, supra cit.*

The weight of authority is at present in favour of considering the restraint upon anticipation bounded by the limits of the "rule against perpetuities:" *Re Ridley, Buckton* v. *Hay* (1879), 11 Ch. D. 645, 48 L. J. Ch. 563, where the Master of the Rolls (Sir G. Jessel) elaborately reviewed, and reluctantly followed, previous decisions. *Herbert* v. *Webster* (1880), 15 Ch. D. 610, 49 L. J. Ch. 620; *Cooper* v. *Laroche* (1881), 17 Ch. D. 368. The effect is that, where the rule is infringed, the separate use remains, but the restraint is rejected. *Re Ridley, Buckton* v. *Hay, supra cit.*

Having determined whether there is a restraint upon anticipation, it sometimes becomes material to consider the time during which it is to operate. The separate use and the restraint may, as in *Tullett* v. *Armstrong* (the principal case), arise and continue during every coverture; but it may be confined to a particular coverture: see *Re Gaffee's Settlement* (L. C. 1849), 1 McN. & G. 541, 19 L. J. Ch. 179; and the judgment of Lord Romilly in *Hawkes* v. *Hubback* (1870), L. R., 11 Eq. 5, 40 L. J. Ch. 49.

A man cannot settle his own property so as to make his enjoyment of it depend on his solvency, whether the persons sought to be affected are creditors at the date of the settlement, or become so subsequently. *Higinbotham* v. *Holme* (1812), 19 Ves. 88, 12 R. R. 146. In the case of a woman it was only in respect of ante-nuptial debts that she could not withdraw property from her creditors. *London and Provincial Bank* v. *Bogle* (1878), 7 Ch. D. 773, 47 L. J. Ch. 301. It is now, by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75, s. 19), enacted that "no restriction contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into

by a man could have against his creditors." This provision is not retrospective in its operation: *Smith* v. *Whitlock* (1886), 55 L. J. Q. B. 286; *Beckett* v. *Tasker* (1887), 19 Q. B. D. 12; and the words "before marriage" mean, — *before the marriage, during the continuance of which it is sought to enforce the right given by this section to disregard the former effect of a restraint upon anticipation.* *Jay* v. *Robinson* (C. A. 1890), 25 Q. B. D. 467, 59 L. J. Q. B. 367. In cases which are outside this section, it is immaterial whether the settlement is ante-nuptial or post-nuptial. *Clive* v. *Carew* (1859), 1 J. & H. 199, 28 L. J. Ch. 685; *Hewison* v. *Negus* (1853), 16 Beav. 594, 22 L. J. Ch. 655; *Beckett* v. *Tasker* (1887), 19 Q. B. D. 7.

The form of a judgment against property of a married woman has been settled with express reference to her disability in regard to separate estate. *Scott* v. *Morley* (C. A. 1887), 20 Q. B. D. 120, 57 L. J. Q. B. 43.

A married woman cannot be called upon to make good out of property which she is restrained from anticipating and which has not accrued, the results of her breaches of trust: *Clive* v. *Carew* (1859), 1 J. & H. 199, 28 L. J. Ch. 685; *Pemberton* v. *McGill* (1860), 1 Dr. & Sm. 266, 29 L. J. Ch. 499; nor to compensate those who have been induced to advance money to a married woman by her fraudulent concealment of a restraint upon alienation. *Stanley* v. *Stanley* (1878), 7 Ch. D. 589, 47 L. J. Ch. 256. And it has been held by the Court of Appeal (Lord Esher, M. R., and Lords Justices Bowen and Fry, reversing the decision of Kay, J.), that a married woman cannot be compelled to make compensation out of property which she is precluded from anticipating, to those disappointed by her election to take against a marriage settlement executed by her when an infant. *Re Vardon's Trusts* (C. A. 1885), 31 Ch. D. 275, 55 L. J. Ch. 259. By the settlement in question in that case a certain income had been settled by the husband upon the wife for her separate use with restraint on anticipation, and by the same settlement there was an agreement executed by both that her after-acquired property should be settled. The contention of the trustees, which had been sustained by Mr. Justice Kay, was that the lady was bound to elect, and if she elected to take the present benefit of a certain legacy of £8000, that she was bound to make compensation out of the life interest as to which she was restrained from anticipation. But it does not appear that the point was taken, or fully considered, that the lady, who had actually enjoyed the income under the settlement for 23 years, *had already elected*, and so was bound to settle the £8000. If this point had been properly brought before the Court, it would seem to be unanswerable. *Edwards* v. *Carter* (H. L. 1893), 1893, A. C. 360; *Greenhill* v. *North British, &c. Co.*

(1893), 1893, 3 Ch. 474, 62 L. J. Ch. 918. Under a writ of sequestration to enforce obedience of an order of the Divorce Division of the High Court, property to which a restraint applies cannot be taken. *Hyde* v. *Hyde* (C. A. 1888), 13 P. D. 166, 57 L. J. P. D. & A. 89.

Apart from statutory provision, a married woman could not, as to property which she was restrained from anticipating, have her interest attached or impounded to indemnify trustees against the results of a breach of trust committed with her knowledge: *Jackson* v. *Hobhouse* (1817), 2 Mer. 483; or at her instigation: see *Sawyer* v. *Sawyer* (C. A. 1885), 28 Ch. D. 595. It is now provided by the Trustee Act 1893 (56 & 57 Vict. c. 53, s. 45), embodying a clause first introduced by an Act in 1888: "Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the High Court may, if it think fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation, make such order as to the Court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him;" and this applies to the case of breaches of trust committed as well before as after the passing of the Act. The words "in writing" are only to be read in connection with the word "consent:" *Griffith* v. *Hughes* (1892), 1892, 3 Ch. 105, 62 L. J. Ch. 135; per LINDLEY, L. J., in *Re Somerset*, *Somerset* v. *Earl Poulett* (1893), 1894, 1 Ch. at p. 265. The discretion under this clause has been exercised in three reported cases, of which the first is *Ricketts* v. *Ricketts* (1891), 64 L. T. 263, where ROMER, J., held that the discretion should not be exercised if the trustee was presumably aware that he was committing a breach of trust. In *Griffith* v. *Hughes* (*supra cit.*), KEKEWICH, J., thought that the power should be exercised where the trustee and beneficiary were on a footing of equality as to knowledge of the facts constituting the breach of trust, unless there was moral dishonesty on the part of the trustee; and that the discretion should, if possible, be exercised. The last case is *Re Somerset*, *Somerset* v. *Earl Poulett* (C. A. 1893), 1894, 1 Ch. 231. In that case trustees having power to advance upon mortgage advanced an excessive amount, without having a proper valuation made; it was held that the discretion given to the Court under the Act did not arise. The Court considered that the section of the Act only applies to a breach of trust in the sense of an act or omission outside the powers of the trustees, but not to that which is a breach of trust by reason of the manner in which the power is exercised or the duty neglected.

Another statutory provision which requires consideration is the Trustee Act 1888 (51 & 52 Vict. c. 35, s. 8), which provides that in any

action or other proceeding commenced after the 1st January, 1890, against a trustee or any person claiming through him "except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof, still retained by the trustee, or previously received by the trustee and converted to his own use," he and the person claiming through him shall enjoy the benefit of any existing statute of limitations; or if the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee and the person claiming through him shall be entitled to the benefit of and be at liberty to plead lapse of time as a bar in the like manner and to the like extent as in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use whether with or without a restraint upon anticipation.

As the section is of general application, it will be sufficient for the purposes of the present note to refer shortly to the decisions. In *Re Gurney, Mason* v. *Mercer* (1892), 1893, 1 Ch. 590, ROMER, J., had to consider the exception which is set out above in inverted commas, and held that fraud was a necessary ingredient to bring a case within the exception; so that the mere fact that a trustee was a partner in a firm, was not sufficient to prevent the plea of the statute operating as a bar of the beneficiaries' claim to follow trust funds which had got into the hands of the firm. As regards constructive trusts, Courts of Equity have always acted by analogy to the statutes of limitations. *Beckford* v. *Wade* (1805), 17 Ves. 87, at p. 97, 11 R. R. at p. 28; and purchasers from trustees have the additional protection of 3 & 4 Wm. IV. c. 27, s. 25. As regards express trusts, it is only in the case of trusts for payment of debts and legacies that there is any protection: 37 & 38 Vict. c. 57, s. 10. In all other cases lapse of time was no bar as between trustee and beneficiary: 36 & 37 Vict. c. 68, s. 25 (2), 40 & 41 Vict. c. 28. The statute incorporated by analogy into s. 8 of the Trustee Act 1888, above abstracted, is the statute 21 Jac I. c. 16: see *Re Somerset, Somerset* v. *Earl Poulett* (C. A. 1893), 1894, 1 Ch. 231, and the cases there cited.

The Courts (apart from statutes) have no power to remove the restraint on alienation. In *Robinson* v. *Wheelwright* (L. C. and L. JJ. 1856), 6 De G. M. & G. 535, 21 Beav. 214, 25 L. J. Ch. 385, a testator gave a legacy to a married woman upon condition that she conveyed within twelve months an estate to which she was entitled for her separate use without power of anticipation; and it was held that the Court had no power to interfere for the purpose of enabling the married woman to comply with the condition, though to have done so would have been

greatly for her benefit. This is now remedied by the Conveyancing and Law of Property Act 1881 (44 & 45 Vict. c. 41, s. 39), which, as regards proceedings instituted thereunder since the 1st January, 1882, enacts: "Notwithstanding that a married woman is restrained from anticipation, the court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent bind her interest in any property." The power given by the section is purely discretionary: *Re Little, Harrison* v. *Harrison* (C. A. 1889), 40 Ch. D. 429, 58 L. J. Ch. 233, and only confers jurisdiction to remove the restraint for the purpose of giving effect to a particular transaction: *Re Warren's Settlement* (C. A. 1883), 52 L. J. Ch. 928.

In an action commenced by a married woman through a next friend, she can only be ordered to pay costs out of income which she is restrained from anticipating so far as it has accrued at the time of action brought. *Re Glanvill, Ellis* v. *Johnson* (C. A. 1886), 31 Ch. D. 532, 55 L. J. Ch. 325. In proceedings under the Married Women's Property Act 1882 (45 & 46 Vict. c. 75), without the intervention of a next friend, the costs which she is ordered to pay are payable out of income accrued at the date of the order. *Cox* v. *Bennett* (C. A. 1891), 1891, 1 Ch. 617, 60 L. J. Ch. 651. As regards proceedings pending on the 5th December, 1893, or instituted thereafter, in which a married woman is plaintiff whether with or without the intervention of a next friend, costs may be awarded against her, and the order enforced against property which she is restrained from anticipating (Married Women's Property Act, 1893, 56 & 57 Vict. c. 63, s. 2). Prior to this Act it was the custom of the Court of Appeal to dismiss with costs the unsuccessful appeal of a married woman, notwithstanding that the order might not be enforceable. *Cox* v. *Bennett (supra cit.)*; *Russell* v. *Russell* (C. A. 1892), 1892, P. D. 152, at p. 157.

The restraint upon anticipation is in force only during coverture: *Barton* v. *Briscoe* (1822), Jac. 603, and, being merely devised as a protection for the wife against the husband, comes to an end upon a judicial separation. *Munt* v. *Glynes* (1872), 20 W. R. 823, 41 L. J. Ch. 639. It does not however cease where a married woman, who has been deserted by her husband, obtains a protection order under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85, s. 21). *Hill* v. *Cooper* (cited 1893), 1893, 2 Q. B. 85, 62 L. J. Q. B. 423.

AMERICAN NOTES.

The principal case is cited by Mr. Beach (1 Eq. Jur. p. 209), and is more or less sustained by *Shirley* v. *Shirley*, 9 Paige (New York Chancery), 363; *Fears* v. *Brooks*, 12 Georgia, 195, citing the principal case. *Fellows* v. *Tann*, 9 Alabama (N. S.) 999; *Waters* v. *Tazewell*, 9 Maryland, 291.

But in some States the period of restriction is held to be during the first marriage alone, and not to extend to a second marriage. *Wells* v. *McCall*, 64 Penn. St. 207. This was based on the force of the words, "immediate contemplation of marriage," in the settlement. The Court said: "We take it therefore as settled that the trust will be supported, notwithstanding the *cestui que trust* is a *feme sole* at the time of its creation, provided that it be done in immediate contemplation of marriage." "But a second marriage is evidently not a thing in immediate contemplation." But the Court also held that the impending marriage need not be recited nor appear in the instrument.

In *Miller* v. *Bingham*, 1 Iredell Equity (North Carolina), 423, it was held that where property is conveyed to a trustee for the sole and separate use of a woman then married, and she survives her husband and remarries, she no longer holds it to her sole and separate use, but her whole interest, if it is personalty, vests in the second husband.

In *Apple* v. *Allen*, 3 Jones Equity (North Carolina), 120, it was held that the words "for her sole and separate use," applied in a will to an unmarried woman, do not prevent the estate's vesting in her husband on her subsequent marriage, although the Court conceded that it would be otherwise if the legatee had been married at the time when the will was made. Citing *Adamson* v. *Armitage*, 19 Vesey, Jr., 419, and *Miller* v. *Bingham*, *supra*.

Mr. Pomeroy (2 Eq. Jur. § 989) cites and approves the principal case, stating the doctrine and the exception as above by Mr. Beach.

Kent cites the principal case, speaking of it as "the older and juster doctrine, viz.: that a restraint against anticipation annexed to a separate use for a *feme sole*, even in the case of a trust in fee, will take effect on coverture, and reattach on a second marriage, although suspended and inoperative during the interim before marriage, or the interval between the first and second coverture." See *Dubs* v. *Dubs*, 31 Penn. St. 152.

APPEAL.

SECTION I. — *Conditions under which appeal is entertained.*

No. 1. — HOPE *v.* CARNEGIE.

(CH. 1869.)

RULE.

IT was the general rule of the Court of Chancery — which is now confirmed and made absolute (by the Judicature Act 1873, s. 49) so far as relates to costs which are in the discretion of the Court — that no appeal can be entertained upon a mere question of costs.

Hope v. Carnegie,

L. R. 4 Ch. 264–266.

This was an appeal motion by the defendant, Admiral [264] Carnegie, asking that an order made by Vice Chancellor STUART on the 3rd of December, 1868, might be discharged or varied, and that the plaintiffs might be ordered to pay to the appellant the costs of two motions made on the 28th of July and the 2nd of November, 1868, and his costs of this application.

On the 25th of June, 1868, an order was made restraining the appellant and his wife, and their agents, until further order, from commencing or continuing any proceedings in the Netherlands as to the personal estate of the testator in the cause, and from intermeddling with such estate, and from allowing a certain notice served upon a person having the custody of part of the estate to remain unrevoked.

By an *ex parte* order, dated the 25th of July, 1868, it was ordered that substituted service on Admiral Carnegie and two other per-

sons of a notice of motion for the 28th of July to commit Admiral and Mrs. Carnegie for an alleged breach of the injunction should be good service on Mrs. Carnegie. This service had not been effected on the 28th of July, and on that day the motion for committal was ordered to stand over till the first day of Michaelmas Term, and another order for substituted service of a notice of motion for committal for the 2nd of November, 1868, on the same persons as before, was obtained.

The motion to commit was adjourned from the 2nd of November, and was not disposed of till the 3rd of December, when the Vice Chancellor made the order now under appeal, discharging the orders for substituted service, and ordering that the plaintiffs and the defendants, Carnegie and wife, or any or either of them, [* 265] should be * at liberty to make such application as they, or he or she, might be advised, to obtain the appearance of Mrs. Carnegie separately from her husband. And it was ordered that each of the parties should bear their own costs of that application. L. R. 7 Eq. 254.

The defendant, Admiral Carnegie, having given notice of appeal motion to the effect mentioned above, the preliminary objection was taken that this was an appeal for costs only.

Mr. Karslake, Q. C., and Mr. Waller, for the appeal motion: —

An application to commit which utterly fails, owing to the irregularity of the proceedings, must be refused with costs. There are *dicta* tending to show that there is now no such rule as that there cannot be an appeal for costs; but if there be such a rule this case comes within the acknowledged exceptions. *Angell* v. *Davis*, 4 My. & Cr. 360; *Chappell* v. *Purday*, 2 Ph. 227; *Taylor* v. *Southgate*, 4 My. & Cr. 203; *Corporation of Rochester* v. *Lee*, 2 D. M. & G. 427; *Horn* v. *Coleman*, 5 W. R. 409; *Lord Advocate* v. *Lord Dunglas*, 9 Cl. & F. 174; *Norton* v. *Cooper*, 5 D. M. & G. 728; *Owen* v. *Griffith*, 1 Ves. Sen. 250.

Sir Roundell Palmer, Q. C., Mr. Dickinson, Q. C., and Mr. Hemming, for the plaintiffs, were not called upon.

Sir C. J. Selwyn, L. J.: —

It is admitted that this is an appeal only on a matter of costs, and in my opinion the general rule prohibiting such appeals is not only well established but useful and desirable. That rule, it is true, is subject to exceptions, but does the present case come within any of them? It is urged in the first place that a question

of principle is involved — that it is a settled rule that, where a motion to commit fails, it is refused with costs, and that there is no instance to the contrary. My own experience, as well as that of my learned brother, furnishes instances to the contrary, and it is impossible to say that it can be a question of principle whether costs should be given or not in cases where the conduct of the parties has so much bearing on the point. The Judge below is * much better able to decide such a question [*266] than the Court of Appeal; and in my judgment applications to commit are eminently cases where appeals for costs should not be allowed. Then it is said that this order discharges certain orders as having been improperly obtained, and that this brings the case within the rule that an appeal for costs will be allowed where the order is wrong on the face of it. But that order had been obtained by the plaintiffs, and the appellants do not contend that there was anything wrong in discharging it by this order. Then it was said that the order in this case affects the funds which are to be administered in the suit. The suit, it is true, is an administration suit, but this order does not affect the estate, and it is difficult to see how the costs of such a proceeding could be ordered out of the fund.

Sir G. M. Giffard, L. J. . —

It is quite unnecessary to go through the cases referred to, all of them being clearly distinguishable from the one before us. If there be any case in which an appeal for costs ought not to be entertained it is a case of contempt, where everything depends on the acts and conduct of the parties.

ENGLISH NOTES.

Section 49 of the Judicature Act 1873 (36 & 37 Vict., c. 66) is as follows: "No order made by the High Court of Justice or any judge thereof, by consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or judge making the order." The exception as to leave to appeal in such a case has been treated as nugatory. *In re Gilbert, Gilbert* v. *Huddlestone* (C. A. 1885), 28 Ch. D. 549, 54 L. J. Ch. 751, and is omitted in the parallel section of the Act of 1890.

By the Judicature Act 1899 (53 & 54 Vict. c. 44), s. 5: "Subject to the Supreme Court of Judicature Acts, and the rules of Court made

thereunder, and to the express provisions of any Statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge."

By R. S. C., 1893 (same as that of 1883), Order 65, rule 1: "Subject to the provisions of the Acts and these Rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge: provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee, who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: provided also that, where any action, cause, or matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, or matter is tried, or the Court, shall, for good cause, otherwise order."

This rule removes any restriction upon the discretion of the Court which rested merely upon the practice of the Court, such as the practice (after the repeal of the Statute 4 & 5 Anne, c. 5), to give the defendant the costs of an action which was dismissed for want of prosecution. Consequently an order dismissing the action without costs is not subject to appeal. *Snelling* v. *Pulling* (C. A. 1885), 29 Ch. D. 85; 52 L. T. 335.

In *Harris* v. *Aaron* (C. A. 1877), 4 Ch. D. 749, 46 L. J. Ch. 488, the Vice Chancellor had dismissed a bill without costs; and the plaintiff appealed against the whole decree. The defendant asked that in the event of the Court holding that the Vice Chancellor was right in dismissing the bill, the decree should be varied by dismissing it with costs. The Court considered that the 49th section of the Judicature Act, 1873, was imperative, and that they had no power to alter the direction as to costs. Holding that the decree was right upon its merits, they dismissed the appeal with costs. The same principle is applied in *Harpham* v. *Shacklock* (C. A. 1881), 19 Ch. D. 207, 215; in *Llanover* v. *Homfray* (C. A. 1881), 19 Ch. D. 224, 231; and in *Willmott* v. *Barber* (C. A. 1881), 17 Ch. D. 772. In the last-mentioned case, although the order as to costs was considered by the Court of Appeal to be wrong in form, they confirmed the order so far as it was substantially an exercise of the discretion of the Judge.

But where the right to costs depends on a principle of law, and is not a question about costs which are in the discretion of the Judge, the Court of Appeal is not bound by the above rule. *In re Rio Grande, &c. S. S. Co.* (C. A. 1877), 5 Ch. D. 282, 46 L. J. Ch. 277. In effect

the question here was the right of the mortgagee to costs out of a particular fund, which would come within the proviso of the modern rule. And so where an express right to costs by way of indemnity is given by statute. *Reeve* v. *Gibson* (C. A. 1891), 1891, 1 Q. B. 652 ; 60 L. J. Q. B. 451.

The costs of a trustee are matters of contract, and have been held not to be within the discretion of the Judge, so as to be subject to the 49th section of the Judicature Act 1873. *Turner* v. *Hancock* (C. A. 1882), 20 Ch. D. 303, 51 L. J. Ch. 517; *In re Lore, Hill* v. *Spurgeon* (C. A. 1885), 29 Ch. D. 348; 54 L. J. Ch. 816. But where a settlement is set aside, so that there is no contract, the costs of the person claiming to be trustee are within the discretion of the judge. *Dutton* v. *Thompson* (C. A. 1883), 23 Ch. D. 278, 52 L. J. Ch. 661.

Whether trustees have been guilty of such unreasonable conduct as to deprive them of the benefit under the proviso of the rule (Ord. 65, r. 1) is a question which the Court of Appeal will entertain; and they may accordingly reverse the order of the judge depriving him of costs. *In re Sarah Knight's Will* (C. A. 1884), 26 Ch. D. 82, 53 L. J. Ch. 223. But this does not apply to an order which allows costs; for then, if there were no misconduct the order is right, and if there were, the matter would be in the discretion of the Court. *Charles* v. *Jones* (C. A. 1886), 33 Ch. D. 80 ; 56 L. J. Ch. 161 (the case of a mortgagee).

Costs incurred by a trustee in an action respecting the trust estate are not costs in the discretion of a judge who did not try the action (within Ord. 65, r. 1), but are charges and expenses incurred in the execution of the trusts; and if such a judge acting in the administration of the estate makes an order as to those costs, the order is subject to appeal. *In re Beddoes. Downes* v. *Cottam* (C. A. 1892), 1893, 1 Ch. 547 ; 62 L. J. Ch. 233.

And where the jurisdiction of the judge to order costs depends on the existence of a breach of injunction or misconduct, an appeal lies against his finding that there has been such breach of injunction or misconduct, although he only inflicts costs. Per Bowen, L. J., in *Stevens* v. *Metropolitan District Railway Co.* (C. A. 1885), 29 Ch. D. 60, 73. 54 L. J. Ch. 737; *Witt* v. *Corcoran* (C. A. 1876), 2 Ch. D. 69, 45 L. J. Ch. 603. Compare *Ashworth* v. *Outram* (C. A. 1877), 5 Ch. D. 943.

AMERICAN NOTES.

In regard to the matter of Appeal it will hardly be useful to review the systems of or cite cases from our forty-four States, differing to some extent, but in the twenty-six so-called "Code States" following the New York system to a greater or less extent.

It is probably a general rule in this country that no appeal lies from an

order or decree in respect merely to discretionary costs. In *Fort* v. *Bard*, 1 New York, 43, it was held that no appeal would lie from a decision of the Court of Chancery on a question of practice addressed to the discretion of that court. And the same principle was laid down as to discretionary costs in *Herrington* v. *Robertson*, 71 New York, 280; *Van Gelder* v. *Van Gelder*, 84 id. 658; *Turner* v. *Johnson*, 95 Missouri, 431; 6 Am. St. Rep. 62. Under the New York system, however, in which there are two appeals, an appeal lies to the general term of the Supreme Court in respect even to discretionary costs, but not to the Court of Appeals. See cases above. But an appeal lies to the highest court on the question of *power* to award costs. The New York system of double appeals is peculiar to that State and New Jersey, and in other States the rule of the principal case is probably recognized

It may be said that on appeal from equity an allowance of costs is generally treated as conclusive, unless a gross abuse of discretion appears. *Cowles* v. *Whitman*, 10 Connecticut, 121; *Smith* v. *Shaffer*, 50 Maryland, 132; *Lake* v. *Sunmate*, 20 South Carolina, 23; *Temple* v. *Lawson*, 19 Arkansas, 148; *Howe* v. *Hutchinson*, 105 Illinois, 501; *Shields* v. *Boglioto*, 7 Missouri, 136; *Sanborn* v. *Kittredge*, 20 Vermont, 632.

No. 2. — GARDNER *v.* JAY.

(C. A. 1885.)

RULE.

WHERE it is, by the rules of procedure, within the discretion of the Judge of first instance to make an order of a certain kind; the Court of Appeal will not as a general rule, and without strong reasons, interfere with or review the mode in which that discretion has been exercised.

Gardner v. Jay.

29 Ch. D. 50-59 (s. c. 54 L. J. Ch. 762-765; 52 L. T. 395, 33 W. R. 470)

[50] This was an action commenced in the Chancery Division by Mrs. Gardner, against her father, W. C. Jay. The plaintiff alleged by her statement of claim, that in 1872 she gave the defendant a sum of £700 upon an agreement that he would stand possessed of it in trust for her, that he still kept it, that he had employed it in his business, and refused to pay it to her, or to render her any account. She further alleged that the defendant had retained certain goods and chattels belonging to her. She asked for a declaration that the £700 was received and had since been held by the defendant as trustee for her, and

that he was liable to account for and to pay that sum to her, with interest at £5 per cent per annum; that all necessary accounts and inquiries might be taken and made, and, if necessary, an account of the profits made by the defendant by the use of the £700 in his business, and payment of the money shown to be due by such accounts. As to the goods and chattels, she claimed the return of them or their value, and damages for their detention.

The defendant by his statement of defence denied that he had *ever received the sum of £700 as trustee for [*51] the plaintiff. He stated that he had borrowed that sum from her in 1872, and had long since repaid it. He denied that he had ever had in his possession any goods and chattels of the plaintiff.

The plaintiff took out a summons to have the issues of fact tried by a jury. The summons was adjourned into Court, and was heard by Mr. Justice PEARSON on the 6th of February, 1885.

The rule of procedure on which the case turned is as follows: —

Ord. XXXVI. R. 3. Causes or matters assigned by the principal Act to the Chancery Division shall be tried by a Judge without a jury, unless the Court or Judge shall otherwise order.

On the hearing of the summons, PEARSON, J., gave judgment as follows: —

The action, so far as it relates to the £700, is a proceeding which is pre-eminently one of those with which the old Court of Chancery had to deal, and with which the Chancery Division now deals, and requires the taking of accounts, with which the Queen's Bench Division never does deal, and has no machinery for dealing with.

The plaintiff was so well advised that the action was one which came under the 34th section of the Judicature Act, and must be assigned under the section to the Chancery Division, that she issued her writ in this Division. She then joined on with it her *second cause of action, which is plainly and simply [*52] an action of detinue.

Now, she asks me to send this cause for trial by a jury, or at all events, to send issues of fact to be tried by a jury. With regard to the issues of fact, on the first branch of the case the simple question is whether or not £700 was given by the plaintiff to the defendant to hold as trustee for her. That really is the issue in the cause. That seems to me to be a case which can be tried properly here, and if it had stood alone, there could not have been

the slightest reason for sending it to the Queen's Bench Division to be tried by a jury. It is a very simple issue of fact with which the Court is in the habit of dealing constantly, and I see no reason why I should send a case of that kind to be tried by a jury. I think it could be much better tried by a Judge without a jury.

With regard to the second case, the question arises under the Rules whether or not this comes at all under the 6th rule of Order XXXVI. The 3rd rule deals with cases which are assigned by the Judicature Act to the Chancery Division. The 6th rule says that "in any other cause or matter," that is, a cause or matter not assigned to the Chancery Division, any party to the cause is entitled to have any issue of fact tried by a jury. When you have two causes of action combined in the same pleadings, one of which is assigned to the Chancery Division and the other of which is not, does that make it a cause which comes under the 6th rule? I am of opinion that it does not. I think that if the plaintiff has chosen to treat her action as an action assigned to the Chancery Division, and has properly treated it so with regard to the form of the relief which is claimed in the action, I am not at liberty to turn that action into two separate actions and to deal with it as if it were two separate actions.

There is no difficulty and no chance of injustice being done in that way, because under the 3rd rule, if I am to treat it as a cause assigned to the Chancery Division, which the plaintiff has no right to send for any particular matter in it to a jury, nevertheless if at the trial of the action, or at any other stage of the action, it appears to the Judge who heard it that it is a case which ought to
[* 53] be submitted to a jury, or that any part of it * ought to be submitted to a jury, the Judge has full power of getting the benefit of a jury to decide so much of the cause as requires the assistance of a jury. I have no hesitation in saying, that as far as regards the convenience of this Court, I should be exceedingly willing to send the second part of this action to a jury, but I am told that it is short; I am told that it depends on a single point. I know not whether that is so or not. If I have to try the action hereafter, at the trial I shall be able to deal with it according as I find it, simple or complicated, requiring or not requiring the verdict of a jury. The reason why at the present moment I decline to exercise any discretion that I may have to send it to a jury is because I think that if I am to decide otherwise than I am decid-

No. 2. — Gardner v. Jay, 29 Ch. D. 53–58.

ing, this Court would be flooded in cases assigned to the Chancery Division, with applications to send particular issues to a jury, when I am quite satisfied it was not the intention of the Legislature that actions should be so treated, and we should have not only the difficulties that we had before, and the inconvenience arising from suitors being bandied about from one Court to another, but all those difficulties and inconveniences would be increased one hundredfold. I must, therefore, refuse this application, and the defendant will have the costs of it in any event.

The plaintiff appealed, and after his counsel had been heard, the Court without calling on the counsel for the defendant, unanimously affirmed the judgment of PEARSON, J., on the principles which are clearly set forth in the following judgment of —

* BOWEN, L. J. In the first place this is an appeal from [* 57] the discretion of the Judge, and although the discretion of the Judge with respect to the mode of trial is a discretion which ought to be exercised with great care, the Judge below, who has all the facts before him, has a certain margin of discretion, which ought to be left to him, and therefore appeals of this sort ought not to be brought except in clear cases. I think it is obvious that in the present case we cannot interfere. First of all, this is a case which is assigned to the Chancery Division. The plaintiff asks for the execution of a trust. She asks also for something else, but she asks for that, and therefore the action is assigned to the Chancery Division by sect. 34 of the Judicature Act, 1873. Now, being assigned to the Chancery Division, it falls directly under Order XXXVI., rule 3, which says that causes assigned to the Chancery Division are to be tried by a Judge without a jury * unless the Court or a Judge shall otherwise order. It is [* 58] to be tried without a jury unless the parties can satisfy the Judge that he ought to send it to be tried with a jury. Therefore it rests upon the appellant to show the Judge below in the first instance that there was reason for sending this case to be tried by a jury. Now, in considering whether a case should be tried by a jury or not, I certainly should be very loth to say that we must go simply upon the paper pleadings, because that would put the Court at the mercy of a man who chose to put on paper a claim or a counterclaim which he had no means whatever of supporting. The Court is always at liberty to find out what is the real question to be tried when it is considering what tribunal ought to try it. Here,

however, we have nothing but paper pleadings, which I treat as *bonâ fide* pleadings. What was there to induce the learned Judge below in the first instance to send the case to be tried by a jury or to induce us to say that he was wrong in refusing to do so? Nothing at all, except that to the claim for the execution of the trust, which has brought the case within the Chancery Division, a claim in detinue is added.

Now Order XXXVI., rule 3, gives the Court discretion to decide upon the mode of trial in a class of cases of which this is one. That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it it will be reviewed, but still it is a discretion, and for my own part I think that when a tribunal is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or the Rules did not fetter the discretion of the Judge why should the Court do so? As to *Cardinall* v. *Cardinall*, 25 Ch. D. 772, 53 L. J. Ch. 636, though it is very convenient that a Judge of first instance, who is going to exercise the discretion in these cases from day to day, should indicate to those who are practising before him the kind of way in which his mind operates on such questions, still when he does so he is not laying down a rule of law nor fettering his own discretion, and, *à fortiori*, * although it is of great value to hear anything that such a master of practice as Mr. Justice PEARSON says on such a subject, he cannot fetter the discretion of another Judge where the rule has left the discretion open. If it were wished to lay down rules as to how a Judge should act about sending cases to be tried by jury, I do not think that anything could be laid down more definite than this, that as the mode of trial by jury differs in many respects, which lawyers know, from trials before a Judge without a jury, the Judge must carefully consider what those differences are, and what are the facilities for trial in the one case and in the other, and then apply his mind to the facts of the special case and see how the case can be most justly and most conveniently tried.

[* 59]

In this particular case it seems to me that the onus has not been satisfied by the appellant. He has not shown us in the first place

any good reason why this case should not be tried in Chancery, and certainly he has not satisfied us that the discretion of the Judge below was wrongly exercised.

ENGLISH NOTES.

In *Lynch* v. *McDonald* (C. A. 1887), 37 Ch. D. 227, 57 L. J. Ch. 651, COTTON, L. J. (at 37 Ch. D. p. 233), says: "If it was within the discretion of the Judge to grant or refuse a trial by jury, we of course should not interfere." It was attempted however to support the appeal on another rule (R. S. C., Ord. 36, rule 6), which is peremptory. But the Court held that that rule did not apply to a cause assigned to the Chancery Division.

Thornton v. *Union Discount Co. of London* (1891), 7 Times Rep. 322, 410, was an action brought in the Chancery Division in respect of an alleged fraud in commercial transactions. The defendant company applied for a trial of the action before a jury. CHITTY, J., refused the application, and the defendants appealed from that refusal. The Court of Appeal (consisting of the Lords Justices LINDLEY, BOWEN, and KAY), although they thought the case involved issues of fact that might be advantageously tried by a special jury of persons versed in mercantile affairs, declined to interfere with the discretion of the judge who had refused to direct the trial to be held before a jury.

But where an action was brought in the Chancery Division for an injunction to restrain trespass, and the question depended on boundaries, the Court of Appeal considered a view of the premises to be so important that they reversed a decision of STIRLING, J., who refused to order the action to be tried by a jury. *Jenkins* v. *Bushby* (C. A. 1891), 1891, 1 Ch. 484, 60 L. J. Ch. 254. The decision was explained by LINDLEY, L. J., in a later case, *Mangan* v. *Metropolitan Electric Supply Co.* (C. A. 1891), 1891, 2 Ch. 551, by saying: "We thought a view was essential to justice, and on that ground we interfered." In this last-mentioned case the judge of first instance, after fully considering the circumstances of the case, had (under Ord. 36, rule 7) ordered the case, though brought in the Chancery Division, to be tried with a jury. And the Court of Appeal refused to interfere with his discretion.

Generally, where the matter is one within the discretion of the judge, the Court of Appeal will not interfere. *Golding* v. *Wharton Saltworks Co.* (C. A. 1876), 1 Q. B. D. 374, 34 L. T. 474; *Watson* v. *Rothwell* (C. A. 1876), 3 Ch. D. 380, 45 L. J. Ch. 744; *Ashworth* v. *Outram* (C. A. 1877), 5 Ch. D. 943; *Macdonald* v. *Foster* (C. A. 1877), 6 Ch. D. 193, 37 L. T. 296.

But where the prolixity of pleadings was excessive, and the judge of first instance (V. C. Hall) had refused to strike out the statement of claim — apparently thinking that the complexity of the case justified a reversion to the practice of pleading in an old bill in Chancery — the Court of Appeal reversed the decision, pointing out that under the new and better system established by the Judicature Acts, it was essential that the statement should be as brief as the nature of the case would admit, and that all irrelevant matter should be avoided. *Davey* v. *Garrett* (C. A. 1878), 7 Ch. D. 473, 47 L. J. Ch. 218. In effect the judge of first instance had not exercised his discretion under the rules, but had misconceived the intention of the rules in regard to the principles of pleading. In *Jarmain* v. *Chatterton* (C. A. 1882), 20 Ch. D. 493, 51 L. J. Ch. 471, there was an appeal from an order of the judge refusing to commit. The Court of Appeal, being of a different opinion upon the question of right upon which the Judge had decided, made an order for a certain payment and in default for committal. The Master of the Rolls (Sir G. Jessel) observed that *Ashworth* v. *Outram* (*supra*) must not be taken as laying down a general rule that no appeal lies from a refusal to commit.

AMERICAN NOTES.

The rule of the principal case is undoubtedly prevalent in this country. (See notes, *ante*, p. 243.) It is familiar in New York, where there are two appellate courts. *Cushman* v. *Brundett*, 50 New York, 296; *Mills* v. *Hildreth*, 81 New York, 94; *McKenna* v. *Bolger*, 94 New York, 641; *Connolly* v. *Kretz*, 78 New York, 620; *Cole* v. *Malcolm*, 66 New York, 67; *Matter of Railroad Co.*, 82 New York, 95; *Syracuse, &c. R. Co.* v. *Syracuse, &c. R. Co.*, 88 New York, 110. See also *Truett* v. *Rains*, 17 South Carolina, 451. An order punishing for contempt is a familiar example. *Crow* v. *State*, 24 Tex. 12; *Huerstal* v. *Muir*, 62 California, 479; *State* v. *Giles*, 10 Wisconsin, 101; *Cass* v. *Maxwell*, 20 Florida, 17; *Atlantic, &c. Tel. Co.* v. *B. & C. Tel. Co.*, 87 New York, 355 (but see *Romeyn* v. *Caplis*, 17 Michigan, 49).

In some instances an appeal is allowed if there has been an injurious abuse of discretion. *Market Bank* v. *Pacific Nat. Bank*, 102 New York, 464; *Logan* v. *Logan*, 90 Indiana, 107; *Louvais* v. *Leavitt*, 53 Michigan, 577.

No. 3. — HARLOCK v. ASHBERRY.

(C. A. 1881.)

RULE.

UNDER the rule enabling the Court (under special circumstances) to direct a deposit to be made or security given for the costs of an appeal, it has become the settled practice, if the respondent asks for it, to require security for costs to be given by an appellant who would be unable through poverty to pay the costs if the appeal should be unsuccessful.

Harlock v. Ashberry.

19 Ch. D. 84-86, s. c. 51 L. J. Ch. 96-97; 45 L. T. 602; 30 W. R. 112.

The action in this case was tried before Mr. Justice FRY, [84] who gave judgment in favour of the plaintiffs. 18 Ch. D. 229; 50 L. J. Ch. 745. The defendant appealed from this decision, and the plaintiffs now applied to the Court to order the defendant to give security for costs of the appeal.

In support of the application the plaintiffs filed an affidavit stating their belief that the defendant was in very poor circumstances, and wholly unable to pay the plaintiffs' costs of the appeal in case it should be decided against her. They also stated that the defendant was a woman of very advanced age, living in a cottage which was the subject-matter of the action, without visible means of support, and that on the death of her father she admitted that she was unable to pay the expense of his funeral.

This affidavit was not answered by the defendant.

Cozens-Hardy, in support of the application.

H. A. Giffard, for the defendant: —

Insolvency has repeatedly been held a sufficient ground for ordering an appellant to give security for costs, but there are no reported cases in which mere poverty without anything else has been held sufficient. In the case of insolvency the appellant has ceased to have a personal interest in the action; but if mere poverty should be held a sufficient ground, it would often be a denial of justice. Every suitor has a right to carry his

[*85] case to * the Court of Appeal: *Wilson* v. *Smith*, 2 Ch. D. 67; 45 L. J. Ch. 292; *Ex parte Isaacs*, 9 Ch. D. 271, 47 L. J. Ch. 111; *Rourke* v. *White Moss Colliery Company*, 1 C. P. D. 556; 46 L. J. C. P. 283; *Waddell* v. *Blockey*, 10 Ch. D. 416.

Jessel, M. R.: —

For some time past it has been the settled practice, if the respondent asks for it, to require security for costs to be given by an appellant who would be unable through poverty to pay the respondent's costs of the appeal if it should be unsuccessful. The amount is generally very moderate, and often turns out to be a good deal less than the actual costs. In the present case I think that £30 will not be too large a sum to deposit as security, the case being one in which two counsel have been employed on each side on the original hearing, and in which there are difficult points of law to be argued. With respect to the alleged hardship on the appellant it must not be forgotten that before the Judicature Acts every appellant in the Court of Chancery had to deposit the sum of £20.

Baggallay, L. J.: —

I am of the same opinion.

Lush, L. J.: —

Before the Judicature Acts there appears to have been some difference between the practice in the Court of Chancery and in the Common Law Courts. In the Court of Chancery it was the practice to require security to a certain amount for the costs of an appeal to be given in every case. That was not the practice in the Courts of Common Law; there poverty alone was not considered a sufficient reason for requiring security to be given. If the appellant had become either really or technically insolvent, or was out of the country, the Court would order security to be given. In other cases security was not required. If, however, the appellant asked for a stay of execution on the judgment upon his writ of error, he had to give bail for the amount of the judgment; if he did not ask for a stay of execution the writ of error issued as a matter of course. The rule under the Judicature Act (rule [*86] 15 of Order LVIII.) * provides that such security for the costs of any appeal shall be given as may be directed under special circumstances by the Court of Appeal. This was intended to alter the whole practice both of the Court of Chancery and of the Courts of Common Law, and to leave it in the discretion of the

Court whether security should be given under special circumstances. I understand that it has been the practice to hold that poverty or inability to pay the costs of the appeal if it should be unsuccessful is a special circumstance. I therefore agree that in this case a deposit of £30 should be made.

ENGLISH NOTES.

The clause of R. S. C. Ord. 58, r. 15, so far as relates to the above rule, is: "Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal."

In *Rourke* v. *The White Moss Colliery Company* (1876), 1 C. P. D. 556, 46 L. J. C. P. 283, — an action by a workman against a colliery-owner for negligence in sinking a shaft whereby the plaintiff was injured, — the question arose out of a common employment; and in answer to an application that the plaintiff should give security for costs, it was argued that he ought not to be deprived of the opportunity of discussing the question which had not previously been considered in a Court of Error. The Court, under the circumstances, thought the appeal ought to be heard without calling on the plaintiff to give security for costs. It has since been stated that there is no general rule that the appellant should be exempted because there is a new question of law to be discussed; and the true view on which the Court of Appeal had acted was explained to be, that the insolvency of the plaintiff had arisen from what (if the plaintiff was right) was the wrongful act of the defendant; and that to require security for costs on the ground of an insolvency so caused might have been a denial of justice. *Farrer* v. *Lacy, Hartland, & Co.* (C. A. 1885), 28 Ch. D. 482, 54 L. J. Ch. 808.

In *Whittaker* v. *Kershaw* (C. A. 1890), 44 Ch. D. 296, the Court held that a married woman who had no property except what she was restrained from anticipating must give security for the costs of an appeal. "The question is," said Lord Justice COTTON in his judgment, in which the Lords Justices LINDLEY and BOWEN concurred, "whether the appellant has any property against which payment can be enforced by the respondent."

That poverty alone is a "special circumstance" affording ground for ordering an appellant to give security for the costs of an appeal, has been repudiated by the Lords Justices of Appeal in Ireland, as a principle applying to the courts there. *Brooke* v. *Kavanagh* (1888), 21 L. R., Ir. 474. In that case however there was a suggestion that the appeal was to be prosecuted in the interest of other parties; and they

held this, together with the poverty of the nominal appellant, a sufficient reason for requiring security, which was fixed at £20.

There are other special circumstances which have been held sufficient for requiring security; for instance, where the proceedings appear an abuse of the process of the Court; as where a plaintiff whose action has been dismissed as frivolous brings a second action for the same cause which is in like manner dismissed, and appeals from the latter order of dismissal. *Weldon* v. *Maples* (C. A. 1887), 20 Q. B. D. 331, 57 L. J. Q. B. 224. Where the defendant is out of the jurisdiction, and there is no property which the respondent can look to for the payment of his costs, the requirement is a matter of course, if applied for in time. *In re The Indian, Kingston, &c. Mining Co.* (C. A. 1882), 22 Ch. D. 83, 52 L. J. Ch. 31.

AMERICAN NOTES.

The matter of security for costs on appeal is probably regulated by statute in most of the States of this country, and not left to the discretion of the Court. Nor is poverty alone recognized as a reason for demanding security. There are certain statutory grounds for demanding security for *all* the costs of an action, as for example, non-residence, but in New York at least, poverty is not one of these. Indeed, a plaintiff may sue *in formâ pauperis*. In the Supreme Court of New York, the Court may stay the entry of judgment pending an appeal to the general term, the appellate branch of that Court, but insolvency is generally regarded as a valid ground for refusing such stay. If judgment is entered, the appellant need not give security for any part of the judgment unless he desires to stay execution, and if the judgment is enforced pending the appeal, and is reversed on such appeal, the Court may order restitution. If the party desires to appeal from that Court to the Court of Appeals, as a general rule (excepting certain specified cases of issues tried by the Court alone, of interlocutory judgments, and cases involving mere questions of law, etc.), final judgment must be entered, and security for $250 costs must be given in all instances, and if a stay of execution is desired additional security must be given to pay the judgment if affirmed. If the execution is not thus stayed, and the judgment is meantime enforced, restitution may be awarded. Under the exceptions noted parenthetically above, a wide latitude is allowed for appeal without security and ample provision is made for restitution, into the details of which it will not be useful to enter at this point. This explanation will suffice to denote the different policy and practice of these States from that of England in respect to liberty of appeal.

The power to require security for costs in Courts of law depends on express enactment. *Gordon* v. *Ellison*, 9 Iowa, 317; 74 Am. Dec. 353.

It has been held that where security is absolutely required, an appeal *in formâ pauperis* may not be prosecuted. *Bolton* v. *Gardner*, 3 Paige (New York Chancery), 273; *Campbell* v. *Chicago, &c. R.*, 23 Wisconsin. (But it has also been held by way of alleviation that if the *pauper* gives security and succeeds on the appeal, he may recover "*dives* costs." *Bolton* v. *Gardner, supra.*)

No. 4. — DAGNINO v. BELLOTTI.

(Privy Council App. 1886.)

RULE.

A COURT of ultimate appeal will not entertain the contention of a person who has not followed the course open to him by the ordinary practice of the Court below, to obtain what he asks. So that where a person has not moved for a new trial in accordance with the practice pointed out by rules of procedure of the Colonial Court, the Judicial Committee of the Privy Council will not entertain an application to alter the verdict, or direct a new trial.

Dagnino v. Bellotti.

11 App. Cas. 604-606 (s. c. 55 L. T. 497).

Appeal from a decree of the Supreme Court of Gibraltar [604] (June 2, 1885), whereby judgment was entered for the respondent for 20,842 pesetas, with costs, in an action for goods sold and delivered, money paid, and work and labour done.

The trial took place before the CHIEF JUSTICE and three sworn assessors. No application for a new trial was made, but on the 6th of June the defendant petitioned for leave to appeal to Her Majesty in Council, and the petition was registered. On the 9th of June he moved for leave to appeal, which was opposed by the plaintiff on the ground that there should have been a motion for a new trial within four days, but granted by the Court, the CHIEF JUSTICE ruling, that under the charter he had no option to refuse leave, "though the authorities cited might prove fatal in the Privy Council."

Arbuthnot, and J. Frobisher Mills (Matthews, Q. C., with them), for the appellant, contended that he should be allowed to show that the verdict could not be justified by the evidence, and that no reason was given, or could be suggested, for arriving at its amount. The respondent's case was that the appeal was excluded by reason of the omission to apply to the Supreme Court for a new trial within four days from the verdict, as directed by the rules. But that rule only applies where one judge alone had found the

[*605] facts * — here the verdict was of a judge and three assessors. Clark's Colonial Law, p. 684; *Santa Cana* v. *Ardevol*, 1 Knapp, 269; *Canepa* v. *Larios*, 2 Knapp, 283, *Musadee Mahomed Cazum Sherazee* v. *Meerza Ally Mahomed Khan*, 8 Moo. P. C. 112; *Tronson* v. *Dent*, 8 Moo. P. C. 441.

Greene, Q. C., and W. English Harrison, for the respondent, were not called upon.

The judgment of their Lordships was delivered by

Sir Barnes Peacock: —

Their Lordships do not think it necessary to call upon the counsel for the respondent.

This is an appeal against a judgment and decree of Her Majesty's Supreme Court of Gibraltar, dated the 2nd of June, 1885, in which, in an action for goods sold and delivered, judgment was entered for the respondent, the plaintiff, for the sum of 20,842 pesetas, together with the costs of suit. By the Charter of Justice of the Court of Gibraltar, that Court consists of a single judge, and it is provided that "all issues of fact arising in civil suits, or actions depending in the said Court, shall be tried and decided by the said judge and three assessors, to be appointed as hereinafter mentioned, until otherwise provided for by law; and that the verdict of the said judge and assessors on the trial of any such issue, shall be according to the majority of votes, but if such votes shall be equally divided, then according to the opinion of the said judge; and every such verdict shall be delivered in open court by the mouth of the said judge." By the same charter a provision is made for an appeal to Her Majesty in Council in certain cases, and it is also provided that on trials before the judge and assessors in appealable cases the evidence given in the case shall be recorded. By another portion of the charter a power is given to make Rules of Court, and by one of those rules it is provided: "That all judgments shall be promulgated at the expiration of eight days from the time of their being pronounced, and in case of a trial by the judge and assessors, or by a jury, each party shall be allowed four clear days after judgment pronounced in [*606] which to move the Court, if in term, or take out a * summons before the judge if in vacation, for a new trial, upon such grounds alone as new trials are granted by the Courts at Westminster, upon giving two clear days' notice of the motion or the summons."

In the present case it is contended that the judgment was wrong, because it gave effect to a verdict which was not warranted by the evidence. If the verdict was not warranted by the evidence, the case fell within the rule which has just been read, which states that the party may move for a new trial. The proper course for the appellant to have adopted was, if he considered that the verdict was not warranted by the evidence, to move the Court for a new trial. He has not exhausted the remedies which the rules and practice of the Court directed should be observed in cases where a verdict of the judge and assessors is objected to upon the ground that it is not warranted by the evidence. It would be very inconvenient if parties, without moving the Court for a new trial, could be at liberty to ask Her Majesty in Council to set aside the judgment upon the ground that the verdict was wrong, without having taken that course which is pointed out by the rules made in pursuance of the charter to be adopted in the case of an objection to a verdict. The parties may be put to very great expense by an appeal to Her Majesty in Council in a case in which that expense might be avoided by adopting the course of applying to the Court below; and it would be very inconvenient if the parties could come here and ask Her Majesty in Council to reverse that judgment without going in the first instance to the judge who had seen the witnesses and knew the whole of the circumstances of the case, and applying to him to have that verdict reviewed.

Her Majesty cannot alter the verdict or set it aside, and their Lordships are of opinion that they cannot advise Her Majesty to direct a new trial, the parties not having applied to the Court in the regular course instead of coming here.

Their Lordships will therefore humbly recommend Her Majesty to affirm the judgment of the Court below. The appellant must pay the costs of this appeal.

ENGLISH NOTES.

The cognate rule of the House of Lords, as an ultimate Court of Appeal, that the Court will not go into a point which was not taken in the Court below, is so well known and observed that it is perhaps not to be found expressly laid down in the reports. Even in the lower Court of Appeal, although the hearing there is, under the rules, a rehearing of the case, a new point cannot be raised, which, if it had been

raised in the Court below, might have been met by evidence which would have caused it to fail. *Ex parte Firth, In re Cowburn* (C. A. 1881), 19 Ch. D. 419, 51 L. J. Ch. 473.

AMERICAN NOTES.

This doctrine is not precisely applicable in this country where everything on the subject is regulated by statute or rule, but the result is the same, for it is believed to be the rule here that the appellant must exhaust his remedies below before appealing. For example, formerly, in New York, if the general term of the Supreme Court granted a new trial, the parties must go back and take it before an appeal would lie to the Court of Appeals, but now this is changed, so that the aggrieved party may appeal directly to the Court of Appeal by stipulating to allow final judgment against him if the order for a new trial shall be affirmed in that Court.

Section II. — *Execution Pending Appeal.*

No. 5. — MERRY *v.* NICKALLS.

(CH. 1873.)

RULE.

Execution pending an appeal from a judgment for the payment of money, on a suggestion of the plaintiff's inability to repay it, will not be stayed except on the plaintiff declining or failing to give security for the repayment; and then only upon the terms of the defendant paying the money into Court. The stay is a matter of favour; and the costs of an application for it must be borne by the defendant applying.

Merry v. Nickalls.

L. R. 8 Ch. 205-206 (s. c. 42 L. J. Ch. 479-480, 28 L. T. 296, 21 W. R. 305).

[205] This was a suit in Chancery, in which the defendant had been ordered to pay to the plaintiff a sum of about £1100 and the costs of the suit.

Mr. Buchanan now moved that the proceedings under the order for payment might be stayed, pending the defendant's appeal to the House of Lords. The defendant was willing to bring the money into Court.

Mr. Davey, for the plaintiff, objected that his client would have to pay the money, and would then be out of pocket pending the appeal.

Their Lordships made an order to stay proceedings under [206] the order for payment; the defendant to pay the money to the plaintiff, the plaintiff giving security for repayment if the defendant succeeded on the appeal; or the defendant, if the plaintiff preferred that course, to pay the money into Court. The costs of the suit to be paid according to the decree, on the solicitor undertaking to repay if the Court should so direct.

Mr. Buchanan asked that the costs of the application might be costs in the cause, and cited *Burdick* v. *Garrick*, L. R., 5 Ch. 453; 39 L. J. Ch. 661.

Their Lordships thought that there must have been some special circumstances in that case. The defendant came here to ask a favour, and must pay the costs of his application.

ENGLISH NOTES.

The ruling case gives an example of the practice of the Court of Chancery before the merger of that Court by the Judicature Acts. The practice was different in the case of appeals by writ of error from the Superior Courts of common law.

Formerly a writ of error operated as a *supersedeas* of execution from the time of the allowance of the writ. 2 Wm. Saunders, p. 101, *h. et seq.* This effect came to be conditional upon bail being duly put in where bail was required. Bail was not required by common law; but by certain statutes (commencing with 3 Jac. I., c. 8) was required as a condition for the stay of execution. By the earlier statutes this condition only applied to certain classes of actions; but from and after the statute, 6 Geo. IV., c. 96, bail was required in all cases after judgment for the plaintiff in any personal action, unless it was otherwise ordered by the Court or a judge. By s. 151 of the C. L. P. Act 1852, upon any judgment of any of the Superior Courts of common law, execution should not be stayed or delayed by proceedings in error without the special order of the Court or a judge, unless the plaintiff in error should bind himself with sureties by recognisance in the manner there pointed out.

Under the modern procedure, proceedings in error are superseded by appeals to the Court of Appeal or the House of Lords as the case may be. The practice of putting in bail in error under the C. L. P. Act 1852 continued in respect of appeals to the House of Lords until the Appellate Jurisdiction Act 1876. But the practice now is to apply to

the Court of Appeal for a stay of execution. *Hamill* v. *Lilley* (C. A. 1887), 19 Q. B. D. 83, 56 L. J. Q. B. 337; and see *The Khedive* (C. A. 1879), 5 P. D. 1.

By R. S. C. Ord. 58 (as to appeals to the Court of Appeal), r. 16 . . . "an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any judge thereof, or the Court of Appeal, may order; and no intermediate act or proceeding shall be invalidated, except so far as the court appealed from may direct."

The rule of the principal case has been followed as the guide for the Court in carrying out the rules under the Judicature Acts. *Cooper* v. *Cooper* (C. A. 1876), 2 Ch. D. 492, 45 L. J. Ch. 667; *Morgan* v. *Elford* (C. A. 1876), 4 Ch. D. 352, 388.

But in the case of *The Attorney General* v. *Emerson* (C. A. 1889), 24 Q. B. D. 56, 59 L. J. Q. B. 192, the judges in the Court of Appeal all strongly protested against the position that there was any such established practice as to limit their discretion under the terms of the statutory rule. The question there raised was whether the Court of Appeal could refuse to stay execution for costs pending an appeal to the House of Lords, without putting the respondent's solicitor upon an undertaking to repay them in the event of the appeal being successful. It was argued on the part of the Crown (appellant), that according to the established practice this undertaking must be given in every case. The Court denied the proposition argued for, but, under the circumstances of the case, required the undertaking to be given.

In *Barker* v. *Lavery* (C. A. 1885), 14 Q. B. D. 769, 54 L. J. Q. B. 241, where there was an application by the defendant to the Court of Appeal for a stay of execution for costs pending an appeal to the House of Lords, the Court laid down the rule that the application is not to be granted as a matter of course; and that there must be evidence to show that the plaintiff would be unable to repay the costs if he should be unsuccessful before the House of Lords. In all cases some special circumstances must be shown by affidavit. *The Annot Lyle* (C. A. 1886), 11 Pro. D. 114, 55 L. J. P. D. & A. 62. And compare cases cases under No. 6, *infra*.

AMERICAN NOTES.

See note to No. 3, *ante*, p. 258.

No. 6. — WILSON *v.* CHURCH.

(C. A. 4 July, 1879.)

RULE.

WHERE there is a *bonâ fide* appeal from a judgment which, if carried out, would render a successful appeal nugatory — *e. g.* for the distribution of money in Court amongst the holders of bonds to bearer — the Court will make an order for staying proceedings under the judgment so far as necessary to prevent this consequence, upon terms of speeding the appeal. But it will not interfere with the judgment, so far as it ordered the payment of costs, except by putting the solicitor who was to receive them upon an undertaking to repay them.

Wilson v. Church.

12 Ch. D. 454-461 (s. c. 28 W. R. 284).

This action was brought by W. M. Wilson on behalf [454] of himself and all other holders of the bonds of the Republic of Bolivia, and the Republic of Bolivia, against Colonel Church, the National * Bolivian Navigation Com- [* 455] pany, the Maderia and Mamoré Railway Company, Messrs. Lloyd and Lambert, who were trustees for the bondholders, and L. Nash, a dissentient bondholder, claiming a declaration that a fund of a large amount in the hands of the trustees should be returned to the bondholders and not applied in the construction of the works or the railway.

On the 20th of June, 1879, judgment was pronounced by the Court of Appeal in favour of the plaintiff, ordering the trust fund to be distributed among the bondholders, and that the defendants other than the trustees should pay the costs of the action, the plaintiff to have his costs in the first instance paid out of the fund.

The defendants, the National Bolivian Navigation Company and the Maderia and Mamoré Railway Company, and L. Nash, proposed to present a petition of appeal to the House of Lords against this judgment. They now moved that on the undertaking by the defendants to present their petition of appeal within

a month all proceedings under the judgment, except as to the taxation and payment of the costs, might be stayed until after the appeal should have been decided; and that all proceedings under such judgment to obtain payment of the costs might be stayed until after the decision of the appeal, unless the solicitors of the parties to whom costs were made payable should give their personal undertaking to refund in case the judgment should be reversed.

The plaintiff filed an affidavit by one of his solicitors stating that the costs amounted to between £4000 and £5000, that the National Bolivian Navigation Company was a company incorporated and domiciled in the United States of America, that neither that company nor the Maderia and Mamoré Railway Company had any property which could be made available for the payment of the plaintiff's costs, and that the defendant, L. Nash, had no means to pay the same costs, and was merely a nominal party to the action whose costs were guaranteed by the two companies.

4 July, 1879, Benjamin, Q. C., and Rigby, in support of the application: —

The appeal in this case is a matter of right, no leave of the Court being necessary; and in such a case the practice of the Court has always been to order a stay of execution of a [*456] judgment *pending the appeal if the appellant would be irremediably injured by carrying it into execution, in case his appeal should succeed. When the appeal is a matter of right the Court will always so deal with the subject-matter of the appeal as not to render the appeal, if successful, nugatory. In the present case the whole of the fund is in the power of the Court, and cannot be distributed without the Court's permission. The judgment appealed from directs the entire distribution of the funds; the bonds are payable to bearer; it is known that from 900 to 1000 persons are interested in the fund; many of the bonds are held by persons on the continent of Europe, and others by persons in South America. If the fund is now distributed it can never be recovered. On the other hand the plaintiff and the other bondholders cannot be injured by a stay of execution, for the fund is perfectly secure and is paying interest at £4 per cent.

[James, L. J. What pecuniary interest have the two companies, *quâ* companies, in the fund? If the money is laid out in making the railway, as the companies wish it to be, the under-

taking will be charged with the whole amount of the debt and a very large arrear of interest.]

We believe that after paying the bondholders, the undertaking would be a valuable property. We believe that the enterprise is practicable both physically and financially. We are willing to expedite the appeal to the House of Lords as much as possible.

Southgate, Q. C., and Cozens-Hardy, for the plaintiff: —

This is an exceptional case. Our affidavit shows that both the companies and also Nash are practically insolvent. The appeal is merely speculative; if it succeeds the defendants will get no real benefit from the money, which will be all wasted. Each bondholder, on receiving his money, can give an undertaking to repay it if the appeal succeeds, and the difficulty in recovering it would not be great.

If the application to stay proceedings is granted, we ask the Court that it may be upon condition of the defendants giving us a material guarantee for the amount of the costs in the Court below by paying into Court £5000, or some other sufficient sum; *for it would be useless to take out execution [*457] against either of the companies or against Nash. *Morgan* v. *Elford*, 4 Ch. D. 352.

[COTTON, L. J. Is there any precedent for the Court making any such condition?]

In the *Citizens' Bank of Louisiana* v. *Bank of New Orleans*, L. R., 6 H. L. 352, not reported on this point, the appellants asked that the payment of a sum of £5000, which by the decree of the MASTER OF THE ROLLS had been ordered to be paid to the respondents, might be stayed; and the Court ordered that the money should be paid into Court to abide the result of the appeal to the House of Lords, "upon the appellants giving security to be answerable as this Court shall direct for any loss that may be occasioned to the respondents by reason of the order." The principle of that case applies to the present. But if there were no precedent the Court has power to make one in a case like the present, as was said by Lord Justice JAMES, in *Corporation of Hastings* v. *Ivall*, L. R., 9 Ch. 758.

Macnaghten and Snagge for the trustees.

Benjamin, in reply.

COTTON, L. J. This is an application to stay the execution of an order for payment of a very large sum of money to the bond-

holders who are interested in it, on the ground that there is an appeal presented by the defendants, the unsuccessful parties, to the House of Lords. There is also a direction in the order for payment of the costs out of the fund, and also a right given to the plaintiff to get his costs from the defendants. Now, as regards the direction for the payment of the costs out of the fund, and the direction for payment of the costs by the defendants, it would be contrary to the usual practice to stay any direction for the payment of costs, and therefore, in my opinion, there ought to be no interference whatever with the direction for payment of the costs out of the fund, and no interference with the right of the plaintiff to get such costs as he can from [* 458] the defendants by putting the order into execution. * Of course the plaintiff's solicitors will give, as is usual, an undertaking to refund the costs if the House of Lords should reverse the decree which has been made by this Court.

But then there comes the question whether or no that part of the order which directs payment to the bondholders should be stayed. I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory; and, acting on that principle, when there was an appeal to this Court from the judgment of Mr. Justice Fry dismissing the plaintiff's action altogether, and it was urged therefore that this Court had no jurisdiction to stay the execution of the order, we were of opinion that we ought to stay the execution of a judgment in another action made by Mr. Justice Fry, ordering the fund to be dealt with, — that is to say, by granting an injunction against the trustees to restrain them from parting with any portion of the fund in their hands till the appeal was disposed of. *Wilson* v. *Church*, 11 Ch. D. 576. That possibly was rather novel, but it was right, in my opinion, to make that order to prevent the appeal, if successful, from being nugatory. Acting on the same principle, I am of opinion that we ought to take care that if the House of Lords should reverse our decision (and we must recognise that it may be reversed), the appeal ought not to be rendered nugatory. I am of opinion that we ought not to allow this fund to be parted with by the trustees, for this reason: it is to be distributed among a great number of persons, and it is obvious that there would be very great difficulty in getting back the

money parted with if the House of Lords should be of opinion that it ought not to be divided amongst the bondholders. They are not actual parties to the suit, they are very numerous, and they are persons whom it would be difficult to reach for the purpose of getting back the fund.

If there had been any case made by the plaintiff that this appeal was not *bonâ fide*, that it was for some indirect purpose and not for the purpose of trying whether the judgment of this Court was right, the case would have stood in a different position, but there is no affidavit or tangible fact upon which, in my opinion, we can rely for the purpose of arriving at the conclusion that *such is the fact. I deal with it as being [*459] presented in the right of the defendants, and *bonâ fide* presented for the purpose of trying this question whether the judgment of this Court is or is not right. But then, of course, in staying the payment out of this money, we must put the appellants on terms that they shall have the question, so far as in them lies, decided at the earliest possible opportunity by the House of Lords, and they must pay the costs of this application.

Brett, L. J. This is an application to the discretion of the Court, but I think that Mr. Benjamin has laid down the proper rule of conduct for the exercise of the judicial discretion, that where the right of appeal exists, and the question is whether the fund shall be paid out of Court, the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory. That being the general rule, the next question is whether, if this fund were paid out, the appeal, if successful, would be nugatory. Now it seems to me that, looking at this matter in the view of men of business, one cannot help seeing that if this fund is paid out it is impossible to say to whom it will be paid. It is quite true that the payments out will be to persons many of whom will never be able to be found; it is very possible, and most likely, that several of them will be abroad; it is most likely that several of them will be in America; and the practical result of paying this money out to the different bondholders, or to the persons who would be holding the bonds at the time, would be that the fund never could be got back again if the appeal were successful. Therefore, if this case is to be dealt with according to the general rule, it seems to me that the Court ought to stay the payment out

of this fund. That rule must be acted upon unless this is an exceptional case. It is suggested this is an exceptional case, because the appellants are subject to a good deal of suspicion and open to a good deal of observation; but, whatever may be the ground of suspicion, or however right the observations may be, I cannot think that we ought on that ground to prevent them from having the usual protection in case their appeal is [* 460] successful. With regard to the question of costs, even * if there had not been the order, which it seems exists, that these costs should be paid out of the fund, I am of opinion that we ought not to deal with the costs. The plaintiff is a litigant and must stand by the fate of all other litigants. He has an execution for costs. He says that he cannot make that execution effectual, but that would be so whether this application were granted or not. But, however, he seems to me to be amply protected, at all events on the present occasion, for his solicitor can get the payment of the money out of the present investment, and he may expend it if he thinks proper, and upon an unsuccessful appeal he will have other funds to pay it back, if not, he will amuse himself by putting the money from one investment into another, — the fate of all other plaintiffs and respondents upon appeal. I do not see anything in this case to alter the ordinary rule of conduct; therefore I think this application must be acceded to.

James, L. J. I am unable to agree with the conclusions at which the majority of the Court has arrived. I think this is a very exceptional case, and that it should be dealt with with reference to those exceptional circumstances. It is not a question of who is entitled to the money. If it were a question as to whether the plaintiff or the defendants were entitled to the money I should fully concur with what has been said by my colleagues, but, as I understand the case, the money was lent by the bondholders to the Bolivian Government for the purpose of being laid out upon a work, and the question is whether it is to be laid out upon that work when made, being a work for the benefit of the bondholders and the Bolivian Government; the only possible interest (which it appears to me is such a shadowy interest, I cannot pay the slightest attention to it) that the companies can have in the matter being the possible interest which the contractors may have in laying out the money in these works, and in the value of the works after they have been made. That

interest appears to me, as a man of business, to be utterly idle and nonsensical. That is to say, A. has agreed to lend money to be laid out on property in which B. has an interest, but which when laid out will simply be * a security for the [*461] man whose money is to be laid out. It appears to me that that does make an exceptional circumstance, and therefore, although it is not a matter of very great consequence, I cannot myself agree that this is a case which ought to be decided upon the general principle which is applicable to a case where the question is between two persons claiming a fund.

ENGLISH NOTES.

In *Polini* v. *Gray*, *Sturla* v. *Freccia* (C. A. 23 July, 1879), 12 Ch. D. 41, 49 L. J. Ch. 41, — a suit in which inquiries were made as to the next of kin of an intestate — an injunction which had been granted against dealing with certain funds was continued notwithstanding a decision of the Court in favour of the persons holding the funds, pending an appeal to the House of Lords: the reason being that, if the appellant ultimately succeeded in the House of Lords, her success would be useless unless the fund was protected in the meantime.

In *Bradford* v. *Young*, *In re Falconer's trusts* (C. A. 1884), 28 Ch. D. 18, 54 L. J. Ch. 368, the decision of the Court of Appeal was substantially to the same effect as in the principal case. The question related to the transfer out of Court of a sum of about £10,000 stock, which Mr. Justice Pearson upon the hearing of a certain action on further consideration had ordered to be made to the plaintiff. On a motion by other parties that the payment out should be suspended pending an appeal, Mr. Justice Pearson suspended the payment over the long vacation in order that the question might be determined by the Court of Appeal. While making this direction, he observed, referring to *Walburn* v. *Ingilby* (1832), 1 My. & K. 79, and *Huguenin* v. *Baseley* (1808), 15 Ves. 180, that "it appears to be by no means the settled rule of the Court that, without any special ground being shown, a fund which has been ordered to be paid out should be retained in Court simply because there is an appeal from the order." On the application being made after the long vacation to the Court of Appeal, it appeared by affidavit that the plaintiff had been abroad for two years, and that the applicant could not find his address. The Court gave the counsel for the plaintiff the alternative of (*a*) giving security for refunding in case the appeal should be successful, or, (*b*) of having the payment out stayed until the hearing of the appeal,

upon the applicant giving security to pay interest at £4 per cent on the present market price of the stock, and to make good to the plaintiff the difference, if any, between the highest market price of the stock at any time between the day of hearing the application and the day of hearing the appeal, and the market price on the latter day. The counsel for the plaintiff having elected the latter alternative, the case stood over for the applicant to give security, which he ultimately declined to do.

Section III. — *Appeal by way of rehearing.*

No. 7. — IN RE ST. NAZAIRE CO.

(C. A. 1879.)

RULE.

Under the system of the English Judicature Acts, a judge of the High Court has no power, after an order of the Court has been drawn up, to rehear the case; the power of rehearing being part of the appellate jurisdiction which is transferred by the Acts to the Court of Appeal.

In re St. Nazaire Co.

12 Ch. D. 88-101 (s. c. 41 L. T. 110, 27 W. R. 854).

The question which was argued before the Court of Appeal in this case was whether the Vice Chancellor had jurisdiction to entertain a certain petition, the nature of which will sufficiently appear from the judgments. In the argument for the petitioners, *Miller's Case*, 3 Ch. D. 661, and *Plumstead Water Company* v. *Davis*, 28 Beav. 545, were cited.

[Jessel, M. R. In *Miller's Case* no order had been drawn up. A Judge can always reconsider his decision until the order has been drawn up. What you have to make out is, that the old practice in Chancery of a Judge rehearing his own decisions still exists under the Judicature Acts.]

The judgments pronounced were as follows: —

[*93] *Jessel, M. R. [After some preliminary observations.]

The first question to be considered is whether this is a petition of rehearing, and I cannot imagine on what grounds it

can be otherwise described. Upon the application of the liquidator of the European Bank to be admitted a creditor against the St. Nazaire Company for a sum of £22,300 7*s.* 2*d.*, alleged to have been advanced and paid by the bank to the company, with interest, the VICE CHANCELLOR, on the 27th of January, 1877, made an order "that the claim of the liquidators of the said bank to be admitted as creditors against the said St. Nazaire Company, Limited, be allowed for such an amount as shall be certified to be due to the said European Bank, Limited, in respect of their said claim in the winding-up of the said company." The meaning of that was that in principle the claim was allowed, and the amount was left to be ascertained in Chambers. It was equivalent in effect to a declaration that the claim was well founded, with a reference to Chambers to ascertain the amount only, but the order having been made upon summons the term "declare" is not employed. It is often so convenient to make a declaration, that I have * constantly made declarations both on petition and on summons; but there used to be a notion in the Court of Chancery that the word "declaration" could not be used when the order was made on interlocutory application, and that accounts for the form of the order. That order was appealed from, and on the 27th of April, 1877, the appeal was dismissed with costs, so that the appeal Court decided that the claim was well founded, but that the amount due was to be ascertained by the Judge in Chambers. [*94]

The petition is presented by certain contributories of the St. Nazaire Company; not pursuant to leave, for the leave given included the liquidator, but the petition was presented by contributories of the St. Nazaire Company only, without the liquidator.

Now, first of all, we must see for what the petition asks. When we look at the body of the petition we find that in the 40th paragraph it says that the VICE CHANCELLOR in making his order of the 27th of January, 1877, was misled by the form of the minute of the Chief Clerk, which was treated by both parties as accurate when it was inaccurate; so that as regards the VICE CHANCELLOR there is a complaint that in making the order he was misled. Then in the 41st paragraph the order of the Court of Appeal is attacked, not on the same ground as the decision of the VICE CHANCELLOR, but in this way: "The liquidator of the

St. Nazaire Company afterwards appealed from the order of the said VICE CHANCELLOR to Her Majesty's Court of Appeal, but the appeal was dismissed. In consequence of the defective evidence before the Court, the judgment of the said Court of Appeal was delivered under an erroneous impression as to the true facts of the case." Therefore it is alleged that the judgment of the Court of Appeal was wrong, but upon a different ground. Then it goes on to allege what the true facts of the case were, and then it states that a call has been made by the liquidator, then that a summons has been taken out to set aside and to vary the certificate by the Chief Clerk, which summons, as I understand, is still pending, and then they pray "that the said order of the 27th day of January, 1877, and the said certificate dated the 29th day of November, 1877, may be discharged." That is, that they ask to discharge an order affirmed by the Court of Appeal. "And that the said claim of the said European Bank may be reheard, [*95] and *that it may be declared that under the circumstances hereinbefore stated the said bank were not at the date of the winding-up of the St. Nazaire Company, and are not, creditors of the said company." That is the declaration they ask. Then it goes on to ask for a declaration, "that having regard to the facts herein stated a call ought not to have been made upon the petitioners (other than the company), or any of the other contributories of the St. Nazaire Company, or at all events that such call ought not to have been made on such of the former shareholders in the St. Nazaire Company as gave up their shares in the St. Nazaire Company in exchange for shares in the *Société de Commerce*, and have paid the amounts of their liability in respect of such last-mentioned shares, or that such call, if allowed at all, may be limited to the amount required for satisfying any claims for costs or otherwise."

If it had not been that the European Bank's order to be admitted as creditors was sought to be discharged, they ought not to have been parties to an application as to a call order, for that is a matter between the liquidator and the contributories, and not one to which the creditors are properly parties, although, of course, if the liquidator does not do his duty a creditor may apply that the call may be made. Then it goes on, "or if the Court shall be of opinion that all material facts were before the Court upon the hearing of the said application on the part of

the European Bank, that the petitioners may be at liberty in the name of the St. Nazaire Company or otherwise as they may be advised to appeal from the said order of the 27th day of January, 1877, to the House of Lords, and that in the meantime all proceedings under or consequential on such order may be stayed." Now, so far as relates to the first part, the liberty to appeal, the petition is not one with which the European Bank could be served; that is a matter between the contributories and the liquidator with which the appellants have nothing whatever to do. No doubt the application for a stay of proceedings will affect them very much; but you cannot apply for a stay until you have made some progress towards an appeal. Therefore that will not help the petitioners. Then in the usual form: "or that the said order and certificate may be varied in such manner as to the Court shall seem just." I have gone through the whole of the prayer in order to show that * in substance it is a petition [* 96] of rehearing, and nothing more. It is in substance simply a petition for rehearing, because the fringes that are added in the other paragraphs of the prayer are not matters with which the European Bank has any concern, and therefore an order to amend would not be proper as against them, if the only matter with which they have any concern is not a matter within the jurisdiction of the Court below. Consequently the only point to which I think it necessary to direct my attention on the present occasion is the question of jurisdiction. If the VICE CHANCELLOR had no jurisdiction, the petition ought to have been dismissed as against the European Company, because they have nothing else to do with the matter. Whether afterwards any other proceedings may be taken for the purpose mentioned, with which the European Company has nothing to do, may be a matter for the consideration of the appellants, and the dismissal will not affect those questions.

Now, the VICE CHANCELLOR, thinking, as it is said, that it was not a petition for rehearing, gave liberty to amend. The amendments are made, and I must say, looking at the amendments, that it appears to me quite as much a petition for rehearing as it was before. Instead of asking that the order may be discharged, it asks that it may be discharged or varied. Instead of asking that the claim of the European Bank may be reheard, it asks that the claim of the European Bank may be disallowed. Although

there is a variation in words there is no variation in substance. Then it asks for a declaration that they are not creditors; and asks that, so far as may be necessary for that purpose, the order may be discharged. If they are not creditors at all it ought to be discharged altogether. It really in substance remains as much a petition of rehearing as before, and the alternative is, that if, in consequence of the said order of the 27th of January, 1877, and of the appeal from the same having been dismissed, the Court cannot grant the relief hereby (that is, hereinbefore) prayed, they may be at liberty to appeal, upon which I have already made my remarks. Therefore, whether we consider the original or the amended petition, it is a petition presented to a Judge of the High Court to rehear a decision of the Appeal Court, I should have thought that the mere statement of that would be [* 97] sufficient * to show that the Judge below had no jurisdiction. It would be a wonderful result indeed if the Judicature Act empowered a Judge of an inferior Court to rehear a decision of the Appeal Court which perhaps had reversed his decision. Upon that theory, how long is the thing to go on? If the Judge below has this power, he may exercise it by reversing the decision of the Appeal Court where the Appeal Court had reversed his decision.

Then it was said that under the old practice the Court of Chancery, that is, the Judges of the Court of Chancery, the Lord Chancellor, the Master of the Rolls, and the Vice Chancellor, could rehear not only their own decrees, but the decrees of their predecessors, that is, those whom they succeeded. No doubt it was so, but does that jurisdiction continue? If it does, the most extraordinary results will follow. The power to rehear was confined by General Orders. The time allowed had been twenty years, but at last it came down to five years, and the power to appeal given by the new rules is only for one year; therefore if such a power were considered to remain vested in the Judges of the High Court it would follow that after the lapse of one year you could not appeal at all, but you might at any time within five years present your petition of rehearing to the Judge himself, and then, if he refused it on the ground that he thought he was right before, which would be the most probable result, you could then appeal to the Appeal Court, and thereby get five or six years for appealing instead of one. That would be so

remarkable a result that hardly any one could believe that such was the true construction of the Act of Parliament or the Rules.

Having considered these points, I come to the Act itself, and when we consider the nature of the jurisdiction transferred I think we shall see exactly how much of the old jurisdiction of the Court of Chancery was transferred to the High Court, and how much to the Court of Appeal. The jurisdiction of the old Court of Chancery was no doubt originally the LORD CHANCELLOR'S jurisdiction, and of course, like all jurisdictions, was originally derived from the Sovereign and exercised by the LORD CHANCELLOR; it was afterwards exercised by his deputies in Equity, as regards the MASTER OF THE ROLLS by long usage confirmed by Act of Parliament in the reign of George II., and as regards the VICE CHANCELLOR by *Act of Parliament [*98] passed in the early part of this century, when the first VICE CHANCELLOR was created. Now, all these Acts of Parliament give the Judges of first instance in the old Court of Chancery the whole jurisdiction which was vested in the LORD CHANCELLOR, subject only to this, that there was a right of appeal from them to the LORD CHANCELLOR, but of course they could not alter his decisions. Now, part of the old jurisdiction of the LORD CHANCELLOR was a right to rehear his own decisions, or the decisions of a preceding LORD CHANCELLOR; and similar powers passed under statute to the MASTER OF THE ROLLS and the VICE CHANCELLOR, and they also had a right to rehear their own decisions and the decisions of their respective predecessors. At first that was an unlimited right, as I said before: it was afterwards limited by General Order to twenty years, and finally to five years, and that existed down to the time of the passing of the Judicature Act. Now, what was that right of rehearing? Was it original jurisdiction, or was it appellate jurisdiction? There can, as it seems to me, be but one answer to that question, — it was appellate jurisdiction. No doubt it sometimes was an appeal from a Judge to himself, but it was much more frequently an appeal from a Judge to his successor. One of the very first cases heard before Lord LYNDHURST was a rehearing of a case before Lord ELDON, whose decision he reversed. In fact, the hope of every appellant was founded on the change of the Judge. Such a petition of rehearing could not be described otherwise than as an

application in the nature of an appeal; indeed, every rehearing was an appeal, although every appeal was not a rehearing.

That being so, what are the words used in the Judicature Act? The transfer of the jurisdiction is contained in the 16th and 17th sections of the Act of 1873 explained by the 18th. The 16th section says: "The High Court of Justice shall be a Superior Court of Record, and subject, as in this Act mentioned, there shall be transferred to and vested in the said High Court of Justice the jurisdiction which at the commencement of this Act was vested in or capable of being exercised by," among other Courts, "the High Court of Chancery as a Common-Law Court as well as a Court of Equity." Therefore, the whole jurisdiction of the Court of Chancery is transferred, subject as in the Act [*99] mentioned, and *therefore subject to the next following section, which says: "There shall not be transferred to or vested in the said High Court of Justice by virtue of this Act any appellate jurisdiction of the Court of Appeal in Chancery, or of the same Court sitting as a Court of Appeal in Bankruptcy." Now, the Court of Appeal in Chancery included the LORD CHANCELLOR no doubt, and it of course meant the jurisdiction of that Appellate Court; but the matter is made plain by the 18th section: "The Court of Appeal established by this Act shall be a Superior Court of Record, and there shall be transferred to and vested in such Court all jurisdiction and powers of the Courts following (that is to say) all jurisdiction and powers of the LORD CHANCELLOR and of the Court of Appeal in Chancery in the exercise of his and its appellate jurisdiction." Now, the jurisdiction and powers of the LORD CHANCELLOR were undoubtedly included in the jurisdiction of the High Court of Chancery; and if the Court of Appeal is to have the appellate jurisdiction of the LORD CHANCELLOR and the Court of Appeal in Chancery, is it reasonable to suppose that part of the appellate jurisdiction vested in the High Court of Chancery, that is the CHANCELLOR, who was really the High Court of Chancery, was transferred to the Judges of the High Court with the remarkable consequence I have already referred to? I am satisfied, upon a fair reading of the Act, even without reference to the Rules, we ought to come to the conclusion that the Court below has no such jurisdiction; but when we come to the 58th Order I think the case is clear. First of all, we find that there are times limited for appeals. Now, it

would be a most remarkable thing, as I said before, if the old practice were to apply so as circuitously to give a longer time than the Rules directly allow. The time for appealing from an order in the winding-up of a company is by the 9th rule the same as an appeal from an interlocutory order under rule 15, which is twenty-one days, except by leave of the Court of Appeal; and we find that no other appeal can, except by such leave, be brought after the expiration of one year. Therefore, if no other appeal can be brought after the expiration of one year, and, as I said before, all these rehearings are in the nature of appeals, and are appeals in fact, one year is the limit for all appeals to the Court of Appeal; and this confirms the view which I have already stated, * that there is no appeal at all to the Judge [*100] of the Court of first instance against any decision, either of his predecessor or of the Appeal Court. In fact, the only surprising part of the matter is that any one should have thought for a moment that a rehearing of this kind, involving a discharge, although not precisely in express terms, of an order of the Appeal Court, could be presented to a Judge of the Court of first instance.

It seems to me, therefore, that on this ground the petition should have been dismissed. I have refrained purposely from entering into the discussion of what might happen in some of the cases put at the bar of great hardship. I, on the one hand, am neither prepared to say that such cases of great hardship ought to be without a remedy, nor, on the other hand, am I prepared to say that the general good of the community requiring a final end to be put to litigation would not be better insured even if those exceptional cases of great hardship are not provided for. The matter may be looked at either way, and when a proper case is brought before the Appeal Court for discussion as to whether any remedy exists or not, I think it will be sufficient time to consider and decide upon that question. It seems to me that the decision below ought to be reversed, and that the appellant should have the costs of this petition.

Baggallay, L. J. I am of the same opinion, and I have very few words to add. It appears to me that the Court from whose order the appeal is brought had no jurisdiction whatever to make the order. However the language of the petition may be changed, the order from which this appeal is brought is substan-

tially an order made on the rehearing of the order of January, 1877. Having regard to the several clauses of the Judicature Act, to which the MASTER OF THE ROLLS has referred, to which I may add also the 19th section of the same Act, which provides, "That the Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice or of any Judges or Judge thereof," it appears to me that, with the particular exceptions which are to be found in different
[* 101] sections of the Act, the power * of rehearing is vested in the Court of Appeal, and in that Court alone.

There is a further difficulty in the present case, that, under the 124th section of the Companies Act, 1862, no rehearing can be brought after the expiration of three weeks, without express permission for that purpose given by the Court of Appeal, and no such leave has been given in the present case. The 9th rule of the 58th Order of the Judicature Act is a provision as regards the time within which such appeals are to be brought, and the time fixed by that rule is substantially the same as that mentioned in the 124th section.

THESIGER, L. J. I entirely agree with the conclusions at which the other members of the Court have arrived, and with the reasons they have given for those conclusions. I would only add that they seem to me to harmonize entirely the practice under the Judicature Act in all Divisions of the High Court, because, whatever may have been the practice in the High Court of Chancery before the Judicature Act as to the review of their decisions or the rehearing of their decisions, nothing can be clearer than that there was nothing analogous to that in the Common-Law Courts, and it is equally clear that under the Judicature Act, after once the Common Law Division of the High Court of Justice has pronounced a decision upon the matter in dispute which is being litigated between the parties, there is no power in that Division of the High Court to rehear or review that decision upon any suggestion that it has been misled, or that the parties have not brought all the evidence which ought to have been brought in order to enable the Court to arrive at a just conclusion. It certainly would seem to me to be running counter to the idea of fusion, which is at the bottom of the Judicature Act, if it were held that while that is impossible in the Common-Law Division of the High Court, it is possible in the Chancery Division.

No. 7. — In re St. Nazaire Co., 12 Ch. D. — Notes.

ENGLISH NOTES.

The rule of the principal case does not apply to a judgment which has been given by default. In such a case the proper course, if there is any remedy, is to apply to the judge by whom the judgment was given, to set aside the judgment and to hear or try the action. *Vint* v. *Hudspeth* (C. A. 1885), 29 Ch. D. 322, 54 L. J. Ch. 844.

In *Flower* v. *Lloyd* (C. A. 1877), 6 Ch. D. 297, 46 L. J. Ch. 838 — a case which was cited in the argument in the principal case — it was held that the Court of Appeal, as constituted under the Judicature Acts, had not power, after an order made by the Court had been passed and entered, to rehear the case on a suggestion that one of the parties had fraudulently misled an expert whose evidence was the only material evidence on the point at issue. The remedy was stated to be a new action to set aside the decree as obtained by fraud.

In *Ex parte Banco di Portugal* (C. A. 1880), 14 Ch. D. 1, 49 L. J. Bankr. 21, the Court of Appeal refused an application after a judgment of the Court of Appeal to allow a document to be put in, in order that it might be treated as evidence in a pending appeal to the House of Lords. The decision was guarded by the observation that the case might be different if by mistake in drawing up the order evidence had been omitted which had really been before the Court at the hearing by the Court of Appeal.

Where an order has been made by Her Majesty in Council upon a report of the Judicial Committee sitting as a Court of ultimate appeal, a rehearing will not be ordered on the ground that documentary evidence has been subsequently discovered which, if brought before the Committee, might have influenced their decision. *Venkata Narasimha Row* v. *Court of Wards* (P. C. 1886), 11 App. Cas. 660.

But the Judicial Committee has the same power as any other Court of Record to rectify a mistake which has crept in by misprision or otherwise in embodying its judgments. *Rajunder Narain Rae* v. *Bijai Govind Sing* (1839), 1 Moo. P. C. 117, & 2 Moo. Ind. App. Cas. 181.

AMERICAN NOTES.

Rehearings are regulated by statute or rule in these States, and are only granted by the whole court hearing the case. Thus the trial judge may grant a new trial "on the minutes," and an appellate court may order a reargument. In the western States, a "petition for rehearing" is almost as common as an appeal, and has become so much a matter of course that frequently counsel spend but little force on the first argument of the appeal. In New York however it is very different, and re-hearings or re-arguments are almost unknown. In the Court of Appeals, it is said, only two or three have ever been ordered except in a few cases of equal division of the Judges in opinion. Like physicians the Judges bury their mistakes.

APPORTIONMENT.

Section I. — *Of income.*

No. 1. — JONES *v.* OGLE.

(Ch. 1872.)

RULE.

The profits of a private partnership declared as at the date to which the accounts have been made up, are not dividends apportionable under the Apportionment Act, 1870. (33 & 34 Vict. c. 35).

Jones v. Ogle.

42 L. J. Ch. 334–337 (s. c. L. R., 8 Ch. 192–198, 28 L. T. 245, 21 W. R. 239).

Before the full Court of Appeal, Lord Selborne, L. C., James, L. J., and Mellish, L. J.

[335] The testator by his will, dated the 6th of September, 1863, bequeathed as follows:

"As to the share or interest which I have in the Lilleshall Iron Company, I bequeath the dividends and income thereof to my said uncle for his life, and after his death the same share or interest shall belong to his two daughters in equal shares."

The testator died on the 21st of October, 1870.

The Lilleshall Iron Company was a private trading company, regulated by a deed under which the management was vested solely in Earl Granville, who with the local manager went through the accounts, which were made up annually in the beginning of each year to the end of the year preceding, and a statement of such accounts for the preceding year was submitted by the directors in the month of January or February each year, and the

custom was that upon the statement of account being laid before Lord GRANVILLE, his Lordship determined what amount of profit should be divided and what amount carried forward. This dividend was not actually paid at once, but by four instalments, the first immediately, and the subsequent instalments in the April, July, and October following.

In February, 1871, a dividend was declared for the year ending on the 1st of January, 1871, and was paid by four instalments at the usual times, the total amount of dividend on the testator's shares being £350 17*s.* 6*d.* The residuary legatees claimed to have this sum apportioned according to the portion of the year 1870 during which the testator had lived.

The MASTER OF THE ROLLS thought that the apportionment Acts did not apply to the case, and considered that the whole of the dividend was specifically given to the uncle.

The residuary legatees appealed.

Mr. Fry and Mr. Cozens Hardy for the appellant, repeated the arguments used by them in the Court below, and cited: *Hartley* v. *Allen*, 27 L. J. Ch. 621; *Re Maxwell's Trusts*, 1 H. & M. 610; 32 L. J. Ch. 333; *Re Rogers's Trust*, 1 Dr. & S. 338; 30 L. J. Ch. 153; *Browne* v. *Collins*, L. R., 12 Eq. 586, 4 & 5 Will. IV. c. 22.

Mr. Roxburgh and Mr. Phear, for the respondent, cited: *Clive* v. *Clive*, L. R., 7 Ch. 433; 41 L. J. Ch. 386; *Bates* v. *Mackinley*, 31 Beav. 280; 31 L. J. Ch. 389; *Ibbotson* v. *Elam*, 35 Beav. 594; L. R., 1 Eq. 188; *Macintyre* v. *Connell*, 1 Sim. (N. S.) 225; 20 L. J. Ch. 284; 1 Lindley on Partnership, 13 (2d ed.).

Mr. Cozens Hardy replied.

THE LORD CHANCELLOR. We all think the decision of the MASTER OF THE ROLLS in this case is correct.

[After some observations upon the construction of the will independently of the Act, which have been the subject of criticism in some subsequent cases, he continued.]

But I also think that this is not really a dividend or [336] a periodical payment in its nature apportionable under the Act. The real object of the statute was to obliterate technical distinctions between different kinds of fixed income recurring from time to time at stated periods, upon which on account of their nature those in receipt of income would rely for their maintenance and ordinary arrangements in life. I for one should be

very sorry to put any narrow construction on that Act of Parliament which would tend to diminish its beneficial operation for the purpose evidently intended; but on the other hand, we ought not to put upon it any interpretation going beyond that purpose, and which would tend materially to embarrass or interfere with the working out of trading partnerships and other kinds of business which pay what are called dividends, but are in reality payments of a different nature, not proceeding upon the basis of a fixed income recurring from time to time.

In this particular case there was a mere private partnership in which the partnership deed provided for the making up of the accounts, but not to any specified time. It was no doubt very natural that they should be made up to the end of the preceding year, but there was nothing in the deed to prevent the partners, if it suited them, from making them up to any other time, and the managing partners had the power at their discretion, whenever they should think fit, to declare dividends, but no period was fixed at which dividends were to be declared. I do not think the word "dividends" in the deed makes these profits dividends within the meaning of the Act of Parliament, which, as I understand it, refers to such dividends as those upon stocks in the public funds, where the person who is under the obligation to make the periodical payments, hands to the persons through whom the payments are to be made, funds for the purpose of division among the persons entitled; or in the words of the 5th section of the Act, "payments made by the name of dividends, bonus out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise." In that respect the Legislature has thought fit to relax the rule, making such dividends apportionable, because shares in such companies are in the nature of investments for the production of ordinary income. Now it is admitted this is not a public company, to which alone the Act applies, and I think, therefore, that these payments cannot be brought within the meaning of the word "dividends," as defined by the 5th section.

[*337] Then can they be brought within the *2nd section, which makes "all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved

or made payable under an instrument in writing or otherwise)" apportionable as accruing from day to day? It is clear that as dividends are here expressly mentioned, the words, "other periodical payments in the nature of income," must refer to periodical payments which are not properly dividends; but then they must be payments occurring periodically, that is, at fixed times from some antecedent obligation, and not at variable periods at the discretion of individuals. In my judgment the profits arising from this business are not in the nature of income within the meaning of the Act, and are not the sort of payments which the Act intended to make apportionable. I therefore think that the judgment of the MASTER OF THE ROLLS, on whatever ground it proceeded, is correct, and the appeal must be dismissed with costs.

THE LORDS JUSTICES concurred.

ENGLISH NOTES.

In *Re Maxwell's Trusts* (1863), 1 H. & M. 610, 32 L. J. Ch. 333, — a case under the Act of 4 & 5 W. IV. c. 22, referred to in the argument of the principal case — a distinction was drawn by V. C. Sir W. P. WOOD between the dividends of a public company payable (by the constitution of the company) at fixed periods, and those under the Companies Clauses Act 1845, where the dividends are to be declared only at a general meeting, but there is nothing to fix the time when they shall be due or payable. In the former case he held that the dividends were apportionable, in the latter that they were not.

In *Browne* v. *Collins* (1871), L. R., 12 Eq. 586, — another case referred to in the argument for the appellants in the principal case,— the testator who was a member of a private partnership died in August, 1869, having by his will declared that from the day of his decease the annual income of his residuary estate should belong to A. B. for life, and that for this purpose the clear profits arising from his partnership should be considered as annual income. In December, 1869, the profits for the year ending March, 1869, were ascertained and declared to be divided. In March, 1870, the profits for the half year ending September, 1869, were similarly declared. It was held by V. C. WICKENS that the former profits were capital and belonged to the estate, but that the latter were income payable to A. B.

By the Apportionment Act 1870 (33 & 34 Vict. c. 35), it is enacted, sec. 2: "From and after the passing of this Act, all rents, annuities, dividends and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day

to day, and shall be apportionable in respect of time accordingly." And by sect. 5: " . . . The word 'Dividends' includes (besides dividends strictly so called) all payments made by the name of dividends, bonus, or otherwise out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise; and all such divisible revenue shall for the purposes of this Act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made, but the said word 'Dividend' does not include payments in the nature of a return or reimbursement of capital." And by sect. 6: "Nothing in this Act contained shall render apportionable any annual sums payable in policies of assurance of any description."

The following are some cases occurring soon after the date of the Act, in which apportionment was made according to its terms. *Clive* v. *Clive* (1872), L. R., 7 Ch. 433, 41 L. J. Ch. 386; *Capron* v. *Capron* (1874), L. R., 17 Eq. 288, 43 L. J. Ch. 677; *Pollock* v. *Pollock* (1874), L. R., 18 Eq. 329, 44 L. J. Ch. 168; *Hasluck* v. *Pedley* (1874), L. R., 19 Eq. 271, 44 L. J. Ch. 143; *Constable* v. *Constable* (1879), 11 Ch. D. 681, 48 L. J. Ch. 621.

The principal case is followed, and the same rule applied to a share of profits in a newspaper carried on as a private partnership, of which the testator bequeathed the net profits to J. G. during his life and after his death to his widow. J. G. died on the 23rd December, and his widow was held entitled to the whole profits declared for the half year ending on the 30th of December. *In re Cox's Trusts* (V. C. Hall, 1878), 9 Ch. D. 159. 47 L. J. Ch. 735.

But the annual profits or bonuses in a public company, though not of a periodical character, are apportionable under the Act of 1870. *In re Griffith, Carr* v. *Griffith* (1869), 12 Ch. D. 655, a decision of the Master of the Rolls (Sir G. Jessel), in which he also decided that a life assurance company incorporated in 1843, by a deed of settlement, and which had obtained certain privileges by a special Act of Parliament in 1868, was a public company within the meaning of the Act. And in *In re Lawrence, Lawrence* v. *Lawrence* (1884), 26 Ch. D. 795, 53 L. J. Ch. 982, where a testator died before the Act leaving estate including railway stock to his wife for life with remainder to his nephew; it was held by Pearson, J., that, although the wife had under the former law received payment of the whole dividend after the testator's death, yet upon her death subsequently to the Act the dividends afterwards declared were apportionable.

There have been various cases in which the question has arisen as to the interests of a tenant for life and remainderman in profits which have been declared to be *bonuses* distributable amongst shareholders in a public company. Although these questions very nearly touch upon the provisions of the 5th section of the Apportionment Act of 1870 above quoted, the question is really not whether the profits are apportionable income, but whether they are not capital as distinguished from income. These cases therefore will be more properly considered under the topic of "Tenant for Life and Remainderman." In the meantime the following may be briefly referred to. *In re Bouch, Sproule* v. *Bouch* (reported on appeal in H. L. as *Bouch* v. *Sproule*) (1885, 1887), 29 Ch. D. 635, 54 L. J. Ch. 665, 12 App. Cas. 385, 56 L. J. Ch. 1037; *In re Alsbury, Sugden* v. *Alsbury* (1890), 45 Ch. D 243; 60 L. J. Ch. 29; *Re Bridgwater Navigation Co.* (C. A. 1891), 1891, 2 Ch. 317, 60 L. J. Ch. 415; and *Re Armitage, Armitage* v. *Garnett* (C. A. 1893), 1893, 3 Ch. 337, 69 L. T. 619.

Section II. — *Between income and capital.*

No. 2. — BEAVAN *v.* BEAVAN.

(CH. 1869.)

No. 3. — In re EARL OF CHESTERFIELD'S TRUSTS.

(CH. D. 1883.)

RULE.

Where property is bequeathed on trust to pay the income to a tenant for life, and the reversion to others; and the realization of the property in the form of a fund capable of producing income is postponed for the benefit of the estate; the proceeds when realized are apportionable between capital and income by ascertaining the sum which, put out and accumulated at compound interest at £4 per cent per annum from the day of the testator's death (with yearly rests and deducting income tax), would have produced at the day of receipt the sum actually received. The sum so ascertained should be treated as capital, and the residue as income.

No. 2. — Beavan v. Beavan.

24 Ch. D. 649 n.–653 n. (s. c. 52 L. J. Ch. 961–963)

[649 n.] Adjourned summons (before Sir J. Romilly, M. R. 22 Feb. 1869)

The action was for the administration of the estate of a testator, Henry William Beavan, deceased, and a decree for that purpose was made on the 5th of March, 1853.

By his will, dated the 8th of March, 1849, after directing payment of his debts and funeral and testamentary expenses, and devising certain real estate, the testator bequeathed his money at his bankers', his furniture, plate, &c., to his wife, the defendant, Joanna Beavan, absolutely. And he devised and bequeathed the residue of his real and personal estate to his said wife and Thomas Paterson Anderson (since deceased) upon trust that his said trustees or trustee should sell his real estate at such times and in such manner as they, he, or she should in their, his, or her uncontrolled discretion think most advantageous to his estate, and should with all convenient speed after his decease, and in such manner as they, he, or she should in their, his, or her discretion think most beneficial, sell, call in, and convert into money all the said residuary personal estate (except such part thereof as should consist of ready money), and should, out of the moneys which should come to their hands by virtue of the said residuary devise or bequest and the trusts, pay his debts and funeral and testamentary expenses and legacies, and subject thereto should invest the same residuary moneys in Government or real securities in England or Wales, and should pay the income of the said residuary real and personal estates and trust funds and premises to his said wife during her life or widowhood; and after her decease or second marriage should hold the said trust premises in trust for his children who should attain twenty-one or marry as therein mentioned. And the testator appointed his said wife sole executrix of his will.

The testator died on the 23d of June, 1852, leaving surviving him his widow, the defendant, Joanna Beavan, and five children, the plaintiffs, all of whom except one had attained twenty-one.

Part of the testator's personal estate consisted of a moiety of an annuity of £675 granted by Colonel Tynte on the 10th of

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March, 1847, for ninety-nine years if three persons, who were now still living, or any of them, should so long live.

This annuity was secured principally upon certain estates and trust moneys to which Colonel Tynte was entitled for life in remainder expectant on the several deceases of his father and other persons, subject to incumbrances, and was payable quarterly, with interest at five per cent. per annum on any quarterly payment remaining unpaid. The entire annuity was redeemable at any time on payment of £4668 15*s.*, and arrears (if any) of interest and costs.

Nothing whatever was paid to the testator during his life, nor to his executrix, in respect of the annuity from the time it was granted down to the 8th of August, 1865, there being in fact no income of the estates charged with the annuity until after the death * of Colonel Tynte's father, and the Colonel [* 650 n.] himself being personally unable to pay it.

The testator also died possessed of a mortgage dated the 31st of March, 1848, whereby Colonel Tynte mortgaged the above-mentioned estates to him as security for the repayment of the sum of £3000 and other principal sums therein mentioned, with interest at 5 per cent. per annum.

By the Chief Clerk's certificate, dated the 23d of February, 1858, it was certified that, having regard to the nature of the mortgage of the 31st of March, 1848, and the testator's moiety of the said annuity, which securities were certified as part of the testator's estate outstanding or undisposed of, it was fit and proper and for the benefit of all parties interested under the will that the same should not be sold but allowed to remain in their then present state during the life of the Colonel's father, the tenant for life of the greater part of the estates comprised in the securities, and who was then eighty-two years of age, or until further order.

Colonel Tynte's father died on the 22d of November, 1860, whereupon the colonel's life interest in two estates fell into possession, and his life interest in the remaining estate and trust moneys fell into possession at a later period.

At the death of Colonel Tynte's father certain suits relating to the family estates were pending, and shortly afterwards a suit of *Ford* v. *Tynte*, and other suits were instituted also relating to those estates.

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In 1865 orders were made in these suits for payment of all arrears of the said annuity and interest on such arrears and for keeping down the same.

The total sum received for arrears and interest of the testator's moiety of the annuity down to the 8th of August, 1865, was £8656 10*s.* 7*d.*, of which £1949 15*s.* 3*d.* represented arrears and interest due at his death.

For the same reasons as those which delayed the payment of the annuity no payment was made in respect of the mortgage of 1848 until the year 1866, and ultimately the balance of the whole principal money and interest was paid off in 1868. The sums received by the defendant, Joanna Beavan, as executrix of the testator under orders in *Ford* v. *Tynte*, and the other suits on account of the sum of £3000, part of the sums secured by the mortgage of 1848, amounted in five payments made during the years 1866, 1867, and 1868, to £5950 17*s.* 6*d.*, consisting of £3000 for principal money and £616 0*s.* 3*d.* for arrears of interest thereon due at the testator's death, and of £2334 17*s.* 3*d.* for interest at five per cent. accrued subsequent to his death.

The two sums of £8656 10*s.* 7*d.* and £5950 17*s* 6*d.* having been received by the testator's estate as above mentioned, the question arose upon what principle they ought to be apportioned as between the tenant for life and the remaindermen under the will In order to have this question decided the defendant, Joanna Beavan, on the 23rd of December, 1868, took out a summons to determine (amongst other things), "First, the principle on which the said sum of £8656 10*s.* 7*d* received
[* 651 n.] * thirteen years after the testator's death, for arrears of the said annuity granted by Colonel Tynte to the testator, and interest, ought to be divided, the tenant for life of the residue of the testator's estate having received no payment for income on the fund during the above period; and secondly, to determine the principle on which the sum of £5950 17*s.* 6*d.* received in five payments during the years 1866, 1867, and 1868 for principal and interest in respect of Colonel Tynte's mortgage dated the 31st of March, 1848, ought to be divided as between the tenant for life and those in remainder."

The summons was adjourned into Court, and now came on for argument.

Jessel, Q. C., and Archibald Smith, for the defendant, Joanna Beavan, the tenant for life, in support of summons: —

No. 2. — Beavan v. Beavan, 24 Ch. D. 651 n., 652 n.

We submit first, that as to the testator's moiety of the annuity and the arrears thereof and the interest thereon, — inasmuch as that moiety ought or might, according to the direction in the will, have been sold and realized immediately after the testator's death, but for the common advantage of all parties was retained unsold and outstanding, — the proper mode of apportionment is as follows: a sum of £100 accumulating at compound interest from the testator's death in 1852 at 4 per cent. per annum payable half yearly would in thirteen years ending in 1865, when the fund was received, amount to £167 6*s.* 10*d.* Dividing the £8656 10*s.* 7*d.* in the proportion of £100 to £67 6*s.* 10*d.*, the result is that that sum recovered at the end of thirteen years ought to be considered as consisting of £5172 19*s.* for capital and £3483 11*s.* 7*d.* for income. Then if income tax at the rate of 10*d.* in pound (being the average rate between the years 1852 and 1865) be deducted so that interest is calculated at the rate of £3 16*s.* 8*d.* per cent. the result will be £5261 13*s.* for capital, and £3394 17*s.* 7*d.* for income. Any subsequent instalments of the annuity becoming due either in the lifetime of the tenant for life or after her death ought to be apportioned on the same principle.

The principle of apportioning, as between capital and income, property falling into a testator's estate subsequently to his death has already been settled by your Lordship in *Wilkinson* v. *Duncan*, 23 Beav. 469, 26 L. J. Ch. 495; and as the postponement of the getting in and conversion of the several funds was for the interest of both tenant for life and remainderman, the capital sum ascertained upon the above principle in respect of each fund as at the death of the testator should carry interest from the death at the rate of 4 per cent.: *Gibson* v. *Bott*, 7 Ves. 89; 6 R. R. 87. We also submit that in applying the principle of apportionment as between capital and income, compound interest and not simple interest should be calculated, so that the tenant for life may receive the full income value.

Secondly, we submit that as regards the £5950 17*s.* 6*d.*, the £3616 0*s.* 3*d.* *due for principal and interest [* 652 n.] at the testator's death should be considered as capital, and the £2334 17*s.* 3*d.*, the balance thereof, should be treated, as in fact it is, as arrears of income and paid to the tenant for life.

No. 2.—Beavan v. Beavan, 24 Ch. D. 652 n.

Sir R. Baggallay, Q. C., and Macnaghten, for the plaintiffs, the remaindermen:—

With regard to the testator's moiety of the annuity, we submit that out of the £8656 10s. 7d. the £1949 15s. 3d. due for arrears and interest at his death should in the first place have been made good to his estate and treated as capital: that out of the interest which actually accrued upon the arrears of annuity due at his death interest on that £1949 15s. 3d. at 4 per cent. per annum calculated from the day of death to the 8th of August, 1865, when the arrears and interest were received, should then have been paid to the tenant for life: that in the next place a value should have been set upon the moiety of annuity as on the 23rd of June, 1853, the expiration of one year from the death, and that out of the residue of the £8656 10s. 7d., after deducting the £1949 15s. 3d. and the interest thereon, interest at 4 per cent. per annum upon the estimated value of the moiety of annuity should have been paid to the tenant for life in respect of the period between the testator's death and the 8th of August, 1865; and then that the balance of the £8656 10s. 7d. and all further payments in respect of the moiety of annuity as they accrued due or may accrue due should have been and should be treated as capital and invested accordingly, the tenant for life receiving the interest upon such investment. The account should therefore be adjusted upon this footing.

As regards the £5950 17s. 6d., we submit that, as the mortgage in respect of which it was received was not, strictly speaking, a security authorized by the will, the tenant for life is only entitled to interest at 4 per cent. from the testator's death until the mortgage was paid off, and that the surplus interest should be treated as capital and invested accordingly. Simple interest only should be allowed in adjusting the accounts of the above-mentioned funds, particularly in the case of the annuity. *Wildbraham* v. *Deacon*, 23 Beav. 469; 26 L. J. Ch. 195, is not directly in point, for there the annuity had fallen in, whereas in the present case it is still subsisting.

Lord Romilly, M. R., held that the £8656 10s. 7d. and the £5950 17s. 6d. ought to be apportioned on the principle laid down in *Wildbraham* v. *Deacon*, but that in making such apportionment the several amounts should be calculated at compound and not simple interest.

No. 2 — Beevor v. Beevor, &c., 24 Ch. D. 663 n.

The order was, so far as is material, drawn up in the following form (Entry Book of Decrees and Orders (Chancery), 1869, A. fol. 402): —

"On the application of the" defendant, Joanna [*663 n.] Beavan &c., his Lordship is of opinion,

"1. That the £8636 10s. 7d. received by the defendant, Joanna Beavan, on the 5th of August, 1865, in respect of the arrears of the testator's moiety of the annuity of £675 and interest ought to be apportioned as on that day between corpus and income by ascertaining the sum which, put out at interest at £4 per cent. per annum on the 23rd of June, 1852, the day of the death of Henry William Beavan, the testator in this cause, and accumulating at compound interest calculated at that rate with yearly rests, and deducting income tax, would, with the accumulations of interest, amount on the 5th of August, 1865, to £8636 10s. 7d., and that the sum so ascertained ought to be treated as corpus as on that day, and the difference between £8636 10s. 7d. and the sum so ascertained ought to be treated as income payable on that day to the defendant, Joanna Beavan, as tenant for life.

"2. That each of the instalments of the said moiety of the annuity of £675, with or without interest, received after the 5th of August, 1865, or to be hereafter received, ought to be apportioned between corpus and income as on the day on which such instalment was or shall be received, on the same principle on which the £8636 10s. 7d., received on the 5th of August, 1865, is hereinbefore directed to be apportioned.

"3. That each of the several sums making up the sum of £2830 17s. 6d. received by the defendant, Joanna Beavan, on account of principal and interest on the sum of £2000, part of the sum secured by the mortgage of the 31st of March, 1848, irrespective of premiums, ought to be apportioned between corpus and income as on the day on which each such sum was received on the same principle on which the said £8636 10s. 7d. is to be apportioned as aforesaid."

No. 3. — In re Earl of Chesterfield's Trusts.

24 Ch. D. 643–654 (s. c. 52 L. J. Ch. 955–960).

Petition. [643]

By an indenture dated the 18th of March, 1850, and made between Colonel Tynte (the same person as the Colonel

No. 3. — In re Earl of Chesterfield's Trusts, 24 Ch. D. 643, 644.

Tynte mentioned in No. 2, *supra*) of the one part, and George, sixth Earl of Chesterfield, of the other part, Colonel Tynte covenanted with the Earl that in case, he, the Colonel, should be living at the death of his father, C. K. K. Tynte, he, the Colonel, would, within six calendar months after the death of his said father, pay to the Earl, his executors, administrators, or assigns, the sum of £18,310 with interest for the same at the rate of £5 per cent. per annum from the day of such death until payment of the principal sum; and further that he, the Colonel, would, during the joint lives of himself and his said father, and in case he should survive his said father, until payment of the said principal sum, and the interest thereof, upon the request and at the expense of the Earl, his executors, administrators, or assigns, do all acts for enabling him or them to effect and keep on foot any assurance or [*644] assurances on *his, the Colonel's, life to the extent of £18,310; and the Colonel conveyed his life interest in remainder expectant on the death of his said father in the Tynte family estates (subject to certain prior incumbrances) to the Earl by way of mortgage for securing the repayment of the £18,310 and interest.

In pursuance of that deed, and shortly after its execution, the Earl effected two policies of insurance for £5000 each on Colonel Tynte's life, and these policies were thenceforward kept up and the premiums thereon paid by the Earl during his life. Colonel Tynte's father died on the 22nd of November, 1860, and shortly afterwards a suit of *Ford* v. *Tynte*, and other suits were instituted against Colonel Tynte, for the purpose of ascertaining the priority of the incumbrances upon his life interest in the Tynte family estates, and of obtaining payment of such incumbrances. The priority of the incumbrances having been ascertained, they were paid off in succession out of the income of the estates, but those having priority over the Earl's security were numerous, and it was not until the year 1878, as hereinafter mentioned, that any part of the moneys due on that security were paid.

The Earl died on the 1st of June, 1866, having by his will given all his property to his son the seventh Earl of Chesterfield, absolutely, and appointed him sole executor.

The seventh Earl, by his will dated the 6th of May, 1871, after certain specific bequests and legacies, devised and bequeathed unto and to the use of the Honorable Edward Chandos Leigh and

Earl Howe his real and residuary personal estate upon trust that his said trustees or trustee should at such times or time after his decease as they or he should in their or his absolute discretion think fit, and with power to postpone such conversion at such discretion, get in, receive, and convert into money so much of his personal estate as should not consist of money, and out of the money arising thereby should pay his debts and funeral and testamentary expenses and legacies, and in the next place should pay all the debts of his late father then remaining unpaid, and after such payments should lay out the surplus of such personal estate in the purchase of lands and hereditaments in England or Wales to be settled upon the uses thereinafter declared of his real estate, or as near thereto as circumstances would permit.

And * the will went on to declare limitations of the testa- [* 645] tor's real estate in strict settlement in favour of his sister Evelyn, Countess of Carnarvon, her only son Lord Porchester, and his issue. And the testator appointed the said Edward Chandos Leigh and Earl Howe executors and trustees of his said will.

The testator, the seventh Earl, died on the 1st of December, 1871.

Shortly after the death of the seventh Earl, his trustees got in and converted his personal estate not specifically bequeathed (except the debt due from Colonel Tynte and the policies on his life) and exhausted the proceeds in payment of his funeral and testamentary expenses and of some of his debts and legacies.

Under an indenture dated the 6th of August, 1874 (being a re-settlement of the Chesterfield family estates), all the hereditaments subject to the will of the seventh Earl, whether originally devised or directed to be purchased with his residuary personal estate and to be conveyed to the uses of the will, and also his residuary personal estate until invested in land as by the said will directed, became limited to the use of the said Countess of Carnarvon during her life, with remainder (subject to a rent-charge thereby limited in favour of Lord Porchester on his attaining twenty-one), to the use of her husband the Earl of Carnarvon during his life, with remainder to the use of Lord Porchester during his life, with remainder to his first and other sons in tail male, with remainders over.

The Countess of Carnarvon died on the 25th of January, 1875, having by her will appointed the Earl of Carnarvon her executor.

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She had no other son but Lord Porchester, who was at present an infant.

From the death of the sixth Earl of Chesterfield the two policies on Colonel Tynte's life were kept up by the seventh Earl during his life, after his death by the Countess of Carnarvon during her life, and after her death by the Earl of Carnarvon down to the end of 1878.

In the year 1878 the time at length arrived for payment out of the income of the Tynte family estates of the debt of £18,310 and interest due from Colonel Tynte, and the trustees of the will of the seventh Earl from time to time in the course of the [* 646] years * 1878, 1879, 1880, and 1881, accordingly received in respect of the said debt and interest sums of money amounting together to £36,641 5*s.* 4*d.* (hereinafter referred to as the "Tynte moneys"), of which £18,310 represented principal, and £18,331 5*s.* 4*d.* accumulations of interest from the death of Colonel Tynte's father.

On the 6th of March, 1879, the trustees of the will of the seventh Earl out of the Tynte moneys repaid to the Earl of Carnarvon the aggregate amount of the premiums paid by himself and the Countess on the policies, and thenceforward the trustees, out of the same moneys, paid the premiums on the policies down to Colonel Tynte's death.

Colonel Tynte died on the 16th of September, 1882, and thereupon the trustees duly received the sum of £10,000, the amount of the policies. They had also received at various times during Colonel Tynte's life sums amounting to £539 by way of bonuses on the policies. These two sums, amounting together to £10,539, are hereinafter referred to as "the policy moneys."

The trustees invested the Tynte and policy moneys, amounting together to £47,181 3*s.* 11*d.* in Exchequer bills, and from time to time as opportunities arose sold out portions of such Exchequer bills and applied the proceeds in payment of past and other premiums on the policies, and in discharge of certain charges and incumbrances on their testator's estate, the balance remaining in their hands being represented by £15,100 Exchequer bills, and £1428 10*s.* 1*d.* cash.

The question then arose whether this balance was distributable as between capital and income, and, if so, upon what principle. In considering this question the trustees were advised that the

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Tynte and policy moneys formed part of the residuary personal estate of the seventh Earl, and should be treated accordingly, and that they, the trustees, having in exercise of the power contained in the seventh Earl's will, postponed the conversion of the moneys for the benefit of the estate, should now, for the purpose of adjusting the equities between the persons successively entitled, ascertain how much thereof was attributable to capital and how much to income; and that the proper course in order to * arrive at such result was to take separately each [* 647] amount received by the trustees (deducting in the case of the policy moneys the total accumulated premiums chargeable against the same) and to calculate what principal sum invested on the 1st of December, 1871 (the date of the death of the seventh Earl), at 4 per cent. interest, with yearly rests, would, at the date of the receipt, have produced the amount actually received; and that the aggregate of the principal sums arrived at by such calculation should be treated as capital and the residue as income, such income being further apportionable between the successive tenants for life.

The real estates subject to the seventh Earl's will were still subject to certain charges and incumbrances exceeding the balance of the Tynte and policy moneys; and in consequence of the falling in of the Tynte and policy moneys his estate was subject to some further liability for legacy duty, and the trustees had incurred some costs in recovering the Tynte moneys, and in administering the estates of the sixth and seventh Earls.

Under these circumstances the trustees presented this petition under Lord St. Leonards' Act, 1859 (22 & 23 Vict. c. 35), for the opinion of the Court upon the following questions: (1) Whether the Tynte and policy moneys should be apportioned as between capital and income; (2) Whether, if so, the principle above stated was the right principle for ascertaining how much of the Tynte and policy moneys respectively was attributable to capital and how much to income; or, if not, what was the right principle for ascertaining such result; (3) Whether the trustees, out of the Exchequer bills and cash now in their hands representing the unapplied balance of the Tynte and policy moneys, might properly pay to the Earl of Carnarvon, in right of and as representative of the Countess of Carnarvon, such proportion of the amount so found to be attributable to income as should have

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accrued in respect of the time down to her death; (4) Whether the trustees, out of the Exchequer bills and cash, might properly pay to the Earl of Carnarvon in his own right the balance of the amount so found to be attributable to income; and (5) Whether the trustees should apply the ultimate residue of the Exchequer bills [* 648] and cash, after such payments thereout as * aforesaid, in payment of such legacy duty and costs as above-mentioned, and then in or towards the further discharge of the incumbrances and charges affecting the estates subject to the seventh Earl's will; and (6) In what manner the costs of this application should be paid or provided for.

Macnaghten, Q. C., and Douglass Round, for the petitioners: — We submit that it is settled, as a matter of principle, that in a case of this kind there ought to be an apportionment as between capital and income. The trustees and executors of the seventh Earl's will postponed the getting in and conversion of the Tynte and policy moneys, as they were entitled to do by the terms of the will; but the power to postpone conversion was a power not to be exercised for the benefit of the tenants for life as against the remaindermen, or for the benefit of the remaindermen as against the tenants for life, but for the benefit of the estate without disarranging the equities between the successive takers. *Wilkinson* v. *Duncan*, 23 Beav. 469; 26 L. J. Ch. 495. The only question is how the amounts respectively attributable to income and to capital are to be arrived at. We submit that the proper mode of calculation is as follows: each item of receipt should be taken separately, deducting in the case of the policy moneys the amounts repaid on account of the premiums; and as regards each item of receipt, it should be calculated what sum invested at the death of the seventh Earl, at 4 per cent. interest, with yearly rests, would have produced the amount actually received: then the aggregate of the principal sums arrived at by this calculation ought to be treated as capital, and the rest ought to be treated as income and, as such, payable to the Earl of Carnarvon, partly in his own right and partly in right of his deceased wife. It seems the proper course to allow the tenant for life compound interest, and not merely simple interest, though this point does not appear to have been discussed in the reported cases, it having been apparently assumed that simple interest only could be allowed. *Wilkinson* v. *Duncan*; *Cox*

v. *Cox*, L. R., 8 Eq. 343; 38 L. J. Ch. 569; *Wright* v. *Lambert*, 6 Ch. D. 649; and it is so laid down in Jarman on Wills, 4th ed. p. 609. But in an unreported * case of *Beavan* [* 649] v. *Beavan* (the principal case, No. 2, *ante*, p. 288, *et seq.*), decided in 1869, before *Cox* v. *Cox*, L. R., 8 Eq. 343; 38 L. J. Ch. 569, and *Wright* v. *Lambert*, 6 Ch. D. 649, this * very [* 650] question was argued, and it was held that compound interest should be allowed.

[Chitty, J. I do not see on what ground the remainderman, * rather than the tenant for life, should be enti- [* 651] tled to what is in substance attributable to income.]

Beavan v. *Beavan*, *ante*, p. 288, certainly appears to adopt the more logical * principle. It seems also right [* 652] that the calculation should be made as from the testator's death, and not from the expiration of a year afterwards.

[Chitty, J., referred to *In re Grabowski's Settlement*, L. R., 6 Eq. 12; 37 L. J. Ch. 926.]

* Romer, Q. C., and Bromehead, for the respondents, [* 653] the Earl of Carnarvon and Lord Porchester: —

We think *Beavan* v. *Beavan* lays down the more correct principle for calculating an apportionment in such a case as this.

Chitty, J. :—

It appears to me that *Beavan* v. *Beavan*, adopts the right principle, and I therefore follow it in the present case.

The order stating the opinion of the Court was, so far as is material, in the following form: —

" Upon the petition, &c., this Court is of opinion that the said Tynte moneys are apportionable between principal and income by ascertaining the respective sums, which, put out at £4 per cent. per annum on the 1st of December, 1871, * the day [* 654] of the death of the seventh Earl of Chesterfield, and accumulating at compound interest calculated at that rate with yearly rests, and deducting income tax, would, with the accumulations of interest, have produced, at the respective dates of receipt, the amounts actually received; and that the aggregate of the sums so ascertained ought to be treated as principal and be applied accordingly, and the residue should be treated as income: And that the amount apportioned in respect of income is payable to the Earl of Carnarvon in his own right, and as representing his late wife, Evelyn, Countess of Carnarvon, deceased: And that the

policy moneys, including bonuses, after deducting and repaying the sums advanced for premiums with simple interest at 4 per cent., are apportionable and distributable in the same way: And this Court is also of opinion that the legacy and other duty is payable out of capital and income according to their respective liability thereto: And that the costs of the petitioners and respondents of this petition ought to be apportioned between capital and income according to their respective amounts.

ENGLISH NOTES.

The rule has since the latter of the principal cases been treated as established. It is followed by Kay, J., and applied by him to the apportionment of the value of a reversion forming part of the residuary estate of a testator, which it is proposed to sell. *In re Hobson, Walker* v. *Appach* (27 Oct., 1885), 55 L. J. Ch. 422, 34 W. R. 70, 53 L. T. 627.

In *Re Moore, Moore* v. *Johnson* (1885), 54 L. J. Ch. 432, 33 W. R. 447, settled money was invested on a mortgage the interest on which fell into arrear, and the investment was ultimately realized at a loss. Pearson, J., directed the apportionment, on a calculation of simple interest only. It is perhaps questionable whether such a case afforded any solid ground for refusing to admit compound interest into the calculation.

The rule is again applied by North, J., in *Re Godden, Teague* v. *Fox* (1892), 1893, 1 Ch. 292; 62 L. J. Ch. 469; and by Kekewich, J., in *Re Hengler, Frowde* v. *Hengler* (1892), 1893, 1 Ch. 586, 62 L. J. Ch. 383.

Section III. — *Of sale money under joint contract.*

No. 4. — REDE *v.* OAKES.

(CH. 1865.)

RULE.

Trustees for sale of land are not entitled unless specially empowered, or unless clearly for the advantage of the beneficiaries, to join with owners of other lands in selling both parcels at one price for the whole, and in apportioning that price according to previous arrange-

ment between them: particularly where the result has been to import into the sale depreciatory conditions as to title.

Rede v. Oakes.

34 L. J. Ch. 145–149 (s. c. 10 Jur. (N. S.) 1246–1248).

This was a suit, by vendors against a purchaser for [145] specific performance of a contract for the sale of lands.

The premises, the subject of the contract, consisted of three parcels; the lands comprised therein being held under several different titles, which varied in length.

The chief part of the estate was devised by the will, executed on the 17th of November, 1821, of Robert Rede, who died in August, 1822, upon limitations under which the plaintiffs, the four daughters of Robert Rede Rede, had become entitled as tenants in common.

Upon the daughters' marriages, their respective shares under the will of Robert Rede were, by indentures, dated severally the 20th of March, 1845, the 4th of August, 1846, the 9th of January, 1850, and the 25th of January, 1859, vested, or agreed to be vested, in trustees, in trust for them and their respective husbands for their lives, with remainder to their children; and the trustees of the four several settlements were empowered, with the consent of the four daughters severally and their respective husbands, to sell the shares respectively comprised therein.

Another, and small part of the estate included in the contract for sale, was vested, with a power of sale, in the trustees of the settlement made on the 13th of November, 1821, on the marriage of Robert Rede Rede with the plaintiff Louisa Rede, now the widow of Robert Rede Rede, then Louisa Henshaw, in trust for him and her for their lives, with remainder to the children of the marriage, that is to say, the plaintiffs, the four daughters of Robert Rede Rede.

The plaintiff Louisa Rede was entitled absolutely in fee simple to the rest of the premises comprised in the contract, under the will, dated the 1st of February, 1831, of her late husband, Robert Rede Rede, who died on the 13th of April, 1852, without having altered or revoked his will, which was duly proved by the plaintiff, Louisa Rede, as the executrix, in December, 1852.

No. 4. — Rede v. Oakes, 34 L. J. Ch. 145, 146.

The plaintiffs, who were severally the trustees of the five several settlements already referred to, Louisa Rede, the widow, and the four daughters, who were the only children of the late Robert Rede Rede, and their respective husbands, all concurred in the expediency of a sale of the estate as one entire estate, they being the only persons whose consents were necessary to sales of the several portions of it. The estate was accordingly put up to public auction as an entire estate, but in several lots, subject to certain conditions of sale. It was not then sold; but on
[* 146] the 8th of March, 1862, the * property comprised in lots 1 and 7, was agreed to be sold by private contract to the defendant, J. H. P. Oakes, for £16,650, subject to the conditions of sale already mentioned, so far as they were applicable to a sale by private contract.

The sixth of these conditions was: "The abstracts of title to the property, other than that part of which Mrs. Rede is vendor, shall commence as follows, viz., as to the manors and freehold portion, with indentures, bearing date respectively the 5th and 6th of January, 1803, the 25th and 26th of March, 1805, the 29th and 30th of November, 1805, the 1st and 2nd of March, 1807, the 1st and 2nd of October, 1813, and the 31st of December, 1845, which respectively comprise certain parts thereof; and as to the copyhold portion, with the admissions of the 30th of December, 1825, the 27th of December, 1833, and the 19th of February, 1823; and as to the leasehold portion, with indentures dated respectively the 31st of March, 1788, and the 27th of March, 1797; and as to such parts of the said manors and freehold portions as are not comprised in any of the aforesaid indentures (other than in the said indenture of the 31st of December, 1845), the title shall commence with the will of Robert Rede, Esq., dated in 1821, and proved in 1822; and as to Mrs. Rede's part of the property, consisting of several cottages, the title shall commence with the will of her late husband, dated the 1st of February, 1831, and proved the 13th of December, 1852, with a declaration of a previous possessory title by him of upwards of fifteen years."

The property comprised in the indenture of the 31st of December, 1845, was that small part of the estate comprised in the contract, which was held on the trusts of the marriage settlement of the late Robert Rede Rede and the plaintiff Louisa Reed.

No. 4. — Rede v. Oakes, 34 L. J. Ch. 146.

By an agreement entered into, on the 8th of October, 1862, between the several plaintiffs, after the sale to the defendant, it was agreed that £140 should be considered as the value of such part of the estate as was the property of Mrs. Rede in her own right, and be received by her; that £352 should be considered the value of the part comprised in the marriage settlement of Robert Rede Rede and the plaintiff Louisa, his wife, and should be received by the trustees of that settlement; and that £16,158 should be considered the value of the residue of the estate, being the part which belonged to the plaintiffs, the four daughters, and which was comprised in their respective marriage settlements, and should be received by the trustees of those settlements, and be applied accordingly. This agreement was communicated to the defendant.

The defendant subsequently objected to complete his purchase, and the plaintiffs filed a bill praying specific performance. The defendant, in his answer, submitted that the plaintiffs, the trustees of the marriage settlements of the plaintiffs, the four daughters of Robert Rede Rede, in whom severally was vested the property devised by Robert Rede's will, and the plaintiffs, the trustees of Robert Rede Rede's marriage settlement, in whom was vested another part of the premises comprised in the defendant's contract, were not competent as such trustees to enter into the agreement of the 8th of October, 1862, for the apportionment of the purchase-money; that the several properties comprised in these different marriage settlements, being vested in several sets of trustees, under the trusts and powers contained in several settlements, ought to have been sold separately; that the contract to sell all the properties at one price was not valid, or such a contract as a purchaser could safely complete; and that such objections to the validity of the contract were in no way remedied or displaced by the agreement of the 8th of October, 1862, for apportionment of the purchase-money. The defendant, by his answer, claimed the same benefit of these objections to the contract as if he had demurred to the bill.

The cause was heard before the MASTER OF THE ROLLS (Sir J. ROMILLY) and a decree made, to the effect that the contract ought to be specifically performed. After the usual reference as to title, his Lordship directed an inquiry in what proportions, and among whom, the purchase-money ought to be

divided and paid, and the further consideration was adjourned. The Chief Clerk made his certificate in pursuance of this decree, and found that the title was good, and that the purchase-money ought to be apportioned between the parties in the pro-
[* 147] portions * mentioned in the certificate, which were the same as those contained in the agreement of the 8th of October, 1862. The defendant moved to vary the certificate. But by the order made upon this motion, and upon the hearing of the cause on further consideration, his Lordship dismissed the motion, and ordered specific performance of the contract, directing the accounts which were necessary with a view to the specific performance, and ordering payment of the purchase-money in the proportions mentioned in the agreement of the 8th of October, 1862.

The defendant brought the present appeal from the last-mentioned order and from the decree made at the hearing of the cause.

Mr. Selwyn and Mr. J. T. Humphry, for the appellant, contended that a vendor could not maintain a bill for specific performance if there were any cloud upon the title which made the title reasonably questionable in the opinion of competent persons, even though the Court held the probabilities to be in favour of the title. *Pyrke* v. *Waddingham*, 10 Hare, 1. The decision in *Clark* v. *Seymour*, 7 Sim. 67, proceeded on the ground of the particular acts of the plaintiff. The Vice Chancellor expressed in his judgment in that case a positive opinion that such an apportioning of the purchase-money as that proposed by the plaintiffs was not permissible. It was a clear breach of trust for trustees to join in selling together lands of different qualities, and held under titles of different length, the best lands being thus affected by the faults of the worst. There was, for instance, nothing in the particulars or conditions of sale to show which parts of this property were sold with only a seventeen years' title, although it now appeared that, in fact, but a very insignificant portion of the premises had so short a title as this. Again, there had been no proper arrangement for the apportionment of the purchase-money among the different parcels. A subsequent arrangement made by the trustees among themselves could not cure such a defect as this. The Court would dismiss a bill for specific performance where there were circumstances in the case

amounting to breach of trust. *Mortlock* v. *Buller*, 10 Ves. 291; 7 R. R. 417; *Thompson* v. *Blackstone*, 6 Beav. 470. The contract was not one which the Court would attempt itself to carry out by supplying details. *The South Wales Railway Company* v. *Wythes*, 5 De Gex, M. & G. 880; 24 L. J. Ch. 87. Moreover, the sale included land of which an ancestor of the *cestuis que trust* had obtained a lease from a corporation of which he was a member, which was a direct breach of trust; and it was doubtful whether this defect could be cured by the lapse of time. On this point there were discussed on behalf of the appellant, *The Attorney-General* v. *the Earl of Clarendon*, 17 Ves. 491; *Magdalen College, Oxford* v. *the Attorney-General*, 6 H. L. Cas. 189; 26 L. J. Ch. 620; *The Attorney-General* v. *Payne*, 27 Beav. 168; *The Attorney-General* v. *Davey*, 4 De Gex & J. 136.

Mr. Baggallay and Mr. F. J. Turner, for the plaintiffs. If it could have been shown that any of the trust property was injured by being sold conjointly with other premises, the contract might have been set aside. But the trust estate had in effect benefited. So far from there being any general principle forbidding trustees for sale from so massing properties together for the purposes of sale, *primâ facie* they certainly were entitled to do so, and afterwards to apportion the purchase-money. As for the objection urged with regard to the lease by the corporation, in the first place the corporation was not an eleemosynary corporation, to which class the cases cited on the subject referred; but, even had it been such, the lease was not of so improvident a character as to be impeachable; besides that, the length of possession was in any case now a sufficient bar to such an attempt. *The Attorney-General* v. *Payne*.

Mr. J. T. Humphry, in reply.

* Lord Justice KNIGHT BRUCE (Dec. 21). — The nature [* 148] and facts of this case are such, that it would not have been with regret that I should have found myself arriving at a conclusion different from that at which I have arrived. The opinion which upon consideration I have formed is, that the bill should be dismissed, the reason being my inability to satisfy myself that the contract of the 8th of March, 1862, sought by it to be specifically performed, was not a breach of trust on the part of either set of trustees, parties to it; or to convince myself that the plaintiff's case was or is assisted by the agreement of the 8th of

October, 1862. In using, however, the expression "breach of trust," I do not mean to impute any wrong motive to any person concerned as principal or agent in the contract of March or the agreement of October. It may be taken, I think, that the sellers meant only to do what was right The contract of March was, I apprehend, a mistake. The vendors in it were, as vendors, a single body. The contract went to render the sale of so much of the property contracted to be sold as was comprised in the earliest settlement, and the price, whatever it was or might be, of that portion, and the trustees of it, liable to be affected by considerations and matters, with which properly they had no concern; and to render the sale of so much of the property contracted to be sold as was comprised in the other settlements respectively, and the price, whatever it was or might be, of that portion, and the trustees of it, liable to be affected by considerations and matters with which properly they had no concern. The trustees of the first settlement ought not, I think, to have been liable to be affected by any defect of title in any part of the lands sold belonging to the other vendors respectively; nor should the trustees of the later settlements have been made liable to be affected by any defect of title in any part of the lands sold by Mrs. Rede or her trustees. It seems to me that the doctrine and principles applicable to a case of specific performance are opposed to granting specific performance in the present instance; for, if it is not clear that the contract of March, 1862, was a breach of trust on the part of each set of trustees, it must be held, I think, to be at least reasonably and seriously doubtful whether it was not so. The bill should, I think, be dismissed without costs.

Lord Justice TURNER [after recapitulating the facts to the same effect as above stated]. I regret to say that I find myself unable to agree with the MASTER OF THE ROLLS in the conclusions at which he has arrived. The case presents two distinct points for consideration: first, whether a specific performance of this agreement ought at all to have been decreed; and, secondly, whether, assuming that specific performance was proper to be decreed, the decree and order under appeal were proper to be made. The second of these questions does not of course arise, if the first of them ought to be decided in the negative; and, in my opinion, it ought to be so decided.

The argument on the part of the defendant on this point was

carried to a very great length. It was argued on his part, that in no case could trustees for sale of property join in selling trust property conjointly with other property not subject to the trust, but I am not disposed to assent to this proposition. I think it would be in the highest degree detrimental to trust property that any such general rule should be laid down. There are and must be many cases in which it is obviously beneficial to the persons interested under trusts, that property not subject to the trust should be sold conjointly with the trust property; and I cannot agree that in such cases the two properties cannot be sold together; but I agree in this, that, when such a sale is made, due precaution ought to be taken that the trust property is in no way injured by the other property being united in the sale, and that the sale ought to be so made as that the portion of the proceeds to be attributed to the trust property can be settled upon some fair and reasonable basis, and is not left to rest upon speculation and conjecture. The true question on which the validity of such a sale must depend seems to me to be this: was or was not the sale made under such circumstances, and in such a manner, as that the *cestuis que trust* ought to be held bound by it? If it was, the title of the * purchaser could not, as I conceive, [* 149] be impeached. If it was not, his title would, as I apprehend, be liable to impeachment at the suit of the *cestuis que trust.* It is in this point of view that the case before us ought, in my opinion, to be looked at.

Looking to the position of the different parts of this estate, I have no doubt it was for the benefit of the persons interested under the trusts of the will that the whole estate should be sold together; and if, therefore, the case rested there, I should have no difficulty in holding the purchaser to be bound by the contract. The difficulty seems to me to lie, not in the circumstances under which the sale was made, but in the manner in which it was made. There are two difficulties which here present themselves. First, do the terms of the contract furnish the means of ascertaining, upon any fair and reasonable basis, the proportion of the proceeds of the sale which ought to be attributed to the trust properties? And, secondly, has the sale been so made as that the bulk of the trust property may not have been injured by the other properties having been united with it in the sale?

The first of these questions is, I think, to say the least, open

to very serious doubt. Looking to the sixth condition of sale, it would be necessary, in order to ascertain the proportion of the purchase-money proper to be ascribed to the different trust properties, to determine the values to be attributed to the different parcels of the properties, held upon titles of longer and shorter duration, a problem which it would be very difficult to solve. The trustees, indeed, seem to have arrived at a solution of it, and the Court seems to have adopted their solution; but I can see no *data* upon which either the trustees or the Court can have proceeded. I assume, for the purposes of this case, that, upon a sale of this description, the trustees would have, or the Court would have the power of apportioning the purchase-money, although I am not satisfied even of this; but, assuming it, I cannot but doubt whether the trustees could be warranted in making, or the Court could be justified in directing or acting upon an apportionment based on no sufficient *data*, and which must, in a great degree, if not wholly, be founded on conjecture or speculation; and I doubt whether *cestuis que trust* would be bound by such an apportionment. I much doubt whether, upon this ground alone, specific performance of this agreement ought not to have been refused.

I do not, however, decide the case upon this ground alone. There appears to me to be a still more substantial difficulty in the case, and it is this; whether this sale has not been so made as that the bulk of the trust property may have been injured by the properties having been sold together? The particulars and conditions of sale nowhere specify the extent of the property held under the different titles; and, as to part of the property, the extent of which is not specified, but which now appears to be of very limited extent, it is stipulated that seventeen years' title only shall be required. A purchaser of the property, therefore, might well suppose that he was to have a seventeen years' title, only as to a large part of the property, and might fix the price which he would give accordingly. I cannot but think that it is at least doubtful whether *cestuis que trust* can be bound by a sale made by their trustees under such circumstances; I go no further than to say that it is doubtful; for if there be a doubt, it cannot, in my opinion, be thrown upon the purchaser to contest the doubt. Looking to both the difficulties to which I have referred, but more especially to the latter, my opinion is, that this is not

a case in which a specific performance ought to have been decreed; and I think, therefore, that the orders under appeal should be discharged, and the bill dismissed; but, having regard to the novelty of the questions raised by the appeal, and to the defendant's not having at once appealed from the original decree, I think it should be dismissed without costs.

ENGLISH NOTES.

The general rule has, on the authority of the principal case, been accepted by conveyancers, as at least a rule of caution. There is indeed a protest made against it by the Master of the Rolls (Sir G. Jessel) in *Re Cooper & Harleck* (1876), 4 Ch. D. 803, 46 L. J. Ch. 133. But that was a case of the sale of two separate interests, which had been carved out of the fee simple of the same land; where it was of course obviously for the benefit of the beneficiaries that they should be sold together. The same observation applies to *Morris* v. *Debenham* (1876), 2 Ch. D. 540, and the older case of *McCarogher* v. *Whieldon* (1864), 34 Beav. 107, where a first and second mortgagee concurred in selling. In the case of *Cavendish* v. *Cavendish* (Appeal in Ch., 1875), L. R., 10 Ch. 319, under order of the Court made in an administration suit, a mansion devised by the testator on trust for sale had been sold in one lot together with an adjoining house held on the trusts of the testator's marriage settlement, with which the administration suit had no immediate concern. The purchase-money was paid into Court in the suit. The Lords Justices of Appeal, affirming the decision of V. C. Malins, overruled an objection of the purchasers to this title on the grounds, 1st, that the sale of the two houses together was clearly beneficial to all parties; and 2ndly, that the Court could make a valid order for the apportionment of the purchase-money.

In *Tolson* v. *Shand* (C. A. 1877), 5 Ch. D. 25, 46 L. J. Ch. 815, the principal case was successfully relied on as an authority for the proposition that two parcels of land held upon different trusts could not be joined together in the same lease. The Court in that case held that the principle applied *a fortiori* to a lease. Baggallay, L. J., observed that whether two or more sets of trustees of different properties with different beneficiaries, having separate powers of sale, might sell the trust properties together, must depend upon the particular circumstances of each case.

AMERICAN NOTES.

The principal case is cited by Mr. Pomeroy (3 Eq. Jur. § 1105) to the point that "the contract must be such that its specific enforcement would not be nugatory," and by Mr. Beach to the point that "equity will not enforce specific performance of a contract which would operate as a breach of trust" (2 Eq. Jur. § 576).

APPROBATE AND REPROBATE.

No. 1. — KER *v.* WAUCHOPE.

(H. L. 1819.)

No. 2. — GANDY *v.* GANDY.

(C. A. 1885.)

RULE.

A PERSON who succeeds in one action in having an instrument pronounced invalid against him, cannot in another action set up a claim under the same instrument treated as valid. Nor can a person who has succeeded in persuading the Court to adopt for his advantage a certain construction of an instrument, turn round and repudiate that construction when the benefit under it is claimed against him.

Ker v. Wauchope.

1 Bligh, 1–27.

[1] John, Duke of Roxburgh, by a testamentary disposition dated 4th October, 1790, conveyed his whole unentailed heritable estate and his personal estate to himself and the heirs whatsoever of his body, whom failing, to the appellants equally between them and the heirs of their bodies, &c. By another deed in the nature of a testamentary disposition he conveyed the same estate to trustees upon trust for sale, and after payment of debts, &c., to make over the surplus as he should direct by any writing he might thereafter execute; and he directed that in the event of his sudden death, or in the event that he should be prevented from executing a deed of instructions, it was his will that the deed which he formerly made in favour of the appellants should be carried into effect so far as regarded them. In the beginning of March, 1804, the Duke fell ill with the complaint of which he died. On the 19th of March he executed an

instrument of instructions or codicil by which he directed his trustees to sell his whole unentailed estate in Scotland, and from the produce thereof and of his personal estate, after payment of certain legacies and annuities, and of his debts, &c., to invest the residue, and pay the interest of the investment to the appellants during their lives and the life of the survivor, and then to distribute the fund amongst other persons. The Duke died without issue upon the day on which the last-mentioned instrument was executed; and immediately after his death, the appellants brought an action in the Court of Session to reduce (or set aside) the instrument; and obtained a judgment, by which it was found that, being executed on death bed, it was inept, so far as it conveyed lands; in consequence of which the instrument was set aside, and the appellants' right to the lands, as heir-at-law, established upon appeal to the House of Lords.

After a lapse of some years an action was raised by the trustees for the purpose of ascertaining the rights in the residue of the personal estate. In this action the appellants claimed a life interest in the terms of the instrument of instructions, or if that should be regarded as annulled, then they claimed as next of kin to have the interest of the residue during their lives as undisposed of personalty. The respondents, who claimed under the ultimate gift in the instrument of instructions, opposed the claim of the appellants upon the ground that having reprobated the instrument so far as it contemplated the disposal of land in Scotland, they could take no benefit under it. The Scotch Court in effect sustained this contention.

The Lord Chancellor (Lord Eldon) after hearing the arguments, and after some comments as to the form of the judgment in the Court below, proceeded as follows: —

I do not undertake a minute discussion of the argu- [21]
ments urged in this case; it will be sufficient to state the fundamental principle which ought to guide our decision. The deed in question, upon this appeal, is in the nature of a testament. It is equally settled in the law of Scotland, as of England, that no person can accept and reject the same instrument. If a testator gives his estate to A., and gives A.'s * estate [* 22]
to B.; Courts of Equity hold it to be against conscience, that A. should take the estate bequeathed to him, and at the same time refuse to effectuate the implied condition contained in

the will of the testator. The Court will not permit him to take that which cannot be his, but by virtue of the disposition of the will; and at the same time to keep what by the same will is given, or intended to be given, to another person. It is contrary to the established principles of equity that he should enjoy the benefit while he rejects the condition of the gift. I have not overlooked the distinction which has been pressed on the consideration of the House. It is said, if a will be made which is attested by three witnesses, and which, therefore, according to the statute, is a good will, to pass land; and, in the same will, a case of election is proposed, there the will being duly executed according to the statute, if the devisee will take the land of the devisor, according to the disposition, he shall not refuse to comply with the implied condition of making good the will in certain respects, where it cannot have effect under the will, without his assent and co-operation: that is the simplest case of election. But in a case like the present, where the will has made the land personal estate; and, in one part of that will, the land is disposed of, and in another part, the personal estate: if the will is not executed according to the statute, it is no will of land; but, as a bequest of personalty does not require attestation, the will is good to that extent. What then is to be done as to the case of election? It is said, that because, as a will of land, it is [*23] *absolutely void, it is exactly the same as if it contained nothing as to land; that it cannot be read to show an intention; and, therefore, cannot be viewed as an instrument proposing election. The distinctions upon this head of law appear to be rather unsubstantial. It has been held, that although a will containing dispositions of land be not duly executed according to the statute: yet, if in the same will, personalty is given upon condition that the legatee convey the land: in such case, inasmuch as the disposition of the personalty cannot be read, without reading at the same time the condition upon which it is given, the gift and the condition are inseparable; and the case of election is raised, because the testator in the disposition, not of land, but of personalty, expresses and directs what is to be done. These are undoubtedly thin distinctions; and a judge having to deal with them finds a difficulty in stating to his own mind, satisfactory principles on which they may be grounded. This was the opinion of Sir W. Grant, late Master of the Rolls, who

has lately, to the regret of the profession and the public, retired from his judicial labours. I doubt whether the Court in which he so long administered justice will ever see a judge of greater ability and integrity. The opinion to which I allude is expressed in a recent case, *Brodie* v. *Barry*, 2 V. & B. 127 [13 R. R. 37], where the Judge, having disburdened his mind of his sentiments as an individual, observes in conclusion, that whatever might have been the foundation of the distinction, he found it established, and therefore, in his judicial character, he could not, with propriety, travel *beyond this question, [*24] — Is the distinction applicable to the decision of the case before the Court? In such a conclusion, and upon similar grounds, I acquiesce; for long professional experience has convinced me that it is more beneficial to the community to adhere to imperfect or ineligible rules of law, which have been long established, than that each succeeding Judge should be at liberty, upon his own notions of expedience, to improve and unsettle the law. The distinction which I am now considering was promulgated by Lord HARDWICKE, a Judge profound in legal knowledge. Since his time, men have enjoyed their property upon that established doctrine, and the traditional experience of the Courts does not furnish a wiser maxim than that which is contained in the short precept, *stare decisis*. I therefore shall only consider the question whether the doctrine of election is applicable to the case before the House. In *Brodie* v. *Barry*, the late MASTER OF THE ROLLS applied the doctrine to the case of property in Scotland, as Lord HARDWICKE had before done in the case of *Gainer* v. *Cunyngham*.[1] I have looked at the decree and the proofs as recorded in that case, and it appears to me from the result, that Lord HARDWICKE was of opinion, that a Scotch instrument, though not good to make an effectual title to Scotch land, might be read to raise a question of election. There is a ground which may be represented as a solid ground to take a Scotch case out of the *distinction, which I have [*25] admitted to exist in English cases. A deed made upon death-bed is not absolutely void by the law of Scotland. In many cases it will regulate the title, notwithstanding the objec-

[1] This case is not to be found in any of the books of English Reports. A note of it, extracted from the Register's Book, is printed at the end of the report of the above case in 1 Bligh, 27 *et seq.*

tion which the heir may raise against it. Until reduced to a nullity, it is only voidable, and may be read for the purpose of ascertaining the intention of the testator. I do not think it necessary to examine and discuss all the cases upon this subject. It may be sufficient to state my opinion that, according to the law of Scotland (perhaps more directly than in our law), the doctrine of election was properly applied to this case. According to this decision, if the appellants set up their title as next of kin, an election would be made, but it would be made in a manner perfectly nugatory, if they are left at liberty to disappoint the intentions of the testator, as to the real estate; to abandon their rights under the deed, and to claim, in the character of next of kin, the life-interest in the personal estate which is not disposed of by the deed. But as the appellants have in fact, to a certain extent, annulled the deed by judicial process, their election is thereby made to take nothing under that repudiated instrument. A question then arises, what is to become of the life-interest, which the appellants cannot take, either as legatees, or as next of kin? In our courts we have engrafted upon this primary doctrine of election, the equity as it may be termed of *compensation*. Suppose a testator gives his estate to A. and directs that the estate of A., or any part of it, should be given to B. If the devisee will not comply with the provision of the will, [* 26] the Courts * of Equity hold that another condition is to be implied, as arising out of the will, and the conduct of the devisee; that inasmuch as the testator meant that his heir-at-law should not take his estate which he gives A., in consideration of his giving his estate to B.: if A. refuses to comply with the will, B. shall be compensated by taking the property, or the value of the property, which the testator meant for him, out of the estate devised, though he cannot have it out of the estate intended for him. Under these circumstances it does not appear to me that there is any ground for advising your Lordships, either to affect this interlocutor, as far as regards the question of approbation and reprobation of the deed, or as far as in construction it negatives the title of the appellants as next of kin. It may be necessary to correct the language contained in this interlocutor, so as to show unequivocally what points are determined. The latter point the Court has not yet determined, namely, whether the respondents are, or are not, entitled to take their compensa-

tion, until the death of the survivor of the appellants; the Court below having given no opinion, it is impossible that we should give any opinion upon that point. It is for their determination in the first instance. The cause must, in point of form, be remitted, with a view to have that question decided. It appears to me very easy of solution. There are certain persons who, according to the expression and principles of our law, have a vested remainder in the capital. They have also, by way of compensation, a title to the life-interest, preceding that remainder in the fund. Having, therefore, the * whole [* 27] interest, I do not understand upon what ground it can be argued, that there ought to be an accumulation of the profits, until the decease of the survivor of the appellants. If the appellants have no right, and the respondents have all the right, in the subject of litigation, why is it not to be applied immediately by way of compensation, upon the ground, that, the condition of the gift being rejected, the life estate did not form a part of the disposition?

Gandy v. Gandy.

30 Ch. D. 57–83 (s. c. 54 L. J. Ch. 1154–1163, 53 L. T. 306, 33 W. R. 803).

By a separation deed dated the 26th of June, 1879, and [58] made between the defendant, Maurice Gandy, of the first part, Elizabeth Gandy, his wife, of the second part, and the defendants, Stephenson and Mylcrist, the trustees of the deed, of the third part; after a recital that the said Maurice Gandy and Elizabeth Gandy had agreed to live separately from each other for the future, and to enter into the covenants thereinafter contained, Maurice Gandy covenanted with the trustees in the usual form to allow E. Gandy to live separate from him, and not to take any steps to compel her to return to cohabitation, and for the enjoyment by her of * her property for her separate use. [* 59] By a second witnessing part M. Gandy covenanted with the trustees that he, his heirs, executors, or administrators would "during the continuance of these presents, and if the said Elizabeth Gandy shall survive the said Maurice Gandy, then during the life of the said Elizabeth Gandy, subject to the due performance of the covenants herein contained, pay to the said trustees, for the use of the said Elizabeth Gandy and her daughters, other than her two youngest daughters, the annual sum of

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£252 by monthly payments, . . . and further, that he, the said M. Gandy, will also pay to the said trustees all the expenses connected with the maintenance and education of the two youngest daughters of himself and his said wife, provided that the said trustees permit the said daughters to go to such school as the said M. Gandy shall from time to time direct, and provided also that the covenants herein contained on the part of the said trustees are duly observed and performed: Provided also, that the said E. Gandy shall not be entitled to the custody of the said two youngest children, but they shall remain and live at such place or places (being reasonable and proper for that purpose) as the said M. Gandy shall direct, and shall be maintained and educated at the expense of the said M. Gandy, but the said M. Gandy and E. Gandy shall have all reasonable access to and intercourse with them, and they may from time to time temporarily reside with the said M. Gandy." And the trustees covenanted with M. Gandy that they would, during the continuance of the separation, keep him indemnified against all debts and liabilities thereafter to be contracted by the said E. Gandy, or her said two daughters, for the maintenance and support of herself and her said two daughters (except the expenses connected with the maintenance and education of the two youngest children, as thereinbefore provided for), or otherwise, and against all molestation on the part of the said E. Gandy and her daughters (other than as aforesaid), and against all actions, &c., on account of such debts and liabilities: and also that the said E. Gandy would not, nor any person on her behalf, thereafter commence any proceedings against the said M. Gandy for alimony, except as aforesaid; and that they, the said trustees, would, on the said M. Gandy defraying all [*60] the expenses connected therewith as *aforesaid, carry out his desires in respect to the school or schools at which his two youngest daughters should be educated, and the place or places at which they should live, as he might from time to time direct; and also that they, the said trustees, would permit the said two youngest children, if they so desired, and without any interference on the part of the said E. Gandy, to accept any invitation which the said M. Gandy might from time to time give them to reside with him.

There were four daughters, two adult at the date of the deed and two infants. The original plaintiff was the elder of the two

youngest daughters, and at the date of the deed she was in her fourteenth year.

On the 30th of July, 1881, the Probate and Divorce Division granted a decree for the judicial separation of Mr. and Mrs. Gandy, giving Mrs. Gandy the custody of the two youngest children until further order.

After the decree Mrs. Gandy applied for an order that her husband's means should be ascertained by the Registrar, for the purpose of fixing her permanent alimony, and the President decided that the Court could give alimony according to its ordinary principles, the husband having by his subsequent adultery lost his right to enforce the stipulation that the wife should not sue for further alimony; 7 P. D. 77. This decision was reversed by the Court of Appeal on the 18th of April, 1882, 7 P. D. 168, both the arguments and the judgments proceeding on the footing that the husband continued liable under his covenant to pay the expenses of the maintenance and education of the two youngest children.

In April, 1882, Mr. Gandy expressed his intention of no longer providing for the maintenance and education of the plaintiff, who had attained sixteen years of age in November, 1881, whereupon Mrs. Gandy presented a petition in the Probate and Divorce Division that her husband might be ordered to pay her a proper sum for the maintenance and education of the two youngest children. The President, however, considered that he had no jurisdiction to make the order asked for, and suggested that the plaintiff's proper remedy was to endeavour to enforce her father's covenant in the separation deed. The plaintiff's solicitors then * wrote to the trustees of the deed informing them of [* 61] the plaintiff's intention to commence proceedings in the Chancery Division against Mr. Gandy to enforce his covenant, and inviting them to co-operate with her as plaintiffs, but they both refused to be joined as plaintiffs, or to take any active steps whatever in the proposed litigation. The plaintiff thereupon instituted this action, by one of her adult sisters as her next friend, against her father and the trustees, claiming (1) a declaration that the defendant, M. Gandy, was, upon the construction of the separation deed, liable to pay to the trustees on behalf of the plaintiff all the expenses connected with her maintenance, and an order for payment accordingly; (2) execution of the trusts

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of the deed; and (3) an inquiry as to the amount expended by Mrs. Gandy for the plaintiff's maintenance from the date of her attaining sixteen years of age up to the present time.

The defendant, M. Gandy, delivered a statement of defence, in which he denied having refused to maintain the plaintiff. The defendants, the trustees, delivered no defence, and did not appear on the trial. The action came on for trial before Vice Chancellor Bacon on the 15th of May, 1884, when the case was argued principally upon the construction of the deed and upon the question as to whether the defendant, M. Gandy, was under any legal liability to maintain his daughter, the plaintiff, she having attained the age of sixteen. During the argument, however, the counsel for the defendant, M. Gandy, raised an objection which had not been raised by his statement of defence, namely, that the plaintiff was not competent to sue upon the separation deed, and that the only proper parties to sue were the trustees.

[On this point being argued the Court held, in effect, that the covenant not having been made with the plaintiff, nor having been made simply for the benefit of the plaintiff, the plaintiff could not sue upon it. They gave leave to amend, and the
[72] trustees having refused to be joined as plaintiffs, the statement of claim was amended by joining Mrs. Gandy and her two eldest daughters as co-plaintiffs. On a further argument as to parties the Court held that, the trustees having declined to enforce the covenant, Mrs. Gandy was entitled to sue upon it.

[75] The case then proceeded on the merits.

Marten, Q. C., Davey, Q. C., and Ingle Joyce, for the appellant: —

The covenant is put an end to, or at least suspended, by Mrs. Gandy's taking the custody of the two youngest children. The deed contains provisions that the wife shall not have the custody of the youngest children, and that they shall reside where the father chooses, and the covenant to pay is made conditional on the observance of the covenants by the trustees, one of which is that they will carry out his directions as to the school at which the daughters shall be educated and the places where they shall live. The covenant is conditional on the husband having the custody of the children, and Mrs. Gandy cannot both approbate and reprobate.

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[COTTON, L. J. : — This objection, that the covenant has come to an end, was not taken before the Court of Appeal when the decision of the President was reversed, which was after the order giving the custody of the children to Mrs. Gandy had been made. If it had been shown on that occasion that the covenant was no longer in force, the decision probably would not have been the same.]

The covenant must be read as a covenant to pay for the maintenance and education of these children so long as Mrs. Gandy is not entitled to the custody of them. The decision of the Court of Appeal, 7 P. D. 168; 51 L. J. P. D. & A. 41, proceeds on the ground that there is no jurisdiction to alter the provisions of the deed. The wife, therefore, is still bound by it.

Hemming, Q. C, and R. Gaskell, *contrà* : —

The covenant is to pay to the trustees provided they allow the children to go to such school as the father chooses, and they have * done so. No breach of the covenants by the [* 76] trustees is shown. The appellant relies on the provision that Mrs. Gandy is not to have the custody of the children, but looking at the covenants together, the meaning is that the trustees are not to take the children and place them where the father does not approve. There is nothing that amounts to giving the custody of them to him. The Court on the appeal from the Divorce Court, held that as the Court could not diminish the amount of alimony provided by the deed, it was not right that it should enlarge it. It was held there that the father was liable on this covenant, and we ask the Court to hold the same now. We cannot ask the Court to say that the construction of the deed is different from what it was considered to be on the former occasion, but if the appellant succeeds in that contention, we ask the Court to say that the husband has so far repudiated the separation deed that he cannot now claim any benefit from it, and that under the altered circumstances the wife should be allowed to claim alimony before the Divorce Court.

[BOWEN, L. J., referred to *Whieldon* v. *Whieldon*, 2 Sw. & Tr. 388, as showing that the maintenance of the children would be taken into account in allotting alimony.

COTTON, L. J. How far do you go in your claim for maintenance? Can you go beyond minority?]

We do not ask the Court to decide at present how long maintenance is to last. In *De Crespigny* v. *De Crespigny*, 9 Ex. 192,

and *Carr* v. *Living*, 33 Beav. 474, it was extended beyond minority, but we do not say that the VICE CHANCELLOR intended to decide this point, and it is not necessary to do so now, when the elder of the two girls is still a minor.

Davey, in reply: —

We do not admit that the covenants on the part of the trustees have been kept: the girls are not living at a place which the father approves.

[COTTON, L. J. It is to be a place "reasonable and proper for the purpose."]

[*77] *Suppose he wished them to live with an unexceptionable female relative, that would be against the decree which gives the custody of them to the mother.

[COTTON, L. J. Does the proviso limit the time of payment? It does not do so in terms.]

Yes; the covenant is to pay provided the education is carried on under his reasonable directions, and the residence is where he reasonably directs.

[BOWEN, L. J. You obtained a decision of the Court of Appeal in your favour on a particular view of the construction of the deed, in which view you then acquiesced. Can you now turn round and say that view was wrong?]

That is to say, that I am estopped from saying that I am not estopped by matter of record. If it can be shown that the *ratio decidendi* of the Court was a particular construction of the deed, then I am estopped by matter of record, but there must be estoppel by *res judicata*, or there is no estoppel at all. The Court did not decide on any particular construction of the deed, but on the ground that the Court had no jurisdiction in a suit for judicial separation to alter a separation deed, and that effect must be given to the deed unless one of the parties had been guilty of such misconduct as to become disentitled to enforce it.

July 14. COTTON, L. J.: —

This is an appeal by the defendant against a judgment of Vice Chancellor BACON, whereby he declared that under a deed of separation executed in 1879, the defendant was liable to provide for the expense of the maintenance and education of the two infant children of his wife, Mrs. Gandy. We have already disposed of a preliminary objection that Mrs. Gandy has no title to sue in order to enforce the particular covenant in question.

No. 2. — Gandy v. Gandy, 30 Ch. D. 77, 78.

It having thus been decided that Mrs. Gandy had an interest enabling her to sue upon this covenant when the trustees refused to do so, the defendant then raises this point; he says that the agreement to provide for the maintenance and education of the two youngest children was subject to a condition, not only that the children should be allowed by the trustees to reside at such * school as he desired, but that Mrs. Gandy should [* 78] not have the custody of them, and that they should live at the places pointed out by the defendant, the father, and should be at liberty to reside with him. He says that this condition has been broken, and that therefore there is an end, or at least a suspension, of his liability under this covenant. We must consider whether that contention can prevail, and also consider what is right to be done, having regard to a previous case between the same persons, where the Divorce Court, having been applied to to grant alimony to the wife, and in substance having granted it, there was an appeal to this Court by Mr. Gandy, who contended that she was bound by the provisions of the deed, and could not have any alimony beyond what the deed provided for her. In that case, the sole question raised before the Divorce Court was this, that the subsequent adultery of the husband had put an end to the deed, there being an implied condition that the husband and wife should live a chaste life. Sir James Hannen decided that there was such an implied condition, but the Court of Appeal did not agree with that. There was also another point raised here on that appeal: it was argued on behalf of Mrs. Gandy that there was an additional burden thrown upon her, because the order which had directed a judicial separation had given her the custody of the children. The argument on behalf of the appellant on the present occasion is that the fact of obtaining that order is a breach of the condition, and suspends or puts an end to his convenant to provide for these children; that although it was not expressed in terms that his liability was only to last so long as he had the custody, yet that this was a condition imposed by the proviso, and that Mrs. Gandy's obtaining that order for the custody of the children put an end to the provision for these children. The Court of Appeal in deciding the appeal from the Probate and Divorce Division went upon two grounds. They said that the adultery of the husband was not against an implied condition in the deed, and that the deed was not therefore at an

end. But then they considered the question whether, assuming the deed not to be at an end, there was a ground for increased maintenance, and in answer to the point raised by the counsel for Mrs. Gandy, they said that no greater burden had been [* 79] thrown on * her by the order that she should have the custody of the children, for that there was still standing the provision in the deed by which the husband is to provide for the expense of their maintenance and education. Whether it was then contended by Mr. Gandy's counsel that that was the true construction and effect of the deed, I do not now recollect, but certainly the judgment in his favour was based on this, that, if the deed stood, there was no ground, from alteration of circumstances, for any addition by way of alimony to the provision made by the deed for Mrs. Gandy and her two elder children. There are passages in the judgment of the late MASTER OF THE ROLLS, and in the judgment which I delivered, which show clearly that this was the view which we then took of the deed, the husband not then contending that the order which had been made giving the custody of the children to the wife had released him from the covenant. It was part of our *ratio decidendi*, when we refused further alimony to Mrs. Gandy, that in our opinion the deed was not put an end to, and that the circumstances were not so altered that, the deed standing, she ought to have an increase of alimony, the provision then made for her being £252 plus the provision for the maintenance of the younger children, and no further burden being thrown upon her

Mr. Gandy now comes here and contends that his covenant to pay the expenses of the maintenance and education of the two youngest children is at an end, or at least suspended, and that the only provision which can now be enforced against him on behalf of Mrs. Gandy is to pay the £252 a year. If that be the true construction of the deed, then in my opinion the Court ought not to be bound not to grant alimony beyond the provision made for the wife and her two elder children, for that is not the whole of the provision made for her. In fixing the amount of alimony to a wife, the Court (as in the case referred to by Lord Justice BOWEN) considers, and in my opinion ought to consider, not only what provision should be made for her, but what provision should be made for the maintenance of those children of whom the Court has said she is to have the custody and control.

What, then, ought we to do under the circumstances? The * decision on the appeal from Sir JAMES HANNEN was [* 80] in favour of Mr. Gandy, on the ground that this was a continuing provision for the maintenance of the children. He contends now that this is not the true construction and effect of the deed. It would be wrong in my opinion to allow him to take advantage of a decision given on one construction, whether accepted by him or argued by him, and to give another decision in his favour on the ground that that was not the true construction. It has been suggested that we ought not to listen to such arguments. Mr. Davey says, and that seems to me to be so, that we really gave no judgment as to the construction of the deed in the former case, though our opinion was expressed, and one particular construction of the deed was one of the grounds on which we decided that case. Ought we, therefore, there being no positive decision, to say we are bound? I feel a difficulty about that, but I feel a greater difficulty in giving a judgment in the husband's favour on the present occasion, while that former decision stands. In my opinion the proper course will be not to dispose of this appeal for the present, but, having regard to our opinion, which I have expressed, of what must be considered in fixing the proper amount of alimony, to allow Mrs. Gandy to make a fresh application to the Divorce Court for increased alimony, that is to say, alimony other than the £252 covenanted to be paid by the husband to the trustees for her and the elder children, and in the meantime to stay all proceedings under the judgment which is appealed against. I do not think that we ought to dispose of this question of construction until the result of that application is known, we shall then have the whole matter before us, and shall be able to do what is right. It may be that Sir JAMES HANNEN or the Judge before whom it comes may feel a difficulty in granting any increased alimony while Vice Chancellor BACON'S judgment stands, but after the expression of my opinion, which I believe is concurred in by the other members of the Court, I should think that he would not feel that difficulty. If Mrs. Gandy does not obtain an order for increased alimony she can appeal to this Court, we then shall have the two appeals before us, her appeal and this present appeal, and can dispose of both of them. If she obtains an order from the Divorce Court for increased * alimony, [* 81] Mr. Gandy, if dissatisfied with it, may appeal, and when

that appeal comes before us with the present appeal we shall know how to deal with the matters so as to do justice between the parties.

Lindley, L. J. : —

I am of the same opinion, and I will only add that having been a party to the previous decision, I can venture to say that no member of the Court ever dreamed of deciding that Mrs. Gandy was only entitled to £252, if she had to maintain the two younger children. We may have said something which looks like it, but nothing was further from our intention. What was decided was this, that the continuing adultery of the husband did not discharge the wife from the obligation to accept the provisions made by the deed in satisfaction of all her claims. The reported expressions of the different members of the Court, show plainly enough that they assumed that the husband would maintain the two younger children, and on that assumption they said that the wife could not claim more than the £252.

Bowen, L. J. : —

I am of the same opinion. It seems to me that the decision in *Gandy* v. *Gandy*, 7 P. D. 168, 51 L. J. P. D. & A. 41, proceeded on two grounds. The first was, that the adultery of the husband was not a breach of any implied condition in the deed, and the second was, that that being so the adultery of the husband was not *per se* a sufficient reason for allowing the wife to apply for increased alimony, no increased burden being thrown on her. In order to arrive at the second ground, which is vital, I think, to the decision, it was taken for granted, with the acquiescence of Mr. Gandy by his counsel, that Mr. Gandy still acknowledged a continued liability to bear the expense of the maintenance and education of the two youngest children. If it had been otherwise, and if it had appeared that there was no such continuing liability, it seems to me that the case must have been otherwise decided, because the Court ought, and would feel that it [* 82] ought, to have regard to the whole circumstances * of the case, in deciding whether the wife might apply for increased alimony or not, and ought to consider what the liability of the husband was, and what the burdens imposed on the wife were in respect of her children as well as other matters.

The husband having got the benefit of our decision on the appeal from the Divorce Court, on the ground that he was

acknowledging his continued liability to pay for the maintenance of the two youngest children, now turns round and declines to contribute to their maintenance and education. I am not quite sure (and I reserve the point for further consideration) that the decision of the Court on that appeal did not involve a judicial construction of the covenant which, whether it was right or wrong, would be binding upon the parties. I am not certain that this is not *res judicata* within the view which has been taken of *res judicata*, when the same questions arise again between the same parties litigating similar subject-matter. But whether it is *res judicata* or not, it seems to me that there would be monstrous injustice if the husband, having suggested one construction of the deed in the old suit and succeeded on that footing, were allowed to turn round and win the new suit upon a diametrically opposite construction of the same deed. It would be playing fast and loose with justice if the Court allowed that. It is clear, at all events, to my mind, that unless the construction which was suggested and adopted on the appeal from the Divorce Court is to be treated as binding, the conduct of the husband, and the decree of the Divorce Court which changed the custody of the children from husband to wife, have imposed on the wife a burden and duty which render the alimony inadequate, unless the husband was to pay for the maintenance and education of the two children.

It seems to me, therefore, that the order which Lord Justice Cotton has suggested is the right one, viz., to stay proceedings under the judgment of Vice Chancellor Bacon, in order that the wife may apply, if she is so advised, to the President of the Divorce Court for increased alimony, with liberty to bring this appeal on again if it is necessary. The Lords Justices agree with me in thinking that the proper form of order will be this: It now appearing that the husband declines to contribute to the * maintenance and education of the two youngest [* 83] children, stay the proceedings under the judgment of Vice Chancellor Bacon till further order, with liberty to the wife if she is so advised, to present a fresh petition to the Divorce Court for increased alimony, with liberty to either side to apply to restore this appeal to the paper.

ENGLISH NOTES.

The principle that a person cannot approbate and reprobate the same legal consequence of an event or act in the law, belongs to the same class of cases as those to which the equitable doctrine of election has been applied; but, where the principle of *approbate* and *reprobate* is applied, it is not only assumed that a case of election has arisen, but it is also presumed from the conduct of the party that his election has been conclusively determined.

Some of the cases to which the principle properly applies have been loosely described as cases of estoppel. The principle of *approbate* and *reprobate* is, however, distinguishable as well from the doctrine of election as from estoppel in the proper sense of the term. And the two above ruling cases have been selected as containing a full exposition of the principle.

Another good illustration is furnished by the case of *Roe* v. *Mutual Loan Fund* (C. A. 1887), 19 Q. B. D. 347, 56 L. J. Q. B. D. 541. The plaintiff had given a bill of sale of his furniture to the defendants, and afterwards became bankrupt. In his statement of affairs he entered the defendants as secured creditors for the amount due under the bill of sale. The defendants sold the goods leaving an unsecured balance of debt, and then joined with the other creditors in accepting a composition. Subsequently the plaintiff obtained from the defendant a receipt in full for his debt. He then sued the defendants in trespass for seizing and selling the furniture. The Court of Appeal held that, as he had got credit for the amount realized by the sale, and had the composition accepted and the debt discharged, on the footing of the bill of sale being valid, he could not now turn round and set up the invalidity of the bill. It is clear from the judgments of all the judges of appeal (Lord Esher, Lindley, L. J., and Lopes, L. J.) that the principle applied by them was that of *approbate* and *reprobate*, though they do not give this name to it. Lord Esher in his judgment cites the observation of Mr. Justice Honeyman in *Smith* v. *Baker* (1873), L. R., 8 C. P. 350, 42 L. J. C. P. 155: "A man cannot say at one time that the transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage." This is exactly the principle of *approbate* and *reprobate*. Lord Esher says further on: "It is immaterial to decide whether the case comes within the legal definition of an estoppel, since it is clearly within the principle laid down in *Smith* v. *Baker*, with which I entirely agree." The other judgments proceed on the same essential ground, although they admit of some confusion of language between the

principle of *approbate* and *reprobate*, and that of estoppel in the sense of a representation of a fact within the oft-quoted doctrine of *Pickard* v. *Sears* (1837), 6 Ad. & Ell. 474.

The principle of *approbate* and *reprobate* is essentially the foundation of the rule that a plaintiff, by suing and recovering damages for the conversion of a chattel, divests himself of the ownership in favour of a purchaser (see *Cooper* v. *Shepherd* [1846], 3 C. B. 266; *Adams* v. *Boughton*, 2 Str. 1078). For having recovered damages on the footing of having lost the property, he cannot be allowed to set up his title as undivested owner.

AMERICAN NOTES.

It is no doubt accepted that a party may not assume inconsistent positions in legal proceedings. This proceeds on the ground of estoppel.

Thus if counsel stipulate in open court that the jury may assess damages in currency, they may not object to the verdict on that account. *Dreyfous* v. *Adams*, 48 California, 131. So in treating a cause as if issues had been made up and a final decree entered. *Long* v. *Fox*, 100 Illinois, 43. So a party, for the purpose of turning another out of court, may not set up a contract which he admits he had repudiated. *McQueen* v. *Gamble*, 33 Michigan, 344. So an admission in an agreed statement of facts that an estate is insolvent estops the party from setting up a judgment obtained against the estate by default. *Thurlough* v. *Kendall*, 62 Maine, 166. So where goods are levied on, a third party may not claim them as owner and also by virtue of a lien as landlord. *Edwards' Appeal*, 105 Penn. St. 103. They could not "both affirm and deny their own title," said the court. See *Callaway* v. *Johnson*, 51 Missouri, 33.

A defendant may not on appeal insist that his answer was bad, for the purpose of showing error in refusing him the closing argument, if after the overruling of his demurrer to the petition, which settled the law of the case, he denied facts proof of which was essential to a recovery, and thereby attempted to place the burden of proof on the plaintiff. *American Accident Co.* v. *Reigart*, Kentucky Court of Appeals, 21 Lawyers' Reports Annotated, 651.

If a defendant defeats an action on the ground that a third person ought to have been joined with the plaintiff as a partner, he may not deny the partnership in a subsequent suit brought by both on the same cause of action. *Kelly* v. *Eichman*, 1 Wharton (Penn.), 419. So where one pleads a former recovery for the same cause, he may not subsequently deny its validity. *Taylor* v. *Parkhurst*, 4 Barbour (New York Supreme Court), 97. See also *Garrett* v. *Lyle*, 27 Alabama, 586; *Stark* v. *Hunton*, Saxton (New Jersey Chancery), 217; *Clay* v. *Hart*, 7 Dana (Kentucky), 1.

One may not accept a dividend under an assignment for creditors and afterward impeach the assigment for invalidity. *Adlum* v. *Gard*, 1 Rawle (Penn.), 163; *Jones* v. *Hersey*, 4 Maryland, 306; *Gutzwiller* v. *Lackman*, 23 Missouri, 168. So as to coming in under a compromise. *Paine* v. *Hibbard*, 6 Wisconsin, 175.

Where one puts forth his own title in support of the tenant's right to resist ejectment, and thus invites action against himself, he may not afterward object that he is not a proper party to the action. *Abeel* v. *Van Gelder*, 36 New York, 513.

One who has accepted a benefit under a will may not dispute its provisions, nor claim his own property thereby bequeathed to others without compensating them therefor. *Smith* v. *Guild*, 34 Maine, 443; *Martin* v. *Ives*, 17 Sergeant & Rawle (Penn.), 364.

It has been adjudged that a person who has procured the passage of a legislative Act is estopped from setting up that it is unconstitutional, although it has been so pronounced in favour of others who did not participate in procuring its passage. *Ferguson* v. *Landram*, 5 Bush (Kentucky), 230. So of one who has taken advantage of a statute. *People* v. *Murray*, 5 Hill (New York Supreme Ct.), 468; *Van Hook* v. *Whitlock*, 26 Wendell, 43. So one who joins in a petition for opening a street may not object that it was not signed by the requisite number. *City of Burlington* v. *Gilbert*, 31 Iowa, 356; 7 Am. Rep. 143; *Cross* v. *City of Kansas*, 90 Missouri, 13; 59 Am. Rep. 1. But *contra*, *Matter of Sharp*, 56 New York, 257; 15 Am. Rep. 415.

So one who accepts the benefit of a judgment will not be permitted to assign error upon it. *Males* v. *Lowenstein*, 10 Ohio St. 512; *Reynolds* v. *Roebuck*, 37 Alabama, 408.

A person cannot claim under an instrument without confirming it. He must found his claim on the whole, and cannot adopt that feature or operation which makes in his favour, and at the same time repudiate or contradict another which is counter or adverse to it. *Jacobs* v. *Miller*, 50 Michigan, 127; *Emmons* v. *Milwaukee*, 32 Wisconsin, 434; *Morrison* v. *Bowman*, 29 California, 337; *Thompson* v. *Thompson*, 19 Maine, 235; *Smith* v. *Smith*, 14 Gray (Mass.), 532; *The Water Witch*, 1 Black (United States Supreme Ct.), 494; *Cowell* v. *Colorado Springs*, 100 United States, 55; *Scholey* v. *Rew*, 90 United States, 331; *Tuite* v. *Stevens*, 98 Massachusetts, 305; *Caulfield* v. *Sullivan*, 85 New York, 153; *Swanson* v. *Tarkington*, 7 Heiskell (Tennessee), 612; *Hart* v. *Johnson*, 6 Ohio, 87; *Botsford* v. *Murphy*, 47 Mich. 537; cited in note, 6 N. Y. Chan. Rep. (Lawy. Co-Op. ed.) 1029.

The first principal case is cited in Herman on Estoppel. § 469, who says a party "cannot blow hot and cold," and "cannot claim inconsistent rights with regard to the same subject," and "cannot accept and reject the same instrument."

APPROPRIATION (OF PAYMENTS).

DEVAYNES *v.* NOBLE. CLAYTON'S CASE.

(CH. 1816.)

RULE.

WHERE a payment is made by a debtor to a creditor, the presumptions of the civil law, as to the intention of the payments, are generally followed. The debtor has the first option, the creditor the second, to declare the intention at the time of payment. And if no express declaration is then made by either, the intention is presumed in favour of the appropriation most favourable to the debtor.

But, in the case of an account current, such as a banking account, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably it is the sum first paid in that is first drawn out, — the first item on the debit side that is discharged by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other.

Devaynes v. Noble. Clayton's Case.

1 Merivale 530–611 (s. c. 15 R. R. 151–169).

BY decree of the Court of Chancery (March 2, 1812), [530] it was referred to the Master to take an account of what was due, at the death of William Devaynes, deceased, from the partnership of the said William Devaynes, John Dawes, William Noble, R. H. Croft, and Richard Barwick, to the persons who were creditors of the partnership at the time of the death of

Devaynes, and also of what was due, at the time of making the decree, from the partnership to such creditors; and to inquire whether such creditors, or any, and which of them, continued to deal with the surviving partners after the death of Devaynes, and what sums of money were paid by the surviving partners to such creditors, respectively; from the death of Devaynes to the bankruptcy, and what had since been received by them respectively; and also whether such creditors, or any and which of them, had, by such subsequent dealings, released the estate of Devaynes from the payment of their respective debts, or what (if anything) [* 531] remained due in respect thereof. And it was * ordered that, in making such inquiries the Master should state to the Court any special circumstances.

Under this decree, the Master made his separate report, dated the 15th of March, 1815, whereby he found that, in respect of the amount of many of the debts claimed to have been due from the partnership at the death of Devaynes; and in respect of that part of the decree by which he was directed to inquire whether the creditors, or any and which of them, had by their subsequent dealings released the estate of Devaynes; and also, in respect of the special circumstances material to that inquiry, there were several general questions of equitable principle, upon the decision of which the liability of the separate estate of Devaynes to a great part of the debts would depend; and that, in respect of the said general questions, the said claims were capable of being reduced to a few different classes, so that the decision of one case in each class would virtually dispose of all the rest; but, as he conceived some of the questions to be of considerable difficulty, and that if he should form an erroneous opinion thereon for the purpose of a general report upon the matters in reference, it might subject many of the claimants to further investigation, productive of useless expense and delay; he had thought it right, in the first instance, to select a leading claim of each class, and submit them to the consideration of the Court in a separate report; and he had therefore selected, from the claims so brought in, the several claims of E. B. Sleech, spinster, Sir John Palmer, Bart., Nathaniel Clayton, Esq., Ann Johnes, spinster, the plaintiff, Sir Thomas Baring (as executor of John Wigglesworth, deceased), John Warde, Esq., Jane Brice, widow, and Robert Houlton, Esq.; and, in respect of such selected claims, the Master reported the

*following facts, as stated and proved, or admitted, be- [*532] fore him.

The said William Devaynes, deceased, for many years prior to, and until, the time of his death, carried on business as a banker, in partnership with Dawes, Noble, Croft, and Barwick, under the firm of Devaynes, Dawes, Noble, and Co.; and died on the 29th of November, 1809, seized and possessed of a considerable real and personal estate, leaving William Devaynes (plaintiff in the first cause, and defendant in the second), his son and heir-at-law; having first made his will, and thereby devised and bequeathed his said real and personal estate to the defendants, Noble, Cockerell, and Booth (whom he also appointed executors), upon trust, after payment of certain annuities, and of his debts and legacies, for his son, the said Wm. Devaynes, at twenty-seven, and for his issue in the manner therein mentioned; and the testator thereby directed that, in case it should be agreed after his death to admit his said son an equal partner in the banking-house, his trustees should advance £10,000 out of the said estates, as his capital, to remain in the house for five years, whether his said son should be living or dead, at interest after the rate of £3 per cent.; and, after the expiration of the five years, in case his son should be then living, at the same rate of interest as the other partners should receive for their respective capitals; and he thereby declared that the said £10,000 and the interest thereof, should be deemed part of the trust-moneys arising from the sale of his estates, and be subject to the trusts thereof, and be called in and applied upon the said trusts at the end of the five years, in case his son should then be dead without having attained a vested interest therein. From and after the death of Devaynes, the said Dawes, Noble, *Croft, and Barwick continued to carry on the [*533] banking business under the same firm of Devaynes, Dawes, Noble, and Co., on their own proper account, the representatives of Devaynes having no continuing share or interest in the business, or in the profits thereof; but being entitled by the partnership agreement only to his share of the profits to that period, and to his share of the then subsisting joint capital and effects, after payment of all the partnership debts and charges then charged and chargeable thereon. Devaynes, the son, did not become a partner; but shortly after the testator's death (he being then above twenty-one, but not twenty-seven, years of age), made

known to the trustees and executors, and to the surviving partners, his determination not to avail himself of the conditional directions in the will, but to decline the same, in consequence whereof the trustees did not place the £10,000, nor any other sum, in the house, for him, or on his behalf. Neither Devaynes, the son, nor the trustees, in any manner consented to the name of Devaynes being continued in the firm, except in so far as Noble (who was one of the trustees, and also one of the surviving partners), did, in his capacity of partner, concur therein with the other surviving partners; but, on the contrary, shortly after the death of the testator, and at the request of Devaynes, the son, the trustees gave notice in writing[1] to the surviving [* 534] * partners, "that the use of the name of Devaynes in the firm was without their consent, and that they considered the testator's estate as wholly unconnected with the house;" which notice was drawn up and served by Messrs. Clayton and Scott, as solicitors for the trustees; but Mr. Clayton (who was one of the selected claimants), being resident at Newcastle, did not (as appeared by his examination before the Master) know of the transaction until after the bankruptcy, Mr. Scott personally transacting the business in London, on behalf of himself and his partner; nor did it appear by any evidence before the Master, that any of the other selected claimants at any time knew or heard that any such notice had been given. It also appeared that the trustees had, by their said solicitors (but without the personal intervention or knowledge of Clayton), taken the opinion of counsel on the question whether they had power to prevent the surviving partners from continuing to use the name of Devaynes in the firm, and that the answers given were, that they had no such power, and that, if the name were used without their consent, no responsibility could attach upon the estate, where-

[1] This notice, as appeared in a subsequent stage of the proceedings, bearing date March 1st, 1810, *and signed by the Executors themselves*, was in the following words: "Gentlemen, we observe that you continue to use, in the carrying on of your banking business, the name of Mr. Devaynes, and that no alteration has, in consequence of his death, been made in your firm. This may, probably, induce the public to believe that we, as Mr. Devaynes's executors, have some interest in the house, and we therefore feel it incumbent upon us, in pursuance of the advice of our counsel (copies of whose opinions we inclose for your information), to give you notice that the use of Mr. Devaynes's name in your firm is without any consent of ours, and that we consider our estate to be wholly unconnected with your present partnership concern, beyond the claim we, as Mr. Devaynes's executors, have for the balance that was due to him at the time of his death."

upon they desisted from further opposition to the name being so used.

The Master further reported, that the several selected claimants were all persons who, before and at * the death [* 535] of Devaynes, dealt with the said house of Devaynes, Dawes, Noble, and Co., as their bankers; and had respectively, at the time of Devaynes's death, such claims against the house in respect of cash balances, due to them, and of stocks and securities lodged with, and under the control and management of, the house, as after mentioned; and all the said claimants (with the exception of Houlton) admitted that they became informed of Devaynes's death by the public papers, wherein the same was mentioned immediately, or very shortly after, the event. But it was alleged by some of them that, finding no alteration in the firm, they supposed the estate, or the family, of Devaynes, to be still interested therein, and responsible for the debts and transactions thereof; and, without making any inquiries to ascertain the truth or falsehood of that opinion, they continued to deal with and employ the house as their bankers from the time of Devaynes's death to the time of the bankruptcy of the surviving partners.

The report proceeded to state the ordinary course of the banking business in London, in which the only general mode of stating and adjusting accounts between bankers and their customers residing in or near the metropolis, is as follows: —

A book, called a *passage-book*, is opened by the bankers, and delivered by them to the customer, in which, at the head of the first folio, *and there only*, the bankers, by the name of their firm, are described as the debtors, and the customer as the creditor, in the account; and, on the debtor side, are entered all sums paid to or received by the bankers on account of the customer; and, on the creditor side, all sums paid by them to him, or on his account; and, the said entries * being summed up at [* 536] the bottom of each page, the amount of each, or the balance between them, is carried over to the next folio, without further mention of the names of the parties, until, from the passage-book being full, it becomes necessary to open and deliver out to the customers a new book of the same kind. For the purpose of having the passage-book made up by the bankers from their own books of account, the customer returns it to them from time to time, as he thinks fit; and, the proper entries being made

by them up to the day on which it is left for that purpose, they deliver it again to the customer, who, thereupon, examines it; and, if there appears any error or omission, brings or sends it back to be rectified, or, if not, his silence is regarded as an admission that the entries are correct; but no other settlement, statement, or delivery of accounts or any other transaction which can be regarded as the closing of an old, or opening of a new account, or as varying, renewing, or confirming (in respect of the persons or the parties mutually dealing) the credit given on either side, takes place in the ordinary course of business, unless when the name or firm of one of the parties is altered, and a new account thereupon opened in the new name or firm. The course of business is the same between such bankers and their customers resident at a distance from the metropolis, except that, to avoid the inconvenience of sending in and returning the passage-book, accounts are, from time to time, made out by the bankers, and transmitted to the customer in the country, when required by him, containing the same entries as are made in the passage-books; but with the names of the parties, debtor and creditor, at the head, and with the balance struck at the foot of each account; on the receipt of which accounts, the customer, if there appears to be any error or omission, points out the same by letter [* 537] to the * bankers; but, if not, his silence, after the receipt of the account, is in like manner regarded as an admission of the truth of the account, and no other adjustment, statement, or allowance thereof, usually takes place.

The report proceeded to state that the several selected claimants (with the exception of Sir John Palmer, Clayton, and Houlton) were all persons resident in or near the metropolis, who conducted their business with the house of Devaynes, Dawes, Noble, and Co., as to their said accounts, according to the general custom, by means of their respective passage-books; and, that the said Sir John Palmer, Clayton, and Houlton, being resident at a distance from the metropolis, conducted their business with the house according to the custom, in respect of customers so resident.

On the 30th of July, 1810, the surviving partners became bankrupt, and the defendants, Wilson, Morris, and Dorien, were appointed assignees.

The report further stated that no settlement of accounts had

taken place, since the death of Devaynes, between his executors and the surviving partners, or their assignees, in respect of the partnership; but that it was alleged, on the part of Devaynes, the son, that the cash credits, and effects of the house, at the death of Devaynes, greatly exceeded the amount of all debts and demands for which the house was then liable, except the sums due from the house to the respective partners; and therefore, if all the other creditors had then immediately called on the house for payment of their respective demands, they would all have been satisfied; while, on the other hand, it was alleged, on
* the part of the claimants, and of the assignees, that the [* 538]
house was not solvent at Devaynes's death; but then owed to its creditors collectively (not including the respective partners), much more than all its cash credits and effects were really worth, so that, if the creditors in general had then called for payment, the house must have immediately stopped. But the Master found that the difference between these statements chiefly arose from the great amount of the credits, or outstanding debts due at that period to the banking-house, which had since proved bad, or irrecoverable; which bad debts were included in the former, but excluded from the latter statement; that, though it was contended, on the part of Devaynes, the son, that a great part of such debts as had since proved bad might have been good if called in at the time of the testator's death, the contrary was maintained on the other side, and it was impossible for the Master upon any evidence laid before him, to decide that question. The Master was, therefore, unable to state whether, if an account were taken, between the executors and the assignees, of the partnership stock, credits, and effects, at the time of Devaynes's death, and of the debts then due from, as well as the good debts due to, the partnership (excluding the separate accounts of the partners), the house would be found to have been at that time in solvent circumstances; and, still less, whether all, or what proportion of, the debts then due from the house might have been paid to the then joint creditors, if they had immediately called for payment thereof; nor did he conceive it possible to form any certain or probable conclusion on those questions, without first taking such accounts between the executors and assignees, and also entering into difficult and extensive retrospective inquiries as to the circumstances of other persons indebted to the house

[* 539] at the time, who had since proved * insolvent; wherefore, and because the decision of the questions, as to the solvency of the house at the time of Devaynes's death, and as to the consequence which would have followed if the surviving partners had immediately been called on for payment of the debts of the house, did not appear to the Master to be necessary to the accounts and inquiries referred to him by the decree, he declined to investigate the same; but found that, in point of fact, the house continued in good credit from the time of Devaynes's death till the 30th of July, 1810, when it stopped payment, and that the several selected claimants, having no doubt of the responsibility of the house, continued to deal, and keep cash securities, with the said house, until the last-mentioned period, without in fact drawing for, or demanding payment of, the balances respectively due to them, or applying to have their respective securities and stocks delivered up, or transferred to them.

[The report proceeds to set forth the selected cases above mentioned, and, *inter alia*,]

CLAYTON'S CASE.

[* 572] * The class of creditors represented by Mr. Clayton consisted of those who, after the death of Devaynes, continued to deal with the surviving partners both by drawing out and paying in money; payments being made by the surviving partners before they received any money of the creditors; and the balance, varying from time to time, sometimes increased, and sometimes diminished; but upon the whole considerably increased by the subsequent transactions.

In this case also, the creditor had deposited exchequer bills with the house, which exchequer bills were sold in Devaynes's lifetime without the knowledge of the creditor, and the produce applied to meet the exigencies of the house; and the particular facts of the case, as appeared upon the Master's Report, were the following: —

At the death of Devaynes, Clayton had a balance of £1713 on his cash account with the banking-house. Prior to the death of Devaynes, he had deposited with the partners two exchequer bills for £500 each, without giving them any power or authority to sell or dispose of the same, except as it was mutually agreed and understood between him and them, that, when the exchequer bills

should be paid off, they, the partners, were to buy with the produce, or take in exchange, other exchequer bills, to be held by them in the same manner. Contrary to this agreement or undertaking, and without the consent or knowledge of Clayton, the partners did, in in the lifetime of Devaynes (on the 19th of June, 1809), sell these bills for £1035, which produce they applied to their own use. And of this transaction Clayton had no notice until after the bankruptcy of the surviving partners.

Between the death of Devaynes and the bankruptcy, [573] the payments made to Clayton by the surviving partners exceeded the amount of the balance (£1717) and the produce of the exchequer bills (£1035) together; and the payments so made amounted to the sum of £1260, within a few days after Devaynes's death, and before they had received any moneys whatever. But their subsequent receipts largely exceeded the sums paid; and the balance due at the time of the bankruptcy (exclusive of the produce of the exchequer bills) exceeded the amount of the balance due at Devaynes's death. And Clayton having, since the bankruptcy, discovered that the exchequer bills had been sold, and not replaced, proved the amount of the balance, together with the produce of the bills, as a debt under the commission; and received dividends upon the same, but did not sign the certificate.

The report went on to state that Clayton, residing at Newcastle, kept his accounts with the partnership according to the custom already explained, of bankers with their country customers. On the 30th of March, 1810, his account was made up and balanced by the surviving partners, and transmitted to him; and the balance was carried forward, and the account continued to the time of the bankruptcy. In the account so rendered, the proceeds of the exchequer bills were credited so as falsely to represent that they had been paid off by government on the 31st of October, 1809, the day at which they were payable, and that a new exchequer bill for £1000 had on the same day been purchased, or taken in exchange from government, in their stead; and Clayton, being deceived by such statement, did not learn the truth of the case till after the bankruptcy, as already mentioned.

Under these circumstances Clayton claimed against the [574] estate of Devaynes the sum of £1,171 (as the residue of the balance of £1713, after deducting the amount of the dividends received thereon), and the sum of £971 (as the value of the

exchequer bills), with interest, after deducting the amount of the dividends received in respect of the said exchequer bills. The circumstance of the notice given by Clayton and Scott, as solicitors for the executors of Devaynes, to the surviving partners, "that the use of Devaynes's name in the firm was without their consent" (which notice was so given without Clayton's personal knowledge), has been already detailed.

On the subject of these claims, the Master reported his opinion to be: First, that the subsequent payments made by the surviving partners ought to be applied to the account of the cash balance due at the death of Devaynes; and that Clayton had, by his subsequent dealings and transactions with the surviving partners, released the estate of Devaynes from the payment of the said cash balance, and every part thereof. Secondly, that, with respect to the value of the exchequer bills, Clayton had not, by his said dealings and transactions, released the estate of Devaynes from the payment of the value thereof, and such interest as after mentioned. Thirdly, as to the mode of estimating the value, and computing the interest, that the mode of computation adopted by the claimant (viz. by charging the actual amount of the proceeds on the 19th of June, 1809, and calculating interest on that amount from that time), was erroneous, because, if the exchequer bills had not been sold, but kept and disposed of according to the agreement, the same, both principal and interest, would have been [*575] received on the 31st of October, 1809, and *the principal only invested in new exchequer bills bearing the same rate of interest, which was accordingly represented (as aforesaid), to have been actually done; and the Master was consequently of opinion that Devaynes's estate should be charged with interest at the rate of £5 per cent. only from the said 31st of October, 1809, in addition to the principal sum; and having computed the same accordingly, found the sum of £885 to be the amount of such principal and interest, for which the estate of Devaynes still remained liable in respect of the said exchequer bills.

To different branches of this report each of the parties took exceptions; Clayton contending that, with respect to the cash balances, the estate ought merely to be discharged to the extent of any such balance as was paid to his use, after giving him credit for the sums paid in, and deducting the amount of the drafts drawn by him, after the testator's death; and, as to the interest on the

exchequer bills, that the same ought to be allowed from the time when they were sold, and not only from the time when they would have been paid off by government; while the representatives of Devaynes disputed the claim to the exchequer bills altogether.

The last exception, relating to the entire claim as to the exchequer bills, was first argued and overruled, and that as to the interest on the exchequer bills was then argued and allowed.

The first exception came to be argued last. In support of the exception the argument was as follows: —

*This was a case, the decision of which will be of [*587] the greater importance, as it has lately been one of frequent occurrence, and has never been decided, either at law or in equity. Suppose that, in this case, Devaynes, instead of dying, had merely quitted the partnership; and that public notice had been given of that event, tantamount to the notice afforded by the advertisement of his death in the newspapers; and that the same transactions had taken place with the continuing partners which have now taken place with the surviving partners. In such case, the question would have been a mere legal question; and what we submit is, that in such a case, the retiring partner would clearly be liable to the extent of the £453; and if so, then that in the present case, the rule of equity is strictly analogous to the rule of law.

If this view be correct, then all that remains to be considered is, whether there are here any special circumstances which would, in the case we are supposing, have discharged the legal liability.

The legal principle is that which is laid down in *Bois* v. *Cranfield*, Styles, 239; Vin. Ab. title Payment, M. pl. 1, and appears to be this: viz., that if a man owes another two debts, upon two distinct causes, and pays him a sum of money, he (the payor) has a right to say to which account the money so paid is to be appropriated.

Then follows *Heyward* v. *Lomax*, 1 Vern. 24, deciding that, if a man, owing another money on a security carrying interest, and also on simple contract, pays money generally, without specifying on what specific account, it *shall be taken to [*588] the advantage of the payor, in discharge of the debt carrying interest. This, however, has been overruled by subsequent cases.

The next is *Perris* v. *Roberts*, 1 Vern. 34, where, there being a mortgage debt, and also a debt by simple contract, and both being

cast into one stated account, and a bill of sale made for securing the balance, which proved deficient, the payment was decreed to be apportioned. In this case there were strong circumstances to have exonerated the debtor altogether.

In *Manning* v. *Weston*, 2 Vern. 606, however, the rule is strictly brought back within its former limits. There, a man indebted both by specialty and by simple contract, having made payments and entered them in his book as made on account of what was due by specialty, this was held not a sufficient appropriation; and the Lord Chancellor said, that the rule of law, "Quicquid solvitur solvitur secundum modum solventis," is to be understood only when, at the time of payment, the payor declares the purpose. If he does not, the payee may direct how it shall be applied. See, to the same purpose, an *Anonymous case* in 2 Mod. Rep., 2 Mod. 236, and *Bowes* v. *Lucas*, Andrews, 55.

Meggott v. *Mills*, Ld. Raym. 287, must also be mentioned, because that is a case on which some stress will probably be laid. Lord C. J. Holt there expressed it to be his opinion that, where two sums were due, one of which might make the debtor a bankrupt, and the other (being a debt incurred after he ceased to [* 589] trade), could * not produce that consequence, the payment should be taken without more, as meant to be applied to the former debt. But this opinion of Lord Holt's has since been called in question.

Goddard v. *Cox*, 2 Stra. 1194, is next in order of time, and has been considered as a ruling case ever since its decision. There, a widow, being indebted as executrix to her deceased husband, became also indebted on her own account, and afterwards married again, and her second husband became also indebted on his own account, and made payments without declaring the purpose. It was agreed that he had the first right to appropriate his payments, but having neglected it, that it devolved on the payee, who might apply them as he pleased either to the debt incurred by the wife *dum sola*, for which the husband was answerable, or to the husband's own debt, but not to the debt of the wife as executrix. And a case of *Bloss* v. *Cutting* was there cited, to the same effect as *Manniny* v. *Weston*, and the rest.

The next is *Hammersley* v. *Knowlys*, 2 Esp. 665, 5 R. R. 764, which would have been against us if we had contended for the whole amount of Clayton's claim; but, taking it at the lesser sum only, is

in our favour. In that case, Lord KENYON held that, the note of A. being deposited by B. at his banker's, as a security for money, the bankers knowing that it was an accommodation note, and B. afterwards paying money to his bankers without any specific appropriation, the money must be placed as far as it would go in discharge of the then existing debt, and the banker could not make the maker of the note responsible for more than the * balance [* 590] remaining due at the time of such payment, although he afterwards trusted his debtor with a further sum of money.

Then comes *Dawe* v. *Holdsworth*, Peake, 89, which was an action of trover. The defence was bankruptcy; and the question arose, as it did in the case in Lord RAYMOND, whether the petitioning creditor's debt could be established by reason of the bankruptcy. To establish the bankruptcy, the defendant proved that Pittard was a trader, and so continued till 1785, when he became indebted to one creditor in £200, upon whose petition the commission issued. This debt was originally a simple contract debt, but a bond was given after he had ceased to be a trader, and Lord KENYON held that the question was, not when the bond was given, but when the debt was contracted. There had been dealings between the bankrupt and the petitioning creditor since he ceased to be a trader, and it was proved that, though at the time the commission issued, there was a larger balance than £200 due to the creditor, yet more than £200 had also been paid on account between the time when the trading ceased and the issuing of the commission. Lord KENYON further held that, as no particular directions had been given for the application of the money paid on account, it must be placed to pay off the old debt first. Consequently, no part of the debt contracted while Pittard was a trader remained due when the commission issued; and the commission itself was therefore unsupported.

Now, *primâ facie*, this seems to be an authority unfavourable to us. But in *Peters* v. *Anderson*, 5 Taunt. 596; 15 R. R. 592, * after all the cases on the subject had been fully gone [* 591] through, it was laid down that, although the payor may apply his payment to which of two or more accounts he pleases, and although his election may be either expressed or inferred from the circumstances of the transaction; yet, if not paid specifically, the receiver might afterwards appropriate the payment to the discharge of either account as he pleases. And Lord C. J. GIBBS,

referring to the cases of *Meggott* v. *Mills*, and *Dawe* v. *Holdsworth*, observes that, in both, the debts arose on the same account, and it was totally immaterial to which end of the account the payment should be applied; but that Lord C. J. HOLT, and after him Lord KENYON, went upon this ground, that it would be too hard if a man, having made a payment sufficient to exempt him from the operation of the bankrupt laws, should not have the benefit of paying off that part of his debt which subjected him to their operation. "It is an exception," he said, "and founded on the circumstance of bankruptcy."

There is one more case of *Newmarch* v. *Clay*, 14 East, 239, where Lord ELLENBOROUGH said, there might be a special application of a payment made, arising out of the nature of the transaction, though not expressed at the time in terms by the party making it. And he said, the payment in that case was evidenced by the conduct of the parties to have been made for the purpose of taking up the bills which had been antecedently dishonoured; for that, upon receiving that payment, the dishonoured bills were delivered up. And, upon that ground, the Court of K. B. were of opinion there ought to be a new trial; the present LORD CHIEF BARON [* 592] having previously decided it upon the general * principle that, where there is no express appropriation, the payee has a right to apply the payment at his own option; which general principle is also admitted by the very ground on which the Court of K. B. granted the new trial. Upon this, therefore, the doctrine of Courts of common law rests at the present day.

Now, to apply this doctrine to the circumstances of the present case. In none of those cited does it appear that the payee had actually appropriated the payments made until the matter came into question; and the last case of *Newmarch* v. *Clay*, as well as the principle of *Goddard* v. *Cox*, show that the doctrine applies equally in the case of a partnership. Then it is shown that the Court may, from circumstances, infer the intention to apply a payment in discharge of the old debt; but what were the circumstances from which that inference was drawn in the case referred to? They were of such a nature that no doubt could arise respecting their tendency. Accordingly, the counsel acquiesced immediately, and did not even urge an inquiry. The case of *Dawe* v. *Holdsworth* proves, what we do not mean to dispute, that, when the old debt is completely discharged, the payments subse-

quently made must be applied in discharge of the new debt. This is the only case in which we hear of applying the payments to a first debt in priority to a subsequent debt; and this is the case which, Lord C. J. GIBBS afterwards says, was rightly decided, upon the principle that one debt would have exposed the party to a commission of bankruptcy, stating that "it is an exception founded on the circumstance of bankruptcy."

Now, still considering the present case as involving the legal question, let us suppose that Devaynes retired from the partnership in November, 1809, from * that time till the [* 593] commission issued in July, 1810, Mr. Clayton continued to deal with the house both by paying in and drawing out; and in making his payments, he had a right to apply them to whatever demand he thought proper. But it is said there are special circumstances. What are they? — First, That Mr. Clayton's partner gave notice to the house that Devaynes would have nothing more to do with the house. What would be the effect at law, of such a notice? Does it discharge the debt? A release cannot be by parol. How then could the debt be discharged? Not by the subsequent payments; for, those payments being made generally, the payee had a right to attribute them to whatever account he pleased. In fact, there was no payment made to the account of the old debt, except as it was actually reduced on the entire balance. Then was it in any manner altered in consequence of Clayton's accepting the new house as his debtors? He never did accept them as his debtors, any otherwise than as they were, and continued to be his debtors in law. But he never, by any acts of his, specifically accepted them as such. This might have been more strongly urged in *Newmarch* v. *Clay*, 14 East, 239. Devaynes's executors could not, by giving notice, withdraw themselves from their responsibility. Then what does the notice amount to? Besides, notice to a partner does not bind, except in the case of a co-partnership transaction; and therefore, even if this notice could operate as a discharge (but which it cannot), if both had been privy to it, it could not at all events have any effect whatever on Mr. Clayton.

Then there is the circumstance of the account delivered in March, 1814. What conclusion can be drawn from that circumstance? Clayton had * continued to deal with the house; [* 594] so had the parties in *Newmarch* v. *Clay*. So they had

in *Meggott* v. *Mills*, and in *Peters* v. *Anderson*. There can be no distinction between a banking co-partnership and any other co-partnership.

The question is, was the sending this account any admission by Clayton that, so far as his debt had not been paid, he considered this account as a payment? The proper way to try this would be by supposing that the account consisted only of sums drawn out. And this, as your Honour has already decided in Miss Sleech's case, would not have operated in discharge. Does the circumstance of the creditor having paid in, as well as drawn out, make any distinction? It proves that he credited the house for the terms so paid in, not that he credited it for an already existing debt of Devaynes: that remains just as it did before. Upon that security he rested, and had a right to rest.

So it would be at law, if Devaynes had only *retired* from the partnership. What then discharges his estate in equity? We have already your Honour's opinion that, although in this case it is a mere equitable demand, yet it is an equity founded upon the principles of law; and, if so, it is impossible to conceive of any defence in equity that would not have been an available defence at law, supposing the circumstances of the case were such as to constitute it a legal demand instead of an equitable.

(The following cases were also cited in support of this exception. *Wilkinson* v. *Sterne*, 9 Mod. 427, *Hall* v. *Wood*, 14 East, 243 n., *Kirby* v. *Duke of Marlborough*, 2 Maule & S. 18; 14 R. R. 573.

[* 595] * Hart, Wetherell and Sidebottom, and Hazlewood, for different parties against the exception.

The four surviving partners, having possessed themselves of all the funds of the five, were bound first to discharge the obligations of the five; and in taking the accounts between the parties, the Court must consider every subsequent payment as to be carried to the account of that debt which, in a fair and equitable understanding between the parties, was first to be discharged, in exoneration of Devaynes's estate.

The rule of law to which it has been attempted to adapt this case, stands on a principle quite foreign to that with which the Court has now to deal. It is that where there are debtor and creditor, and the debtor owes more than one debt, and pays a sum of money, he has a right to direct to which of the debts that payment shall be

applied; and, if he omits to do so, then the law implies that it is immaterial to him to which the payment is applied, and, by his omission, he has left the application to the option of the creditor; and again, that, if the creditor neglects to exercise that option, still the application may be regulated by circumstances.

But how is it in the absence of all circumstances except that of the order of time? Suppose A. owes B. a debt of £100 contracted five years ago, and another debt of £100 contracted half a year ago, and pays money equal to the discharge of either of the two debts, without directing to which it is to be applied, and without the creditor's doing any act to appropriate it to either. What then? Shall it not, in common sense, be taken as applied to the payment of that * debt for which there has been the longest forbear- [* 596] ance, and against which, if remaining unsatisfied, the Statute of Limitations will soonest operate? *Wentworth* v. *Manning*, 2 Eq. Ab. 261.

This, however, is not a case between the same debtor and creditor. The relations of the same parties are altered. What are the terms to be implied in the very first draft drawn by Clayton after Devaynes's death? He must be considered as saying to the surviving partners, You are my debtors, in respect of a debt contracted by you and your deceased partner; and I now call upon you to pay me a certain sum in discharge of *that debt*. He draws a second and a third draft on the same terms. He then pays in an additional sum, not expressing that he pays it in to any new account, and afterwards draws a fourth draft. What is there to show that this fourth draft was drawn upon any other terms than the three preceding? He knows that it is the duty of the four to pay the debts due from the five. He knows equally well that it is not competent to him, by giving credit to the four, to charge the estate of the deceased partner with any sums to which it was not previously liable.

If Mr. Clayton had been asked, when he began to draw upon and pay money to the surviving partners, knowing that Devaynes's representatives had nothing to do with the firm, whether he did so, considering Devaynes's estate as responsible to him, or whether he did not deal upon the sole responsibility of the surviving partners, would he not, as a man of honour and integrity, have answered. Certainly, I never had any conception that any other but the surviving partners * were responsible? If he had been [* 597]

asked, whether he did not consider that as in the ordinary course of his former dealings with the partnership, the first draft he drew on the new partnership was in like manner applicable to the old balance, would he have hesitated for a moment to say, I drew this draft considering that, whenever there is an item on one side of an account, it is supposed to be in satisfaction of the old standing items on the other side, and that, whenever a balance is struck, there is an extinction *pro tanto* of the existing debt? If, on the other hand, Mr. Clayton had done these acts in contemplation of reserving to himself the double responsibility of the surviving partners, and of the estate of the deceased partner; would not a Court of Equity have said, this is a fraud in him to endeavour so to deal with the surviving partners as to be guaranteed by the estate of the deceased partner without communicating to the representatives of the deceased partner that he is dealing with that intention?

When Lord ELDON said, in *Ex parte Kendal*, 17 Ves. 514; 11 R. R. 122, that there may be dealings between the surviving partners and the creditors of the old partnership which would discharge the estate of the deceased partner, could he by possibility have contemplated a stronger case, in respect of such dealings, than the present? If it were competent to the creditor thus to deal with the surviving partners, keeping to himself in reserve the responsibility of the deceased partner's estate, for nine months after his death, why not for nine years? Why not for thirty years, during which he might have paid in hundreds of thousands; and, if at the end of the thirty years, one of
[*598] the survivors were to become * insolvent, he might even then, upon this principle, resort to the account *ab initio*, and, fixing upon the sum to which the balance was at one time reduced, call upon the Court to give him out of the estate of the deceased partner the amount of that balance.

[*599] * Now, if Mr. Clayton could show that, at any period, he attributed his payments into the banking-house to any particular account distinct from the other account, and that he attributed his drafts correspondingly to those payments, that might have considerable weight; for he might say, having no
[*600] doubt his old balance * would ultimately be paid, but doubting whether the new house would be able to pay back the sums he paid in, he had taken care to draw upon the recent

payments, reserving to himself the liability of Devaynes's estate. Even then, it would be said, * whatever was your [* 601] intention, it was one upon which, if you acted, you were bound to disclose it to Devaynes's representatives. Otherwise, you have acted fraudulently towards them, and a Court of Equity will give you no assistance. But that is not the present case. There was no such intention on the part of Mr. Clayton; and it comes simply to this, whether his dealings with the surviving partners are not such as come within the meaning of Lord ELDON, when he says there may be dealings which would discharge the estate.

(In addition to the cases already cited, the following were mentioned. *Simpson* v. *Vaughan*, 2 Atk. 31, *Strange* v. *Lee*, 3 East, 484.)

Bell, in reply: —

If a man is bound in any one bond jointly with another, as principal and surety, and in another bond by himself alone, and pays money on account, nobody can doubt he means to pay off the bond in which he is solely bound, in preference to that in which another is bound with him. If it is asked on one side, how did Mr. Clayton mean to apply this payment? I would ask on the other, how did Mr. Devaynes's partners mean that it should be applied? Certainly in payment of their own debts, not of the debts of the five.

Where is the authority for the alleged rule as to the priority of the debts? In *Newmarch* v. *Clay*, the LORD CHIEF BARON was of opinion, the payment was not applicable to the first debt, notwithstanding there * was a partner concerned in the first [* 602] who was not concerned in the second; and the Court of K. B. afterwards varied the decision, not on that ground, but on a ground which was perfectly distinct. If that ground existed, why did Lord C. J. GIBBS say, that *Dawe* v. *Holdsworth* was distinguishable on account of its being a case of bankruptcy? Every argument applicable to this case might have been applied to *Kirby* v. *The Duke of Marlborough*; for Devaynes's estate cannot be placed in a higher degree of responsibility than that of a surety.

In *Ex parte Kendal*, Lord ELDON expressly declared he would not decide the question. Then why refer to that case as containing his lordship's decision of this?

Whether the continuation of payments and receipts alone

amounts to a discharge is a mere legal question in the case of a withdrawing partner, and must be decided on the same principles in the case of a partner who dies. Does a single payment, or a single receipt, alter the case? They say, yes; but where is the authority? *Newmarch* v. *Clay* is an authority against them. So are all the cases. They are all cases which decide that it may be inferred from circumstances. But the question remains, What is a sufficient foundation for the inference? The continuance of the transactions, it has been held over and over again, is not enough. It must be a continuance attended with other circumstances.

Then they say, the new firm ought first to pay off the old debts. That depends upon whether they have assets of Devaynes [* 603] in their hands. If he was a debtor * to them, where was the obligation between them? The obligation, if there was any, must depend on their having assets of his in their hands. But, if there had been such an obligation, how would that affect Mr. Clayton as a creditor? *Crawshay* v. *Holmes*, *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298, 11 R. R. 77.

The house was not trading on Devaynes's assets. In fact, the assets of the house, at the period when Mr. Devaynes quitted it, were not got in; and that creates the insolvency of the house. The house had been paying off the debts contracted in Devaynes's lifetime by their new credit; and, in this very case of Mr. Clayton's, where we claim only £453, the difference between that sum and the £1171 has been paid by money lodged with these gentlemen, and obtained on their own credit; for the assets of the house are still outstanding.

Then what is the equity of this case? What circumstances are there which apply to the case of a dying partner, and do not apply to the case of a retiring partner? It is said, the debt is extinguished at law; and that equity will not revive it where there is a superior equity. But this is a fallacy. The debt was not extinguished; for, though the remedy was gone at law, it continued in equity; as in *Lane* v. *Williams*, 2 Vern. 277, 292; *Bishop* v. *Church*, 3 Atk. 961; 2 Ves. Sen. 100–371, &c., as soon as the securities were found to be given for a partnership debt, they were considered as joint and several. The single questions, therefore, are whether the continuing to deal, by drawing out and paying in, has operated to extinguish the debt, or whether it has been so extin-

guished by the circumstance of the account delivered? And these questions must be taken as the facts stand upon * the report; that is, without any inquiry how the affairs [*604] of the house stood as between Devaynes and his partners.

The case of *Wentworth* v. *Manning* was one of a specific payment, and therefore does not apply. But, if it were applicable, it would be contradictory to the cases of *Goddard* v. *Cox*, and the others which have been cited, and therefore of no authority, considering the book in which it is printed, 2 Eq. Ab. 261.

Sir WILLIAM GRANT (Master of the Rolls). Though the report, following (I presume) the words of the inquiry directed by the decree, states the Master's opinion to be that Mr. Clayton has, by his dealings and transactions with the surviving partners subsequent to the death of Mr. Devaynes, released his estate from the payment of the cash balance of £1713, yet the ground of that opinion is, not that the acts done amount constructively to an exoneration of Mr. Devaynes's estate, but that the balance due at his death has been actually paid off, — and, consequently, that the claim now made is an attempt to revive a debt that has once been completely extinguished.

To a certain extent, it has been admitted at the bar, that such would be the effect of the claim made before the Master, and insisted upon by the exception. To that extent it is, therefore, very properly abandoned; * and all that is [*605] claimed is the sum to which the debt had at one time been reduced.

It would, indeed, be impossible to contend that, after the balance, for which alone Mr. Devaynes was liable, had once been diminished to any given amount, it could, as against his estate, be again augmented, by subsequent payments made, or subsequent credit given, to the surviving partners. On the part of Mr. Devaynes's representatives, however, it is denied that any portion of the debt due at his death now remains unsatisfied. That depends on the manner in which the payments made by the house are to be considered as having been applied. In all, they have paid much more than would be sufficient to discharge the balance due at Devaynes's death; and it is only by applying the payments to subsequent debts, that any part of that balance will remain unpaid.

This state of the case has given rise to much discussion as to

the rules by which the application of indefinite payments is to be governed. Those rules we probably borrowed, in the first instance, from the civil law. The leading rule, with regard to the option given, in the first place to the debtor, and to the creditor in the second, we have taken literally from thence. But, according to that law, the election was to be made at the time of payment, as well in the case of the creditor, as in that of the debtor, "in re præsenti; hoc est statim atque solutum est: cæterum, postea non permittitur." Dig. Lib. 46, tit. 3, Qu. 1. 3. If neither applied the payment, the law made the appropriation according to certain rules of presumption, depending on the nature of the debts, or the priority in which they were incurred. And as it was the [* 606] actual * intention of the debtor that would, in the first instance, have governed; so it was his presumable intention that was first resorted to as the rule by which the application was to be determined. In the absence, therefore, of any express declaration by either, the inquiry was, what application would be most beneficial to the debtor. The payment was, consequently, applied to the most burthensome debt, — to one that carried interest, rather than to that which carried none, — to one secured by a penalty, rather than to that which rested on a simple stipulation; and if the debts were equal, then to that which had been first contracted. "In his quæ præsenti die debentur, constat, quotiens indistinctè quid solvitur, in graviorem causam videri solutum. Si autem nulla prægravet, — id est, si omnia nomina similia fuerint, — in antiquiorem." Dig. L. 46, t. 3, Qu. 5.

But it has been contended that, in this respect, our courts have entirely reversed the principle of decision, and that in the absence of express appropriation by either party, it is the presumed intention of the creditor that is to govern; or, at least, that the creditor may, at any time, elect how the payments made to him shall retrospectively receive their application. There is, certainly, a great deal of authority for this doctrine. With some shades of distinction, it is sanctioned by the case of *Goddard* v. *Cox*, 2 Stra. 1194; by *Wilkinson* v. *Sterne*, 9 Mod. 427; by the ruling of the Lord Chief Baron in *Newmarch* v. *Clay*, 14 East, 239; and by *Peters* v. *Anderson*, 5 Taunt. 596, 15 R. R. 592, in the Common Pleas. From these cases I should collect that a proposition which, in one sense of it, is indisputably true, — namely, that, if the [* 607] debtor does * not apply the payment, the creditor may make

the application to what debt he pleases, — has been extended much beyond its original meaning, so as, in general, to authorize the creditor to make his election when he thinks fit, instead of confining it to the period of payment, and allowing the rules of law to operate where no express declaration is then made.

There are, however, other cases which are irreconcilable with this indefinite right of election in the creditor, and which seem, on the contrary, to imply a recognition of the civil-law principle of decision. Such are, in particular, the cases of *Meggott* v. *Mills*, Ld. Raym, 287, and *Dawe* v. *Holdsworth*, Peake, 89. The creditor, in each of these cases, elected, *ex post facto*, to apply the payment to the last debt. It was, in each case, held incompetent for him so to do. There are but two grounds on which these decisions could proceed, — either that the application was to be made to the oldest debt, or that it was to be made to the debt which it was most for the interest of the debtor to discharge. Either way, the decision would agree with the rule of the civil law, which is, that if the debts are equal, the payment is to be applied to the first in point of time, — if one be more burthensome, or more penal, than another, it is to it that the payment shall be first imputed. A debt on which a man could be made a bankrupt would undoubtedly fall within this rule.

The Lord Chief Justice of the Common Pleas explains the ground and reason of the case of *Dawe* v. *Holdsworth* in precise conformity to the principle of the civil law.

"The cases then set up two conflicting rules, — the pre- [*608] sumed intention of the debtor, which, in some instances at least, is to govern; and the *ex post facto* election of the creditor, which, in other instances, is to prevail. I should, therefore, feel myself a good deal embarrassed, if the general question of the creditor's right to make the application of indefinite payments, were now necessarily to be determined. But I think the present case is distinguishable from any of those in which that point has been decided in the creditor's favour. They were all cases of distinct insulated debts, between which a plain line of separation could be drawn. But this is the case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying, this draft is to be placed to the account of the £500 paid in on Monday, and this other to the account

of the £500 paid in on Tuesday. There is a fund of £1000 to draw upon, and that is enough. In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged, or reduced, by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle, all accounts current are settled, and particularly cash accounts. When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has, or has not, been discharged, but by examining whether payments to the amount of that balance appear by the account to have been made?

[*609] * You are not to take the account backwards, and strike the balance at the head, instead of the foot, of it. A man's banker breaks, owing him, on the whole account, a balance of £1000. It would surprise one to hear the customer say, "I have been fortunate enough to draw out all that I paid in during the last four years; but there is £1000, which I paid in five years ago, that I hold myself never to have drawn out; and, therefore if I can find anybody who was answerable for the debts of the banking-house, such as they stood five years ago, I have a right to say that it is that specific sum which is still due to me, and not the £1000 that I paid in last week." This is exactly the nature of the present claim. Mr. Clayton travels back into the account, till he finds a balance, for which Mr. Devaynes was responsible: and then he says, — "That is a sum which I have never drawn for. Though standing in the centre of the account, it is to be considered as set apart, and left untouched. Sums above it, and below it, have been drawn out; but none of my drafts ever reached or affected this remnant of the balance due to me at Mr. Devaynes's death." What boundary would there be to this method of re-moulding an account? If the interest of the creditor required it, he might just as well go still further back, and arbitrarily single out any balance, as it stood at any time, and say, it is the identical balance of that day which still remains due to him. Suppose there had been a former partner, who had died three years before Mr. Devaynes — What would hinder Mr. Clayton from saying, "Let us see what the balance was at his death? —

I have a right to say, it still remains due to me, and his representatives are answerable for it; for, if you examine the accounts, you will find I have always had cash enough lying in the house to answer my subsequent drafts; and, therefore, all the payments * made to me in Devaynes's lifetime, and since his [*610] death, I will now impute to the sums I paid in during that period, — the effect of which will be, to leave the balance due at the death of the former partners still undischarged." I cannot think, that any of the cases sanction such an extravagant claim on the part of a creditor.

If appropriation be required, here is appropriation in the only way that the nature of the thing admits. Here are payments so placed in opposition to debts, that, on the ordinary principles on which accounts are settled, this debt is extinguished.

If the usual course of dealing was, for any reason, to be inverted, it was surely incumbent on the creditor to signify that such was his intention. He should either have said to the bankers, — "Leave this balance altogether out of the running account between us," — or, — "Always enter your payments as made on the credit of your latest receipts, so as that the oldest balance may be the last paid." Instead of this, he receives the account drawn out, as one unbroken running account. He makes no objection to it, — and the report states that the silence of the customer after the receipt of his banking account is regarded as an admission of its being correct. Both debtor and creditor must, therefore, be considered as having concurred in the appropriation.

But there is this peculiarity in the case, — that it is, not only by inference from the nature of the dealings and the mode of keeping the account, that we are entitled to ascribe the drafts or payments to this balance, but there is distinct and positive evidence that Mr. Clayton considered, and treated, the balance as a * fund out of which, notwithstanding Devaynes's [*611] death, his drafts were to continue to be paid. For he drew, and that to a considerable extent, when there was no fund, except this balance, out of which his drafts could be answered. What was there, in the next draft he drew, which could indicate that it was not to be paid out of the residue of the same fund, but was to be considered as drawn exclusively on the credit of money more recently paid in? No such distinction was made; nor was there anything from which it could be inferred. I should,

therefore say, that, on Mr. Clayton's express authority, the fund was applied in payment of his drafts in the order in which they were presented.

But, even independently of this circumstance, I am of opinion on the grounds I have before stated, that the Master has rightly found that the payments were to be imputed to the balance due at Mr. Devaynes's death, and that such balance has, by those payments, been fully discharged.

The exception must, therefore, be overruled.

ENGLISH NOTES.

The judgment of Sir W. GRANT in *Clayton's Case* has been uniformly regarded as the leading authority in English law as to the appropriation of payments between debtor and creditor. The latter branch of the rule was followed by the Court of King's Bench in *Bodenham* v. *Purchas* (1818), 2 B. & Ald. 39, and the principle of the former branch is recognised by that Court in *Simson* v. *Ingram* (1823), 2 B. & C. 65, where the distinction is made that in the latter case the appropriation was made by the creditor, and his election intimated to the debtor within a reasonable time which they thought the true rule allowed him. The time allowed to the creditor to exercise his option appears from the case in the Exchequer Chamber, of *City Discount Co.* v. *McLean* (1874), L. R., 9 C. P. 698, 43 L. J. C. P. 344, to be more extensive; and according to the judgment of BLACKBURN, J., he may exercise the option at any time if he has done nothing to determine his election.

The latter branch of the rule is adopted and applied by the House of Lords in *London & County Bank* v. *Ratcliffe* (1881), 6 App. Cas. 722, 51 L. J. Ch. 28.

In *Lacey* v. *Hill* (C. A. Nov. 1876). 4 Ch. D. 537, the Court refused to apply the rule in *Clayton's Case*, in a question between the joint creditors of a partnership estate and the separate creditors on the estate of one of the partners who had fraudulently drawn out of the partnership banking account moneys which he had applied to his own purposes.

On a somewhat similar principle the Court of Appeal, *In re Hallett's Estate, Knatchbull* v. *Hallett* (C. A. 1880), 13 Ch. D. 696, 49 L. J. Ch. 415, held that the rule does not apply as between a trustee, or other person in a fiduciary capacity, and the person beneficially entitled to money. So that where a trustee had improperly mixed trust funds with his own by paying in trust moneys to his own general credit, any sums which he draws out for his own purposes must, in a question of

following trust money, be treated as drawn out of his own and not from the trust moneys. This case is followed in *Hancock* v. *Smith* (C. A. 1887), 41 Ch. D. 456, 461, 58 L. J. Ch. 725. And in the same case COTTON, L. J., confirms an opinion expressed by FRY, J., in the former case to the effect that the rule in *Clayton's Case* does apply between two beneficiaries under a trust, where the sum which can be got from the trustee is not enough to make good the claims of both.

In the case of *Blackburn Building Society* v. *Cunliffe* (C. A. 1882), 22 Ch. D. 61, 52 L. J. Ch. 92, where a building society had borrowed money *ultra vires*, but the bankers who were the creditors were allowed to have a valid claim so far as the moneys had been expended in paying debts of the society properly payable, they were held not entitled, in ascertaining the amount, to have the benefit of the rule in *Clayton's Case*.

Where a bank, on the death of a guarantor of an account, closed the account and opened a fresh one with the customer to which any subsequent payments by the customer are credited, it has been held by the Court of Appeal that this is justifiable, and that there is nothing to oblige the bank, for the benefit of the surety, to bring subsequent payments into the old account. *In re Sherry. London and County Bank* v. *Terry* (C. A. 1884), 25 Ch. D. 692, 53 L. J. Ch. 404.

AMERICAN NOTES.

The first branch of the rule states the law universally followed here. It is sufficient to refer to *Brady* v. *Hill*, 1 Missouri, 315; 13 Am. Dec. 503, and cases in note, 505; *Baker* v. *Stackpole*, 9 Cowen (New York), 420; 18 Am. Dec. 508 (citing and extensively considering the principal case), and cases in note, 515; *Burks* v. *Albert*, 4 J. J. Marshall (Kentucky), 97; 20 Am. Dec. 209; *Harker* v. *Conrad*, 12 Sergeant & Rawle (Penn.) 301; 14 Am. Dec. 691; *Putnam* v. *Russell*, 17 Vermont, 54; 42 Am. Dec. 478; *McKenzie* v. *Nevins*, 22 Maine, 138; 38 Am. Dec. 291, citing the principal case; *Miller* v. *Miller*, 23 Maine, 22; 39 Am. Dec. 597, and cases in note, 599; *Pickering* v. *Day*, 3 Houston (Delaware), 474; 95 Am. Dec. 291; *Parks* v. *Ingram*, 22 New Hampshire, 283; 55 Am. Dec. 153; *Hersey* v. *Bennett*, 28 Minnesota, 86; 41 Am. Rep. 271; *Robie* v. *Briggs*, 59 Vermont, 443; 59 Am. Rep. 737; *Haynes* v. *Nice*, 100 Massachusetts, 397; 1 Am. Rep. 109; *Snyder* v. *Robinson*, 35 Indiana, 311; 9 Am. Rep. 738; *Stuart, &c. Bank* v. *Hollingsworth*, 78 Iowa, 575; 6 Lawyers' Rep. Ann. 92; *Washington Nat. Gas Co.* v. *Johnson*, 123 Penn. St. 576; 10 Am. St. Rep. 553; *Phillips* v. *Herndon*, 78 Texas, 378; 22 Am. St. Rep. 59; *Skiles* v. *Watson*, 124 Illinois, 324; *Wood* v. *Callaghan*, 61 Michigan, 402; 1 Am. St. Rep. 597; *U. S.* v. *January*, 7 Cranch (U. S. Sup. Ct.) 572, and other cases cited in note 12 Lawyers' Reports Annotated, 712.

In regard to the second branch it has been held that where there is a continuous account, consisting of many items, if neither party makes an appropriation, the law will apply the payments according to priority of time. The

items of earliest date will be discharged, or so far satisfied as the first payment may extend, and so on. *Willis* v. *McIntyre*, 70 Texas, 34; 8 Am. St. Rep. 574 (citing *Bodenham* v. *Purchas*, 2 B. & Ald. 46; *Truscott* v. *King*, 6 New York, 147; *Harrison* v. *Johnston*, 27 Alabama, 452; *Crompton* v. *Pratt*, 105 Mass. 255), observing, "This is the rule asserted by all the authorities." To the same effect, *Miller* v. *Miller*, 23 Maine, 22; 39 Am. Dec. 597; *Smith* v. *Lloyd*, 11 Leigh (Virginia), 512; 37 Am. Dec. 621; *Parks* v. *Ingram*, 22 New Hampshire, 283; 55 Am. Dec. 153; *Pickering* v. *Day*, 3 Houston (Delaware), 474; 95 Am. Dec. 291; citing the principal case, and observing: "Now where there is a single running account between the same parties, in which third persons are not interested, the application of this rule is well enough, for it will apply the payment according to the justice of the case. . . . There is nothing in the case to warrant the assumption that Sir William Grant intended to lay it down as an inflexible rule applicable alike to all cases. Moreover the case itself did not necessitate the enunciation of such a rule. There had been an account drawn out and delivered to Clayton, showing the appropriation of the payments, to which he made no objection, and the report of the Master states that the silence of Clayton after the receipt of his banking account was regarded as an admission of its correctness. 'Both debtor and creditor must therefore,' says Sir William Grant, 'be considered as having concurred in the appropriation.' So that it is apparent from the case that the appropriation had really been made by the parties themselves. The rule in itself is sound enough. It is its application to cases never contemplated by Sir William Grant that is objectionable. And it seems clear to us that whenever there are intervening equities in favour of third persons, the true doctrine is that the law will apply the payments according to its own notion of the intrinsic justice and equity of the case." Citing *Lysaght* v. *Walker*, 5 Bligh N. S. 1.

The rule finds support in *Wendt* v. *Ross*, 33 California, 369; *Sanford* v. *Clark*, 29 Connecticut, 457; *Horne* v. *Planters' Bank*, 32 Georgia, 1; *Hammett* v. *Dudley*, 62 Maryland, 154; *Fletcher* v. *Gillian*, 62 Mississippi, 8 (where the earlier items were outlawed); *Thurlow* v. *Gilmore*, 40 Maine, 378 (where the earlier items accrued in the debtor's infancy).

ARBITRATION.

SECTION I. — *Nature of Arbitrator's authority.*

No. 1. — VYNIOR'S CASE.

(K. B. 1809.)

RULE.

THE authority of an arbitrator is, at common law, in its nature, revocable, and no act of the party submitting can render it irrevocable; but if the party is bound under a penalty to abide the arbitration, the bond is forfeited by his countermanding the authority.

Vynior's Case.

8 Co. Rep. 81 *b*. – 83 *a*.

Trin' 7 *Jacobi, Rot.* 2629, Robert Vynior brought an [81 b.] action of debt against William Wilde, on a bond of £20. 15 *Julii anno* 6 *regis nunc*. The defendant demanded oyer of the bond, and of the condition thereon indorsed, which was, "that if the above bounden William Wilde do, and shall from time to time, and at all times hereafter, stand to, abide, observe, perform, fulfil, and keep the rule, order, judgment, arbitrament, sentence, and final determination of Wm. Rugge, Esq. arbitrator indifferently named, elected, and chosen, as well on the part of the said William Wilde, as on the part of the said Robert Vynior, to rule, order, adjudge, arbitrate, and finally determine all matters, suits, controversies, debates, griefs, and contentions heretofore moved and stirred, and now depending between the said parties, touching or

concerning the sum of two and twenty pence heretofore taxed upon the said Wm. Wilde, for divers kinds of parish business, within the parish of Themilthorpe in the county of Norfolk, so as the said award be made and set down in writing under the hand and seal of the said Wm. Rugge, at or before the feast of St. Michael the Archangel next ensuing, after the date of these presents, that then," &c. And the defendant pleaded, that the said Wm. Rugge, *nullum fecit arbitrium de et super præmissis*, &c. The plaintiff replied, that after the making of the said writing obligatory, and before the said feast of St. Michael, "scil. 22 Aug. anno 6, supradicto apud Themilthorpe præd' prædict' Willihelm' Wilde per quodd' script' suum cujus datus est eisdem die et [*82 a.] anno revocavit et *abrogavit, Anglicè, *did call back*, omnem authoritatem quamcunque quam idem Willielmus Wilde per præd' scriptum obligatorium dedisset, et commisisset præfat' Willielmo Rugge arbitratori suo, et adtunc totaliter deadvocavit, et vacuum tenuit totum et quicquid dict' Willielmus Rugge post deliberationem ejusdem scripti sibi faceret in et circa dict' arbitrium regulam, &c. unde ex quo præd' Wil'mus Wilde post confectionem præd' scripti, et ante præd' festum Sancti Michaelis tunc prox' sequen' in forma præd' exoneravit, et abrogavit arbitratorem præd' de omni authoritate arbitrandi de et super præmissis in conditione præd' superius specific' contra formam et effectum conditionis illius, et submissionis in ead' mention' idem Robertus petit judicium, &c." Upon which the defendant demurred in law. And in this case three points were resolved. 1. That although W. Wilde, the defendant, was bound in a bond to stand to, abide, observe, &c. the rule, &c. arbitrament, &c. yet he might countermand it ;[1] for a man

[1] Generally speaking, the submission may be revoked at any time before an award is made. Per Dallas, C. J., *Clapham* v. *Higham*, 1 Bing. 89 · S. C. 7 B. Moore, 403. Nor has the stat. 9 & 10 W. III. c. 15, made any difference in this respect, *Milne* v. *Gratrix*, 7 East, 611 ; and the submission may equally be revoked, whether it be by deed, or other writing, or by a judge's order, or order of *Nisi Prius*, *Clapham* v. *Higham*, *Milne* v. *Gratrix*, *ub. sup.* It seems that where the submission is by deed, the revocation ought to be by deed also, according to the rule, — *Unumquodque eo dissolvi ligamine quo ligatum est. Vid. Rex* v. *Watt*, 1 Bing. 121 ; S. C. 7 B. Moore, 473 *Contra*, *Parker* v. *Lees*, 2 Keb. 64.

But the party cannot revoke his bond or deed of submission, *Milne* v. *Gratrix*, *ub. sup.*, but will be liable to be sued upon it. And if after the submission (whether such submission is by a judge's order, order of *Nisi Prius*, or agreement within stat. 9 & 10 W. III.) is made a rule of Court, either party revokes the submission, such party so revoking will be guilty of and liable to an attachment for a contempt. *Milne* v. *Gratrix*, *Clapham* v. *Higham*, *ub. sup.* And where a judge's order contained not only the submission of the parties, but directed that either party

cannot by his act make such authority, power, or warrant not countermandable, which is by the law and of its own nature

should, under certain circumstances, pay to the other such costs as the Court should think reasonable and just; it was held that such order might be made a rule of Court after a revocation, in order to enable the Court to dispose of the question of costs. *Aston* v. *George*, 2 B. and Ald. 395; S. C. 1 Chitty, 200, for a judge's order may be made a rule of Court, without reference to any statute, and so differs from a submission by deed, which can alone be made a rule of Court, by virtue of the stat. 9 & 10 W. III. c. 15; and such submission by deed being revoked, there remains nothing to be made a rule of Court, *ib.* And accordingly in *King* v. *Joseph*, 5 Taunt. 452, where the submission was by deed, and was made a rule of Court after the revocation of the arbitrator's authority, the Court set aside the rule for making the submission a rule of Court.

If there be a submission by a feme sole, and she marry before an award made, it will be a revocation, Com. Dig. Arbit. D. 5; *Anon.*, W. Jones, 388, *Charnley* v. *Winstanley*, 5 East, 266, and the cases cited there; for her marriage is in law a civil death of all her rights, *Andrews* v. *Palmer*, 4 B. and Ald. 252, and such marriage will be a breach of the agreement to submit. *Charnley* v. *Winstanley*, *ub. sup.*

So also the death of either party to a submission before award made is a revocation of the arbitrator's authority, whether the reference is by deed, rule of Court, or whether under an order of *Nisi Prius*, and a verdict taken subject to the award. *Rhodes* v. *Hargh*, 2 B. and C. 345; S. C. 3 Dow. and Ryl. 608, and the cases cited there, *Blundell* v. *Brettargh*, 17 Ves. 232. And where two of the plaintiffs in an action were guardians and trustees of an infant tenant for life, and an award was made against them in their characters of trustees, and respecting the infant's property, before which the infant had died, the Court set aside the award as against the trustees. *Bristow*, and *Others* v. *Binns*, 3 Dow. and Ryl. 184.

It is now usual to provide in an order of *Nisi Prius*, that the death of either party shall not operate as a revocation, but that the award shall be delivered to their personal representatives, according to the suggestion of Abbott, C. J., in *Cooper* v. *Johnson*, 2 B. and Ald. 395. Where a verdict was taken subject to the award of an arbitrator, and by the order of reference, the award was to be delivered to the parties; or, if they or either of them were dead before the making of the award to their respective personal representatives, on or before a given day, with liberty to the arbitrator to enlarge the time for making his award: the plaintiff died before the award was made; and after his death, the arbitrator enlarged the time for making the award. The Court held, that the award made within the enlarged time was good. *Tyler* v. *Jones*, 3 B. and C. 144; 4 Dow. and Ryl. 740. And in *Douse* v. *Coxe*, 3 Bing. 20, the Court held that where there was a clause in the reference, that it should not abate in case either of the parties should die, an award made after the death of one of the parties was good.

It seems that the death of one of several parties on the same side, to a joint and several submission, is not a revocation as to the others. Therefore where differences arose between the owners of a ship and the freighters (the latter having distinct interests in the cargo), and it was agreed between them, that the matters in difference should be referred to arbitration; it was held that the death of one of the freighters before award made only affected the award as to him, and was no revocation as to the others. Per 3 Js. MSS. Hil. Term, 1820, cited in the Addenda, 2 Archb. Practice, p. 24; and where the interest is joint, and the cause of action survives, an award made after the death of one, and against the survivors, might perhaps be good. *Edmunds* v. *Cox*, 2 Chitty, 435. But it would be bad if made not only against the survivors, but also directing the executors of the deceased to give a release, *ib.* and *vid. Bristow* and *Others* v. *Binns*, 3 Dow. and Ryl. 184.

Where after judgment by *nil dicit*, in an action of ejectment to recover posses-

countermandable; as if I make a letter of attorney to make livery or to sue an action, &c. in my name; or if I assign auditors to take an account; or if I make one my factor; or if I submit myself to an arbitrament; although these are made by express words irrevocable, or that I grant or am bound that all these shall stand irrevocably, yet they may be revoked: so if I make my testament and last will irrevocable, yet I may revoke it, for my act or my words cannot alter the judgment of the law to make *that* irrevocable, which is of its own nature revocable. And therefore (where it is said in 5 Ed. IV. 3 b, if I am bound to stand to the award which I. S. shall make, I could not discharge that arbitrament, because I am bound to stand to his award, but if it be without obligation it is otherwise) it was there resolved, that, in both cases the authority of the arbitrator may be revoked; but then in the

sion of a mill, the lessor of the plaintiff and the defendant, by bond, submitted the right of the mill to arbitration, and then the lessor of the plaintiff sued out a *habere facias possessionem*, the Court was of opinion that this act, by taking away the subject matter of the reference, had taken away the possibility of making the arbitration. *Green* v. *Taylor*, T. Jones, 134.

As bankruptcy does not put an end to a suit which the bankrupt has instituted, so therefore it cannot put an end to an arbitration founded on such suit. *Andrews* v. *Palmer*, 4 B. and Ald. 250, and vid. *Snook* v. *Hellyer*, 2 Chit. Rep. 43.

The effect of a revocation of the submission is, to determine the arbitrator's power entirely, and any award made afterwards is a mere nullity. *Milne* v. *Gratrix*, *Marsh* v. *Bulteel*, 5 B. and Ald. 507; 1 Dow. and Ryl. 106; 2 Chit. 317. And in *Clapham* v. *Higham*, *nb. sup.* where a cause was referred under a judge's order, the Court set aside an award, where the arbitrator's authority had been revoked, and notice thereof given to him before the judge's order had been made a rule of Court. But in *King* v. *Joseph*, where the submission was by deed, the Court under similar circumstances, although they set aside a rule that had been obtained for making the submission a rule of Court, refused to set aside the award; Gibbs, C. J., assigning as a reason, that it would deprive the other party of his action. But as the award would be a nullity, an action would be brought, not for non-performance of the award, but for not submitting to arbitration according to the agreement. Indeed if the declaration in an action, founded upon the deed of reference, should under such circumstances aver the making an award, and allege as a breach the non-performance of it; the revocation and notice of it to the arbitrator would be a good plea in bar. *Marsh* v. *Bulteel*, *nb. sup.* Although the reasoning of C. J. Gibbs is not satisfactory, yet the decision in this last case seems more reconcilable to principle than that in *Clapham* v. *Higham*; for it is difficult to see what jurisdiction the Court could have over the award, except it was given to them by making the submission a rule of Court. In the case of a deed, by the revocation the submission is gone, and consequently there is nothing to make a rule of Court. So also it would seem that a revocation, made before a judge's order is made a rule of Court, is also a revocation of the submission; and therefore the submission being gone, there remains nothing to make a rule of Court, which can give them power over any act done, by virtue of the submission. Although if the order contain something ulterior the submission, for the purpose of enforcing that part of the order, it may be made a rule of Court, *supra*, and vid. *Aston* v. *George*, *nb. sup.*

one case he shall forfeit his bond, and in the other he shall lose nothing; for, *ex nuda submissione non oritur actio*:[1] and therewith agrees Brooke in abridging the said book of 5 Ed. IV. 3 b, and so the book of 5 Ed. IV. is well explained. *Vide* 21 H. VI. 30 a. 28, 29; H. VI. 6 b; 49 Ed. III. 9 a; 18 Ed. IV. 9; 8 Ed. IV. 10, 2. It was resolved, that the plaintiff need not aver, that the said William Rugge had notice of the countermand, for that is implied in these words, *revocavit et abrogavit omnem authoritatem*, &c. for without notice it is no revocation or abrogation of the authority;[2] and therefore if there was no notice, then the defendant might take issue, *quod* * *non revocavit*, &c. and if there [* 82 b.] was no notice, it should be found for the defendant; as if a man pleads, *quod feoffavit, dedit*, or *demisit pro termino vitæ*, it implies livery, for without livery it is no feoffment, gift, or demise; but there is a difference when two things are requisite to the performance of an act, and both things are to be done by one and the same party, as in the case of feoffment, gift, demise, revocation, countermand, &c. And when two things are requisite to be performed by several persons; as of a grant of a reversion, attornment is not implied in it, and yet without attornment the grant hath not perfection, but forasmuch as the grant is made by one, and the attornment is to be made by another, it is not implied in the pleading of the grant of one; but in the other case both things are to be done by one and the same person, and that makes the difference. And therewith agrees 21 H. VI. 30 a, where W. Bridges brought an action of debt for £200 on an arbitrament against William Bentley; the defendant pleaded that before any judgment or award made by the arbitrators, the said William Bentley discharged the said arbitrators at Coventry, in the county of Warwick; and it was held a good bar, and yet he did not aver any notice to be given. So it is adjudged in 28 H. VI. 6 b; 6 H. VII. 10, &c.

[1] But an action of assumpsit will lie in case of a breach for revoking the submission, although the submission is not under seal. *Newgate* v. *Degelder*, 2 Keb. 10, 20, 24; 1 Sid. 281. So also where an award is made for the performance of a collateral act, where the submission was without deed, the party may have assumpsit to compel performance, although formerly the contrary was held. *Vid.* n. 5. *Hodsden* v. *Harridge*, 2 Saund. 62 a.

[2] Where the revocation is by express act of the party, notice must be given to the arbitrator: but where the revocation is by marriage or death, no notice of the revocation is necessary. Roll. Ab. Auth. E. pl. 4. *Blundell* v. *Brettargh*, 17 Ves. 232, and *vid.* acc. with Vynior's case, that there need not be an averment in the pleadings, that the arbitrator had notice *Marsh* v. *Bulteel*, 5 B. & Ald. 507; 1 Dow. & Ryl. 106; 2 Chit. 317.

3. It was resolved, that by this countermand or revocation of the power of the arbitrator, the obligee shall take benefit of the bond, and that for two reasons. 1. Because he has broken the words of the condition, which are "that he should stand to, and abide, &c., the rule, order," &c., and when he countermands the authority of the arbitrator, "he doth not stand to and abide," &c., which words were put in such conditions, to the intent that there should be no countermand, but that an end should be made, by the arbitrator, of the controversy, and that the power of the arbitrator should continue till he had made an award; and when the award is made, then there are words to compel the parties to perform it, *scil.* observe, perform, fulfil, and keep the rule, order, &c., and this form was invented by prudent antiquity; and it is good to follow in such cases the ancient forms and precedents, which are full of knowledge and wisdom; and with this resolution agrees the said book of 5 Ed. IV. 3 b, which is to be intended, *ut supra*, that the obligor cannot discharge the arbitrament, but that he shall forfeit his bond, and the book gives the reason, which is the cause of this resolution, *scilicet*, because I am bound to stand to his award, *scilicet*, "to stand to his award," which I do not when I discharge the arbitrator. The other reason is, because now the obligor has by his own act made the condition of the bond (which was indorsed for the benefit of the obligor, to save him [* 83 a.] from the penalty of the bond) impossible * to be performed, and by consequence his bond is become single, and without the benefit or help of any condition, because he has disabled himself to perform the condition.[1] *Vide* 21 Ed. IV. 55 a, *per* CHOKE; 18 Ed. IV. 18 b, and 20 a. If one be bound in a bond, with condition that the obligor shall give leave to the obligee for the space of seven years to carry wood, &c., in that case, although he gives him leave, yet if he countermands it, or disturbs the obligee, the bond is forfeited. And afterwards judgment was given for the plaintiff.

[1] Accordingly where two parties entered into an agreement to refer a dispute to the arbitration of C. S. and bound themselves mutually in a penalty, "for the true and faithful observance and performance" of the award to be made by C. S., it was held that the penalty was incurred by a revocation of the submission. Abbott, C. J., observed, in delivering the judgment of the Court, that the second reason in Vynior's case was clearly applicable to the present; and further observed that the distinction drawn between the different words cited, ("observe, perform, fulfil, and keep," &c., and "stand to and abide," &c.), was extremely nice and subtle, and that he could not discover any real and substantial difference between them. *Warburton* v. *Storr*, 4 B. & C. 103.

ENGLISH NOTES.

The report of the principal case is taken from the edition of Coke's Reports published by J. F. Fraser in 1826, and the notes by the learned editor contain a full review of the authorities up to that date. These notes have been printed as they stand in the above-mentioned edition; but it should be observed that the learned editor has in several places fallen into the common error of using the word "submission" instead of "authority of the arbitrator," as that which may be revoked.

It will be seen from the note on p. 359, *ante*, that although a submission had been made a rule of Court under 9 & 10 W. III. c. 15 (which provides for this being done where there is an agreement to that effect in the submission), the authority of the arbitrator was still revocable; although, perhaps, if the submission while standing unrevoked had been made a rule of Court, the party revoking might have been deemed in contempt for breach of the order.

By the Act made in 1833, 3 & 4 W. IV. c. 42, s. 39, it was enacted that the power of the arbitrator appointed in pursuance of a rule of Court made in an action, or in pursuance of a submission containing an agreement that the submission should be made a rule of Court, is not revocable by any party, without the leave of the Court. By the same section power was given to the Court to enlarge the time for making an award.

And by the C. L. P. Act, 1854 (17 & 18 Vict. c. 125), it was enacted (by s. 17) that every submission might be made a rule of Court, unless the agreement expressed a contrary intention.

But, notwithstanding these enactments, it remained the law that where there was no agreement that the submission should be made a rule of Court, and where no action was pending, the authority (although the submission has been made a rule of Court) is revocable. *In re Rouse & Meier* (1871), L. R., 6 C. P. 212, 40 L. J. C. P. 145; *Randell* v. *Thompson* (C. A. 1876), 1 Q. B. D. 748, 45 L. J. Q. B. 713.

Where however by a contract containing an arbitration clause it was agreed that the provisions of the C. L. P. Act, 1854, with regard to arbitrations, should apply to the arbitration thereby agreed to, it was held that the contract by incorporating s. 17 of the C. L. P. Act 1854 impliedly provided for the submission being made a rule of Court; and that consequently the authority of an arbitrator who had been appointed under the submission could not be revoked. *In re Mitchell & Izard* (C. A. 1888), 21 Q. B. D. 408; 57 L. J. Q. B. 524.

By the Arbitration Act, 1889 (52 & 53 Vict. c. 49, which repealed

the clauses of the former Acts above mentioned) it is enacted (s. 1) as follows: "A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a Judge, and shall have the same effect in all respects as if it had been made an order of Court."

The language of this enactment is not so clear as to have escaped criticism. As Lord Justice Bowen points out in *Re Smith & Nelson* (1890), 25 Q. B. D. 545, at p. 547, the language "A submission shall be irrevocable" is ambiguous; the word "irrevocable" being applicable not to the agreement to refer, but to the authority of the arbitrator. And as to the latter words "and shall have the same effect in all respects as if it had been made an order of Court." the same learned authority observes (at p. 554) "the meaning must be that the submission, whether it be a general agreement to refer or not, is to have the same effect as would have been given to it before the statute by an act of the parties making it a rule of Court." He continues: "Making a submission a rule of Court never gave the power of compelling a party to go on and present himself before some arbitrator or another when the arbitrators were not named."

The above-mentioned case of the arbitration between *Smith* and *Nelson* (1890), 25 Q. B. D. 545, 59 L. J. Q. B. 533, is itself a ruling case upon the application of the common law under the conditions of the Arbitration Act 1889. The case arose out of a contract of charter-party which contained a clause referring any disputes which might arise to three arbitrators, — one to be appointed by each party and the third by the two arbitrators so appointed. The vessel not arriving until after the day named for being placed at the disposal of the charterer, the charterers would have nothing to do with her, and the shipowners claiming damages for breach of the contract appointed an arbitrator and gave the charterers notice to appoint one also, but this they failed to do. The shipowners obtained an order in Chambers within seven days from the date of the order to appoint an arbitrator in terms of the submission contained in the contract. The Divisional Court (Lord Coleridge, C. J., and Willes, J.,) upheld the order, and the charterers appealed.[1]

[1] The clauses of the Arbitration Act chiefly referred to in the discussion were sections 1, 5, 6, and 27, which are as follows: —

"1. A submission unless a contrary intention is expressed therein shall be irrevocable, except by leave of the Court or a Judge, and shall have the same effect in all respects as if it had been made an order of Court."

"5. In any of the following cases: —

"(*a*) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen con-

It was admitted in the course of the argument that the case did not come within the sections 5 or 6, and the question turned on sections 1 and 27. The Appeal Court consisting of Lord Esher, M. R., Lindley, L. J., and Bowen, L. J., came unanimously to the conclusion that the Court below had no jurisdiction to make the order appealed from, and the appeal was allowed.

The judgment of Bowen, L. J., sufficiently represents the *ratio decidendi* of the Court, and is in itself a good exposition of the joint effect of the common law and the Acts.

This judgment, as succinctly reported in the Law Journal (59 L. J. Q. B. D. 536), is as follows: "We have to construe section 1 of the Arbitration Act 1889. The word 'submission' is a word used with some inexactitude, both in the cases and in the text-books. An agree-

cur in the appointment of an arbitrator:

"(*b*) If an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy:

"(*c*) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him:

"(*d*) Where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy:

"Any party may serve the other parties, or the arbitrators as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

"If the appointment is not made within seven clear days after the service of the notice, the Court or a Judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

"6. Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention: —

"(*a*) If either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place:

"(*b*) If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent:

"Provided that the Court or a Judge may set aside any appointment made in pursuance of this section."

"27. In this Act, unless the contrary intention appears, 'submission' means a written agreement to submit present or future differences to arbitration, whether an arbitrator be named therein or not."

ment to refer to arbitration was always irrevocable by one of the parties, but there may be an agreement to clothe a particular arbitrator with authority, which authority could be revoked, and then the agreement in that sense became useless. The distinction between the two cases, which must be borne in mind, is pointed out by Lord Justice Mellish in *Randell* v. *Thompson*, 1 Q. B. D. 748, 45 L. J. Q. B. 713. The difficulty here is that the definition of 'submission,' given in section 27 of the Act of 1889 includes cases in which the arbitrator is not named. The statute 3 & 4 Will. IV. c. 42, s. 39, recognised the distinction, and enacted that the power and authority of an arbitrator was not to be revocable by any party to the reference when it had been made a rule of Court; but the mandate given to the arbitrator was revocable. The difficulty here arises with regard to the latter words of section 1 of the Act of 1889, that the submission is to have the same effect as if it had been made an order of the Court. It was said that the agreement here is a general agreement to refer, and is to have the same effect in all respects as if it had been made an order of the Court; but the mere fact of making a submission a rule of Court did not give the Court power to compel a party to appoint an arbitrator when the arbitrator was not named in the submission.

"The Act of Will. IV. therefore, would not have applied to such an agreement as this. The power of the Court to attach a party for not appointing an arbitrator is explained in the judgment of Mr. Justice Willes in *In re Rouse & Meier*, L. R., 6 C. P. 212, 40 L. J. C. P. 145, from which it does seem that a party might be attached if he revoked the authority of the arbitrator after he had been appointed, and after the submission had been made a rule of Court. I can find no authority, however, where a party has been attached for not appointing an arbitrator in accordance with the agreement to refer; and if the practice was not to make the submission a rule of Court until after the arbitrator has been appointed, then no such authority would be found. I am not sure whether the submission in the case of *In re Rouse & Meier* was made a rule of Court before the arbitrator was appointed, but the object of making it a rule of Court was to give the Court power to enforce the award. There is certainly no case in which specific performance of an agreement like this has been granted, nor have I ever heard of an attachment at common law against a party for not appointing an arbitrator in accordance with an agreement to refer."

The result appears to be that, when once an arbitrator is duly appointed, his authority is irrevocable; but there is no power to compel an unwilling party to proceed with a reference except in the cases specially provided for, formerly by the C. L. P. Act 1854, and now by the 5th and 6th sections of the Arbitration Act 1889. The submission

or agreement to refer is itself, as it always has been, irrevocable; but where an arbitrator has not been appointed, and in a case to which the 5th and 6th sections of the Act of 1889 do not apply, there are no means by which one of the parties can compel the other, if unwilling, to proceed with the reference.

It has been decided that the jurisdiction of the Court to appoint an arbitrator under s. 5 of the Act arises only in a case where the submission is silent, or where the parties have provided no machinery for the appointment. *Re Wilson & Son and the Eastern Counties Navigation, &c. Co.* (21 Nov. 1891), 1892, 1 Q. B. 81, 61 L. J. Q. B. 237.

In an agreement for the sale of goods the bought note contained the provision that any dispute should be settled by arbitration, but the sold note contained no such provision. It was held by Denman, J., and Wills, J., that there was no submission within clause 27 of the Act. *Caerleon Tinplate Co.* v. *Hughes*, 3 July, 1891, 60 L. J. Q. B. D. 640, 65 L. T. 118.

It has been decided by Day, J., and Collins, J., that a written agreement under s. 27 of the Act includes a reference made by agreement in an action embodied in terms indorsed by counsel on their briefs. *Aitken* v. *Bachelor* (30 Jan'y, 1893), 62 L. J. Q. B. 193, 68 L. T. 530.

As to the leave to revoke the authority under s. 39 of the Act 3 & 4 W. IV. c. 42 (which is doubtless *in pari casu* with the leave under sec. 1 of the Act of 1889), it has been held not enough, in the case of an ordinary commercial contract, to suggest that the question to be determined is a pure question of law. The parties have chosen to make it part of their contract that in case of any dispute the matter in dispute should be settled by arbitration. The intention evidently was to avoid all litigation, and to have all differences settled by persons conversant with commerce. *Forwood* v. *Watney* (1880), 49 L. J. Q. B. 447, per Cockburn, C. J., p. 448.

A very special case in regard to such leave is presented by the appeal in the House of Lords, *East and West India Dock Co.* v. *Kirk* (1887), 12 App. Cas. 738, 57 L. J. Q. B. D. 295. The question arose upon a contract for the construction of docks, containing a clause for the settlement by an arbitrator of differences as to the meaning of the contract and anything to be done thereunder, and for the submission to be made a rule of Court. An arbitrator was duly appointed, and in the proceedings before him certain evidence was tendered by the contractors which was objected to by the company on the ground that the rights and obligations between the parties were contained in the contract in writing, and could not be affected by the alleged fact (which was denied) that the soil, or the depth of the work, proved to be of an unexpected character. The arbitrator overruled the objections on

grounds which he embodied in a written decision. The company (as the report states) moved for leave to revoke the submission (*scilicet*, meaning "to revoke the authority of the arbitrator appointed in pursuance of the submission"). A rule *nisi* was granted by Smith, J., and Grantham, J., accordingly; but was discharged by a Divisional Court consisting of Grove, J., and Stephen, J. The latter decision was affirmed by the Court of Appeal (Lord Coleridge, C. J., Lindley, L. J., and Lopes, L. J.), and the company appealed to the House of Lords. The ground of decision both in the Divisional Court and in the Court of Appeal was that the Court had no jurisdiction to interfere with a pending arbitration, unless it was shown that the arbitrator was acting in excess of his jurisdiction. The Lords present at the hearing of the appeal in the House of Lords were Lord Halsbury, L. C., Lord Watson, Lord Fitzgerald, and Lord Macnaghten; and in the course of the argument Lord Halsbury, L. C., intimated that the House had no doubt that it had jurisdiction to give leave to revoke the submission (*scilicet*, meaning the "authority"), if there was reasonable ground for supposing that the arbitrator was going wrong in point of law, even in a matter within his jurisdiction. After hearing out the argument and taking time for consideration, the Lord Chancellor intimated that in the opinion of the House the arbitrator ought to state, as part of and on the face of his award, all the purposes for which he had admitted, and the effect, if any, which he had given to, certain specified classes of evidence — the statement to be in the form of a Special Case; and they gave the contractor the option of consenting to an order being made to that effect; intimating that in default of that consent the rule for leave to revoke the authority would be made absolute. The consent of the contractors was given, and the order of the House was drawn up accordingly to the effect that the order of the Court of Appeal and the latter order of the Queen's Bench Division were reversed, and "that the arbitrator do state, as part of his award, in a Special Case for the opinion of the Court, the purposes for which he has received, and the effect, if any, which he has given to, the five different classes of evidence specified in the five following paragraphs, namely: 1. Evidence as to representations made verbally and in writing, and by the borings, before the signing of the contract. 2. Evidence as to the nature of the soil. 3. Evidence as to the soil being different from that which can be inferred from the drawings, specifications, and schedule. 4. Evidence as to the extra depth of foundations. 5. Evidence as to the fair price to be paid for excavation, brickwork," &c. And that the order *nisi* should be discharged and the matter remitted back to the Queen's Bench Division to do therein as should be just according to the judgment of the House.

No. 1. — Vynior's Case. — Notes.

The effect of the decision of the House of Lords in *East and West India Dock Co.* v. *Kirk* is commented on by the Court of Appeal in a case which came before them shortly afterwards. *James* v. *James* (C. A. 1889), 23 Q. B. D. 12, 58 L. J. Q. B. D. 424. The Queen's Bench Division, DENMAN, J., and STEPHEN, J., had refused the leave, and the Court of Appeal (LINDLEY, L. J., and LOPES, L. J.,) affirmed that refusal. LINDLEY, L. J., says in his judgment (23 Q. B. D. 15): "I do not understand the case of *East and West India Docks Co.* v. *Kirk* as laying down any general rule opposed to what had been the ordinary practice previously. That case being one of a very exceptional character, the House of Lords took the view that it was expedient and right under the circumstances to compel the arbitrator to state a special case with regard to the purposes for which he had received, and the effect which he had given to, certain classes of evidence as to matters involving enormous expense. It was a question of discretion: this Court did not think the circumstances of the particular case such as to render it right to interfere; the House of Lords differed from that view; but I do not think they intended to lay down any general principle on the subject." In the case immediately under consideration the learned LORD JUSTICE went on to observe that the parties asked the arbitrator to decide in the first place the question of liability, and he did decide it; and then the party against whom he decided it comes and asks the Court for leave to revoke the arbitrator's authority. He considered this against good faith; and that the Court ought not to exercise their discretion to interfere. LOPES, L. J., concurred with this judgment.

Doubtless in regard to the "leave of the Court," under the 1st section of the Arbitration Act 1889, the Court has the same discretion as it had under the 39th section of the Act of 3 & 4 W. IV., so that the two last-mentioned decisions will still furnish a rule as to the jurisdiction and discretion of the Court under the later Act. See the reference to the case of *East and West India Docks Co.* v. *Kirk*, 12 App. Cas. 738, 57 L. J. Q. B. D. 295, in *Tabernacle Permanent Building Society* v. *Knight* (*Knight* v. *Tabernacle, &c. Society*) (1892) 1892, A. C. 298, 301, 62 L. J. Q. B. 50, 51.

It was decided by the King's Bench in *Cooper* v. *Johnson* (1819), 2 B. & Ald. 394, that where there is nothing in the reference to the contrary the death of either party was a revocation of the arbitrator's authority; and it was suggested that the effect of the common-law rule might be obviated in a reference by order at *nisi prius* by a clause inserted in the order; and this became the usual practice as mentioned in the note on p. 359, *supra*. In *Macdougall* v. *Robertson* (1827), 2 Y. & J. 11, it was decided by the Exchequer Chamber, affirming a

judgment of the King's Bench, that where the instrument of submission contained a proviso that it should not be determined by death, the proviso was effectual so as to prevent the death operating as a revocation of the authority. In *Lewin* v. *Holbrook* (Ex. 1843), 11 M. & W. 110, 12 L. J. Exch. 267, the order of reference provided that the award might be delivered to the personal representatives of a party who might be dead; and one of the parties having died pending the reference, application was made by the other party that the arbitrator should proceed. The application was refused; PARKE, B., saying: "If you get your award, then you have a remedy against the personal representative, because the defendant has agreed that his assets should be bound thereby; but the Court has no power to direct the arbitrator to proceed." In the case of *Edwards* v. *Davies* (1854), 23 L. J. Q. B. 278, where the order was in a similar form, application was made under 3 & 4 W. IV. c. 42, s. 39, by the executor of one of the parties who had died, for an enlargement of the time for making the award. The Court refused the application on the ground of special circumstances, as well as on the general ground that an arbitration after the death of one of the parties might not be continued on equal terms. For the estate of the deceased may not be solvent, and his executor is not liable to attachment. It will be observed that the Act of 3 & 4 W. IV., which says that the authority shall not be revoked *by any party* does not alter the ordinary rule of the common law as to revocation by death. And although the expression of the Act of 1889, 52 & 53 Vict. c. 49 (s. 1) simply says that the "submission" shall be "irrevocable," this probably means no more than that the authority shall not be revoked by any party as in the Act of 3 & 4 W. IV. (per BRETT, L. J., in *Smith* v. *Nelson*, 25 Q. B. D., at p. 550).

Though not directly within the rule of the principal case, it may be a convenient place here to refer to the point as to the constitution of the authority of an umpire. The authority of the arbitrators to appoint an umpire is to exercise an act of concurrent judgment and choice, and cannot validly be done by lot or by each arbitrator putting a name or names into a hat, and agreeing to appoint the one whose name should be drawn. *Young* v. *Miller* (K. B. 1824), 3 B. & C. 407; *In the Matter of Cassell* (K. B. 1829), 9 B. & C. 624; *Ford* v. *Jones* (K. B. 1832), 3 B. & Ad. 248; *Pescod* v. *Pescod* (21 Dec. 1887), 58 L. T. 76. But an appointment by lot out of two, each of whom has been agreed to as a fit person by both arbitrators, has been held good. *Neale* v. *Ledger* (K. B. 1812), 16 East, 51, 14 R. R. 283, followed in *Re Hopper* (1867), L. R., 2 Q. B. 367, 36 L. J. Q. B. 97. But the Court of Session in Scotland have decided differently. *Smith* v. *Liverpool and London, Globe Insur. Co.* (1887), Court of Session, 4th series, Vol. 14, p. 931.

No. 2. — Filmer v. Delber, 3 Taunt. 486. — Rule.

AMERICAN NOTES.

The doctrine that at common law either party may revoke the arbitration before award is stated in *Bank of Monroe* v. *Widner*, 11 Paige (New York Chancery), 529; 43 Am. Dec. 769; but this is changed by the New York statute. "There can be no doubt that a submission can be revoked at any time previous to an award," but bringing an action on the same cause of action does not work a revocation. *Knaus* v. *Jenkins*, 11 Vroom (New Jersey), 288; 29 Am. Rep. 237. (But bringing suit to enforce a mechanics' lien revokes the submission; *Paulsen* v. *Mauske*, 126 Illinois, 72; 9 Am. St. Rep. 532.)

Submissions being naturally revocable, an agreement not to revoke is invalid. *People* v. *Nash*, 111 New York, 310; 7 Am. St. Rep. 747; 2 Lawyers' Reports Annotated, 180, citing the principal case. See *Buckwalter* v. *Russell*, 119 Penn. St. 495; *Tobey* v. *County of Bristol*, 2 Story (U. S. Circ. Ct.) 800; *Power* v. *Power*, 7 Watts (Penn.), 205.

Mr. Morse cites the principal case (Arb. and Award, p. 230), although he does not tabulate it, and he also cites *Allen* v. *Watson*, 16 Johnson (New York), 205; *Marseilles* v. *Kenton's Executors*, 17 Penn. St. 236; *Aspinall* v. *Tonsey*, 2 Tyler (Vermont), 328; *Tyson* v. *Robinson*, 3 Iredell Law (North Carolina), 333; *Peter's Adm'r* v. *Craig*, 6 Dana (Kentucky), 307; *Leonard* v. *House*, 15 Georgia, 473.

Section II. — *Where the Court will order (or indirectly compel) a reference.*

No. 2. FILMER *v.* DELBER.

(C. P. 1811.)

RULE.

The attorney in an action has a general authority to consent to an order of reference; and the Court will not set aside such order on an affidavit of the party denying the authority.

Filmer v. Delber.

3 Taunt. 486 (s. c. 12 R. R. 688).

Clayton, Serj., moved to set aside an order of *nisi prius* [486] by which this cause had been referred to a barrister, on an affidavit by the defendant, stating that she had expressly desired her attorney not to consent to any rule of reference. No step had

yet been taken by the arbitrator, excepting that he had appointed a distant day for a meeting, in order to give time for this motion. In answer to a question by the Chief Justice, whether there was any precedent for the Court's interference in such a case, Clayton, Serj., cited the case of *Doe d. Carlisle* v. *Morpeth*, 3 Taunt. 378, where the Court intimated that an application might be made to them to vary the terms of the rule of reference.

Mansfield, C. J. That was where it was thought that the intention of the parties had been misunderstood; but here is an express agreement to refer properly entered into by counsel and attorney; it is now said that they had no authority to enter into that agreement; if so, the defendant's remedy is by action against her attorney. There would be no end to these applications if the Court were to interfere; such interference would lead to collusion; when a party did not like the prospect of the reference, he would say that he had never given his attorney authority to refer.

Rule refused.

ENGLISH NOTES.

In *Faviell* v. *Eastern Counties Railway Co.* (1848), 2 Exch. 344, 17 L. J. Ex. 223, the rule was applied to the attorney acting for a corporation, although it was urged that the corporation could itself have entered into a binding agreement of reference only under seal.

The rule was again followed in *Smith* v. *Troup* (C. P. 1849), 7 C. B. 757, 18 L. J. C. P. 209.

But an attorney acting for an infant cannot give a valid consent to an order of reference so as to bind the infant. *Biddell* v. *Dowse* (K. B. as Court of error, 1827), 6 B. & C. 255. This however does not prevent the award being enforced against parties who are *sui juris*. *Wrightson* v. *Bywater* (1828), 3 M. & W. 199. And executors and the estate of a testator may be bound by it, although the persons under disability are not, and may hold the executors liable for a *devastavit*. *In re Warner* (1844), 2 Dowl. & L. 148, 13 L. J. Q. B. 370. Although the attorney acting for an infant has not as such any authority to consent to an order of reference, the Court of Chancery has sometimes made such an order on the ground of its appearing to be for the benefit of the infant to do so; and in such a case will make the award binding on the infant. *Davis* v. *Page* (1804), 9 Ves. 350; *Bishop of Bath and Wells* (a decision of Lord Nottingham), referred to in *Harvey* v. *Ashley*, 3 Atk. 613.

Partnership does not of itself constitute an implied authority to a partner to bind the other partners by a submission. *Stead* v. *Salt* (1825),

10 Moore, 389, 3 Bing. 101. But the partner submitting for the firm is himself bound to perform the award. *Stangford* v. *Green*, 2 Mod. 228.

The attendance of a party at a reference made under a judge's order, is evidence of his consent to the reference. *Wharton* v. *King* (1831), 1 Mood. & Rob. 96. So is an indorsement made under the hand of the parties on the order of reference. *Lievesley* v. *Gilmore* (1866), L. R., 1 C. P. 570, 35 L. J. C. P. 351. And in either case an action will lie upon the award in respect of the implied promise given by the consent to the reference.

AMERICAN NOTES.

The principal case is cited with approval by Weeks (Attorneys), section 222, citing no others. The attorney may consent to the reference and stipulate as to the referee's compensation. Such a stipulation is "the consent of the parties in writing," within the statute. *Mark* v. *City of Buffalo*, 87 New York, 184. The Court said: "In all that properly relates to the conduct of a trial, the attorney represents the party and is his authorised agent. The attorney's agreement and stipulation within the boundaries of that authority is the agreement and stipulation of the client, and binds the latter as if he himself had personally made it."

No. 3. — WILLESFORD *v.* WATSON.

(CH., FULL COURT OF APPEAL, 1873.)

RULE.

WHERE an action is brought upon a contract containing an arbitration clause, the Court will, on the application of a defendant, liberally apply the provision of section 11 of the C. L. P. Act 1854 (now embodied in ss. 4 & 27 of the Arbitration Act 1889) for having the matter referred to arbitration.

It is no valid argument against the application that the arbitrator may give a wrong decision upon a point of law, such as the construction of the contract, and that there will be no appeal. For the finality of the decision is presumably one of the objects intended by the clause.

Nor is it an objection that there may be other defend-

ants who would be barred from insisting on an arbitration by reason of their not having been all along willing to have the matter referred.

Willesford v. Watson.

42 L. J. Ch. 447–452 (s. c. L. R. 8 Ch. 473–481, 28 L. T. 428, 21 W. R. 350).

[448] The plaintiffs were the owners of an estate in the county of Devon, called Capel Tor, and the bill was filed to restrain the defendants, who were lessees of the mines and minerals under the estate, from making use of a shaft sunk through the plaintiffs' land for the purpose of working the adjoining mines, of which the defendants were also the lessees under Earl Fortescue.

The lease by the plaintiffs to the defendants was dated the 25th of April, 1866, and contained the following clause: —

"Provided always, and it is hereby agreed and declared that if and whenever any dispute, question or difference shall arise between the said parties to these presents or their respective heirs, executors, administrators or assigns touching any dues or moneys payable or retainable, under these presents, or the price to be paid for any engine, machine or apparatus taken by the lessors, their heirs or assigns, in pursuance of the provisions in that behalf hereinbefore contained, or touching these presents, or any clause or matter or thing herein contained, or the construction hereof, or the working of the said mines, or any compensation or satisfaction to be paid or made, or any other thing to be done under the covenants by the lessees herein contained, or touching the rights, duties and liabilities of either party in connection with the premises, the matter in difference shall be referred to two arbitrators or their umpire, pursuant to, and so as in all respects to conform to the provisions in that behalf contained in the Common Law Procedure Act 1854."

The plaintiffs, on discovering that the defendants had sunk a shaft through the plaintiffs' land in a slanting direction into the adjoining land of Lord Fortescue, and were making use of it for the purpose of working the mines under Lord Fortescue's lands, and bringing minerals and refuse therefrom into the plaintiffs' land, objected to this being done without a license, which they were willing to grant upon reasonable terms as to compensation. No agreement, however, could be come to, and the bill was accordingly filed for an injunction. Thereupon, two of the defendants

took out a summons to stay proceedings, and to refer the matters in dispute to arbitration, under the 11th section of the Common Law Procedure Act 1854 (17 & 18 Vict. c. 125).[1]

The summons was adjourned into Court, and upon the hearing, WICKENS, V. C., was of opinion that the defendants were entitled to the order. It appearing however, that one of the defendants had * not joined in the application, the order was not [*449] drawn up until he also had consented to be bound by the judgment.

The plaintiffs now appealed from the order.

Mr. Greene and Mr. Dunning, for the appellants. The question raised by the bill is not within the agreement to refer to arbitration, and the Court has no jurisdiction. The lease is only for the purpose of working the mines under our land, and it has nothing to do with those under Lord Fortescue's land. *Cook* v. *Catchpole*, 34 L. J. Ch. 60; *Cooke* v. *Cooke*, L. R., 4 Eq. 77, 36 L. J. Ch. 480; *Wood* v. *Robson*, 15 W. R. 756; *In Wheatley* v. *The Westminster Brymbo Coal and Coke Company*, 2 Dr. & S. 347; what had been done was admittedly done in pursuance of the powers of the lease, and that case therefore has no application. In the next place, this is not a proper case for making the order. It is simply a question of law whether the defendants are entitled to bring minerals from a foreign mine upon our land, and an arbitrator could not give us the injunction we ask for by our bill.

They referred also to *Llanelly Railway and Dock Company* v. *London & North Western Railway Company*, L. R. 8 Ch. 943, L. R.

[1] The section enacts as follows: "Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the Court in which such action or suit is brought, or a judge thereof, on application by the defendant or defendants or any of them after appearance, and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was, at the time of the bringing of such action or suit, and still is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action, or suit, on such terms, as to costs and otherwise, as to such Court or judge may seem fit. Provided always that any such rule or order may at any time afterwards be discharged or varied as justice may require."

7 Ap. Cas. 550, 42 L. J. Ch. 884; and to *Witt* v. *Corcoran*, L. R. 8 Ch. 476 n., 6 Notes of Cases, 133; W. N. 1871, p. 144.

Mr. Dickinson, Mr. Charles Hall, and Mr. Romer, appeared for the respondents, but were not called upon to support the order.

The Lord Chancellor. We all agree that the Vice Chancellor has come to a right conclusion in this case. The whole argument has really depended upon two things; first, upon the construction of the agreement; and secondly, upon the construction of the Act of Parliament.

With respect to the agreement, one cannot but be struck with these two points; first of all, that it is as absolute a contract as the law permitted these parties to make *inter se*, that such questions as this agreement according to its true construction refers to, shall be referred to arbitration. It does not give the one party or the other an option, which the other may dissent from; but all the parties to this agreement are bound by it as far as such a contract can by law bind them. Then what is it which they are to refer to arbitration? It struck me throughout that the endeavour of the defendants has been to require this Court, in dealing with a clause of this description, to do the very thing which the arbitrators ought to do; that is to say, to look into the whole matter, to construe the instrument, to decide whether the thing which is complained of is inside or outside the contract, and then to limit the arbitrator's power to those things which are determined to be within it. In all such cases the real question between the parties is whether it is within or whether it is without the contract. Here, with even more than ordinary care, the parties seem to have taken pains to throw in words that cover all things collateral as well as all things expressed, because that which they agree to refer is every question; first of all "touching any dues or moneys payable or retainable under these presents;" that no doubt is something provided for expressly by the agreement; secondly, "or the price to be paid for any engine, machine or apparatus taken by the lessors, their heirs or assigns, in pursuance of the provisions in that behalf hereinbefore contained;" that again is a thing which is within the provisions of the lease; thirdly, "or touching these presents, or any clause or matter or thing herein contained or the construction hereof." Whenever, therefore, there is a dispute between the parties as to whether the instrument, according to its true construction, does or does not warrant a particular thing to be done, they

have agreed that that shall be referred to arbitration, and it would be extravagant to say that if the Court think that according to the true construction of the *instrument the thing [*450] ought not to be done, therefore the dispute is not to be referred to arbitration.

But it does not stop there. After having thus exhausted apparently everything which is necessarily within the terms of the lease, it goes on to say, "or the working of the said mines." What can be larger? Any question whatever as to the working of the mines is to be referred. Then it goes on with another provision — "or any compensation or satisfaction to be paid or made, or any other thing to be done under the covenants by the lessees herein contained." The lessors, as I observed in reading the lease, reserve to themselves a right to interfere with the workings and privileges of the lessees, making them compensation. Then, all that having been said, these words are superadded to the whole, "or touching the rights, duties and liabilities of either party in connection with the premises." Now these words, "in connection," evidently are apt to include, and I think must have been intentionally used to include, everything relating to the demised property and the use of it, even though it might arise out of collateral matters between the parties, and I cannot but think that the very facts of this case and the nature of the present controversy, independently of anything that I find in the letter of the lease, strongly indicate the reasonableness of such a provision. I do not suppose those words were put in in foresight of the exact controversy which has arisen, but, if they had been, their use would have been very well illustrated by it, because the real controversy, or at least one main part of the controversy, as I perceive by a letter which is stated in the fifteenth paragraph of the bill, is this, whether the objections which the plaintiffs are now making to the manner in which the defendants are using the mine are not against the faith of the real contract between them, against the faith of what passed in a matter as to which, as I should collect, the defendants intend to say equity would preclude the plaintiffs from acting contrary to what was really understood between the parties. I am not going, of course, to say anything as to the way in which the arbitrator, with all the evidence before him, may view that point; but I cannot help thinking it reasonably clear that, under those words in the arbitration clause, if, subsequently to the exe-

cution of the lease, there had been communications between the parties, and the landlords had given a verbal consent to something which the lease did not authorize, and money had been expended upon the faith of this thing being done, that would be a matter which the arbitrator would with perfect propriety take into account. So, if there were a contemporaneous collateral agreement having any equitable force which added something to, or took something away from, the rights of either party, I cannot but think that these words, "or touching the rights, duties and liabilities of either party in connection with the premises," would perfectly authorize the arbitrator, indeed, would make it his duty, to take all those matters into account, in order to see what were the mutual rights and liabilities of the parties in respect of the demised property at the time when the question arose.

Then, I also think, some doubt having been expressed about it, that it would be perfectly within the arbitrator's power to direct money to be paid, if he thought money should be paid for something which he deemed to have been wrongfully done by the lessees according to his view of their rights. It appears to me, therefore, that there is no reason to doubt that the present controversy is within the terms of the agreement of reference, or that the arbitrator would have as large powers as arbitrators ever can have to do justice under it.

When we are told that this is an arbitrary tribunal, final and without appeal, and so forth; and that these are not fit questions to go before an arbitrator, I think that the Legislature, by the Act of Parliament under which the Court is now acting, have given the answer to that argument. If parties choose to determine for themselves that they will have a domestic *forum*, instead of the ordinary Courts under that Act of Parliament and since that Act [* 451] was passed, a *prima facie* duty is cast upon the Courts * to act upon such an agreement. The parties have made such an agreement here; they probably knew what were the reasons in favour of determining these questions by arbitration, and what were the reasons against so doing, and they have made it part of their mutual contract that these questions should be so determined. They cannot, therefore, be heard to complain if that part of the contract is carried into effect.

Then it is said that the arbitrator cannot grant an injunction. Beyond all possible doubt, he cannot grant an injunction, but he

might say that a particular thing was not to be done, and, there being liberty to apply to this Court, this Court would grant an injunction to prevent its being done. I agree that, if in the present state of circumstances the Court saw there was a case for now granting an injunction, that would be an extremely good reason for not sending the matter to arbitration. But nothing has been said to us which has any tendency whatever to make us think that in the present state of circumstances there is a case for now granting an injunction.

Then with regard to the only other argument, namely, that it is a condition precedent under section 11 of the Act to the obtaining such an order as this that every defendant must, before the suit began, have been willing, and must still continue willing to go to arbitration. I do not think it is so, according to the true construction of the section. The clause is certainly imperfectly expressed, and looks very much as if it had undergone a process of amendment at a time when the language was not very accurately considered, but the substance of it is this — it clearly gives a right to one of several defendants to make the application to the Court, taking notice that there may be more than one defendant. That by itself tends to show that it does not mean to make it necessary that the application should be the application of all the defendants, unless afterwards there had been such clear words as necessarily to lead to that conclusion. But the words which follow are — "If the defendant before the institution of the suit was, and still is ready and willing." Does not that mean the same defendant who is making the application? And that view of the meaning of the section is surely fortified by considering the whole nature of the case. The nature of the case is this, that several parties have met together, and by an agreement in writing have determined that certain disputes shall be referred to arbitration. Those parties have a wish to have that agreement performed, and it is not the dissent of somebody else whether he be a co-defendant or whether he be a plaintiff, which ought to prevent the Court from performing it.

The result is, in my judgment, that the Vice Chancellor's opinion is correct, and the appeal motion must be dismissed with costs.

James, L. J. I am of the same opinion. With regard to one argument pressed upon us, that we ought not to send the matter

to arbitration, because the arbitrator would decide without appeal, I can easily conceive that sensible men may possibly have had that very thing in their view; that they may even have preferred running the chance of the arbitrator's making a mistake, to having every matter in dispute between them brought into this Court or a Court of law, to having the dispute heard by the VICE CHANCELLOR, then on appeal by this Court, with perhaps an ultimate appeal to the House of Lords. I can conceive that sensible men may even prefer an arbitrator, to being at liberty to carry one another through litigious proceedings in three successive Courts.

With regard to the other points, I entirely agree with what the LORD CHANCELLOR has said. It appears to me that any defendant has a right to make this application, and that there is no difficulty arising from the absence of another defendant. If this Court saw that the thing could not be effected without the concurrence of somebody else who would not concur, that would be a sufficient reason why the matter should not be sent to arbitration. But if the other person is willing now to concur, there is no difficulty in substance. I think there is no difficulty upon the words of the section.

[*452] *MELLISH, L. J. I am of the same opinion.

ENGLISH NOTES.

The section of the Arbitration Act 1889 (52 & 53 Vict. c. 49), which replaces and substantially embodies the 11th section of the Common Law Procedure Act 1854, is the following: —

Section 4. "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a Judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

The cases in which a reference under this enactment, or the corresponding clause of the C. L. P. Act 1854, has been ordered, are very

numerous; and it may be said generally that the Court will not without strong grounds refuse to make the order in a case coming within the statutory conditions. The order always reserves liberty to apply; and in effect places the matter in the same position as if the reference had been made by an order of Court.

The following are reported cases in which orders have been made under the 11th section of the C. L. P. Act 1854, or the corresponding section (4) of the Arbitration Act 1889: —

In *Russell* v. *Pellegrini* (1856), 6 El. & Bl. 1020, 26 L. J. Q. B. 75, there was a cross-claim under the contract which according to the then system of pleading could not have been pleaded, and otherwise there was no defence. The Court of Queen's Bench (Lord Campbell, C. J., Coleridge, J., Wightman, J., and Erle, J.) stayed the action, so as, in effect, to compel a reference of both claims.

In *Hirsch* v. *Im Thurn* (1858), 4 C. B. (N. S.) 569, 27 L. J. C. P. 254, the contract was for sale of seed "warranted fair merchantable quality," with an arbitration clause in general terms. The action was by the purchaser for breach of warranty, and he pleaded amongst other things that the defendant knew of the inferior quality. The Court held that the issue of fraud could not properly arise, and that there was no reason why effect should not be given to the agreement to refer. The order was made accordingly.

In *Seligman* v. *Le Boutillier* (1866), L. R., 1 C. P. 681, the Court of Common Pleas in a full Court (Erle, C. J., Willes, J., Byles, J., and Montague Smith, J.,) followed the decision of the Queen's Bench in *Russell* v. *Pellegrini*, *supra*.

In *Randegger* v. *Holmes* (1866), L. R., 1 C. P. 676, an action on a charter-party, the Court of Common Pleas (Willes, J., Erle, C. J., Byles, J., and Montague Smith, J.) considered that it was no answer to the application under the 11th section of the C. L. P. Act 1854, to say that the difference was one of law as to the construction of the instrument.

In *Plews* v. *Baker* (1873), L. R., 16 Eq. 564, 43 L. J. Ch. 212, a partnership suit had been instituted by a bill alleging breaches of the partnership articles, and praying that accounts should be taken on the footing of the partnership being dissolved. On the motion of the defendant, V. C. Bacon stayed the proceedings (except for the purpose of giving effect to an order which had been made appointing a receiver), in order that the question as to the validity of the notice for dissolution might be determined by arbitration.

In *Russell* v. *Russell* (M. R. 6th Feb. 1880), 14 Ch. D. 471, 49 L. J. Ch. 268, there was a dispute arising out of a partnership. The articles provided for the continuation of the partnership for a term of

seven years subject to a certain power to give notice to dissolve, and contained an arbitration clause in general terms. The defendant had given notice of dissolution. The plaintiff sued for a declaration that the notice was void, and for consequential relief. The defendant moved under section 11 of the C. L. P. Act 1854. The plaintiff by his affidavit stated that the defendant had under the circumstances set forth, formed a fraudulent scheme to exclude him from the benefit of certain business under the partnership, and that the notice of dissolution was given under this scheme, and not *bonâ fide*. The Master of the Rolls (Sir George Jessel) observed that the only point was whether this was a case in which the Court ought, in the exercise of the discretion given to it by the Act, to refuse to allow the matter, which had been expressly agreed to be referred to arbitration, to be so referred. As a rule, he further observed, the cases in which that discretion ought to be exercised are few and exceptional. "Persons enter into these contracts with the express view of keeping their quarrels from the public eye, and of avoiding that discussion in public which very often is a painful discussion, and which might be an injury even to the successful party to the litigation, and most surely would be so to the unsuccessful." The Master of the Rolls then combated the position which had been argued that an issue of actual fraud entitled the person raising it to have the issue tried in open court. On this part of the judgment he concluded by saying: "I for one do not wish to countenance the doctrine that the mere fact of a person — a partner who has a contract in a deed to refer partnership disputes to arbitration — making a charge of fraud against a co-partner, is sufficient to prevent the co-partner insisting upon a reference to arbitration. As I conceive, the Court ought only as a matter of course to refuse the reference upon investigating the circumstances, and where the person charged with the fraud desires the inquiry in open court." He further observed that even in a case where the Court ought to exercise its discretion by refusing the motion, there must be sufficient *primâ facie* evidence of fraud: that the circumstances set forth did not amount to such a *primâ facie* case; and the general charge of fraud amounted to no more than a statement of belief, only calling upon the defendant to deny the statement, which he did by his affidavit in reply. "I consider therefore," he concluded, "that whether or not there may be cases in which, at the instance of the person charging fraud, the Court can properly refuse to refer the matter to arbitration, in the present case there is no such *primâ facie* case of fraud made out as ought to induce the Court to interfere as far as regards the exercise of a judicial discretion; and therefore I think I ought to grant the motion."

The Railway Passengers Assurance Company were constituted under a Special Act (in 1864), containing a clause similar to section 11 of the C. L. P. Act 1854 applying to all questions arising on any contract of assurance made by them. In *Minifie* v. *Ry. Pass. Ass. Co.* (1881), 44 L. T. 552, the question in an action by the representatives of one of the assured was whether he had met his death by accident or disease. A divisional Court (POLLOCK, B., and STEPHEN, J.,) held that there was no reason why this question should not be referred to arbitration, and stayed the action accordingly. In *Hodgson* v. *Ry. Pass. Ass. Co.* (C. A. 1882), 9 Q. B. D. 188, there was a similar application. The Judge made an order, on the application of the defendants, to stay proceedings; and this had been affirmed by a Divisional Court. In the Court of Appeal, the MASTER OF THE ROLLS (Sir G. Jessel), said: "The plaintiffs here [who resisted the motion to stay proceedings] are in the position of a party applying, and if there is any reason why the matter should not be referred to arbitration, it is their duty to bring it forward and present it to the judge; and if they cannot do so, the judge is quite justified in being satisfied that there is no reason." LINDLEY, L. J., and BOWEN, L. J., were of the same opinion; and the order to stay proceedings was accordingly affirmed.

Compagnie du Senegal v. *Woods & Co.* (1883), 53 L. J. Ch. 166, was an action arising out of a shipbuilding contract between the plaintiffs and a firm of Smith & Co. Wood & Co., as mortgagees of the interest of Smith & Co., were made co-defendants with them. The plaintiffs had moved for the appointment of a receiver, and the defendants moved for an order to stay in respect of an arbitration clause in the contract. It was conceded that it was proper to appoint a receiver in the interests of all parties. Mr. Justice KAY decided that he had jurisdiction to grant the application to stay as well as by the same order to appoint a receiver; and he made that order accordingly. This decision was followed by STIRLING, J., in *Pini* v. *Roncoroni* (5 Feb. 1892), 1892, 1 Ch. 633, 61 L. J. Ch. 218.

In *Cope* v. *Cope* (1885), 52 L. T. 607, the principal case is followed by KAY, J., in an action brought by the executors of a deceased partner against the surviving partner for winding up the affairs of the partnership. The question argued was whether the matter in question — the purchase of the share of a deceased partner — was within the agreement of reference.

While it is clear, on the one hand, that the application to stay will be granted unless reason is shown to the contrary, it is clear, on the other hand, that the Court or Judge has a discretion to refuse to grant it.

No. 3. — Willesford v. Watson. — Notes.

It seems proper here to observe that the comparative frequency of reported cases where the application has been granted or refused is no sort of measure of the comparative frequency of the actual cases which occur. The cases where such applications have been granted with or without a contest are exceedingly numerous, and frequently considered unnecessary to report, as the application is almost of course; while the reported cases on the other side must represent a large proportion of the cases in which the discretion has been exercised. The following are most of the reported cases in which the discretion has been exercised, and the application refused: —

In the case of *Wallis* v. *Hirsch* (1856), 1 C. B. (N. S.) 816, 26 L. J. C. P. 72, an action by the purchaser arising out of a commercial contract for purchase of linseed cake, the plaintiffs alleged that the defendants had tendered a spurious imitation; and the Court refused an application by the defendants to stay the action. Cockburn, C. J., said: "I think the Court ought to be reluctant to prevent an arbitration where the parties have agreed to one; but as the Act gives us a discretion, we must see whether the party who objects makes out a case for limiting the operation of the instrument. Now, it can hardly be supposed here that the parties contemplated a question of fraud arising. The plaintiffs allege that a gross fraud has been practised on them: and we do not think that is a proper question to be referred to two brokers. The defendants therefore cannot have a rule." This decision should be compared with the judgment of the Master of the Rolls (Sir G. Jessel) in *Russell* v. *Russell, supra*, with the observation, however, that the judgment of the Common Pleas does not appear to have been cited to the Master of the Rolls; and it is not clear what view the latter would have taken of the judgment if it had been cited. It must be taken however that the judgment of the Common Pleas cannot, having regard to the judgment of the Master of the Rolls, be accepted as laying down a hard and fast rule that a charge of fraud is necessarily to be taken as a reason compelling the Judge to exercise his discretion in the same way.

In the case of *Cook* v. *Catchpole*, cited in the argument of the principal case (1865), 34 L. J. Ch. 60, the action was for a dissolution of partnership on the ground of misconduct. V. C. Wood refused the application. The Vice Chancellor in so deciding does not appear to have considered he was exercising a discretion; but placed his decision on the ground that the dispute did not arise out of the articles. He thought the cause of action (if proved) was that the defendant had broken through the articles altogether; and the question was not fairly within the scope of the arbitration clause. It is very questionable whether this decision could now be supported, having regard to

the general tenor of the cases, and particularly the principal case, and *Russell* v. *Russell, supra.*

In contrast with the two cases relating to the Railway Passengers Assurance Company already mentioned, is the case of *Fox* v. *Railway Passengers' Assur. Co.* (C. A. 1885), 54 L. J. Q. B. 505. The company in this case had resisted the claim on the ground that the death was a case of suicide or wilful exposure to danger such as exempted them from liability under their contract. The Judge of first instance had exercised his discretion by refusing the motion, but it was granted by the Divisional Court. The Court of Appeal reversed the decision of the Divisional Court, and affirmed the refusal of the Judge, considering that the discretion of the Judge who refused a stay of the action, ought not to be interfered with. Bowen, L. J., observed that the section of the special Act was similar to s. 11 of the C. L. P. Act 1854, and proceeded: "According to the old law an agreement to refer did not oust the jurisdiction of the Courts; but that state of the law being found to work hardship, the provisions of the Common Law Procedure Act 1854, section 11, were enacted, and under that section the defendant could obtain a stay of proceedings. Both sections give a discretion to the Court to stay an action which a plaintiff has a right to begin."

In *Lyon* v. *Johnson* (1889), 40 Ch. D. 579, 58 L. J. Ch. 626, an action by a partner in a medical practice against the other partner to have it declared that certain benefits which the plaintiff took under the will of a patient were not divisible as partnership profits, Kay, J., exercised his discretion by refusing a stay for the purpose of having the matter referred.

In *Davis* v. *Starr* (C. A. 1889), 41 Ch. D. 242, 58 L. J. Ch. 808, an action by a dismissed employé against his employer, the Court of Appeal affirmed the refusal of Kekewich, J., to grant a stay, on the ground that the defendant (employer) having pending the dispute taken the law into his own hands by dismissing the plaintiff, had disentitled himself to say that he had been ready and willing to submit the matter (*i. e.*, the whole matter in dispute) to arbitration.

In *Nobel Brothers Petroleum Co.* v. *Stewart* (1889), 6 Times Law Rep. 378, Lord Coleridge thought that as the action arose, not out of a dispute on the contract, but out of alleged unfair conduct to prevent the plaintiffs obtaining the benefits which should have resulted to them from the contract, the matter should not be referred; and Willes, J., concurring, the motion was refused.

In *Turnock* v. *Sartoris* (C. A. 1889), 43 Ch. D. 150, where the arbitration clause did not cover all the matter in dispute, the Court refused to stay the action.

In re Carlisle, Clegg v. *Clegg* (1890), 44 Ch. D. 200, 59 L. J. Ch. 520, North, J., exercised the discretion so far as to let the application stand over in order to try first a question of law as to the construction of the instrument, which he thought would be the only question.

In *Brighton Marine Palace and Pier Co.* v. *Woodhouse* (14 April, 1893), 1893, 2 Ch. 486, 62 L. J. Ch. 697, it was held by North, J., that applications for further time to plead were not "steps in the proceedings" within section 4 of the Arbitration Act 1889, so as to bar the right to insist on arbitration.

The cases of *Randell* v. *Thompson* (1876), 1 Q. B. D. 748, 45 L. J. Q. B. 713 (referred to under No. 1, pp. 363 & 366, *supra*), and *Deutsche Springstoff, &c.* v. *Briscoe* (1887), 20 Q. B. D. 177, 54 L. J. Q. B. 4, raised a question which appears to be of little importance since the Arbitration Act of 1889. In the former of these cases, after disputes had arisen out of a contract which did not contain an arbitration clause, the parties referred the dispute to a specific arbitrator. No award having been made, the plaintiff revoked the authority, and brought an action. The defendant applied for a stay under section 11 of the C. L. P. Act 1854. The Court of Appeal held that in order to bring the case within the Act there must be an existing agreement of reference capable of being carried into effect, and that the authority having been revoked, there was no such existing agreement. In the latter case (*Deutsche Springstoff, &c.* v. *Briscoe*) there was an arbitration clause in the contract providing that, if any dispute should arise, it should be referred to two named arbitrators or an umpire, the powers of the C. L. P. Act 1854 to apply to the reference. A dispute having arisen, the defendant gave notice to proceed to arbitration. The plaintiffs then brought an action, and revoked the authority of the arbitrators. The Court on the authority of *Randell* v. *Thompson* held that the defendant was not entitled to have the action stayed. It seems clear that in either of these cases, if there had been nothing in the agreement expressly to negative the provision of section 1 of the Arbitration Act 1889, the authority would not, under the present law, have been revocable. Whatever may be the authority of the two last-mentioned cases it seems clear that, although the authority of a particular arbitrator might be revoked, and possibly the submission to a particular arbitrator thereby rendered nugatory, a general agreement to refer could not, even before the Act of 1889, be revoked, so as to prevent the operation of section 11 of the C. L. P. Act 1854. *Piercy* v. *Young* (C. A. 1879), 14 Ch. D. 200, and see per Bowen, L. J., in *Re Smith and Nelson* (1890), 25 Q. B. D. 547, 59 L. J. Q. B. 536, and p. 364, *supra*.

In *Moffat* v. *Cornelius* (1878), 26 W. R. 914, the plaintiff had

revoked, or purported to revoke, the authority. The Court held that *Randell* v. *Thompson* did not apply, on the ground that the contract in question contained an agreement that the reference might be made a rule of Court. Cockburn, C. J., however, took the opportunity of saying that he entirely dissented from the decision in *Randell* v. *Thompson*, and would only follow it where he was absolutely bound to do so.

AMERICAN NOTES.

There is no similar provision of procedure to our knowledge in this country. The question of the effect of an arbitration clause in a contract is very learnedly considered by Mr. Freeman in a note, 2 Am. St. Rep. 566. His conclusions may be summarized as follows: —

1. A general provision in a contract for arbitration of any dispute which may arise thereunder does not oust the Courts of jurisdiction, nor bar a suit either at law or in equity. *Allegre* v. *Maryland Ins. Co.*, 6 Harris & Johnson, (Maryland), 408; 14 Am. Dec. 289; *Stone* v. *Dumis*, 3 Porter (Alabama), 231; *Chamberlain* v. *Connecticut, &c. R. Co.*, 54 Connecticut, 472; *Robinson* v. *Georges Ins. Co.*, 17 Maine, 131; 35 Am. Dec. 239; *Dugan* v. *Thomas*, 79 Maine, 221; *Wood* v. *Humphrey*, 114 Massachusetts, 185; *March* v. *Eastern Railroad*, 40 New Hampshire, 571; 77 Am. Dec. 741; *Haggart* v. *Morgan*, 5 New York, 422; 55 Am. Dec. 350; *President, &c.* v. *Penna. Coal Co.*, 50 New York, 250; *White* v. *Middlesex Railroad*, 135 Mass. 210; *Kinney* v. *Baltimore, &c. Ass'n*, 35 West Virginia, 385; 15 Lawyers' Rep. Annotated, 142.

2 Where the contract explicitly makes the determination by arbitrators of amounts, values, quality, etc., a condition precedent to the maintenance of an action, it is binding; as in insurance and building contracts. *Campbell* v. *American, &c. L. Ins. Co.*, 1 McArthur (Dist. Columbia), 246; 29 Am. Rep. 591; *Leach* v. *Republic Fire Ins. Co.*, 58 New Hampshire, 245; *Herrick* v. *Belknap*, 27 Vermont, 673; *Railroad Co.* v. *McGrann*, 33 Penn. St. 530; *Condon* v. *R. Co.*, 14 Grattan (Virginia), 302; *President, &c.* v. *Penna. Coal Co.*, 50 New York, 250; *Holmes* v. *Ricket*, 56 California, 307; 38 Am. Rep. 54; *Hood* v. *Hartshorn*, 100 Massachusetts, 120; 1 Am. Rep. 89; *Stephenson* v. *Piscataqua F. & M. Ins. Co.*, 54 Maine, 55; *Hanley* v. *Walker*, 79 Michigan, 607; 8 Lawyers' Rep. Annotated, 207. To the contrary, however, *Liverpool, &c. Co.* v. *Creighton*, 51 Georgia, 95; *Mentz* v. *Armenia F. Ins. Co.*, 79 Penn. St. 478; 21 Am. Rep. 80; *Com. Union Ins. Co* v *Hocking*, 115 Penn. St. 107; 2 Am. St. Rep. 562; *Berry* v. *Carter*, 19 Kansas, 135; *Denver* v. *N. O., &c. Court Co*, 8 Colorado, 61.

3. But if the condition is not clearly and explicitly precedent, and is merely collateral, an action is not barred. *Mark* v. *Nat. F. Ins. Co.*, 24 Hun (New York Sup. Ct.), 565; *Rowe* v. *Williams*, 97 Massachusetts, 163; *Cole Manuf. Co.* v. *Collier*, 91 Tennessee, 525; 30 Am. St. Rep. 898.

4. A provision in a contract that certain matters of estimate, involving no dispute, shall be determined and certified by a certain person (as an engineer or architect), is binding. *Smith* v. *Brady*, 17 New York, 176; *Herrick* v. *Belknap's Estate*, 27 Vermont, 673; *Baltimore, &c. R. Co.* v. *Polly*, 14 Grattan

(Virginia), 447; *Smith* v. *Boston, &c. R. Co.*, 36 New Hampshire, 458; *Faunce* v. *Burke*, 16 Penn. St. 469; 55 Am. Dec. 519; *Hudson* v. *McCartney*, 33 Wisconsin, 331; *Butler* v. *Tucker*, 24 Wendell, 447; *White* v. *Middlesex Railroad*, 135 Mass. 216.

Allen, J., in *President, &c.* v. *Penna. Coal Co.*, 50 New York, 250, observed: "An agreement of this character, induced by fraud or overreaching, or entered into unadvisedly through ignorance, folly, or undue pressure, might well be refused a specific performance, or disregarded when set up as a defence to action. But when the parties stand upon an equal footing, and intelligently and deliberately, in making their executory contracts, provide for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, it is not easy to assign at this day any good reason why the contract should not stand, and the parties made to abide by it and the judgment of the tribunal of their choice. Were the question *res nova*, I apprehend that a party would not now be permitted, in the absence of fraud or some peculiar circumstances entitling him to relief, to repudiate his agreement to submit to arbitration, and seek a remedy at law, when his adversary had not refused to arbitrate, or in any way obstructed or hindered the arbitration agreed upon. But the rule that a general covenant to submit to arbitration any difference that may arise in the performance of a contract, or under an executory agreement, is a nullity, is too well established to be now questioned; and the decision of the appeal of the present defendant does not make it necessary to inquire into the reasons of the rule or question its existence. The better way doubtless is to give effect to contracts, when lawful in themselves, according to their terms and the intent of the parties, and any departure from this principle is an anomaly in the law, not to be extended or applied to new cases unless they come within the letter and spirit of the decisions already made. The tendency of the more recent decisions is to narrow rather than enlarge the operation and effect of prior decisions limiting the power of contracting parties to provide a tribunal for the adjustment of possible differences without a resort to Courts of law; and the rule is essentially modified and qualified."

See Morse on Arbitration, 91; May on Insurance, sect. 492; 2 Parsons on Contracts, *707. Mr. Lawson (Contracts, sect. 318) acutely expresses the distinction as to the provisions in question, as follows: "The one imposes a *condition precedent* to a right of action accruing; the other endeavors to *prevent* any right of action accruing at all." Citing *Tredwen* v. *Holman*, 1 H. & C. 72, 31 L. J. Ex. 389.

No. 4. CALEDONIAN RAILWAY CO. *v.* GREENOCK & WEMYSS BAY RAILWAY CO.

(H. L. SCOTCH APPEAL, 1874.)

RULE.

WHERE an agreement containing a clause that all differences arising under it shall be referred to arbitration, is confirmed by an Act of Parliament, which requires the parties to carry out the stipulations of the agreement: it is competent to either party to insist that the jurisdiction of the ordinary Courts as to matters within the reference is excluded, and that all disputes arising under the agreement must be settled by arbitration.

Caledonian Railway Co. v. Greenock and Wemyss Bay Railway Co.

L. R. 2 H. L. Sc. 347-351.

In April, 1862, an agreement was concluded between the [347] Caledonian Railway Company and the promoters of the Greenock and Wemyss Bay Railway Company, who had applied to Parliament for an Act of Incorporation, which passed in the course of the session. By the agreement, which was scheduled to the Act, the Caledonian Railway Company undertook to work the projected line and also to contribute one-fourth to its capital. The line was opened in 1865, and has been worked since conformably to the agreement, which provided that the Caledonian Railway Company should be entitled to one-fourth share of the net revenue, in consideration of their contributions and assistance. It appeared, however, that they soon became dissatisfied with their receipts. In February, 1871, they brought the present action against the Greenock and Wemyss Bay Railway Company demanding payment of several sums amounting to about £3480, independently of interest.

The defenders pleaded, in the first place, that the action was excluded by a clause in the agreement which provided that all differences arising between the parties should be settled by arbitration; and, secondly, that after clearing the proper expenses of the Greenock and Wemyss Bay Railway, there was no surplus or balance remaining to meet the pursuer's claim.

[*348] * The Lord Ordinary (Lord Ormidale) sustained the first plea, and dismissed the action. Against his order the Caledonian Railway Company appealed to the First Division of the Inner House, who, taking the assistance of three Judges, of the Second Division, and making in all seven Judges, decided, on the 2nd of July, 1872 (Scotch Reports, 3rd Series, vol. x. p. 893), that the question "fell to be settled by arbitration under the 18th article of the agreement; superseding further consideration of the cause until the said question should be settled by arbitration in the manner prescribed by the Railways Clauses Consolidation (Scotland) Act, 1845" (8 & 9 Vict. c. 33, s. 119). Against this judgment the Caledonian Railway Company appealed to the House.

The Attorney-General (Sir Richard Baggallay), and Mr. Kay, Q. C., were heard for the appellants.

The Lord Advocate (Mr. Gordon, Q. C.), and Mr. Cotton, Q. C., appeared for the respondents; but were not called upon to address the House, whose judgment was delivered at once, in conformity with the following opinion: —

The Lord Chancellor (Lord Cairns): —

My Lords, the question in this case is, whether the respondents were well founded in their first plea, which alleged that the action brought against them was excluded by clause 18 of the agreement. That agreement was entered into with the Caledonian Railway Company, then an incorporated company. The contractors on the other part were the promoters of the Greenock and Wemyss Bay Railway, all, or some of them, becoming afterwards its directors. The agreement would not, without more, have been binding on the Greenock and Wemyss Bay Railway Company, when incorporated; and therefore it was scheduled to the Act of Parliament which incorporated the Greenock and Wemyss Bay Railway Company, and a special clause (the 59th) was inserted, reciting that —

"An agreement had been entered into between the provisional directors of the Greenock and Wemyss Bay Railway Com-
[*349] pany and the Caledonian Railway * Company, in relation to the construction and the maintenance of the railway and other works by this Act authorized, the working and management of the traffic thereon, the fixing and apportionment between the said companies of tolls, rates, and charges, and other matters in con-

nection therewith; and it is expedient that the said agreement should be sanctioned. The said agreement shall be, and the same is hereby sanctioned and confirmed, and shall be as valid and obligatory upon the company and the Caledonian Railway Company respectively, as if those companies had been authorized by this Act to enter into the said agreement, and as if the same had been duly executed by them after the passing of this Act."

Up to this point, the enactment does no more than give statutory validity to the agreement; but the clause proceeds in these words: —

"And it shall be lawful for the company (that is, the Greenock and Wemyss Bay Railway Company) and the Caledonian Railway Company respectively, and they are hereby required, to implement and fulfil all the provisions and stipulations in the said agreement contained."

Now, my Lords, I apprehend it to be clear beyond the possibility of argument, that when an agreement between two companies who are coming for an Act of Parliament is scheduled to the Act of Parliament, and when an enactment is found in the body of the Act that each company shall be required to implement and fulfil all the provisions and stipulations in the agreement, every provision and stipulation in that agreement becomes as obligatory and binding on the two companies as if those provisions had been repeated in the form of statutory sections.

To find what is the provision contained in the statute with reference to the matter now under consideration, we turn to the 18th clause of the agreement, which is as follows: —

"All differences which may arise between the parties hereto respecting the true meaning or effect of this agreement, or the mode of carrying the same into operation, shall, from time to time, so often as any such questions or differences shall arise, be referred to arbitration in terms of the Railways Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 33, s. 119)."

I am at present addressing myself to the argument which was urged at the bar, that there was in this case nothing more than one of those voluntary agreements or contracts to refer to arbitration, which, without more, would not exclude the jurisdiction of the Court. But it appears to me to be entirely a misapprehension to describe this as a voluntary agreement. It has become a statutory obligation. This 18th clause must now be read as if

No. 4. — Caledonian Ry. v. Greenock, &c. Ry., L. R., 2 H. L. Sc. 350, 351.

[*350] it were a * section of the Act, and as if the Act had said in so many words that all differences which may arise between the parties hereto respecting the true meaning or effect of this agreement, or the mode of carrying the same into operation, shall, from time to time, be referred to and settled by arbitration. It appears to me clear, beyond any doubt whatever, that we have here no room for the application of the doctrine which has so much occupied the attention of the Courts as to the effect of voluntary agreements, but simply to consider the case arising upon an Act of Parliament forcing the parties to have their disputes settled, not by the ordinary tribunals of the country, but by a reference to arbitration.

There remains the question, is the dispute which has arisen a difference between the parties "respecting the true meaning or effect of this agreement, or the mode of carrying the same into operation?" The Greenock and Wemyss Bay Railway Company were to make, and to be at all events the nominal proprietors of, their railway; but, when made, it was to be worked by the Caledonian Company. The Caledonian Company were to contribute £30,000 to a capital which was to amount in the whole to £120,000, and the remaining £90,000 was to be provided by the Greenock and Wemyss Bay Railway Company. In respect of their trouble and expenditure in working the railway, the Caledonian Company were, in the first instance, to have one-half (50 per cent.) of the gross earnings, to compensate them for the working expenses. The other moiety was to be placed in the hands of the proprietors of the line, the Greenock and Wemyss Bay Railway Company, and out of that other half, certain expenses connected with the maintenance of the line, and the maintenance of the Greenock and Wemyss Bay Railway Company, were to be deducted. Up to that point there is no dispute between the parties, and those deductions have from time to time been made in a manner against which no complaint is alleged. But then, over and above the capital of £120,000, the Greenock and Wemyss Bay Railway Company were to be allowed to borrow £40,000, and had what are called borrowing powers given to them for that purpose. Those borrowing powers were in substance an incorporation of the ordinary Clauses Consolidation Act, with which your Lordships are familiar. Mortgages of the undertaking were to be created [*351] nor * was there any limitation whatever of the ordinary, characteristics which borrowing powers possess.

The agreement went on to provide that after the expenses to which I have referred were deducted, the net earnings were to be divided, three-fourths being received by the Greenock and Wemyss Bay Railway Company, and one-fourth by the Caledonian Railway Company.

The difference which has arisen between the parties here is not respecting the true meaning or effect of this agreement, because the words of the agreement are clear and plain enough, but respecting the mode of carrying the agreement into operation, having regard to the paramount rights of the mortgagees which the Legislature has allowed to be created. The contract to refer to arbitration is clearly obligatory, and it is equally clear that a difference has arisen as to the mode of carrying the agreement into operation, and, if so, Parliament has ordered that it shall be referred to the decision of an arbitrator.

It appears to me that the action in the Court of Session is excluded by the 18th clause of the agreement, and therefore, concurrently with the Judges in the Court below, I humbly move your Lordships to dismiss this appeal with costs.

Lord CHELMSFORD : —

My Lords, my noble and learned friend has put the question before your Lordships so very clearly, that, agreeing as I do entirely with him, I do not think I can usefully add anything to what he has said.

Lord HATHERLEY : —

My Lords, I am of the same opinion.

Lord SELBORNE : —

I also am of the same opinion.

Judgment affirmed ; and appeal dismissed, with costs.

ENGLISH NOTES.

By the common law, an agreement to refer all matters in difference to arbitration does not oust the jurisdiction of the Courts; nor can a person by his mere voluntary agreement preclude himself from seeking relief in the Courts. *Thompson* v. *Charnock* (1799), 8 T. R. 139: *Cooke* v. *Cooke* (1867), L. R., 4 Eq. 77, 36 L. J. Ch. 480. But where an action is referred by order of the Court, or where a submission has been made a rule of Court under the Act 9 Will. III. c. 15, the jurisdiction of the Courts is so far ousted as to preclude an application to any other Court than that to which the rule or order belongs. *Harding* v. *Wickham* (1861), 2 J. & H. 676. The effect of the 4th section of the Arbitration

Act 1889, and other similar general statutory provisions, have been considered under the preceding ruling case No. 3, *ante*, pp. 380 *et seq.*

The above ruling case exemplifies the distinction where there is a positive statutory enactment requiring parties to submit their differences. The following cases under various statutes may be referred to as illustrations of the same principle.

The Acts relating to benefit building societies have given rise to a number of these cases.

The Municipal Permanent Investment Building Society v. *Kent* (H. L. 1883), 9 App. Cas. 260, 53 L. J. Q. B. 290, was an action where the Building Society sued the defendant (Kent), a member of the society, for recovery of instalments due by him upon a mortgage to the society. The defendant after putting in a defence had taken out a summons to stay the action on the ground that the Court had no jurisdiction to try it. The summons having been referred to a Divisional Court, that Court made an order staying the action. That order was affirmed by the Court of Appeal, and the society appealed to the House of Lords. The question depended on the effect of the Building Societies Act 1874, and the rules of the society made under that Act. The 16th section of the Act enacts that the rules of the society shall set forth (*inter alia*) "Whether disputes between the society and any of its members or any person claiming by or through any member, or under the rules, shall be settled by reference to the Court, or to the registrar, or to arbitration." The 34th section provides for the appointment of the arbitrators, etc. in the case where the rules direct disputes to be referred to arbitration. And by section 36th "Every determination by arbitrators or by the Court or by the registrar under this Act of a dispute shall be binding and conclusive on all parties, and shall be final to all intents and purposes, and shall not be subject to appeal, and shall not be removed or removable into any Court of Law, or restrained or restrainable by the injunction of any Court of Equity; provided always that the arbitrators or the registrar or the Court, as the case may be, may, at the request of either party, state a case for the opinion of the Supreme Court of Judicature on any question of law." The 49th rule of the society was as follows: "In case of dispute arising between the society and any members thereof, or the legal representatives of any member, it shall be settled by arbitration, etc." The House of Lords affirmed the judgment of the Divisional Court and of the Court of Appeal, deciding in effect that the jurisdiction of the Court was ousted [1] by the joint effect of the Act

[1] This word is here used for convenience, in the loose sense in which it is frequently applied in the judgments. It does not necessarily mean that the Courts

and the rules. Lord SELBORNE differed in opinion, not on the ground that such a consequence would not have ensued so far as relates to disputes *within* the scope of the arbitration intended by the Act, but that the disputes intended to be referred under the Act and rules were disputes arising simply out of the members' contract with the society, as members, and not questions arising out of the relation between mortgagor and mortgagee constituted by deed of mortgage.

The decision of the House of Lords in *The Municipal Permanent Investment Society* v. *Kent* in effect affirmed also the decision of the MASTER OF THE ROLLS (Sir G. Jessel) in *Wright* v. *Monarch Building Society* (1877), 5 Ch. D. 726, 46 L. J. Ch. 649, and of the same Judge and of the Court of Appeal in *Hack* v. *London Provident Building Society* (C. A. 1883), 23 Ch. D. 103, 52 L. J. Ch. 541. The case was, in the opinion of the majority, distinguishable from that which came before the House in *Mulkern* v. *Lord*, in 1879.

In *Mulkern* v. *Lord* (1879), 4 App. Cas. 182, 48 L. J. Ch. 745, the question had arisen under the older Building Societies Act (1836), 6 & 7 W. IV. c. 32, which by s. 4 incorporates the provisions of the Act relating to friendly societies (10 Geo. IV. c. 56), "so far as the same or any part thereof may be applicable to the purpose of a building society." The last-mentioned Act (s. 27) contained a clause to the effect that provision should be made by the rules of the society specifying whether a matter in dispute between the society and a member should be referred to a justice of the peace or to arbitrators; and also contained a scheduled form of award of a very simple character. The House of Lords, in effect, decided that this latter provision was not applicable to the purpose of a building society, at all events so far as relates to questions between the society and members under their mortgages; and that the jurisdiction of the Court was not ousted by the Act of 6 & 7 W. IV.

In the case of *French* v. *Municipal Permanent Building Society* (1884), 53 L. J. Ch. 743, PEARSON, J., refused to apply the decision of the House of Lords in the case of *The Municipal Permanent Building Society* v. *Kent* (H. L. 1883), 9 App. Cas. 280, 53 L. J. Q. B. 290, to an action between the society and a purchaser of property sold under the powers of a mortgage by a member, although the purchaser was also a member.

Subsequently to the decision of the House of Lords in *The Municipal Permanent Building Society* v. *Kent*, the Building Societies Act 1884

are incapacitated from dealing with any questions, but that either party may insist on excluding the jurisdiction of the ordinary Courts. See the judgment of Lord Justice BOWEN in *London, Chatham, & Dover Ry. Co.* v. *South Eastern Ry. Co.*, (C. A. 1888), 40 Ch. D. 100, 58 L. J. Ch. 75, cited p. 396, *post*, R. C.

(47 & 48 Vict. c. 41) was passed, which by section 2 enacts that "the word 'disputes'" in the Building Societies Acts, or in the rules of any society thereunder, shall be deemed to refer only to disputes between the society and a member, or any representative of a member "in his capacity of a member of the society," unless it should be by the rules otherwise provided. This was construed by the Court of Appeal in *Western, &c. Permanent Building Society* v. *Martin* (1886), 17 Q. B. D. 609, 55 L. J. Q. B. 382, to exclude from the operation of the Acts and rules disputes between the society as mortgagee and a member as mortgagor. And the clause in the Act of 1884 was likewise construed by STIRLING, J., and by the Court of Appeal in *The Municipal Permanent Investment Building Society* v. *Richards* (1888), 39 Ch. D. 372, 58 L. J. Ch. 8, so as to exclude the case of an action by the society against former directors (who were still members) of the society, for sums of money alleged to have been improperly received or retained by them, and for which they ought to account. STIRLING, J., takes occasion to observe that the Act of 1884 follows closely the language of the dissenting judgment of Lord SELBORNE in the case of *Municipal Permanent Building Society* v. *Kent*.

But in a case intermediate in date between the two last-mentioned — *Walker* v. *General Mutual Building Society* (C. A. 1887), 36 Ch. D. 777, it was held that a member who had withdrawn from the society was still so far a member that the rules as to arbitration might be applied to him.

By "The Railway Companies Arbitration Act 1859" (22 & 23 Vict. c. 59) it is enacted, by s. 2, that "Any two or more Railway Companies, by writing under their respective common seals, may agree to refer and may refer to arbitration, in accordance with this Act, any then existing or future differences," etc.; and, by s. 3, "The Companies jointly but not otherwise, from time to time, by writing under their respective common seals, may add to, alter, or revoke" any such agreement. By s. 4, "Every reference or agreement in accordance with this Act, except so far as it is from time to time revoked or modified in accordance with this Act, shall bind the Companies, and may and shall be carried into full effect." The Act contains ample provisions for making the reference effectual, including a provision that the submission may be made a rule of Court; and there can be no doubt that either or any of the Companies who have entered into such an agreement may effectually insist on the matter being decided by arbitration, to the exclusion of the ordinary jurisdiction of the Courts. The decision of the Court of Appeal in *The London, Chatham, & Dover Ry. Co.* v. *South Eastern Ry. Co.* (C. A. 1888), 40 Ch. D. 100, 58 L. J. Ch.

75, is important to show in what sense the jurisdiction of the Courts is excluded in the case of an agreement under the Act; and the reasoning of the decision probably applies to all the cases within the principle of the ruling case. One of the companies, who were parties to an agreement under the Act, had brought an action against another company, also a party to the agreement, in respect of matters within the scope of the reference. The defendant company raised in their defence the question of their right to have the matter determined by arbitration; but, at the hearing, did not raise the question, and went into evidence on the merits. The Court of Appeal decided that the existence of an agreement under the Act does not, in the strict sense of the word, oust the jurisdiction of the Court; and they refused to allow the question of excluding the jurisdiction to be raised on the appeal. Lord Justice Bowen takes occasion to observe in regard to Lord Cairns' judgment in the principal case (40 Ch. D. 109): "I cannot believe, on reading the case carefully, that Lord Cairns meant to decide, or meant to indicate his own opinion to the effect, that the jurisdiction of the Courts was ousted. I think his language must be taken *secundum subjectam materiam*. That was a case in which from the first one of the companies had insisted on this right; and Lord Cairns, whenever he uses language to the effect that the Act of Parliament is obligatory, and that the parties are forced to have their disputes settled by a reference to arbitration and not by the ordinary tribunals of the country, is, I think, dealing with a case where one of the parties is asking for, and the other refusing, the right which Parliament said should be granted."

The jurisdiction of the ordinary Courts is ousted (perhaps in the strict sense of the word) where by express enactment in an Act of Parliament certain matters are to be determined in case of difference by Statutory Commissioners. And in such a case the proceedings of the Commissioners are not subject to be challenged or reviewed by the Courts even on grounds which would amount to misconduct in the case of private arbitrators. So it was decided in the case of *The Newry & Enniskillen Ry. Co.* v. *The Ulster Ry. Co.* (1856), 8 De G. M. & G. 487, where a bill had been filed for the purpose of setting aside an award of The Railway Commissioners (who had succeeded to the functions of the Board of Trade) under a Special Act made in 1847, by which the proportion of the expense of altering the gauge of a certain railway was to be borne by three railway companies in proportions to be decided in case of difference by the Board of Trade. The Vice Chancellor Stuart dismissed the bill, and an appeal was brought before the Lords Justices Turner and Knight Bruce. Lord Justice Turner gave an elaborate judgment to the effect that the Court had

no jurisdiction to entertain the matter; and, Lord Justice KNIGHT BRUCE giving no opinion, the judgment of the VICE CHANCELLOR was affirmed.

The clause of the Regulation of Railways Act 1873 (36 & 37 Vict. c. 48, s. 8), which enables a party to apply to the Railway Commissioners "where any difference between railway companies is, under the provisions of any general or special Act, required or authorized to be referred to arbitration," has been held not to apply to a case where there is merely an agreement *under the powers* of the Railway Companies Arbitration Act 1859, but only to cases where the reference is contained in the Act. *Great Western Ry. Co.* v. *Waterford & Limerick Ry. Co.* (C. A. 1881), 17 Ch. D. 494, 50 L. J. Ch. 513. By the Railway and Canal Traffic Act 1888 (51 & 52 Vict. c. 25), s. 15, "the provisions of any general or special Act" in the clause of the Act of 1873, are declared to include "the provisions of any agreement confirmed or authorized by any such Act." This gets rid of the effect of a decision of the Queen's Bench Division in *Reg.* v. *Midland Ry. Co.* (1887), 19 Q. B. D. 540, 56 L. J. Q. B. 585, but probably does not supersede the decision in *Great Western Ry. Co.* v. *Waterford & Limerick Ry. Co.*

The Agricultural Holdings Act 1883 (46 & 47 Vict. c. 61), by sections 7, 8, 9, 57, enacts in positive terms that certain claims for compensation by a tenant shall in case of difference be decided by arbitration in the manner pointed out by the Act. In *The Gaslight and Coke Co.* v. *Holloway* (1885), 52 L. T. 434, a Divisional Court of the Queen's Bench Division (GROVE, J., and MANISTY, J.,) held that, the Court having no jurisdiction to entertain such a claim, it could not form the subject of a counter-claim in an action for rent by the landlord; and they struck out the counter-claim accordingly.

It should be observed that, although persons cannot by their agreement oust the Courts of any jurisdiction, they may by a clear expression of the intention so frame a contract for the payment of money that the obtaining the decision of arbitrators upon a matter of difference may be a condition precedent to maintaining an action for the payment. *Scott* v. *Avery* (H. L. 1855), 5 H. L. C. 811, 25 L. J. Ex. 303. There are many cases illustrating this, of which it may suffice, as a recent one, to cite *Viney* v. *Bignold* (1 Dec. 1887), 20 Q. B. D. 172, 57 L. J. Q. B. 82. In *Collins* v. *Locke* on the other hand (J. C. on appeal from Victoria, 1879), 4 App. Cas. 674, 48 L. J. P. C. 68, where the agreement was that all disputes should be referred to arbitration, and that the parties should not be entitled to maintain any action *in respect of the matters so submitted as aforesaid* except for the amounts determined by the award, it was held that the latter clause was a collateral stipulation and not a condition precedent.

No. 5. — Hoch v. Boor, 49 L. J. Q. B. D. 665. — Rule.

It has been repeatedly decided that the Court has no jurisdiction to grant an injunction on the application of one party against the other party proceeding with an arbitration, whether under an agreement of reference, or under the provisions of an Act of Parliament; although it is suggested that the matter is outside the submission and that the proceedings will be futile. *North London Railway Co.* v. *Great Northern Railway Co.* (C. A. 1883), 11 Q. B. D. 30, 52 L. J. Q. B. 380; *London and Blackwall Railway Co.* v. *Cross* (C. A. 1886), 31 Ch. D. 354, 55 L. J. Ch. 313; *Wood* v. *Lillies* (29 Jan. 1892), 61 L. J. Ch. 158.

No. 5. — HOCH *v.* BOOR.

(C. A. 1880.)

RULE.

UNDER the Judicature Act 1873 (36 & 37 Vict. c. 66), s. 57 (now superseded and extended by the 14th section of the Arbitration Act 1889, 52 & 53 Vict. c. 49), a judge had jurisdiction to refer compulsorily to an Official Referee questions which involve a "prolonged examination of accounts;" although the issues also involve questions of fraud.

But, as a general rule, issues involving the character and reputation of a party to an action ought not to be referred against the will of the party affected by them.

Hoch v. Boor.

49 L. J. Q. B. D. 665-668 (s. c. 43 L. T. 425).

Appeal from an order of GROVE, J., sitting at Nisi [665] Prius.

The plaintiff's claim was for damages for wrongful dismissal of the plaintiff from the defendant's service as manager.

The statement of defence contained a paragraph justifying the dismissal on the ground of the plaintiff's misconduct, negligence, and incompetence during his service. And the defendant counterclaimed for damages alleged to have been sustained by reason of such misconduct, negligence, and incompetence.

An order for particulars having been obtained by the plaintiff, the defendant delivered very lengthy particulars of alleged "mis-

conduct, disobedience, negligence, and incompetence, and dates and items of loss thereby." A great number of items were set forth under different heads. There were particulars of the plaintiff's alleged misconduct in having from time to time made purchases of goods for the defendant, who was a merchant, against his express orders; of the plaintiff having supplied goods to customers abroad not equal to sample, and of his having wilfully destroyed the samples remaining at home; and there were a very great number of dates and items taken from the defendant's office books with respect to instances in which, as was alleged [* 666] on purchases by customers * abroad, the plaintiff had erroneously invoiced wheat to the customers at incorrect weights, and thereby overcharged them for the wheat actually delivered, and the particulars mentioned these customers as having objected to be "defrauded in weight." The plaintiff was to be paid for his services as manager partly by receiving twenty per cent. on profits actually made in the business.

At the trial, before GROVE, J., and a jury, after the opening of counsel, the Judge made the following order: —

"It is ordered that the issues in this action be referred to an official referee, who is to make his report to the Court. By the Court."

The plaintiff appealed from this order.

W. Digby Seymour and Smalman Smith, for the plaintiff. The particulars furnished by the defendant show that the defence raises serious issues involving charges affecting the plaintiff's character and competence. He is entitled to have those issues submitted to a jury. Where fraud is alleged, as it is here, there is no jurisdiction to refer compulsorily under section 57. *Leigh* v. *Brooks*, 5 Ch. D. 592; 46 L. J. Ch. 344.

There was also a preliminary question of law as to what sort of negligence would justify the dismissal, and on that ground the case ought not to have been referred. *Clow* v. *Harper*, 3 Ex. D. 198; 47 L. J. Exch. 393.

They also referred to *Longman* v. *East*, 2 C. P. D. 142; 47 L. J. C. P. 211; *Pontifex* v. *Severn*, 2 C. P. D. 142; 47 L. J. C. P. 211; and *Mellin* v. *Monico*, 3 C. P. D. 142; 47 L. J. C. P. 211.

Willis and Morton Smith, for the defendant. An appeal should have been made to the Divisional Court in the first instance. The order appealed from is on the same footing as an order made at

Chambers. There is jurisdiction to refer compulsorily under section 57, even where questions of fraud are involved, though no doubt in such cases the Judge's discretion ought to be sparingly exercised. But here it would be impossible to try the issues raised by the defence and counterclaim before a jury. The particulars are with respect to transactions relating to shipments of goods abroad, extending over months, and a most minute examination of a great number of documents is necessary.

W. Digby Seymour replied.

BRETT, L. J. The question in this case is, whether we can set aside an order made by Mr. Justice GROVE, referring the issues in the action to an official referee.

A preliminary objection has been taken that the appeal is not to this Court, but that it ought to have been taken to the Divisional Court. The order was not made by Mr. Justice GROVE, sitting at Chambers and acting as a Judge in the place of the Court in a matter which might be heard at Chambers, or before the full Court, but it was made independently of the Court by a Judge sitting at Nisi Prius. Section 39 of the Judicature Act of 1873 provides that, in all cases within the section (and this case is), any Judge sitting in Court shall be deemed to constitute a Court. Therefore the order made by Mr. Justice GROVE is made by him as constituting a Divisional Court. It is an order, therefore, of a Divisional Court. I am of opinion that the appeal is directly to this Court, and that the preliminary objection fails. The form in which the order is drawn up strengthens the view which I take from a consideration of the Act and of the difference which exists between a Judge sitting in Chambers and sitting in his capacity of Judge of Assize. The order is that the report of the official referee is to be made "to the Court," that is, to Mr. Justice GROVE, in that capacity.

As to the merits of this appeal [his Lordship here stated the effect of the pleadings and particulars], the charge against the plaintiff that he had overcharged customers abroad by putting wrong weights in the invoices for the purpose of making a greater profit on which to receive twenty per cent. is a charge of fraud. The charge of wilfully destroying samples is now explained to be a charge of negligence only, so that we have one charge of fraud to deal with. As a general rule I adopt what was said in *Leigh* v. *Brooks* by the MASTER OF * THE ROLLS [* 667]

and Lord Justice JAMES. I interpret their meaning to be that, in almost all cases where a charge of fraud is made and a man's character is at stake, the matter ought not to be withdrawn from a jury. But that rule is not an absolute one. There is nothing in section 57 to except issues which involve a charge of fraud. There must be some cases in which the rule ought not to be applied. Here the charge of fraud involves an unusual and necessarily prolonged examination of documents, because the only way to show that the plaintiff fraudulently put wrong weights in the invoices is by accumulating instances to show that he did it systematically. That course involves an examination of a great number of books and documents relating to purchases and shipments of goods abroad, extending over months.

I therefore think that Mr. Justice GROVE had jurisdiction to make the order appealed from, and I am not prepared to say that he did not exercise his discretion correctly.

COTTON, L. J. The order appealed from is made under section 57 of the Judicature Act 1873. And the first question is, whether the appeal ought not to have been taken to the Divisional Court. Section 39 of the Judicature Act of 1873 provides that any Judge of the High Court may exercise in Court or in Chambers all or any part of the jurisdiction vested in the High Court by the Act in all cases and proceedings which before the passing of the Act might have been heard in Court or in Chambers by a single Judge of a Court whose jurisdiction is transferred to the High Court; and the section ends, "In all such cases any Judge sitting in Court shall be deemed to constitute a Court." I am of opinion, therefore, that the order of Mr. Justice GROVE was the order of a Court, and that the appeal is properly brought here. The questions of substance which arise are whether or not there was jurisdiction to refer, and if there was, whether or not the discretion of the Judge has been so wrongly exercised that we ought to interfere. In my opinion there is no preliminary question of law to be tried. The only questions are of fact, whether or not the plaintiff misconducted himself and disobeyed orders. I think there was such a prolonged examination of accounts requisite for the decision of the issues as to bring the case within the section. It is objected that fraud is alleged and character involved. I should state my opinion that even although there may be jurisdiction to refer some issues because they involve a prolonged examination of accounts, it does

not follow that all ought to be referred, but only those which cannot be tried separately. If there is a charge of fraud which can be separated, that issue ought not to be referred, but should be tried out in open court. But there may be issues raising questions of fraud which entirely depend upon a prolonged examination of accounts; issues which it is impossible for a jury to try satisfactorily, and it is then a proper course to refer them. Therefore I think that, though as a general rule issues involving fraud ought to be tried in court, there are cases in which they ought to be referred. Here there is a doubt in my mind whether upon the issues there is any question of fraud entirely unconnected with the other issues. I think the whole matter depends upon an examination of accounts and documents. I am therefore of opinion that there was jurisdiction to make the order, and that we ought not to interfere with it.

THESIGER, L. J. I can well understand that the plaintiff prefers, where his character for honesty and competence is in question, that the matter should go before a jury. I think it is a justification for this appeal that *primâ facie* issues involving fraud ought not to be referred. But this rule is not without exception. The Legislature has imposed a restriction as to the character of the questions that may be referred compulsorily; they must involve a "prolonged examination of accounts," &c., but with this exception the action may be founded on any ground whatever, and the issues may be referred. I must add that, in a matter within the jurisdiction of a Judge to refer, and therefore fit for the exercise of a judicial discretion, the Court will require a very
* clear case of manifest error before interfering with his [* 668]
exercise of that discretion; but a strong case ought to be made out for a reference when a charge of fraud is made. I am not sure that I should myself have made the order to refer. Practically, no doubt, an honest man accused of dishonesty might prefer to have the charge, if it involved a prolonged and minute examination of accounts, investigated by an official referee. However, here there must necessarily be a considerable examination of documents as regards most of the heads of the particulars. I am of opinion that there was jurisdiction to refer, and that we ought not to interfere with the discretion exercised by Mr. Justice GROVE. I agree in thinking the appeal lies to this Court.

Appeal dismissed.

ENGLISH NOTES.

The principal case was followed by a Divisional Court (Denman, J., and Pollock, B.) in *Sacker* v. *Rayozine* (1881), 44 L. T. 309, where there were charges of misconduct made by way of defence to an action for an account.

The latter branch of the rule is (following *Leigh* v. *Brooks*, cited in the principal case) given effect to by a Divisional Court (Denman, J., and Wills, J.), in *Russell* v. *Harris* (1891), 65 L. T. 752. Denman, J., in reference to *Hoch* v. *Boor*, and such cases, says: "The principle upon which those cases turned seems to me to be this; where the case is one in which an allegation of fraud is so mixed up with the merits of the case as regards small matters of account and such like things, that the two cannot be tried separately, then the whole matter may be tried by a special or official referee." And then he distinguished the case before him, in which the plaintiff alleged collusion between the defendant and the architect who refused to certify, and considered this to be a charge which the defendant was entitled to have tried by a jury.

The powers of the Court under the Judicature Act of 1873 (36 & 37 Vict. c. 66) to order questions to be referred to an official referee, did not authorize the reference (except by consent) of the whole action; for section 56 of that Act only allowed any question to be referred to him for inquiry and report; and section 57 only authorized a reference of any question or issue of fact, or question of account, in a cause requiring a prolonged examination of documents or accounts, or any scientific or local investigation. *Longman* v. *East*; *Pontifex* v. *Severn*; *Mellin* v. *Monico* (c. a. 1877). 3 C. P. D. 142; 47 L. J. C. P. 211.

The power now given by the 14th section of the Arbitration Act 1889 (52 & 53 Vict. c. 49), is more extensive. By that section the Court or a Judge may in all civil cases order the *whole cause or matter*, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator agreed on by the parties, or before an official referee, (*a*) by consent of the parties who are *sui juris*; or (*b*) if the cause or matter requires any prolonged examination of documents, or any scientific or local examination which cannot, in the opinion of the Court or a Judge, conveniently be made before a jury or through the other ordinary officers of the Court; or (*c*) if the question consists wholly or in part of matters of account.

The result is to give the Court full powers in a large class of cases in which, heretofore, the judge could and did exercise a strong moral pressure upon the counsel conducting the case at *nisi prius*.

In *Hurlbatt* v. *Barnett & Co.* (1892), 1893, 1 Q. B. 77; 62 L. J. Q. B. 1, the Court of Appeal expressly decided that this clause of the Act of

1889 is more extensive than that of the Judicature Act of 1873, and that the Court has now jurisdiction to compulsorily refer an action, where they can see that part of the dispute between the parties is substantially a matter of account. But, as shown by the case of *Russell* v. *Harris* (*supra cit.*), the Court will not, under the later Act, withhold the right of a person charged with a fraud which can be tried as a distinct issue, to have the question tried by a jury.

AMERICAN NOTES.

In New York it is held that there is no absolute right to a compulsory reference, even though a long account is involved, but that the circumstances will be considered and the order refused if it would work wrong, hardship, or oppression. *Martin* v. *Windsor Hotel Co.*, 70 New York, 101; *Mayor* v. *Genet*, 67 Barbour, 275.

If the issue involves a long account, a reference may be granted, although one cause of action does not involve a long account. *Place* v. *Cheesebrough*, 63 New York, 315 (two judges dissenting). Even though one issue involved the question of fraud, *Hall* v. *U. S. Reflector Co.*, 14 N. Y. Week. Dig. 48; affirmed, without opinion, 88 New York, 655. The Court below said: "The issue of fraud might properly be excluded from this view, but there are numerous cases in which the question of fraud is considered a proper subject of investigation by a referee when it is one of the elements in the defence or constitutes a part of plaintiff's cause of action and must necessarily be passed upon. . . . The question of fraud is one which in the ordinary course of the action should be submitted to a jury, but it does not follow that because one of the issues presented is not referable in its nature, an order of reference may not be made." This authority disposes of a previous conflict of opinion on the subject in the lower courts.

A very serious question has been raised in this country, however, whether the legislature has any power in any class of cases except those in equity, although involving a long account, to authorize a reference without the consent of both parties, and thus deprive one party of a jury trial, which is generally guaranteed by the constitutions. It has been held in a number of States that no such power exists except in respect to suits in equity, and such is the holding under the Federal Constitution in respect to cases in the Federal Courts. *U. S.* v. *Rathbone*, 2 Paine, 578; *Grim* v. *Norris*, 19 California, 140; 79 Am. Dec. 206; *McMartin* v. *Bingham*, 27 Iowa, 234; *St. Paul, &c. R. Co.* v. *Gardner*, 19 Minnesota, 132; *Mills* v. *Miller*, 3 Nebraska, 87; *Paulison* v. *Halsey*, 38 New Jersey Law, 492; *Averill C. & O. Co.* v. *Verner*, 22 Ohio State, 372; *Plimpton* v. *Somerset*, 33 Vermont, 283. But the contrary is held in *Lee* v. *Tillotson*, 24 Wendell (New York), 337, 35 Am. Dec. 624; *Tribou* v. *Strowbridge*, 7 Oregon, 158; *Huston* v. *Wadsworth*, 5 Colorado, 213; *Galbraith* v. *McCormick*, 23 Kansas, 706; *Edwardson* v. *Gamhart*, 56 Missouri, 81; *Copp* v. *Henniker*, 55 New Hampshire, 179; *Leak* v. *Covington*, 87 North Carolina, 501; *Mead* v. *Walker*, 17 Wisconsin, 189. See note, 79 Am. Dec. 208.

It has recently been held in New York (142 N. Y. 236) that the defendant may not compel a reference if he disputes the plaintiff's claim, although a long account is counterclaimed. Three judges dissented.

No. 6. — Wade v. Dowling, 23 L. J. Q. B. 302, 303. — Rule.

Section III. — *Execution of the award.*

No. 6. — WADE *v.* DOWLING.

(Q. B. 1854.)

No. 7. — ANNING *v.* HARTLEY.

(EXCH. 1858.)

RULE.

Where a matter is referred to the arbitration of several persons, or a certain number of them, the required number must execute the award together, *simul et semel*.

But, where the Court considers that the objection is purely formal, or otherwise involving no misconduct on the part of the arbitrator, they will, under the power contained in the modern Acts (C. L. P. Act 1854, s. 8, replaced by the more general enactment of the Arbitration Act 1889, s. 10), remit the award back to the arbitrators to be re-executed.

Wade v. Dowling.

23 L. J. Q. B. 302–304 (s. c. 4 E. & B. 44; 18 Jur. 728).

[302] This was an action upon an award

Plea — that no such award as in the declaration mentioned was made.

On the trial, before Wightman, J., at the Sittings at Westminster in Easter term last, it appeared that an agreement of reference had been entered into between the plaintiff and the defendant, whereby all matters in difference relative to the sale of some timber by the plaintiff to the defendant, were referred to two arbitrators, and a third person as umpire. The agreement stating "so as the award of the said arbitrators and umpire or any two of them be made in writing under their hands ready to be delivered on," &c. The arbitrators and umpire met to [*303] consider the case; and *after hearing the evidence, the two arbitrators agreed upon what their award should be in every respect, except as regards the costs, which they agreed

No 6 — Wade v. Dowling, 23 L. J. Q. B. 303.

to leave to the decision of the umpire, and it was agreed that when he had come to a decision the award should be drawn up and he should send it to be signed by one of the arbitrators The umpire afterwards signed the award in London, and sent it to one of the other arbitrators at Bristol, by whom it was there also signed as appeared from the attestation clause. A verdict was found for the plaintiff, leave being reserved to move to enter the verdict for the defendant, if the Court should be of opinion that the award was bad, being signed by one of the arbitrators and the umpire at a distance from each other. A rule *nisi* for this purpose was afterwards obtained, against which —

J. Brown now showed cause.— The sole question is, whether this award, being signed by one arbitrator at one place, and by another arbitrator at a different place and time, is, on that ground, void. To hold such an objection a ground for holding the award altogether void, would be going further than the Courts have ever gone, and great mischief will result from so deciding. In *Little* v. *Newton*, 2 M. & G. 351 ; 10 L. J. C. P. 88, two arbitrators had delegated their authority to a third. Here, by the terms of the reference, an umpire was appointed for the very purpose of delegation.

[Crompton, J. After one had signed and before the other signed, could they alter their minds?]

That they might do.

[Crompton, J. When can it be said that the one who had first signed was *functus officio?*]

If all three had met and made up their minds as to the award, the signing the award afterwards apart could not affect its validity.

[Wightman, J. The award is the judgment itself.]

Battye v. *Gresley*, 8 East, 319, is an authority against the objection.

[Erle, J. The mental act is the award. The proof of it is the signing the award. There must be some interval between the one and the other, and the question is whether the interval can be carried to the extent here.]

[Coleridge, J. If the award and the signing were *simul et semel*, it would be all one act.]

[Crompton, J. The arbitrators could not separately enlarge the time for making the award.]

In 2 Chit. Arch. Prac. there are several cases referred to, showing the grounds upon which awards will be set aside, and none of them touch this case. He referred also to *Stalworth* v. *Inns*, 13 M. & W. 466; 14 L. J. Ex. 81, and *Wright* v. *Graham*, 3 Ex. 131; 18 L. J. Ex. 29.

Keating and Phipson, *contrà*, were not heard.

Coleridge, J. I am of opinion that the rule should be made absolute. First, as to the principle upon which we are to decide. I agree that in all matters of mere form we are to give a liberal construction to the acts of the parties who are to carry out the matters submitted to them by an agreement of reference. But considering this, and also that no appeal lies upon the merits from the decision of an arbitrator, it seems to me of importance that the Courts should take care that the first principles of justice are strictly observed. Now, in this case we are bound to give the parties what they stipulate for. Here the condition of the jurisdiction of the arbitrators is, that the parties wish to have at least the joint judgment of two men who are to agree together down to the last moment when they execute their award, and it was well said by the Court, in *Stalworth* v. *Inns*, that something may occur at the last moment which may make a change in the opinions of both the arbitrators. Now, that is not carried out when the award is executed as in the present case. When was it that the execution of the arbitrator, who signed first, [* 304] was to take * effect? When can it be said that the joint act of execution was effected? It cannot be said that the execution of the one was complete when the other signed, when, for all we know, neither had completely determined upon the matter at the particular time. Such an execution was not what the parties stipulated for. During the interval, the matter being present to the mind of A, who signed first, he might alter his mind, and B, when he signed, might do so for reasons, which if he had heard what A. had to say, might have been altogether changed. All these considerations show the good sense of requiring that all the parties should be together, and do the act of execution of the award *simul et semel*. The precise point has never been decided, but in *Little* v. *Newton* and *Stalworth* v. *Inns*, the principle is clearly laid down, and in the latter case the Court expressed a very strong opinion in favour of the objection. As to the consequences of our decision, I think we shall do much

more good by deciding in this way, and that our decision will tend to prevent irregularities and inconveniences which a contrary decision would admit of.

Wightman, J. I am of the same opinion. It was necessary that two persons should make the award, and when did this become the award of the two? The signatures might be a day or a week after each other. It cannot be said that there was an award of the two at the time when the first signed, and something might occur in the intermediate time which might affect the judgment of the arbitrators, and the parties to the submission have a right to the joint judgment of both arbitrators, and that they should together consider the circumstances of the case down to the last moment. Strictly speaking, they cannot sign at the very same instant, but if together at the time of signing, that no doubt is equal to signing at the same instant. The rule, therefore, I think, should be absolute.

Erle, J. This is not the award stipulated for by the submission. That which was stipulated for was the joint judgment of two out of the three persons appointed to arbitrate after hearing all the facts of the case and considering them until the giving of judgment; and if this execution of the award were held to be a joint judgment, our decision would lead us to that which has, in a manner, taken place here, namely, making the award by one conditional upon another of the arbitrators afterwards consenting to it. The inconvenience of such a decision is exemplified by the case of a single arbitrator who, after he has made his award, sees the matter in a different view, and applies to the Court upon an affidavit to be allowed to alter his award. In the case of two arbitrators, it is most important that they should jointly consider the case down to the last moment, because at the very last conference fresh light may break in upon the case and alter their opinions.

Crompton, J., concurred. *Rule absolute.*

Anning v. Hartley.

27 L. J. Ex. 145–146.

This was a rule to set aside an award, on the ground that [145] it had been executed by the arbitrators at different times and places, and that the third arbitrator had heard evidence in the absence of the parties or their attorneys.

No. 7. — Anning v. Hartley, 27 L. J. Ex. 145.

Field showed cause, admitting the first ground as to the execution of the award, but producing an affidavit of one of the arbitrators, stating that the cause had been referred to the deponent and another person, F., with power, if they could not agree in their award, to appoint a third person, and that they had appointed one S. to act as third arbitrator; that the deponent and F. were attended by the attorneys and parties, and evidence was gone into on both sides; that deponent and F. could not agree as to the award, and consented to go before S., the third arbitrator; that they read over to him their notes of the evidence; that he desired to see two or three of the witnesses, who were accordingly recalled and asked a few questions by him; but that, with this exception, he decided on the evidence already taken before the other arbitrators. It appeared, however, that notice had not been given to the parties or their attorneys; and he had then executed the award apart from the other arbitrators. This affidavit, it is submitted, shows that the award should simply be sent back to the arbitrators to be properly executed, as it is too much to inflict upon the plaintiff the penalty of losing the whole benefit of the award when there has been merely a formal mistake, and no misconduct nor any substantial miscarriage.[1]

Sharpe, for the defendant, in support of the rule. — The error was not formal, but substantial; and amounted to a total miscarriage of justice. The proceedings before the third arbitrator were behind the backs of the parties, who had no opportunity of attending to hear the witnesses re-examined, and suggesting additional questions which might then appear to be necessary.

[Martin, B. Why should they have attended? The third arbitrator was to decide between the arbitrators.[2]]

There is no case in which an award has been sent back to the arbitrators after such a miscarriage.

[Watson, B. I have known of more than one such case in which it has been done.]

[Channell, B. No kind of conscious or personal misconduct is imputed, nor even any gross disregard of proper rules.]

Pollock, C. B. This is a rule to set aside an award; and upon

[1] See *Howitt* v. *Clement*, 8 Sco. N. R. 851; *Nicholls* v. *Warren*, 6 Q. B. 615; 14 L. J. Q. B. 75; and the Common Law Procedure Act, 1854, ss. 8, 14

[2] See *Baker* v. *Hunter*, 16 M. & W. 672; 16 L. J. Ex. 203; also *Wynn* v. *Nicholson*, 7 C. B. 819; 6 Dowl. & L. 717, 18 L. J. C. P. 231; and *Barnard* v *Wainwright*, 19 L. J. Q. B. 423. And see *In re Morris*, 25 L. J. Q. B. 261.

which there has been an application to send it back to the arbitrators. That is the course which the Court ought to take, if possible, considering the great expense which the parties must have been put to by the various meetings which have taken place for the purpose of hearing evidence. The award is objected to on two grounds. One is purely formal: that the third arbitrator signed the award at a different time and place from the others. No doubt, as an award is a joint judicial act, where there *are [*146] several arbitrators, that is a fatal objection, and has been held so to be, *In re Lord* v. *Lord*, 5 E. & B. 404, 26 L. J. Q. B. 34; but still it is formal. The other objection is, that the third arbitrator heard evidence in the absence of the parties and their attorneys. I do not find, however, that there is the slightest imputation on the conduct of the arbitrators as to their intention. And it would be indeed lamentable if we were not able to send back the award to them to be set right, as otherwise all the expense already incurred will be thrown away; whereas, when sent back to the same arbitrators, the error can be corrected at once. And I think we have the power, and ought to exercise it. See *In re Peterson v. Ayre*, 14 C. B. 665; 23 L. J. C. P. 129.

Watson, B. I am of the same opinion. The Court sends back an award to the same arbitrators in such cases, when there is no reason to believe that they are not to be trusted. And in this case there is really no imputation upon them; we shall act therefore in accordance with very many decisions in taking this course.

Martin, B., and Channell, B., concurred.

Rule absolute to refer back the award to the arbitrators.

ENGLISH NOTES.

In the case of *Stalworth* v. *Inns* (1844), 13 M. & W. 466; 14 L. J. Ex. 81, referred to in the ruling case No. 6, the Court refused a motion to set aside an award executed by the arbitrators at different times and places, but intimated that they would not enforce the award by attachment, or grant a rule calling upon the party to pay money under it. In *Wright* v. *Graham* (1848), 3 Ex. 131, 18 L. J. Ex. 29, the Court refused to make a rule absolute calling upon the party to pay money under the award where the arbitrators had signed on different days.

"There is a great deal of good sense in saying, that where a matter is referred to two persons to decide by a statement in writing, that

writing must be made by the two together, a contemporaneous act; because if one person signs at York on one day, and another signs at Exeter the following day, how are we to know that something may not have occurred in the meantime to induce one party to change his mind if he could." Per Lord CRANWORTH, C., in *Eads* v. *Williams* (1855), 24 L. J. Ch. 531, 534.

So, the appointment of an umpire being a judicial act, both arbitrators must perform it together; and, the appointment not having been signed by the arbitrators at the same time or in each other's presence, the Court refused to make absolute a rule for an attachment for non-performance of the award. *Lord* v. *Lord* (1855), 5 E. & B. 404; 26 L. J. Q. B. 34 (referred to in the ruling case No. 7).

On the same principle, where joint arbitrators have carried on some of the inquiries apart, although they signed the award together, it is a ground for *setting aside* the award, as being obtained by "undue means." *Plews* v. *Middleton* (1845), 6 Q. B. 845. The principle, as to execution of the award as well as conduct of the proceedings by joint arbitrators, is summed up in Russell on Arbitrators (p. 217 of 7th edit.) as follows: "As they must all act, so they must all act together. They must each be present at every meeting; and the witnesses and the parties must be examined in the presence of them all; for the parties are entitled to have recourse to the arguments, experience, and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow-judges, so that by conference they shall mutually assist each other in arriving together at a just decision." This statement of the law is cited and approved by CRESSWELL, J., in *Re Beck* and *Jackson* (1857), 1 C. B. N. S. 695, 700.

The award must follow the submission in point of form, as well as of substance; and so where by the submission the award was to be in writing under the hand and seal of the arbitrator, an award in writing which did not appear to be under his hand and seal was held ill. *Henderson* v. *Williamson* (1716), 1 Strange, 116. By the Arbitration Act 1889 (52 & 53 Vict. c. 49, s. 2, and *sched.*), it is prescribed generally, that on a reference by consent out of court the arbitrators shall make their award in writing: and doubtless, under the Interpretation Act 1889 (52 & 53 Vict. c. 63), this applies to the award of a single arbitrator.

Apart from any express stipulation in the submission, and apart from the implied stipulation under the Act of 1889, it has been held that a parol award may be good. *Hanson* v. *Leversedge* (1689), Carthew, 156; s. c. 2 Ventr. 242; *Rawlings* v. *Wood* (1735), Barnes, 54. In the former of these cases it has been pointed out that in parol awards it is sufficient to show the substance; and further, that an

uncertainty in the words in which the award has (according to the evidence) been given, may be assisted by evidence of a fact which would make the award certain; whereas, if uncertainty appeared on the face of an award in writing, no averment *dehors* would have been allowed to make it certain.

The power to refer back which had been expressly given to the Court by the C. L. P. Act 1854 (17 & 18 Vict. c. 125, s. 8), in references by the Court, and in cases where the parties had consented to the reference being made a rule of Court, was extended by the Arbitration Act, 1889, to all references. It is there enacted (52 & 53 Vict. c. 49, s. 10), that "in all cases of reference to arbitration, the Court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire."

An award made by the person to whom the matter is referred is not vitiated by the circumstance of another person joining in it; and therefore, where the arbitrators had differed and the matter had consequently gone before the umpire, an award purporting to be that of the arbitrators and umpire (the arbitrators being *functi officio*) is good as the award of the umpire. *Beck* v. *Sargent* (1812), 4 Taunt. 232; *Bates* v. *Cooke* (1829), 9 B. & C. 407.

AMERICAN NOTES.

Mr. Morse says (Arb. and Award, p. 151): "It is an imperative rule that where the submission is to several arbitrators jointly, all must act together during the proceedings. English and American authorities are alike agreed upon this." And this is so even if a majority are empowered to make the award. *Thompson* v. *Mitchell*, 35 Maine, 281; *Brower* v. *Kingsley*, 1 Johnson's Cases (New York), 331; *Howard* v. *Couro*, 2 Vermont, 492; *Hoff* v. *Taylor*, 2 Southard (New Jersey), 829; *Towne* v. *Jaquith*, 6 Massachusetts, 46; 4 Am. Dec. 84; *Green* v. *Miller*, 6 Johnson (New York), 39; 5 Am. Dec. 184; *Nettleton* v. *Gridley*, 21 Connecticut, 531; 56 Am. Dec. 378; *Blin* v. *Hay*, 2 Tyler (Vermont), 304; 4 Am. Dec. 738; *Bannister* v. *Read*, 6 Illinois, 92; *Henderson* v. *Buckley*, 14 B. Monroe (Kentucky), 236; *Hills* v. *Home Ins. Co.*, 129 Massachusetts, 345; *McCrary* v. *Harrison*, 36 Alabama, 577; *Norfleet* v. *Southall*, 3 Murphy (No. Car.), 189; *Harryman* v. *Harryman*, 43 Maryland, 140; *Hobson* v. *McArthur*, 41 United States, 182; *Moore* v. *Ewing*, Coxe (New Jersey), 144; 1 Am. Dec. 195, and note, 200, citing the first principal case. (Compare *Glass, &c. Co.* v. *Meyer*, 7 Colorado, 51.)

In *Bulson* v. *Lohnes*, 29 New York, 291, a submission was made to three, with the provision that the award should be signed by them "or any two of them." Only two met and acted at any time, although the other was notified. *Held*, that the award signed only by the two was void under the statute, although it would have been good at common law.

But if the submission is of a public nature, a majority may perform the act delegated. *Patterson* v. *Leavitt*, 4 Connecticut, 50; 10 Am. Dec. 98.

Mr. Morse (Arb. and Award, p. 153), while citing, and conceding the doctrine of the principal cases, says, "This is certainly carrying the rule to a point beyond what reason would seem to require. It is probable that so rigid a doctrine would throw out many awards which justice would require should be upheld."

Section IV. — *Requisites of a good award.*

No. 8. — RANDALL *v.* RANDALL.

(K. B. 1805.)

No. 9. HEWITT *v.* HEWITT.

(Q. B. 1841.)

RULE.

An award must decide all the matters submitted, and must be certain and final.

Randall v. Randall.

7 East, 80–83 (s. c. 8 R. R. 601–603.)

[80] Upon a rule to show cause why an attachment should not issue against the plaintiff for non-payment of £20 19*s.* 8*d.*, a sum awarded against him; it appeared that the parties by their several bonds of submission referred to certain arbitrators to determine "all actions and controversies, &c., depending between them; and also of and concerning the value to be put on the hop-poles and potatoes in certain land (described in the award as land first therein after mentioned), and the workmanship done thereto and taxes and rates paid in respect thereof by the defendant; and also concerning the rent to be paid annually by the plaintiff to the defendant for the land (described in the award as secondly after mentioned), together with the costs, &c., so as the said award were made in writing and ready to be delivered to the parties on or before the 12th of May." Then the arbitrators by their award, after reciting the above, and that they had accepted the reference, and that the parties had delivered to them an account in writing respecting the matters referred as aforesaid, and that they had heard the parties and examined such witnesses as they had thought necessary, touching the matters referred as aforesaid, and had duly considered all matters and things referred to them, found

the value of the * hop-poles and potatoes in the grounds [* 81] mentioned to be £154, and the balance due from the plaintiff to the defendant (including that sum in the account) to be £20 19*s.* 8*d.*, which they therefore awarded to be paid, and the costs, &c. to be equally divided; but they did not notice nor make any award concerning the rent to be paid annually by the plaintiff to the defendant for the land. Wherefore it was objected by

Comyn, on showing cause against the attachment, that the award was bad upon the face of it, and could not be enforced. For that where several distinct matters are referred to arbitration, if it do not appear that the arbitrator has determined each of them, the award is void for the whole: and here the words, "so as the said award be made, &c. on or before the 12th of May," makes the submission conditional, that the award shall include all the matters referred. Though if the reference be of all matters in difference, and the award be *de præmissis*, generally, it shall be intended that the arbitrator determined all the matters submitted to him, unless the contrary be shown; and he cited 1 Roll. Abr. 256. Arbitrament, L.; *Risden* v. *Inglet*, Cro. Jac. 838; *Middleton* v. *Weeks*, Cro. Jac. 200; *Bradford* v. *Bryan*, Willes, 268, and *Baspole's case*, 8 Co. Rep. 98.

Espinasse, in support of the rule for the attachment, contended for the sufficiency of the award, so far as the arbitrators had determined the several matters mentioned. He observed that the reference was not merely of such matters only, but of all actions, controversies, &c.; and the arbitrators upon the whole have found a balance of account in favour of the defendant to the amount of £20 19*s.* 8*d.* The Court then will presume that the arbitrators did decide on every matter which was brought before them, unless the contrary were shown by affidavit. And it is even said in *Baspole's case*, that though there be many matters in controversy, yet if one only be signified to the arbitrator, he may make an award of that: for he is to determine *secundum allegata et probata*; and it is in every day's practice that an award may be good in part and bad in part.

Lord Ellenborough, C. J. That is where it does not appear that there is any notice to the arbitrator upon the face of the submission that there is any other matter referred to him than those which are mentioned to him at the time of the reference. But here it does expressly appear that there was another

[*82] matter referred,* on which there is no arbitrament. The arbitrators had three things submitted to them; one was to determine all actions, &c. between the parties; another was to settle what was to be paid by the defendant for the hop-poles and potatoes in certain land; the third was to ascertain what rent was to be paid by the plaintiff to the defendant for certain other land. The authority given to the arbitrators was conditional, *ita quod*, they should arbitrate upon these matters by a certain day. If then they fail as to one of them, the condition has not been performed upon which the award was to have its obligatory effect; and here they have stopped short, and have omitted to settle one of the subjects of difference which was stipulated for. This is not like the case where an award, being good in part and bad in part, the good part shall not be vitiated by the arbitrator having also directed something to be done which is superfluous and bad. But here the very condition on which the parties submitted to the award has failed.

Lawrence, J. I did not know whether there might not have been some modern decisions, which had given a more liberal construction in support of awards, where the arbitrators, having distinct matters submitted to them, had made their award upon some of them only, omitting the mention of others; but as none such have been referred to, there seems to be no answer to the cases cited against this award, which show that the arbitrators have not pursued their authority, not having performed the condition on which it was delegated to them.

Le Blanc, J. The contract of the parties is in effect this: one says that he will submit to the arbitrators to ascertain what he is to pay for the hop-poles, &c. upon condition that it shall also be referred to them to decide what rent is to be paid for certain land. And he may fairly have said that unless both those matters of difference were referred, he would not refer either of them singly. If then the arbitrators omit to decide one of them, the condition fails on which the reference was agreed to.

Rule for the attachment discharged.

Hewitt v. Hewitt.

1 Q. B. (Ad. & El. N. S.) 110-116

[110] Covenant on a deed of submission to arbitration as to all matters in difference between plaintiff and defendant.

No. 9. — Hewitt v. Hewitt, 1 Q. B. (Ad. & El. N. S.) 110-112.

Breach, non-payment of sums awarded to be paid by defendant to plaintiff on certain days unless previously paid by defendant to Sir William Bryan Cooke and Co. The plea, after oyer of the indenture, set out the award, alleging that the arbitrators made no other, and (in substance) that there were matters in difference which ought to have been, but were not, decided by the award, and that the award was bad. Verification. Replication, that no such matters, except those mentioned in the award, were before the arbitrators. * Verification. Special demurrer, [* 111] on grounds which it is not necessary to state, as the decision of the case turned wholly on the validity of the award. Joinder. The demurrer was argued in last Michaelmas term before Lord Denman, C. J., Littledale, Williams, and Coleridge, JJ., by Crompton for the defendant and R. V. Richards for the plaintiff. The point decided, and the facts bearing upon it, are so fully stated and discussed in the judgment of the Court, that a report of the argument is unnecessary.

Cur. adv. vult.

Lord Denman, C. J., now delivered judgment as follows: —

This was an action of covenant for non-performance of an award, the pleadings in which raised substantially the question of the validity of the award; and it will be necessary, therefore, that the purpose of the reference and the nature of the award should be explained.

It appears, then, by the deed of submission of 28th December, 1837, and the award of the 14th February, 1839, that previously thereto, the defendant was the taker of lands, &c., in the county of Cornwall, productive of a mineral useful for certain purposes of manufacture, and that, about the year 1834 or 1835, the defendant admitted the plaintiff into partnership therein for £2000, and further, that by agreement of 25th January, 1836, the defendant, having obtained letters patent for the manufacture of a certain substance therein mentioned, had taken the plaintiff into partnership as therein specified, and that they did accordingly become partners, though no articles of partnership had been executed; and also * that, before the said agreement of the [* 112] 25th January, 1836, the parties had dealings together, and that, shortly after the said agreement, the defendant had deposited with Cooke and Co., bankers, certain securities for such

sums as they had or might advance to defendant as surety for plaintiff; and that, plaintiff being indebted to them in about £4000, the defendant executed an assignment of certain securities for a sum not exceeding £3000;[1] and further, that the said parties dissolved partnership on the 15th January, 1837, without any settlement of accounts between them then or before, by reason whereof they had agreed to refer all matters in difference to the three arbitrators therein named, with the powers and in the manner therein specified. Then comes a provision which it will be necessary to state with more particularity. It is as follows: —

[*113] And it is in the said deed of submission provided * that if the said arbitrators should award any money to be paid to the plaintiff by the defendant at any day therein named, the said arbitrators should in their said award (if the said mortgage to the said bankers should be still outstanding) authorize the payment thereof to the said bankers in reduction of the said mortgage debts, and should further award and direct that the said plaintiff should, at a time to be then named by them, pay in to the said bankers' such a sum of money as would be sufficient to entitle the said defendant to have the estate comprised in the said mortgage released, and his title deeds and guarantees, given to the said bankers by way of deposit, restored to him.

The award then proceeded to state the amount of debt, on the partnership and private accounts, from the defendant to the plaintiff, to be £3121, and directed the payment to be made upon certain days and times to the plaintiff, with liberty to the defend-

[1] The recitals in the deed of submission here referred to were in the following words —

"And whereas, previously to the date of the said recited agreement and pending the said partnership, the said John Hewitt and Robert Lightfoot Hewitt have also had various dealings and money transactions together, unconnected with the said partnership: And whereas, soon after the date thereof, namely, on the 2d day of February, 1835, the said John Hewitt deposited his title deeds to a certain leasehold estate in London, and to certain policies of assurance and other effects, with Sir William Bryan Cooke, Baronet, and Company, bankers, Retford, as a security for such sum or sums of money as the said Sir William Bryan Cooke and Company had then advanced or might thereafter advance to the said John Hewitt as surety for the said Robert Lightfoot Hewitt; and the said John Hewitt further agreed to execute an assignment to them of the said premises whenever requested. And whereas, the said Robert Lightfoot Hewitt being indebted to the said firm on his banking account in about £4000, the said Sir William Bryan Cooke and Company applied to the said John Hewitt, on such his undertaking, to give further security for a sum not exceeding £3000, part thereof, by an assignment to them of the aforesaid leasehold and other premises, which the said John Hewitt, by indenture bearing even date herewith, has accordingly done."

ant to make such payment to the said bankers in reduction and towards satisfaction of the said mortgage debt.[1] And then is the following passage : —

"And we do also order and award that the said R. L. Hewitt do and shall, within one calendar month from the day whereon the said J. Hewitt shall have so paid and satisfied the said sum of £3121 and interest, pay unto the said Sir W. B. Cooke," &c. (the bankers), "such a sum of money as will be sufficient to entitle the said J. Hewitt to have the estates comprised in the said mortgage released therefrom, and all his title deeds, guarantees and securities of whatsoever kind or nature given to the said Sir W. B. Cooke," &c., "by way of *deposit, restored to him." The [*114] other directions contained in the award it is not necessary to pursue further, or to detail with greater minuteness.[2]

The pleadings are as follows. The declaration assigns as a breach of covenant on the part of the defendant the non-payment of the sums of £1000 and of £500, being the two first instalments directed by the award to be paid by the defendant to the plaintiff.

The plea, after setting out the deed of submission upon oyer, and also the award at length, states that at the time of making the said award there were, and yet are, divers assets and debts other than the said lands, places, takes, patents, and materials in the said award mentioned, belonging to the said partnership; and that the said award is wholly bad and void in law. The replication alleges that no assets or debts other than the said lands, places, takes, patents, and materials in the said award mentioned, belonging to the said partnership, were at any time before the making of the said award submitted to the decision of the said arbitrators, nor had the said arbitrators, at any time before the making of the said award, notice of any assets or debts other than the said lands, places, takes, patents, and materials in the said award mentioned, belonging to the said partnership. To this replication there is a demurrer assigning several special causes.

The main question, however, discussed in the argument and now for our decision, is whether the said award upon the face of it be good in point of law, the objection being that it has not dis-

[1] The award stated that the mortgage from defendant to Sir W. B. Cooke and Co. was still subsisting.

[2] On payment of the sums awarded, mutual releases were to be given.

posed of and adjusted all matters in difference between the parties, and therefore is not final. It is obvious, from the terms of submission, that one important object, so far as the defendant [* 115] * is concerned, was to release him from the engagements into which he had entered with Messrs. Cooke and Co., the bankers, and to procure his securities which he had deposited with them to be restored to him. This is apparent from the provision that, if any sum should be awarded to be paid to the plaintiff, it might be paid by the defendant to the bankers in reduction of the balance due upon the advances made by them. And, if the payment of the whole sum awarded to the plaintiff must necessarily have had the effect of extinguishing that balance, it might perhaps have been reasonably contended that this purpose of the reference had been answered. The state of that account, however, and the sum actually due to the bankers are left in perfect uncertainty. That the sum of £4000 was due from the plaintiff to them is certain; but how much more may have been advanced by them in addition, and by reason of the securities deposited by the defendant, does not appear. That there was some addition there is every reason to conclude, as it is stated expressly that the said securities of the defendant were deposited to cover "such sum or sums of money as the said bankers had then advanced or might thereafter advance." There seems to be no reason why the sum actually due to the bankers at the time of making the award might not have been precisely ascertained. That, however, has not been done in terms; nor can it be collected from anything appearing upon the face of the award. A new and distinct inquiry beyond anything that has been done by the arbitrators is indispensable to fix the sum upon the payment of which the defendant would be released from his obligation and obtain the return of his securities; for which purpose the plaintiff is, by the terms of the deed [* 116] * of submission, after payment made to himself of what is awarded to him, to pay to the bankers what is necessary. The award on this point runs thus: "the plaintiff shall pay such a sum of money as will be sufficient to entitle the defendant;" as by the extract above set forth appears. Suppose, now, that the defendant had complied with all the terms imposed upon him by the award, but that a sum was still due to the bankers which the plaintiff ought to pay in order to release the securities, but refused to do so. What remedy would there be for him (the defendant),

upon the deed of submission, against the plaintiff for not paying in to the said bankers' "such a sum of money as will be sufficient to entitle" him to regain his securities, in the terms above quoted from the award? For want of sufficient distinctness and certainty upon this point there would be none: the investigation of all the accounts anew would become absolutely necessary; and almost every point that has been referred to the final decision of the arbitrators must be again made matter of evidence and discussion before a jury.

We think that this matter was, by the plain meaning of the deed of submission, a matter to be determined conclusively by the arbitrators, and therefore that an important matter in difference between the parties has been left by them unsettled and undecided, or in other words that the award is not final. The consequence is that there must be judgment for the defendant.

Judgment for the defendant.

ENGLISH NOTES.

That an award in order to be good must be certain and final was ruled in the King's Bench in 1687 in the case of *Watson* v. *Watson*, Styles, 28. This was an action of debt upon an obligation with condition to stand to an award. Plea, no arbitrament made. Reply, setting forth the award. Defendant demurs, and for cause shows that the award is uncertain and not final; for it is that one of the parties shall pay so much money to the other as shall be due in conscience, so that both parties are at liberty to go to law as before. It was ruled by the Court to show cause why judgment should not be against the plaintiff.

In *Bradford* v. *Bryan* (1741), Willes, 268 (referred to in the ruling case No. 8), the parties had submitted all matters in difference to arbitration "so as the said award should be made on or before," &c.; and the arbitrator had determined all matters except one "for which the defendant was at liberty to prosecute if he thought fit." Action was brought on a bond for performance of the award. Willes, C. J., held that the award was void, and gave judgment for the defendant. He observed that the rule is that where all matters are submitted, and the submission is conditional, all matters must be determined, otherwise the award is void. "I am willing," he said, "to carry it as far as it has been carried already, because were it not for the cases I should be of opinion that where all matters are submitted, though without such condition, all matters must be determined; because it was plainly

not the intent of the parties that some matters only should be determined, and that they should be left at liberty to go to law for the rest."

In later cases the condition that all matters should be determined has been assumed to be implied without reference to such particular words as "so as," &c. to express this intention.

"An award *de præmissis* of a single matter is good; for others shall not be intended unless they be shown." Com. Dig. tit. "Arbitrament," cited as good law *per* LAWRENCE, J., in *Ingram* v. *Milnes* (1807), 8 East, 445, 450.

Cargey v. *Aitcheson* (1823), 2 B. & C. 170 (S. C. in error, s. n. *Aitcheson* v. *Cargey*, M'Cleland, 367, 2 Bing. 199), affords a good illustration of the kind of certainty and finality necessary for a good award. It was an action of debt on an award. The declaration set out the submission by which it appeared that differences had arisen respecting the value of stock and goods which each had had from a certain farm, and also concerning the proportion which each was to pay of a sum of £2500 for which the plaintiff was primarily liable, and also about the costs in certain actions; and set out the award by which the defendant was to pay to the plaintiff £444, that five eighths of the costs should be paid by the plaintiff, and three eighths by the defendant, that the sums already expended by either of them on account of the suit should be allowed as part payment of his proportion; and that, when the sum of £444 and the costs were paid, mutual releases should be given. On demurrer, it was argued that there was no award as to the value of the stock and goods; nor as to what each should contribute of the £2500; that the award as to costs was not final, because it was left to future calculation; and that the award that the sums expended should be allowed, left room for future differences. The Court of King's Bench gave judgment for the plaintiff for these reasons: (1) it was to be presumed that the arbitrators had awarded the £444 after taking into consideration the value of the stock and goods; (2) the proportions payable of the £2500 were sufficiently ascertained; for as the plaintiff was primarily liable to pay this sum he must pay all but the £444 now awarded to him; (3) the award as to costs was sufficiently certain, for the amount would become certain upon the taxation of the proper officers; (4) As to the sums expended, the award would be final or otherwise according as there were or were not disputes about them; if there were, the defendant might have pleaded it. This judgment having been brought in error before the Exchequer Chamber, that Court unanimously affirmed the judgment of the King's Bench. The Court entirely agreed with the King's Bench on the first three points. But in regard to the allowance of sums

expended in the suits, the argument was pressed that the arbitrators had done wrong in directing this mode of payment of the costs. The Court held that in this they had exceeded their authority, and that the direction in question was a nullity; but they held that this did not vitiate the rest of the award. Another illustration as to the sufficiency in point of certainty of that which is capable of being ascertained, is furnished by the case of *Waddle* v. *Downman* (1844), 1 Dowl. & L. 560, where the Court of Exchequer (Lord ABINGER, C. B., PARKE, B., and ALDERSON, B.,) held that in a dispute as to (*inter alia*) the value at which certain iron rings and shafts should be taken, an award of "such sum of money as the same amounts to according to the present market price of pig-iron" was sufficiently certain.

In *Auriol* v. *Smith* (in Chancery, 1823), 1 Turn. & Russ. 121, 128, the VICE CHANCELLOR (Sir J. Leach) laid down that, although an award may be good in part and bad in part where the subject is clearly capable of being separated, this is not so where all the matters (being matters of account) are within the submission, and the arbitrators exercising their jurisdiction on the whole subject pronounced one entire sum to be due.

To enforce a claim against the real and personal estate of a testator a chancery suit was instituted, in which the executor and certain persons having various interests in the real estate were defendants. By an order of the Court made in the suit all matters in difference between the parties in the cause were referred. The arbitrators made an order that the executor should pay a certain sum to the plaintiff and that on payment the plaintiff should execute a release; and that as touching the claims of certain defendants against the estate they "should be at liberty to prosecute the same at law or in equity, in like manner as if the said order of reference had never been made." On motion by plaintiffs for payment according to the award, and a cross-motion by defendant to set aside the award, the Court held the intention of the reference to be not only to determine the matters in difference between the plaintiffs on the one hand and the defendants on the other, but that the rights of all the parties to the suit should be adjusted. Accordingly the motion of the plaintiffs was dismissed, and order made, on the motion of the defendants, that the award should be set aside. *Turner* v. *Turner* (1827), 3 Russ. 494.

Upon a reference by order in an action of the cause and all matters in difference, the award ordered the payment of certain sums of money and performance of various things, and further awarded that, on performance of the award as aforesaid, the plaintiff and defendant should execute mutual and general releases. Pleas to the effect that

the liabilities upon a certain bill of exchange, and likewise in a certain action, and upon a certain unsatisfied judgment, had not been awarded upon were held bad, because the arbitrator by having ordered mutual and general releases must be deemed to have adjudged and finally decided the matter of those pleas. *Wharton* v. *King* (K. B. 1831), 2 B. & Ad. 528. Compare *Goddard* v. *Mansfield* (1850), 19 L. J. Q. B. 305 (stated under No. 13, p. 449, *post*), where, all the matters having been specifically awarded upon, the clause as to mutual releases was held superfluous and separable.

Another point decided in *Wharton* v. *King* (*supra*) is that, if an award directs one of two things to be done, one of which it is impossible for the person to perform, he is obliged to perform the other, and the award is good. On this see further *Lee* v. *Elkins* (1701), 12 Mod. 585 (No. 13, *post*, p. 441).

An award in a partnership dispute which directed one of the parties to pay a sum of money to one of the arbitrators to be applied in the payment of certain specified debts due by the firm has been held bad, because there would have been no means of enforcing the proper application of the fund. *Re Mackay* (1834), 2 Ad. & El. 356. But in the case of *Wood* v. *Adcock* in the Exchequer Chamber (1852), 7 Ex. 468, 21 L. J. Ex. 204, where on a submission between A. and B. the award directed B. to pay S., one of the arbitrators, a sum of money, and ordered that immediately on the receipt thereof the sum should be paid over by S. to A., it was held in an action on the award that the award was good.

Under a reference of all matters in a cause, the arbitrator by his award stated that the plaintiffs had claimed certain sums before him as matters in difference, but that he (the arbitrator) by his award declared and determined them not to be so; and he then awarded in favour of the plaintiff as to other matters. The Court set aside the award for want of finality, although the plaintiff by affidavit stated that the demand as to the matters not awarded upon had been admitted by him before the arbitrator not to be in difference in the present cause, and had been abandoned by him as a demand in the cause. *Samuel* v. *Cooper* (1835), 2 Ad. & El. 752.

In *Stone* v. *Phillips* (C. P. 1837), 4 Bing. N. C. 37, where four actions and all matters in difference were referred, and the arbitrator awarded on the four actions, but did not award upon a fifth action which was one of the matters in difference, the award was held bad *in toto*.

In *Bowes* v. *Fernie* (1838), 4 My. & Cr. 150, an award was set aside by the Court of Chancery on the grounds, 1st, that the arbitrators had awarded on a matter not referred to them (and as to which

the matter could not be separated from the other parts of the award); and 2ndly, that they had declined to arbitrate upon matters included in the reference.

In a dispute between landlord and tenant as to repairs and fixtures, the arbitrator (*inter alia*) ordered the plaintiff "to fix and set up other grates, locks, bolts, and fastenings in the place and stead of such as were removed as aforesaid." This, besides that it was an excess of the authority in the submission, was held bad for uncertainty, and the whole award was vitiated. *Price* v. *Popkin* (Q. B. 1839), 10 Ad. & El. 139.

In a partnership suit between W. & P. all matters in difference were referred to arbitration. One of the questions in difference was whether W. or P. ought to be ultimately liable upon a promissory note made by P. and indorsed by W. The arbitrator by his award, amongst other things, declared that the liabilities of P. on the note, as between P. and W., should remain unaffected by the award. *Held*, that the award was not final, and was therefore bad. *Wilkinson* v. *Page* (1842), 1 Hare, 276.

In the arbitration in the matter of *Marshall* and *Dresser* (Q. B. 1842), 3 Q. B. 878; 12 L. J. Q. B. 104, the award set out the reference, showing that there were disputes relating to accounts, &c., including a transaction about yarn for which five bills of exchange for £1000 each were given, and then awarded as to the property in the bills, but not as to the accounts or damages in respect of the transaction as to the yarn. The Court made absolute a rule to set aside the award.

If the arbitrators do not agree on all points, then, by intendment of law, the umpire must adjudicate upon the whole question. *Wicks* v. *Cox* (1847), 11 Jur. 542.

On a reference as to the amount of composition of tithe, the arbitrators awarded that a certain sum should be paid provided the whole lands were subject to tithe, but if they were only subject to tithes according to a certain specified terrier, then a different sum should be paid. This was held bad for uncertainty. *Goode* v. *Waters* (Ch. 1849), 20 L. J. Ch. 72.

A reference of all matters in difference, including the liability to an indictment touching the public interest — *e. g.* for non-repair of a public highway for which the delinquent is liable *ratione tenuræ* — is illegal. *Reg.* v. *Blackemore* (1850), 14 Q. B. 544.

In *Bhear* v. *Harradine* (1852), 7 Ex. 269; 21 L. J. Ex. 127, there had been a reference under a Judge's order of all matters in difference. One matter in difference was whether a partnership existed between the parties during a certain period, and another was whether, if such partnership ever did exist, it had been put an end to. The award found

that "if any co-partnership ever existed between them, the same was dissolved and put an end to, by their mutual consent and agreement, on the 30th of August last past." The Court held that the award was bad, because it did not decide whether there ever was a partnership or not; that being one of the matters expressly referred by the parties to the arbitrator.

By a reference, after reciting in general terms that differences had arisen relating to a former partnership, it was agreed amongst other things that the claims and demands of H. against W. in respect of the differences and matters aforesaid and all matters in dispute between them, and the amount to be paid for the shares, should be referred. The arbitrator awarded the payment of a lump sum in satisfaction of all claims including the amount to be paid for the shares. The Court refused to set aside the award. The question was, did the submission contain anything clearly requiring the arbitrator to decide separately the matters referred to him. *Whitworth* v. *Hulse* (1866), L. R., 1 Ex. 251, 35 L. J. Ex. 149.

The following statement of the law by BLACKBURN, J., in *The Duke of Buccleuch* v. *Metropolitan Board of Works* (1870), L. R., 5 Ex. 221, 229, may (although the decision itself was overruled by the House of Lords, see No. 15, p. 455, *post*) be regarded as sound and authoritative: "An award is the decision of one having a limited authority to determine those matters submitted to him by the parties (or by a statute), and no other. And from this it follows that if that limited authority has not been pursued and the arbitrator has awarded something beyond the authority, the award is *pro tanto* void, and if the void part is so mixed up with the rest that it cannot be rejected, the award is void altogether; otherwise those against whom the award is made would be compelled to fulfil the void part."

It is clear that an arbitrator cannot delegate his authority. If the award contains any clause in which the authority is left to another, that is clearly bad; and if the clause is not separable (see No. 12, *infra*), the whole award is void for uncertainty. *Tomlin* v. *Fordwich* (Mayor, &c.) (K. B. 1836), 5 Ad. & El. 147, cited at length at p. 439, *infra*; *Johnson* v. *Latham* (1850), 19 L. J. Q. B. 329, cited at length p. 440, *infra*.

The arbitrators however may call in and act upon the advice of an expert. *Anderson* v. *Wallace* (1835), 3 Cl. & Fin. 26; *Gray* v. *Wilson* (1865), L. R., 1 C. P. 50, 35 L. J. C. P. 123; *Caledonian Railway Co.* v. *Lockhart* (1860), 3 Macq. 808; but so that he does not leave to the judgment of another the matters on which it is intended he should exercise his own judgment. *Eastern Counties Railway Co.* v. *Eastern Union Railway Co.* (1863), 3 De G. J. & S. 610.

It is not a ground for avoiding an award that the arbitrators have taken advice on a point of law in presence of one of the parties who did not interfere, and where the only result was that correct information was obtained upon the law. *Rolland* v. *Cassidy* (1888), 13 App. Cas. 770, 57 L. J. P. C. 99.

It was observed by Lord ABINGER in *Gisbourne* v. *Hart* (1839), 5 M. & W. 50, 58, 8 L. J. Ex. 198, that it used to be the practice under the old form of pleading, when an award good on the face of it was pleaded, to reply specially matter *dehors* the award which went to nullify it, or if the award was bad on the face of it to demur. This remark is borne out by the old cases. *Morgan* v. *Man* (1644), 1 Sid. 180; *Harding* v. *Holmes* (1745), 1 Wils. 122; and *Fisher* v. *Pimbley* (1809), 11 East, 188. But in *Dresser* v. *Stansfield* (1845), 14 M. & W. 822, 15 L. J. Ex. 274, it was laid down that the plea of "no award" meant "no valid award," and that a plea setting forth in detail that the arbitrator had not awarded on all the issues in the cause referred to him was bad, as an argumentative denial that there was a valid award. This decision was followed in *Armitage* v. *Coates* (1849), 4 Ex. 641, 19 L. J. Ex. 95. And in *Williams* v. *Wilson* (1853), 9 Ex. 90, 23 L. J. Ex. 17, it was held that a plea setting out the award *verbatim* and then averring simply that it was not a final award, was a correct form of raising the question.

Where the arbitrator desires the aid of the Court in determining a point of law, there are two courses open. He may either obtain a consultative opinion of the Court under the 19th section of the Arbitration Act 1889; or he may make his award in such a manner as to leave the final determination to the Court.

By the 19th section of the Arbitration Act 1889, "Any referee, arbitrator or umpire may, at any stage of the proceedings under a reference, and shall, if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any questions of law arising in the course of the reference." It has been held by the House of Lords that the power of the Court to direct the arbitrator to state a special case for the opinion of the Court is not inconsistent with the clause (s. 36) of the Building Societies Act 1874, which says that a determination by arbitrators under that Act shall be final, provided that the arbitrator may at the request of either party state a case for the opinion of the Supreme Court; and that the Court has therefore power under the Act of 1889 to direct an arbitrator under the Building Societies Act to state a special case. *Tabernacle Permanent Building Society* v. *Knight* (*Knight* v. *Tabernacle Permanent Building Society*), (1892), 1892. A. C. 298, 62 L. J. Q. B. 50. And it was decided by the Court of Appeal in the matter of the same

arbitration (*Knight* v. *Tabernacle Permanent Building Society*), (1892), 1892, Q. B. 613, 62 L. J. Q. B. 33, that no appeal lies from the decision of the High Court upon a special case stated with regard to a question arising in the course of the reference under this section (19) of the Arbitration Act 1889. For the opinion of the Court so obtained is of a consultative character, and not in the nature of a judgment or order subject to appeal under the 19th section of the Judicature Act 1873. The Court of Appeal here followed the judgment in *Ex parte County Council of Kent* (29 April, 1891), 1891, 1 Q. B. 725, 60 L. J. Q. B. 435, where the language of the Act giving the power to state a special case was to state the case for the "decision" (a stronger expression) of the Court.

But it is also competent for the arbitrator, under the practice which grew up under the C. L. P. Act 1854, s. 5, to state his award in the form of a special case, and in such a manner that the determination one way or other is to depend upon the opinion of the Court on the case stated by him; and, where that is done, the opinion of the Court is an effective determination of the rights of parties, and is subject to appeal like any other judgment. *Re Kirkleatham Local Board* and *Stockton, &c. Local Board* (C. A. 9 Dec. 1892) 1893, 1 Q. B. 375, 62 L. J. Q. B. 180. The judgment in this case was appealed to the House of Lords and there affirmed (31 July, 1893), 1893, A. C. 445; but the decision of the Court of Appeal upon the point here referred to was not called in question.

AMERICAN NOTES.

The award must be final, certain, and conclusive. *Coghill* v. *Hord*, 1 Dana (Kentucky), 350; *Walsh* v. *Gilmor*, 3 Harris & Johnson (Maryland), 383; 6 Am. Dec. 502; *Remelee* v. *Hall*, 31 Vermont, 582; 76 Am. Dec. 140. An award that a party may maintain flash-boards on a dam except in times of "freshet" is void for uncertainty. *Harris* v. *Social Manuf. Co.*, 9 Rhode Island, 99; 11 Am. Rep. 224. See *Whitcher* v. *Whitcher*, 49 New Hampshire, 176; 6 Am. Rep. 486; *Colcord* v. *Fletcher*, 50 Maine, 398.

It must be final. *Cox* v. *Jagger*, 2 Cowen (New York), 638; 14 Am. Dec. 522; *Smith* v. *Potter*, 27 Vermont, 304; 65 Am. Dec. 198. But it may refer to and adopt a judicial report previously made. *Brickhouse* v. *Hunter*, 4 Henning & Munford (Virginia), 363; 4 Am. Dec. 528; *Walsh* v. *Gilmor*, *supra*. But such instruments must accompany or be fully described in the award. *Hollingsworth* v. *Pickering*, 24 Indiana, 435.

It must embrace all matters submitted. *Bancroft* v. *Grover*, 23 Wisconsin, 453; 99 Am. Dec. 195, citing the first principal case; *Smith* v. *Potter*, *supra*; *Byars* v. *Thompson*, 12 Leigh (Virginia), 550; 37 Am. Dec. 680; *Carnochan* v. *Christie*, 11 Wheaton (U. S. Sup. Ct.), 446; *Tudor* v. *Scovell*, 20 New Hampshire, 171; *Harker* v. *Hough*, 7 New Jersey Law, 428; *Walker* v. *Shannon*, 44 Connecticut, 480; *Boston, &c. R. Co.* v. *Nashua, &c. R. Co.*, 139 Mas-

sachusetts, 463; *Johnston* v. *Brackbill*, 1 Penn. St. 364; *Jones* v. *Welwood*, 71 New York, 208; *Bean* v. *Bean*, 25 West Virginia, 604. But it need not specify each particular. *Blackledge* v. *Simpson*, 2 Haywood (No. Carolina), 30; 2 Am. Dec. 615; *Bancroft* v. *Grover*, *supra*, the court observing: "But I think no case will be found where the questions submitted are merely questions of mutual indebtedness which has held that a general award of a certain sum to be paid by the one party to the other, the award professing to be upon the matters submitted, would not be construed as including them all. On the contrary, the cases are numerous which hold that such a general finding, either in a report of a referee or award of arbitrators, is sufficient." Citing *Heckers* v. *Fowler*, 2 Wallace (U. S. Sup. Ct.), 123; *Harden* v. *Harden*, 11 Gray (Mass.), 435; *Bowman* v. *Downer*, 28 Vermont, 532. If the thing awarded necessarily includes the other things mentioned in the submission, it is sufficient. *Smith* v. *Demarest*, 8 New Jersey Law, 195; *McCullough* v. *McCullough*, 12 Indiana, 487.

Mr. Morse repeatedly cites and approves both the principal cases.

No. 10. — BOURKE *v.* LLOYD.

(EXCH. 1842.)

No. 11. — PHILLIPS *v.* HIGGINS.

(Q. B. 1851.)

RULE.

WHERE all matters in difference in an action are referred, and the costs are to abide the event, the award must find on each issue, so as to enable the officer of the Court to tax the costs.

But it is sufficient that the award, without finding specifically upon each issue, shows, by a reasonable intendment, in whose favour each is decided.

Bourke v. Lloyd.

12 L. J. Ex. 4–6 (s. c. 10 M. & W. 550–553).

Debt for money lent, money paid, interest, and on an ac- [4]
count stated.

Pleas — Nunquam indebitatus and payment.

Before trial, the cause was referred to an arbitrator by a Judge's order, which directed that the costs of the cause should abide the event of the award, and that the costs of the reference should be

in the discretion of the arbitrator. The arbitrator awarded, that the plaintiff had good cause of action against the defendant, and that the defendant should pay £20 to the plaintiff, together with the costs of the action, but he did not award specifically upon each issue. A rule having been obtained for setting aside this award, on the ground, amongst others, that the issues in the action were not determined by the award, so as to enable the Master to tax the costs, —

Cowling showed cause. No verdict having been given in this case, it was unnecessary for the arbitrator to find specifically on all the issues. But, in fact, his directing the defendant to pay £20 to the plaintiff, and stating that the plaintiff had good cause of action against the defendant, makes the award sufficiently certain, and amounts, in fact, to a finding for the plaintiff upon all the issues. *Dicas* v. *Jay*, 5 Bing. 281; 7 L. J. C. P. 80. In *Duckworth* v. *Harrison*, 4 M. & W. 432; 8 L. J. Ex. 41, where the general issue and set-off were pleaded, "the costs of the reference and award to abide the event," the arbitrators found that the plaintiff was not entitled to recover in the action, and had not any cause of action against the defendant, but were silent as to the set-off: it was held, that the award * was final, and that the defendant might maintain an action for the costs of the reference and award, although the arbitrator had not awarded distinctly upon each issue. In the present case, there was no intention that the arbitrator should find specifically upon each issue, and there will be no difficulty in taxing costs.

[* 5]

Ramshay, *contra*. The arbitrator was bound to find on all the issues, for otherwise there would not be a legal event to enable the plaintiff, under the new rules, to obtain his costs. In *Norris* v. *Daniel*, 10 Bing. 507; 3 L. J. C. P. 160, where the arbitrator had not awarded on three counts, the award was set aside, on the ground, that there was no legal event which could authorize the taxation of costs. *Gisborne* v. *Hart*, 5 M. & W. 50; 8 L. J. Ex. 197, is to the same effect. *Duckworth* v. *Harrison* is distinguishable, because there the costs of the action were not to abide the event of the award. In *Doe* d. *Madkins* v. *Horner*, 8 Ad. & El. 235; 7 L. J. Q. B. 164, where the costs of an action of ejectment were to abide the event of the award, the award was held bad for not stating on which demise the plaintiff was entitled to succeed. In *England* v. *Davison*, 9 Dowl. P. C. 1052, the cause, in which

there were several issues, was referred to arbitration, the costs of the action, the reference, and the award, to abide the event of the award. The arbitrator, who had not been requested to find each issue specifically, awarded that the plaintiff had no cause of action against the defendant, and directed a verdict to be entered for the defendant: COLERIDGE, J., held, that the award was bad. *Hunt* v. *Hunt*, 5 Dowl. P. C. 442, is to the same effect. He also referred to *Dibben* v. *The Marquis of Anglesea*, 2 Cr. & M. 722; 4 L. J. Ex. 278; 10 Bing. 568. *Cur. adv. vult.*

LORD ABINGER, C. B., now delivered the judgment of the Court. There was a case of *Bourke* v. *Lloyd*, in which a motion was made, in Easter Term, to set aside an award. We took time to consider, in consequence of a reference to a recent decision of COLERIDGE, J., which was supposed to militate against the doctrine more than once laid down in this Court, that where an action is referred generally to an arbitrator, and the costs of the cause are distinctly to abide the event of the award, and there are several issues joined, he ought to award upon each issue, in order to determine what are the costs which are so to abide the event. That has been settled by several cases, and discussed, I think, more than once in this court. COLERIDGE, J., was supposed in his judgment in the case of *England* v. *Davison*, which was cited on showing cause against the rule, to have said that this Court, in a judgment given by me, had overruled these cases, and had intended to set up a case decided in the time of Lord Lyndhurst, which had a different aspect. *Dibben* v. *the Marquis of Anglesea*. Now looking at the judgment in *Duckworth* v. *Harrison*, which is the case referred to, it appears to me that it has been misunderstood. That was the case of a construction put by the Court on a rule of reference in which the costs were referred, and the costs of the reference and award were to abide the event of the award, but the costs of the action were not there distinctly made to depend on the award of the arbitrator. In delivering the judgment of the Court, I had stated that which I still adhere to; and although the Court entertained some doubt at first, they finally came to the same conclusion, that to make it incumbent on the arbitrator to find upon each issue, words ought to have been introduced into the rule of reference, to show that he was bound so to find, or that the costs were to abide the event of the cause, whereas in that case there was merely an agreement

that the costs of the reference and award were to abide the event of the award; and as the other stipulation was by implication excluded, it did not follow that the arbitrator was bound to award upon each issue. That was my meaning at the time, and, if rightly understood, that is the meaning of the judgment. We are therefore of opinion, that the cases must be adhered to, and that where an action is referred to an arbitrator, and the costs of the action are to abide the event of the award, each issue [* 6] * must be found specifically by the arbitrator, otherwise the Master has no rule of proceeding as to the costs. We think, therefore, the rule to set aside the award ought to be made absolute.

Rule absolute.

Phillips v. Higgins.

20 L. J. Q. B. 357–359.

[358] This was a rule calling on the defendant to pay two sums of £220 and £51, pursuant to a rule of court, the Master's allocatur thereon, and an award between the parties.

The action was in assumpsit. The declaration contained two counts, — one alleging a breach of the defendant's promise to procure sufficient security for money lent by the plaintiff at defendant's request to a third party; the other alleging a breach of the defendant's promise that certain indentures given as a security for such a loan were a sufficient security.

Pleas — first, non assumpsit to the whole declaration; second, to the first count, that the defendant did produce sufficient security; third, to the first count, a rescinding of the agreement by consent before breach; fourth, to the first count, that another agreement which it set out was substituted by consent. The fifth and sixth pleas were to the second count, and were traverses of allegations in the second count.

Issues were joined on these pleas before the order of reference was made.

By a Judge's order, made on the 27th of July, 1849, it was by consent ordered that "all matters in difference in this cause" should be referred to arbitration; that "the costs of the cause and of the reference and award shall abide the event of the said award," and "that all letters written to or for or by or on behalf of either party upon the subject-matter of and relating to this action, and all deeds or documents signed by them or either of

No. 11. — Phillips v. Higgins, 20 L. J. Q. B. 358, 359.

them, or forming part of the assurance, shall be admitted as evidence without reference to or requiring stamps."

The award, after reciting the submission, and setting out the last-mentioned clause of the submission in full, proceeded thus: — "I, &c., having examined upon oath all such witnesses as were produced before me by the said parties respectively, and having read all the letters and documents produced before me by or on behalf of the said parties, &c., do award, find, and adjudge that the said Walter Phillips had good cause of action against the said William Higgins, as stated in the declaration of the said action so referred to me as aforesaid, and I assess and award the damages to be paid by the said defendant to the said plaintiff on the said action at the sum of £200."

Skinner showed cause. First, the clause in the submission that unstamped documents shall be received in evidence is illegal and void as contrary to public policy. It is recited in the award, and the award, therefore, is void also. It must be presumed that the arbitrator acted upon it. The award recites that he read the letters and documents put in evidence. Secondly, the award does not sufficiently decide all the issues. The award says that the plaintiff had a good cause of action against the defendant. It does not say when. It may be before the time when the substituted agreement as mentioned in the fourth plea was entered into.

[Wightman, J. Surely the award must be held to mean that the plaintiff had good cause of action at the time of action brought.]

The costs of the action, reference and award are to abide the event. It is necessary, therefore, that each issue be if not specifically at least substantially decided. Here, the award simply is, that the plaintiff has a good cause of action against the defendant. That is in effect an award that on one or other of the counts the plaintiff has a good cause of action, — it is uncertain on which. It is, therefore, uncertain how the issues have been decided. The reference of a "cause" and of "all matters in the cause," amounts to the same thing. *Hobson* v. *Stewart*, 4 Dowl. & L. P. C. 589; 16 L. J. Q. B. 145. The cases show that the award is insufficient. *Bourke* v. *Lloyd*, 10 M. & W. 550; 12 L. J. Ex. 4, p. 429, *ante*; *Pearson* v. *Archbold*, 11 M. & W. 477; 12 L. J. Ex. 308; * *Kilburn* v. *Kilburn*, 13 M. & W. 671; 14 L. J. Ex. [*359] 160; *Stonehewer* v. *Farrer*, 6 Q. B. 730; 14 L. J. Q. B.

122; *Wilcox* v. *Wilcox*, 4 Ex. 500; 19 L. J. Ex. 27; *Creswick* v. *Harrison*, 1 L. M. & P. 721; 20 L. J. C. P. 56. If the award is doubtful, the Court will refuse the rule.

W. H. Cooke (T. Jones with him), in support of the rule as to the second point. The award is sufficient. The true rule is laid down in *Wilcox* v. *Wilcox* by Parke, B. A verdict for the plaintiff means on all the issues for which a jury can find for the plaintiff. The award that the plaintiff has good cause of action against the defendant as stated in the declaration, must mean an award in the plaintiff's favour on both counts. There has been no difficulty felt here. The Master has taxed the costs. (He was here stopped by the Court.)

WIGHTMAN, J. I do not entertain any reasonable doubt in this case. Two objections have been made. One that the recital in the award of the clause of the submission respecting the admission in evidence of unstamped documents renders the award void. Assuming that the objection to that clause of the submission be good, there is here no ground for the making any objection to the award on this account, as it does not appear that any unstamped document was admitted in evidence. The second objection is, that the award does not decide the issues in the action. When the costs of the action are to abide the event of the award, it is no doubt the duty of the arbitrator to determine on each issue. But there are several cases which determine that it is not necessary for an arbitrator to award specifically on each issue, if the award by necessary intendment decides on each issue. The question then here is, whether by necessary intendment the arbitrator has not found on all the issues in favour of the plaintiff. If the arbitrator had awarded simply that the plaintiff had a good cause of action against the defendant, it might have been said that possibly the plaintiff had a good cause of action on the first count, but none as to the second; but the award here says that the plaintiff had good cause of action against the defendant, "as stated in the declaration." That by every reasonable intendment of language must mean on the whole declaration, and I think it equivalent to a finding that the plaintiff had a good cause of action on all the counts in the declaration. The case, therefore, seems to me to fall within the cases to which I have referred, and to be by reasonable intendment a sufficient decision on all the issues.

Rule absolute.

No. 12. — Pope v. Brett. — Rule.

ENGLISH NOTES.

The latter part of the rule is also illustrated by the following cases: An action and all matters in difference were referred; costs of the action to abide the event. The arbitrator awarded that the action should cease, and that there was due from plaintiff to defendant a certain balance. This was held sufficient and final, although it did not in terms say in whose favour the award was. *Eardley* v. *Steer* (1835), 4 Dowl. Pr. Ca. 423, 1 C. M. & R. 327.

Under a reference of a cause and all matters in difference, the costs to abide the event, if the award is partly in favour of one party and partly in favour of the other, it appears that the arbitrator has no power to award costs; nor does it appear that any order as to costs can be made in the action or otherwise. *Boodle* v. *Davies* (1835), 3 Ad. & El. 200.

But where by an order in a cause, the cause and all matters in difference are referred, the costs to abide the event, and the arbitrator decided the suit in favour of the defendant, and ordered the plaintiff on a certain day to pay those costs, this latter direction was held immaterial, as it would not deprive the defendant of any right which he might have under the order in the action to recover the costs at an earlier date. *Cockburn* v. *Newton* (1841), 9 Dowl. 676; 2 M. & G. 899.

A cause was, after verdict, referred along with another cause between the same parties; the verdict to be reduced or vacated according to the award, and the costs to abide the event. The arbitrator made an award finding as to the facts in issue, although it was not expressly stated in whose favour the award was made. *Held*, that the award was sufficient and final. *Allen* v. *Lowe*, *Lowe* v. *Allen* (1843), 4 Q. B. 66, 12 L. J. Q. B. 115.

No. 12. — POPE *v.* BRETT.

(K. B. 1670.)

RULE.

WHERE some part of an award is void for uncertainty, or any other reason, and it appears to be the intention of the award that the performance of the part of the award which appears good in itself, is to be dependent upon the performance of that which is uncertain, or otherwise void, the whole award is void.

No. 12. — Pope v. Brett, 2 Saund. 292, 293.

Pope v. Brett.

2 Saund. 292, 293 *c*.

[292] Assumpsit. The plaintiff declares upon three several promises for money, for work and labour, and for other money expended. The defendant pleads in bar an award, by which it was awarded that the said William Pope (the plaintiff) should be satisfied and paid by the said John Brett (the defendant) the money due and payable to the said William Pope, as well for task-work as for day-work, and then the said William, his executors, administrators or assigns should pay, or cause to be paid, to the said John Brett, his executors, administrators or assigns, the sum of £25 of lawful money of England, on the 29th day of April then next following, in the then mansion-house of the said John Brett, in full payment and satisfaction of and for all debts, claims and demands whatsoever; and it was further awarded that upon payment of the said money each of the parties should give to the other a general release of all controversies, &c.; and the defendant avers that the task-work and day-work in the whole amounted to £12 10*s*. and no more, and that the defendant paid and satisfied the £12 10*s*. to the plaintiff, being all the money due to him for any task-work and day-work; and this, &c. wherefore, &c.; to which plea in bar the plaintiff demurs in law.

And Sympson for the plaintiff argued that the plea was bad, because the award was void for uncertainty, inasmuch as the arbitrator has not ascertained what sum should be paid for the task-work and day-work, but has left it in as great an uncertainty as it was before. And then the averment of the defendant of the sum it amounted to, and that he has paid it, is nothing to the purpose, because his averment cannot make the award good which was void at the time of making it; wherefore he concluded that the award was void, and consequently the plea insufficient.

Saunders for the defendant agreed that the award as to this clause was void; but he said that here there is a sufficient award without that clause; for the award is that the plaintiff should pay £25 in certain to the defendant, and that general releases [* 293] should be given to both parties, which is sufficient * of itself without the other clause of task-work and day-work. And an award may be void in one clause, and good for the residue. That was granted by the Court; but the Court said

that here, if the clause of task-work and day-work be void, as it is admitted to be, the whole award is void; for it appears that the plaintiff was awarded to pay the £25, and to give a general release upon a supposition by the arbitrator that he should be paid for the task-work and day-work by virtue of that award; and that not being so, it was not the intention of the arbitrator, as appears by the award itself, that the plaintiff should pay the money to the defendant and give him a general release, and yet receive nothing for the task-work and day-work, as by reason of the uncertainty of the award in that part he could not. But the arbitrator intended that the plaintiff should be satisfied for his task-work and day-work, and then he should pay the £25 and give a release; but the plaintiff not having any remedy to recover satisfaction for his task-work and day-work by the award, he is not bound to perform any part of it. But true it is, that in some cases an award may be void in part, and good for the residue; as if an award be made between A. of the one part, and B. of the other, by which it is awarded that A. should pay £10 to B., and also that A. should pay £5 to a stranger, and that B. should give A. a general release; here the award to pay £5 to the stranger is void, and yet the award is good for the residue; for B. is not prejudiced though the £5 be not paid to the stranger; for no more than £10 was intended for him or his benefit. (See note by the late J. Williams, *infrà*.) But in the case at bar it is otherwise; for * here the plaintiff shall pay £25 and give a [* 293 *a*] release, and yet cannot have the benefit of the task-work and day-work which was intended for him by the award, and without which the arbitrator did not intend that the plaintiff should either pay the £25 or give any release. And for this reason it was adjudged for the plaintiff. — Note a good diversity.

NOTE BY THE LATE JOHN WILLIAMS.

But where in debt on bond to perform an award, by which it was awarded that the defendant should pay the plaintiff £16 10*s*. and all such costs, charges and expenses, as the plaintiff had been put unto in a certain cause then depending between the parties, at a certain day then to come, and that thereupon they should give each other general releases; the breach assigned in the replication was in the non-payment of the said £16 10*s*.; and on

demurrer it was objected, first, that no certain costs, charges and expenses were set down and averred; secondly, that the award did not mention any cause between the parties depending in any certain court, and it might be in an inferior court; and, thirdly, that there was nothing awarded to the defendant but a release, and that was not to be made until all the rest were performed; and although the award were good for the £16 10*s.* which were certain, yet the costs, charges and expenses of the suit were totally uncertain and void, and the award in that part could never be performed, and so the release to the defendant could never be made, for it was to be made *thereupon*. To which it was answered and resolved, that there was no doubt but an award might be good in part and bad in part; and if the award was good in that part upon which the breach was assigned, and the defendant demurred, whereby he admitted the breach, the plaintiff must have judgment; and as to the costs, that the recovery in that action would be a bar to any future action on the bond for non-payment of those costs. *Fox* v. *Smith*, 2 Wils. 267. So where in debt upon bond to perform an award, by which it was awarded that the defendant should, on a certain day therein mentioned, pay to the plaintiff the sum of £4 15*s.*, and all costs and charges due to the steward and attorneys on account of an action of replevin depending in the court of the hundred of Norman Cross, and all the costs and charges of the arbitration bonds and of the award, and that the parties should execute mutual general releases; the breach assigned in the replication was, that the defendant had not paid to the plaintiff the said sum of £4 15*s.*: and on demurrer it was objected, that the award was void in awarding costs in an inferior court unsettled and uncertain, and did not make a final end between the parties. But it was adjudged that the award was good for the payment of the £4 15*s.*, and the mutual releases made a final end between the parties, and though other parts of the award were bad, yet the breach was well assigned. *Addison* v. *Gray*, 2 Wils. 293. The same point had been long before determined in the case of *Bargrave* v. *Atkins*, 3 Lev. 413, which was, debt on bond conditioned to perform an award of all controversies, &c. The defendant pleaded no award. The plaintiff replied, and set out an award that the defendant should pay to the plaintiff £7 10*s.* on the 11th of May then following, and also all the expenses of a suit prose-

cuted by the plaintiff against the defendant, and all reasonable expenses which the plaintiff had sustained about the said suit; and thereupon each of the parties should execute general releases one to the other, and assigned a breach in non-payment of the £7 10*s*. The defendant rejoined, that the arbitrator made no such award; upon which issue and verdict for the plaintiff. And it was moved, in arrest of judgment, that the award was void; for nothing was awarded to the defendant but the release, and it was not to be executed until all the rest was performed. And although the award was good for the £7 10*s*., which was certain, yet the expenses of the suit, and all the reasonable expenses which the plaintiff had incurred about his suit were all uncertain, and the award was void as to them, and in that part could never be performed; and so the release could never be made; for it was to be made thereupon. And so held the court when it was first moved; but afterwards, on the authority of *Pinkny* v. *Bullock*, East, 23 Car. 2, where the award was to pay £10 and the charges of making the award, each to release the other, though it was void as to the charges, yet on the payment of £10 which was good, it was held that the *release ought to be made; [*293 *b*] so in the principal case; wherefore judgment for the plaintiff.

However, these cases differ from the present; and there seems to be no doubt that the principle of the resolution in the principal case is well founded, namely, that if by the nullity of the award in any part, one of the parties cannot have the advantage intended him as a recompense or consideration for that which he is to do to the other, the award is void in the whole. 1 Rol. Abr. 259, pl. 9, 10. S. P. See *Birks* v. *Trippet*, 1 Saund. 32; *Veale* v. *Warner*, ib. 394, note (2); *Hodsden* v. *Harridge*, 2 Saund. 61; *Coppin* v. *Hurnard*, ib. 127.

ENGLISH NOTES.

In *Tomlin* v. *Fordwick* (Mayor, &c.), referred to at p. 426, *ante* (K. B. 1836, 5 Ad. & El. 147), there was an agreement between plaintiff and defendant for a lease for a specified term, and it was (*inter alia*) agreed that the rent and other conditions of the lease should be named by an arbitrator. The arbitrator awarded that defendant should put the premises in good and tenantable repair "to the satisfaction of M.," and should, on a later day named, execute a lease to plaintiff containing a covenant to keep in repair, and plaintiff should execute a counter-

part. The award was held bad by reason of the delegation of authority to M., that not being separable from the rest of the award.

In the case of *Bowes* v. *Fernie* (1838), 4 My. & Cr. 150 (also referred to at p. 424, *ante*), there was a reference of a certain suit and disputes as to accounts upon the terms (*inter alia*), that a certain account and release of the 25th of December, 1833, should be considered and adopted as a closed and settled account up to that day. The award allowed to the defendant certain sums in excess of what were allowed on that settled account. The Lord Chancellor (Lord Cottenham) held that in this respect the arbitrators had awarded upon a matter not referred to them, and that what they had so awarded without authority could not be separated from the other parts of the award.

In the arbitration between *Tandy* and *Tandy* (1841), 9 Dowl. 1044, an arbitrator on a reference with respect to the right to a certain house and land directed certain conveyances to be executed, and awarded that in case of any dispute arising with respect to the form of the conveyances the dispute should be settled by such counsel or solicitor as he (the arbitrator) should appoint. The Court set aside the award on the ground that the reservation of a contingent power to appoint a counsel to settle the conveyances was bad, both as an excess and as a delegation of authority; and that, as this went to the substance of the whole award, the award was bad.

By a reference, the arbitrator was empowered to determine all disputes touching all rights of water or depths of weir, and to order to be erected and put up, and forever thereafter to be kept in repair, any erections in and about the weir. The award ordered that the defendant was entitled to keep and maintain his weir at the depth of fourteen inches and no more; and proceeded to direct that for defining and perpetuating the measure of depth "such durable marks and erections be placed on the land adjoining the weir as B. may direct," &c. The latter part of the award was held bad, as a delegation of the arbitrator's authority; and it was held that the bad part was not separable, as the consideration for the submission was not only settling existing differences, but setting at rest all disputes about the water rights for the future. *Johnson* v. *Latham* (1850), 19 L. J. Q. B. 329 (also referred to, p. 426, *ante*).

AMERICAN NOTES.

The principal case is much cited by Morse on Arbitration and Award. (See notes, p. 449.) He says however that if the prevailing party is willing to forego a provision about costs which was void for uncertainty, the Court may enforce the remainder. Citing *Morgan* v. *Smith*, 1 Dowl. N. S. 617 and other English cases.

No. 13. LEE *v.* ELKINS.

(C. P. 1701.)

RULE.

AN AWARD that one of the parties should do a thing out of his power, as to deliver up a deed which is in the custody of another, is void.

But where the award, in the alternative, orders him to do something which is, or which the law presumes to be, in his power, as to pay a sum of money, it is good.

Where the matters awarded are distinct and not depeuding the one on the other, the award may be good as to one part and void as to the other.

Lee v. Elkins.

12 Mod. 585–591.

Upon an award these points were agreed by the Court: [585]

First, That an award, that one of the parties should do a thing out of his power, as to deliver up a deed which is in the custody of J. S., is void.

Secondly, Where the matters awarded are distinct, and not the one depending on the other, the award may be good as to one part, and void against the other. Dy. 217; Cro. Jac. 577; Br. Award, 65.

Thirdly, That in that case the breach must be assigned in that part that is good. *Ormlad* v. *Coke*, Cro. Jac. 354.

Fourthly, Award of a collateral thing in satisfaction of trespass, good. Cro. Car. 216.

Fifthly, If arbitration exceed the time of submission, yet no cause shall be presumed to have arisen out of the time, if it be not shown.

Sixthly, That where the submission is simply without condition, award of part is good. 8. Co. Rep. 97.

Seventhly, If award be for payment of money at or before such a day, it is no breach to say that it was not paid at the day, but at or before.

But another day the Judges put the case at large, and delivered their opinions *seriatim* in it.

No. 13. — Lee v. Elkins, 12 Mod. 585, 586.

Debt upon an award bond; upon[*nullum fecer. arbitr.* an award was set forth, reciting several differences between the parties concerning a parcel of land sold by the defendant to the plaintiff; and that parcel thereof was recovered by a stranger by a prior title from the plaintiff; and that the plaintiff was out of pocket in defence thereof, &c., and then all these controversies were submitted to them on such a day, viz. the day of the date of the bond; and then they award, that the defendant should deliver to the plaintiff a certain deed concerning the title of the said land, or pay the plaintiff fifty pounds in case of failure; that he should pay him twelve pounds for his costs in defending the suit concerning the land recovered; and also eleven pounds for his damage by the said recovery; and that thereupon the plaintiff shall give the defendant a general release to and upon the day of the date [*586] of the *arbitration bond; and breach is alleged in non-payment of the said eleven pounds, and demurrer.

One exception to this award was, that it ordered the delivery of a deed which was in the power of a third person, and therefore as to that void; and the plaintiff was not to release till upon performance of all the particulars to be done by the defendant, and one of them being void and impossible was never to be done, therefore the release was never to be given; *ergo* the whole award was *ex parte*.

Blencowe, Justice. The award is good, for it does not positively order the delivering up of the deed, but that the defendant shall do that or pay fifty pounds.

The second exception is, that the release awarded to be made of all matters, &c., to or upon the date of the award bond, would release the very award bond, and therefore avoid release.

And he held the award good; for let the release awarded be void, and even let the first matter awarded be likewise void; yet here will be sufficient in the award to make it good; for here is twelve pounds awarded for costs in defending the title; and in action for the same costs this award will be a good plea. And again, here are eleven pounds awarded to be paid for the plaintiff's damage; and if he is to pay it for the damage, the plaintiff is to receive it so, and surely that is mutual; and the breach being assigned in that which is well awarded, plaintiff ought to recover.

Powell, *acc.* First, It is excepted, that in assigning the breach it is not alleged that on or before the day mentioned in the condi-

tion of the bond the defendant did not pay the said eleven pounds and he agreed that had been the neatest way; but here he held it well enough, as it was laid, viz. that the defendant did not pay it *juxta tenorem et effectum* of the award. And the rule is, that where the day of payment or performance appears before on the record, there, in averring performance, or assigning breach for the want of it, you need not mention the day certainly, but may refer it by a *præd.* to the record; for *id certum est quod referendo fit certum.* But if award be for payment of money, &c. at one or more days in a certain indenture mentioned, there to assign breach in non-payment, or to allege payment at the day, &c. in the said indenture mentioned, would be ill; but the way there is to set forth the indenture, that so the day might appear on record, and then refer to it. *Vide* 1 Vent. 87; 3 Cro. 281. Debt upon bond for payment of money at two several days and places; afterwards defendant pleads *payment *secundum formam* [*587] *et effectum conditionis;* and adjudged good, *reddendo singula singulis.*

Second exception. The release awarded exceeds the submission, for it extends to the bond of submission. Let it be supposed void for that reason, yet the award will be mutual throughout: *ergo* good. It has been often resolved, that if an award be void in part, as being only *ex parte;* yet if it be mutual for another part, it shall be good for that part; and vide *Osborne's Case*, 10 Co. Rep. 131, where it is held, that if award be of some matter within the submission, and for that void, as to that part; and though it appears by the award, that it designed both matters should be recompense of what is to be done of the other side; yet if there be ever so small a matter to make it mutual, it shall stand for the matter within the submission; but PER LUY, *durus est hic sermo;* and that judgment was after reversed upon writ of error. 1 Leo. 170. And the rule there put will not hold of the extent which Coke gives it. One recovered ninety pounds damages in waste, and then the matter is submitted to reference; and it is awarded, that the defendant should at one time pay ten pounds to the plaintiff, and that at another day he should pay him fifteen pounds, and that for payment another and the defendant should become bound in a bond; this being good in part, though void for the rest, was held good; but surely that was hard, and would not pass at this day. *Vide* Hard. 399. A difference is taken, where the thing

to be done on one side is only applied to one particular thing of the other side; there, though the award be void in other parts, it may be good in that part; *secus* where a particular thing of one side is applied by the award to all that is to be done of the other side, if any of those things be ill awarded, the award cannot be good for the rest. If an award were, that one of the parties with his wife and son join in a conveyance to the other, and the other pay him one hundred pounds, that award is good, as to a conveyance to be made by himself; and if that only had been awarded for the one hundred pounds, it had been well; but surely such award would be wholly void; for the other was to have had a title made to him from the party, his wife and son. And it would be unreasonable if it were that one should be obliged to pay his money, and not have such title made to him as the arbitrators designed; and if this award had been only mutual in this point in which the breach is assigned, and not throughout the whole matter in difference, it would be void without doubt.

[*588] * First, Here the defendant is to deliver the plaintiff his writing relating to the land sold to him by the defendant, or else fifty pounds damages; and this is a bar to an action of detinue for these writings; and the award imitates a verdict in detinue, and judgment and execution thereupon, which would be in this manner, for the thing itself, if it could be; *secus* for damages. Secondly, Thing is of so much for costs, which is a good discharge of those costs; and therefore mutual; so is the eleven pounds for damages for the recovery. So the award is mutual throughout, and the release nothing to the purpose. And he compared it to an award of forty pounds for all trespasses, and that the plaintiff should release all damages to time of award, which award of release would be void, and yet the award would be good. *Vide* Cro. Eliz. 89; Jac. 447; 1 Rol. Abr. 260; Allen, 85, that ordering of all suits to cease between the parties makes the award mutual.

And as to the awarding the releases, the one, besides what before is said, is ordered to execute a release to the other to and upon the day of arbitration bond; and *super performationem inde*, the other is to release to him in like manner; so that the one is not ordered to release till all the matter to be done, or awarded to be done of the other side, be performed. And though the awarding such a release were void, yet, if the giving thereof be ordered to

be before the other does release, it is a condition precedent, which ought to be before the release is to be made by the other; and that is one of the points resolved in *More and Bigle's Case*. But PER LUY: This diversity is to be observed; where an award consists of divers things, and one of them is void, and it be expressly said, that upon performance of that void thing the other party shall do such a thing, there the doing of the void thing is a condition precedent, and must be averred, before action against the other for not doing his part. But where there be several things in an award, and some are good, and others not, and it is further said, that upon performance *præmissorum* the other shall release for the purpose, there it suffices to make averment of performance of what is well awarded, without more. *Vide* 2 Keb. 759, 833. So here, there being several matters awarded, the *super performationem inde* shall only go to that part of the award which is good; and performance of so much obliges the other to do what belongs to him. Suppose award be, that both parties shall make mutual releases to one * another to the time of the award, [*589] and that A. upon B.'s making him such release, should release to B., B. tenders a release to A. to the time of the submission, it would be a good tender; so it would be here. 1 Rol. Ab. 260; 1 Sid. 265, *per* WINDHAM, Hutt. 29, *cont.* to Rol. 244.

Besides, this release would not discharge the bond, notwithstanding the words reach to it; for the award is, *de et super præmissis*. *Vide* Allen, 51, 52, the consequence of these words in an award. And though these words have but of late been introduced into pleading, yet it is to very good purpose to put them in; for thereby the general words of an award are applied only to the matter submitted. And if award be to pay money at a day to come, and the other shall give a release *de præmissis*, it shall only be a release of things before the submission. So here, the release of matters to and upon the day of submission shall be intended of matters on that day before the submission.

NEVILL, Justice, agreed the plaintiff ought to have judgment, but doubted if the award were good throughout; and cited Hob. 109, *contra* to Roll. Abr. 254.

TREVOR, Chief Justice. I am not satisfied that that part of the award which relates to release is good; but hold the award good as to the rest. First, This is a release to be given by the defendant to the plaintiff at a day after the submission of all matters, &c.,

to or upon such a day, which is the date of the arbitration-bond; and thereupon the like release is to be given by the plaintiff to the defendant. Now I think the awarding the first release is void, for it takes in the arbitration-bond expressly as can be. Though I agree with Brother POWELL, *de et super præmissis* is of good use in a general matter, where there is room for extensive construction, to restrain it to matters submitted; but where words are very plain and full, I deny that *de et super præmissis* will do the business. As if award be, that one party shall on such a day give a general release to the other, there *de et super præmissis* will make it interpretable to be a release only to the submission, though to be made long after; for though it be given now, it may only be of matters long before; and in that generality of words it shall be intended a release of such things as the parties that ordered it had power to order a release in. But here they expressly show how far the release shall work, viz. to and upon the day of submission; and to construe this otherwise than they have expressly declared it, will be very odd. And surely to construe a tender of a [*590] release to time of *submission to be good, where the arbitrators have ordered a release to the time of the award, would be to make an award and not declare the law upon it; and then farewell all awards. And it is in Hutt. 447, that awarding a release to time of award is void; which could not be if it could be made good to the time of submission. 1 Ro. Ab. 242; 1 Ro. Rep. 1, 2 So as to that point I differ with my Brother POWELL. And the present case goes not so far as that before put, for this is not to the time of the award, but only to and upon submission day; and the law will make no fractions of a day; and the submission being of all matters on that day, the release is likewise so: so that if that were the question, I could not give my opinion for the making it good as far as it goes upon the release.

Now as to the release ordered to be given by the plaintiff to the defendant, that cannot be ill awarded upon the same reason that I hold the other ill, viz. that it would release the award bond; for that release by the award is the last thing to be done, and then it is no matter though it should release the bond, the conditions whereof would be completely performed by the giving of it. But I hold, it will not be good upon another reason, because it is to be given upon the defendant's performing all the parts of

the award of his side; so that is the consideration of it, which is a matter precedent, and therefore ought to be first performed. So if any thing that is awarded to be done by the defendant be void, it ought not to be done; and till it be done, this release is not to be made; *ergo* never to be made. So I do agree with my Brother POWELL in part, viz. that if part of the award be void, yet if it be a condition precedent, it must be performed before the other performs of his side; but my Brother's diversity of express words of reference I think will not hold; that is, that where the words be express that upon performance of that part which is void, the other shall do such a thing, there the void thing, says he, is a condition precedent, and must be done; but where several things are ordered, and some of them void, and that *super performationem præm.* such a thing shall be done, there, he says, it is enough to do that which is well awarded, to be entitled to the thing to be done of the other side: I say that every illegal part of an award is the same thing, to many purposes, as if it were not in; but yet if it appear that the arbitrators designed that *such [*591] illegal part should be part of the consideration in respect of which the other was to perform, it must be done, or else here is not that advantage for the other side which was designed for it, and he has a wrong done him by being forced to pay for a consideration which he has not.

Then here is a submission of all matters in difference; and here is mention made of such causes of demand the plaintiff has against the defendant, and such and such matters ordered to be done by him in discharge of them; and accord with satisfaction would be a good plea in actions for them, therefore this award will.

Judgment for the plaintiff.

ENGLISH NOTES.

In *Bretton* v. *Pratt*, 42 Eliz. (1600), Cro. Eliz. 758, it was held that an award giving the plaintiff an estate for life and the remainder to a stranger was good for the particular estate, although void as to the remainder.

In *Webb* v. *Ingram* (1622), Cro. Jac. 663, there was a submission of suits for tithes. The award ordered a surcease of all suits. It was held good so far as relates to the tithe suits.

In *Hill* v. *Thorn* (1679), 2 Mod. 309, these points were adjudged: "1. If two things be awarded, the one within and the other not within the submission, the latter is void; and the breach must be assigned

only upon the first. 2. If there be a submission of a particular difference, and there are other things in controversy, if in such a case a general release is awarded it is ill, and it must be showed on the other side to avoid the award for that cause. 3. If the submission be of all differences till the 10th day of May, and a release awarded to be given of all differences till the 20th day of May, if there be no differences between these two days, the award is good: If any, it must be showed in pleading, otherwise the Court will never intend it."

It has been adjudged that an award ordering a release of all matters to the time of the award is good. For (1) It is not to be intended that any new difference has arisen between the time of the submission and the award. And (2) If there had been any such new difference, the award would be void as to that part and good as to the rest. *Abrahat* v. *Brandon* (1713), 10 Mod. 201; *Hooper* v. *Pierce* (1796), 12 Mod. 116. See also *Squire* v. *Grevett* (1703), 2 Ld. Raym. 961.

The judgments of HEATH, J., and CHAMBRE, J., in *Simmonds* v. *Swaine* (C. P. 1809), 1 Taunt. 549, are in point upon the two latter branches of the above rule. The award (*inter alia*) directed that the defendant should pay the plaintiff £500, and that the same should be paid or be secured to be paid within a week from the date of the award. Sir J. MANSFIELD, C. J., held, in effect, that this was the same as to say that the sum should be paid within a week. It was implied that the security must be to the satisfaction of the creditor; and therefore the alternative was immaterial, since the creditor might have taken security in lieu of payment, without any direction from the arbitrator. HEATH, J., concurred in the result, saying that "if one of two matters is awarded in the disjunctive, and one alternative is impossible or uncertain, that alternative must be taken which can be performed." CHAMBRE, J., mentioned that in a case of *Payne* v. *Cook*, adjudged many years since in the Exchequer Chamber, the general doctrine was strongly laid down that where there was no clause in the submission providing 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 award should be sustained.

Johnstone v. *Cheape* (1817), 5 Dow. 247, 16 R. R. 114, was a Scotch case in which the House of Lords held the award *ultra vires* in respect of certain items, but it was held that this did not affect the validity of the award further than to rectify it in respect of the excess. Part of the award dealt with the future conduct of parties, and in this respect the award, in the opinion of Lord ELDON, was *ultra vires*; but in the judgment of the House this part, if *ultra vires*, might be regarded *pro non scripto*.

In *Doe d. Williams* v. *Richardson* (1819), 8 Taunt. 697, where there was a reference of an action of ejectment, and the arbitrator after awarding on the subject-matter directed mutual releases; it was held that, if the latter direction was bad, it would not vitiate the whole award.

The case of *Wharton* v. *King* (K. B. 1831), 2 B. & Ad. 528, already referred to under Nos. 8 & 9, p. 424, *ante*, furnishes an illustration of the second branch of the rule.

Where an award determines the matters referred, and then reserves power to settle future differences as to work awarded to be done; the latter part may be rejected as bad, and the former part stand as final and good. *Manser* v. *Heacer* (1832), 3 B. & Ad. 295.

This contrasts with the case of *Tandy* & *Tandy*, cited under No. 12, p. 440, *ante*. The difference is that there the matter left over for settlement in case of difference entered into the direction itself of what was to be done.

In *Ward* v. *Hall* (1841), 9 Dowl. P. C. 610, a cause in which several issues were joined was referred, the costs of the action to abide the event. The arbitrator disposed of each issue, and then awarded a *stet processus* (which he had no power to do). *Held*, that this latter clause did not vitiate the rest of the award, and that the parties might proceed to tax their costs in the action.

Where an award specifically determined all the matters which were in difference, and then went on to order that the parties should execute mutual releases, and that the form of the releases should be settled by another person in case of dispute; the concluding provision was held clearly bad; but, although this might vitiate the whole clause as to the mutual releases, that clause was separable and would not vitiate the award, which was otherwise good. *Goddard* v. *Mansfield* (1850, per Erle, J.,), 19 L. J. Q. B. 308.

AMERICAN NOTES.

An award may be good in part and void in part where the parts are separable, but not otherwise. Thus it is void as to a part beyond the scope of submission. *Cox* v. *Jagger*, 2 Cowen (New York), 638; 14 Am. Dec. 523. See *Rand* v. *Mather*, 11 Cushing (Mass.), 1; 59 Am. Dec. 131, overruling *Loomis* v. *Newhall*, 15 Pickering, 159. "In early times," said the court, "it was held that an award if bad in part was wholly bad. But it has long been settled, on satisfactory grounds, that the general validity of an award is not impaired, though some things which the arbitrator appoints to be done are impossible, unreasonable, or unlawful, unless 'by the particular defect, a mutuality of interest or advantage, appearing evidently to have been intended by the arbitrator to be given, is destroyed, or where the general substance of the award and the real justice of the case are affected.' Caldwell

on Arbitration, 1st Am. ed. 120; *Hartnell* v. *Hill*, For. 79, 80." To the same effect, *Whitcher* v. *Whitcher*, 49 New Hampshire, 176; 6 Am. Rep. 486, and note, 498; *Orcutt* v. *Butler*, 42 Maine, 83; *Nichols* v. *Rens. Co. Ins. Co.*, 22 Wendell (New York), 125; *Parmalee* v. *Allen*, 32 Connecticut, 115; *Philbrick* v. *Preble*, 18 Maine, 255; 36 Am. Dec. 718; *Muldrow* v. *Morris*, 2 California, 74; 56 Am. Dec. 313; *Leslie* v. *Leslie*, New Jersey Equity, 24 Atlantic Reporter, 319; *McCall* v. *McCall*, South Carolina, 15 S. E. Repr. 348.

Where an award is in the alternative, and one alternative is impossible, the other will stand. *Clement* v. *Comstock*, 2 Michigan, 359; *McDonald* v. *Arnout*, 14 Illinois, 58, both citing *Simmonds* v. *Swaine*, 1 Taunton, 549; *Stanley* v. *Chappell*, 8 Cowen (New York), 235, citing the principal case.

The principal case is frequently cited in Morse on Arbitration and Award.

No. 14. — CANDLER *v.* FULLER.

(C. P. 1737–8.)

RULE.

An arbitrator cannot (at common law), without express authority, award the costs of the reference.

But, if the rest of the award is good otherwise, it is not vitiated by his awarding such costs, provided that the award upon the matters referred does not in any way depend upon the award as to the unauthorized matter.

Candler v. Fuller.

Willes, 62–66.

[62] The opinion of the Court was thus delivered by Willes, Lord Chief Justice. "Debt on bond entered into by the defendant to the plaintiff on the 21st of July, 1733, in the sum of £100."

The defendant prays oyer of the condition, which is to stand to the award of Thomas Scotchmer and John Ling, to whom all matters in difference between the parties were submitted, so as their award was made in writing under their hands ready to be delivered to the parties on or before the 20th of August next, if not then to stand to the award of such person as the arbitrators should choose for an umpire, so as he made his award under his hand on or before the 27th of August next. And the defendant pleads that the arbitrators on the 17th of August, 1733, made their award in writing under their hands and seals of and concerning the premises:

and that they awarded that the * defendant, his heirs [* 63] executors and administrators, should upon the 1st day of September next ensuing pay or cause to be paid unto the plaintiff the full sum of 8*s.* "with his costs of suit and charges on that their arbitration as the same should be taxed by the prothonotary of his Majesty's Court of Common Pleas at Westminster wherein the suit was depending, or as the parties within themselves should agree;" and that the plaintiff and the defendant after such payment should deliver to each other general releases of all matters to the 21st of July, 1733; and the defendant avers that on the said 1st of September he tendered to the plaintiff 8*s.*, and also a general release according to the award duly stamped and executed by him. And further pleads that he had no notice of the plaintiff's costs of suit mentioned in the said award or of his charges of the said award at any time before or upon the said 1st of September, and that the prothonotary of his Majesty's Court of Common Pleas at Westminster did not tax the plaintiff's costs of suit and charges on the said arbitration at any time on or before the said 1st day of September; and that no agreement was made between the plaintiff and the defendant at any time before or upon the said 1st day of September for ascertaining how much should be paid by the defendant to the plaintiff for his said costs or for his charges of the said arbitration, nor of or concerning the said costs or charges or either of them in any respect whatsoever.

The plaintiff replies that after the making of the said award and before the suing out of the said original writ, to wit, on the 11th day of December in the year of our Lord 1736, the plaintiff's costs of suit in the said award mentioned were duly taxed by Mr. Prothonotary Thompson at the sum of £10 3*s.* 2*d.*, of which the defendant the same day and year had notice and was then and there requested to pay him the said sum of £10 3*s.* 2*d.*, which the defendant hath not yet paid, but hath refused to pay the same.

The defendant demurs generally, and the plaintiff joins in demurrer.

The defendant's objection to the plaintiff's replication was that the costs of the award were to be taxed before * the [* 64] 1st of September, 1733, because they were to be paid on that day; and that it was incumbent on the plaintiff, who was to receive them, to get them taxed before that time, otherwise it was impossible for the defendant to pay them, and that his getting them

taxed on the 11th of December, 1736, which the plaintiff insists on in his replication, is entirely immaterial, the defendant not being obliged to pay them by the award, unless they were taxed before the said 1st day of September.

Several objections were likewise taken to the award; as that it does not appear in what suit the costs were awarded; that there was not time enough for the prothonotary to tax them between the date of the award and the time of payment; and that the arbitrators have awarded the costs of the arbitration, which they had no power to do.

To support this last objection several cases were cited; but I need not particularly take notice of them, because it is undoubtedly true that the arbitrator cannot award costs of the arbitration,[1] it being a matter not submitted to them as arising subsequent to the time of submission. *Vid.* Yelv. 98; Moore, pl. 489: Cro. Eliz. 432; 2 Ventr. 242, and Plowd. 396, cited to this purpose.

But then the answer is plain, that an award may be good in part and bad in part, that is, bad as to the matters that are not within the submission and good as to the rest, provided they are entire and distinct and do not at all depend upon the matters awarded which are not within the jurisdiction; and so it is expressly held in *Martham* v. *Jemx*, Yelv. 98; *Samon* v. *Pitt*, Cro. Eliz. 432; and in several cases that are mentioned in 1 Rol. Abr. 258 [* 65] and 259.[2] The costs of the suit in the * present case are certainly distinct from the charges of the arbitration; and therefore the award may be good for the costs of suit, and bad for the charges of arbitration, as it undoubtedly is in the present case.

As to the objection that it is uncertain what suit is meant, we are of opinion that the award is certain enough. It is described a suit in this Court; it must be taken to be between the parties; and we cannot suppose (no such thing appearing in the pleadings) that there was more than one suit depending. Nor can we suppose that

[1] But if a cause be referred, the arbitrators may award the costs of the cause to be paid by either of the parties without any express authority for that purpose. *Roe* d. *Wood* v. *Doe*, 2 T. R. 644, 1 R. R. 566. Where the arbitrator awarded the defendant to pay the plaintiff a certain sum "and the costs sustained by him in the said action, to be taxed by the proper officer," it was holden that the award did not include the costs of the reference. *Brown* v. *Marsden*, 1 H. Bl. 223. See also *Bradley* v. *Tunstow*, 1 Bos. & P. 34.

[2] See also *Vanlore* v. *Tribb*, 1 Rol. Rep 437; *Norton* v. *Lakins*, Winch. 1; *Pinkeny* v. *Bullock*, 2 Lev. 3; *Bargrave* v. *Atkins*, 3 Lev. 413; *Simon* v. *Gavil*, Salk. 74; and *Pickering* v. *Watson*, 2 Bl. Rep. 1117.

between the 17th of August and the 1st of September there would not be time enough for the prothonotary to tax the costs.

In answer to the objection to the replication, the plaintiff took an objection to the plea, for that the defendant had not said that the prothonotary had not taxed the costs of suit and the charges of arbitration before the 1st of September, which might be true if he had not taxed the charges of arbitration though he had taxed the costs, which would be sufficient, the award being void as to the charges of the arbitration.

To this as well as to the defendant's objection to the replication several answers were given, which I need not take notice of, because we are all of opinion that there is another fatal objection to the plea.

For we are of opinion that it was incumbent on the defendant, who was awarded to pay the plaintiff his costs of suit, to procure them to be taxed by the prothonotary. As in case a man be awarded to convey an estate to another person by such a time, he is to procure the conveyances to be made. Or to bring it nearer to the present case, if a man be awarded to convey an estate to another by such conveyances as shall be approved of by such a counsel, he is certainly to prepare the conveyances and to procure them to be approved of by that counsel.

* We therefore being of this opinion, the objection to the [* 66] replication is out of the case, and judgment must be for the plaintiff.

ENGLISH NOTES.

The above rule is now of little importance for English purposes. For (by the Arbitration Act 1889, sect. 2, and First Schedule *i.*) amongst other provisions to be implied in a submission (unless the contrary is expressed) is the following: "The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client."

By the common law the arbitrator could not award costs *as between attorney* and *client* even if the costs of the action and reference were (in general terms) referred to him. *Marder* v. *Cox* (1774), 1 Cowp. 127.

The authority of the last-mentioned case, as well as of the principal

case, was admitted and followed in *Whitehead* v. *Firth* (1810), 12 East, 165.

The principal case was followed by the Court of Common Pleas in *Strutt* v. *Rogers* (1816), 7 Taunt. 213.

And in *Firth* v. *Robinson* (1823), 1 B. & C. 277, where a cause and all matters in difference were referred, and the submission was silent as to the costs of the reference, it was held that the arbitrator had power to award the costs of the cause, being a matter in difference, but not the costs of the reference. The award having included both, a rule to set aside the award was discharged, on counsel giving up the costs of the reference.

To avoid the consequences of this rule it became the usual practice to insert in references by order of the Court or special power to award the costs of the reference. This is mentioned in *R.* v. *Moate* (1832), 3 B. & Ad. 237. The convenience of this is recognised and the practice extended by the Act of 1889 as above mentioned.

AMERICAN NOTES.

In some States it is held that arbitrators have no power to award costs unless authorized by the submission. *Warner* v. *Collins*, 135 Massachusetts, 26; *Hanson* v. *Webber*, 40 Maine, 194; *Dundon* v. *Starin*, 19 Wisconsin, 261; *Alling* v. *Munson*, 2 Connecticut, 296; *Morrison* v. *Buchanan*, 32 Vermont, 288; *Matter of Vanderveer*, 4 Denio (New York), 249.

But *contra*: *Oakley* v. *Anderson*, 93 North Carolina, 108; *Cox* v. *Jagger*, 2 Cowen (New York), 638; 14 Am. Dec. 522; *Chapin* v. *Boody*, 25 New Hampshire, 285; *Bumell* v. *Everson*, 50 Vermont, 449; *Dickerson* v. *Tyner*, 4 Blackford (Indiana), 253; *Young* v. *Shook*, 4 Rawle (Penn.), 302; *Wade* v. *Powell*, 31 Georgia, 1; *McClure* v. *Shroyer*, 13 Missouri, 104.

But an unauthorized award of costs may be eliminated. *Matter of Vanderveer*, *supra*; *Porter* v. *Buckfield*, *&c. R. Co.*, 32 Maine, 539; *Clement* v. *Comstock*, 2 Michigan, 359; *Maynant* v. *Frederick*, 7 Cushing (Mass.), 247. The doctrine of the principal case, says Morse (Arb. and Award, p. 463), is sustained by "a multitude of cases," citing those above, and *Rixford* v. *Nye*, 20 Vermont, 130; *Doke* v. *James*, 4 New York, 567.

No. 15. THE DUKE OF BUCCLEUCH *v.* METROPOLITAN BOARD OF WORKS.

(EXCH. 1869, EXCH. CH. 1870, H. L. 1872.)

RULE.

In an action to enforce an award, it is competent by way of defence to show that the umpire (or arbitrator) has included, as an inseparable part of the sum awarded, a matter not within his jurisdiction; and to show this the evidence of the umpire is admissible.

The umpire may be questioned as to what took place before him, so as to show over what subject-matter he was exercising jurisdiction, up to the time when he was proceeding to make his award.

There the right of asking questions of the umpire ceases. The award is a document which must speak for itself, and the evidence of the umpire is not admissible to explain or to aid, much less to contradict, what is to be found upon the face of that written instrument.

An arbitrator, acting under the statutory powers of the Lands Clauses Consolidation Act 1845, has no jurisdiction to take into consideration matters not within the subject-matter (such as "injuriously affecting," &c.) described by the Act; but the substitution of a land access for a water access to the plaintiff's land is "injuriously affecting" within the Act.

The Duke of Buccleuch v. Metropolitan Board of Works.

L. R., 3 Ex. 306-330, 5 Ex. 221-256, 5 H. L. 418-463 (s. c. 37 L. J. Ex. 177; 39 L. J. Ex. 130; 41 L. J. Ex. 137).

Action to recover a sum of £8325 awarded to the plaintiff by way of compensation under the provisions of the Thames Embankment Act 1862, with which the Lands Clauses Act 1845 is incorporated. [307]

The defendants pleaded (*inter alia*) a plea setting out the award *verbatim* whereby after reciting that the defend- [308]

ants had under the Thames Embankment Act 1862, entered on a causeway, pier, or jetty, in which the plaintiff claimed to be interested as thereinafter mentioned, and shut up, removed, and obstructed the use and enjoyment of a landing-place there, to which the plaintiff was entitled; that the plaintiff alleged that he had sustained damage by reason of the premises, and further damage by the depreciation of a certain mansion-house, lands, &c., belonging to him, and by the otherwise injuriously affecting the same by the execution by the defendants of the works authorized by their Act of Parliament; that the plaintiff gave notice in writing to the defendants on the 11th of March, 1867, that "he was the owner of the said causeway, pier, or jetty, and also of the said mansion-house, and other lands, tenements, and hereditaments, as lessee thereof, under or by virtue of a lease dated the 19th of April, 1810, granted by his late Majesty King George III., to Henry, Duke of Buccleuch, and his trustee, and of two agreements, dated respectively the 4th of February, 1854, and [* 309] the 26th * of October, 1858, and made between the Queen's Majesty, the Honourable C. A. Gore, and Walter, Duke of Buccleuch (the plaintiff), for a term whereof at the time of the said entry and taking, and of the said injuriously affecting, ninety years or thereabouts were unexpired, and that he, the said Walter, Duke of Buccleuch, was entitled as such lessee, to the use and enjoyment during the said term of the said landing-place, and of the easements, rights, and privileges belonging thereto, and connected therewith," and claimed compensation by reason of the premises to the amount of £10,000; and after reciting the various proceedings had upon the reference the umpire awarded £8325 to be due from the defendants to the plaintiff, "as and for the compensation for the pier, and jetty, and for shutting up of the said landing-place, and for the damage by the depreciation of the said mansion-house, lands, tenements, and hereditaments, by the otherwise injuriously affecting the same by the execution by the said board of the said works, and by the exercise of the powers of the said Act." The plea then traversed the interest of the plaintiff in respect of the causeway, pier, or jetty, and landing-place, and his title to compensation in respect thereof, and concluded with an allegation that "the said sum of £8325 so awarded as aforesaid was and is awarded as one entire unseparated and indivisible sum of money, and is awarded as such for and in respect of (among

other matters) the aforesaid supposed interest of the plaintiff in the said causeway, pier, or jetty, and landing-place, and for compensation for and in respect of the same;" and (7) that the said sum of £8325 so awarded as aforesaid was and is [311] one entire indivisible, unseparated, and inseparable sum, and that the said sum includes damages and compensation for things in respect of which neither the arbitrators nor the umpire had any jurisdiction whatsoever.

The facts proved at the trial before KELLY, C. B., were, briefly, as follows: —

The plaintiff's predecessors have been for a long period tenants to the Crown of the house in Whitehall Place, Westminster, called "Montagu House," under leases which from time to time have been renewed. One of these leases was dated the 19th of April, 1810, and thereby the king granted to Henry, then Duke of Buccleuch, for a term of sixty-two years from the 5th of January, 1806, all the piece of ground lying in the privy garden within the precinct of the palace at Whitehall, abutting eastward on the river Thames, on which Montagu House stood, "together with all courts, areas, vaults, cellars, sollars, ways, passages, lights, easements, waters, watercourses, profits, commodities, advantages, and appurtenances whatsoever to the said piece of ground, messuage, and premises hereinbefore expressed to be demised, or any part thereof belonging or appertaining, or therewith or with any part thereof held, used, occupied, or enjoyed or accepted, reputed, deemed, taken, or known as part and parcel thereof." This term would have expired in January last, had it not been for two agreements, dated respectively the 4th of February, 1854, and the 26th of October, 1858, made between the Crown and the plaintiff, the present Duke of Buccleuch, whereby it was agreed, that in consideration, amongst other things, of the plaintiff spending £20,000 on the premises, in rebuilding the house and in other improvements, he should have a renewal for a term of ninety-nine years from the 5th of January, 1855, at an increased rental. According to the earlier agreement, the money was to be spent and the house rebuilt before the 5th of January, 1858; but the time was extended by the second agreement to the 5th of January, 1861. The plaintiff, it was not disputed, had performed his part under these * agreements, and was therefore entitled to call on [* 312] the Crown to execute to him a lease in pursuance of them,

at any time he might think fit. So far, therefore, as regarded time his interest in Montagu House and the grounds attached to it, for which compensation was sought, was at the time of the execution of the works by the defendants, that of a lessee for the unexpired residue of a term of ninety-nine years, counting from the 5th of January, 1855.

The plaintiff's premises were formerly bounded on the river side of them by a wall, along the whole length of which, at high water, the river flowed. In this wall was a gate, usually kept locked, and of which the plaintiff possessed the key, leading from some stairs in the garden of the house to a causeway or pier about four or five feet wide, which ran out into the river to low-water mark. The principal purposes for which the causeway was used were for landing coals from barges for the plaintiff's use, and also for landing vegetables, &c., which were constantly being brought by water to Montagu House from a country house possessed by the plaintiff on the banks of the Thames at Richmond. No one but the plaintiff used the causeway, which had been in existence for more than forty years, and no one but himself or his predecessors had within that period repaired it. In 1833, when in want of repair, it was restored at the plaintiff's sole expense.

By the 25 & 26 Vict. c. 93 (the Thames Embankment Act 1862), with which was incorporated the Lands Clauses Act 1845, and the Lands Clauses Amendment Act 1860, the defendants, the Metropolitan Board of Works, were authorized to construct an embankment on the north side of the river Thames, from Westminster Bridge to Blackfriars Bridge, and subsequently they proceeded with the execution of the necessary works. In the course of performing them they had occasion to remove the plaintiff's causeway and the landing-place connected therewith, and also entirely to shut off his premises from direct access to the river. In the place where the water had previously flowed a solid embankment was made, on which will eventually be a public highway. By s. 78 of the Act, the plaintiff (in common with other lessees of the Crown of land at Whitehall with a river frontage) had the option of taking a lease of so much of [* 313] the reclaimed * land as lay between the roadway and his former boundary, for the same term as he already possessed, at a fixed rental; "and such rent shall be estimated on the basis of a fair rental on the land as garden ground which cannot

be built upon; and in any claim for compensation by the said lessees on the ground of their lands or interest being injuriously affected by reason of the works by this act authorized, regard shall be had to the option by this section given to such lessees of taking leases of the land and foreshore adjoining to their respective properties at such rent as aforesaid." The plaintiff did not exercise his option under this section.

On the 14th of March, 1867, the plaintiff gave the defendants his notice of claim and arbitration, stating his interest in the causeway in the terms recited in the award, and set forth above in the 3d plea, and demanding compensation for damage done to him by reason of the defendants taking and using the causeway, and obstructing and removing the landing-place, and for further damage by the depreciation of his messuage and dwelling-house, lands, tenements, &c., and otherwise injuriously affecting the same. The amount payable was referred to arbitrators, who duly appointed an umpire, under the Lands Clauses Act 1845, before whom the matter was finally investigated. On the 5th of August, 1867, he awarded £8325 to the plaintiff "as and for compensation for the interest of the said Duke of Buccleuch in the said causeway, pier, and jetty, and for shutting up the said landing-place, and for the damage by the depreciation of the said mansion-house, lands, tenements, and hereditaments by the otherwise injuriously affecting the same by the execution by the said board of the said works, and by the exercise of the powers of the said Act. The defendants having declined to pay the sum awarded, this action was brought to recover it.

At the trial, the regularity of the formal proceedings and the validity of the award on the face of it were admitted; but the defendants proposed to impeach it by showing that the umpire had included certain matters in his award which were not the proper subjects of compensation. With this view they tendered the umpire himself (Mr. C. Pollock, Q. C.) *as a [*314] witness, in order to explain the mode in which the total sum of £8325 was arrived at. The learned judge admitted the evidence, which, so far as is material, was as follows: I was the umpire in this matter. The claim was presented to me on the part of the duke in this way: it was said that the duke's causeway was taken from him, and that therefore, an easement attached to his house having been taken, he was let in to claim before an

arbitrator for the loss and for general damage to the house, including all its "amenities," of whatever kind they might be.

Q. Among the amenities, was the one of view or prospect specifically mentioned? — *A.* Yes. *Q.* Was it not very much dwelt upon? — *A.* It is almost wrong to say loss of prospect. It was the comfort and privacy of the house. I cannot say there was any specific claim for loss of prospect in the sense of view from the house. It was not only the prospect of the water; the privacy was considered. Then there was the head of actual structural injury by the subsidence of a portion of the kitchen.

By the COURT: You took all these matters into consideration, and awarded £8000 or thereabouts? — *A.* Yes, my lord. *Q.* Will you tell us of what items the £8000 was composed. [This question was objected to, and admitted subject to the objection.] — *A.* I will tell you the mode in which the case for the board, the defendants, was shaped. They said, "True, the duke's house might be injured if he did nothing; but he may, if he likes, under the Act of Parliament, become a lessee of the Crown of (I think) very nearly half an acre of ground between the house and the river, and you (the umpire) must assume that he will become the lessee of the half acre." I may say, that if I had assumed that he had no power to take that land, my damages would have been larger; and I did assume that he would be advised to take it as lessee of the Crown. Then there was no dispute that, if he did so, the capitalized rent of the garden would be £2475. Adopting, as I did, that sum as a datum, my award was this: loss of jetty, £200; the structural damage to the walls, £50. I think the kitchen was said to have been penetrated by water. Capitalized rent of the garden, £2475. Then I put it that the expense of building a wall, laying out the garden, and other matters which the duke would be put to, would be £600; and then I thought that, after all [* 315] that * had been done, the house would be of less value to be occupied by a nobleman or gentleman than it had been before by the sum of £5000. If these sums are added together, they make up £8325. *Q.* As to the last item, what was it that occasioned the loss in value of the house? — *A.* I thought, in the market, if that house was to be let to a nobleman or gentleman, he would give less for it by a capitalized sum of £5000. *Q.* How was the £5000 made up; was it £100 for this, and £1000 for that? Can you give us generally what the elements were? — *A.* I

cannot give you one single amount, but I can give you the elements. I had evidence before me by the surveyors, who put the sum at £16,000. They said the annual depreciation was £1000 in the rental. I did not think that, but I took into consideration the fact that the Duke of Buccleuch's house had, as it stood before, the road on one side in continuation of Parliament Street to Whitehall, but on the other side perfect privacy. When the embankment was made, the evidence showed there would be a roadway, and that roadway would be above the present level of the duke's garden; and, therefore, the only thing he could do would be to build a high wall, and shut it out. There would be traffic, and dust, and dirt, and noise, which seemed to me to alter the character of the house entirely. After I had heard all the evidence and arguments, and had been to see the place a second time, and taken into consideration all I could, it seemed to me, although it is true some people might not have the same objection to the alteration that others had, that upon the whole, if a person came there to take the house, he would not give for it by £5000 what he would have given for it before.

No further evidence was offered on the part of the defendants. and the plaintiff, who had not proved in the first instance that there had been any structural damage to the kitchen, did not give any evidence, after the examination of the umpire, on that point. His attention, however, was not expressly drawn to the matter at the time by the defendants. A verdict was entered for the plaintiff for the full amount of the award, with leave to move to enter a nonsuit or verdict for the defendants.

In Easter Term, Hawkins, Q. C. (Philbrick with him), obtained a rule accordingly, calling on the plaintiff to show cause why a * verdict for the defendants or a nonsuit should not [* 316] be entered, or a new trial had on the ground that the umpire awarded compensation in respect of items, the existence of which was not shown at the trial; that no title to the jetty or causeway was proved; that the taking, user, destruction, or obstruction of the jetty or causeway, was not a matter in respect of which the plaintiff was entitled to compensation, and that in awarding compensation in respect thereof, the umpire exceeded his jurisdiction; that the umpire awarded compensation in respect of some one or more matters, in respect of which he had no jurisdiction to award compensation; that the injurious affecting of the premises

in respect of which the umpire made his award, was not proved at the trial, nor was the plaintiff's right or title to recover compensation in respect thereof, proved; that the verdict was against the evidence; and that the Lord Chief Baron misdirected the jury, in telling them that on the evidence given the plaintiff was entitled to the verdict and full benefit of the award.

There was no cross rule on the ground of the improper reception of evidence, but the umpire's evidence was admitted, subject to the opinion of the Court. If admissible and relevant, it was to be considered; if inadmissible, it was to be struck out. It was arranged that the demurrer should be brought on at the same time with the rule.

[317] May 25, 26. Mellish, Q. C., and Dering, showed cause against the rule. First, the plaintiff made out a sufficient title to the causeway.

[318] Secondly, the inquiry into what were the components of the total awarded ought not to have been entered on. The award is good on its face. It is for two things: 1st, the obstruction of the causeway in which the plaintiff had an interest either as its owner or as an adjoining occupier, with an easement over it (and in his notice he claims in the alternative), and 2ndly, for the injurious affection of his premises. Now, he certainly had an interest of some sort, capable of being the subject of compensation in the causeway; and the judgment of the Court in the demurrer shows that his premises might be, and the facts show that they were, injuriously affected. Here, therefore, is a clear case of a good award made *primâ facie* concerning matters within the umpire's jurisdiction. That being so, he ought not to have been called to prove how he had arrived at the sum awarded; in other words, to say what was passing in his own mind. Such evidence is inadmissible.

[Bramwell, B. Suppose two persons agree to refer matters, A. and B., to an arbitrator; and he makes an award reciting that they were so referred to him, and giving, say, £100 "of and concerning the premises." You contend that he cannot be called to prove that he really included matter C. in making his award, and gave £20 in respect of it?]

Certainly not. If such a course could be adopted no award would be safe, especially where the arbitrator was a layman. He might be right in the result, but his account of the way he came to a conclusion would be sure to give rise to legal objection.

No. 15. — Buccleuch v. Metr. Board of Works, L. R., 3 Ex. 318, 319.

[KELLY, C. B. This is not a case where the umpire made an award concerning a matter wholly beyond his jurisdiction. His evidence was sought by the defendants to show that he acted on a wrong impression as to a matter within his jurisdiction.]

* It is alleged that he exceeded his powers, and made [* 319] compensation in respect of matters over which he had no jurisdiction to award it. But that is no objection to the award. In *Mortimer* v. *South Wales Railway Company*, 1 E. & E. 375 28 L. J. Q. B. 129, it was held that a jury's excess of jurisdiction was no answer to an action on a judgment, and the same rule applies to an arbitrator.

[CHANNELL, B. The real point is this: Can you contradict an award or vitiate it by oral evidence? It would be a very broad proposition to assert that you can never do so.]

Evidence consistent with the award may be given; but nothing inconsistent with its being a good award is admissible. Upon both grounds, therefore, the rule should be discharged. The umpire's evidence was not admissible, but if admissible it only confirmed the award.

Hawkins, Q. C., and Philbrick, in support of the rule. The umpire's evidence was not offered to vary the award but to avoid it altogether. The case differs from that put by Baron BRAMWELL, for this was a compulsory reference under the Lands Clauses Act, 1845, and the award is open to the same objection as the inquisition of a jury (25 & 26 Vict. c. 93, s. 23), which could be set aside if they exceeded their jurisdiction, *Read* v. *Victoria Station and Pimlico Railway Company*, 1 H. & C. 826; 32 L. J. Ex. 167; which disposes of the case cited, *Mortimer* v. *South Wales Railway Company*. An arbitrator cannot by carefully wording his award give himself jurisdiction; nor can the award be sent back to him that he may divide it; see per ERLE, C. J., and WILLES, J., in *Re Newbold* v. *Metropolitan Railway Company*, 14 C. B. (N. S.) 405, at p. 410; Russell on Arbitration, 3rd ed. p. 467. Then if the award may be shown to be absolutely void by extrinsic evidence, the arbitrator or umpire is as competent a witness to show it as any one else. Again, there was no proof of structural damage at the trial, although it was expressly traversed. [Mellish, Q. C., objected that this point was not taken at the trial. If it had been he was perfectly prepared to have proved structural damage.] It was part of the plaintiff's case to prove it.

No. 15. — Buccleuch v. Metr. Board of Works, L. R., 3 Ex. 319, 320.

[Kelly, C. B. I do not think this point can be made now. Although the umpire's evidence showed he had given a [* 320] small * amount for structural damage, I do not think under the circumstances that the plaintiff was bound to prove it had actually occurred unless he was challenged to do so. It was not necessary at the trial to go through every item which the umpire had gone through before. The contest, substantially, was not whether this or that damage had in fact been done, but whether or not the umpire had awarded compensation on correct principles.]

Thirdly: the plaintiff failed to prove his title sufficiently at the trial, and as this was a matter into which the umpire could not inquire, he should have proved it absolutely. *Reg.* v. *London and North Western Railway Company*, 3 E. & B. 443; 23 L. J. Q. B. 185. The notice described the plaintiff as owner of the jetty for a fixed term, and there was no evidence that he had that term, or indeed had anything beyond an easement over it. The words of the lease are incapable of conferring any right in the soil to him. Moreover, the Crown cannot grant the soil of a navigable river in derogation of a public right.

[Bramwell, B. The jetty is claimed in two ways: first, by the plaintiff as owner of the soil, and, secondly, by him as possessing an easement.]

Nothing but ownership of the jetty could entitle the umpire to award any sum in respect of loss of "amenity." The principle of Crompton, J.'s, decision in *Re Stockport Railway Company*, 33 L. J, Q. B. 251, only applies where a part of a man's land is taken. Here no land was taken, and the ordinary rules which govern the assessment of compensation for "injurious affection" apply. This being so, the umpire was wrong in giving anything for loss of prospect or loss of privacy. *Re Penny & South Eastern Railway Company*, 7 E. & B. 660; 26 L. J. Q. B. 225; *Ricket* v. *Metropolitan Railway Company*, L. R., 2 H. L. 175, 187, 36 L. J. Q. B. 205, 1 R. C. 745; although possibly those injuries might furnish a cause of action.

The Court, Kelly, C. B., Martin, B., Bramwell, B., and Channell, B., agreed in discharging this rule; but they differed in opinion as to the admissibility of the umpire's evidence. The opinion of the majority is fairly represented by the following judgment of

Kelly, C. B. This is an action to recover the sum of £8325,

alleged to be due under an award made in pursuance of the provisions of the Lands Clauses Act 1845. The Duke of Buccleuch, the plaintiff, had a certain interest under a lease and two agreements in a mansion in Parliament Street, the back of which is *parallel to and bounded by the river Thames; [*321] and the Metropolitan Board of Works, the defendants, had constructed an embankment between the back of the plaintiff's premises and the river. For the purpose of constructing it, the Board of Works found it necessary to remove the area or mass of water which formerly used to run at the back of the premises between high and low water mark, and also to annihilate or take away a causeway or jetty, running from the foot of some stairs on the plaintiff's land across the shore to low-water mark. The plaintiff, in consequence, made a claim, which we find, from the notice he gave to the defendants, from the award, and from the evidence given on the trial by the arbitrator, was twofold: first, for the annihilation of the jetty and landing-place; and, secondly, for the taking away of the water which used to flow along the eastern or river side of the premises. These claims having been made, the arbitrator awarded £8325 in respect of them, and, on being called to state in detail how that sum was made up (I assume for the present that his evidence was properly admitted), he said that £200 was given for the mere loss of the jetty as a landing place, and £8125 for damage arising from the premises being injuriously affected by the execution of the defendants' works, and the question we have to consider is, whether this verdict in an action on that award can be sustained. The whole sum is given as damage done to the plaintiff's premises, arising either from the taking away of the jetty, or the water, or from both causes.

Many objections have been made to the award, and it must be conceded that, as the award was for one entire sum, if any part of that sum was given contrary to law, the whole award is invalidated. No doubt, if the umpire is shown, by properly admissible evidence, to have included in his award subjects of compensation which he ought not to have included, inasmuch as the plaintiff was not entitled to recover in respect of them, and thus to have exceeded his jurisdiction, the award is bad. We must, therefore, consider in detail, for what kind of damage the umpire has given this amount. Now, first of all, it is said that the claim is founded

on a notice alleging an ownership of the premises and causeway for a fixed term, whereas the duke was not owner for that term absolutely, and, indeed, not "owner" of the causeway at [* 322] all. But, * in fact, the notice is not of a claim in respect of any particular legal interest or easement in or over the jetty. When looked at in conjunction with the lease and agreements under which the plaintiff asserts his interest, we find no absolute ownership claimed. The notice refers to the lease, &c., and on looking at these instruments we find the real nature of the claim to have been one for the residue of a term of ninety-nine years, which the Crown contracted to grant when £20,000 had been laid out on the premises. The umpire, we must take for granted, was well aware of this, for the instruments were before him, and he must have satisfied himself that the money was laid out which gave the plaintiff a right to have the term granted to him. In fact, there could be little doubt that that sum at least had been expended. If, then, in making his award, he treated the plaintiff's interest in the term as absolute, he did no more than substantial justice, for the plaintiff had done all that was necessary to enable him to call on the Crown to make his interest absolute.

But, further, the defendants contend that by the terms of the notice, of the declaration, and of the award, the plaintiff is claiming as *owner*, whereas at most he is entitled to an easement over the causeway only. It is not necessary to determine this point, but I myself should not hesitate to say that the soil had actually been granted. Under the lease of 1810 we find that there was granted not merely "all ways and passages," &c., but also "all easements, waters, water courses, and appurtenances thereto belonging, or with any part thereof, held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part or parcel thereof," and I do not see why we should not hold that under the term "way," with the words superadded, "held, used, occupied or enjoyed," &c., the soil of the way passed. Doubt, however, may be entertained on this point, and although therefore there was evidence that the plaintiff had a right to the soil of the way, I do not decide the question. If an easement only were granted, the question remains, whether it was not a proper subject of compensation under this umpirage, and whether it was not properly treated by the umpire. Now the terms of the notice are large. Not only

is the duke described as the "owner" of this causeway, but he also claims as "being entitled to the use and enjoyment of it, and of *the easements, rights, and privileges belonging [*323] thereto or connected therewith." This notice was before the umpire, and very possibly he considered that the plaintiff had an easement only when he made his award. I see no distinction between the case of the plaintiff being owner and of his having an easement only, so far as the question of valuing his interest is concerned. He had an exclusive right over the causeway of some sort, and whether it was an exclusive right of passage or to the soil seems to me, for the purposes of this award, immaterial. It is clear that the plaintiff, and he alone, had the only beneficial use which could be made of the soil, and, moreover, he had from time to time, and once at a considerable cost, repaired the jetty. When estimating its value to him, therefore, what does it signify whether he had the soil or not? I am of opinion that we need not decide which sort of interest he had, for in either case the same compensation might be legitimately awarded. Some interest in the plaintiff was established before the umpire, and at the trial, and therefore this objection, which in form was that there was no evidence of title, fails.

Suppose, then, that the jetty was the duke's, or that he had an easement over it, and suppose, further, that he was therefore entitled to damages for its being injuriously affected, it is still objected that the umpire has made an improper award, since he has not made it in reference to the jetty and the taking away thereof. But it is perfectly consistent with the award, which is good on its face, that the whole damage might have been considered by the umpire to flow from the taking of the jetty alone, and nominal damages only for the injuriously affecting of the premises. The language used is as follows: "Compensation for the interest of the said Duke of Buccleuch on the said causeway, pier, and jetty, and for shutting up the said landing-place, and for the damage by the depreciation of the said mansion-house, &c., by the otherwise injuriously affecting the same." And we now approach the question of the admissibility of the umpire's evidence to explain the award. The defendants contended that the umpire might be called at the trial to prove how the sum he awarded was made up, and they further say that his evidence showed that much was awarded in respect of subjects for which the plaintiff was not entitled

[* 324] to recover. It is *really unnecessary to decide whether the evidence was admissible or not, for I am of opinion that it was irrelevant, or that so far as it was relevant it supported the award. However, as the question of admissibility has been fully argued, I may say that in my judgment it is properly admissible. I think it is open to a defendant to show that the sum awarded by an arbitrator includes an amount for something over which he had no jurisdiction. Suppose, for example, that an arbitrator were empowered to give compensation for injury to a house numbered "one" in a particular row of houses, and he professed to award such compensation, although in fact the whole evidence before him related to injury to a house numbered "two," and his award really was made for injury to that house. Can it be doubted but that this circumstance might be proved by the defendant on the trial of an action on the award, and if so, I see no reason why it should not be proved by the evidence of the umpire himself. I am therefore of opinion that in this case the umpire's evidence was admissible. Then, this being the law, we have to consider what he actually proved, and the effect of his evidence was this: that the claim was twofold, viz., for annihilating the jetty and taking away the access by water, and substituting an embankment intended hereafter to be used as a public highway. This being the claim the umpire had to consider whether these works, executed as they were under parliamentary authority by the defendants, injuriously affected the plaintiff's premises.

Now, I accept as the test the possibility there would have been of maintaining an action against any one who had done the acts complained of without authority, and I am clearly of opinion that the plaintiff would have been entitled to bring an action against a person who should have deprived him of the mass of water flowing along the back of his premises just as much as he would against anybody who took away the public road in front of the house in Whitehall. There are many cases, no doubt, in which an obstruction of a highway is an injury to the public only, and for which no individual can maintain an action. But there are others, where one who is especially damaged may maintain an action, and I think this case is one of them. Suppose, for example, the plaintiff had been a coal-merchant, with [* 325] a wharf where the garden is, *and using the river to bring his merchandise to his wharf; if his means of water access

were taken away, it cannot be doubted he would be able to maintain his action. Then, this being so, why is he not entitled to compensation against the defendants who, under their Act, have destroyed his water access? It has been said that there are cases where there might be an action, but no claim for compensation; but I am myself at a loss to conceive what they can be. The right to an action and the claim for compensation seem to me to be co-extensive. It is further said that the question of injury ought to have been left to the jury; but if the proceedings of the defendants would, in the absence of statutory powers, have founded an action, and therefore did found this claim, there really was nothing to leave to them, except whether the defendants actually had done the works complained of as to which there was no dispute. But it is also objected that the umpire, according to his own evidence, has given a certain amount for loss of privacy, or "amenity" to the house, and that he had no right to give anything for such a head of claim. This may, perhaps, be the case; but when the evidence is looked at, it amounts, so far as it is relevant, only to this, that the umpire has found that by reason of the substitution of the proposed highway for the water the premises were injuriously affected; and from this point the evidence seems to me to be irrelevant. Once establish that the defendants have taken away the area of water, and you have an act proved to have been done whereby the plaintiffs were affected injuriously, and all the rest of the evidence is merely on a question of amount. The umpire was called to say how much and for what he gave certain sums, and, taking a great number of circumstances into consideration, he arrived at £8325. In my judgment, however, his evidence on this question, it being one purely of amount which was for him to decide, is irrelevant even if it were properly admissible.

But if I were called on to consider these various items, I should hold that they were rightly awarded. It cannot be that the plaintiff is entitled to the same damages only, no matter whether something agreeable or convenient has been substituted for the former condition of his premises, or something such as a bank of mud, for example, which may be the subject of daily and *hourly annoyance. It seems to me that a [*326] jury or the umpire may well take in account the new state of the premises when the fact of their being in some way

injuriously affected is established. The substance of this case, then, is really this: The defendants have taken away the causeway and the water access. Both acts would have furnished causes of action, and are the proper subjects of compensation, and the plaintiff claims in respect of both. The umpire has settled the amount of damage flowing from one or other of these acts, or from both, and I do not think the verdict in this action on his award ought to be disturbed.

As to the sum of £50 given for structural damage to the kitchen, it really falls within the previous observations, because the injury to the kitchen may be treated as an "injurious affection" of the premises. But I do not put my decision about it on that ground simply. The umpire, in his evidence, stated, among the details he gave, that £50 was for this damage, and the defendants now say that no evidence was given at the trial of its having occurred. The plaintiff certainly did not prove it; but this objection should have been taken then, so as to give him an opportunity of doing so. The defendants, however, did not take it, and they cannot avail themselves of it now. This rule must therefore be discharged.

This judgment of the Court of Exchequer was brought, by way of appeal, before the Exchequer Chamber..

[L. R. 5 Ex. 224.] The Court (consisting of Blackburn, J., Keating, J., Lush, J., Mellor, J., Montague Smith, J., Willes, J., and Brett, J.,) were unanimously of opinion (in accordance with the Court below) that the evidence of the umpire was admissible for the purpose of showing whether he had or had not exceeded his jurisdiction; but by a majority (Blackburn, J., Keating, J., Mellor, J., and Lush, J., against Willes, J., M. Smith, J., and Brett, J.) they held that the general depreciation which the arbitrator had taken into account was not a matter arising from the severance of the land, and consequently was not within the matters submitted under the provisions of the Lands Clauses Act 1845. They accordingly reversed the judgment of the Court of Exchequer.

The following judgment of Blackburn, J. (which was concurred in by Keating, J., and Lush, J.), so far as relates to the question of admissibility of the evidence referred to and incorporated in the opinion hereinafter set forth of the same learned judge delivered in answer to questions of the

No. 15. — Buccleuch v. Metr. Board of Works, L. R., 5 Ex. 224–229.

House of Lords is, so far as relates to that question, here set forth.

Blackburn, J. This was an action on an award by [225] an umpire assessing the compensation due to the plaintiff in respect of his claim upon the defendants as promoters of the Thames Embankment Act 1862, at £8325, and was brought to recover that sum with interest and the costs of the reference.

The Thames Embankment Act 1862, incorporates the Lands Clauses Act 1845; and the umpire was duly appointed under the 68th section of that Act. The verdict was found for the plaintiff, subject to points reserved at the trial, which were raised by the issues joined on the 3rd and 7th pleas, and are distinct. . .

The 7th plea avers that the sum of £8325 was one entire and unseverable sum, and that the said sum includes damages and compensation for matters and things in respect of which the umpire had no power or right to assess damages or compensation, and over and in respect of which he had no jurisdiction. The plaintiff joined issue on these pleas, and obtained particulars of the 7th plea under a judge's order.

[After dealing with the question of title under the 3rd plea the learned judge proceeded]: —

.The issue on the 7th plea gives rise to questions of [228] greater general importance, and in my opinion of much more difficulty.

The defendants called the umpire as a witness; and from his evidence, which is set out in the case, it appears that in assessing the compensation he took into consideration the taking away of the causeway, and blocking up of the landing place, and some slight structural injuries to the buildings, the direct compensation for which he valued at £250; and that he also took into consideration that the bringing the promoters' works so near to the plaintiff's mansion, affected its value by taking away the privacy of the garden, &c., so as, in his opinion, greatly to reduce its selling or letting value, and that the compensation for this depreciation formed the residue of the large sum awarded. On this, two points * were reserved, first, [*229] whether the evidence of the umpire was admissible at all; and, secondly, whether it showed that the award had been given for something which the umpire had no power to give. If the plaintiff is right on either of those points, he is entitled to retain his verdict.

The Court below were unanimous in their judgment that the plaintiff was entitled to retain his verdict, but were not agreed in their reasons, the majority, consisting of the Chief Baron and my Brothers Martin and Channell, being of opinion that the evidence of the umpire was admissible, but that it showed that the umpire proceeded on a right ground, and that the award was good; my Brother Bramwell being of opinion that the evidence was not admissible, but that if admitted it showed that the award was made on a principle which he inclined to think was wrong, though he doubted whether the finding of the umpire could be reviewed. And now both questions come before this Court, which is, therefore, required as a Court of Error to decide those points.

The 7th plea itself is not demurred to, and all that we have now to consider is, whether the substance of it was proved. But, in considering this, we unavoidably inquire what that substance is, and so, collaterally as it were, consider whether the plea is good; and it seems to me that it is good.

An award is the decision of one having a limited authority to determine those matters submitted to him by the parties, or, as in the present case, by a statute, and no other. And from this it follows that if that limited authority has not been pursued, and the arbitrator has awarded something beyond the authority, the award is pro tanto void, and if the void part is so mixed up with the rest that it cannot be rejected, the award is void altogether, otherwise those against whom the award is made would be compelled to fulfil the void part. And I think, both on authority and principle, this is a matter which may be pleaded as a defence to an action. In old times the only way of enforcing an award was by action upon it, and the only mode of resisting the enforcement of the award was by pleading to that action, and consequently all the old authorities, to the effect that an award is void for excess of jurisdiction, are authorities that it may be shown in evidence at the trial under a proper plea.

[*230] Those old authorities are very numerous; * it is sufficient to refer to those mentioned in Comyns' Digest, Arbitrament, E 1. But if the arbitrator had, whilst his authority was unrevoked, actually decided the matter which he was called upon to decide, it was no defence at law to an action on the award that he had misconducted himself, or improperly rejected evidence, or even been induced to come to that decision by the fraud

of the plaintiff now seeking to enforce the award; though these facts might afford grounds for obtaining relief in equity, see *Veale* v. *Warner*, 1 Wm. Saund. 327 a., note 3. A practice arose first in the time of Charles II. of making submissions a rule of court, so as to render any misconduct under that submission, or any refusal to act on the award, a contempt of that Court, and so give that Court jurisdiction over the award and the parties to the submission; and this practice gave rise to the various enactments under which a Court of law now has extensive powers over the reference. Those powers, however, must be exercised by the court in a summary way; and the statutes neither take away any defence given by common law, nor enable any defendant in an action to set up any defence which he could not have so set up before. Accordingly it still remains open to a party to plead to an award any matter which shows that the arbitrator has not pursued his authority; either, in cases where he is required to make a final determination on all matters, by not determining some matter brought before him which he ought to determine, *Mitchell* v. *Stavely*, 16 East, 58, 14 R. R. 287: or, by including in his award something which he had no authority to entertain, and which could not be severed from the rest and rejected *Beckett* v. *Midland Ry. Co.*, L. R., 1 C. P. 241; 37 L. J. C. P. 11.

Nor is it, I think, any objection to such a plea that the award is good on the face of it, so as to purport to be a decision on all matters which ought to be decided, and only on matters within the authority; though where that is the case it renders it more difficult to prove that the award was, in fact, a decision on matters not within the authority. The award is the judgment of an inferior tribunal having a limited authority, and the law is, I think, accurately stated in the very learned opinion delivered by WILLES, J., in *Mayor, &c. of London* v. *Cox*, L. R., 2 H. L. at p. 262; 36 L. J. Ex. 232: "The judgment of an inferior
* Court involving a question of jurisdiction, is not final. [* 231]
If the decision be for the defendant there is nothing to estop the plaintiff from suing over again in a superior Court, and insisting that the decision below had turned, or might have turned, upon jurisdiction. If the decision were in favour of the plaintiff, it is still not conclusive, because 'the rule, that in inferior Courts and proceedings by magistrates the maxim, *omnia præsumuntur rite esse acta*, does not apply to give jurisdiction,

never has been questioned;' per HOLROYD, J., *Reg.* v. *All Saints, Southampton*, 7 B. & C. 785; *Reg.* v. *Bolton*, 1 Q. B. 66; 10 L. J. M. C. 49, and *Chew* v. *Holroyd*, per PARKE, B., 8 Ex. 249; 22 L. J. Ex. 95. And, therefore, not only must the declaration in the inferior Court allege jurisdiction, but also, in an action brought in a superior Court upon a judgment of an inferior Court duly obtained, it must be again averred that the original cause of action arose within the jurisdiction of the inferior Court, so that upon a traverse of that averment the question of jurisdiction may be retried." All this, I think, is accurate, and is applicable to the case of an award. "An award or umpirage," says Serjeant Williams (2 Wm. Saund. 62, note 3), "ought in pleading to be stated to have been made pursuant to the submission in form as well as substance;" and this is exactly for the same reason that jurisdiction must be averred in an action on the judgment of an inferior Court. In *Mitchell* v. *Stavely*, 16 East, 58. 14 R. R. 287, the award was good on the face of it, yet the plea was held good; and to hold that an arbitrator, in fact acting out of his jurisdiction, can estop the parties by untruly saying that he awards of and concerning the premises, would be to stretch the technical rule that one cannot aver against the record much further than any authority warrants. And it is established by *Re Penny & South Eastern Ry. Co.*, 7 E. & B. 660; 26 L. J. Q. B. 225, that though the finding of a compensation jury is good on the face of it, it may be shown by extrinsic evidence that the jury exceeded their jurisdiction, and the finding may be quashed.

But there is a point which it was not material to allude to in *Mayor, &c. of London* v. *Cox*, L. R., 2 H. L. 239, 36 L. J. Ex. 225, which it is necessary to notice in the present case.

[* 232] Though, as is accurately stated, the judgment of a limited tribunal * is not final on the question of jurisdiction, yet if that tribunal has jurisdiction, the decision on a point within its jurisdiction (or, as BRAMWELL, B., in the Court below expresses it, within its *arbitrium*), whether on the law or the fact, cannot be reviewed except in a Court having jurisdiction to sit as a Court of appeal from that decision.

Now, it may happen that the same question may arise either as a question of jurisdiction or on the merits within the jurisdiction. It is frequently very difficult to say whether the jurisdiction is exceeded or not. For instances showing the difficulty

of deciding on such a point, see *Reg.* v. *Dayman*, 7 E & B. 672; 26 L. J. M. C. 128; *Reg.* v. *Brown*, 7 E. & B. 757; 26 L. J. M. C. 183; *Bailey's Case*, 3 E. & B. 607; 23 L. J. M. C. 161. Now, in cases where an award is good on the face of it, but the arbitrator has made a mistake either of law or fact, if that mistake has been as to a matter within the arbitrator's authority, then, inasmuch as there is no court of appeal from the arbitrator, the mistake cannot be remedied, nor can the court, even in the exercise of its equitable jurisdiction, set aside the award, unless it can be shown that there was misconduct or some other equitable ground for interference; and in the case of the verdict of a compensation jury, inasmuch as the *certiorari* is taken away, there is no remedy at law at all unless there be excess of jurisdiction. But if the mistake has been as to the extent and nature of the arbitrator's authority, leading him to exceed it, then inasmuch as an excess of authority by mistake is just as much an excess as if it had been in consequence of a wilful disregard of the limits of the authority, the award may be impeached as being made without jurisdiction. Were this otherwise no one who submits to a reference of one thing could be safe from having an award put upon him as to anything else.

Accordingly, in *Jones* v. *Corry*, 5 Bing. N. C. 187, where the Court of Common Pleas were satisfied that the arbitrator had misconstrued the order of reference and so mistaken the limits of his authority, the award was set aside. This principle is very clearly laid down in the judgment of Lord Chancellor HART, in *Brophy* v. *Holmes*, 2 Molloy, 1. There, * there [* 233] had been a reference by order of *nisi prius* to three jurymen of all matters in difference, and they had awarded in favour of the defendant by an award on all matters in difference, which, therefore, purported to be a decision on all such matters brought before them. The LORD CHANCELLOR had to decide whether this finally disposed of an equitable claim under a guarantee. It appears that the LORD CHANCELLOR was satisfied that, in fact, the claim on the guarantee was brought before the three arbitrators, and that the counsel for the defendant protested that they had no right to consider it, and gave them what is called a "caution not to entertain such a claim." The LORD CHANCELLOR says (at p. 8), "If the arbitrators said we think the guarantee not within our jurisdiction" [*i. e.*, in fact did so, for on the face of the award

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they professed to decide it], "that would be one case. But if the arbitrators looked at it, and determined it was not a claim that was entitled to have effect given to it, and, moreover, that by reason of having accepted such an undertaking the plaintiff was disentitled to any contribution towards the loss, that is different; and, although I think it was a wrong conclusion, I cannot remedy it." He then, after stating the clear facts and the giving the caution, says (at p. 11): "But the question is, did that caution act before [? upon] the minds of the arbitrators, and did they throw the matter of the guarantee out of their calculation accordingly, or did they disregard it as an empty threat and consider the matter of the guarantee? That is the question; for if it could be shown that the caution prevented them from exercising their judgment on the guarantee, and the effect of the contract, and quantum of damages, the plaintiff has not had a fair trial of his claims; but if they disregarded the caution, then the matter has been tried already. But the evidence in this case has been omitted to be pointed to the very fact which alone could entitle a court of equity to interfere after the award. The plaintiff might have examined each of the arbitrators, and put this plain interrogatory to each, — Did you abstain in consequence of the caution, or for any other reason, from weighing the effect of the guarantee; or did you look into it and all the matters in difference between the parties, and conclude on the whole case?" He then proceeds to say that, if there had not been delay, he should have directed an inquiry on that point alone, and, as it was, would [* 234] *consider whether he should do so or not. Afterwards it appears that, on fresh evidence, he was satisfied that the arbitrators had, in fact, adjudicated on the claim.

It seems clear, therefore, that the Lord Chancellor thought that, though the award was good on the face of it, and purported to be an adjudication on all matters in difference brought before the arbitrators, there might be an inquiry as to whether, in fact, the arbitrators did exercise the jurisdiction, and that the arbitrators themselves might be examined as witnesses as to that fact. There is no case or authority that I can find that says an umpire or arbitrator is either incompetent as a witness or privileged from giving testimony as to any matter material to the issue. Of course any attempt to annoy an arbitrator by asking questions tending to show that he had mistaken the law, or found a verdict

against the weight of evidence, should be at once checked, for these matters are irrelevant. But where the question is whether he did or did not entertain a question over which he had no jurisdiction, the matter is relevant, and nobody can be better qualified to give testimony on that matter than the umpire. I wish to guard against being supposed to express an opinion that a juryman might be asked on what grounds he and his fellows gave their verdict; that involves very different considerations, and may be decided when the case arises. But I can see no reason for the doubt as to whether the umpire's evidence was admissible. And in the recent case of the *Dare Valley Ry. Co.*, L. R., 6 Eq. 429, 37 L. J. Ch. 719, upon a question closely resembling the present, the Lord Justice GIFFARD, then Vice Chancellor, expressed a clear opinion as to the admissibility of the evidence of an arbitrator, and acted upon it. . . .

From this judgment of the Exchequer Chamber the plaintiff brought a proceeding in error in the House of Lords.

The Judges were summoned, and Mr. Baron [L. R. 5 H. L. 423] MARTIN, Mr. Justice BYLES, Mr. Justice BLACKBURN, Mr. Justice MONTAGUE SMITH, Mr. Justice HANNEN, and Mr. Baron CLEASBY attended.

Sir R. Palmer, Q. C., and Mr. Kemplay, for the plaintiff in error: —

The first point to be considered relates to the examination of the umpire. It is submitted that his evidence was inadmissible. The award was good on the face of it. It could not, therefore, be impeached by evidence of what passed in the mind of the umpire when he made it. Such evidence was inadmissible. No misconduct of any sort was imputed against him, so no extrinsic evidence could be brought forward in opposition to his award. *Johnson* v. *Durant, Ellis* v. *Saltau*, 4 Car. & P. 327, and 327, n.; *Hodgkinson* v. *Fernie*, 3 C. B. N. S. 189, 27 L. J. C. P. 66. Yet he was called with a view to show that he had allowed matters not properly within his jurisdiction to exercise an influence over his mind. As to the question of the admissibility of his evidence, the only direct and clear opinion pronounced in the Courts below was that of Mr. Baron BRAMWELL, and that learned Judge had expressly declared the umpire's evidence to be inadmissible. L. R., 3 Ex. 327. The other Judges seemed to think that if his evidence

went to show that he had arbitrated on something which was not within his jurisdiction, or that he had omitted to arbitrate on something which was within it, his evidence would be admissible. This mode of considering the matter was erro-
[* 424] neous. He could not be asked what were the * reasonings passing in his own mind, which inclined his opinion one way or the other. In *Ponsford* v. *Swaine*, 1 J. & H. 433, it was held that arbitrators were bound to produce the documents laid before them by the party who called them, but not by the other party, and that though they might be asked if a particular matter was pressed on their attention, they could not be asked what was the view they had taken of it. In *Mortimer* v. *The South Wales Railway Company*, 1 El. & El. 375, 28 L. J. Q. B. 129, which was an action to enforce the finding of a jury, the jurors were alleged to have given compensation in respect of the interruption of the flow of a stream of water, whereas, in fact, the stream was divided into two branches, of which one alone had been interrupted, and therefore the claim for compensation was too large, as the finding had not been restricted to that particular damage which alone ought to have been made the subject of compensation. It was answered that the verdict, being valid on the face of it, could not, in an action to enforce it, be impeached upon such a ground as this. Lord CAMPBELL said, 1 El. & El. 381: "The defendants endeavour to show, by way of defence to this action, that the sheriff's jury awarded, in respect of the diversion of the water which flows through the plaintiff's premises, damages in respect of the whole stream diminished, the plaintiff having a right to compensation only in respect of the diminution of a portion of it; and that, in so awarding, the jury committed an excess of jurisdiction. I am of opinion that that defence is not open upon these issues; nor do I think that the defendant could have pleaded any plea to that effect which would have been good." He held the pleas pleaded to be in themselves good, but unavailable for the purpose of impeaching the finding of the sheriff's jury, which ought to have been impeached, if at all, upon a *certiorari* to bring it up and quash it. *Re Penny & South Eastern Ry. Co.*, 7 El. & Bl. 660, 26 L. J. Q. B. 226, was relied on to show that the verdict of a jury might be impeached for awarding compensation for one claim among others, which was not legally the subject of compensation; but there, though the excess of the

jurisdiction did not appear on the face of the proceedings, the sheriff had wrongly directed the jury, and evidence of that fact was obtainable without the aid either of the sheriff's notes or the statement of the jurors. The case of *The* * *Cale-* [* 425] *donian Railway* v. *Ogilvy*, 2 Macq. Sc. Ap. 229, does not affect the present, for there the objection to the finding was apparent on the face of it. So it was in *The City of Glasgow Union Railway Co.* v. *Hunter*, L. R., 2 H. L., Sc. 78. Here the award was valid on the face of it, and could only be impeached by evidence, in itself inadmissible, of the motives which had influenced the mind of the umpire in making it.

As to the claim for compensation in respect of the causeway. In the first place it was denied to be in any way a part of the property of the plaintiff. It is true it was not the subject of an actual lease, but it had always been used as part of the property under the former lease, and the Crown was bound by two agreements to grant a new lease as from 1855, and as the plaintiff had performed his part of the agreement for the new lease, it must be taken to have been actually granted. In the next place, it was said that the plaintiff only had, and could only have, an easement over it, which he enjoyed in common with all the other subjects of the realm, for that being part of the soil of a navigable river it could not be made the subject of a grant to an individual, and that the taking away of that easement could not be matter for individual compensation. It may be admitted that the Crown could not grant to a subject special and peculiar rights in a navigable river. *Attorney-General* v. *Johnson*, 2 Wils. Ch. Ca. 87, and *Gann* v. *Whitstable*, 11 H. L. C. 192. He had an actual property in the use of it. *Mason* v. *Hill*, 5 B. & Ad. 1 — 24; *Sampson* v. *Hoddinott*, 1 C. B. (N. S.) 590; *Miner* v. *Gilmour*, 12 Moo. P. C. 131; and see *Lord* v. *The Commissioners of Sydney*, 12 Moo. P. C. 473; but here the special use was that of a part of the shore at low water, which use did not interfere in the least degree with any right of the public, who could not possibly use it as the plaintiff did, though it was individually advantageous to him. This especial use of the shore had been taken away by the act of the defendants, and the plaintiff was entitled to compensation for its loss.

The umpire had a right to consider all the matters which occasioned injury to the plaintiff, all which "injuriously affected"

his property. In *Reg.* v. *The Eastern Counties Railway*, 2 Q. B. 347, the return to a mandamus negatived the injury [* 426] alleged, as the ground for * compensation, but it was held that the compensation was not limited to the cases negatived in the return, but might extend to injury done without entering upon or taking the land, namely, by lowering a road on which the land abutted. That was a special injury to the plaintiff though it might be that the lowering of the road was a matter beneficial to the subjects at large. In *Ricket* v. *The Metropolitan Railway Company*, L. R., 2 H. L. 175, R. C. Vol. 1, p. 574, the subject of complaint was distinctly a public annoyance alone, yet even there one noble Lord in this House, Lord Westbury, was strongly inclined to hold that, for the special injury arising to an individual from that public annoyance, compensation ought to be given. Then came the case of *The Hammersmith Railway Company* v. *Brand*, L. R., 4 H. L. 171; 38 L. J. Q. B. 265; R. C. vol. 1, p. 623; but that case does not affect the present, for it was decided on the special words of the particular Act, and the claim being for injury from the effect of things which the Act had authorized to be done, and the effects of which must have been foreseen, the claim was held unsustainable. *The City of Glasgow Union Railway* v. *Hunter*, L. R., 2 H. L., Sc. 78, merely followed *Hammersmith* v. *Brand;* yet even there a noble Lord protested against the too narrow construction which had been adopted in previous cases with regard to consequential damage. In *Re The Stockport Railway Company*, 33 L. J. Q. B. 251, a plaintiff was held entitled to compensation for consequential damage, because the proximity of the railway rendered his building less suitable for a cotton-mill on account of an increased danger of being set on fire. It is true that there land of the plaintiff had been taken, but that was only important as a reason for not applying to that case the rule that compensation could not be given for that which unless sanctioned by the Act would have been an actionable wrong. In *Reg.* v. *The London Docks Co.*, 5 Ad. & E. 163, no land was taken, and on that account the party seeking compensation was held not to be entitled to it. But that ground of decision is one which can hardly be supported on principle, and it has already been questioned in this very case, L. R., 3 Ex. 328, by Mr. Baron Bramwell, and in this House by Lord Chelmsford, in *The City of Glasgow Union Railway* v. *Hunter*, L. R., 2 H. L., Sc. 82,

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where his Lordship * said, " I should be disposed to say [* 427] with Baron BRAMWELL, ' It does seem strange that the taking a piece of a man's land should let him in to prove all sorts of damage for which he could not otherwise recover.' "

Mr. Hawkins, Q. C., and Mr. Philbrick, for the respondents : —

The validity of the award is the real substantive question before the Court. The umpire had a right to determine an amount, but not to determine any question of law, nor to assume any new jurisdiction. Here the umpire has, by his own statement, assumed a jurisdiction over matters which were not properly subject to his authority. The award showed that upon the face of it. The plaintiff had asked for compensation for the loss of the jetty as if for the loss of a part of his property. It never was his property. Yet he treated it as such, and insisted that his property was injuriously affected by what had been done, and, as the defendants contended, rightfully and properly done, under the Act ; he asked for compensation for the loss of the use of the jetty during the progress of the work and after its completion. [Lord CAIRNS : By reason of the severance from the lands.] There was no distinct claim made on the ground of severance. The notice of claim set up the loss of the use of the jetty and nothing else.

The award is bad, because it is made in respect of a claim which could not be sustained at law. There could be no legal claim in respect of the loss of the pier or jetty. The extent of that claim was not in dispute, but the right to make any claim in respect of such a matter was so. That right was entirely denied. The plaintiff had no interest in the soil or bed of the river ; and therefore he had no right to claim compensation for a loss of what was a mere incident to that soil. The *Stockport Case*, 33 L. J. Q. B. 251, did not justify such a claim, for there the injury made the subject of compensation was an injury in respect of what was the plaintiff's undoubted property ; it was not doubtful or indirect injury, but direct and substantial, and was capable of a money measurement. The umpire here could not give himself jurisdiction over a supposed claim, a claim not sustainable in law, by making a formal finding in respect of it. In *Ellis* v. *Saltau*, 4 Car. & P. 327, n., the witness was * merely told [* 428] that he need not state the reasons which influenced him

in making his award, if he desired not to do so: he did not object here. If the umpire has made an award which he had no legal right to make, no Court can properly be called on to enforce it.

What the umpire did was rightly got at by his evidence. His own statement was not only admissible, but it was the best evidence on the subject. There is great reason to doubt the supposed declaration of Baron BRAMWELL on the admissibility of the umpire as a witness, and the other Judges are clearly the other way. In *In re The Dare Valley Railroad Company*, L. R., 6 Eq. 429, 435, Vice-Chancellor GIFFARD said, "I can see no reason why the arbitrator should not be just as well called as a witness as anybody else, provided the points to which he is called as a witness are proper points on which to examine him. If there is mistake in point of subject-matter, that is, if a particular thing is referred to an arbitrator, and he has mistaken the subject-matter on which he ought to make his award, or if there is mistake in point of legal principle going directly to the basis on which the award is founded, these are subjects on which he ought to be examined, and also grounds for setting aside his award." The examination of the umpire was certainly confined within these limits. [Lord CHELMSFORD suggested that in Espinasse's Reports there were to be found [* 429] cases on this subject.[1]] In *Brophy* v. * *Holmes*, 2 Molloy,

[1] The cases are probably these: *Habershon* v. *Troby* (3 Esp. 38). Case for maliciously holding to bail. There had been an action on disputed accounts — it was referred to arbitration. The award was in favor of the plaintiff. Erskine, for the plaintiff, called for the books, and proposed to examine the arbitrator. Lord KENYON: "I do not think I ought to admit the evidence. It seems to me that the arbitrator ought not to be permitted to depose here as to what transpired before him, either upon the examination of the parties, or on an inspection of the plaintiff's books."

Gregory v. *Howard* (3 Esp. 113). Disputed accounts; action on a promissory note. The plaintiff called a witness who had been acting as arbitrator to settle the accounts between the parties. Objection was taken to the witness speaking as to any communication made to him in the course of the arbitration. Lord KENYON: "I have often given my opinion on this subject. Evidence of concessions made for the purpose of settling disputes I shall never admit, but facts admitted before the arbitrators I always shall. I shall, therefore, allow the arbitrator to be examined and to speak to such matters of fact as were admitted by the parties before him."

Martin v. *Thornton* (4 Esp. 180). Action for maliciously holding to bail. Plaintiff had been employed as a writer for the defendant, and had sued for payment for his services. While that action was pending, defendant had arrested plaintiff, and held him to bail for two sums which had been paid as satisfaction to him. Both cases were referred to arbitration. Award that the plaintiff had been fully paid, but that there was not any cause of action against him on account of the money which he had been so paid. The award was produced. Defendant's counsel then called the arbitrator to prove that the reference was of all matters in difference,

1, there was a suit in respect of partnership accounts — there was an inquiry before an arbitrator, and he was examined and allowed to be asked what had passed before him.

The evidence shows that £5000 were given in respect of matters not included in the reference. If that should be determined to be an illegal item that vacates the whole award. Now that item can be, as it were, earmarked, for the umpire gives a specific sum for each particular thing, and there is not any other item but that which may not be made the subject of compensation, and all the other items and the sums given in respect of them are known. [Lord CAIRNS: Suppose that, in consequence of all these other things, the house would have a less money value than before by £5000, would not the award be right?] But independently of the right to consider some of the things as causes of depreciation, the defendants insisted that, so far from the house being lessened in value by £5000, it was increased in value by £10,000. But without going into that question, it is clear that what was made to furnish grounds for so large a claim for compensation was, in fact, not a subject for consideration by the umpire. The case of the *Stockport Railway*, 33 L. J. Q. B. 251, cannot justify this claim, while the case of *The Caledonian Railway* v. *Ogilvy*, 2 Macq. Sc. Ap. 230, is a distinct authority to show that such a claim cannot be supported. No injury consequent on the creation of works authorized by the Legislature can be a ground for compensation. *Hammersmith Railway Company* v. *Brand*, L. R., 4 H. L. 171; 38 L. J. Q. B. 265; R. C. Vol 1, p. 623. The loss of prospect cannot be a ground for an action or for compensation. If one man comes on another's land and builds a high brick wall, there may be an action of trespass against him, and damages can be given for his wrongful use of the land, but not for the mere * loss of prospect [* 430] which the wall occasions. Here the loss is of that kind, and the loss and obstruction take place not on the plaintiff's land but on land that does not, and never did, belong to him. No action, therefore, would have lain by him if the Act had not passed, and no claim for compensation can be made under such circumstances for what was done under the authority of the Act. *Re Penny & South Eastern Ry. Co.*, 7 El. & Bl. 660, 26 L. J. Q. B. 226.

and that a claim had been made before him by Martin for compensation for the injury. This evidence was objected to. It was contended that the award must speak for itself, Lord ALVANLEY admitted the evidence.

In *Mortimer* v. *The South Wales Railway Company*, 1 El. & El. 375, 28 L. J. Q. B. 129, there was a good ground of claim for compensation for the interruption of the flow of water in one branch of a stream, but the claim had been as if for the interruption of the flow of the whole stream, and if that objection had been presented to the Court in proper form and at a proper time it would have been fatal to the claim. *Reg.* v. *The Eastern Counties Railway Company*, 2 Q. B. 347, is not an authority for the plaintiff, for there though certain things made the subject of the claim for compensation were denied to be so, the return did not conclusively show that there might not be others which could lawfully be the subject of such a claim, and therefore the mandamus was issued to have the claim investigated. In both these cases the claim was allowed only through an objection to the form of meeting it. In *Chamberlain* v. *The West of London Railway Company*, 2 B. & S. 605, there was an actual interference with the access to the plaintiff's houses, and their value in letting was materially diminished. That was held to be a subject for compensation but any sort of injury in diminution of money value would not have been so held. [Lord CHELMSFORD: What is the distinction between cutting off access to a house by altering a road and cutting off access to it by embanking a river?] That is not here made the subject of a specific claim. The compensation claimed is for something connected therewith, namely, the use of a jetty which never was nor could be the plaintiff's property.

It may even be that, in some way or other, the plaintiff is entitled to compensation for the loss of his water-way, — his access to the river; but something else is claimed, and it does not follow that he is entitled to anything for the noise and dirt that may be occasioned by the construction of the road which is substituted for the river. Here the access to the river is not cut off [* 431] * altogether, the mode of access alone is altered. [Lord WESTBURY: Is he not to be compensated for being deprived of access to the river at high water?] No such claim is made in the case. The loss for the jetty alone is claimed. [Lord CHELMSFORD: The use of the jetty at low water, but access to the river at high water. You admit the whole in the 13th paragraph of the case [1]]

[1] "That the embankment was constructed on the site of the causeway or jetty, so that the river could not flow up to the garden-wall, and that the plaintiff's communication with the river was by the embankment, which was a public road."

No. 15. — Buccleuch v. Metr. Board of Works, L. R., 5 H. L. 431, 432.

The umpire had only the right to deal with the case as it was placed before him, and as there was not any claim for the loss of access to the river at high water, he was bound not to give more than nominal damages for that, or to discard it altogether. Turning the river into a roadway did not afford ground for compensation. The access was as complete as before, nay, it was more so. The Legislature had authorized that change. He had no other right on the river than any other subject. He had not the exclusive use of the causeway; it was on the shore where barges might be anchored, and every one might pass along. If another man brought up barges in front of the plaintiff's garden wall the plaintiff would have no right of action on that account, certainly not on account of spoiling his prospect or destroying the amenity of his house. [Lord CAIRNS: Suppose he had a right of common, and that was interfered with, what then?] He could not claim compensation, an individual compensation for a general injury to the common. If he had no right to claim compensation for one particular matter, and that matter is yet, by the award, made part of the sum given him as compensation, the whole award is bad.

The case of *Re Penny*, 7 El. & Bl. 660, is very important, as establishing that what is ordered by an Act to be done cannot, of itself, furnish any ground for compensation. The plaintiff's premises were there overlooked from the railway and the railway platform, and he was held not entitled to compensation on that account, and though actual injury to the premises occasioned by the passing of the ballast trains during the construction of the railway was allowed to form a ground of compensation, Lord CAMPBELL expressly said that it would not be payable in respect of the passing of trains after its construction. This last matter was the substance *of the decision in *Hammer-* [*432] *smith Ry. Co.* v. *Brand*, L. R., 4 H. L. 171, 38 L. J. Q. B. 265; R. C. Vol. 1, p. 623, and that must be so in this case, since by the Thames Embankment Act the Board of Works had no control over the use of the road after it had once been constructed and dedicated to the public. The construction of the road here was not only authorized but directed by the Thames Embankment Act. The Board of Works was not responsible for anything at all, except for injury sustained in the course of the construction of works, and none such was complained of here.

Sir R. Palmer replied.

No. 15. — Buccleuch v. Metr. Board of Works, L. R., 5 H. L. 432, 433.

Lord CHELMSFORD: —

The first question is, how far an arbitrator is bound to give evidence explanatory of his award; the next, under what circumstances the owner of land may be entitled to compensation for the operations of these defendants acting under their own Act and the Land Clauses Act. Two questions may be proposed for the consideration of the judges: —

First. Whether the evidence given by the umpire was admissible; and if so, to what extent, and for what purpose?

Second. Whether, upon the facts, admissions and evidence set forth in the Case and Appendix (so far as the evidence was admissible), the plaintiff in error is entitled to a verdict on the issue raised on the seventh plea?

The following were the opinions given by the Judges, so far as relates to the former question.

Mr. Baron CLEASBY: —

I answer the first question by giving it as my humble opinion —

1. That the umpire was a competent witness, like any other person, to prove matters material to the issues.

[* 433] * 2. That questions might be properly put to him for the purpose of proving the proceedings before him, so as to arrive at what was the subject-matter of adjudication when the proceedings closed, and he was about to make his award.

3. That as regards the effect of the award no questions could properly be put to the umpire for the purpose of proving how it was arrived at; or what items it included, or what was the meaning which he intended at the time to be given to it.

First. With regard to the competency of the umpire as a witness, I am not aware of any real objection to it. With respect to those who fill the office of judge, it has been felt that there are grave objections to their conduct being made the subject of cross-examination and comment (to which hardly any limit could be put) in relation to proceedings before them; and, as everything which they can properly prove can be proved by others, the courts of law discountenance, and I think I may say, prevent them being examined. But those objections do not apply at all to a person selected as arbitrator for the particular occasion by the parties, and he comes within the general obligation of being bound to give evidence.

The practice entirely agrees with this; for it is every day's practice for the arbitrator to make an affidavit where a question arises as to what took place before him, and I have known him to be examined as a witness without objection.

Secondly. Being competent generally, it follows that he may be questioned as to what took place before him, so as to show over what subject-matter he was exercising jurisdiction. He might, therefore, prove that a claim was made for compensation in respect of one matter, A., and also in respect of another matter, B., and that both were entertained without objection; or he might prove that claim B. was objected to and rejected, or that it was after objection received. He might, in short, give any evidence for the purpose of showing what was the subject-matter into which he was inquiring, and upon which his judgment therefore was to be founded. This would enable us to judge whether he was acting within his jurisdiction or not, for a person exceeds his jurisdiction by prosecuting a judicial inquiry in a matter over which he has no jurisdiction, quite independent of the judgment eventually given. *And it deserves notice, that as to this evidence [*434] the umpire would be no better witness than any other person, and would not have it in his power afterwards, by his own evidence, to sustain or destroy the award. He could be corrected by any other person present at the proceedings, including the short-hand writer, if there was one.

Thirdly. As soon as the award is made it must speak for itself. It must be applied, as in other cases, by extrinsic evidence to the subject-matter, but cannot be explained or varied or extended by extrinsic evidence of the intention of the person making it. There appear to me to be the strongest objections against allowing the umpire to be examined for the purpose of showing what he intended to be included in the award.

In the first place it is (and, indeed, must be) a written instrument, and the general rule is applicable, that its effect must be collected from the instrument itself. The subject-matter to which it is applicable is ascertained by proof of the subject-matter of the inquiry. I cannot think that if the umpire admitted upon the inquiry claims A. and B., and made a general award of one sum for compensation, he could be allowed to prove that in arriving at that sum he had rejected claim B from the computation, or *vice versa* if he had rejected claim B., upon the inquiry could he be allowed to prove that he had included it in the computation.

The award taken by itself is something certain and fixed, and settles the rights of the parties; but if evidence be admitted of the intention and state of mind of the umpire when he made it, its certainty is destroyed, and its effect depends upon his memory, clearness of intellect, and perhaps upon his views and wishes taken up afterwards. Surely it would be a most dangerous thing, after an award has been made which becomes of itself the foundation of a right, to allow any one to retain the power of explaining it away, or even of defeating it. We can properly investigate the acts of a judge or arbitrator in prosecuting a particular inquiry, and his judgment founded upon it; but how can we investigate his secret thoughts or intentions? He is the only master of them, and what he says must be conclusive, as there is nothing which can contradict or explain it.

The objection to such evidence would be more striking if, instead of the umpire being appealed to, two arbitrators had joined [* 435] in an * award. Could each have been questioned as to the composition of the award? Although they had agreed as to the result and amount of the award, it would not at all follow that they agreed in the steps by which it was arrived at. Indeed, we know that agreement in such a result is often only arrived at by some concession and compromise, and in case of a difference in the evidence of what was intended, which is to govern and influence the award?

Or it may be farther illustrated by supposing the case, instead of going to arbitration, to go to a jury. There is an assessor who presides, and he directs the jury to reject certain heads of claim and to compensate for others. The jurymen give a general verdict. Could the twelve jurymen be called as witnesses to show to what extent they had severally acted upon the direction given, or against it, so as to vitiate the verdict by showing that some jurymen included in it matters they could not properly include? I submit not, and that the verdict must speak for itself and be applied to the proper subject-matter, viz., so much of the claim put forward as had been entertained.

An authority has been referred to which does not seem to agree with the opinion which I have ventured to express, the case of *Brophy* v. *Holmes*, 2 Molloy, 1, decided by Lord Chancellor Hart. A question arose in that case whether a certain equitable claim under a guaranty had been disposed of by arbitrators in a reference

of all matters in difference. It appeared that the claim had been brought forward by the plaintiff, but the defendant protested that the arbitrators had no right to consider it, and gave them a caution not to entertain it. The LORD CHANCELLOR says, "If the arbitrators said we think the guaranty not within our jurisdiction, that would be one case." All would agree, I apprehend, that so far the view taken was correct, because there would be an *act* of the arbitrators in refusing to entertain the claim which would be decisive. But in what follows the LORD CHANCELLOR appears to think the state of mind of the arbitrators is the subject of inquiry and not their acts; for he goes to say, "The plaintiff might have examined each of the arbitrators, and put this plain interrogatory to each — Did you abstain in consequence of the caution, or for any other reason, from weighing the effect of the guaranty, or did you look into it and all *the matters in [*436] difference between the parties, and conclude on the whole case?" I beg most respectfully to dissent from this, as not being a correct mode of dealing with the case. The acts of the arbitrators and not the hidden operations of their minds are the proper subject of inquiry. If the claim was made and received and evidence given upon it, this would be decisive of the jurisdiction exercised by the arbitrators, quite independent of any reservation in the minds of the arbitrators at the time. One cannot help asking what would be the effect, in such a case, of the arbitrators giving different answers to the supposed question. It certainly strikes me very strongly that the state of the arbitrator's or Judge's mind is of no importance, except so far as it is embodied in some judicial act done by him. His mind may fluctuate and change more than once until the decision is delivered, and then, whether it be upon an interlocutory or final matter, the case is so far bound.

I wish to add that what has been said has reference only to such a proceeding as the present, and not to a proceeding of a different nature, viz., when an application is made (the submission having been made a rule of Court) to refer back the award, or set it aside on the ground of some mistake or misconception of the arbitrator so as to make it wrong that the award should stand. In the exercise of such a jurisdiction the Court to which the application was made would probably reject no means of informing itself whether the arbitrator had proceeded upon such a mistake or misconception. This was the nature of the application in the case *In re Dare Val-*

ley Railway Company L. R., 6 Eq. 429, 37 L. J. Ch. 719, where Vice-Chancellor GIFFARD thought a written statement by the arbitrator of his reasons admissible in considering whether the arbitrator had proceeded upon an erroneous view of his duties or not. The opinion given has reference only to an action at law upon the award, in which of course the rules of evidence must be attended to.

I beg, therefore, to answer your Lordships' first question, by giving my humble opinion that the umpire was a competent witness, that he might properly be questioned as to the subject of claim put forward and inquired into before him, and that he could not properly be questioned as to the matters which he included in or excluded from his award.

[*437] *I am authorized by my Brother BRAMWELL to state (by permission of your Lordships) that he was misunderstood when he gave his opinion in the Court of Exchequer, if he was supposed to hold that the umpire was not a competent witness; *Buccleuch* v. *The Board of Works*, L. R., 3 Ex. 327; 37 L. J. Ex. 177. He did not hold that he was not competent for any purpose, but only that he could not be questioned as to the composition of his award. This appears from the report of what he said, especially from that in the Law Journal.

The effect of the above opinion applied to the present case is, that the questions as to what were the matters in discussion before the umpire were properly put, and that those which follow beginning with the question: "Will you tell us of what items the £8000 was composed?" were improperly put; and it seems that the answers to the questions properly put raise sufficiently the question of excess of jurisdiction by the umpire. . . .

[441] Mr. Justice HANNEN: —

My Lords, in answer to the first question proposed by your Lordships, I say that I am of opinion that the evidence of the umpire was admissible, and in support of this opinion I

[*442] beg leave *to refer to the reasons given by my Brother BLACKBURN in his judgment in the Court below, to which I am unable to add anything. . . .

[446] Mr. Justice BLACKBURN: —

My Lords, in answer to your Lordships' first question, I have to state that I am of opinion that the evidence of the umpire was admissible, so far as it tended to show that he had exceeded his jurisdiction by including in the award compensation for matters for which he was not authorized to give compensation.

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I stated fully in the judgment I delivered in the Exchequer Chamber in this case, L. R., 5 Ex. 228, my reasons for coming to this opinion, and then quoted all the authorities that I am aware of bearing on the question; and, as nothing has occurred to me in addition to what I there stated, I think it better to refer your Lordships to that printed judgment than to repeat the same words.

I have only to add that I think the evidence of a juryman as to what were the grounds of the verdict of himself and his fellow-jurors has always been rejected on grounds of public policy, some of which are well indicated in the opinion which my Brother MARTIN is about to deliver to your Lordships in this case, and which I *have had the advantage of perusing. I [*447] think those grounds are not applicable to an umpire, and, consequently, I do not think that a decision by your Lordships that the umpire's evidence is admissible would render it necessary to admit the evidence of jurors. . . .

Mr. Justice BYLES: — [448]

I entirely agree with the judgment about to be delivered by my Brother Martin.

*Mr. Baron MARTIN: — [*449]

My Lords, in answer to your Lordships' first question, I am of opinion that the evidence given by the umpire was admissible, and I see no limit as to its purpose and extent beyond the ordinary one, that evidence is to be confined to the matter in issue. The object of calling him was to prove the seventh plea, viz. that the sum awarded by him included damages and compensation for matters in respect of which he had no power or right to award or assess compensation. Now if this matter is to be the subject of judicial inquiry, there is no person who possesses the same means of proving the truth as the umpire. He must know in respect of what he awarded, and to exclude him would seem like excluding the truth. At the same time I cannot but feel that if he be an admissible witness, there will be very great difficulty in excluding a juryman who has assessed compensation in a case under the Lands Clauses Act.

The award is said to be bad, because the umpire has only a limited authority by virtue of the 63rd section, which it is alleged he has exceeded. By the 49th section jurymen have precisely the same limited authority. They must deliver their verdict in two separate sums, but the same limited authority is conferred upon

both. Now if the arbitrator or umpire is competent to give evidence that he exceeded his authority, and so to annul and defeat his award, what reason is there why a juryman is not competent to give evidence to prove that the jurors included in their verdict compensation in respect of a matter which is without the 49th section? I find a difficulty in answering the question. There can be no doubt as to the inconvenience and uncertainty which will arise if jurymen are permitted to give evidence to defeat their verdicts. If one juryman is admissible all are admissible, and their evidence may be conflicting, and great inconvenience arise. In ordinary cases in the Courts of Law and Equity jurymen are not permitted to make affidavits, or give evidence to affect or defeat their verdicts, and although I feel myself bound to answer your Lordship's question as I have done, I am conscious that your Lordships, as the Court of ultimate resort, may, by reason of the great inconvenience, feel yourselves called upon to arrive at a different conclusion.

[*450] * I can find no authority against the umpire's admissibility. Two cases have been cited in its favour, and although I feel that great inconvenience may arise from permitting an award to be so impeached, I nevertheless feel constrained to answer your Lordships' first question as I have done. . .

[454] I am authorized to state that Sir Montagu Smith, who heard the arguments, concurs in this judgment.

Lord CHELMSFORD: —

My Lords, in this case the four Judges of the Court of Exchequer were unanimous in favour of the plaintiff in error; but in the Court of Exchequer Chamber their judgment was reversed by a majority of four Judges to three; the opinions of seven Judges having been thus overruled by a minority of four. Of the six Judges whose assistance your Lordships had upon the hearing of the appeal, all of them, with the exception of Mr. Justice BLACKBURN, concurred in the judgment of the Court of Exchequer.

The case upon the appeal may conveniently be considered under the heads of the two questions put by your Lordships to the learned Judges. First, whether the evidence given by the umpire was admissible, and if so, to what extent and to what purpose? Secondly, whether, upon the facts, admissions, and evidence (so far as such evidence was admissible) the plaintiff in error is entitled to a verdict on the issue raised on the 7th plea.

No. 15. — Buccleuch v. Metr. Board of Works, L. R., 5 H. L 454, 455.

The Duke of Buccleuch is tenant to the Crown of Montagu House in Whitehall Place. At the time the Metropolitan Board of Works was proceeding to construct the embankment on the north side of the River Thames the Duke held the premises under a lease, dated the 19th of April, 1810, for a term of sixty-two years from the 5th of January, 1806, by the description of "all the piece of ground, &c., abutting eastward on the River Thames, on which *Montagu House stood, together (*inter alia*) [*455] with all easements, waters, watercourses, profits, commodities, advantages, and appurtenances whatsoever to the said piece of ground belonging or appertaining, or therewith or with any part thereof held, used, occupied, or enjoyed, or acccepted, reputed, deemed, taken, or known as part, parcel, or member thereof." This lease would have expired in January, 1868; but before its expiration the Duke, by agreements with the Crown, upon spending £20,000 upon the premises in rebuilding the house and in other improvements, was to be entitled to a renewal for a term of ninety-nine years. He had performed his part under these agreements, and therefore at the time of the execution of the works by the Metropolitan Board of Works his interest in Montagu House and premises was that of a lessee for the residue of a term of ninety-nine years.

Montagu House and premises were bounded on the river side by a wall, along the whole length of which, at high water, the river flowed. There was a gate in this wall, usually kept locked, which led from some stairs in the garden of the house to a causeway or pier which ran out into the river to low-water mark. The causeway had been used for more than forty years for landing coals from barges, and for bringing vegetables, &c., for the use of the tenants of Montagu House, who always repaired the causeway at their own expense when it needed repair.

By the Thames Embankment Act, 25 & 26 Vict. c. 93, the Metropolitan Board of Works was authorized to construct an embankment on the north side of the Thames from Westminster Bridge to Blackfriars Bridge. In the course of performing the necessary works it became necessary to remove the causeway and the landing-place connected therewith, and also entirely to shut off Montagu House and premises from direct access to the river. In the place where the water had previously flowed a solid embankment was made, which has since become a public highway.

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The plaintiff gave the defendants notice that he claimed compensation as well for the entering upon and taking by them of the causeway, pier, or jetty, as for the removal and obstruction of the use and enjoyment of the landing-place, and for all other damage sustained or to be sustained by him by such injurious affecting of his said messuage or dwelling-house, and other lands, [* 456] premises, * and hereditaments. And he farther gave notice under the provisions of the Lands Clauses Consolidation Acts (which are incorporated with the Thames Embankment Act) that he desired to have the amount of such compensation settled by arbitration.

Arbitrators were named by the respective parties, who nominated Mr. Charles Pollock, Queen's Counsel, as umpire. Mr. Pollock, having taken upon himself the reference, ultimately made an award in the following terms: "I award, order, and determine that there is due from the said Metropolitan Board of Works to the said Duke of Buccleuch and Queensberry the sum of £8325 as and for compensation for the interest of the said Duke of Buccleuch and Queensberry in the said causeway, pier, and jetty; and for the shutting up of the said landing-place, and for the damage by the depreciation of the said mansion-house, lands, tenements, and hereditaments, by the otherwise injuriously affecting the same by the execution by the said Board of their said works, and by the exercise of the powers of the said Act."

The defendants having refused to pay the compensation, an action was brought against them to recover the sum of £8325, the sum awarded. To the declaration upon the award the defendants pleaded several pleas, only one of which in this stage of the case is necessary to be considered. By the 7th plea the defendants pleaded that the sum of £8325 awarded was and is one entire and indivisible and unseparated and inseparable sum, and that the said sum includes damages and compensation for matters and things in respect of which neither the arbitrators nor the umpire had any power or right to award or assess damages or compensation, and over and in respect of which neither the arbitrators nor the umpire had any jurisdiction whatever.

At the trial before the Lord Chief Baron KELLY the defendants in support of this plea, called Mr. Pollock, the umpire, as a witness. I do not quite understand whether an objection was made *in limine* to his admissibility as a witness, or merely to certain parts of his

evidence, but I rather collect that the latter must have been the case, because at the close of his examination there follows the statement: "The evidence of the umpire was objected to by the plaintiff, and admitted by the Judge, subject to such objection, and on the terms that such parts as the Court should think * inadmissible should be deemed to be struck out." But if [*457] the umpire was not a competent witness, the whole of his evidence ought to have been struck out.

That the umpire was admissible as a witness was, without a single exception, the opinion of all the Judges who have considered the question in this case; Mr. Baron CLEASBY having been authorized to state (by permission of your Lordships) that Mr. Baron BRAMWELL was misunderstood when he gave his opinion in the Court of Exchequer, if he was supposed to hold that the umpire was not a competent witness, for he did not hold that Mr. Pollock was not competent for any purpose, but only that he could not be questioned as to the composition of the award.

The umpire being a competent witness, the only question is, to what extent the defendants were entitled to examine him as to the particulars of his award. They had an undoubted right to know from him whether in his estimate of the compensation he took into consideration any matters not included in the reference, and therefore not within his jurisdiction. To prevent the defendants from questioning him so far would have been to deprive them of information to which they were entitled, by shutting them off from the only source of it, in the breast of the umpire. He alone could tell what subjects he included under the general terms of his award. But this having been ascertained, the defendants were not at liberty to go farther, and to ask the umpire what were the elements which entered into his consideration in determining the *quantum* of compensation. Within the limits of the reference the amount to be awarded was entirely in the discretion and judgment of the umpire. His opinion as to the extent of the damage done to Montagu House by the execution of the works of the defendants was necessarily of a speculative character, and founded upon a general view of the annoyance and inconvenience which would result from the new state of things after the embankment was made and publicly used. To ask the umpire, as the counsel for the defendants did, what led him to the conclusion as to the proper sum to be awarded, was really to inquire what

passed through his mind before he formed his judgment. It would be, in my opinion, contrary to all principle so to scrutinise the exercise by an arbitrator of a discretionary power to award [*458] compensation; *and I think that all the questions put with this object were objectionable, and the evidence given upon them ought to be struck out.

Before proceeding to the next question, I must observe that even if the evidence of the umpire had been admissible as to his reasons for thinking that Montagu House would be depreciated by the construction and use of the embankment because "there would be traffic, and dust, and dirt, and commotion, and noise which seemed to alter the character of the house entirely," I do not think it would prove that his award was invalid. In *Hammersmith Railway Company* v. *Brand*, L. R., 4 H. L. 171, 38 L. J. Q. B. 265, R. C., Vol. 1, p. 623; it was held that a person whose land had not been taken for the purposes of a railway was not entitled to compensation from the railway company for damage arising from vibration occasioned (without negligence) by the passing of trains after the railway had been brought into use. And in *City of Glasgow Union Railway Company* v. *Hunter*, L. R., 2 H. L., Sc. 78; it was held that compensation could not be claimed, by reason of the noise or smoke of trains, by a person no part of whose property had been injured by anything done on the land over which the railway ran. In neither of these cases was any land taken by the railway company connected with the lands which were alleged to have been so injured, and the claim for compensation was for damage caused by the use and not by the construction of the railway. But if, in each of the cases, lands of the parties had been taken for the railway, I do not see why a claim for compensation in respect of injury to adjoining premises might not have been successfully made on account of their probable depreciation by reason of vibration, or smoke, or noise, occasioned by passing trains. In this case (as I shall presently show) land of the plaintiff was taken, which would have given a foundation for a claim to compensation for other lands injuriously affected. But in addition to this, in the two cases cited, there were distinct claims made, in the one on account of vibration, and in the other on account of smoke and noise occasioned by the passing trains; whereas here the umpire did not say, I gave so much for dust and noise, &c., but it occurred to my mind that these would be

the consequences of the public use of the embankment, and would altogether alter the character of the house.

* I now proceed to consider whether the umpire has in- [* 459] cluded in his award any head of damage not properly the subject of compensation.

It appears to me that the notice of claim is rather imperfectly framed, as it does not point distinctly to the injury to Montagu House arising from the construction and use of the embankment. It requires the Metropolitan Board of Works to pay the Duke of Buccleuch compensation, as well for the entering upon and taking of the causeway, pier, or jetty, as for the removal and obstruction of the use and enjoyment of the said landing-place, and for all other damage sustained and to be sustained by him by *such* injurious affecting of his said messuage and dwelling-house, the word "such" referring to the taking of the causeway and removing of the landing-place. However, it has never been questioned that the umpire had authority to take into his consideration the injury to Montagu House arising from the construction and use of the embankment. There can be no doubt, and none has been entertained, that the plaintiff is entitled to compensation in respect of the taking away the causeway and landing-place, and the injury arising to his house and premises by depriving him of access to the river. The only question upon which there has been a difference of opinion among the Judges is, whether the umpire was authorized to give compensation in respect of the depreciation of Montagu House by the conversion of the land between it and the river into a highway, and the consequent public use of it. This question partly depends upon the 63rd section of the Lands Clauses Consolidation Act, 1845, which is incorporated with the Thames Embankment Act, and which enacts that in estimating the purchase-money or compensation to be paid by the promoters of an undertaking "regard shall be had not only to the value of the land to be purchased or taken, but also to the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of such power."

The plaintiff was the owner of lands within the meaning of this clause in respect of the causeway which was taken away from him. It is quite immaterial whether the soil of the causeway belonged

to him, or he had merely an easement over it; for, by the [*460] 4th *section of the Thames Embankment Act, the word "lands" is to include easements, interests, rights, and privileges in, over, or affecting lands; and the 27th section of the same Act empowers the Metropolitan Board of Works to appropriate, by grant or demise, any reclaimed land, &c., to any owner of lands now situated on the present left bank and river frontage of the River Thames, in front whereof the said intended embankment shall pass as aforesaid, in consideration of, and in lieu, in whole or in part, of the compensation which such owner or person may be entitled to claim for the damage, if any, to be sustained by him by loss of river frontage or otherwise, by reason of such embankment or roadway or other the exercise of any of the powers of the Act.

This section contemplates two descriptions of damage likely to be sustained by the owners of lands on the bank and river frontage of the Thames, — one by loss of the river frontage; the other in any other manner, by reason of the embankment or other the exercise of any of the powers of the Act.

It seems to me to be quite clear that the umpire was entitled to consider not only the damage which the plaintiff sustained by being deprived of the causeway, but also whether he was entitled to compensation in respect of damage otherwise sustained by reason of the embankment. Now, if he was of opinion that Montagu House was depreciated in value as a residence by reason of the proximity of the embankment, and of all the consequences of its use as a public highway, he was bound to give the plaintiff some compensation, and the amount proper to be awarded was entirely for him to determine.

It can hardly be doubted that in addition to the damage sustained by the loss of the river frontage the house must have been "injuriously affected" — *i. e.*, depreciated in value — by the interposition between it and the river of an embankment to be used as a public highway; and this seems to bring the right to compensation within the very words of the 27th section of the special Act, because it is a damage otherwise than by loss of the river frontage by reason of the embankment or roadway.

It is unnecessary to consider the cases of *The Hammersmith Railway Company* v. *Brand*, and *The City of Glasgow* [*461] *Union *Railway Company* v. *Hunter*, and other cases which were cited in argument, because their applicability

to the present case depended upon that part of the evidence of the umpire which I think ought to be struck out as inadmissible.

The only question then arises upon the award itself, — whether the umpire had any power to give compensation for the damage by the depreciation of the mansion-house, lands, tenements, and hereditaments, by the otherwise injuriously affecting the same by the execution by the defendants of the said works and by the exercise of the powers of the Act. Now, he was authorized, both by the special Act and by the Lands Clauses Act, to give compensation if the premises were injuriously affected, — a fact which it was the duty of the umpire to ascertain and determine.

He has determined it and awarded compensation in respect of the damage thereby sustained by the plaintiff; and I see nothing in the case to impeach the correctness of his award.

I think that the judgment of the Court of Exchequer Chamber must be reversed.

Lord WESTBURY: —

My Lords, I concur entirely with the majority of the Judges in the point relating to the admissibility of the evidence of the umpire, and also with respect to the limit to which the right of examining the umpire ought to be carried. On the other point, I must confess that on this occasion, as on some others (see *Ricket* v. *The Metropolitan Railway Company*, L. R., 2 H. L. 175-200; 36 L. J. Q. B. 205; R. C., Vol. 1, p. 574, *The City of Glasgow Union Railway Company* v. *Hunter*, L. R., 2 H. L., Sc. 78-85), I do not concur in the principles which have been established. But it would be useless to enter into that discussion, as I understand that the majority of your Lordships is, on that point, in harmony with the opinion which has been expressed by my noble and learned friend who has just addressed the House; and therefore I concur in the judgment proposed to be pronounced.

Lord COLONSAY: —

My Lords, I entirely concur in the judgment proposed to be delivered on both grounds. First, as to the competency of examining the umpire, I think the distinction has been [*462] well drawn, and the opinions of the majority of the Judges are right. And in regard to the other part of the case, I think that my noble and learned friend now on the woolsack (Lord CHELMSFORD) has stated the most conclusive reasons for the judgment he has proposed to pronounce. I therefore do not think it

necessary to take up your Lordships' time by stating particularly the grounds on which I have arrived at the same conclusion.

Lord CAIRNS: —

My Lords, I must express my own sense of the obligation, and I am sure there is the same feeling on the part of your Lordships, to the learned judges who have favoured us with their opinions upon this very important case. I own that, speaking for myself, both as regards the extent to which the evidence has been challenged as receivable, and as regards the other points in the case, I should have felt great hesitation in coming to the conclusion at which I have arrived had I not had the advantage of the concurrence of so large a majority of the learned Judges.

As regards the reception of the evidence, in my opinion the line has been most properly and accurately drawn by Mr. Baron CLEASBY. It appears to me that upon every point which may be considered to be a matter of fact with reference to the making of the award, the evidence of the arbitrator or umpire was properly admissible. He was properly asked what had been the course which the argument before him had taken, — what claims were made and what claims were admitted; so that we might be put in possession of the history of the litigation before the umpire up to the time when he proceeded to make his award. But there it appears to me the right of asking questions of the umpire ceased. The award is a document which must speak for itself, and the evidence of the umpire is not admissible to explain or to aid, much less to attempt to contradict (if any such attempt should be made) what is to be found upon the face of that written instrument.

My Lords, upon the other part of the case, I own I have had less doubt than I had with regard to the extent to which the evidence was receivable. It has appeared to me throughout that the property of the plaintiff in error in this case was what [* 463] is * commonly called riparian property. The meaning of that is, that it had a water frontage. The meaning of its having a water frontage was this, that it had a right to the undisturbed flow of the river, which passed along the whole frontage of the property in the form in which it had formerly been accustomed to pass. That being the state of things, this water frontage, with these rights, which the plaintiff in error possessed, were taken for the purposes of the Act. Beyond all doubt the water right was a property belonging to the plaintiff, for which

compensation was to be made, and it was for the arbitrator to assess the compensation to which the plaintiff was entitled upon that footing.

Now it is quite true that some difficulty might have arisen in consequence of the wording of the claim put forward by the plaintiff in error. In that claim undue weight, as it seems to me, is laid upon the possession of the causeway, that is to say, upon the one point in the whole frontage by means of which, for the time being, he enjoyed access to the water in a particular and convenient way. But it seems to me that his claim is quite large enough to cover the damage to the whole of his interest, whatever that interest might be; and that interest, it appears to me, was a claim to a water right along the whole of the frontage.

Then, that being so, when the arbitrator came to consider that claim, it seems to me, that it was entirely open to the arbitrator to say what the value of it was. It was impossible for the arbitrator, in estimating that value, to reject from his mind the consideration of the entire depreciation of value which the property would be subject to by reason of its being deprived of that water right. If we are to look at the whole of the evidence, it appears to me that that is nothing more than what the arbitrator says.

Upon these grounds it appears to me that the motion which has been submitted to your Lordships is entirely correct, and that judgment should be given for the plaintiff in error.

Judgment of the Court of Exchequer Chamber reversed.

Lords' Journals, 30th April, 1872.

ENGLISH NOTES.

The principle involved in the above ruling case and in the decision of the Court of Appeal in *Re Dare Valley Railway Co.*, L. R., 6 Eq. 429, cited pp. 477 & 482, *ante* (and see p. 503, *post*) must be taken as modifying the statements in the older cases to the effect that, apart from misconduct, the grounds for setting aside an award, or for regarding it as void, must appear on the face of the award itself. Subject to these modifications the older cases are valuable authorities upon the general principle.

"The arbitrator is the judge of law and fact, as to all matters presented to him on the arbitration. His decision, therefore, is final, and the Court will not interfere with it unless the question of law is raised by the award." Judgment of PATTESON, J., in *Armstrong* v. *Marshall* (1836), 4 Dowl. 593. See the earlier judgment to same

effect of the Court of Common Pleas, *Delver* v. *Barnes* (1807), 1 Taunt. 48, 9 R. R. 707; and in the Court of Exchequer, *Campbell* v. *Twemlow* (1814), 1 Price, 81, followed by *Wade* v. *Malpas* (1834), 2 Dowl. P. C. 638, and *Wilson* v. *King* (1834), 2 Cr. & M. 689. See also *Bouttilier* v. *Thick* (1822), 1 Dowl. & R. 366; *Payne* v. *Massey* (1824), 9 Moo. 666; *Symes* v. *Goodfellow* (1836), 2 Bing. N. C. 533, *Price* v. *Price* (1841), 9 Dowl. P. C. 334; *Eastern Counties Railway Co.* v. *Robertson* (1843), 6 Man. & Gr. 38; *Fuller* v. *Fenwick* (1846), 3 C. B. 705. In some of the older cases, stress was laid on the circumstance of the arbitrator being a barrister, but that distinction has been long abandoned, as is clearly shown by the judgments of Parke, B., and Alderson, B., in *Huntig* v. *Ralling* (1840), 8 Dowl. P. C. 879.

But if it appears on the face of the award that the arbitrator has acted contrary to law, his award must be set aside. *Aubert* v. *Maze* (1801), 2 Bos. & P. 371, 375, 5 R. R. 624, 630; *Kent* v. *Elstob* (1802), 3 East, 18, 6 R. R. 520. And so if the reasons appear on a certificate given by the arbitrator with the award and apparently intended to form part of it. *Holmes* v. *Higgins* (1822), 1 B. & C. 74.

The Court of Common Pleas has refused to set aside an award on a suggestion, supported by the affidavit of a witness who had given evidence before the arbitrator (and who might have been cross-examined), that the arbitrator had been imposed on by that witness. *Pilmore* v. *Hood* (1839), 8 Scott, 180.

In the arbitration between *Hall* and *Hinds* (1841), 2 Man. & Gr. 847, 10 L. J. C. P. 210, the Court set aside an award, though good on the face of it, upon distinct evidence including an admission by the arbitrators themselves, of a clear and palpable mistake, contrary to their own judgment and intention, by subtracting instead of adding the figures arrived at as the basis of their award.

But in *Phillips* v. *Evans* (1843), 12 M. & W. 309, 13 L. J. Ex. 80, the Court refused to set aside the award where it appeared by affidavit (but no affidavit was made by the arbitrator) that there was a mistake by the omission to take into the final calculation of what was due, a sum of £119 7*s.* 4*d.*, admitted to be due to the plaintiff.

Under a submission by agreement, if the parties bring before him a matter which is not within the submission and he entertains it without objection and determines it, it is not open to either party to object to the award that the matter was not within the jurisdiction of the arbitrator; and this holds good although the party objecting is a corporation. *Faviell* v. *Eastern Counties Railway Co.* (1848), 2 Ex. 344, 17 L. J. Ex. 223 (p. 372, *supra*). The parties by their conduct before the

arbitrator "make the question one for his determination, and he has determined it," per ALDERSON, B., p. 350. Or, to use the language of Scotch law, the parties have *prorogated* the jurisdiction.

In the case of *Hodgkinson* v. *Fernie*, referred to in the argument, p. 477, *ante* (1857), 3 C. B. N. S. 189, 27 L. J. C. P. 66, it is laid down that the decision of an arbitrator is conclusive between the parties both as to law and fact, unless corruption or fraud (s. c. including partiality or other misconduct) on the part of the arbitrator is shown, or there is a mistake of law apparent on the face of the award.

An arbitrator on the day of making his award writes to one party a letter disclosing the grounds of his award. Such a letter cannot be used for showing that the arbitrator was mistaken in point of law. *Holgate* v. *Killick* (1861), 7 H. & N. 418, 31 L. J. Ex. 7.

Where under the submission parties have the opportunity of having a special case stated by the umpire, and leave the umpire to make his award without any request to him to state a special case, it is not competent to one of the parties subsequently to elicit from the arbitrator a statement of his reasons and then apply to the Court to send back the matter to the umpire. *In re The London Docks Co.* v. *The Trustees of the Parish of Shadwell* (1862), 32 L. J. Q. B. 30.

An award of compensation under a general statutory power (*e. g.*, in respect of land injuriously affected under the 68th section of the Lands Clauses Consolidation Act, 1845) is in effect an award of the amount, subject to the condition that the subject-matter of the claim is good ground for compensation under the statute. And if the arbitrator awards damages for injuriously affecting lands by (amongst other things) a certain act, it is good matter of plea to an action on the award that the plaintiff was not injuriously affected by that act. *Beckett* v. *Midland Railway Co.*, on demurrer (1866), L. R., 1 C. P. 241, 35 L. J. C. P. 163. In the final decision (after trial) of this case it was held that the narrowing of the road in question was an injuriously affecting of the land. And this view is confirmed by the decision of the House of Lords in the above ruling case (*The Duke of Buccleuch* v. *Metropolitan Board of Works*) and in the case of *Metropolitan Board of Works* v. *McCarthy* (1874), L. R. 7 H. L. 243, 43 L. J. C. P. 385. Nevertheless the above decision on the demurrer in *Beckett's Case* remains a good authority for the proposition in the commencement of this paragraph.

The case referred to in the principal case (pp. 477 & 481, *ante*) of *Re Dare Valley Railroad Co.* (1868), L. R., 6 Eq. 429, 37 L. J. Ch. 719, affirmed L. R., 4 Ch. 554, was a proceeding for setting aside an award. It was held that the arbitrator may be called as a witness, and if he has mistaken the subject-matter on which he ought to make his award, or

if he made a mistake in point of legal principle going directly to the basis on which the award is founded, — these are subjects on which he ought to be examined, and also grounds for setting aside his award.

AMERICAN NOTES.

The testimony of the arbitrators is admissible to impeach the award for mistake. *Davis* v. *Cilley*, 44 New Hampshire, 448; 84 Am. Dec. 85, citing *Johnson* v. *Durant*, 4 C. & P. 327. Or for fraud. *Pulliam* v. *Pensoneau*, 33 Illinois, 375. Greenleaf says such witnesses are incompetent "unless under very cogent circumstances, such as upon an allegation of fraud." 1 Greenleaf Evidence, § 249.

An arbitrator should not be allowed to impeach his award eight days after rendition. *S. C. R. Co.* v. *Moore*, 28 Georgia, 398; 73 Am. Dec. 778.

The testimony of arbitrators is competent to show what was submitted to them. *Republic Bank* v. *Darragh*, 30 Hun (New York Supreme Ct.), 29; *Hale* v. *Huse*, 10 Gray (Mass.), 99; *Hall* v. *Vanier*, 6 Nebraska, 85; *Thrasher* v. *Overby*, 51 Georgia, 91; *York, &c. R. Co.* v. *Myers*, 18 How. (U. S. Supreme Ct.) 246.

But not to explain uncertainties, *Aldrich* v. *Jessiman*, 8 New Hampshire, 516; *Ward* v. *Gould*, 5 Pickering (Mass.), 291; *Cobb* v. *Dortch*, 52 Georgia 548; nor to show errors or mistakes or contradict the findings, *Chapman* v. *Ewing*, 78 Alabama, 403; *Tucker* v. *Page*, 69 Illinois, 179; nor to show that they were misled. *Doke* v. *James*, 4 New York, 568.

To establish a want of authority to make a certain award the arbitrators may be called on to testify. *Woodbury* v. *Northy*, 3 Greenleaf (Maine), 85.

So to show that the award was not final. *Huntsman* v. *Nichols*, 116 Massachusetts, 521.

Section V. — *Finality of the Award.*

No. 16. — HENFREE *v.* BROMLEY.

(K. B. 1805.)

RULE.

Where an arbitrator, or umpire, has executed his award in terms of the reference, he is *functus officio*, and has no power, of his own authority, to alter it.

Henfree v. Bromley.

6 East, 309–311 (s. c. 8 R. R. 491–493).

[309] This case was referred to arbitration, and the umpire was to make his award under his hand, ready to be delivered by a certain day; on which day he accordingly awarded the

defendant to pay to the plaintiff £57, and signed the award; recommending to the parties at the same time by parol, to pay the costs of the reference in equal moieties: and he then put the written award in the hands of his own attorney, who sent notice immediately to the defendant that the award was executed and ready for delivery: but, on the same day, the umpire having been informed that the defendant refused to pay his share of the costs of the reference, took the award before it was delivered by his attorney, and struck his pen *through the £57 (still, [*310] however, leaving it legible), and inserted the sum of £66 in order to include the defendant's moiety of the costs; after which he re-signed the award with a dry pen, and such his signature was attested by witnesses, and notice of the award so altered was given to the parties.

An application was made in the last term for an attachment for non-performance of the award upon an affidavit of service of it, and a demand of the £66, and there was an adverse application to set aside the award as being vitiated by such alteration. These rules came on together in the last term, when the court, after hearing counsel, were of opinion that the award having been once complete by the first signature of the umpire, and being then ready for delivery (*Brown* v. *Vawser*, 4 East, 584), though not attested or delivered, which, by the terms of reference, were not necessary to perfect it, there was an end of the umpire's authority; and he could not afterwards alter the award any more than any other stranger: and, therefore, they refused the rule for an attachment for non-payment of the £66, which they thought there was no authority for demanding; but the other rule for setting aside the award was enlarged to this term, to consider, on the one hand, whether the award were not altogether vitiated by the alteration; and, on the other hand, to enable the plaintiff to make a new demand of the lesser sum originally awarded, and apply for a new rule for an attachment in case of non-payment of it, upon the supposition that the award was good for the original sum inserted in it, notwithstanding the subsequent obliteration made by the umpire without authority.

*Gurney was now heard in support of the award; and [*311] contended, That if the umpire had no authority to make the alteration, that award must be good for the original sum, the alteration having been made by mistake, and not with any fraudu-

lent purpose; and said that, were it not for the opinion expressed by the court in the last term, he should have contended, that the umpire might have corrected the mistake he had made in putting in a wrong sum at any time before the award was delivered out of his hands.

Lord ELLENBOROUGH, C. J. This was not a mere mistake of the umpire in putting down one sum instead of another, as in casting up an account wrong, or the like; but it was a new and distinct act of judgment formed by him after his authority was spent, and he was *functus officio*. Still, however, I see no objection to the award for the original sum of £57; for the alteration made by him afterwards was no more than a mere spoliation by a stranger, which would not vacate the award. He only intended originally to give a recommendation to the parties to divide the costs of the reference between them, and not to make it part of his award. Then when he found that the defendant would not pay his share, he tried to resume his authority again, after he had laid it down; which he could not do.

Erskine and Pooley were to have supported the rule for setting aside the award, upon the ground of the alteration having vitiated it altogether; and referred to *Pigot's Case*, 11 Co. Rep. 27 a, where it was resolved, "that when any deed is altered in a [*312] * point material by the plaintiff himself, or by any stranger without the privity of the obligee, be it by drawing of a pen through a line or any material word, &c., the deed thereby becomes void:" and so, it is added, "although the first word be legible." But finding the opinion of the court decidedly against them on this point, they did not press the argument further.

Lord ELLENBOROUGH, C. J. I consider the alteration of the award by the umpire, after his authority was at an end, the same as if it had been made by a stranger, by a mere spoliator; and I still read it with the eyes of the law, as if it were an award for £57, such as it originally was. If the alteration had been made by a person who was interested in the award, I should have felt myself pressed by the objection; but I can no more consider this as avoiding the instrument than if it had been obliterated or cancelled by accident.

PER CURIAM, *Rule for setting aside the award discharged.*

No. 16. — Henfree v. Bromley. — Notes.

ENGLISH NOTES.

The rule is followed in *Irvine* v. *Elnon* (1806), 8 East, 54; and in *Ward* v. *Dean* (1832), 3 B. & Ad. 234.

But the law was modified, so far as relates to compulsory references by the Court, or where the parties had consented to the submission being made a rule of Court, by the power to remit given to the Court by the C. L. P. Act 1854 (17 & 18 Vict. c. 125, s. 8). And now by the Arbitration Act 1889, s. 7, the arbitrator may correct in an award "any clerical mistake or error arising from any accidental slip or omission." And, by s. 10: "In all cases of reference to arbitration, the Court or a Judge may, from time to time, remit the matters referred or any of them to the re-consideration of the arbitrators or umpire." This is, in effect, an extension to every reference of the provision of the C. L. P. Act 1854.

Under the last-mentioned section, the Court has jurisdiction to remit an award for reconsideration where material evidence has been discovered since the award. *Keightley, Maxsted & Co.* and *Bryan, Durant & Co.* (C. A. 1892), 1893, 1 Q. B. 405, 62 L. J. Q. B. 105; following the decision in *Barnard* v. *Wainwright* (1850), 19 L. J. Q. B. 423, where there was a clause in the submission for making it a rule of Court, and a clause specially providing that in the event of either of the said parties disputing the validity of the award, or moving the Court to set it aside, the Court should "have power to remit the matters to the re-consideration of the said arbitrators."

In the above case of *Keightley, Maxsted & Co.*, and *Bryan, Durant & Co.*, it seemed to be the opinion of the Court that the evidence to form the ground of the application was not necessarily legal evidence, but might be any such evidence as might have been properly received by and might fairly have affected the mind of the arbitrator. The Court also referred to, and distinguished, the case of *Dinn* v. *Blake*, decided under the C. L. P. Act 1854 (C. P. 21 April, 1875), L. R., 10 C. P. 388, 44 L. J. C. P. 276, where it was held that "an award will not be sent back to the arbitrator on the ground that he has made a mistake in the legal principle on which his award is based, except where the arbitrator himself admits the mistake."

AMERICAN NOTES.

The arbitrator may perhaps correct any error appearing on the face of the award, but he may not reopen it, go into a general hearing, and take new testimony. *Robinson-Rea Manuf. Co.* v. *Mellon*, 139 Penn. St. 257; 23 Am. St. Rep. 186: "We know of no authority to sustain such a proceeding as this. If we were to do so, who can say when an award would become final,

and litigation end? If an award may be opened in this way, after two weeks have elapsed, why not after two months or two years?" After an arbitrator has made and published his award he cannot re-examine the case to correct an error, without consent of both parties. "The authorities on this subject appear to leave no room for doubt." *Woodbury* v. *Northy*, 3 Maine, 83. To the same point, *Doke* v. *James*, 4 New York, 568; *Bayne* v. *Morris*, 1 Wallace (U. S. Supreme Ct.), 97; *Clement* v. *Rohrabach*, 15 Penn. St. 116; *Aldrich* v. *Jessiman*, 8 New Hampshire, 516; *Indiana, &c. R. Co.* v. *Bradley*, 7 Ind. 49; *Lansdale* v. *Kendall*, 4 Dana (Kentucky), 613; *Ward* v. *Gould*, 5 Pickering (Mass.), 291; *Smith* v. *Smith*, 28 Illinois, 56; *Butler* v. *Boyles*, 10 Humphrey (Tennessee), 155. But a party who is not prejudiced by the change of the award cannot object. *Rogers* v. *Corrothers*, 26 West Virginia, 238, 249. The principal case is cited in Morse on Arb. and Award. pp. 226, 228.

No. 17. — SMITH *v.* JOHNSON.

(K. B. 1812.)

RULE.

WHERE all matters in difference are referred, and the award made, the Court will not allow an action to be brought afterwards in respect of matters which were in difference at the time of the reference, and which might have been, but were not, brought before the arbitrator.

Smith v. Johnson.

15 East, 213, 214 (s. c. 13 R. R. 449–451).

[213] The plaintiff being master, and the defendant owner of the ship *Lustre*, bound on a voyage to Jamaica, agreed to ship goods on their joint account and expense, to be disposed of there, and that the proceeds should be accounted for by the plaintiff. The defendant thereupon purchased the goods, and paid the whole price for them. After the ship's return, disputes having arisen between them touching the ship's accounts, the parties by their several bonds referred all manner of actions and causes of action to two arbitrators, who thereupon awarded the defendant to pay to the plaintiff £223 10*s.* 4*d.* in full of all accounts, claims, and demands whatsoever due from the defendant to the plaintiff, and that the plaintiff should accept the same in full accordingly, and that thereupon all differences and disputes subsisting between the parties should finally cease and determine. A rule *nisi* for an

attachment against the defendant for non-payment of the sum so awarded having been obtained,—

Campbell insisted that the defendant was entitled to a deduction of £72 9*s.*; which sum the affidavit of the defendant stated to be the amount of a moiety of the price of the goods invested and the proceeds thereof, for which the plaintiff had never accounted, though the investment had been disposed of by him in Jamaica; * and that the said deduction had not been sub- [* 214] mitted to or made the subject of claim before the arbitrators, nor did it form any part of their award. He relied on *Ravee* v. *Farmer*, 4 T. R. 147; 2 R. R. 347, which was decided on the authority of *Golightly* v. *Jellicoe*, 4 T. R. 147 n., 2 R. R. 348 n., and vide *Seddon* v. *Tutop*, 6 T. R. 610; 3 R. R. 278, where the Court held that an award made upon a reference of all matters in difference did not preclude the party from suing on a subject-matter of difference then subsisting, but not taken into consideration by the arbitrator, and not included in the matters referred.

[Lord Ellenborough, C. J. observed that the latter words formed a distinction very important in that case.]

He cited also the Digest, lib. 4, tit. 8, sect. 43.

Lord Ellenborough, C. J. Here is a reference of all matters in difference, and it appears that the subject in respect of which the deduction is now claimed was a matter in difference at the time, and within the scope of the reference: notwithstanding which the defendant contends that he was not obliged to bring forward the whole of his case before the arbitrators, but might keep back a part of it in order afterwards to use it as a set-off. But it was competent to him to have brought the whole under the consideration of the arbitrators; and therefore without deciding against the authority of *Golightly* v. *Jellicoe*, or the case cited from the civil law, I think that where all matters in difference are referred, the party as to every matter included within the subject of such reference ought to come forward with the whole of his case.

Grose J., concurred.

* Bayley, J. The defendant, in order to entitle himself [* 215] to claim this deduction, should have shown that it was not a matter in difference at the time of the reference, or that the arbitrators could not have taken it into their consideration.

Marryat was to have argued in support of the rule.

Per Curiam, *Rule absolute.*

ENGLISH NOTES.

Where parties to a contract have expressly referred to an arbitrator what is the true construction of an agreement, the award is conclusive as to the construction, in a subsequent action brought for other breaches of the same contract. *Gueret* v. *Audony* (C. A. 17 May, 1893), 62 L. J. Q. B. 633, 637.

AMERICAN NOTES.

A valid award is conclusive and a bar as to all matters actually submitted. *Curley* v. *Dean*, 4 Connecticut, 259; 10 Am. Dec. 140 (citing the principal case); *Shackleford* v. *Purket*, 2 A. K. Marshall (Kentucky), 435; 12 Am. Dec. 422; *Johnson* v. *Noble*, 13 New Hampshire, 286; 38 Am. Dec. 485; *Davis* v. *Havard*, 15 Sergeant & Rawle (Penn.), 165; 16 Am. Dec. 537; *Bulkley* v. *Stewart*, 1 Day (Connecticut), 130; 2 Am. Dec. 57, stating that "an award of arbitrators decides the right of the parties as a judgment at law or a decree in chancery." *Chapline* v. *Overseers*, 7 Leigh (Virginia), 231; 30 Am. Dec. 504; *Ellicott* v. *Coffin*, 106 Massachusetts, 365.

Morse (Arb. and Award, p. 492), cites the principal case as authoritatively stating the English doctrine, which he pronounces "intrinsically just," but says a majority of the American cases incline the other way. Some courts make a distinction between matters intentionally and those unintentionally omitted, allowing a subsequent action for the latter. *Robinson* v. *Morse*, 26 Vermont, 392; and so intimated in *Warfield* v. *Holbrook*, 20 Pickering (Mass.), 531, 534.

Among the cases holding that the award is not a bar as to matters included in the submission, but not actually submitted, are *King* v. *Savory*, 8 Cushing (Mass.), 312; *Hopson* v. *Doolittle*, 13 Connecticut, 236; *Mt. Desert* v. *Tremont*, 75 Maine, 252; *Whittemore* v. *Whittemore*, 2 New Hampshire, 26; *Hewitt* v. *Furman*, 16 Sergeant & Rawle (Penn.), 135; *Lee* v. *Dolan*, 39 New Jersey Equity, 193; *Keaton* v. *Mulligan*, 43 Georgia, 308; *Briggs* v. *Brewster*, 23 Vermont, 100.

"The adjudications of the courts on this subject are conflicting. In the States of Maine, New Hampshire, Massachusetts, and probably in Kentucky, the award is merely conclusive of the matters actually laid before the arbitrators. Hence in each of these States it is competent to show, by parol or other competent evidence, that the particular demand sought to be barred was not the subject of consideration by them. *Whittemore* v. *Whittemore*, 2 N. H. 24; *Bixby* v. *Whiting*, 5 Greenl. 192; *Webster* v. *Lee*, 5 Mass. 334; *Hodges* v. *Hodges*, 9 id. 320; *Smith* v. *Whiting*, 11 id. 445; *Engleman's Executors* v. *Engleman*, 1 Dana, 437. In New York it has been held that an award upon a submission of all demands is conclusive of everything constituting a demand on either side existing at the time of the submission, and evidence to show that any particular demand was not before the arbitrators, nor passed upon by them, was inadmissible. *Wheeler* v. *Van Houten*, 12 Johns. 311; *De Long* v. *Stanton*, 9 id. 38; *Sellick* v. *Addams*, 15 id. 197. The rule on this subject in England corresponds with the decision in New York. *Smith* v.

No. 17. — Smith v. Johnson. — Notes.

Johnson, 15 East, 213, 13 R. R. 449. It would be unjust in this instance, if not dangerous as a precedent, to allow the defendant, on a submission which clearly embraced the whole partnership property, and which was intended to settle everything between the parties connected with the partnership, to insist that a part of that very property was not embraced by the award, and that too after the terms of the award were fully complied with by the other party to it. The object of the submission was to avoid litigation; such a precedent would encourage it." *Gardener* v. *Oden*, 24 Mississippi, 382. To the same effect, *Stipp* v. *Washington Hall Co.*, 5 Blackford (Indiana), 473, citing the principal case and the New York cases. And so in *McJimsey* v. *Traverse*, 1 Stewart (Alabama), 244; 18 Am. Dec. 43, in which, as well as in *Wheeler* v. *Van Houten*, *supra*, the claim in question had been omitted before the arbitrators through forgetfulness. This doctrine is also declared in *Ott* v. *Schroepel*, 5 New York, 482. The same doctrine seems to be warranted by *Bunnelp* v. *Pinto*, 2 Connecticut, 431.

The contrary doctrine is thus stated by Chief Justice PARSONS in *Webster* v. *Lee*, 5 Massachusetts, 334, a case of submission of "all demands:" "But without deciding that an agreement to refer *all demands* is subject to the same construction as a submission of *all matters in difference*, it is manifest that an agreement to refer may not be executed, for the arbitrator may take upon himself the trust of arbitrating, or a party where the rule is not *ex parte*, may refuse to appear before the referees. So a party may execute the agreement but in part, by omitting through accident or mistake to bring a particular demand, not in fact disputed, before the referees. And though when referees report upon all the demands submitted, the presumption is that all existing demands were submitted, yet evidence that a particular demand was not before the referees does not deny the agreement to refer all demands, but only proves the non-execution of that agreement in part. We are therefore satisfied that the testimony of D. that the note was not laid before the referees, nor by them taken into consideration, was properly received and submitted to the jury."

In *Warfield* v. *Holbrook*, 20 Pickering (Mass.), 531, a pending action was referred to arbitrators under a submission of the plaintiff's claim therein and all claims of the defendant. The plaintiff claimed that they should consider a joint and several note made by him and another, upon which a suit by the defendant was then pending, but the defendant refused to bring it forward, the arbitrators declined to pass upon it, and awarded no recovery to the plaintiff. *Held*, that if the note was not embraced in the submission the arbitrators could not pass on it, and if it was, the award would bar any action by the defendant on it. Citing the principal case.

It has been held that under a submission of all matters "in dispute" an award will not bar an action upon a claim then existing but not then in dispute. *Newnan* v. *Wood*, Martin & Yerger (Tennessee), 190. Citing *Ravee* v. *Farmer*, 4 T. R. 146, 2 R. R. 347; *Golightly* v. *Jellicoe*, 4 T. R. 147, n., 2 R. R. 348, n.

Submission of a pending suit to arbitration works a discontinuance. *McNulty* v. *Solley*, 95 New York, 244.

Section VI. — *Setting aside Award.*

No. 18. — PEDLEY *v.* GODDARD.

(K. B. 1796.)

RULE.

The limit of time for objection imposed by the Statute (9 & 10 W. III. c. 15) which enacted that awards procured by corruption or undue means should be set aside, does not apply to an objection (whether urged against a motion for attachment or by plea in an action for enforcing the award) appearing on the face of the award.

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7 T. R. 73-79 (s. c. 4 R. R. 382-387).

[73] Two rules had been obtained, the one for an attachment against the defendant for not performing an award made the 5th of November, 1795, under arbitration bonds, the submission to which had been made a rule of Court. The other, a cross motion made in last Trinity term to set aside the attachment, on the ground that the award was bad on the face of it, it not being final. The arbitrators awarded that there was due from the defendant to the plaintiff £147 3*s.* 3*d* (in case the sum of £25 11*s.* thereinafter mentioned, was paid to the defendant), over and above the dividends thereinafter set forth; and that the defendant should pay that sum to the plaintiff on or before the 14th of December, 1795. The award then set forth, that doubts had arisen in the minds of the arbitrators whether the sum of £25 11*s.*, for which a bill of exchange, dated in February, 1792, was drawn at the instance of the plaintiff on one A. Carew, payable to the defendant on demand, had ever been paid to the defendant; and also whether any dividends, over and above the sum of £12, had been received by the defendant for the use of the plain-
[* 74] tiff, in respect of a certain other * bill of exchange for £49 either drawn, accepted, or indorsed by one Elliot. Then the arbitrators awarded that the defendant should, within twenty-one days from the date of the award, by an affidavit, declare, on oath, what sum had been received by him or for his use by virtue

of the bill so drawn on A. Carew; and if the whole or any part of the sum of £25 11*s.* has not been paid, they awarded and authorized the defendant to deduct from the £147 3*s.* 3*d.* so much of the sum of £25 11*s.* as should appear by the affidavit not to have been received. And further, in case it should within twenty-one days from the date of the award, be made to appear, by an affidavit to be made by any person whomsoever, that any further dividend or sum over and above the sum of £12 had been paid by any person to the defendant, or for his use in respect of the bill of exchange for £49, then they awarded that the defendant should, on or before the said 14th December, 1795, pay to the plaintiff such further sum, over and above the said £12 as should be so proved to have been received, etc.

Holroyd showed cause[1] against the rule for issuing the attachment, and argued in support of the rule for setting aside the award. The application for the attachment is grounded on the 9 & 10 W. III. c. 15, which directs that a submission to arbitration may be made a rule of Court, and that for non-performance of the award, the party shall be subject to all the penalties of contemning a rule of Court, with this proviso, that any arbitration procured by corruption or undue means may be set aside, so as complaint be made to the Court before the last day of the next term after such arbitration made and published. This, it is contended, precludes the defendant from making any objection to the award after that period. But the meaning of the act was only to confine the party complaining to move within the time limited to set aside an award for any matter *dehors* the award; because where the objection arises on extrinsic circumstances, evidence of the facts might be lost if not brought forward recently after the occasion, and therefore it was proper that the time should, in that respect, be limited. But there is no danger of leaving the time unlimited where the objection appears on the face of the award; nor was there any reason why the legislature should in that case put the party to the expense of applying to set it aside. It is clear that if an action were brought on an illegal award, the defendant might object to it on that ground notwithstanding the Act; and if so it would be absurd and inconsistent to suppose that * the legislature meant that the Court should [* 75]

[1] This case was several times before the court; it was first mentioned in the last term.

enforce that in a summary way which they are bound to resist in the regular course of justice, and therefore by necessary construction, when the Court are called upon to enforce an award, it is competent to the party to show that it is an illegal one, and ought not to be enforced. Besides an attachment only issues for a contempt; and the Court will never consider a party in contempt for not performing an award which in the face of it is illegal and void. The only method of enforcing an award before the statute of William was by action; and the statute only meant to give a summary remedy in lieu of the former more circuitous one, but not to legalize a bad award; but in the instances of an award being procured by corruption or undue means, for the reasons alluded to, they thought proper to require that the objection should be made within a certain time. There is indeed a case of *Dubois* v. *Medlycott*, Barnes, 55, 4to ed., where the Court are supposed to have said that an objection to the award cannot be made after the first term: but non-constat that there the objection appeared on the face of the award. And besides that was in Easter, 10 Geo. II.; and in *Stephenson* v. *Browning*, Ib. 56, E. 12 Geo. II., the Court expressly said that "objections appearing upon the face of the award may be made at any time; but that where the party complains of corruption or ill practice, he must do it within the time limited." In *Hutchins* v. *Hutchins*, Andr. 297, Lee, C. J., said that he remembered this distinction to be made by Mr. Justice Powell: "That the Court will not set aside an award for defects appearing on the face of it; but this is a good reason against granting an attachment for refusing to perform it." And in *Holland* v. *Brooks*, 6 T. R. 161, 3 R. R. 142, the same distinction was taken. He then proceeded to show, secondly, that the present award was bad on the face of it, it not being conclusive between the parties, but depending on a future examination and future acts of one of them; and because also those acts were not to be done until after the expiration of the time limited by the bonds for the ultimate decision of the arbitrators.[1]

B. Morice, *contra*. As to the argument that the Act of William only meant to preclude objections to the award after the time limited in the two excepted cases of corruption and undue

[1] By the arbitration bonds, the award was to be made on or before the 6th Nov. 1795. It was, in fact, made on the 5th, and the defendant was allowed 21 days after to make the affidavit required.

means, that * would be to defeat the whole policy of [* 76] the Act, which was to give effect to awards, and render them conclusive between the parties to prevent further litigation; and therefore it only permitted objections to be made on those two grounds within a limited time; whereas the construction contended for would let in more exceptions than it excluded. What is supposed to be said in the case of *Stephenson* v. *Browning*, Barnes, 56, is extrajudicial, and has no reference to the case then before the Court: It is a distinct note of the reporter's at the end of the case. But in the preceding page the very point was in judgment; and there the Court held that an objection in point of law to the award could not be taken after the time limited. The question did not arise in *Holland* v. *Brooks*, 6 T. R. 161, 3 R. R. 142; for there it was only determined that an award could not be impeached for defects not appearing upon the face of it, on a motion for an attachment. But it is said that as this could not be enforced by action, the Court will not enforce it in this manner. But that is begging the question; for the statute of William operates as a statute of limitations, and precludes all objections to an award in any shape, unless made within the time specified. So if a writ of error be not brought within due time,[1] to reverse an erroneous judgment, the courts are bound to give effect to the judgment afterwards, however erroneous it may appear to be on the face of the record; and yet the same argument might be applied there as in this case. But, secondly, this award is good on the face of it. It is true that all awards must be certain and final. But Lord Mansfield said, in *Hawkins* v. *Colclough*, 1 Burr. 277, that the certainty was to be judged of according to a common intent, and consistent with a fair and probable presumption. Now here the award is final; for there is nothing further left for the judgment of the arbitrators; and it is certain to a common intent; because it is capable of being reduced to a certainty within twenty-one days. For it awards that a certain sum is due if a particular bill has been paid and certain dividends received; and it points out the method of ascertaining those facts within a given period, and what shall be received or deducted according to the event. The maxim therefore applies *id certum est quod certum reddi potest.* An award to pay a certain sum, and give such a bond as counsel should advise as a security, is good. 1 Rol. Abr. 250. pl. 5.

[1] Twenty years, but that is by the stat. 10 & 11 W. III. c. 14.

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In *Winch* v. *Sanders*, Cro. Jac. 584, it is said that an [*77] *arbitrator cannot award so much to be paid and afterwards that if before the last payment it shall appear to him that such a sum was due from the payee, he should repay it to the other, because that is reserving something for his own future judgment. But if it had been that if the payee had shown any bill of debt to such a sum, that this sum certain should be repaid, peradventure that had been good enough. So an award that the defendant should pay the plaintiff the charge of a suit then depending, and that the plaintiff should give the defendant a bill of charges was held good; *Linfield* v. *Ferne*, 3 Lev. 18, though something remained there to be done by one of the parties. All these cases proceeded on the ground that the arbitrator did not reserve anything for his future consideration; and as that was not the case here, this award may also be sustained.

. Lord KENYON, C. J. With regard to the last point I do not think that the award is final. The case that most resembles this is that cited from 3 Lev. 18; but that is like the common case of leaving costs to be taxed by the officer of the Court, which does not vitiate the award. But here the arbitrators, instead of determining the points in dispute between these parties, have left one sum in dispute to be decided by the person who of all others was the least qualified to decide, the defendant himself.

But the first point is one of the most important questions that has been agitated since I have had a seat in this Court. There appear to be *dicta* both ways. In *Freame* v. *Pinegar*, Cowp. 24, Lord MANSFIELD said "that where no objection is made to an award within the time limited by the statute, the other side may apply for an attachment to enforce the performance of the award." Now that is very correct when applied to the case then in judgment: but it was not meant as a general rule; or if it were I think that it was extrajudicial, and we are not bound by it. I am afraid however that I was misled by this on a former occasion,[1] when I thought that an attachment for non-performance of an award ought to be granted *ex debito justitiæ*, unless a motion to set aside the award were made within the time limited by the statute. But on looking into the Act of Parliament and the cases that have been cited, I think that that opinion was hastily formed. This is an authority given by the legislature to the Court to be

[1] When this case came before the court the first time.

exercised in a summary way; the Act directs that in case of disobedience to [* 78] an award made under the statute, the party neglecting or refusing to execute the same shall be subject to all the penalties of contemning a rule of court, &c., unless the award be procured by corruption, or other undue means; in which case, the second section says the arbitration shall be judged and esteemed void; so as complaint of such corruption or undue practice be made in the Court, &c., before the last day of the next term after such arbitration made, &c. When a party therefore wishes to set aside an award on account of extrinsic circumstances, it is proper that the application should be made to the Court recently after the award is made, and while the facts are in the memory of the parties concerned: But when the award is bad on the face of it, it carries with it those circumstances which go to its destruction; and in that case it seems reasonable that the objection may be taken to the award at any time whenever the adverse party endeavours to enforce it; and certainly this is the case when the attempt to enforce the award is by action. However, this does not depend on reason or the good sense of the thing alone; for it is supported by great authorities. In the case cited from Andr. 297, *Hutchins* v. *Hutchins*, the Court said that "an award could not be set aside, unless it be for fraud or corruption in the arbitrators, because to these cases only the statute extends." And LEE, C. J, added, "that he remembered this distinction to be made by Mr. J. POWELL, that the Court will not set aside an award for defects appearing on the face of it; but this is a good reason against granting an attachment for refusing to perform it. Some of the other cases that were cited are also to the same purpose. Therefore after the best consideration that I can give the subject, and I have frequently turned it in my mind since the case first came before the Court, I am of opinion that the sound construction of the Act of Parliament is, that if a motion be made to set aside an award for extrinsic matter, it must be made within the time limited by the Act, namely, before the end of the next term: but that an application for an attachment for not performing an award, may be resisted at any time for defects appearing on the face of the award itself.

ASHHURST, J. I confess I have always understood the distinction to be that which my Lord has adopted; and I think it has been several times laid down in this Court since I have been

here. When either party moves to set aside an award for matter *dehors* the award, the motion must be made within the time prescribed by the statute; but where the defect is apparent on the award, the objection to it may be taken at any time
[* 79] when the Court are called * upon to enforce it; for it would ill become the dignity of a court of justice to enforce by attachment, for a contempt of the Court, an instrument which on the face of it appears to be an illegal instrument. This seems to be a sensible distinction, independently of the authorities; but the authorities also seem to establish it.

Grose, J. Two different things are prayed by these rules; one that the award may be set aside; the other that an attachment may be granted. With regard to the first, as this was submission to arbitration under the statute, everything that is to be done either for the purpose of enforcing or setting aside the award, must be done under the powers given by the statute. Now on looking to the Act, it appears that the Court have no jurisdiction to set aside the award; the words being clear and explicit, that such an application must be made before the end of the term next after the award was made. But that is no reason why we should grant an attachment for not performing the award if it be bad on the face of it. If the party has a right to enforce the award, he may bring his action, and then the adverse party may take advantage of any objections appearing on the award by pleading or demurring; and either party may carry the record to another tribunal by writ of error. I do not think that this award is final for the reasons already given; but even if it be doubtful whether the award be or be not good, we ought not to grant an attachment. The distinction in *Hutchins* v. *Hutchins* is applicable to both these rules; we will not set aside this award, nor will we grant an attachment for refusing to perform it.

Lawrence, J. If we grant an attachment, we deprive the party objecting to it of all opportunity of discussing its legality hereafter; the attachment would be conclusive; whereas if we leave the party who wishes to enforce the award to bring his action, the legality of the award may be questioned in a superior court on a writ of error. Since the case was first mentioned, I have looked into the several authorities in order to see whether the legality of an award may be questioned on a rule for an attachment for not performing it; and I think that the case in

Andrews decides that it may for objections appearing on the award itself. In many cases the Court have refused to inquire into the award after the time limited by the Act, where the award appeared to be good on the face of it; but I find no case contrary to that in Andrews, which seems to mark out the true line of distinction.

PER CURIAM, *Both rules discharged.*

ENGLISH NOTES.

The case of *Pedley* v. *Goddard* has been selected to illustrate the broad distinction which exists between what may be termed *intrinsic nullities* in an award (whether by reason of objections appearing on the face of the award, or by the want of jurisdiction the proof of which may be aided by extrinsic evidence to the extent shown in the rule under No. 15, p. 455, *ante*), — and the objections which arise from what may be broadly termed *misconduct* in the arbitrator, the proof of which is entirely extrinsic to the award. The latter class of objections must be promptly verified and established; the former class of objections, being inherent in the award itself, may be taken at any time.

The Act of Wm. III. was said by Lord MANSFIELD to have been only declaratory of what the law was before, in cases where there was a cause depending in Court. *Lucas* v. *Wilson* (1758), 2 Burr. 701.

By the Arbitration Act 1889, the Act of William III. referred to in the ruling case is repealed. The Act of 1889 does not itself contain any provision as to the time when the application to set aside must be made; but by the Rules of the Supreme Court, Order LXIV., R. 14, "An application to set aside an award may be made at any time before the last day of the sittings next after such award has been made and published to the parties." Where the notice of motion has been given before the last day of the sittings, the "application" has been held to be within the time prescribed by the rule. *In re Gallop & Central Queensland Meat, &c. Co.* (1890), 25 Q. B. D. 230, 59 L. J. Q. B. 460.

Conversely to the principal case, a person cannot, in showing cause against a motion to enforce an award on a submission which has been made a rule of Court under 9 Wm. III. c. 15, object to the award for any defect not apparent on the award itself; but he must obtain a rule for that purpose within the time limited by the Act. *Holland* v. *Brooks* (1795), 6 T. R. 161, 3 R. R. 142, followed in *Davies* v. *Pratt* (1855), 17 C. B. 183, 25 L. J. C. P. 71, and in *Woollen* v. *Bradford* (1864), 33 L. J. Q. B. 129.

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In *Whitmore* v. *Smith* (Exch. Ch. 1861), 7 H. & N. 509, 31 L. J. Ex. 107, where the award was made on all the matters in difference and was in the required form and intended by the arbitrators to express their decision, the Court decided (reversing the judgment of the Court of Exchequer) that an objection that the arbitrators adopted the opinion of a third person by which they agreed to be bound, cannot be raised under a plea of "no award." In the judgment of the Court, delivered by Willes, J., it was observed that this objection, assuming it to be well founded, was one of the sort which ought to be brought forward while the matter is fresh, in the manner and within the period prescribed by the Statute of William III. in cases which fall within its provisions, or by the practice of the Courts in other cases within their summary jurisdiction. The distinction was important, as in the one class of cases the application was, in effect, to the equitable jurisdiction of the Courts and might be granted on terms; whereas, upon the plea, the award must be held good or bad *simpliciter*.

To further illustrate the distinction, it is convenient here to state some of the circumstances which have been considered to be misconduct. It is not however proposed here to make an exhaustive analysis of the cases.

Proceeding in the absence of, and without due notice to, one of the parties is misconduct on the part of the arbitrator, and ground for setting aside the award. An arbitrator having, in presence of the parties and with their acquiescence, declared his determination to hear no more evidence, proceeded in the absence of one of the parties to hear further evidence; the award was set aside, although the arbitrator swore, and the Court was satisfied, that the evidence so taken had no effect upon the award. *Walker* v. *Frobisher* (1801), 6 Ves. 70, 5 R. R. 223. The same principle is followed in *Re Hicks* (1819), 8 Taunt. 694; *Dobson* v. *Groves* (1844), 6 Q. B. 637, 14 L. J. Q. B. 17; and in *Plews* v. *Middleton* (1845), 6 Q. B. 845, 14 L. J. Q. B. 139.

So the exclusion of persons whose presence one of the parties reasonably desired to assist him has been held a ground for setting aside the award. *Re Haigh's Estate*, *Haigh* v. *Haigh* (1862), 3 De G. F. & J. 157, 31 L. J. Ch. 420. So it seems that the omission to give one of the parties the opportunity of being heard or of cross-examining the witnesses is misconduct affording ground for an application to set aside, though it is no ground of defence to an action on the award. *Braddick* v. *Thompson* (1807), 8 East, 344, 15 R. R. 751; *Thorburn* v. *Barnes* (1867), L. R., 2 C. P. 384, 36 L. J. C. P. 184; *Bache* v. *Billingham* (C. A. 1893), 1894, 1 Q. B. 107, 112 (per Lopes, L. J.).

Where matters in difference are referred to arbitrators, and if they

disagree to an umpire, the umpire who is called in to act after the arbitrators have heard the witnesses and disagreed, must rehear the witnesses. If he omits to do so, and it is not shown that the requirement has been waived, the award will be set aside. *Re Salkeld and Slater* (1840), 12 Ad. & El. 767. A similar decision in *Jenkins* v. *Ward* (1841), 1 Dowl. N. S. 276.

Mere social entertainment not shown to have influenced the arbitrator or umpire, is no ground for setting aside the award. *Crossley* v. *Clay* (1848), 5 C. B. 581; *Re Hopper, Barningham and Wrightson Arbitration, &c.* (1867), 8 B. & S. 10, L. R., 2 Q. B. 367, 36 L. J. Q. B. 97; *Moseley* v. *Simpson* (1873), L. R., 16 Eq. 226, 42 L. J. Ch. 739. In *Crossley* v. *Clay* it was also held that the mere fact of the arbitrator obtaining information on a particular point in the absence of one party, was no ground for obtaining a rule to set aside the award.

Where in a contract for works or buildings for a company the engineer or architect is made the referee, his decision cannot be objected to on the mere suggestion of his having an interest in the company; for, on the face of the contract itself he is not set up as an impartial judge, but as the organ of one of the contracting parties. *Ranger* v. *G. W. Ry Co.* (1854), 5 H. L. C. 72.

The following are other instances of cases in which the grounds alleged for setting aside an award for misconduct, were held insufficient. *In re Tunno and Bird* (1833), 5 B. & Ad. 488; *Kingwell* v. *Elliott* (1839), 7 Dowl. P. C. 423; *Hobbs* v. *Ferrars* (1840), 8 Dowl. P. C. 779; *Hagger* v. *Baker* (1845), 14 M. & W. 9, 14 L. J. Ex. 227; *In re Marsh* (1847), 16 L. J. Q. B. 330; *In re Firth and Houlett* (1850), 19 L. J. Q. B. 169.

An application to set aside the award is the proper remedy in the case of the award being obtained by fraud. Per Pollock, C. B., in *Blagrave* v. *Bristol Waterworks Co.* (1856), 1 H. & N. 369, 383, 26 L. J. Ex. 57.

The admission by an arbitrator, made to one of the parties after publishing his award, that the award has been improperly obtained, is not evidence which can be used against the other party in an application to set aside the award on account of the arbitrator's misconduct. Such an admission, in order to be evidence, must be made upon oath and to the Court itself. *Re Whiteley and Roberts Arbitration* (17 Dec. 1890), (1891), 1 Ch. 558, 60 L. J. Ch. 149.

It is convenient here to note some of the principles relating to summary application for the enforcement of awards.

Under the practice before the Judicature Acts, when an award of a

liquid sum was made on a submission which had been made a rule of Court, a rule could be moved for and obtained calling upon the party to show cause why he should not pay the amount awarded. This might be done before the expiry of the time limited for applying to set the award aside, and upon the rule being made absolute execution would issue under the Act (1 & 2 Vict. c. 110) relating to the execution of judgments. *Doe* v. *Amy* (1841), Dowl. (N. S.) 23, 8 M. & W. 565.

In order to be a good ground of execution, the rule must express that a certain sum of money is to be paid. *Jones* v. *Williams* (1839), 11 Ad. & El. 175; *Spooner* v. *Payne* (1847), 11 Jur. 242; *Graham* v. *D'Arcy* (1848), 6 D. & L. 385. In order to obtain the rule for an order to pay, it was not necessary (as it was to obtain an order for an attachment) that the award itself should have contained an express order to pay. *Bowen* v. *Bowen* (1862), 31 L. J. Q. B. 193.

By the Arbitration Act 1889, s. 12, "an award on a submission may, by leave of the Court or a Judge, be enforced in the same way as a judgment or order to the same effect." This appears to carry out the effect of the former practice as to a submission which has been made a rule of Court, with the modification that the award itself has the effect of a judgment; see Snow, Annual Practice (under the Arbitration Act 1889). By R. S. C. Ord. 42, R. 31 (A.), the award may, with the leave of the Court or a Judge, and on such terms as may be just, be enforced at any time though the time for moving to set it aside has not elapsed. The Act and rules do not in terms apply to the case where (as in *Bowen* v *Bowen*, *supra*) the award finds a certain sum due, but does not contain an express order to pay it. But doubtless in such a case an order may be obtained, by analogy to the former practice, upon a summons or motion with previous notice given to the party. See R. S. C. Ord. 52, Rules 2 & 3.

The Court has refused to enforce payment on summary application in a case where it appeared by the award that there was a set-off of an amount not yet ascertained, *Lambe* v. *Jones* (1861), 9 W. R. 202; and also where it appeared *aliunde* that there was a *bonâ fide* claim for set-off which might have been pleaded in an action upon the award. *Swaine and Borill* v. *White* (1862), 31 L. J. Q. B. 260. But it is otherwise where all matters in difference have been referred, and the claim of set-off might have been made in the arbitration. *Smith* v. *Johnson* (1812), 15 East, 212, 13 R. R. 449 (No. 17, p. 508, *ante*).

ASSIGNMENT.

HOPKINSON *v.* ROLT.

(H. L. 1861.)

RULE.

THE assignment of an equity of redemption (or of property subject to a right in security) puts an end to any right of the person holding the security and having notice of the assignment, to charge subsequent advances, although his security expressly authorises him to charge further advances.

Hopkinson v. Rolt.

Rolt v. Hopkinson.

9 H. L. C. 514–554 (s. c. 34 L. J. Ch. 468–477).

The appellants were the registered public officers of "The Commercial bank of London;" the respondent a merchant in London. [514]

In the year 1853, Charles John Mare carried on business as a shipbuilder, at premises situated at Blackwall, of part of which he was seized in freehold, and the other part was rented by him under a lease. He had a banking account with the appellants. The respondent was Mare's father-in-law. The offices of each were in the same house, in Clements Lane, and one Joseph Payne, a confidential clerk of the respondent, was also confidentially employed by Mare. The appellants were applied to by Mare for advances, and he offered them a *guaranty of the respondent, for loans not to exceed £20,000; but the appellants were always to retain in their hands a sum of £4000, to constitute a "lodgment account." This guaranty was shortly afterwards given up, the appellants being satisfied with having the name of the respondent, or of his firm, to the bills discounted by [*515]

them for Mare. The lodgment account, however, continued to exist. The transactions became unsatisfactory, and the appellants refused to make farther advances, except on the security of a mortgage for £20,000. Mare had previously obtained from the Palladium office an advance of money by way of mortgage, and had given to that office, on the 6th January, 1855, a first mortgage on his estates in the counties of Chester and Cambridge, to secure the sum of £45,000. A second mortgage was executed by Mare on the 26th January, 1855. This included the previously mortgaged property, and also Mare's property at Blackwall. It was in favour of the appellants, was negotiated with the full knowledge of the respondent, and his own solicitors acted on the occasion as the sole solicitors in the transaction for Mare and for the appellants. This mortgage recited that which had been given to the Palladium, and was witnessed to be given for effectually securing unto the appellants the "sum or sums of money which then was and were, or at any time and from time to time thereafter, should or might be due or owing to them" on the balance of the account current of Mare; subject to redemption "on payment to the appellants on demand of all and every the sums and sum of money which then were or was, or at any time and from time to time thereafter, should or might become due or owing" from Mare to the appellants either for money paid and advanced, or to be paid or advanced by the appellants unto Mare. Provided that the
[*516] *principal money thereby secured (exclusive of any sums to be paid for insurance) should not exceed £20,000.

By a third mortgage, dated 12th February, 1855, made between Mare and the respondent, reciting the two former mortgages, the same premises were mortgaged to secure the repayment from Mare to the respondent, of money then due, or of money which the respondent should be called on to pay on account of Mare.

The appellants continued to make advances to Mare by way of discounting bills and otherwise. On the 16th July, a sum of £8000 was advanced to him by the appellants, and carried to his general account; but representations were made to him on the very unsatisfactory state of that account. On the 16th August, 1855, an attachment at the suit of other parties was lodged at the appellants' bank against any property of Mare in their hands. In consequence of this, the account current was closed; but on the 18th August a new account was opened in the name of the respon-

dent, and with his privity and concurrence. On Saturday, 15th September, 1855, the respondent sent to the bank his clerk, Mr. J. Payne, who there saw the manager, and delivered to him a message, that if Mare should come to ask for any advance on Mr. Rolt's responsibility, it should not be made unless the bank received Mr. Rolt's cheque. Mare did apply for an advance of £7500, to pay the wages of his men, and notwithstanding the message so received from the respondent this sum was advanced by the appellants. On the 20th September, 1855, Mare executed another mortgage to the appellants for securing to them the sum of £7500 beyond the sum of £20,000 already secured, and also any other sum which then was or might hereafter become due to them from him. On the 18th September, 1855, at the request of the respondent, the *appellants delivered to [*517] him an account, headed "Balance of loan account," which was in these terms: —

Loan granted 21 July 1855:	
Ships	£8,000
Loan granted 15 September 1855:	
For Wages	7,400
	£15,400
Less amount of lodgment account	4,300
	£11,100

On the 25th September, 1855, Mare was declared a bankrupt, at which time the sum claimed by the appellants to be due to them, amounted to £41,000, of which £30,000 were for bills which had been discounted for him, and had not then arrived at maturity. These were afterwards paid by the persons liable thereon, and then £11,000 were claimed as remaining due.

On the 13th of November the respondents, who had been called on to pay what was due from him on Mare's dishonoured bills, gave notice to the appellants that he should, on concluding such payment, require all the securities held by the appellants to be delivered up to him.

In the year 1856, under orders of the Court of Bankruptcy, the estates in the counties of Chester and Cambridge were sold; but they did not satisfy the demand of the Palladium office. The sale of the premises at Blackwall then took place, and the reserved

bidding of £55,000 was fixed by the Court of Bankruptcy, [*518] and, *with the consent of all parties, it was agreed that if there should be no sale at a sum exceeding that amount, the respondent should be declared the purchaser of them at that amount. No bidding was made, and he was declared the purchaser. The respondent afterwards presented his petition to the Court of Bankruptcy, praying that he might be at liberty to retain the whole of the balance of the purchase-money, after payment of what was due to the Palladium. The appellants, as to the sum of £11,000, opposed this petition. This sum was, by consent, ordered to be paid in to a deposit account, to abide the order of the court; the respondent paid £28,000 to the Palladium office, and the premises were then conveyed to him.

The respondent, in March, 1857, filed his bill against the appellants, stating all these facts, and alleging that he was only a surety under the indenture of the 26th January, 1855, and, as such surety, had paid the amount of all the bills and notes secured thereby, and was entitled to the benefit of that security, and to the sum carried to the lodgment account, and that the mortgage to him had priority over all other advances made by the bank; and praying (among other things) first, that it might be declared that he was entitled to the benefit of the mortgage of 26th January, 1855, and that the appellants might be ordered to execute to him a proper and valid assignment thereof; and, thirdly, that it might be declared that the sums due to him upon the security of the indenture of the 12th February, 1855, had priority over the sums of £8000 and £7500, etc., and all other sums, if any, advanced by the appellants subsequent to the date of the said indenture; and for an account of what was due to him under both indentures, and for general relief.

The appellants, by their answer, insisted that they [*519] *were entitled to the £11000 as the balance on Marc's account current, secured by the indenture of the 26th January, 1855, out of the proceeds of the sale of the Blackwall property in priority to the claim of the respondent under the indenture of the 12th February, 1855. The cause was heard before the Master of the Rolls, and on the 29th May, 1858, his Honor made an order declaring the respondent entitled to priority over the appellants, and directed accounts accordingly (25 Beav. 461). This order was confirmed on appeal to the Lord Chancellor. The present appeal was then brought.

Mr. Rolt and Mr. Lloyd (Mr. E. Lloyd was with them) for the appellants: —

The mortgage of the 26th January, 1855, was intended to be a continuing security for any balance of account for the time being, not exceeding £20,000, and this was perfectly well understood by the parties to it. The respondent, with whose full knowledge it was executed, so understood it. If there was any doubt as to the real intention of the parties in executing this indenture, there ought to have been an inquiry directed as to that point. That the respondent understood it to be a continuing guaranty to this amount, is shown by the fact that after the 12th February 1855, when the mortgage had been granted to him, he continued to accept bills for Mare, which he knew were to be, and which were in fact, discounted by the appellants. He had the best means of knowledge of Mare's circumstances, not only through his near relationship to Mare, but also because their offices were in the same building, and because his own confidential clerk, Joseph Payne, constantly acted in the same *capacity for [*520] Mare; and he showed that he had this knowledge by the notice he gave before the advances of the £8000 and the £7500.

The question of priorities is not raised by the respondent's bill, which is the bill of a surety and not of a mortgagee, and consequently the plaintiff is not entitled to that relief which a mortgagee might ask from the Court. That question cannot now be relied on by him. But if it should be considered competent to him to raise that question, then it is submitted that the terms of the mortgage to the appellants distinctly entitle them to priority in respect of advances made by them after the date of that instrument. These terms were perfectly well known to the respondent, and the decision of the Court below is, therefore, correct; and it is fully warranted by that of *Gordon* v. *Graham*.[1]

[1] 7 Vin. Abr. 52, pl. 3. The report is in these words: "A. mortgages to B. for a term of years, to secure the sum of £ already lent to the mortgagor, as also such other sums as should hereafter be lent or advanced to him. Afterwards A. makes a second mortgage to C., for a certain sum, with notice of the first mortgage, and then the first mortgagee, having notice of the second mortgage, lends a farther sum. *The question was, on what terms the second mortgagee shall redeem the first mortgage.* Per Cowper, C. 'The second mortgagee shall not redeem the first mortgage without paying all that is due, as well the money lent after, as that lent before the second mortgage was made, for it was the folly of the second mortgagee, with notice, to take such security. But upon the importunity of counsel, it was ordered that the Master should report what money was lent by the first mortga-

It is true that that case has had some doubt thrown on it in a note by Mr. Coventry in his edition of "Powell on Mortgages" Ed. by Coventry, 834; but Mr. Powell adopted it in the text, and it has always been acted on, and Mr. Coventry only [*521] *hesitates a doubt about it—a doubt upon which, he himself says, he places but slender dependence.[1] It never was seriously impugned by any judicial authority till, in *Shaw* v. *Neale*, the MASTER OF THE ROLLS said (20 Beav. 181): "This decision has not met with the unanimous approbation of the profession." His Honor there refers to an observation made upon it by Lord Chancellor SUGDEN in Ireland, in the case of *Blunden* v. *Desart* where his Lordship is supposed to have expressed his dissent from it. He said (2 Dru. & War. 405): "Even in the case of a first mortgage, whether legal or equitable, covering future advances, it deserves farther consideration, whether it would be safe to rely, in all cases, upon *Gordon* v. *Graham* as an authority that advances may be safely made after the first mortgagee has notice of a second mortgage." That observation does not impeach the authority of the decision, but only suggests caution as to the circumstances in which it is to be applied. When that case of *Shaw* v. *Neale* afterwards came before this House (6 H. L. Cas. 581) Lord ST. LEONARDS said (p. 597), "If Lord COWPER had, in the end, maintained the opinion he was at first supposed to express, he could not have made the order of reference to the Master which is found in that case." Here again is a mere incidental observation which does not go to the authority of the case itself, and yet, if that case is not overruled, there can be no ground for the respondent's argument. Even, however, if that case should not be held to govern the present, the circumstances here are adverse to the claim of the respondent; he was a mere surety; he was fully [*522] aware of every proceeding; he *knew the stipulations in the mortgage to the appellants as to covering future advances, and he himself assisted in procuring them to be made. Neither in principle nor on the facts is he entitled in equity to the relief he now seeks.

gee after he had notice of the second mortgage. M. S. Rep. Pasch.; 2 *Geo; Canc.; Gordon* v. *Graham*." With the exception of the words in italics, the report in 2 Eq. Cas. Abr. 598, pl. 16, is almost literally the same.

[1] "The editor, in submitting these remarks to the consideration of the learned reader, desires to add, that individually he places but slender dependence in the force of their application. p. 534 n. (e)."

The Attorney-General (Sir R. Bethell) and Mr. R. Palmer (Mr. Waller and Mr. Herbert Smith were with them), for the respondent:

The doctrine contended for by the other side is that a first mortgagee, where the mortgage is given to secure future advances as well as an existing debt, may go on making advances, notwithstanding his notice of a second mortgage, and may attach all those fresh advances to the first, in priority and prejudice to the second mortgagee. If that was true he might do so, though the mortgagor had actually sold his equity of redemption, a result which is absurd. The case of *Gordon* v. *Graham* certainly does not warrant such a doctrine. But if it did it has not met with the assent of the profession. Not only does Mr. Coventry assert it in his note in "Powell on Mortgages," but Mr. Jarman and Mr. Sweet, in their notes to "Bythewood's Conveyancing," express their serious doubts of its correctness.[1] In practice, conveyancers have not acted on that case as an authority, and it has encountered the disparaging criticisms of the MASTER OF THE ROLLS and Lord ST. LEONARDS. It cannot now be treated as an authority. As a matter of business, too, the banker, the moment he receives notice of a second mortgage, strikes a * balance of what is then due, and opens [* 523] a new account. Each new advance after that is a new contract, and cannot by mere implication be tacked on to the former.

The circumstances here do not warrant the argument that the respondent gave up his right to stand on his own mortgage according to its priority.

The form of the bill is sufficient to warrant the relief here granted. The bill is not that of a mere surety; and, besides, it shows that the £8000 were advanced not on the first mortgage, but on a new and a distinct authority, and that the £7500 were advanced on no authority at all, and it expressly claims priority over both.

[The LORD CHANCELLOR: Even though the first prayer in the bill might be considered to have a different aspect, if the third is warranted in law and fact, the respondent is entitled to this relief.]

It could not be pretended that the respondent entered into a

[1] Jarman's Bythewood (1832), Vol. V. p. 427, n. (e), Jarman by Sweet (1839), Vol. V., p. 443. The argument here went into a very close examination of the reports of that case, of the comments on it, and of the facts. See *post* for the statement made from the copy of the Registrar's Book, and for the remarks by the Lords on the case after the copy of the Registrar's Book had been obtained.

security to stand responsible for any sum not beyond £20,000 that might be at any time advanced; and, if not, there is no answer to the bill.

The Lord Chancellor (Lord Campbell). — My Lords, this appeal raises a question of great importance to bankers and to the mercantile interests of the country.

Independently of any particular agreement between these parties, either express or to be implied from their dealings, beyond what is to be found in the written documents, I think the question is accurately as well as tersely stated by Lord Chancellor Chelmsford in the judgment appealed against. "A prior mortgage for present and future advances; a subsequent mortgage of the same description; each mortgagee has notice of the other's deeds; ad-
[* 524] vances are made by the prior mortgagee after * the date of the subsequent mortgage, and with full knowledge of it; is the prior mortgagee entitled to priority for these advances over the antecedent advance made by the subsequent mortgagee?"

The supposed decision of Lord Chancellor Cowper in *Gordon* v. *Graham* (2 Eq. Cas. Abr. 598, pl. 16, 7 Vin. Abr. 52, pl. 3) is relied upon by the appellants as a conclusive authority in their favour. But the report of the case in both books is evidently from the same note-taker; and, as it appears in both books, it is very meagre, and in some material points certainly incorrect. When the registrar's book is examined, and the bill and answers and directions are considered, the facts of the case are found to be exceedingly complicated; and I must say, that I do not think that the facts which were there actually alleged and proved, are by any means equivalent to those which raise the question before us.

The question to be decided being so very important, and our decision depending so much upon the authority to be given to *Gordon* v. *Graham*, I must bring both the printed reports of it fully before your Lordships, and state what appears to me to be the result of a very careful examination of the original documents to which I have referred.

[His Lordship read both the reports. See *ante*, p. 527 n, 1.]

My Lords, I have thus read *in extenso* the two reports, and I must now beg your Lordships' patience when I enter into a full statement of all the proceedings in that case.[1]

[1] This statement was made from a copy of the proceedings and the order in the Registrar's Book, A., 1715, fol. 341, E. G., furnished to the House by direction of their Lordships.

Instead of this being a suit brought by a second mortgagee to redeem a first mortgage, as supposed by the * reporter, the bill was filed by Patrick Gordon and William Gordon against William Graham, John Montgomery, Elias Turner, Edmund Lassells, Richard Lee, and Jacob Douglass, the plaintiffs alleging themselves to be partners with and creditors of the defendant Graham, and claiming as such a sale of certain lands of Graham in Lincolnshire, which, subject to prior mortgages in the defendants Turner and Montgomery respectively, had, by Graham's direction, been conveyed upon trust for sale, with a view to payment of what was due from him to the partnership. [* 525]

The material facts appear to have been as follows: In the year 1707, Sir Richard Hutchinson, being seized in fee of the lands in question, borrowed £1800 of the defendant Graham; and for securing the repayment thereof, with interest, by indenture dated the 29th of September, 1707, demised the premises to the defendant Lassells, his executors and administrators, for 1,000 years, in trust for Graham, under a proviso to be void upon repayment of the £1800 and interest at a day long past before the bill was filed.

In August, 1711, more than £2000 was due to Graham from Sir Richard upon this mortgage; and Graham being himself indebted upon an unsettled account to the defendant Turner, Lassells, by an indenture dated the 7th August, 1711, and indorsed on the mortgage of 1707 by Graham's direction, assigned to Turner the premises therein comprised, to secure not only what moneys were then due, but also all such farther sums as should afterwards become due from Graham to Turner, subject to such equity of redemption as the premises were subject to by virtue of the said mortgage.

Subsequently, Graham contracted with Sir Richard for the purchase of his remaining interest in the premises *(consisting of the equity of redemption in the term and the reversion expectant upon its determination) for a sum of £2009 14*s.*, part of which was to be advanced by and secured to the defendant Montgomery. And by lease and release dated the 3d and 4th January, 1711, Sir Richard, in consideration of £2009 14*s.*, therein mentioned, to be then paid by the defendant Montgomery, conveyed the premises to the use of Montgomery and his heirs; and thereby covenanted that the premises were free from all incumbrances except the mortgage to Lassells in trust for Graham, and [* 526]

declared that there were then due, for principal and interest on the said mortgage, £2184 6*s.* 3*d.*

Only £900 (part of the £2009 14*s.*) were Montgomery's own money. The bill alleged, and all the defendants except Montgomery admitted, "that the remainder was the proper money of the defendant Graham, and that Montgomery was trustee in the said deeds for the said Graham in respect thereof, which trust Montgomery declared by the same deeds." Montgomery by his answer says the conveyance was made to him "as a security for paying to him in the first place £900, and then to secure the payment of what was due to the partnership;" *i. e.*, to the plaintiffs. But the plaintiffs do not so state their case in the bill, and the discrepancy is immaterial.

In 1713, Graham being largely indebted to the partnership in which he was a partner with the plaintiffs, and in which Montgomery also was a partner, Montgomery, with his consent, by indenture of lease and release, dated the 24th and 25th of August, 1713, conveyed the premises to the defendant Douglass and his heirs. This deed is stated by Douglass in his answer to have been "in order to a sale of the premises, and that the money arising thereby might be applied, first in payment of what was
[*527] * due to Turner, then of the £900 to Montgomery, and the surplus towards satisfying the debt due from Graham to the partnership."

Douglass, finding difficulties likely to arise, declined acting under this deed; whereupon the plaintiffs filed their bill against Graham, Montgomery, Turner, Lassells, and Douglass, charging that Turner under pretence of his mortgage, had entered on the premises and received the rents and profits thereof ever since, and applied the same to his own use, without ever accounting; and praying to have a discovery of what conveyances had been made of the premises, and for what consideration they were respectively made, and to have an account of the rents and profits of the mortgaged premises, and that the same might be sold, and that the plaintiffs might, out of the rents and profits and money arising by the sale of the premises, be paid what was due to them on account of the partnership.

The bill represented the mortgage to Turner to be "for securing unto him what money was then due from Graham, and which was then computed and reckoned to be £600 or thereabouts," and Montgomery by his answer, makes a similar statement with the view of cutting down Turner's security.

Turner, on the contrary, by his answer says, "that the deed of mortgage and premises were assigned to him for securing what was or should afterwards be due to him from Graham, which was not so small a sum as £600 as in the bill alleged; but Graham owed Turner, at the time of executing the assignment to him, £1300 principal money, besides a considerable sum for interest and money laid out for him by Turner, who hath since also advanced monies to the defendant Graham, and the accounts between them are not adjusted." Of the monies so * advanced one sum only, amounting as it afterwards appeared to £1300, was advanced by Turner after the date of Montgomery's mortgage of January, 1711. [*528]

Turner, by his answer, admits, that at the date of his answer he had notice of the deeds of January, 1711, but there is nothing to show when first he had such notice. He admits, that at the date of his answer he had seen the conveyance of the 25th of August, 1713, which would properly disclose the deeds of January, 1711; but it does not appear when first he saw that conveyance. His words are: "This defendant saith, that he doth not know what conveyance hath been at any time made of the said premises by the said Montgomery, by the consent of the said Graham, to James Douglass, in the bill named; but believes that some such conveyance was executed as in the bill for that purpose is set forth; for that this defendant remembers some such conveyance was *some time since* shown to this defendant, but this defendant doth not remember the date or contents thereof."

Montgomery, on the other hand, admits in the clearest terms, that before he took his security of January of 1711, Graham informed him of Turner's mortgage, and promised "to assign and transfer to some other person, in trust for Montgomery, his (Graham's) right to the mortgage, after payment of what should be found due to the said Turner, being then computed about £600."

The following extract from the Minute Book of the Registrar, 1716 (Lib. A., 171 *b*), contains a minute of the decree and of what took place at the hearing. The Registrar seems to have taken note of the argument on both sides, as well as of the judgment. "*Mercurii* 25° *die Aprilis*, 1716, — *Gordon* v *Graham*. — Hamilton, for plaintiff: The scope of the bill is to have lands sold for satisfaction of one demand. Bedford, for defendant William Graham, opens his answer. Williams, for defendant Montgomery, opens his answer. Mead opens the answer [*529]

of Elias Turner. Edwards opens the answer of the defendant Lassells. Williams opens the answer of the defendant Richard Lee. Mr. Serjeant Jekyll, for plaintiff: The chief question is upon the defendant Turner's demand. Mr. Cowper for plaintiff: The mortgage, 7th August, 1711, assigned *to plaintiff*;[1] read, deed 25th August, 1713. Read *cur.* — Decree: The partnership account to be taken in the first. If, in taking thereof, any account stated shall appear the same is to stand, and the Master is not to travel into the same farther than that the parties be at liberty to falsify or surcharge the same; and to answer what shall be coming on this account of the partnership. Let a sufficient part of the monies arising by the sale hereafter directed be reserved to pay the common debt of the partnership; and in order to satisfy Graham's debt, by his consent, decree the estate by him purchased of Hutchinson to be sold to the best purchaser can be got for the same, to be approved by the Master. Out of the money arising by the sale let Turner be paid his debt in the first place; and for that purpose let the Master see what is due to him as advanced or lent on this mortgage, and if the Master shall find more money advanced on the credit of this mortgage after the 25th of August, 1713, he is to state the same specially; and after Turner shall be paid his principal, interest, and costs, then Montgomery is out of the money arising by sale, to be next paid his principal, £900, with his interest and costs, to be computed and taxed by the Master; and the rest of the money arising by sale is to be liable to make good what the defend-
[*530] ant Graham shall be found to be *indebted to the other partners. If anything shall be afterwards left, the same belongs to Graham. All parties to be examined on interrogatories before the Master as he shall direct; and let all deeds and writings be brought before the Master. Lassells to have the costs; and refer it to Miller," — who, I suppose, was the Master in rotation.

The material point of the decree, as it appears *in extenso* in the Registrar's Book, is substantially the same. It is as follows: 'And in order to satisfy the said Graham's debts, it is by his consent ordered and decreed, that the said estate by him purchased of the said Sir Richard Hutchinson be sold to the best purchaser that can be got for the same, to be allowed by the said Master; and that all proper parties do join in the sale, as the said Master shall direct.

[1] This should be "to defendant Turner," and is so stated in the previous entry in the Registrar's Book. See *ante*, p. 531, 9 H. L. C. 525

And out of the money arising by such sale the defendant Turner is to be paid his debt in the first place; and for that purpose the said Master is to see what is due to him as advanced or lent on the credit of the said mortgage; and if he shall find any monies advanced by the said Turner on the credit of the said mortgage, after the 25th of August, 1713, he is to state the same specially; and the said Master is to tax the defendant Turner his costs of this suit. And after the defendant Turner shall be satisfied what shall be so certified due to him for principal, interest, and costs, then the defendant Montgomery is in the next place to be paid his principal sum of £900, with interest for the same, together with his costs of this suit, to be computed and taxed by the said Master out of the said money arising by such sale of the premises; and the residue thereof is to be applied to make good what the defendant Graham shall be found to be indebted to the other partners for principal and interest, to be computed and settled by the said Master. And if anything shall be left, his Lordship declared that the same will belong and shall be paid to the defendant Graham." And "the consideration of the plaintiff's costs of this suit" was reserved. (Reg. Lib. A. 1715, fol. 341, E. G.)

In pursuance of this decree the Master made his report, dated the 21st of January, 1719, by which he found that Turner, at several times from the 25th of March, 1713, advanced and lent to Graham, on the credit of his mortgage, several sums of money, amounting in the whole to * £4633 14*s.* 7*d.*, for [* 531] which he, the Master, had computed interest to the 29th of September the last, amounting to £2281 8*s.* 5*d.*, making in all £6915 3*s.* and he found that Turner had received of Graham and for his use, and of the receiver of the rents and profits of the premises, several sums of money, amounting in the whole to £5148 13*s.* 9*d.*, for which he (the Master) had likewise computed interest, amounting to £1557 4*s.* 4*d.*, making in all £6705 18*s.* 1*d.*, which being deducted out of the said £6915 13*s.*, reduced the same to £209 4*s.* 11*d.* remaining due to Turner from Graham for principal and interest on the premises in question. The Master's report contains, in two schedules, the particulars of the monies advanced and received by Turner respectively, consisting in each case of a vast variety of items in the form of a running account. It mentions only one item (the sum of £300 already referred to) as having been advanced after the 25th of August, 1713. The

date of this advance was 13th October, 1713. Of the entire amount advanced by Turner (£4633 14*s.* 7*d.*) this was the only advance made subsequently to Montgomery's mortgage. The order confirming the Master's report is not to be found, but we may presume that it was confirmed.

Now, my Lords, such being the facts of the case, the question is, whether they are correctly stated in the Report in Equity Cases Abridged and in Viner, and whether the decree justifies the proposition of law deduced from it by the reporter, and for which it is now cited by the appellants as an authority; viz., "That a first mortgagee, with a mortgage covering future advances, has priority, not only for what may be due to him at the time of a second mortgage, but also for advances made by him after notice of such second mortgage."

[*532] It appears to me that the statement of the case in both * reports is erroneous in one particular which goes to the root of the proposition in question. The reporter in each report represents the advance made by Turner (whom he calls "B.") after the date of the mortgage to Montgomery (whom he calls "C.") as having been made by Turner with notice of Montgomery's mortgage. This representation is, as it seems to me, without foundation.

To fix Turner with such notice it must have been admitted by his answer, or established in evidence. Now evidence there was none; and as regards Turner's answer I have searched it repeatedly in the original record without finding any such admission. There was no such admission by Turner. There is no such assertion in the answer of Montgomery, or in that of Graham. There is no such suggestion in the bill. The first deed by which Turner would seem to have had notice of Montgomery's charge was the deed of the 25th of August, 1713. Referring to this, he admits that "some such conveyance was some time since shown to this defendant," but as to when it was shown him, or when first he saw it, his answer is silent. Whether he first saw it before or after he made his last advance, the only advance in question, there was nothing at the hearing to show.

If the date of that advance was capable of being ascertained, the question of notice might still be determined, and accordingly Lord Cowper directed the Master, "if he should find any monies advanced by Turner on the credit of his mortgage after the 25th August, 1713, to state the same specially;" leaving it open to the

plaintiffs and Montgomery to show if they could, before the report was confirmed, that when Turner advanced such monies he had seen their securities.

Of the result of that direction (which upon the appellant's contention was not only useless but contradictory) * nothing can now be ascertained; but this much is clear, [*533] that Lord COWPER by his decree gave Turner priority in respect of no single advance shown at the hearing to have been made with notice of any incumbrance subsequent in date to his own.

For these reasons it appears to me that both reports are incorrect, and that the decree does not justify the proposition of law for which it is cited as an authority.

Although the case of *Gordon* v. *Graham* appears to be misreported, and the inquiry which Lord COWPER certainly directed is inconsistent with the rule he is supposed to have laid down, still, if that rule has been adopted and acted upon as the doctrine of the Courts, I think it ought not now to be disturbed. The rule is repeated by treatise writers, as all rules are which are to be found in books of reports (even of such doubtful authority as 2 Equity Cases Abridged) until they have been overruled. I do not find any case in which this rule has been judicially acted upon, and on several occasions it has been seriously questioned. Although the rule is laid down by Mr. Powell in his Treatise on Mortgages, in the edition of this valuable book published in 1822, Mr. Coventry, the learned editor, seriously cautions the reader against it, which he would hardly have done had it been generally approved of and recognized by conveyancers. He suggests that the first mortgagee, in respect of advances made after notice of the second mortgage, having no legal right, is not entitled to preference. The weight to be given to his opinion can hardly be diminished by the modesty with which it is expressed.

In *Blunden* v. *Desart*, 2 Dr. and War. 405, 431, Lord Chancellor SUGDEN, in Ireland, when treating upon this subject is reported to have * said, "Even in the case of a first mortgage, [*534] whether legal or equitable, covering future advances, it deserves further consideration whether it would be safe to rely in all cases upon *Gordon* v. *Graham* as an authority that advances may be safely made after the first mortgagee has had notice of a second mortgage." Again in this House in the case of *Shaw* v. *Neale*, that same most learned Judge, Lord ST. LEONARDS, clearly intimated a grave

doubt whether Lord COWPER ever had pronounced the judgment imputed to him in *Gordon* v. *Graham*, saying that, "If Lord COWPER had in the end maintained the opinion he was at first supposed to express, he could not have directed the order of reference to the Master, which is found in that case."

Finally, the present MASTER OF THE ROLLS in *Shaw* v. *Neale*, when that case was before him, 20 Beav. 181, says, that "*Gordon* v. *Graham*, as reported, has not met with the unanimous approbation of the profession," and he pretty plainly intimates that he himself did not approve of it.

I must say that the doctrine seems to me to be contrary to principle. Although the mortgagor has parted with the legal interest in the hereditaments mortgaged, he remains the equitable owner of all his interest not transferred beneficially to the mortgagee, and he may still deal with his property in any way consistent with the rights of the mortgagee. How is the first mortgagee injured by the second mortgage being executed, although, the first mortgagee having notice of the mortgage, the second mortgagee should be preferred to him as to subsequent advances? The first mortgagee is secure as to past advances, and he is not obliged to make any further advances. He has only to hold his hand [*535] *when asked for a further loan. Knowing the extent of the second mortgage, he may calculate that the hereditaments mortgaged are an ample security to the mortgagees; and if he doubts this he closes his account with the mortgagor and looks out for a better security. The benefit of the first mortgage is only lessened by the amount of any interest which the mortgagor afterwards conveys to another consistent with the rights of the first mortgagee. Thus far the mortgagor is entitled to do what he pleases with his own. The consequence certainly is that, after executing such a mortgage as we are considering, the mortgagor, by executing another such mortgage, and giving notice of it to the first mortgagee, may at any time give a preference to the second mortgagee as to subsequent advances, and as to such advances reduce the first mortgagee to the rank of *puisne* incumbrancer. But the first mortgagee will have no reason to complain, knowing that this is his true position if he chooses voluntarily to make further advances to the mortgagor. The second mortgagee cannot be charged with any fraud upon the first mortgagee in making the advances with notice of the first mortgage; for, by the hypoth-

esis, each has notice of the security of the other, and the first mortgagee is left in full possession of his option to make or to refuse further advances as he may deem it prudent. The hardship upon bankers from this view of the subject at once vanishes, when we consider that the security of the first mortgage is not impaired without notice of a second, and that when this notice comes, the bankers have only to consider (as they do as often as they discount a bill of exchange) what is the credit of their customer, and whether the proposed transaction is likely to lead to profit or to loss.

A mistaken notion had got abroad that *Gordon* v. **Gra-* [*536] *ham* had been expressly overruled by the House of Lords in *Shaw* v. *Neale*, the *ratio decidendi* there steering quite clear of this question. But I am of opinion that the doctrine supposed to have been laid down in *Gordon* v *Graham* is not sound, and that it ought now to be overruled by your Lordships.

If this should be your Lordships' opinion, we must next consider whether in this case there is anything to show that there was any agreement between the plaintiff and the bank that the plaintiff should not use his mortgage so as to have a preferable security for further advances to Mare. Nothing with such a tendency appears in the deeds or any written document; nor is there any parol evidence to prove any such agreement. And the appellants are driven to contend that there must have been an understanding to that effect, on the ground that the mortgage to the bank would be wholly useless if the subsequent mortgage to the respondent would give him a priority as to future advances. But it is a fallacy to say that on this supposition the first mortgage was of no value. It secured all past advances absolutely, and it secured further advances to the amount of £20,000 absolutely, till there should be notice of a second mortgage, and continuously as between mortgagor and mortgagee, although there should be a second mortgage. I make no doubt that the £8000 and the £7500 were secured by the first mortgage, although additional security was asked and obtained before these sums were advanced. The mortgaged hereditaments, when sold, might have produced enough to pay in full the Palladium Company, the Commercial Bank, and the plaintiffs, in which case the Commercial Bank would have received 20s. in the pound on the whole of the balance due to itself, although there had not been a shilling * to be divided [*537] among the many unsecured creditors of Mare.

Mr. Lloyd, who ably argued for the appellants, seemed to me to feel, and almost to admit, that at present there is no sufficient evidence to prove the alleged agreement that the effect of the first mortgage, in giving the bank a continuing preferable charge for all future advances to Mare, should never be impaired. He excuses this penury of evidence by the frame of the plaintiff's bill, which seeks relief to the plaintiff as a surety to the bank for Mare; but as it likewise pointedly claims priority by virtue of the second mortgage, it was clearly incumbent on the defendants, who denied this claim, and disavowed all notice of the second mortgage, if there had been any such agreement, as is now suggested, to vary the effect of the deeds, to allege it in their answer, and to adduce evidence to prove it before the hearing of the cause. This agreement was not even hinted at before the MASTER OF THE ROLLS; and although the contention of the plaintiff's counsel before the LORD CHANCELLOR, that the two mortgages might be treated as one transaction, may have some reference to it, no application was made to the LORD CHANCELLOR, any more than to the MASTER OF THE ROLLS, to direct an inquiry upon this subject. The prayer for such an inquiry on the hearing of an appeal from the LORD CHANCELLOR to the House of Lords comes too late, and if yielded to would be a precedent for introducing a most inconvenient practice. I should have looked with great jealousy on any evidence to establish a parol agreement or implied understanding to vary the effect of the deeds; but no such evidence has hitherto been, or can now be adduced.

The appellants, as to £11,000, find themselves in the [* 538] same position as the unsecured creditors of Mare, * but for this they can only blame their own imprudence in miscalculating his solvency, or in mistaking the force and value of the security which he had given them.

I have only farther to notice the technical objection, strenuously relied upon by the appellant's counsel, that the bill does not support the decree.

The plaintiff, by his bill, certainly does bring forward the case that the mortgage given by Mare to the Commercial Bank was only intended as a security for the £20,000, which he had guaranteed, that he had paid this sum of £20,000, and that he, as surety, was entitled to the benefit of this mortgage. The first prayer of the bill is, "That it may be declared that the plaintiff is

entitled to the benefit of the mortgage by Mare to the bank by the indenture of 26th January, 1855, and that the bank may be ordered to execute to the plaintiff a proper and valid assignment thereof, and of the principal money and interest secured thereby and also to deliver up to the plaintiff the said indenture."

The plaintiff entirely fails in his attempt to make out this case; for, although he has paid the £20,000 for which he was surety for Mare, it is quite clear that Mare's mortgage to the bank was not confined to that sum of £20,000, and that, as between Mare and the bank, it does cover the whole of the balance of £11,000 due to the bank from Mare.

But the bill contains another prayer, "That it may be declared that the sums due to the plaintiff upon the security given to him by the mortgage deed of the 12th February, 1855, have priority over the sums of £8000 and £7500 advanced by the bank to Mare, with notice of that mortgage."

All the facts relied upon to show that the plaintiff is * entitled to the priority he claims are distinctly stated in [* 539] the bill; and I can make no doubt that this question, upon which I have expressed my opinion, is properly raised and brought before us by this appeal.

Upon the whole, my Lords, I think that the MASTER OF THE ROLLS and Lord Chancellor CHELMSFORD took the correct view of this case, and that the appeal should be dismissed.

Lord CRANWORTH: My Lords, this is a case which affecting as it does in principle the securities ordinarily given to bankers to cover current accounts, is of great importance.

Two points were made by the appellant in the argument at the bar; first, it was said that the appellants, as first mortgagees by virtue of a mortgage for securing to them future as well as present advances, had, on the general rule of equity, priority over the respondent, the second mortgagee, for the amount of the balance due to them from Mare, the mortgagor, when he became bankrupt. And secondly, even if that would not be their right as a general abstract proposition of law, yet that the circumstances of this case would give them the priority for which they contend.

On the second point, I may say at once that I cannot go along with the appellants; I do not see sufficient to justify me in holding that their case is exceptional, — that there are any circumstances taking it out of the general rule, whatever that rule may be.

The question, therefore, to be considered is, what is the general rule or law of the Court as to the priority of two incumbrancers standing in the position of these parties, *i. e.* of a first mortgagee holding a mortgage to secure a present debt and future [*540] advances not exceeding *a fixed amount, and a second mortgagee, there being at the time of the execution of the second mortgage notice to both mortgagees of both securities.

I certainly had understood that, in such a case, excluding all special circumstances, the first mortgagee would be secure for any subsequent advances covered by his security, even though he had notice of the second mortgage. This is so laid down on authority, and has, I believe, been often acted on, and seems to me perfectly just and reasonable.

Mortgages are but contracts; and when once the rights of parties under them are defined and understood, it is impossible to say that any rule regulating their priority is unjust. If the law is once laid down and understood, that a person advancing money on a second mortgage, with notice of a prior mortgage covering future as well as present debts, will be postponed to the first mortgagee, to the whole extent covered or capable of being covered by the prior security, he has nothing to complain of. He is aware when he advances his money, of the imperfect nature of his security, and acts at his peril. The only question, therefore, is, whether this has been the law laid down and acted on in the Court of Chancery, where alone questions on this head can be raised.

It was certainly stated to be the law of the Court by Lord COWPER, and was acted on by him in the case of *Gordon* v. *Graham*, 2 Eq. Cas. Abr. 508, pl. 16; 7 Vin. Abr. 52, pl. 3, if the report of that case is to be relied upon

But we were told, and truly told, at the bar, that that book is often of doubtful authority, and one on which reliance cannot always be placed with confidence. In order, therefore to see [*541] how far the report of that case is accurate, *your Lordships thought it right to call for the Registrar's Book. My Lords, having examined the entry there attentively, I cannot discover any substantial inaccuracy in the printed report. The report is not accurate in saying that the question was, on what terms the second mortgagee should redeem the first, but the principle involved is the same. There was no question of redemption, because the estate was by consent to be sold; and then the ques-

tion was, as to the right of the second mortgagee to the purchase-money.

My noble and learned friend has stated so fully the proceedings in that case as they are to be collected from the Registrar's Book, that I shall not trouble your Lordships by again alluding to them. He considers that the printed report is probably erroneous in stating that the advance made by the first mortgagee, after the date of the second mortgage, was so made with notice of that second mortgage. And it is certainly true, that the answers both of the first and of the second mortgagee, as set out in the Registrar's Book, are silent on the point of notice. But the entries of these answers are very meagre, and the absence of any allusion by the first mortgagee to the subject of notice leads me irresistibly to the inference that he must have had notice; for if he could have said that his subsequent advances were made without notice of the second mortgage, that would have put an end to all question.

The right of a first mortgagee to tack subsequent advances made without notice, so as to exclude an intermediate mortgagee, was fully established long before the year 1716, when the case of *Gordon* v. *Graham* was decided. So far back as the year 1669 the case of *Marsh* v. *Lee* (2 Vent. 337; 1 Chan. Cas. 162) had established the right of a third * mortgagee without [* 542] notice, to secure himself against the second mortgagee by buying in a first mortgage, laying hold, as it was said, of the *Tabulam in naufragio.* I cannot, therefore, think it probable that the question raised in *Gordon* v. *Graham* could have been merely as suggested, whether the first mortgagee was entitled to tack subsequent advances made without notice. If that had been the question, it would have been unnecessary for him to allege, as he does by his answer, that his mortgage was a mortgage to cover future advances, as well as what was then due; future advances made without notice of the second mortgage would have been well secured by the first mortgage, whether it extended to subsequent advances or was confined to the sum due at its date.

I confess, therefore, that I think Lord COWPER must have intended to decide what he is represented in the printed report to have decided, namely, that a mortgage covering future advances is, as to those advances, valid against a subsequent mortgagee even with notice.

This principle having been thus reported in the case of *Gordon*

v. *Graham* as being the law of the court, the next inquiry is, how far the doctrine there propounded has been subsequently considered as sound.

I do not find any allusion to it in any subsequent book until that of Mr. Powell, who wrote, I believe, at the end of the last or very early in the present century. He, in his treatise on the Law of Mortgages, states, apparently without doubt, that the rule is as laid down by Lord COWPER. Mr. Powell, as a conveyancer of eminence, must have had frequent occasions to consider mortgages like those now in question, and his work may be taken as a tolerably good index of what was considered to be the rule of [* 543] the Court. It is true that Mr. Coventry, in his * edition of Mr. Powell's work, published in 1822, states that the principle of the case of *Gordon* v. *Graham* was in some degree questionable, on the ground that the first mortgagee in respect of advances made after notice of the second mortgage can have no legal, but only an equitable right; and then the doctrine *prior tempore potior jure*, might be held to apply. But in this observation he overlooks the fact, that the original security was to cover future advances; and the question is, whether such advances when made, do not attach themselves to the mortgage, so as to put them in the same position as if they had all been made when the mortgage was originally created. It is but fair to Mr. Coventry to add, that he concludes his observations by saying, though he has submitted them to the learned reader, he individually places but slender reliance on them. My noble and learned friend says, that the weight to be attributed to Mr. Coventry's opinion cannot be diminished by the modesty with which it is stated. But the fair result of the passage cited from his note appears to me not that he stated his own doubt with diffidence, but that he meant to state the doubts of others in which he did not concur.

Six years after the publication of Mr. Coventry's edition of *Powell*, the late Mr. Jarman published his edition of Bythewood's Conveyancing, and he there states the case of *Gordon* v. *Graham* at length; and after doing so he makes the following remarks (5 Jarman's Bythewood, 427, n. (*e*) 5 Sweet's Jarman, 443): "It will be seen that Lord COWPER relied upon the circumstance of the second mortgagee having notice of the first mortgage; and though the reasons before suggested in favour of the priority of the first [* 544] mortgagee might seem to apply as well to cases in * which

the second mortgagee had not, as where he had notice, yet it is not safe to consider the case as an authority to this extent. The learned editor of Mr. Powell's Treatise on Mortgages, 5th edit. p. 531, indeed seems to doubt the soundness of the decision as applicable even to the case of a second mortgagee with notice; but in those doubts the present writer cannot concur, though, as a difference of opinion appears to exist upon the subject, a mortgagee should hesitate to make further advances in any case after notice of a subsequent incumbrance. On the other hand, no person ought to accept a security subject to a mortgage authorizing farther advances, without treating it as an actual incumbrance to that extent."

I have quoted these remarks, because the authority of Mr. Jarman cannot fail to carry with it great weight. No man had more practical experience or was better able to understand and criticise the principles of law connected with that branch of it now under consideration.

It is necessary here to remark, that the rule laid down in *Gordon* v. *Graham*, though it has, as I conceive, been the general rule of the Court, yet is a rule which must yield to circumstances, showing the intention of the parties to have been at variance with it. To put, for instance, an extreme case: suppose that the second mortgage should be made on the express contract of the mortgagor, communicated to the first mortgagee, that he would not thenceforth borrow any more money from the first mortgagee. In such a case the rule giving precedence to the first mortgagee for future advances could not be acted on. There would be irresistible evidence that the parties meant to deal on terms not consistent with the ordinary principles of the Court. And whenever the dealings of the parties had been such as to satisfy the Court that * they intended to postpone the future advances [* 545] of the first mortgagee to those under the second mortgage, effect would be given to that intention. I have adverted to this sort of special case, because it fully explains what Lord Chancellor SUGDEN is reported to have said in Ireland, when the case of *Gordon* v. *Graham* had been cited in argument. In *Blunden* v. *Desart*, 2 Dru. & War. 405, 431, that very learned Judge is reported to have said, "Even in the case of a first mortgage, whether legal or equitable, covering future advances, it deserves further consideration whether it would be safe to rely in all cases upon *Gordon* v.

Graham, as an authority that advances may be safely made after the first mortgagee has had notice of a second mortgage." It was assumed at the bar that his Lordship had cast a doubt on the authority of the case in question by what he then said. On the contrary, his Lordship appears to me to consider it to be in general a correct exponent of the law, and merely to guard against the supposition that it was necessarily applicable to all cases.

In the year 1843, a case came before Lord Justice KNIGHT BRUCE, then Vice Chancellor, which though it did not raise the precise question, seems to give much countenance to the doctrine of Lord COWPER. I allude to the case of *Johnson* v. *Bourne*, 2 You. & C., C. C. 268. There Hugh Gore being engaged in building speculations, and being indebted to the Liverpool Banking Company in a sum of £2167 executed to the bank a mortgage of land, on which were three unfinished houses, to secure what was then due from him, or should thereafter become due, provided that the principal moneys recoverable by the security should not exceed £5800. In November, 1837, one of the houses was [*546] completed. It was sold for a sum of £1850, and *the purchase-money was received by the bank and placed to Gore's credit. After that sale Gore made a mortgage to the plaintiff, dated on the 1st of January, 1838, to secure sums due and to become due to him, not exceeding £1000, and notice of this second mortgage was on the 4th of January, 1838, given to the bank. In June, 1839, another of the three houses was completed and sold for £2000, the purchase-money being paid to the bank. In March 1840, the third house was completed, and sold for £2100, and this sum was also paid to the bank. The bank had thus received three sums amounting together to £5950; and soon after the sale of the last house, the plaintiff, as second mortgagee, called on the bank to account for what was due to it on the first mortgage, on the footing that the sums thus received on the sale of the houses had more than exhausted the £5800, for which alone the mortgage to the bank was a security. The bank alleged that there was still a balance due from Gore of about £1100, for which the bank claimed to hold the mortgaged property remaining unsold.

The question raised on the bill was, whether by the receipt of the three sums of £1850, £2000 and £2100, being the purchase-money on the sale of the three houses, the whole security was not exhausted; and the VICE CHANCELLOR held that it was exhausted

so far as these sums were applicable, when received by the bank, towards liquidation of the principal money secured; and he directed accounts on the footing of that declaration. Now, if the plaintiff, the second mortgagee, had supposed that his security gave him precedence over all advances made by the bank after the date of his mortgage (*i. e.* the 1st of January, 1838), he surely would have made that point by his bill. Though the dates of the advances by the bank are not stated, it can hardly be doubted that many of * them must have been made during [* 547] the years 1838 and 1839, and up to March 1840, when the last house was completed; and if the doctrine on which the decree now under consideration rests is well founded, it would in all probability have been unnecessary for him to rest his title to relief on the ground on which he put it, namely, that the sums received on the sales were to be taken *pro tanto* in discharge of the principal sums secured to the first mortgagee. This case affords strong evidence of what was the general understanding of the profession.

I do not find that the doctrine of Lord COWPER had again been alluded to in any reported case till the year 1855, when it certainly seems to have been doubted by a very high authority, the present MASTER OF THE ROLLS. In the case of *Shaw* v. *Neale*, 20 Beav. 181 his Honour is reported to have said that the decision in *Gordon* v. *Graham* had not met with the unanimous approbation of the profession. But for this he refers to no authority except the treatise of Mr. Powell, and the *dictum* of Lord Chancellor SUGDEN in *Blunden* v. *Desart*, which I have quoted. His Honour was clearly wrong in supposing that Mr. Powell had intimated any doubt on the subject, though such a doubt was suggested by Mr. Coventry; and Lord Chancellor SUGDEN does not, as it appears to me, by what he said in *Blunden* v. *Desart*, express any doubt of the general soundness of the doctrine, though his Lordship stated most truly that the rule must not be taken as one which will necessarily govern all cases. It is true that when, in the argument of the case of *Shaw* v. *Neale* on appeal in this House, the case of *Gordon* v. *Graham* was referred to, Lord ST. LEONARDS said, 6 H. L. Cas. 581, 597, that, if Lord COWPER had in the end maintained the opinion he was first supposed to express, he could not * have directed the order of [* 548] reference to the Master which is found in that case;

alluding to the order stated in the report to have been made on the importunity of counsel, that the Master should report what money was lent after Turner had notice of the second mortgage. This, however, was but a casual observation made by the noble Lord, when he had not the advantage we have since had of seeing a correct copy of the whole decree; for from that it is plain that Turner, as first mortgagee, obtained payment in full of all principal and interest due to him, as well on account of advances subsequent to the subsequent security as of those made previously.

Considering, then, the state of the authorities on this subject, and the opinions of eminent conveyancers, I have come to the conclusion that the law was correctly laid down by Lord COWPER. The rule propounded by him is a convenient rule, causing injustice to no one. It has probably been often acted on, and to depart from it may, I think, retrospectively cause great injustice, and prospectively prevent advances of money by bankers or others, where such advances might be safely and usefully made; and where, as in this case, the second mortgage is, like the first, a security for future as well as present advances, great difficulty must arise in settling the priorities of the two mortages in respect of future advances.

Differing thus, as I do unfortunately, from my noble and learned friend on the woolsack, I have thought it right to state the grounds on which my opinion rests; but as I believe my noble and learned friend opposite (Lord CHELMSFORD) has not changed the opinion he entertained in the Court below, the decree which he then made will of course be affirmed.

[*549] * Lord CHELMSFORD. — My Lords, I adhere to the judgment which I pronounced upon this case in the Court below. But as my noble and learned friend (Lord CRANWORTH), whose opinion is always entitled to the greatest respect, does not agree in the propriety of my decree, I must trespass upon your Lordships' attention with a few additional reasons in support of it; however unnecessary this may appear, after it has been sanctioned by the authority of my noble and learned friend the LORD CHANCELLOR.

Your Lordships have had the advantage of being informed of everything which can be ascertained respecting the case of *Gordon* v. *Graham*, so as to enable you to determine whether the meagre reports of it are likely to be accurate, and whether the doctrine

attributed to Lord COWPER was necessary to found the decree which he pronounced. I expressed myself, perhaps, a little too strongly in the Court below as to the doubts which had been thrown upon that case. I was led to the remarks which I made, by the opinions of Mr. Coventry, in his edition of Powell on Mortgages, and of Mr. Fisher in his excellent treatise on the same subject (p. 363), also by the observations of the MASTER OF THE ROLLS in the case of *Shaw* v. *Neale*, and of my noble and learned friend, Lord ST. LEONARDS in *Blunden* v. *Desart* (which I understand as at least implying disapprobation of the doctrine to the unqualified extent in which it is stated in the report), and also from what I gathered to be the inclination of my same noble and learned friend's opinion from the incidental remark which he made in the course of the argument of the case of *Shaw* v. *Neale* in this House.

But whether my reflections upon *Gordon* v. *Graham* * were [*550] or were not sufficiently guarded is not very material, the question now being, not what previous opinions may have been expressed as to the reported decision of this case, but whether it is entitled to be treated as an authority which ought to have governed my decree. If my noble and learned friend (Lord CRANWORTH) is right in saying that the law was correctly laid down in *Gordon* v. *Graham*, that it has often been acted upon since, and is perfectly just and reasonable, and that a person advancing money on a second mortgage with notice of a prior mortgage covering future as well as present advances must always be postponed to the first mortgagee to the whole extent covered or capable of being covered by his security, except in the extreme case by which he has illustrated the special circumstances which will exclude the operation of the rule, there is, of course, nothing to be said in support of my judgment.

In the reports both in Viner and in Equity Cases Abridged, the proposition attributed to Lord COWPER is stated in the broadest and most unqualified terms. The second mortgagee is to be postponed to the first for a reason which applies to every case, viz. "because it was his folly, with notice, to take such a security." It is clear that there must be an incorrectness in the language attributed to Lord COWPER, that "the second mortgagee shall not redeem the first mortgage without paying as well the money lent after, as that lent before the second mortgage was made;" for

(as my noble and learned friend Lord CRANWORTH has pointed out) the suit instituted was not a suit for redemption at all, and the close and careful examination of the facts of the case which my noble and learned friend the LORD CHANCELLOR has made, induces me to believe that still more serious inaccuracies [* 551] are to be detected in the reports. I shall not, of * course, repeat the facts so fully stated by him, but will merely offer a few suggestions as to the conclusions which appear to me to be deducible from them.

The equitable charge for the £900 to Montgomery existed at the time of the assignment of the mortgage to Turner. But that assignment gave Turner the legal estate, and a security for his present debt, and also for any advances which he might subsequently make to the extent of £1800. It nowhere appears whether Turner had notice of Montgomery's equitable charge, but the legal estate which he obtained by the assignment, would give him priority within the limits of the mortgage security. And no doubt appears to have been entertained that Turner was to be first paid all his advances prior to the deed of 1713. The decree was made upon hearing the deed of assignment of the mortgage to Turner, and the deed of the 25th August, 1713. By this latter deed the premises were to be sold, and the money arising from the sale was to be applied in payment, first, of what was due to Turner and then of the £900 due to Montgomery. The question of notice was only applicable to this deed, and it is to the advances made after it, that the part of the decree directing the inquiry refers. It must, I think, be assumed that Turner had notice of this deed, not only from the admission (however qualified) made by him in his answer, but also because there would otherwise have been no reason for the Master being required by the decree to state specially his finding of any monies advanced by Turner on the credit of the mortgage after the 25th August, 1713.

There is some inaccuracy in the language of the decree in first ordering that Turner should be paid his debt, and then directing an inquiry as to advances made after the deed of 1713. [* 552] This inquiry would have been wholly * unnecessary if it had been intended that Turner should at all events in the first place be paid all his advances in full. The apparent inconsistency is to be reconciled by understanding the words "the defendant Turner is to be paid his debt in the first place," to

mean the debt which was due to him at the time of the execution of the deed of 1713. This explanation will render the decree perfectly just and consistent. The deed of 1713 provided for the sale of the premises and for the payment of Turner's debt, which of course must mean all that was due to him at that time. The bill was filed by the parties to the deed of 1713 praying for a sale, and the decree referring to this deed of 1713 directed the sale to take place. Now of course Turner, under this sale, was entitled to the benefit given to him by the deed of 1713, to be first paid the debt then due to him. But it was a very different question whether if, with knowledge of this deed and of the priorities established by it (which must be assumed), he chose to make further advances, he ought to be allowed to rank for these before Montgomery. The inquiry as to advances made after the date of the deed, could only have become important in case the sale had not produced enough to satisfy Montgomery, and also the subsequent advances (if any) by Turner. It is said to have been ordered upon the importunity of counsel, which of course must mean the counsel of Montgomery, as the plaintiffs were not at all interested in the question, they being entitled only to the surplus after Turner's and Montgomery's demands were satisfied. But if Lord COWPER entertained the strong opinion which is attributed to him, he could hardly have yielded to any pressure to direct an inquiry which, in his judgment, must have been wholly useless.

The explanation which I have offered of the decree * may [* 553] tend to show the propriety of it in every respect, but, at the same time, renders it difficult to understand how the case could have presented any opening for the general proposition reported to have been laid down by Lord COWPER, on terms clearly inapplicable to the facts upon which his decision proceeded. I do not feel restrained, therefore, by the deference which is justly due to Lord COWPER'S high authority, from questioning freely the doctrine which he is supposed to have sanctioned. The reason upon which the doctrine proceeds is, "that it was the folly of the second mortgagee with notice to take such security." Now, what is this but to say that a mortgagee, by taking a security for advances which may never be made, may effectually preclude a mortgagor from afterwards raising money in any other quarter? And as the first mortgagee is not bound to make the stipulated further advances, and with notice of a subsequent mortgage, he

can always protect himself by inquiries as to the state of the accounts with the second mortgagee, if he chooses to run the risk of advancing his money with the knowledge, or the means of knowledge, of his position, what reason can there be for allowing him any priority? What injustice is done to him by postponing him to the second mortgagee under such circumstances? But, on the other hand, if it is to be held that he is always to be secure of his priority, a perpetual curb is imposed on the mortgagor's right to incumber his equity of redemption.

Difficulties were raised in argument as to the mode in which the alternating priorities between the respective mortgagees might have to be adjusted. But the simple answer to these suggestions is, that the advances must have priority according to the order in which they are made. No difficulty of this kind, however, [* 554] arises in the * present case. I do not adopt the argument of the respondent, that the mortgage to the bank did not cover the advances made to Mare in August and September, 1855, which were carried to his account current, because the terms of the security embrace all sums due and payable from Mare to the bank, "upon any contract, or in any other manner whatever." It must be observed, however, that the appellants in their answer to the respondent's bill did not insist upon a priority over the advances made by Rolt, by reason of their prior mortgage covering future advances, but solely on the ground that they had no notice of his mortgage. But if the law had been considered to be conclusively settled by the case of *Gordon* v. *Graham*, the want of notice would hardly have been set up as an answer to the respondent's claim, as it would have been a circumstance wholly immaterial. Even the warning given by Rolt, and his request that the bank would not make any further advances, which occurred just before the transaction with respect to the £7500, would not have had the slightest effect in depriving the appellants of their legal right, and changing the order of priority.

I admit that special circumstances may vary the rights of the parties, but these must bear equally on the position of both mortgagees. The second mortgagee might waive his priority in respect of certain advances, and insist upon it with respect to others; and the question arises in this case whether any evidence of such intention is to be gathered from the circumstances connected with the advances of the two sums in question. In making

these advances the appellants appear to have relied but little (if at all) upon the security of the mortgage, for the £8000 were expressly lent upon the security of the ships which Mare was building for the Great Western and South Wales Company, and the £7500 were lent upon the * undertaking of [* 555] Mare that Rolt would repay that sum on the following morning. All the facts connected with these transactions appear to be strongly opposed to the notion that Rolt intended to waive his claim to priority over these advances by the bank. The appellants can succeed only upon the ground supposed to be established by *Gordon* v. *Graham*, that their prior mortgage secured to them a continuing priority available against a second mortgagee under all circumstances, except an agreement by them to waive their right.

A full examination of the case relied upon has shown that the proposition cannot be maintained upon the ground of authority, nor can it, in my opinion, be supported upon any sound principle; and I therefore agree with the Lord Chancellor that the decree ought to be affirmed.

The Lord Chancellor. I presume that as there is a difference of opinion among your Lordships, the decree will be affirmed without costs.

Lord Cranworth. With all deference, I do not think that is a correct principle. This case was first decided by the Master of the Rolls. It was then brought before the Lord Chancellor, and the decision affirmed; and I do not think that, as a general rule, it is correct to say that the appellant ought not to pay the costs, merely because your Lordships are not unanimous in thinking that both the Courts below were right in their judgments.

Decree appealed from affirmed, and appeal dismissed, with costs.
Lords Journals, 30 May, 1861.

ENGLISH NOTES.

In the case of *Daun* v. *City of London Brewery Co.* (6 May, 1869), L. R., 8 Eq. 454, 38 L. J. Ch. 454, an attempt was made to set up a custom between brewers and publicans (of which distillers dealing with the latter have implied notice) that the equitable mortgage of the public-house premises to the brewers should be unaffected by the second charge usually given to distillers. It was held by Vice Chancellor James that, even if such custom existed so as to affect the priorities

in a manner different from the rule of law as decided in the principal case — of which he thought there was not sufficient evidence — the priorities must, after notice to the brewers of the distiller's mortgage, be regulated (according to the decision of *Hopkinson* v. *Rolt*) by the respective dates of the advances being made and goods supplied. This decision was followed by Lord Romilly, M. R., in *Menzies* v. *Lightfoot* (17 March, 1871), L. R., 11 Eq. 459, 40 L. J. Ch. 561.

In *Burgess* v. *Eve* (25 Jan., 1872), L. R., 13 Eq. 450, 41 L. J. Ch. 515, Vice Chancellor Malins clearly laid down that the principle of *Hopkinson* v. *Rolt* applied to the case where a person having given a continuing guarantee (under seal or otherwise) for advances to be made by a banker for a large sum, withdraws it by notice to the bank at a time when a much smaller sum only has been advanced. The notice of withdrawal would have the same effect as a notice of assignment given by the assignee; and if the fact of the instrument being under seal made any difference, the guarantor would at all events be entitled to withdraw the guarantee on the terms of paying the amount already due under it. In the case in point, however, he held that no notice had been given, and that the guarantee continued effectual.

Where security is given to a bank for an overdrawn account, and notice is given of a subsequent assignment to another, the amount of debt for which the bank holds the security is determined by the rule in *Clayton's Case* ("Appropriation," p. 329, *supra*), so that if after notice of the subsequent assignment payments are made to the customer's credit in the account they will be applied *pro tanto* in discharge of the liability existing at the time of the notice. *London & County Banking Co* v. *Ratcliffe* (H. L. 14 June, 1881), 6 App. Cas. 722, 51 L. J. Ch. 28.

The principle of the decision in *Hopkinson* v. *Rolt* extends to a purchaser as well as a subsequent mortgagee; and the original security does not extend to charge, as against the purchaser, the vendor's lien for unpaid purchase-money with the advances made after notice of the contract of sale. *London & County Banking Co.* v. *Ratcliffe, ut supra.*

It has been attempted to argue that in the case of a company constituted under the Companies Act 1862, the operation of the rule in *Hopkinson* v. *Rolt* (so as to affect the company by a notice of charge on shares in the company to a bank) was excluded by the 30th section of the Act, which enacts that "no notice of any trust, expressed, implied, or constructive, shall be entered on the register or be receivable by the Registrar in the case of companies under this Act." But the House of Lords in *Bradford Banking Co.* v. *Briggs* (7 Dec., 1887), 12 App. Cas. 29, 56 L. J. Ch. 364, rejected this argument, and held that the

notice of charge was not notice of a trust within the section, but simply affected the company in its trading capacity with knowledge of the Bank's interest, which they were not entitled as traders to disregard. So that, although the company had a lien on its own shares under their articles of association, which (according to a frequent form) provided that the company "shall have a permanent lien and charge" on all shares for debts to them due by the shareholders, they were not entitled after notice of charge on the shares to the bank to insist as against the bank on their own lien for debts incurred to them by the shareholders after the notice.

Hopkinson v. *Rolt* has been followed by the House of Lords in an appeal from Scotland, in a case where property was conveyed (or disponed) on an *ex facie* absolute title, but with a contemporaneous agreement showing that the property was to be held only in security of advances made and to be made. The House, reversing the decision of the Court of Session, decided that the disponee could not hold the property in security for repayment of advances made by him after receiving notice that the disponer had, for valuable consideration, conveyed his interest to another. *Union Bank of Scotland* v. *National Bank of Scotland* (H. L. 10 Dec., 1886), 12 App. Cas. 53. To explain the form in which the security was granted, it must be explained that, by Scotch law, a conveyance expressed on the face of it to be made by way of security cannot operate as a legal title by way of security for future advances. The expedient usually adopted is to give an *ex facie* absolute conveyance, and to accompany it by a memorandum expressing the real intention. The decision of the House of Lords was that the form of the security made no difference in the essential rights as between the disponer (or original owner), the disponee (the creditor holding the primary security), and other persons deriving rights from the original owner, and giving notice of them to the creditors holding the security.

The rule in *Hopkinson* v. *Rolt* does not apply to the case where a contractor has assigned certain beneficial rights under his contract, so as to avoid the claims of the other party to damages for the breach of the contract, although such claims arise by reason of breaches after notice of the assignment. *Government of Newfoundland* v. *Newfoundland Railway Co.* (Judicial Committee of Privy Council, 7 Feb., 1888), 13 App. Cas. 199, 57 L. J. P. C. 35.

AMERICAN NOTES.

The principal case is cited by Mr. Pomeroy (3 Eq. Jur. § 1198), and also by the Court in *Ackerman* v. *Hunsicker*, 85 New York, 43; 39 Am. Rep. 621, with special reference to the doctrine that actual notice of the assignment is es-

sential to terminate the lien for future advances. (It seems however that under the American Recording Acts, by the preponderance of conflicting decisions, the mere record of the assignment is not valid notice to the mortgagee. See authorities above.) Mr. Beach also cites the principal case (1 Eq. Jur. § 423).

ASSIGNS.

HOGG *v.* BROOKS.

(C. A. 1885.)

RULE.

A MORTGAGEE by sub-demise is not an "assign" within the meaning of a proviso for determining a lease by notice delivered to the tenant or his "assigns."

Hogg v. Brooks.

15 Q. B. D. 256, 257.

Ejectment to recover possession of a shop in Regent [256] Street, Marylebone. At the trial before MATHEW, J., without a jury, it appeared that the plaintiff was the assignee of the reversion of a lease of the premises sought to be recovered, which had been granted in March, 1870, by the Royal Polytechnic Institution, Limited, to one Richard Curtis for twenty-one years from the 24th of June, 1870. The lease contained the following proviso; "It shall be lawful for the landlords to put an end to this present demise at the end of the first fourteen years thereof by delivering to the tenant, his executors, administrators, or assigns, six calendar months' notice in writing of their intention to do so." Curtis, the lessee, shortly after he became tenant, mortgaged the demised premises by way of sub-lease to a Mr. Purkis, who took possession and let the premises to the defendant. The plaintiff being desirous to determine the lease of 1870, gave a notice to that effect in a letter sent by the post directed to Curtis at his last known address, but the letter was returned without having ever reached Curtis, who, it was admitted, had disappeared and could not be found. The plaintiff then directed a similar notice to Purkis and the defendant, as well as to Curtis, and served the same on Purkis and the defendant.

The learned judge at the trial held that such notice was not *sufficient to determine the tenancy, as the [* 257] notice, to be within the terms of the lease, could only be served by delivering it to Curtis, and he accordingly directed judgment to be entered for the defendant. The case is reported, 14 Q. B. D. 475.

The plaintiff appealed.

Finlay, Q. C., and Nicoll, for the plaintiff, contended, as at the trial, that Curtis, the lessee, could not by keeping out of the way prevent the plaintiff from determining the tenancy, and that service of the notice upon the occupier of the premises was sufficient. *Blair* v. *Street*, 2 Ad. & El. 329; Bac. Abr. title "Conditions" Q. "of the act of the parties," citing Co. Litt. 210 b, and Com. Dig. title "Condition" L (5).

W. Allen, appeared for the defendant, but was not called on.

Brett, M. R. In this case there was a lease for a certain number of years of the premises sought to be recovered, and which lease would be still continuing if nothing were done to determine it; but by a clause in it the parties have stipulated that if one thing be done the landlord may put an end to it, and in my opinion the Court must construe that clause according to the ordinary meaning of the English language. The parties to the lease have stipulated that the landlord may put an end to the lease if notice in writing to that effect be delivered to the tenant or his assigns, and it is as plain as can be that unless such notice be served by delivering it to the tenant or his assigns, the landlord has not fulfilled the condition on which alone he can put an end to the lease. Here there was no assign of the tenant, because the mortgage was by way of sub-lease, and the only person on whom the notice could be served in order to fulfil the terms of the proviso was the tenant Curtis himself; but on him the notice has not been served. Therefore the plaintiff is not entitled to recover possession of the premises.

Baggallay and Bowen, L.JJ., concurred.

Appeal dismissed.

AMERICAN NOTES.

The principal case is cited in Taylor on Landlord and Tenant, 8th ed., Boston, 1887, p. 65, note, but without any corresponding American doctrine.

ATTACHMENT.

LEVY *v.* LOVELL.

(C. A. 1880.)

RULE.

PROCESS in the nature of foreign attachment, being merely a process to compel appearance, does not create a charge for a debt over the property attached; nor does it constitute the person using it a secured creditor for the purposes of the Bankruptcy Acts.

Levy v. Lovell.

49 L. J. Ch. 305–310 (s. c. 14 Ch. D. 234, 42 L. T. 242, 28 W. R. 602).

[305] This was an appeal from a decision of Vice Chancellor BACON. The case is reported 48 L. J. Ch. 357, 11 Ch. D. 220, where the material facts are sufficiently stated. The VICE CHANCELLOR had held that where creditors had issued a writ of foreign attachment in an action in the Lord Mayor's Court against their debtor, and had served the garnishees with the writ, but took no further step, and the debtor filed a liquidation petition, the creditors were secured creditors within the meaning of the 12th section of the Bankruptcy Act 1869.

The trustee in the liquidation appealed.

Argued by counsel for the trustee: —

A writ of attachment is not a judgment or an execution under a judgment of a Superior Court. It is merely a process to compel appearance. If the defendant appears in the Court, there is an end of the attachment. Brandon on the Law of Foreign Attachment, at p. 104, says, "An attachment is a process merely to compel the appearance of the defendant in an action brought against him; therefore, upon his appearance becoming perfected, according to the custom, the attachment and all the proceedings thereupon become void, and the action becomes an action against the defendant, with

security by bail or otherwise for his appearance." The defendant in the action, by simply appearing or giving bail, or going into custody or paying into Court, can dissolve the attachment, and the money in the hands of the garnishee will belong to him.

No property in the debt passes to the creditor by serving the attachment. In *Richter* v. *Laxton*, 48 L. J. Q. B. 184, 27 W. R. 214, LUSH, J., distinguishes between a foreign attachment, which he says is merely process to compel an appearance, and a garnishee order, which is a process of execution, and he there decided that an attachment was defeated by a garnishee order, properly served, whereas, if the prior attachment was really a security transferring property, it would be superior to a subsequent garnishee order; but the decision was otherwise. It is to be observed that the amount of the bail never exceeds £1000, though the amount of the debt may be £50,000.

Vice Chancellor HALL in *In re The London Cotton Mills Company*, 25 W. R. 109, came, it is true, to a totally different conclusion; but all the cases cited before the VICE CHANCELLOR were cases of *garnishee orders. But in those cases the [*306] property in the debt is absolutely transferred to the judgment creditor from the judgment debtor the moment the garnishee order is served, as was said by JAMES, L. J., in *Ex parte Joselyne*, 8 Ch. D. 327, 47 L. J. Bankr. 91.

But that makes the distinction. The whole process by foreign attachment is personal. *Wetter* v. *Rucker*, 1 Brod. & B. 491, shows that the garnishee when served with an attachment must not pay the judgment creditor unless under pressure of an execution out of the Mayor's Court; a payment before such execution is no discharge to him. That was an action by the original debtor against the garnishee. The garnishee set up a defence of payment under a foreign attachment. The defence was held not good. And under such execution he pays to the Serjeant-at-Mace, who pays into Court. The creditor cannot get the money out of Court without giving security to refund in the event of the original defendant appearing and successfully disputing his debt. That shows that the debt itself is not charged.

The decisions of GROVE, J., in *Barnfather* v. *Barrow*, 37 L. T. 231, and of Lord ROMILLY in *Redhead* v. *Welton*, 29 Beav. 521; 30 L. J. Ch. 577, are in our favour.

The service of the writ is not enough. The creditor must do

something more. The service must be perfected by going on to judgment and execution.

That being so, the creditor cannot be a person who comes within the definition of a secured creditor given by the Bankruptcy Act, he holds no mortgage charge or lien on the bankrupt's estate; he has a security for the appearance of the defendant. It may happen that the proceedings may cause the fund to go specifically into the creditor's hands; but for the purpose of settling the present question, we must not look at what may be in certain cases the practical result.

In the case of *The London Joint Stock Bank* v. *The Mayor of London*, 1 C. P. D. 1; 45 L. J. C. P 213, which decided that a debt due from a corporation cannot be attached by virtue of the custom of London as to foreign attachment; that custom is very fully gone into in the judgment delivered by Lord COLERIDGE, where he says "It follows" [from authorities cited] "that the customary process in the Lord Mayor's Court was exclusively personal, and that the only way of compelling appearance was by proceeding against the person;" and the custom is again set out in the case of *The Mayor of London* v. *Cox*, L. R., 2 E. & Ir. App. 239, at p. 242; 36 L. J. Ex. 225.

"The garnishee may plead an assignment of the debt due to the defendant from him, with notice to him of such assignment, before the attachment or the bankruptcy or insolvency of the defendant, either before or after the attachment." Brandon, p. 102.

Then, as to the second attachment — a debt due from the testator, and an action brought against her as executrix *de son tort* to attach property belonging to her. In such a case there is no custom to attach an executor's property for the debt due from his testator. Brandon, p. 64.

Argued by counsel for the respondents: —

Emanuel v. *Bridger*, L. R., 9 Q. B. 286; 43 L. J. Q. B. 96, is an authority that an attachment under the Common Law Procedure Act 1854, being a seizure by way of execution for a debt due from a particular person named in the garnishee order, gives a security on the property of the judgment debtor.

In the case of *Ex parte Williams*; *in re Davies* L. R., 7 Ch. 314; 41 L. J. Bankr. 38, it was decided that a writ of *fi. fa.* placed in the sheriff's hands did not give a security, because it was not issued against any specific property. Here the specific debt is attached.

* In the case of *Ex parte Tate ; in re Keyworth*, 43 L. J. [*307] Bankr. 55 ; *sub nom. Ex parte Banner*, L. R., 9 Ch. 379, defendants in an action obtained leave to appear upon paying a sum of money into court to abide the result, and a compulsory order was made that matters in dispute in the action should be referred to arbitration. Before the award was made, the defendants became bankrupt, and it was held that the plaintiffs in the action were secured creditors on the sum paid into Court, the order for reference giving them a sufficient security.

So, too, the case of *Ex parte Bouchard ; in re Moojen*, 48 L. J. Bankr. 105 ; 12 Ch. D. 26.

[James, L. J. In that case the money was actually there in Court to abide the result of the action, and to be the creditor's if he established his title.]

We have a similar kind of security here, — the chance of the defendant not appearing and giving bail that he will render himself for execution.

The case of *Verrall* v. *Robinson*, 2 Cr. M. & R. 495, is an authority that immediately an attachment is made, the property attached becomes *in custodia legis*. That shows that the attachment would prevent the garnishee paying to his original creditor. Here the debt was *in custodia legis*, and must have come to us because the garnishee did not contest the debt.

In the case before Vice Chancellor Hall, it is true judgment was obtained against the garnishee ; but that makes no difference. In Brandon, p. 99, it is said that the garnishee's duty is " to take care of any prior attachments on the same property in his hands, because each attachment becomes a lien on the property, according to the priority of service."

Redhead v. *Welton* was a case of administration only.

They also referred to *Shand* v. *Du Buisson*, L. R., 18 Eq. 283 ; 43 L. J. Ch. 508 ; *Waine* v. *Wilkins*, 43 L. J. Q. B. 95 ; *sub nom. In re Wilkins*, L. R., 8 Q. B. 107.

Argued in reply,—

In *Shand* v. *Du Buisson*, where the parties brought up the case to Chancery, they allowed the fund to come up as well ; the Court having the fund under its control handed it over to the party whom it considered entitled. See *M'Henry* v. *Davies*, L. R., 6 Eq. 462, where they did not bring up the fund, and there the Court held that it had no jurisdiction over the fund.

The whole case is, whether the creditor had a security on the property. This is not a security capable of being realized.

The case of *In re Wilkins* really concludes the question; it shows that the whole process is mesne process, merely to compel appearance.

JAMES, L. J. I am of opinion that our decision must be in favour of the appellant. There are no doubt authorities in favour of both sides.

For the appellant there is the decision of Mr. Justice LUSH and the late MASTER OF THE ROLLS; while on the other side is the decision of Vice Chancellor HALL. What then is the process of foreign attachment? In its substance, origin and intention, it is a process to compel appearance. The Mayor's Court not having jurisdiction over foreigners, its object was to compel the foreigner to come in and plead by attaching goods belonging to him or debts due to him within the city of London. The object was to compel the foreigner to come in and plead, — if he came in and surrendered himself in person or remained to be taken in execution at the end of the action, the whole process by attachment failed. It was a mere mode to compel him to remain within the jurisdiction during the action and until the end of it. True it is that in cer-
[* 308] tain events and cases the process * would ultimately give to the plaintiff in the Lord Mayor's Court execution for the amount of the debt which he recovered to the extent of and out of the moneys due to his debtor from the garnishee. That would be frequently the result of the proceedings. If the defendant failed to appear he was considered as having admitted that the debt claimed was due to the extent of the moneys in the hands of the garnishee, and then process was had against that part of the property in the hands of the garnishee, but only in that event, and only in case nothing was done in the meantime. If the defendant did appear, whatever his motives for appearance, the process was at an end; the plaintiff had no more claim on the moneys attached. But in order to entitle the plaintiff to execution against that part of the debtor's property — either for want of appearance, or as the result of final judgment — the jury would have to find that the money was not only at the time of the attachment, but at the time of the finding still is due to the debtor from the garnishee; of course the money would still be legally due if the garnishee had made a payment which he could not rightly set off. So if, after

the attachment, he had made a voluntary payment to the defendant that possibly might not affect the plaintiff's rights. But, however that might be, it seems impossible to apply that principle to a case where before any execution against the garnishee, before the jury could find a verdict, the money by operation of law had ceased to be due to the debtor, and had been transferred from the debtor to another person whose duty it was to hold for all the creditors. In this case after the defendant's bankruptcy the money had ceased to be due to the debtor, not by any collusion between him and the garnishee, but by operation of law. The jury in this case could not honestly find that the money was still due from the garnishee to the debtor, and it would therefore be impossible that it could be applied in payment of the debt found due to the plaintiff in that action. On that ground alone it is impossible that under the circumstances of the case, after the bankruptcy of the debtor, his property could be applied to the satisfaction of the plaintiff's debt, and consequently the plaintiff had no charge on any property of the defendant.

BRETT, L. J. The respondents cannot be secured creditors unless the mere service of a writ of attachment out of the Lord Mayor's Court gives in favour of the party who issues and serves it a charge within the meaning of the 12th section of the Bankruptcy Act.

Many points have been necessarily raised in the course of the argument, about which it is not necessary to give an opinion. The argument on behalf of the respondents has been this, that from the moment the attachment is served on the garnishee under the process of foreign attachment, assuming the thing attached to be a debt, the garnishee could not voluntarily pay to the defendant in the Lord Mayor's Court, to whom he was indebted, and that from that moment the defendant could not enforce payment from the garnishee to him by any proceeding. Then it was said that by the defendant appearing in Court, true it was that the attachment would be taken off, but the plaintiff would obtain an equivalent, that is, the defendant must surrender himself, or pay money into court, or must give bail, the condition whereof was that he would be surrendered after judgment, and therefore he would be imprisoned, which would amount to satisfaction of the debt, or that if he did not so surrender, his bail would be bound to pay the debt. Therefore it was said that although the particular debt in the hands of the garnishee would be released, the plaintiff in the

Lord Mayor's Court would by reason of the original attachment have obtained an equivalent security. But a due appreciation of the process in the Mayor's Court, at which one can only arrive after considerable discussion, shows that that argument cannot prevail, and the cases on the point are *In re Wilkins,* and *Smidt* v. *Ogle,* 6 Taunt. 73, 16 R. R. 575. Having considered those cases we find that the argument on behalf of the respondents is not correct, that on service of the attachment the garnishee cannot [* 309] voluntarily pay the * debt to the defendant in the Mayor's Court. *Smidt* v. *Ogle* shows that the defendant in the Mayor's Court could, notwithstanding an attachment, continue a process by which he could insist on the garnishee paying him the debt, because the judgment in that case was that the existence of an attachment could not be pleaded in an action against the garnishee in a Superior Court, and that case shows that a Superior Court would not have stayed the action because of the attachment. It is obvious that the defendant in the Mayor's Court would succeed in his action in the Superior Court, and obtain judgment and execution against the garnishee.

The case of *In re Wilkins* shows that the argument which said that the plaintiff in the Mayor's Court would obtain either payment from the garnishee to the extent of the debt which he owed to the defendant, or would obtain payment by the bail, or satisfaction for the debt, by being able to keep the defendant in the Mayor's Court in prison until he paid, was not a true argument, — because that case shows that if the defendant in the Mayor's Court surrendered himself before judgment the attachment is dissolved as against the garnishee, but that the defendant having delivered himself could be kept in custody only till judgment; and equally that if the defendant appeared in the Mayor's Court without rendering himself, and gave special bail, the moment judgment was given, if the defendant was present the bail was released without paying the debt, and if he did appear and did surrender himself into Court, then the moment after judgment was given the defendant was released without paying the debt. This is by reason of the statute which has done away with imprisonment for debt after judgment. Therefore it is not true to say that in spite of the appearance before judgment and after judgment the plaintiff could obtain payment by bail, or satisfaction by the imprisonment of his debtor.

It follows, therefore, from that view of the process, as shown by these two cases, that the expressions used are correct, which say that the foreign attachment is after all only a means of enforcing appearance in the Mayor's Court — only a mesne process — more like a *distringas* to compel appearance than anything else. True that by this process in one state of circumstances the plaintiff in the Mayor's Court will obtain payment of his debt by means of the debt due from the garnishee to his debtor, — that is, if the plaintiff should serve the garnishee with the attachment the defendant should not appear at all, and if the garnishee should not dispute that the debt was due from him to the defendant. In that state of circumstances the plaintiff would obtain payment. That raises the question, therefore, which is now to be decided, Can a process by a plaintiff, which has effect on property and a debt only for a particular purpose, namely, to compel appearance, and which would only take effect on the property in favour of the plaintiff, so as to obtain the realization of the debt due to the plaintiff out of that property or debt in one particular state of circumstances, be called a charge on property within the meaning of sections 12 and 16 of the Bankruptcy Act? In my opinion it cannot be so called; a process can only be called a charge on property within the 12th section if it be a charge which is enforceable in all circumstances. It seems to me, therefore, sufficient to say that this cannot be called, within this rule, a charge within the meaning of the Bankruptcy Act, and we must give judgment for the appellant in accordance with the decision of Mr. Justice Lush, Lord Romilly and Mr. Justice Grove, differing from the decision of Vice Chancellor Hall.

Cotton, L. J. The question we have to consider is whether or no a creditor who has served an attachment on a garnishee has a security on the property of the debtor under the Bankruptcy Act. Is this a security within the meaning of the Act? That turns on the construction of section 12 and section 16, sub-section 5. A secured creditor is one who holds any mortgage, charge or lien upon the bankrupt's estate as security for a debt due to him. So then it must be a security on the property and for a debt, and under section 12, so constituted at the time of *the [*310] bankruptcy, that all that the creditor has to do is take proceedings to realise it. Now the origin of foreign attachment is not in favour of its being such a security. It was a process whereby

if a foreigner owed a citizen a debt any property of his within the city was attached in consequence of his non-appearance. This foreign attachment could be got rid of either by render of the defendant within the Lord Mayor's Court or by giving of bail either for his appearance at the end of the trial or for payment of the debt. This cannot be considered as a security on any part of the property of the bankrupt for payment of the debt due from him — it is a security for his appearance and submission to the jurisdiction; and although under certain circumstances execution might go against the property attached, it is not a security realizable under the 12th section. There is no doubt that there can be a security subject to a certain contingency, but it is not one within the Act if it is only to arise in default of appearance of the debtor.

Then it has been said that it is a security by reason of the advantage given to the creditor of putting the defendant in prison up till final judgment; but that is no security on his property although it may be on his person.

Verrall v. *Robinson* has been cited as showing that immediately after an attachment made, the property attached becomes *in custodia legis*, but it really decided only this, that the attachment showed a reasonable cause why the defendant should refuse to deliver up the property attached at the demand of the person who had deposited the property with him, and that such refusal to deliver did not amount to a conversion of the property. It was very much like a *distringas* upon stock in the Bank of England, which is notice to the Bank, and that is a sufficient justification to the Bank for refusing to pay or transfer that stock for a certain time. The *distringas* gives no security to the person who issues it, but only gives him time to enable him to take steps. Then there was another case cited, where money was paid into Court to abide the result of the action, and on the subsequent bankruptcy of the person paying it in, it was held that the plaintiff who succeeded in the action was a secured creditor, but there the fund was paid in to be applied in payment of the debt if the plaintiff proved the debt. There payment was only contingent on that.

There is a distinction between the foreign attachment and a garnishee order. Under the Common Law Procedure Act a garnishee order when served conclusively binds the debt as between

the original plaintiff and the defendant, and makes the plaintiff a secured creditor, and is, in fact, execution after final judgment.

Foreign attachment is no security within the Bankruptcy Act, and therefore the creditor who has served the order is not a secured creditor, and the appeal must be allowed.

ENGLISH NOTES.

The principal case was followed by the Court of Appeal in the case of *Ex parte Sear; In re Price* (1881), 17 Ch. D. 74, 51 L. J. Ch. 448, where the question arose under an attachment in the Tolzey Court of Bristol, which the Court held to be, like the foreign attachment under the custom of London, merely a process to compel the appearance of the defendant.

The process used in Scotland under the name of arrestment *jurisdictionis fundandae causâ* is similar in its nature to the foreign attachment under the custom of London. It creates (according to the general opinion of text-writers) no *nexus* or charge over the property so as to defeat any competing title. It seems, however, that there is no direct and express decision on this point, though it is much discussed, and the leaning of the Judges appears to be against any such effect of the arrestment in the case of *Malone* (28 May, 1884), 4th Series Court of Session Cases, Vol. II. p. 853. The question there, however, was whether the person in whose hands the arrestment had been used was bound unconditionally to deliver up the goods to the owners. And it was held that he was not.

The principal case is referred to in the discussion of the case of *In re Hoare, ex parte Nelson* (C. A. 4 March, 1880), 14 Ch. D. 41, 49 L. J. Bankr. 44, where the Court held that the issue, and service upon a debtor to the judgment debtor, of a writ of sequestration did not create a charge in favour of the creditor so as to make him a secured creditor within the Bankruptcy Act 1869.

AMERICAN NOTES.

This doctrine is supported by *Fisher* v. *Vose*, 3 Robinson (Louisiana), 457; 38 Am. Dec. 243, which is founded on a decision by Judge Story, in the United States Circuit Court (*Ex parte Foster*, 2 Story, 131), quoted therein, in which he says: "An attachment on mesne process does not come up to the exact definition or meaning of a lien, either in the general sense of the common law or in that of the maritime law, or in that of equity jurisprudence At most it is no more than a conditional security to satisfy the judgment of the creditor if he ever obtains one. A foreign attachment, like a common attachment on mesne process, is a remedy directly given and regulated by law to enable a creditor to obtain satisfaction of his debt, and like every

other remedy, is liable to be defeated by any other act that bars or takes away the remedy or right to judgment under it." And it was held that under the Bankrupt Act of 1841, the lien of foreign attachment was overreached by a decree in bankruptcy upon petition filed before judgment, although the attachment suit was instituted before such petition was filed.

But it was held in *Peck* v. *Jenness*, 16 New Hampshire, 516; 43 Am. Dec. 573, affirmed in 7 Howard (U. S. Supreme Ct.), 612, that the lien of a prior domestic attachment was valid as against a decree of discharge under the Bankrupt Act of 1841. And the same was held under the Bankrupt Act of 1867, in *Stoddard* v. *Locke*, 43 Vermont, 574; 5 Am. Rep. 308. Mr. Kneeland (Attachment, § 435) says that in every case in this country, except those above cited from Story and Louisiana, "the lien of the attachment was sustained." Citing *Downer* v. *Brackett*, 21 Vermont, 599; *Franklin Bank* v. *Bachelder*, 23 Maine, 60; *Davenport* v. *Tilton*, 10 Metcalf (Mass.), 320; *Vreeland* v. *Brown*, 1 Zabriskie (New Jersey), 214; *Wells* v. *Brander*, 10 Smedes & Marshall (Mississippi), 348; *Ingraham* v. *Phillips*, 1 Day (Connecticut), 117. He concludes: "We are therefore justified in considering it settled that an attachment is not dissolved by the bankruptcy of the defendant." See also *Ray* v. *Wight*, 119 Massachusetts, 426; 20 Am. Rep. 333.

All the American cases however proceed on a consideration of the language of the Bankrupt Acts, which provides that "liens" shall be preserved, and they do not consider the precise reason assigned in the principal case.

No. 1. — Stanley v. Grundy, 22 Ch. D. 478. — Rule.

ATTORNMENT.

Note — The following are selected under this title as cases which do not properly belong to the subject of "Landlord and Tenant."

No. 1. — STANLEY *v.* GRUNDY.

(CH. 1883.)

RULE

An attornment clause in a mortgage deed, under which possession has not actually been taken, does not fix the mortgagee with the liability to account on the footing of a mortgagee in possession.

Stanley v. Grundy.

22 Ch. D. 478–480 (s. c. 52 L. J. Ch. 248, 48 L. T. 606, 31 W. R. 315).

Foreclosure action against second mortgagee and mort- [478] gagor.

By an indenture of the 30th of August, 1881, a mortgage for £1600, which by indenture of the 13th of October, 1869, had been transferred by one Kidd to Kershaw, was transferred to the plaintiff by Kershaw. Kidd's title was derived from an indenture of the 11th of December, 1866, by which certain mortgages for sums amounting to £1600 were transferred to Kidd, and a fresh equity of redemption was reserved.

The deed of the 13th of October, 1869, contained the following attornment clause: that Edward Corbett (the mortgagor) "doth hereby attorn and become tenant from year to year to the said John Kershaw, his heirs and assigns, for and in respect of all and singular the hereditaments and premises hereby granted and now occupied by him, the said Edward Corbett, at the yearly rent of £80, clear of all deductions," to be paid by equal half-yearly payments on the 13th of April and the 13th of October, the first half-yearly payment thereof to be made on the 13th of April

next," with a proviso that "it shall be lawful for the said John Kershaw, his heirs and assigns, at any time, without giving previous notice of his or their intention so to do, to enter upon and take possession of the said hereditaments and premises whereof the said Edward Corbett hath attorned tenant as aforesaid, and to determine the tenancy created by the aforesaid attornment."

The plaintiffs by their action against Grundy, a subse-
[*479] quent *incumbrancer, and Corbett, the mortgagor, claimed the usual account and payment, and in default of payment a foreclosure.

The defendant Grundy, who claimed to be mortgagee from Corbett subsequent to Kidd, submitted by his statement of defence that by virtue of the attornment clause contained in the deed of October, 1869, the accounts as against him were to be taken upon the footing of the plaintiffs and their predecessors in title having been mortgagees in possession and as such chargeable with the rent of £80 reserved by the attornment clause.

Millar, Q. C., and Alfred Bailey, for the plaintiffs: —

No doubt there are *dicta* to be found in bankruptcy cases that the effect of an attornment clause is to make the mortgagee liable to a subsequent incumbrancer, in respect of the rent thereby reserved, for wilful default as a mortgagee in possession: see *In re Stockton Iron Furnace Company*, 10 Ch. D. 335, 48 L. J. Ch. 417; *Ex parte Jackson, In re Bowes*, 14 Ch. D. 725; *Ex parte Punnett In re Kitchin*, 16 Ch. D 226, 50 L. J. Ch. 212; *Ex parte Harrison In re Betts*, 18 Ch. D. 127, 50 L. J. Ch. 832; but no case can be found in which as between first mortgagee and second mortgagee, and *à fortiori* as between first mortgagee and mortgagor, an attornment clause has been held to place such first mortgagee in the position of mortgagee in possession, and liable to account on that footing. This view is supported by the opinion of the text-writers, and your Lordship's remarks in *Ex parte Jackson, In re Bowes*, 14 Ch. D. 729.

Ingle Joyce, for Grundy, the second mortgagee, relied on the *dicta* which had been referred to.

The mortgagor did not appear.

Bacon, V. C., said that he would not be the first Judge to decide that a mortgagee whose mortgage deed contained an attornment clause was thereby placed in the position of mortgagee in possession, and liable to account on that footing. On the con-

trary, he was of opinion that the attornment clause was merely an additional security for the mortgagee, as much for the payment of principal as for the payment of interest. A mortgagee was not obliged to *avail himself of this clause, and [*480] there was no pretence for saying that because the mortgage deed contained an attornment clause, under which possession had not been taken, the mortgagee was thereby fixed with all the liabilities of mortgagee in possession. The expressions referred to were merely *dicta*, and were not really in point; and the habit of referring to *dicta* without regard to the facts of the case was most inconclusive. There would be the ordinary foreclosure decree with liberty to the defendant, the second mortgagee, to apply in Chambers for a sale.

ENGLISH NOTES.

In the case of the *Stockton Iron Furnace Co.* (C. A. 1878), 10 Ch. D. 335, 48 L. J. Ch. 417, referred to in the argument of the above case, the mortgagees had actually distrained under their attornment clause. The principal question was whether the attornment clause created a *bonâ fide* relation of landlord and tenant which could avail against the creditors in liquidation; and the Court held that, the rent reserved in the clause being no more than a fair rent, there was such a relation. There are in this case *dicta* by JAMES, L. J., and (though less distinctly) by BRAMWELL, L. J., to the effect that by reason of the attornment clause the mortgagees were mortgagees in possession for all purposes of taking the account of what was due on the mortgage.

That an attornment clause may be good so as to create the power of distress, so far as the rent reserved is a fair rent, is supported by the following cases (besides *The Stockton Iron Furnace Co., supra*): *Morton* v. *Woods* (Ex. Ch. 1869), 9 B. & S. 650, L. R., 4 Q. B. 293, 38 L. J. Q. B. 81; *Ex parte Punnett, In re Kitchin* (C. A. 1880), 16 Ch. D. 226, 50 L. J. Ch. 212; *Ex parte Harrison, In re Betts* (C. A. 1881), 18 Ch. D. 127, 50 L. J. Ch. 832; *Kearsley* v. *Phillips* (C. A. 1883), 11 Q. B. D. 621, 52 L. J. Q. B. 581.

But an attornment clause in a mortgage, which the Court conceives to be a mere device to enable the mortgagee upon bankruptcy to make a distress upon chattels for a sham rent, is void as a fraud upon the Bankruptcy law. *Ex parte Williams, In re Thompson* (C. A. 1877), 7 Ch. D. 138, 47 L. J. Bankr. 26; *Ex parte Jackson, In re Bowes* (C. A. 1880), 14 Ch. D. 725.

Any such instrument of attornment executed after the 1st of Janu-

ary, 1879, must, under the Bills of Sale Act 1878, in order to be good against creditors, be registered as a Bill of Sale. This is subject to the proviso that the section shall not extend to a mortgage of an interest in land, which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair rent. It has been decided that in order to bring a case within the proviso, the mortgagee must first have taken possession and then demised to the mortgagor. *In re Willis, Ex parte Kennedy* (C. A. 23 June, 1888), 21 Q. B. D. 384, 57 L. J. Q. B. 634; *Green* v. *Marsh* (C. A. 9th April, 1892), 1892, 2 Q. B. 330, 61 L. J. Q. B. 442.

AMERICAN NOTES.

A mortgagee in possession must account for the rents and profits. *Matthews* v. *Memphis, &c. Co.*, 108 U. S. 368. But his right to the rents and profits arises only after he has taken actual possession. *Wood* v. *Whelen*, 93 Illinois, 153; *Toomer* v. *Randolph*, 60 Alabama, 356; *Greer* v. *Turner*, 36 Arkansas, 17; *Harrison* v. *Wyse*, 24 Connecticut, 1; *Reitenbaugh* v. *Ludwick*, 31 Penn. St. 131; *Anthony* v. *Rogers*, 20 Missouri, 281; *Dawson* v. *Drake*, 30 New Jersey Equity, 601; *Tharp* v. *Feltz*, 6 B. Monroe (Kentucky), 6. So long as the mortgagee refrains from taking possession, he has no right to the rents and profits received by the mortgagor or any one under him, and although there has been a breach of the condition, the owner of the equity of redemption cannot be called upon to account. *Butler* v. *Page*, 7 Metcalf (Mass.), 42.

Under the American system generally the mortgagee cannot enter into possession until after default and foreclosure and purchase by himself, the mortgage being regarded as a mere security. Consequently the precise doctrine of the principal case will not be found here.

"It may therefore be considered as now settled in England that a mortgagee of leasehold premises is liable to an action on the covenants in the lease, although he has never been in possession of the estate, or received any benefit therefrom. But I apprehend that such a principle cannot be sustained here." *Astor* v. *Miller*, 2 Paige Chancery (New York), 68; 2 Lawy. Co.-Op. ed. 816.

No. 2. — BIDDLE *v.* BOND.

(Q. B. 1865.)

RULE.

WHERE a bailee of goods *attorns* to a purchaser A. by acknowledging his title, — thereby impliedly representing that his vendor, B., was entitled, — with the intention that A. should upon such attornment pay for the goods

No. 2. — Biddle v. Bond, 34 L. J. Q. B. 137.

or otherwise alter his position, and A. does alter his position accordingly; the bailee is estopped, or conclusively barred, from denying A.'s title.

But in the ordinary case of bailor and bailee, it is the bailor who represents that he is the owner; and although in such a case the attornment, or admission of the bailee, is *primâ facie* evidence against the latter of the bailor's title, the fact that the goods are claimed by the rightful owner under a threat of action, is sufficient to admit of a defence by the bailee against his bailor's claim, provided he defends upon the right and title, and by the authority, of the true owner.

Such a case is analogous to a case between landlord and tenant, where by reason of the eviction of the tenant on a title paramount he is no longer precluded from denying the title of his landlord.

Biddle v. Bond.

34 L. J. Q. B. 137–140 (s. c. 6 B. & S. 225, 12 L. T. 178, 13 W. R. 561).

The declaration alleged that in consideration that the [137] plaintiff would employ the defendant as his agent to sell and dispose of certain goods for the plaintiff for reward to the defendant, the defendant promised to sell the same, and on request to render an account of the sale of the said goods, and to pay over the moneys to the plaintiff. That the plaintiff did employ the defendant, and that all things were performed, &c. Breach, that the defendant did not render an account or pay over the moneys arising from the sale to the plaintiff. There were also counts for money had and received, and on an account stated.

Pleas to the first count, first, that the defendant did not promise as alleged; secondly, that the plaintiff did not employ the defendant as his agent, nor did the defendant receive the goods for the purpose and on the terms alleged; thirdly, to the residue of the declaration, never indebted.

At the trial, before Willes, J., at the Surrey Summer Assizes, 1864, it appeared that the plaintiff had seized the goods of one Robbins under a distress for rent of a house alleged to have been

demised by the plaintiff to Robbins, and had delivered them to the defendant, an auctioneer, to sell by auction. When the sale was about to begin Robbins served a notice on the defendant that the distress was void, as the relation of landlord and tenant did not exist between the plaintiff and himself, and there was no rent in arrear. By the notice he required Robbins not to sell the goods, or if he had sold them, to retain the proceeds for him. The defendant sold the goods, but refused to pay the proceeds over to the plaintiff, and relied on the right of Robbins. The relation of the plaintiff and Robbins was that of vendor and vendee only.

It was contended, for the plaintiff, that the defendant being a bailee could not be allowed to set up the *jus tertii* against his bailor, from whom he received the goods, and a verdict was entered for the plaintiff for £44 12*s.* 6*d.*, with leave to the defendant to move to enter the verdict for him.

A rule having been obtained,

Thrupp (Jan. 23) showed cause. — This action is maintainable, and the verdict is right. An agent can only set up the *jus tertii* in a case of fraud, and there was no fraud in the present case. The defendant was employed by the plaintiff to sell the goods, and having done so, he has no right to say now that they were the goods of Robbins, and therefore that he refused to pay over the proceeds of the sale

[*138] [Blackburn, J. I cannot see why *Robbins could not proceed against the defendant for taking and converting his goods, if he had refused to let Robbins have them or the proceeds of the sale.]

It is not clear that such an action would be maintainable by Robbins.

[Blackburn, J. The defendant would have sold the goods without any right to do so, and it would be no answer to say that he had been authorized by the plaintiff to sell them.]

But he cannot set up the *jus tertii* unless there has been some kind of fraud. In *Hardman* v. *Willcock*, reported in a note to *White* v. *Bartlett*, 9 Bing. 382, Alderson, J., in delivering the judgment of the Court, said, "There are many authorities which were cited for the plaintiff, which establish, no doubt, that an agent must account to his principal, and cannot set up the *jus tertii* in an action by his principal against him. The case of

Nickolson v. *Knowles*, 5 Madd. 47, is a distinct authority, showing that an agent to receive for the use of another, cannot by notice from a third person be converted into an implied trustee; and that his possession is the possession of his principal. The same principle, which depends on the relation of the parties as agent and principal, was laid down by the Court of King's Bench in *Dixon* v. *Hamond*, 2 B. & Ald. 310; by the Court of Common Pleas in *Gosling* v. *Birnie*, 7 Bing. 339; and by the Court of Exchequer in *Roberts* v. *Ogilby*, 9 Price, 269. But we think that all these cases are distinguishable from the present, upon the ground that here the jury have found that the plaintiff's possession of the goods arose out of a fraud concerted between him and the insolvent." The doctrine thus laid down has never been contravened. There is a recent case of *Sheridan* v. *The New Quay Company*, 4 C. B. N. S. 618; 28 L. J. C. P. 58, in which the defendants were allowed to set up the *jus tertii*, but it was expressly upon the ground that they were common carriers, and as such bound to receive the goods. So also in *Cheesman* v. *Exall*, 6 Ex. 341; 20 L. J. Ex. 209, the defendant was held to be entitled to set up the *jus tertii*, but POLLOCK, C. B., distinguished the case from the ordinary class of cases upon the subject, in this respect, that the plaintiff had pledged the property to the defendant fraudulently and to avoid an execution.

[BLACKBURN, J., referred to *Load* v. *Green*, 15 M. & W. 216; 15 L. J. Ex. 113, and *White* v. *Garden*, 10 C. B. 919; 20 L. J. C. P. 166, as showing that a contract for the sale of goods obtained by fraud on the part of the purchaser is voidable only at the election of the vendor, and not void.]

There is also a class of cases in which it is laid down that an agent cannot dispute the title of his principal, following the rule that a tenant cannot dispute the title of his landlord. In *Wilton* v. *Dunn*, 17 Q. B. 294; 21 L. J. Q. B. 60, which was an action for use and occupation, the defendant pleaded that the occupation was by leave of the plaintiff, who was mortgagor in possession; that the mortgagee who was entitled to the possession during the whole period of occupation, gave notice to the defendant claiming mesne profits; that the defendant until such notice was ready and willing to pay the plaintiff, and that from the time of such notice he was liable to pay the mortgagee. It was decided that the plea was bad, Lord CAMPBELL, C. J., saying, "The plea is new, and I am of

opinion that this ingenious experiment should not be sanctioned. It calls on us as a Court of law to do that which we have no power to do. We cannot protect this defendant from the threat of the mortgagee. Had the tenant under compulsion of that threat actually paid the mortgagee what was due, it might have been a defence." He also referred to *Hickman* v. *Machin*, 28 L. J. Ex. 310; 4 H. & N. 716.

Parry, Serj., and Howard, in support of the rule. — The defendant is not liable in this action; the goods belong to Robbins, who has a right to proceed against the defendant if he does not pay over the proceeds of the sale to him. He could maintain an action of trover, or he might waive the tort and bring an action for money had and received. In truth, the money is in
[* 139] the * hands of the defendant for Robbins, and is held for him, — see *Adamson* v. *Jarvis*, 4 Bing. 66, *Farebrother* v. *Ansley*, 1 Camp. 343, *Rodgers* v. *Maw*, 15 M. & W. 444, 16 L. J. Ex. 137, and *Neate* v. *Harding*, 6 Ex. 349; 20 L. J. Ex. 250. In *Story on Agency*, s. 217, the author when speaking of the rule that an agent is not in general allowed to set up the adverse title of a third person against that of his principal, says, "an exception, however, is allowed where the principal has obtained the goods fraudulently or tortiously from such third person," and he cites *Hardman* v. *Willcock*, which is on all-fours with the present case. The fraud which was set up only showed that the plaintiff had no title. They also referred to *Betteley* v. *Reed*, 4 Q. B. 511; 12 L. J. Q. B. 172.

Cur. adv. vult.

Blackburn, J., delivered the judgment of the Court. — In this case, which was tried before my Brother Willes, the verdict was directed to be entered for the plaintiff for £44 12*s.* 6*d.*, with leave to move to enter the verdict for the defendant, this Court to have power to amend the pleadings in any manner, and to draw inferences of fact. My Brother Parry obtained a rule *nisi* accordingly, which was argued before my Lord, my Brother Mellor and myself in last term, when the Court took time to consider their judgment. From the Judge's notes it appears that goods which belonged to one Robbins were seized by the plaintiff under a distress for rent of a house alleged to have been demised by the plaintiff to Robbins; these goods had been removed by the plaintiff, and delivered by him to the defendant to sell as his (the plaintiff's) auctioneer,

and the defendant proceeded to sell them in the ordinary way. When the sale was about to begin, Robbins served a notice on the defendant that the distress was void, as the relation of landlord and tenant did not exist between him and the plaintiff, and there was no rent in arrear; and by the notice Robbins required the defendant not to sell the goods, or if he had sold them, to retain the proceeds for him, Robbins. The defendant proceeded to sell the goods, but we think that the inference from the evidence is that he did this only because the notice was served so late that he had not time to make any inquiries before the sale came on. He received the proceeds of the sale, but refused to pay them over to the plaintiff. He did not pay the proceeds to Robbins, but from the evidence of Robbins, who was called as a witness at the trial, we draw the inference of fact that the defendant withheld the proceeds from the plaintiff and defended this action, relying on the right and by the authority of Robbins, and not hostilely to him. It appeared on the trial that the relation between the plaintiff and Robbins was not that of landlord and tenant, but of vendor and vendee, and consequently that the distress was altogether void and tortious. The question, therefore, comes to be whether under such circumstances the defendant can set up the *jus tertii* or not. And we are of opinion that he can do so; and, consequently, that the rule to enter the verdict for the defendant must be made absolute. We do not question the general rule, that one who has received property from another as his bailee or agent or servant, must restore or account for that property to him from whom he received it; and we agree with what is said by my Brother MARTIN in *Cheesman* v. *Exall*, that "there are numerous cases in connexion with wharves and docks, in which, if the party intrusted with the possession of property were not estopped from denying the title of the person from whom he received it, it would be difficult to transact commercial business." But the bailee has no better title than the bailor; and, consequently, if a person entitled as against the bailor to the property claims it, the bailee has no defence against him. *Wilson* v. *Anderton*, 1 B. & Ad. 450. Such was the position of the defendant in the present case. If Robbins had chosen to sue him in trover, or, waiving the tort, had sued for money had and received, the defendant would have had no defence. He was therefore compelled to yield to Robbins's claim; and it would certainly be a hardship on him if, without

any fault of his own, the law left him without any defence against the plaintiff for so yielding. We do not, however, think that such is the law. Several cases were cited on the argument at the bar, and more might have been cited, such as *Stonard* v. *Dunkin*, [* 140] 2 Camp. 344, 11 R. R. 724, *Gosling* v. *Birnie*, * and *Hawes* v. *Watson*, 2 B. & C. 540, in which a bailee, who, by attorning to a purchaser of the goods, has, in effect, represented to him that the property had passed to him (though such was not the fact), and has thereby induced him to alter his position and pay the price to his vendor, has been held estopped from denying the property of the person to whom he has thus attorned, by setting up a title in a third person inconsistent with the representation on which he had induced the plaintiff to act. We in no way question that those cases were rightly decided. But in all these cases the estoppel proceeded on the representation, which was analogous to a warranty of title for good consideration to the purchaser. Now, in the ordinary class of bailments, such as the present, the representation is by the bailor to the bailee that he may safely accept the bailment; and so far as any weight is to be given to the representation, it makes against the estoppel. This is pointed out by PARKE, B., in *Cheesman* v. *Exall*, in the case of a pledge; and is indicated as one of the grounds on which the judgment of the Court of Common Pleas proceeded in *Sheridan* v. *The New Quay Company*, which was the case of a carrier. The position of an ordinary bailee, where there has been no special contract or misrepresentation on his part, is very analogous to that of a tenant who, having accepted the possession of land from another, is estopped from denying his landlord's title, but whose estoppel ceases when he is evicted by title paramount. This was decided as early as the 44 Eliz., in *Shelbury* v. *Scotsford*, 1 Yelv. 22. There the plaintiff sued in assumpsit against the bailee of a horse for the breach of his contract to re-deliver it. The defendant pleaded that J. S., the true owner of the horse, took it from the defendant. After verdict for the defendant, the plaintiff moved in arrest of judgment; but "by Fenner and Yelverton, *contra*; for the matter alleged by the defendant does in law discharge the promise, by reason of the former property of the horse in J. S.; and then it is, as it were, an eviction of the horse out of the defendant's possession, which discharges the promise, as well as an eviction of the lessee for years discharges all rents, bonds, and covenants in any

sort depending upon the interest." In *Wilson* v. *Anderton*, Littledale, J. (without referring to *Shelbury* v. *Scotsford*, but evidently having it in his mind) states the law to the same effect. And accordingly in *Hardman* v. *Willcock*, in *Cheesman* v. *Exall*, and in *Sheridan* v. *The New Quay Company*, a bailee was permitted, under circumstances similar to the present, to set up the *jus tertii*. It is true that in the first two of these cases the plaintiffs had obtained the goods by a fraud upon the person whose title was set up, whilst in the present case there is nothing in the evidence to show that the plaintiff, though a wrong-doer, did not honestly believe that he had the right to distrain. But we do not think that this circumstance alters the law on the subject. The position of the bailee is precisely the same, whether his bailor was honestly mistaken as to the rights of the third person, or fraudulently acting in derogation of them. We think that the true ground on which a bailee may set up the *jus tertii* is that indicated in *Shelbury* v. *Scotsford*, viz., that the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount. It is not enough that the bailee has become aware of the title of a third person. We agree in what is said in *Betteley* v. *Reed*, that "to allow a depositary of goods or money, who has acknowledged the title of one person, to set up the title of another who makes no claim or has abandoned all claim,' would enable the depositary to keep for himself that to which he does not pretend to have any title in himself whatsoever." Nor is it enough that an adverse claim is made upon him, so that he may be entitled to relief under an interpleader. We assent to what is said by POLLOCK, C. B., in *Thorne* v. *Tilbury*, 3 H. & N. at p. 537, 27 L. J. Ex. 407, that a bailee can set up the title of another only "if he defends upon the right and title and by the authority of that person." Thus restricted, we think the doctrine is supported both by principle and authority, and will not be found in practice to produce any inconvenient consequences.

Rule absolute.

ENGLISH NOTES.

In *Kingsman* v. *Kingsman* (C. A. 7 Dec. 1880), 6 Q. B. D. 122, 50 L. J. Q. B. 81, there was a difference of opinion in the Court of Appeal whether the rule in *Biddle* v. *Bond* could be applied to the receipt by an agent of rents of leaseholds after marriage of the lady to

whom the leaseholds belonged. The plaintiff was a woman married in New Zealand in 1875. The husband at the time of the marriage was a minor, and had agreed to settle her property including these leaseholds upon her. The husband had deserted the plaintiff and never claimed these rents. The Court held the settlement void by reason of infancy, and therefore that the rents belonged to the husband. Brett, L. J., considered that the agent, as he did not defend upon the right and title and by the authority of the husband, could not defend himself against the claim of the plaintiff to the rents. But the majority (Selborne, L. C., and Baggallay, L. J.,) held that the rule in *Biddle* v. *Bond* did not apply. They considered that the agent having notice of the marriage was in the same position as if there had been an assignment of the property of which he had notice. The ground, apparently, was that the agency on the part of the wife had been determined before the receipt, so that he did not receive the rents as bailee for the wife.

In *Ex parte Davies, In re Sadler* (C. A. 24 Nov. 1881), 19 Ch. D. 86, it was held by the Court of Appeal that, though in certain cases a bailee may set up the *jus tertii*, yet if he accepts the bailment with full knowledge of an adverse claim he cannot afterwards set up the existence of the claim as against his bailor. So that where an auctioneer had sold goods under the instructions of the trustee in bankruptcy of A., having previously received possession of them and undertaken to sell them for a bill of sale holder, B., he cannot set up B.'s title against the claim of the trustee to receive the proceeds of the sale. The case was distinguished from *Biddle* v. *Bond*, on the ground that the agent had elected to accept the bailment of the trustee with full knowledge of the claim of the other; whereas in *Biddle* v. *Bond* there was no such election.

Rogers & Co. v. *Lambert & Co.* (10 Feb. 1890). 24 Q. B. D. 573, 59 L. J. Q. B. 259 (C. A. 6 Dec. 1890), 1891, 1 Q. B. 318, 60 L. J. Q. B. 187, was an action for wrongful detention of certain copper which had been bailed by the plaintiffs to the defendants as warehousemen. The defendants pleaded a denial of the plaintiff's property in the copper, and to establish that defence sought to administer to the plaintiffs an interrogatory — "Whether after the bailment of the copper to the defendants the plaintiffs had not sold it to M. & Co." It appeared that the defendants' object in defending the action was to enable them, on the copper being claimed by M. & Co., to set up a counter-claim against that firm. The Court (Denman, J., and Wills, J.,) held that, as the defendants did not claim to defend upon the right and title of M. & Co., but in order to set up a claim in their own interest, they were, under the rule in *Biddle* v. *Bond*, estopped from disputing their

bailor's title; and therefore that the proposed interrogatories were inadmissible. On the trial of the action before DAY, J., it was admitted that, before the action, the plaintiffs had sold the copper to M. & Co., who had paid them the price, and had indorsed the delivery order to M. & Co.; but it appeared that the delivery orders had not been presented to the defendants, and before action the plaintiffs had given notice to the defendants that they cancelled the indorsements of the delivery orders and required the defendants not to deliver the copper except to themselves. DAY, J., gave judgment for the defendants. On appeal, the Court (Lord ESHER, M. R., LINDLEY, L. J., and LOPES, L. J.,) reversed this judgment. The Court unanimously held the law to be established by the considered judgment of the Court of Queen's Bench in *Biddle* v. *Bond;* and that as the plaintiffs were not defending upon the right and title, or by the authority, of M. & Co., but were admittedly defending for themselves and in their own interest, the defence failed; and judgment was given that, as between the plaintiffs and the defendants, the plaintiffs were entitled to the copper, and the defendants must pay the costs of the action.

But as the plaintiffs consented, in order to avoid further litigation, to allow the proceeds of the copper which had been sold to be brought into Court, this was ordered to be done, and notice was ordered to be given to M. & Co., and all other persons claiming an interest in it. It was observed by LINDLEY, L. J., that the proper course for the defendants, as soon as there were several rival claimants to the copper, would have been to institute interpleader proceedings; and that since the C. L. P. Act 1860 (under s. 12), such proceedings would have been competent, notwithstanding the contract of bailment. For this he cited *Attenborough* v. *The London and St. Katherine's Docks Co.* (C. A. 1878), 3 C. P. D. 450, 47 L. J. C. P, 763, and *Robinson* v. *Jenkins* (C. A. 1890), 24 Q. B. D. 275, 59 L. J. Q. B. 147.

AMERICAN NOTES.

A bailee is not permitted to dispute the title of his bailor, but he may show that the bailor has assigned his title to another since the property was intrusted to him. If legally assigned, and the bailee has notice of the fact, the bailee must account to the assignee. The rule that a bailee should not attorn to a stranger does not apply, for the assignee is not a stranger. *Roberts* v. *Noyes*, 76 Maine, 590; *Marvin* v. *Ellwood*, 11 Paige (New York Chancery), 376.

"It seems to be now well settled that a bailee is estopped from disputing the title of his bailor and setting up the *jus tertii*, unless the bailment has been determined by what is equivalent to an eviction by title paramount: and then he may." Story on Bailment, § 582, 8th edition, note. Citing the principal case and *Gerber* v. *Monie*, 56 Barbour (New York Supreme Ct.), 652.

No. 2. — Biddle v. Bond. — Notes.

So when the goods are taken from a carrier by legal process against a third person, although he is not the true owner. *Stiles* v. *Davis*, 1 Black (U. S. Supreme Ct.), 101; *Wareham Bank* v. *Burt*, 5 Allen (Mass.), 113; *Bliven* v. *Hudson R. R. Co.*, 36 New York, 403. So where a borrowed horse was taken by government cavalry officers. *Watkins* v. *Roberts*, 28 Indiana, 167. Where a bailee is held in trover by the real owner and compelled to pay the value of the goods, that is a valid defence to an action by the bailor. *Cook* v. *Holt*, 48 New York, 275.

Edwards says (Bailment, § 73): "For nothing will excuse a bailee from the duty to restore the property to his bailor except he show that it was taken from him by due process of law, or by a person having the paramount title, or that the title of the bailor has terminated. By surrendering the property on demand to a third party, the bailee assumes the burden of establishing the title he thus acknowledges." Supported by *Bates* v. *Stanton*, 1 Duer (New York Superior Ct.), 79; *Van Winkle* v. *U. S. M. S. Co.*, 37 Barbour (New York Supreme Ct.), 122; *Burton* v. *Wilkinson*, 18 Vermont, 186; *Aubery* v. *Fiske*, 36 New York, 47; *McKay* v. *Draper*, 27 New York, 256; *Sinclair* v. *Murphy*, 14 Michigan, 392; *Osgood* v. *Nichols*, 5 Gray (Mass.), 420 (auctioneer); *Pulliam* v. *Burlingame*, 81 Missouri, 111; *Roberts* v. *Stuyvesant Safe Dep. Co.*, 123 New York, 57. "A bailee cannot avail himself of a third person (though the person be the true owner) for the purpose of keeping the property for himself, nor in any case where he has not yielded to the paramount title." *The Idaho*, 93 United States, 575.

"When property in the custody of a bailee for hire is demanded by third persons, under colour of process, it becomes his duty to ascertain whether the process is such as requires him to surrender the property, and if it is not, then it is his right and duty to refuse, and to offer such resistance to the taking, and adopt such measures for reclaiming it, if taken, as a prudent and intelligent man would, if it had been demanded and taken under a claim of right to the property by another without legal process. . . . We do not think that the mere levy of an execution or attachment upon the property by a creditor of the owner while it is in the possession of the tort-feasor is available as a defence or in mitigation." *Roberts* v. *Stuyvesant, &c. Co.*, *supra*. That was a case where officers with a search-warrant demanded property in the keeping of the defendant, and the latter without demanding to see the warrant, or notifying the plaintiff, who lived near, pointed out the plaintiff's box, and the officers broke it open, and took away bonds, and while they were in possession of the prosecuting government attorney, they were attached by the plaintiff's creditors. The English doctrine, which in the case of a pledge by a symbolical delivery, requires an attornment by the warehouseman or other custodian of the goods in order to create such a delivery as will support the pledge, does not prevail in this country. *Conrad* v. *Fisher*, 37 Missouri Appeals, 352; 8 Lawyers' Reports Annotated, 147.

AUCTIONEER.

WILLIAMS *v.* MILLINGTON.

(C. P. 1788.)

RULE.

AN auctioneer has a possession coupled with an interest in goods which he is employed to sell; and may maintain an action against the buyer for goods sold and delivered, although the sale was at the house of a third person and the goods known to be his property.

Williams v. Millington.

1 H. Bl. 81–86 (s. c. 2 R. R. 724–726).

The plaintiff was an auctioneer employed by C. to sell his goods at his own house by auction. The defendant by a trick obtained possession of the goods leaving a balance of the price unpaid. The plaintiff paid the whole price to C., and brought his action for the balance, as for goods sold and delivered to the defendant.

Lord LOUGHBOROUGH in delivering judgment said: I en- [84] tertain no sort of doubt on the general question being extremely clear, that an auctioneer has a possession, coupled with an interest, in goods which he is employed to sell, not a bare custody like a servant or shopman. There is no difference, whether the sale be on the * premises of the owner, or in a public [*85] auction-room, for on the premises of the owner, an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest: but an auctioneer has also a special property in him with a lien for the charges of the sale, the commission, and the auction-duty, which he is bound to pay. In the common course of auctions, there is no delivery without actual payment; if it be otherwise, the auctioneer gives credit to the vendee, entirely at his own risk. Though he is like a factor therefore in some instances, in others the case is stronger with him than with a factor, since the law imposes the payment of a duty on him, and the credit in case of a delivery, without the recompense of a commission *del credere*. It is

not a true position, that two persons cannot bring separate actions for the same cause: the carrier and the owner of goods may each bring actions on a tort; the factor and owner may each have actions on a contract. I am therefore, upon the whole, decidedly of opinion that this action may well be maintained.

Gould, J., and Heath, J., were of the same opinion, Wilson, J., doubting whether the plaintiff, though having a special property, had the right to dispose of the absolute property upon which the action for goods sold and delivered was founded.

ENGLISH NOTES.

In the case of *Woolf* v. *Horne* (11 May, 1877), 2 Q. B. D. 355, 46 L. J. Q. B. 534, which was an action against the auctioneer for delivery of the goods (Mellor, J., quoted at length the above judgment of Lord Loughborough, and held (Field, J., agreeing with him), that the action was properly brought against the auctioneer.

In the case of *Daris* v. *Artingstall* (30 April, 1880), 49 L. J. Ch. 609, goods, the separate property of a married woman, were placed by her husband in a hired warehouse and entrusted to the defendant (an auctioneer) for the purpose of sale. The defendant before the sale received notice on behalf of the wife that the goods were her separate property, and that she would hold the auctioneer responsible. Notwithstanding this notice the defendant sold some of the goods and re-delivered the rest to the husband. He was held liable not only for the net price of the goods sold (which he offered to pay), but for the real value, irrespective of the prices realized at the sale of the whole goods. Fry, J., observed that the question turned upon whether the defendant was in possession, or only authorized to sell. "I feel bound," he said, "by the decision of *Williams* v. *Millington*, from which it appears that an auctioneer has not merely the custody but the possession of goods entrusted to him for sale, and there is no difference whether they are on the premises of the owner of the goods, or on his own premises." He then quoted at length from the above judgment of Lord Loughborough; and considered that the defendant, having had the possession, and refused to deliver the goods to the rightful owner after formal notice from the plaintiff, was liable to the plaintiff for the value, irrespective of the prices fetched at the auction, of the goods delivered to him.

The above judgment of Lord Loughborough is again cited in an elaborate judgment of Williams, J., in *Wood* v. *Baxter* (1883), 49 L. T. 45, where the question arose out of a sale by auction of standing corn with the straw. The plaintiff (the purchaser) had paid the price to the defendant (the auctioneer), but was unable to carry off the straw, owing to a claim by the landlord under the conditions of the tenancy

of the farm. Williams, J., upheld the judgment of the County Court Judge, non-suiting the plaintiff. The learned judge considered that the contract on the auctioneer's part was to give to the purchaser all proper authority to enter upon the farm and to cut and carry away the straw, short only of this, that it did not involve an actual warranty of the validity of the title of the principal to sell. But the plaintiff had the authority of his principal (the tenant) to cut and carry away the corn, and had actually cut and harvested it; and the difficulty arose from the claim of a third party that the straw should only be carried away upon a condition which the tenant was unable to fulfil.

In *Barker* v. *Furlong* (23 March, 1891), 1891, 2 Ch. 172, 60 L. J. Ch. 368, furniture which had been assigned to trustees under a marriage settlement, was sent by the person having the immediate possession to an auctioneer for sale on his own premises. The auctioneer sold part of the furniture, delivered it to the purchasers, and paid over the net proceeds to his principal. The plaintiffs, the trustees under the settlement, brought the action, claiming (*inter alia*) that the auctioneer was liable to refund the money to them. Romer, J., held the auctioneer liable accordingly. He considered the criterion of conversion to be whether the defendant had dealt with the goods with the view of passing the property to the purchasers, or whether he merely settled the price or otherwise acted as a mere intermediary between the owner and the purchasers.

In *Consolidated Company* v. *Curtis* (1 March, 1892), 1892, 1 Q. B. 495, 61 L. J. Q. B. 325, the grantor of a bill of sale of furniture instructed an auctioneer to sell the furniture at a house in the grantor's occupation; and it was sold accordingly. The auctioneer, who was ignorant of the bill of sale, delivered the furniture to the purchasers in the ordinary course. An action for conversion of the goods was brought by the grantee under the bill of sale against the auctioneer. The plaintiff was held entitled to recover. Collins, J., in a considered judgment, in order to show that the auctioneer is more than a mere broker or intermediary, cited at length the judgment of Lord Loughborough in the principal case. He considered a number of cases[1] bearing on the question of what amounts to a conversion; and concluded with the opinion that the defendant in this case had transferred as far as in him lay the dominion over and property in the goods to the purchasers in order that they might dispose of them as their own; and that the judgment must therefore be for the plaintiffs.

[1] *Fowler* v. *Hollins* (L. R. 7 H. L. 757, No. 2 of "Agency" R. C. Vol. 2, 410); *Cochrane* v. *Rymill* (40 L. T. 744, cited R. C. Vol. 2, 432); *National Bank* v. *Rymill* (44 L. T. 767, cited R. C. Vol. 2, 433); *Turner* v. *Hockey* (1887), 56 L. J. Q. B. 301 (questioned as well by Collins, J., in the case here abstracted, as by Romer, J., in *Barker* v. *Furlong*); and the above cited case of *Barker* v. *Furlong* (23 Mar. 1891), 1891, 2 Ch. 172, 60 L. J. Ch. 368.

AMERICAN NOTES.

An auctioneer who does not disclose the name of his principal when he sells will be considered as the vendor himself. *Thomas* v. *Kerr*, 3 Bush (Kentucky), 619; 96 Am. Dec. 262.

"At this day the law may be considered as settled that a vendor or purchaser dealing in his own name, without disclosing the name of his principal, is personally bound by his contract; and it makes no difference that he is known to the other party to be an auctioneer or broker, who is usually employed in selling property as the agent for others." *Mills* v. *Hunt*, 20 Wendell (New York), 433.

"The mere fact that defendants were acting as auctioneers is not of itself notice that they were not selling their own goods, and they must be deemed to have been vendors, and responsible as such for title, unless they disclosed at the time the name of the principal." *Schell* v. *Stephens*, 50 Missouri, 379.

But an auctioneer selling mortgaged goods for the mortgagor is not liable to the mortgagee for conversion if he acts in ignorance of the mortgage, although the mortgagor's act was fraudulent. *Frizzell* v. *Rundle & Co.*, 88 Tennessee, 396; 17 Am. St. Rep. 908. *Contra*, *Robinson* v. *Bird*, 158 Mass. 357; 35 Am. St. Rep. 495.

The doctrine of the principal case is approved in Mechem on Agency, § 898, citing *Thompson* v. *Kelly*, 101 Massachusetts, 291; 3 Am. Rep. 353; *Beller* v. *Block*, 19 Arkansas, 566, and several of the cases above cited. In *Thompson* v. *Kelly*, *supra*, the Court say: "This doctrine stands upon the right of the auctioneer to receive and his responsibility to his principal for, the price of the property sold, and his lien thereon for his commissions; which give him a special property in the goods intrusted to him for sale, and an interest in the proceeds." In that case this doctrine was applied in the instance of a sale of lands where a deposit was required to be paid into the auctioneer's hands at the time of the sale.

"It is well settled that an auctioneer can bring a suit in his own name for goods sold and delivered by him, because he has the possession of the goods and a lien upon them for his charges." *Flanigan* v. *Crull*, 53 Illinois, 352.

This principle is also sustained in an action by the auctioneer against the buyer, for his fees, in *Johnson & Miller* v. *Buck*, 35 New Jersey Law, 338, where the Court said: "This action though prosecuted in the plaintiffs' names is really an action to recover part of the purchase money of the sale."

"An auctioneer has such a special property or interest in the subject-matter of the sale that he may sue in his own name, unless the principal or real owner elect to bring the action in his name (Chitty on Contr., 185). And it is not necessary to prove that he has a special property or interest; for that flows as a matter of course from his position as an auctioneer." *Minturn* v. *Main*, 7 New York, 220, 224.

The auctioneer cannot plead title in himself when sued for the proceeds of the sale; *Osgood* v. *Nichols*, 5 Gray (Mass.), 420; and the bailee cannot plead the title of a third person except by his authority. *Dodge* v. *Meyer*, 61 California, 405.

BANKER.

Note. The cases collected under this title are those which primarily concern Bankers, and would presumably be looked for at once under this head. There are many other cases concerning Bankers, which will be found under other headings, such as "Bills of Exchange," "Negotiable Instrument." The cases relating to appropriation of payments will be found under the head "Appropriation." And as to the effect of an assignment of an equity of redemption, putting an end to the right of a banker holding security to charge further advances, see "Assignment," and note there.

Section I. — *General Lien.*

No. 1. — DAVIS *v.* BOWSHER.

(K. B. 1794.)

No. 2. — BRANDAO *v.* BARNETT.

(H. L. 1846.)

RULE.

A BANKER has a general lien (to be judicially noticed) upon all bills of exchange sent in by the customer with a general authority to realize them and place the proceeds to the customer's credit.

But the lien does not extend to securities deposited with the banker for a special purpose, as where Exchequer Bills are placed in the banker's hands to get interest on them and to get them exchanged for new bills.

Davis v. Bowsher.

5 T. R. 488–492 (s. c. 2 R. R. 650–654).

[488] This was an action of assumpsit by the plaintiffs as indorsees of a bill of exchange for £635 10*s.* against the defendant as drawer. The defendant drew the bill in question on one Ames, payable to Cook, from whom he received no consideration for it. Cook was a trader at Bristol, and kept an account with the plaintiffs, who were bankers in the same place. The course of dealing between them was this: Cook lodged bills payable at future days with the plaintiffs from time to time, and drew upon them for any money he wanted in advance; and the plaintiffs charged no interest on these advances, but used to select out of the bills in their hands such as they pleased and were nearest to the sum advanced, and discounted these bills, debiting Cook with the amount of such discount in his account. On the 26th February the balance on Cook's account with the plaintiffs was £103 in his favour. On the 27th he directed his clerk to pay in to the plaintiffs other bills to the amount of about £3000, which was done; and he applied for another advance, which the plaintiffs at first refused, but they afterwards consented to let him have about £1400, and actually entered the discount on such of the bills as they selected, amongst which the bill in question was not one. And on the plaintiffs' refusing to make Cook any further advance, he demanded this and the other bills which had not been discounted, none of which were then due; but the plaintiffs refused to deliver any of them up, alleging their right to detain them all, in case any of the discounted bills should prove bad. Those discounted bills had longer to run than the bill in question. At this time none of the discounted [*489] bills had been dishonoured; though some of them, * beyond the amount of the present bill, afterwards were so; and at the time of the demand and refusal the sums which the plaintiffs had advanced to Cook were considerably more than covered by the amount of the discounted bills in their hands, in the event of their proving to be good bills. Before this action was brought Cook became a bankrupt, and the plaintiffs proved their debt under his commission for the balance of their account, and in the affidavit, usual upon such occasions, they swore that they had no security for their debt, except certain bills which they specified, and which

only comprehended the discounted bills, and not the bill in question. There was also some evidence at the trial of the general custom of the bankers at Bristol to keep their accounts in the same manner as the course of dealing shown between the plaintiffs and Cook; namely, that it was usual with them, upon any advance to a customer, who lodged bills in their hands, to apply such advance to the discount of particular bills, without any special agreement to that effect with such customer, or with a view to select such particular bills as the basis of the credit, or relinquish their general lien upon other securities. The cause was tried before Mr. Baron PERRYN at the last assizes at Bristol when the jury found a verdict for the plaintiffs; to set aside which a motion was made, and rule *nisi* granted in Michaelmas term last. And now the Court desired first to hear —

Gibbs in support of the rule. — He admitted the general rule to be, that where a banker advanced money to a customer upon the general account between them, he had a lien for the amount of his balance upon all securities belonging to such person, which he might happen to have in his hands; but contended that if the banker made the advance upon the specific security of any particular bill, he thereby elected to abandon his general lien, and to resort to that security alone; and therefore could not justify the retaining of any other securities to provide for the possible event of that one bill being dishonoured. And though this is not an action of trover for such other securities, yet if the bankers were not justified in refusing to deliver them up at the time when they were demanded, they cannot now avail themselves of their own wrong; they must stand in the same situation in which they would have been if they had then actually delivered them up; in which case the bill in question would have passed again into the hands of Cook, who had given no consideration for it to the defendant, and therefore he could never * have called upon the defendant for the pay- [* 490] ment of it. And this consideration also gets rid of any difficulty which might have arisen from the circumstance of Cook's having since become a bankrupt; for the question of right must stand upon the same footing as it did at the time of the demand and refusal. The nature of the transaction furnishes a reason why the bankers preferred the advancing of their money upon the discount of particular bills rather than upon the general account, because by that means they got more than 5 per cent. which they

could not do in the other case. And if they secure themselves from the penalties of usury on the one hand, by alleging that their security rests on a particular bill and not on the general lien, they ought not on the other hand to be permitted to avail themselves of the contrary advantage by extending their security. Suppose a man having three bills in the hands of his banker, payable at a future day, none of which have been discounted, carries a fourth bill to him, payable at a day previous to the others, and discounts that bill with him; it cannot be contended that the banker may detain the three bills in his hands, until he received the money due on the fourth bill, upon a supposition that it might not be paid. Again, suppose three bills of a customer in the hands of a banker, and the latter expressly consents to discount one of them, might not the other two be taken out of his hands before the discounted bill was paid? But the present case appears still stronger when the mode of dealing between the parties is adverted to; for it appears that Cook carried bills to the bankers, and when he wanted an advance of cash, they entered it to the discount of a particular bill: this amounts to evidence of an agreement that the bankers always advanced their money upon the security of the particular bill discounted; for if they had rested on their general lien, that ceremony would have been unnecessary. And this is further confirmed by the affidavit made by the plaintiffs themselves, wherein they stated that they had no other security than the two bills which had been discounted.

Lawrence, Serjt., *contrà*. — It was proved at the trial to be the general usage of the bankers at Bristol, in the case of advances to customers, who had lodged bills in their hands, to debit such advances to the discount of particular bills instead of the general account; and that it was not thereby understood by any of the parties concerned in transactions of this nature that the money was so advanced on the specific credit of the bill [* 491] * discounted, but on the credit of the general account; and that this was no more than the mode of keeping the account and computing interest. As these parties therefore resided in Bristol and had been engaged in transactions of this nature before this was evidence of the particular dealing between them, and is an answer to any supposed waiver on the part of the bankers of their general lien, which by the law of the land extends to all securities in their hands for the amount of the balance due to them.

In answer to this it is urged that, unless it be taken that the advance was made upon the credit of the particular bill discounted, and not upon the general account, the transaction would be usurious: but it cannot be usury to take the same interest for the same sum upon the security of several bills any more than it would be usury to take it on the security of one bill only; and unless a special agreement be shown to the contrary, it cannot be presumed that persons would prefer to advance money upon the less instead of the greater security which the law gives to them. But, at any rate, whether the money were advanced on the general lien, or on the security of the particular bill discounted, was the very question on which the jury had to decide between the parties; and their verdict has determined it in favour of the plaintiffs. [He was then stopped by the Court.]

Lord KENYON, C. J. I disclaim grounding my opinion upon any particular law applicable to the City of Bristol only: I am clearly of opinion that by the general law of the land a banker has a general lien upon all the securities in his hands belonging to any particular person for his general balance, unless there be evidence to show that he received any particular security under special circumstances, which would take it out of the common rule. But it is taken for granted by the counsel in support of the rule, that the party had a right to demand of the bankers certain bills, which were not discounted, without paying their general balance; and the whole argument is built on that mistake. I think he had only a right to demand this bill *sub modo*, namely, on paying all that was then due to the bankers: for wherever a banker has advanced money to another, he has a lien on all the paper securities which come into his hands for the amount of his general balance. It has been urged that the bankers abandoned their general lien in this case, by applying the money advanced to the discount of a
*particular bill; but nothing appears to warrant such a [*492]
supposition. So long as they were in advance upon the general account, they had a right to charge interest whether in one shape or another. But whether they could charge interest upon any particular bill, provided they were not in advance upon the general balance, is a question not necessary to be decided now, but upon which they may possibly find themselves mistaken whenever it comes to be fully canvassed. I see nothing however in this case contrary to the general rule of law, and the practice amongst

bankers. It is very proper that there should be a known rule to govern the conduct of all persons of this description, whose dealings are very extensive; and that rule is, that no person can take any paper securities out of the hands of his banker, without paying him his general balance, unless such securities were delivered under a particular agreement, which enables him so to do. If we were to set aside this verdict, we should unsettle that which has always been considered as the law on this subject, and the constantly received course of trade founded upon that law. I am therefore clearly of opinion that we ought not to treat this even as a doubtful question, but that we should discharge the rule for a new trial.

Ashhurst. I entirely concur in opinion with my Lord that the general rule is, that bills paid into a banker's hands generally can at no time be taken away from him, until the party has paid him his general balance. Here the bills were paid in upon the general account, and the balance not being settled at the time when they were demanded, the party had no right to insist upon receiving them. It would be inconvenient to commerce in general, and injustice to the plaintiffs in this particular case, to set aside the verdict which has been given.

Grose, J. The question is, Whether under the circumstances of this case the bankers had not a lien upon all the paper securities in their hands for the amount of the general balance. The evidence goes to show that they had, according to the general dealing and understanding between the parties; and the jury having given credit to this evidence, I see no reason to find fault with their verdict, more especially as it is according to the real justice of the case.

Rule discharged.

Brandao v. Barnett.

12 Cl. & Fin. 787–811 (s. c. 3 C. B. 519).

[787] This was a writ of error brought upon a judgment of the Court of Exchequer Chamber, reversing, upon writ of
[* 788] * error a judgment given for the plaintiff by the Court of Common Pleas, in an action of trover.

The declaration was in the usual form of trover, for converting exchequer bills. The pleas were, first, not guilty; secondly, a

denial of the plaintiff's property in the exchequer bills; and, thirdly, a special plea, in which the defendants, as bankers, set up a claim, by way of lien, to retain the exchequer bills to secure the balance due to them from a firm called James Burn and Co.

The exchequer bills sought to be recovered were twenty-one in number, and amounted to the sum of £10,100. The balance of James Burn and Co., in respect of which the lien was claimed, amounted to £3211 19*s.* 7*d.*

The plaintiff was a Portuguese merchant, who, up to the year 1834, resided at Rio de Janeiro, but in that year returned to Portugal, where he has since resided.

The defendants are bankers in London.

Edward Burn, who for many years carried on business as a merchant in London, and traded under the firm of James Burn and Co., kept an ordinary banking account with them, drawing cheques upon them, and making bills payable at their bank; and such cheques and bills were paid by the defendants out of the funds held by them on Burn's account, which was always in cash to meet them.

Burn was the agent and correspondent of the plaintiff, who from time to time remitted bills of exchange and money to Burn, and employed him upon commission to invest the proceeds in exchequer bills. Burn was employed in the same manner by other foreign correspondents.

Burn kept at his bankers, in separate tin boxes, under his own lock, the exchequer bills purchased for his different correspondents, except when it became necessary to receive the interest and exchange the bills.

Upon some of those occasions Burn took the plaintiff's * exchequer bills from the tin box, and delivered them to [* 789] the defendants, with a request that they would receive the interest and exchange the bills; and after the defendants had so done, Burn obtained the new bills from them when he next called at the banking-house, which generally happened within a week or fortnight after the receipt of the bills by the defendants; and when he so obtained them, he locked them in the tin box, as before, where they remained till wanted.

Prior to December, 1836, Burn had sold, by express order of the plaintiff, so much of the plaintiff's exchequer bills as reduced the amount to £10,100, and on 1st December, 1836, the remain-

ing exchequer bills of the plaintiff (to that amount) were locked up in the private tin box, as before described. The usual advertisement by the Government for the payment of the interest and exchanging the exchequer bills appeared about that time; and on or about 1st December, Burn went to the banking-house of the defendants, and took from his private tin box the last mentioned exchequer bills, and delivered them to one of the defendants, saying, "Will you have the kindness to get these bills exchanged for me?" The defendants counted the bills, repeated the number to Burn, who said, "Right;" and no further conversation passed upon the occasion.

The following is the form of one of the exchequer bills: —

"No. 8551. £1,000. By virtue of an act, 6th & 7th Gulielm. IV., Regis, for raising the sum of £14,007,950, by exchequer bills, for the service of the year 1836–7, this bill entitles ——, or order, to one thousand pounds, and interest after the rate of twopence halfpenny *per centum per diem*, payable out of the first aids or supplies to be granted in the next session of Parliament, and this bill is to be current and pass in any of the public revenues, aids, taxes, or supplies, or to the account of his [*790] * Majesty's exchequer at the Bank of England, after the 5th day of April, 1837. Dated at the Exchequer this 19th day of December, 1836. If the blank is not filled up, this bill will be paid to bearer. The cheques must not be cut off. — J. Newport."

The blanks in the exchequer bills delivered out by Burn had not been filled up, and they were therefore negotiable securities, payable to bearer, and transferable by delivery.

The defendants, on the 20th of the same month of December, delivered up the bills so received from Burn at the proper office, receiving the interest due upon them, which they carried, as usual, to the account of Burn, and obtained in exchange the new exchequer bills, which formed the subject of this action. The defendants had no notice, until the failure of Burn, that the bills were not his property; nor were the names of Burn's bankers ever communicated to the plaintiff.

At the time Burn delivered the exchequer bills to the defendants, on 1st December, he was unwell, and he was unable to come to town on business, as usual, from that time until after his failure in business, which happened on the 23d day of January,

No. 2. — Brandao v. Barnett, 12 Cl. & Fin. 790, 791.

1837, and he had no communication with his bankers (the defendants) further than that in the interval he had desired his clerk to procure from the defendants the particulars of the exchequer bills received in exchange for those delivered by him to be exchanged; and the defendants furnished to the clerk a paper containing such particulars.

On the morning of the 21st January, 1837, the balance of Burn's account was in his favour to the amount of £1596 11*s.* But in the course of that day, bills accepted by Burn, and made payable at the defendants', were presented for payment, and the defendants paid them to the amount of £4808 10*s.* 7*d.* These bills had been accepted at periods prior to the delivery of the exchequer bills to the defendants. These payments, by the defendants absorbed the balance to the credit of Burn's account, * and made him a debtor to the defendants to [* 791] the amount of £3211 19*s.* 7*d.* For this amount the defendants held the plaintiff's exchequer bills, and in consequence of such detention this action was brought.

At the trial of the cause before the Lord Chief Justice TINDAL, at the sittings after Michaelmas Term, 1837, a verdict was found for the plaintiff, subject to the opinion of the Court of Common Pleas upon a special case, with liberty to either party to turn the case into a special verdict, which was afterwards done.

In Michaelmas Term, 1840, the Court, after taking time to consider, gave judgment in favour of the plaintiff, 1 Man. & Gr. 908; Scott N. R. 96. This judgment was afterwards reversed in the Exchequer Chamber, 6 Man. & Gr. 630.

Sir T. WILDE and Mr. MONTAGU SMITH for the plaintiff in error. It is admitted that bankers may, as a general rule, have a lien on property deposited with them by their customer, if at the time of such deposit their customer is actually indebted to them. But that lien can only arise on such property as may come into their hands in the way of their trade as bankers. The first thing, therefore, for the bankers to establish in this case is, that the exchequer bills were put into their hands by the customer in the course of their trade. It cannot be said that that is the case here. The facts of this case show that the exchequer bills were delivered to the bankers, not in the ordinary way of their trade, but only for a special purpose. In such a case no general lien can arise. The thing to be performed by the bankers

here, was what a mere porter could have done; it was to carry the exchequer bills to the proper office, to leave them there, and on the proper day to fetch back the new bills which had been given in exchange for the old ones. The mere possession of exchequer bills does not imply that the person possessing [* 792] them is the owner of * them. In this respect they cannot properly be compared to bills of exchange; and the circumstances which existed here, rendered it impossible for the bankers to believe that these exchequer bills were the property of Burn, and were intended by him to be deposited with them in the course of their business, and for the purpose of securing the advances made to him. These bills were generally kept in tin boxes, and it is not even pretended that while they remained there they were subject to the bankers' lien. The bankers allowed Burn to keep these boxes in their strong room, but they never inquired into the contents of those boxes, nor affected to have any control over them. The mere fact of their being in the bankers' house, conferred no right on the bankers.

As a general rule, it is clear that no two persons can, by agreement between themselves, create a lien in favour of one of them against the goods of a third person. *Leuckhart* v. *Cooper*, 3 Bing. N. C. 99, *Rushforth* v. *Hadfield*, 7 East. 224; 3 Smith, 221; 8 R. R. 520; *Oppenheim* v. *Russell*, 3 Bos. & P. 42; 6 R. R. 604; *Lucas* v. *Dorrien*, 7 Taunt. 278; 1 B. Moore, 29, lay down that principle in a clear and positive manner. See also *Hatfield* v. *Phillips*, 12 Cl. & F. p. 343.

No doubt, it is stated here, that it is the custom of bankers to receive exchequer bills from their customers, and in the course of their business to receive the interest on the bills, and to get those bills exchanged at the proper time for others; but the case here goes on expressly to say, that these bills were received under the special circumstances which the verdict sets forth. This very mode of stating how the bankers became possessed of these bills, takes this particular case out of the general custom; so that, supposing the custom to be what the defendants say, the verdict here shows that that custom does not attach on [* 793] these bills. One of the clearest proofs * that there had been no general dealing between the bankers and Burn, so as to give them a general lien, as on deposits in the way of their trade, is to be found in an answer made on one occasion by

the bankers, when Burn, who had previously delivered to the bankers several exchequer bills, on which he asked them to receive interest, and which were also to be exchanged for others, allowed those bills to remain in the bankers' hands for some time, and then asked for some of them. The bankers answered that they would rather that he should take the whole, which he accordingly did, and locked them up. This answer never would have been made, nor would any such transaction have taken place, with respect to property deposited with them as security for their general balances. The whole circumstances show that they knew that these bills were merely kept by Burn for himself in the bankers' strong room for his own security. And the special verdict does not contradict but rather confirms the plain inference thus raised; for it does not find any deposit in fact made of these exchequer bills for the purpose of meeting the general balance.

The bills are, beyond all question, the property of the plaintiff. It lies on the bankers to show the facts which have taken out of the plaintiff the right to dispose of this property. They have not shown any such facts, and such facts cannot be implied. Nothing can be intended on a special verdict; everything must be found, and no fact which is not found can be intended. *Withams* v. *Lewis*, 1 Wills. 55, is a very strong authority to this point. See also *Duncombe* v. *Wingfield*, Hob. 263. In this case not a word is stated in the special verdict to show any express creation of lien by Burn in favour of the bankers. In all the cases which have been decided upon liens arising on the custom of a particular place or a particular trade, so as to affect two parties dealing *together in that place or trade, the lien has [*794] been pleaded or found. If it was meant to be relied on here, it ought, when the case was turned into a special verdict, to have been distinctly set forth. The banker's lien differs from that of the wharfinger's, *Holderness* v. *Collinson*, 7 B. & C. 212; but the facts which give the right to lien must, as that case shows, be specially shown by the party who claims to set it up. In the case of *Hewison* v. *Guthrie*, 2 Bing. N. C. 755: 2 Scott, 298; 2 Hodges, 51, the same thing was held as to the lien of an insurance agent, and as to the mutual credit between him and the party over whose policy he claimed a right of lien. The general lien of a carrier, though more likely to be known than any other,

must be pleaded. *Oppenheim* v. *Russell*, 3 Bos. & P. 42; 6 R. R. 604; *Searle* v. *Morgan*, 4 M. & W. 485. So that assuming, which is however denied, that any lien was created here, the defendants ought to have pleaded the particular facts on which they alleged it to arise.

The nature of the general lien of the banker is not accurately settled. It is not yet settled what is the lien of a banker upon plate left with him by his customer for safe custody, or whether he has any. The general lien of a banker on bills indorsed in blank, and paid into his bank in order to be received, has been settled in *Collins* v. *Martin*, 1 Bos. & P. 648; 4 R. R. 752. Under such circumstances the banker is entitled to a lien on them. But that case does not apply to the present; for the circumstances are wholly different; and the case of *Kruger* v. *Wilcox*, Ambler, 252, where the Court called in the assistance of four eminent merchants, shows that the right must depend on the particular circumstances of each individual case. In *Drinkwater* v. *Goodwin*, Cowp. 251, a factor who became surety for [* 795] his principal * was held to have a lien on the price of the goods sold by him for his principal to the amount of the sum for which he had so become surety, but there the lien arose upon a special arrangement entered into in writing between the parties. In *Naylor* v. *Mangles*, 1 Esp. 109, 5 R. R. 722, in like manner, the lien of a wharfinger was maintained, but the expressions there used by Lord KENYON show, that circumstances, such as exist in the present case, would not, in his opinion, establish the right to a lien without a special agreement. That was an action by a wharfinger claiming a lien on his general balance. Lord KENYON said, "Liens were, by common law, by usage, or by agreement. Liens by common law were given where a party was obliged by law to receive goods, &c., in which case, as the law imposed the burden, it also gave them the power of retaining for his indemnity. A lien from usage was matter of evidence; but in the present case the usage had been proved so often that he should consider it as a settled point that wharfingers had the lien contended for."

In the course of the argument in this very case in the Court below, Mr. Baron PARKE expressed his opinion as to the necessity of putting this claim of lien on the record. He said, 6 Man. & Gr. 660: "Where the custom is set out upon the record, the Court

can see the extent of it, whether it extends to all negotiable securities, for whatever purpose deposited, or whether it is limited to deposits made with the banker in the course of business." He must of course have changed that opinion when he concurred in this judgment, since the supposed custom, and the circumstances out of which it is said to arise, are not here set forth; but it is submitted with much confidence, that his first impression was the correct one. The special verdict here is defective in two respects, first, because nothing is stated as to what is the general custom of * merchants as to lien, and, secondly, [* 796] because what is now claimed exceeds anything that has been usual. On both these grounds the judgment of the Court below is defective. [Lord CAMPBELL. If a general lien is once established, it surely then becomes matter of law: whether it exists or not may be matter of fact, but when it exists the extent of it must be matter of law.] That is not so in the first instance; for the circumstances from which it arises, and the extent to which in any particular place or trade the lien exists must first be ascertained by evidence. But assuming that bankers have a general lien, and that that is such settled matter of law as not to require to be stated in the special verdict, then it is submitted that the facts here shown on the record do not bring this case within that general rule. The leaving of these exchequer bills in the hands of the bankers was like leaving plate with them. The property continued in the owner. The general right of the plaintiff is clear; the defendants must, by facts, take themselves out of the operation of that clear right. No such facts are shown here. The deposit of the bills was like the deposit of plate, an act done for a special purpose, but not falling within the description of an act done in the ordinary course of their business as bankers.

The Solicitor-General (Sir F. Kelly) and Mr. Martin, for the defendants in error. It is perfectly clear that with respect to the general lien of certain classes of persons, a banker, a wharfinger and a factor, the right to lien is now matter of law. The general right of lien of a factor, and the right of stoppage *in transitu* are instances of this sort. This latter right is of extremely modern origin; yet it is stated by Lord TENTERDEN, in his book upon shipping, Ch. xi. Shee's ed. 511, to be matter of law. No judge would require it to be pleaded, nor any one allow it to be

[* 797] proved. Even so long * ago as Lord KENYON's time, his Lordship in *Naylor* v. *Mangles*, 1 Esp. 109; 5 R. R. 722, held the wharfinger's right to lien to be too well established to require to be proved in evidence. It seems that the lien of a banker does not attach on a deposit of plate: that is a matter which need not now be discussed; but it does attach on a deposit of bills of exchange. The real question for this House to decide is, whether the present case falls within the rule applicable to the first or to the second of these instances. The law as to the banker's lien is so well established that every man who at any time makes a deposit with a banker knows that he does so on the settled though tacit understanding that should the balance of accounts be afterwards against him, the customer, the lien of the banker will attach on all securities of his at that time in his banker's hands. If this was not so, the supposed right of the banker, though well known and admitted, would in truth be valueless. No doubt the general right of the banker might be waived by a special contract, but that contract must be very plain and express, and must be distinctly shown. No such contract has been shown here. The argument on the other side, that the banker must show how his right to lien arises, is completely erroneous. The burden is on the other side; the right is a general right; it is for the other party to show that his is a case of exception.

If exchequer bills are placed in the hands of bankers to do the particular business with respect to them which it is the business of a banker to perform, the lien at once attaches. A case of this kind marks, in the plainest manner, the distinction between the cases of the deposit of plate with a banker and the deposit with him of bills of exchange, with a direction to him to get in the money as it becomes due on those bills. In the latter [* 798] case there is no * doubt that the lien would attach, and so it will in the case of the exchequer bill deposited with the banker to get interest upon and then to get exchanged. The case of *Davis* v. *Bowsher*, 5 T. R. 488; *ante*, p. 588; 2 R. R. 650, shows what is the general right of a banker to lien upon securities of the customer placed in his hands; and the case of *Bolland* v. *Bygrave*, where Lord TENTERDEN delivered a judgment on this very point, distinctly explains the true rule on which the decisions of the Courts must proceed. In that case, Lord TENTERDEN, speaking

of a banker who had made advances for a customer, said, Ry. & Moo. 273, "I think that the banker who stands in this relation to a customer has a lien on any securities of the customer which may for any purpose be placed in his hands."

[Lord CAMPBELL. You admit that the lien did not exist while the bills were locked up in the boxes in the bankers' strong room. Now, suppose Burn had told the bankers to get these bills exchanged and to return them to the boxes, and the bankers had promised to do so by twelve o'clock on a particular day, would they have obtained a lien upon them by the fact that at ten o'clock on that day the balance was turned in their favour?] They would not, if it was shown that there was any positive contract to return the bills, at all events at twelve o'clock; but they would get the lien if there had been a mere delivery of the bills to get them exchanged, without any such contract being made as to their return at a particular time. [Lord BROUGHAM. But is it not the same thing if a man says, "Take the bill and get it exchanged in the usual way"? Does not the taking of the bills, under such circumstances, amount to an undertaking on the part of the bankers to return the bills as soon as the particular thing for which the bills were entrusted to them has been performed?] It is not the same thing. In one case the *general right to lien would arise: in the other it would be excluded by the particular terms of the contract. In the present case the transaction was one so completely in the ordinary business of bankers, and so free from the influence of any particular contract, that the lien arose as of course, and for the plaintiff to make out an exemption from its operation it is necessary for him to show that the deposit was made upon a contract, that though the balance should be against the customer, the lien of the banker should not attach. [Lord CAMPBELL. But was it not a part of the contract that the new bills were to be restored?] In all cases whatever where property is entrusted by one man to another, it is on an implied contract that it is to be returned on request, and so far as that implied contract is concerned there is not a shadow of distinction between property put into the hands of a person in the ordinary course of his business and for a special purpose. [Lord CAMPBELL. You may argue that there is no distinction in law, but there is plainly a distinction in fact. Lord BROUGHAM. Thus: if I put money into the hands of my banker, he is my [*799]

debtor to the amount of the money; but that is not so with respect to a bill of exchange put into a box in his house.] If a bill of exchange and an exchequer bill were put into the hands of a banker on the same day, he would be bound to deal with both as the property of the person depositing them, and to restore both on demand. [The Lord Chancellor (Lord LYNDHURST). It seems to have been thought in the Court of Common Pleas that no representation was here made that the customer had a right to deal with them as his property.] The absence of any distinct representation of that sort will not affect the case, if the deposit of the bills can be treated as a deposit for the purpose of their being used by the bankers in their character of bankers. The purpose for which the deposit was made here established that fact. It is supposed, on the other side, that these particular securi-
[* 800] ties were * delivered to the bankers under an implied promise that they should be delivered back whenever the customer might think proper to ask for them. To a certain extent that is true. But that will not prevent the lien from attaching, for all deposits of property are impliedly subject to that condition. [The LORD CHANCELLOR. The proposition to support your argument should be qualified thus: shall be returned when demanded, provided that the balance shall not be against the depositor. Lord CAMPBELL. That would apply to all negotiable securities deposited with a banker. You say that there is no distinction between the deposit of an exchequer bill and other negotiable security to be locked up, and negotiable securities which remain with the banker.] The qualification "to be locked up," is not to be introduced here; that would be matter of special direction. The act which takes place after the return to the customer, must not be mixed up with the return itself.

The contract with the bankers is, that they will receive the bills, and take care of them. The moment it is shown that exchequer bills pass by delivery, and that it is the custom of bankers, in the course of their business, as such, to change them, the right to lien for a general balance is established. In *Davis* v. *Bowsher*, 5 T. R. 488; *ante*, p. 588; 2 R. R. 650, the banker selected some bills for the purpose of making advances on them, and refused others; yet he claimed to keep those which he had refused till he knew whether those on which he had made advances would be paid. There Lord KENYON said that, in his

opinion, a general lien existed, unless special circumstances showed that there was no lien; *Jourdain* v. *Lefevre*, 1 Esp. 65, and *Bosanquet* v. *Dudman*, 1 Stark. 1, are to the same effect. And in *Boland* v. *Bygrave*, the circumstances appearing to raise the doubt whether the bill was deposited for discount or *safe custody, Lord TENTERDEN said, 1 Ry. & Moo. 272, [*801] "If the right of the plaintiffs to recover depended on the question, whether authority was given on the part of the customer to the bankrupts [the bankers] to discount this bill, I should think, as the case now stands, that I ought to direct the jury to find, as a question of fact, whether this bill was delivered at the bank to be discounted, or to be kept for safe custody. But I am of opinion that the right of the plaintiffs [the assignees of the bankers] to recover, rests on other and independent grounds;" and his Lordship then added the expression of opinion already quoted. The general lien of the banker, and the right it confers, were strongly marked in the case of *Collins* v. *Martin*, 1 Bos. & P. 648; 4 R. R. 752, where it was held, that, if A. should deposit bills indorsed in blank with B., his banker, to be received when due, and the latter should raise money on them by pledging them with C., another banker, and should afterwards become bankrupt, A. could not maintain trover against C. for the bills. That case is an answer to the argument on the other side, that no two persons can by agreement between them, affect the rights of a third. That proposition was too broadly put; and the case just cited shows that, under certain circumstances, an agreement of that kind will be held effectual. And *Wookey* v. *Pole*, 4 B. & Ald. 1, is an authority to show that there is no distinction between a bill of exchange and an exchequer bill in respect of the lien of a banker. There the bill was deposited by the owner with his stockbrokers for the purpose of being sold; they, instead of selling it, deposited it at their bankers for advances, and afterwards became bankrupts; and it was held that the owner could not recover in trover the bill from the bankers, for that an exchequer bill, like bank * notes and bills of exchange, [*802] indorsed in blank, passed by delivery. [The LORD CHANCELLOR. In that case there was an express pledge.] That is so; but the case shows, by being decided on the ground of such instruments passing by delivery, that though the circumstances may not be the same, the principle is.

No. 2. — Brandao v. Barnett, 12 Cl. & Fin. 802, 803.

[The Lord Chancellor. The question here seems to be whether, for all purposes, a party, who is in possession of a negotiable instrument, is to be considered as the owner of it. He may pledge it, provided that all is done *bonâ fide* in making the pledge: but are the circumstances here such as are equivalent to an express pledge?] They must be so considered in virtue of the ordinary business of a banker, and of his established right of lien over securities deposited in his hand in the way of his business. [The Lord Chancellor. Suppose a man goes to a banker with £1000 in bank notes, and says, I want to send this money into the country, will you get these notes changed for a bank post bill, and the banker says that he will; but when the man goes again to get the bank post bill, the banker says, I shall retain these notes, or this bill, until you pay the balance which I now discover to be against you.] That is either a case *idem per idem* with the present, or the answer to it is, that what the banker undertakes to do is not in the ordinary way of his business. [The Lords intimated that it was in the ordinary way of the banker's business.] Then it is matter of particular contract. [Lord Brougham. In the case supposed, the banker ought to say, I take the notes subject to my right of lien; otherwise, he waives it.] But here the banker had not merely to change the bills, but to receive money on them, and he placed that money to the credit of the customer. That was completely in the ordinary way of his business, and no special contract intervened to affect the transaction. It is admitted that a special contract [* 803] may affect the general right. The * case of *Vanderzee* v. *Willis*, 3 Bro. C. C. 21, is an instance of that sort; but that shows that where the special contract does not intervene, the general right applies. Besides which, the answer to that case, as well as to *Lucas* v. *Dorrien*, 7 Taunt. 278; 1 B. Moore, 29, is, that they are not cases of negotiable securities, but that in them the right of lien could only arise upon express contract. Here the instruments were negotiable securities, passing by delivery. The bankers had a right to deal with these bills as if they were the property of Burn. Suppose the accounts had been equal, but just as the bankers returned from the Exchequer Bill Office with £2000 interest, a cheque of their customer for £1500 had been presented, there can be no doubt that the bankers would have been justified in paying that cheque out of the money thus

in their hands. This is in fact a clear case of dealing with bankers in the ordinary way of their business. *Stevenson* v. *Blakelock*, 1 M. & S. 535; 14 R. R. 525, shows that the rule of law is, that where a right to general lien exists in any person, it is not taken out of him by the fact that a particular thing coming into his hands is received for a special purpose: if it comes into his hands in the ordinary way of business, the right to lien attaches. [The LORD CHANCELLOR. Was it not the attorney's duty there to receive the lease?] It was no more his duty to receive the lease than it was the duty of these bankers to receive the exchequer bills, — it was a mere ordinary transaction in the way of business, and so Lord ELLENBOROUGH describes it. 1 M. & S. 543.

In the judgment in the Court of Common Pleas in this case, the fact that an exchequer bill is transferable by delivery, is admitted; yet it is supposed that, as there was no specific pledge of these bills, no right of lien *arose. Such a [*804] doctrine is opposed to the principles of the law and to decided cases. The Court of Exchequer Chamber dissented from this statement of the law. 6 Man. & Gr. 667. Lord DENMAN, who delivered the judgment now brought into this House on a writ of error, summed up the facts of the case, and the law as applicable to them, 6 Man. & Gr. 669; and then he stated it to be "the custom of bankers, in the course of their trade as such, to receive interest on exchequer bills, and to exchange them, and that the delivery of the original bills, and the receipt of the substituted bills, were therefore both in the course of their business as bankers; and they would have a lien on each set for the general balance due to them as bankers, within the terms of the rule above laid down, unless there were some special circumstances which would take this case out of its operation." There are no such circumstances here. The bills were delivered for a special purpose, but that purpose was the performance of a duty as bankers, for which they would be entitled to a commission, if the course of business with London bankers admitted of such a mode of remuneration. The bills were received in the ordinary course of business, and were in the hands of the bankers to be dealt with in discharge of their ordinary duty as bankers, and consequently the right to lien attached, and the judgment of the Court below must be affirmed.

Sir T. Wilde replied.

Lord CAMPBELL. The first question that arises upon this record is, whether judicial notice is to be taken of the general lien of bankers on the securities of their customers in their hands? The exchequer bills, for which this action is brought, are found to be the property of the plaintiff, and the defendants [* 805] rest their defence on their * second plea, that they were not possessed, &c., relying on the lien claimed for the balance due to them from Edward Burn.

The usage of trade by which bankers are entitled to a general lien, is not found by the special verdict, and unless we are to take judicial notice of it, the plaintiff is at once entitled to judgment. But, my Lords, I am of opinion that the general lien of bankers is part of the law-merchant, and is to be judicially noticed, — like the negotiability of bills of exchange, or the days of grace allowed for their payment. When a general usage has been judicially ascertained and established, it becomes a part of the law-merchant, which courts of justice are bound to know and recognize. Such has been the invariable understanding and practice in Westminster Hall for a great many years; there is no decision or *dictum* to the contrary, and justice could not be administered if evidence were required to be given *totics quoties* to support such usages, and issue might be joined upon them in each particular case.

It is hardly disputed that, under the plea of "not possessed," a lien, where it exists, may be made available as a defence; and, therefore, if this special verdict sets forth facts which show that by the law-merchant the defendants have a lien upon these exchequer bills, the judgment in their favour ought to be affirmed. But I am humbly of opinion that, upon the facts found, there was no lien, and that the judgment ought to be reversed.

I do not, however, proceed upon the ground taken by the Court of Common Pleas, — that these exchequer bills being the property of Brandao, there was no lien as against him, although there might have been as against Burn. I think that the defendants were entitled to consider the exchequer bills as the property of Burn, without any express representation by him to that effect. Exchequer bills are negotiable securities passing by delivery. The holder of negotiable securities is to be assumed to be [* 806] * the owner, and third parties acting *bonâ fide* may treat

with him as owner. It is admitted that Burn might have effectually sold these exchequer bills, or pledged them by an express contract, without any representation that they were his own property. But the right acquired by a general lien is an implied pledge, and where it would arise (supposing the securities to be the property of the apparent owner), I think it equally exists if the party claiming it has acted with good faith, although the subject of that lien should turn out to be the property of a stranger. I think that the just view was taken of this point by the Judges in the Exchequer Chamber, and that they were right in holding the reasoning of the Judges in the Court of Common Pleas upon this point to be untenable.

But I must confess that, after much anxious consideration, I have come to the conclusion that the Judges in the Exchequer Chamber have erroneously decided the question on which the Court of Common Pleas expressed no opinion, and that the facts found by the special verdict would not have entitled the defendants to a lien, if the exchequer bills had been the property of Burn.

Bankers most undoubtedly have a general lien on all securities deposited with them, as bankers, by a customer, unless there be an express contract, or circumstances that show an implied contract inconsistent with lien. Lord KENYON says, in *Davis* v. *Bowsher*, 5 T. R. 491; *ante*, p. 591; 2 R. R. 650, "bankers have a general lien on all securities in their hands for their general balance, unless there be evidence to show that any particular security was received under special circumstances, which would take it out of the common rule." And Lord DENMAN, in pronouncing this very judgment in the Exchequer Chamber, says, 6 Man. & Gr. 670, "If indeed there had been an agreement, express or implied, inconsistent * with a right of [*807] lien, as to return them absolutely, at all events, to the depositor, the case would have been different."

Now it seems to me, that, in the present case, there was an implied agreement on the part of the defendants, inconsistent with the right of lien which they claim. It should be recollected that the exchequer bills for which the action is brought, are the new exchequer bills, which the defendants obtained for the express and only purpose of being delivered by them to Burn, that he might deposit them in the tin box, of which he kept the key. They not only were not entered in any account between Burn and

the defendants, but they were not to remain in the possession of the defendants; and the defendants, in respect of them, were employed merely to carry and hold till the deposit in the tin box could be conveniently accomplished. Whether this deposit was to be made in the same hour in which the securities were obtained from the Government, without ever being placed in a drawer belonging to the defendants, or after the lapse of some days, seems to me quite immaterial, bearing in mind the purpose for which they were obtained, and for which they remained in the defendants' possession. Nor can it make any difference that on the particular occasion out of which this action originated, from the illness of Burn, so long a time elapsed from the obtaining of the securities, without their being demanded by him, for the purpose of being locked up in the tin box; for if the defendants had not a right of lien upon them the moment they obtained them, the actual lien clearly could not afterwards be claimed when his account had been overdrawn. Nor, I presume, can any weight be attached to the circumstance that the tin box, in which the exchequer bills were to be locked up, and of which Burn kept the key, remained in the house of the defendants.

[*808] Were not these exchequer bills obtained by the defendants to be delivered to Burn who was himself * to be the depositary and custodian of them? Bankers have a lien on all securities deposited with them as bankers; but these exchequer bills cannot be considered to have been deposited with the defendants as bankers.

During the argument in the Exchequer Chamber it was very properly admitted by Sir FITZROY KELLY, that "if bills of exchange were delivered to a banker, merely for the purpose of being deposited in a box, there could be no lien." Does it signify whether the defendants were to deposit the securities in the box themselves, or to deliver them to Burn for that purpose? I think, that, under such circumstances, bankers acquire no lien, either upon the bills to be exchanged or the bills received in exchange. It is hardly denied that if there had been an express undertaking by the defendants to exchange the bills and to return the new ones as soon as obtained to Burn, that he might lock them up, no lien would have been acquired. But the special verdict shows the course of dealing between them, and raises an implied promise on their part which operates as if it was express.

This seems to me to be like the case put of bank notes given to a banker to procure a bank post-bill for a customer, or a promise by a purchaser to pay ready money, which excludes set-off; there could be no implied right inconsistent with a positive obligation.

It certainly would be most inconvenient if a lien could be claimed under such circumstances, for then an agent, holding exchequer bills for another, could not, although he kept them carefully guarded under lock and key, employ a person who happened to be a banker to get them exchanged; for if he did — without being aware that he was acting improperly — he might commit a crime for which he would be liable to very serious punishment.

Much stress was laid upon the finding that "it is the custom of bankers, in the course of their trade as such, to receive the interest upon exchequer bills for their *customers, [*809] and to exchange the exchequer bills when such interest is paid," but there is no finding that the exchequer bills for which this action is brought and on which the lien is claimed were in the possession of the defendants in the course of their trade as bankers, or that it was their duty as bankers to perform these offices. I think that the transaction is very much like the deposit of plate in locked chests at a banker's. A special verdict might find that it is the custom of bankers, in the course of their trade as such, to receive such deposits from their customers, but I do not think that from that finding a general lien could be claimed on the plate chests. In both cases a charge might be made by the bankers if they were not otherwise remunerated for their trouble.

I further beg leave to observe, that in a course of dealing like this, where the old exchequer bills are immediately to be delivered to the Government and the new exchequer bills to be locked up in the box of the customer, it can hardly be supposed that the bankers will accept or pay bills of exchange for their customer on the credit of securities that in the usual course of dealing are for so short a time to be in their custody.

No reliance, I think, can be placed on the circumstance of the interest received on the old exchequer bills going to the credit of the account of the customer; for while he gives the bankers the interest to keep for him with one hand, he locks up the new exchequer bills in his tin box with the other.

Upon the whole, my Lords, I should humbly advise your Lordships to give judgment for the plaintiff in error. This judgment will leave untouched the rule that bankers have a general lien on securities deposited with them as bankers, but will prevent them from successfully claiming a lien on securities delivered to them for a special purpose inconsistent with the existence of the lien claimed.

[*810] *I move your Lordships that the judgment of the Court of Exchequer Chamber be reversed.

Lord Lyndhurst. My Lords, I entirely concur in the opinion which has been so clearly and so fully expressed by my noble and learned friend.

With respect to some of the points in this case, no doubt whatever can be, I think, for a moment entertained. There is no question that by the law-merchant, a banker has a lien for his general balance on securities deposited with him. I consider this as part of the established law of the country, and that the Courts will take notice of it: it is not necessary that it should be pleaded, nor is it necessary that it should be given in evidence in this particular instance: therefore, as to that part of the case, I think it is entirely free from doubt.

The only question, therefore which remains to be considered is, whether the facts of this case bring this deposit within the general rule. I think that the reasoning of my noble and learned friend is decisive upon that subject, and that the circumstances of the case are not within the general rule: the deposit in this instance was not such, under all the circumstances, as to give the banker a lien upon the exchequer bills; they were deposited in a box, they were kept under lock and key, the key was not kept by the banker, but it was kept by the party, Mr. Burn. From time to time he called, for the purpose of taking the exchequer bills out of the box, in order that he might receive the interest upon them; or if the bills were called in by the government in order that they might be exchanged for others. He himself attended upon those occasions, took the bills out and delivered them for that special purpose to the banker. They were always returned almost immediately: the first time that he applied at the bank after a transaction of this kind, they were delivered to

[*811] him, and were replaced under *lock and key in the same place of deposit. It is impossible, considering how this

business was carried on, that we can come to any other conclusion than this, — that it was an understanding between the parties that the new bills were to be returned after the interest was received, or after the old bills had been exchanged. If so — if that was the understanding — or if that was the fair inference from the transaction, it is quite clear that there could be no lien; that it does not come within the general rule; and what my noble and learned friend has stated, I think is perfectly correct, that although from the accidental circumstance of the illness of Mr. Burn these particular bills happened to remain for a longer period in the hands of the bankers than was usual, that accidental circumstance alone will not vary the case, nor give the bankers a lien, if under other circumstances that lien would not attach.

I therefore entirely concur in the judgment of my noble and learned friend. *Judgment of the Court below reversed.*

ENGLISH NOTES.

Where the rights of third parties intervene, the lien can only be made available to satisfy an actual indebtedness, existing at the time when the third parties make their claim. *Jeffryes* v. *Agra and Masterman's Bank* (1866), L. R., 2 Eq. 674, 35 L. J. Ch. 686.

The lien is not necessarily limited by an express agreement that certain securities shall be appropriated to a specific account. *Jones* v. *Peppercorne* (1858), Johns. 430, 28 L. J. Ch. 158; *Re European Bank, Agra Bank Claim* (Ch. App. 1872), L. R., 8 Ch. 41. But the terms of a security taken by bankers may oust their claim to a general lien. *Wylde* v. *Radford* (1863), 33 L. J. Ch. 51; *London Chartered Bank of Australia* v. *White* (P. C. 1879), 4 App. Cas. 413, 48 L. J. P. C. 75; *In re Bowes, Earl of Strathmore* v. *Vane* (1886), 33 Ch. D. 586, 56 L. J. Ch. 143. The lien does not extend to the contents of boxes, deposited with bankers for safe custody. *Leese* v. *Martin* (1873), L. R., 17 Eq. 224, 43 L. J. Ch. 193.

A banker has no lien on muniments casually left at his house of business, after he has refused to advance money on other securities. *Lucas* v. *Dorrien* (1817), 7 Taunt. 278.

Bankers have no lien on the deposits of a partner on his separate account, for a balance due to the bank from a firm of which the depositor is a member. *Addis* v. *Knight* (1817), 2 Mer. 117, *Watts* v. *Christie* (1849), 11 Beav. 546, 18 L. J. Ch. 173.

Where a bank has several branches and a customer has a separate account at two branches, the lien extends so as to entitle the bank to

combine the two accounts and strike a balance. *Garnett* v. *McKewan* (1872), L. R., 8 Ex. 10, 42 L. J. Ex. 1. This is based upon the ground that, except for certain special purposes, the branches form with the head office one corporation or firm. *Prince* v. *Oriental Bank Corporation* (P. C., 1878), 3 App. Cas. 325, 47 L. J. P. C. 42.

AMERICAN NOTES.

The principal cases are cited by Mr. Morse (Banks and Banking, §§ 324, 325), and by Mr. Jones (Liens, § 241), to the general doctrine of banker's lien, and are supported by *Ford* v. *Thornton*, 3 Leigh (Virginia), 695; *State Bank* v. *Armstrong*, 4 Devereux (North Carolina), 519; *Commercial Bank of Albany* v. *Hughes*, 17 Wendell (New York), 94; *Whittington* v. *Farmers' Bank*, 5 Harris & Johnson (Maryland), 489; *Bank of U. S.* v. *Macalester*, 9 Penn. St. 475; *National Bank* v. *Ins. Co.*, 104 United States, 54. But it was held in *Fourth Nat. Bank* v. *City Nat. Bank*, 68 Illinois, 398, that the lien does not extend to moneys on deposit, but only to collateral securities, the court observing: "The credit must be given on the credit of the securities or valuables either in possession or expectancy. . . . To deny to the holder of a bank check both a legal and equitable right, after presentation of the check, to the money of the drawer in the hands of the banker, would destroy the most valuable feature of bank deposits and checks." In *Bank* v. *Macalester*, *supra*, the bank received funds from the State of Illinois for the special purpose of paying a certain debt of the State. *Held*, that the bank could not refuse to honour the claims of coupon-holders for that debt on the ground of a prior debt of the State to the bank. The Court said: "As long as the deposit is permitted to remain in their hands, they are the agents of the holders of the coupons to the amount of the fund set apart for their payment. It would be a culpable breach of trust to appropriate the fund to any other purpose, and especially to apply it to their own use." Citing *Davis* v. *Bowsher*, 5 T. R. 492; *ante*, p. 588; 2 R. R. 650.

The banker has no lien on securities pledged for the payment of a particular debt. *Brown* v. *New Bedford Inst.*, 137 Massachusetts, 262, approving *Brandao* v. *Barnett*; *Wyckoff* v. *Anthony*, 90 New York, 442. "The general lien is limited and defined by the express contract." Jones on Liens, § 251. Overton on Liens cites *Davis* v. *Bowsher*, (p. 103), saying: "Banks have, as a rule, the title to moneys paid into their possession on general deposit; but where the appropriation is made by the depositor in advance, the bank is bound to apply it to that particular purpose." *See Davenport* v. *Bank of Buffalo*, 9 Paige, Chancery (New York), 12; *Dawson* v. *Real Estate Bank*, 5 Arkansas, 283; *McDowell* v. *Bank of Wilmington*, 1 Harrington (Delaware), 369. Mr. Morse says (Banks and Banking, § 325): "The English cases eliminate from the operation of the lien all property which comes into the banker's hands plainly ear-marked or appropriated for any special purpose." This limitation is also recognized by Mr. Daniel (Neg. Inst., § 334 *b*), citing additionally *Reynes* v. *Dumont*, 130 United States, 391; *Cont. Nat. Bank* v. *Weems*, 69 Texas, 489; *Carroll* v. *Bank*, 30 West Virginia, 520. In Kentucky

it is held that the banker has no lien on a surplus of securities pledged for a particular loan after paying that loan, for a general balance on other claims. *Masonic Sav. Bank* v. *Bangs*, 84 Kentucky, 137. But in Pennsylvania this species of lien is not recognized. *Hackett* v. *Reynolds*, 114 Penn. St. 332.

Section II. — *Duty of Custody.*

No. 3. — GIBLIN *v.* M'MULLEN.

(P. C. APP. FROM VICTORIA, 1869.)

RULE.

Bankers who receive securities by way of deposit for safe custody gratuitously — not making any charge for commission or having any lien on the securities — are not responsible for any higher degree of care than a reasonable prudent man may be expected to take of property of the like description.

Securities to bearer contained in a box deposited with a bank by a customer were stolen by the cashier who had access to the strong room. This cashier had been long in the service of the bank and borne a good character. The key of the box was in the custody of the customer, and it did not appear how the cashier had got access to the contents. It was held that there was not evidence to go to a jury of such negligence on the part of the bank as to make them liable.

Giblin v. M'Mullen.

38 L. J. P. C. 25-30 (s. c. L. R. 2 P. C. 318; 21 L. T. 214; 17 W. R. 445).

This is an appeal from a judgment of the Supreme Court [25] of the colony of Victoria.

The action was brought by Richard Lewis, since deceased, against the respondent as inspector of the Union Bank of Australia to recover damages from the Union Bank of Australia.

The first count of the declaration charged the bank with negligence as bailees for reward, and the second count as gratuitous bailees in keeping certain debentures of the said Richard Lewis,

whereby the same were lost. To this declaration the respondent, as such inspector, pleaded a traverse of the delivering to, and receipt by the bank of the debentures, and also not guilty, upon which pleas issue was joined.

The issues came on to be tried on the 8th of November, 1865, before the Chief Justice of the Supreme Court, and evidence, both oral and documentary, was given, and the jury found that the bankers were not bailees for reward, and gave a verdict for the said Richard Lewis for £10,450. The Supreme Court subsequently granted a rule *nisi* to set aside the verdict and enter a nonsuit, which rule was made absolute, and on the 18th of May, 1867, final judgment was signed for the respondent.

Richard Lewis petitioned the Supreme Court for leave to appeal, and such leave was granted. Richard Lewis died at Hobart Town, on the 8th of November, 1867, having made his will, whereby he appointed the appellants his executors.

The facts of the case are stated in the judgment of their Lordships.

The Solicitor-General (Sir J. Coleridge), Watkin Williams and Beresford, for the appellants. The evidence given at the trial was sufficient to support the verdict of the jury. The question of negligence is one of fact for the jury, and the finding of the jury in favour of the appellants should not have been disturbed. The rule to set aside the verdict and enter a nonsuit ought to have been discharged. The appellants are entitled to judgment for the amount of the damages found by the jury. They referred to *Shiells* v. *Blackburn*, 1 H. Bl. 158; 2 R. R. 750; *Foster* v. *The Essex Bank*, 17 Mass. Rep. 479; *Doorman* v. *Jenkins*, 2 Ad. & E. 256; 4 L. J. (N. S.) K. B. 29; *Willson* v. *Brett*, 11 M. & W. 113; 12 L. J. Ex. 264; *Beal* v. *The South Devon Railway Company*, 3 H. & C. 337; *The Peninsular and Oriental Company* v. *Shand*, 3 Moo. P. C. C. 272; *Grill* v. *The Iron Screw Colliery Company*, L. R., 1 C. P. 612; 37 L. J. C. P. 205; and *Dansey* v. *Richardson*, 3 El. & B. 144; 23 L. J. Q. B. 217.

Mellish, J. Brown and W. Murray, for the respondent. There was no sufficient evidence that the debentures were in the custody of the bank at the time they were stolen. There was no evidence of a bailment of the debentures to the bank on the terms [*26] alleged in the second count. There was no * sufficient evidence that the bank kept the debentures in a negligent

manner, as alleged in the second count of the declaration. If the debentures were stolen by a clerk from the bank whilst in the custody of the bank, the bank is not liable for the loss without negligence; and there was no evidence of negligence. They referred to *Coggs* v. *Bernard*, 1 Smith's Lead. Cas. 171; Ld. Raym. 909; *Finucane* v. *Small*, 1 Esp. 315; *Toomey* v. *The London, Brighton and South Coast Railway Company*, 3 C. B. N. S. 146; 27 L. J. C. P. 39; *Cornman* v. *The Eastern Counties Railway Company*, 4 H. & N. 781; 29 L. J. Ex. 94; *Cotton* v. *Wood*, 8 C. B. N. S. 568; 29 L. J. C. P. 333; and *Crafter* v. *The Metropolitan Railway Company*, L. R., 1 C. P. 300; 35 L. J. C. P. 132.

Cur. adv. vult.

Lord Chelmsford now (Feb. 19) delivered the judgment of their Lordships. — This is an appeal from a judgment of nonsuit of the Supreme Court of the colony of Victoria, in an action by the appellant's testator against the respondent. The action was brought against the defendant, as inspector of the Union Bank of Australia, to recover damages for the negligent keeping of certain railway debentures delivered to the bank to be safely kept and taken care of. The plaintiff who resided at Hobart Town, in Tasmania, had an account with the Union Bank of Australia from the year 1857. From the earliest period of his becoming a customer of the bank he had placed in their care a box, of which he kept the key, containing securities, deeds and debentures. The bank received no consideration for taking care of the deposits of their customers. In the month of January, 1862, the plaintiff purchased the railway debentures in question and put them in his box. The box appears always to have been kept in a strong room underground, in which the boxes of other customers of the bank were placed. There were also in this strong room the manager's box, containing bills for discount and collection, worth from £1,500,000 to £2,500,000, teller's boxes, worth £50,000 and securities of the Royal, Central and Agra banks, in which the Union Bank was interested. The access to this room could only be obtained by passing through a compartment of the office which was separated from the part where the clerks were employed by a partition about five feet high. In this compartment Fletcher, the cashier, always sat during bank hours, and a messenger slept there during the night. There was a wooden door in this com-

partment, which opened upon a flight of steps leading to the room where the plaintiff's box was deposited. This room had two iron doors, which were opened by separate keys. Fletcher always kept the key of the wooden door, and also, during the day, the keys of the two iron doors, but at the time the debentures in question were placed in the box one of the keys of the iron doors only was kept by him at night, the other being taken care of by another officer of the bank. Beyond the room where the box was, there were two other rooms; in the outer of the two, uncoined gold was kept, in the inner, bullion and unsigned notes of the bank. The manager kept the key of the outer of these two rooms, and one of the directors of the bank that of the inner one. The plaintiff had frequent opportunities of seeing how and where his box with the debentures was kept. The customers were permitted to have access to their boxes during the bank hours, but always in the presence of a bank clerk. The plaintiff occasionally went down to the strong room to take the coupons from his debentures for collection, but generally the box was brought up to him. The coupons, when taken from the debentures, were always given by the plaintiff to Fletcher to collect for him.

On the 19th of April, 1864, the plaintiff went to the bank and asked for his box; Fletcher brought it to him. The plaintiff opened the box, took out his debentures and carried them away. He then cut off the coupons, took back the debentures, replaced them in the box, locked it, and gave the coupons to Fletcher to collect for him as usual. Before the plaintiff's next visit to the bank, Fletcher had abstracted the debentures. The exact time at which this act of dishonesty was committed cannot be ascertained, but it must have been before the month of July, 1864, as Fletcher then left the bank on leave of absence and never [* 27] * returned. Up to the time of his leaving he had always maintained a good character. The plaintiff did not come again to the bank till the 3rd of July, 1865. He then went into the strong room and took out of his box some gas shares. On the following day he returned to the bank and had his box brought up to him, when he discovered that the debentures were gone. All the material facts above stated were proved in the course of the plaintiff's case, — that the bank were gratuitous bailees, that the plaintiff had known for years the manner in which the bank kept the property of their customers deposited

with them, and the means which they employed for its protection, and that the debentures were dishonestly taken away by Fletcher.

At the close of the plaintiff's case the counsel for the defendant applied for a nonsuit, on the ground that the bank being gratuitous bailees no evidence had been given of such negligence as would render them liable for the loss of the debentures. The Judge refused to stop the case, but reserved leave to the defendant to move to enter a nonsuit. The defendant thereupon went into his case and called witnesses. The only material additions which he made to the facts proved by the plaintiff's witnesses were, the keeping in the strong room in which the plaintiff's box with the debentures was placed, not only of the boxes of other customers, but also of the before-mentioned valuable property belonging to the bank; the good character of Fletcher, and his leaving the bank in the end of the month of July, 1864; and that after Fletcher left, but before the loss of the plaintiff's debentures was discovered, a rule was made in the bank that two clerks instead of one (as formerly) should go with a customer wishing to examine his box in the strong room. The jury found a verdict for the plaintiff upon an issue as to the delivery of the debentures to be kept by the bank without reward, and also upon the plea of not guilty (which raised the question of negligence); and they assessed the damages at £10,450.

The defendant, upon the leave reserved at the trial, moved for and obtained a rule from the Supreme Court to set aside the verdict, and to enter a verdict for the defendant or a judgment of nonsuit. That rule was afterwards made absolute, the Chief Justice stating that, "in the opinion of the Court, the defendant was entitled to a verdict; but that as at the trial, when leave to enter a verdict was reserved, there was an understanding that the rule, if absolute, should be for a nonsuit, and not to enter a verdict, the rule would be absolute accordingly." In the argument of the appeal, the counsel for the appellants, admitting that the bank were gratuitous bailees, and therefore not responsible except for the highest degree of negligence, usually styled "gross negligence," insisted that it was a question of fact for the jury whether the bank had been guilty of this species of negligence, and that the Judge would not have been justified, at the close of the plaintiff's case, in withdrawing the question from the jury and directing a nonsuit; and that after the defendant's case had been gone into,

and the jury had pronounced a verdict upon all the evidence on both sides, it was not competent to the Court to give a judgment of nonsuit, or to do more than to direct a new trial upon the question of negligence. The learned counsel contended that the bank had been guilty of negligence, because, there being two iron doors with protecting locks to the strong room where the plaintiff's debentures were, the cashier was permitted to keep both keys. And they urged that the bank by their own act admitted that they had not been sufficiently careful, as, after Fletcher left, they made a rule that two clerks should always accompany the customers to the strong room instead of only one, as had previously been the practice.

The first question to be considered is, whether the Supreme Court was right in directing a nonsuit to be entered. It was the duty of the Court to do what the Judge ought to have done at the trial; and if, at the close of the plaintiff's case, there was not evidence upon which the jury could reasonably and properly find a verdict for him, the Judge ought to have directed a nonsuit. Formerly it used to be held that, if there were what was called a scintilla of evidence in support of a case, the Judge was bound to leave it to the jury. But a course of recent decisions — most of which are referred to in the case of *Ryder* v. *Wombwell* [* 28] L. R., 4 Ex. 32; 38 L. J. Ex. 8 — has established a more * reasonable rule, viz., that, in every case, before the evidence is left to the jury there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed. If, therefore, the plaintiffs' evidence in this case was such that the Judge ought to have considered that it fell short of proving the bank to have been guilty of that species of negligence which would render them liable to an action, he ought to have withdrawn the case from the jury, and directed a nonsuit. But the appellants' counsel insisted that, as the defendant at the trial did not rest upon his objection to the sufficiency of the plaintiff's case, but went into evidence of his own, he did it at his peril; and that if he proved any facts which were favourable to the plaintiff, they might be used in answer to the application to the Court for a nonsuit, upon the leave reserved at the close of the plaintiff's case. It is unnecessary to determine whether this position is correct or

not, because the counsel for the respondent agreed that the appellants' counsel might be at liberty to use in argument any facts which they could extract from the defendant's evidence in support of their case. But it may be convenient to see how the plaintiff's case stood upon his own evidence, before considering whether it was at all improved by any facts obtained from the defendant's witnesses. Did the plaintiff, then, give any evidence of the bank having been guilty of that degree of negligence which renders a gratuitous bailee liable for the loss of property deposited with him? From the time of Lord HOLT'S celebrated judgment in *Coggs* v. *Bernard*, in which he classified and distinguished the different degrees of negligence for which the different kinds of bailees are answerable, the negligence which must be established against a gratuitous bailee has been called "gross negligence." This term had been used from that period, without objection, as a short and convenient mode of describing the degree of responsibility which attaches upon a bailee of this class. At last, Lord CRANWORTH (then Baron ROLFE), in the case of *Wilson* v. *Brett*, objected to it, saying that he "could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet." And this critical observation has been since approved of by other eminent judges. Of course, if intended as a definition, the expression "gross negligence' wholly fails of its object. But as there is a practical difference between the degrees of negligence for which different classes of bailees are responsible, the term may be usefully retained as descriptive of that difference, more especially as it has been so long in familiar use, and has been sanctioned by such high authority as Lord HOLT, and Sir William Jones in his "Essay on the Law of Bailments." In the case of *Grill* v. *the General Iron Screw Collier Company*, Mr. Justice WILLES, after agreeing with the *dictum* of Lord CRANWORTH, and stating that the same view of the term "gross negligence" was held by the Exchequer Chamber in *Beal* v. *The South Devon Railway Company*, said: "Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use." It is hardly correct to say that the Court of Exchequer Chamber, in the case referred to, adopted the view of Lord CRANWORTH as to the impropriety of the term "gross negligence." Mr. Justice CROMPTON, in delivering

No. 3. — Giblin v. M'Mullen, 38 L. J. P. C. 28, 29.

the opinion of the Court, said: "It is said that there may be difficulty in defining what gross negligence is; but I agree in the remark of the Lord Chief BARON in the Court below, where he says, 'There is a certain degree of negligence to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them;'" and he added, "For all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill, and diligence is gross negligence." Mr. Justice MONTAGUE SMITH, in the case in which the above-mentioned observations of Mr. Justice WILLES were made, said: "The use of the term 'gross negligence' is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence." The epithet "gross" is certainly not without its significance. The neg-
[*29] ligence for which *according to Lord HOLT, a gratuitous bailee incurs liability is such as to involve a breach of confidence or trust, not arising merely from some want of foresight or mistake of judgment, but from some culpable default. No advantage would be gained by substituting a positive for a negative phrase, because the degree of care and diligence which a bailee must exercise corresponds with the degree of negligence for which he is responsible, and there would be the same difficulty in defining the extent of the positive duty in each case as the degree of neglect of it which incurs responsibility. In truth, this difficulty is inherent in the nature of the subject, and, though degrees of care are not definable, they are with some approach to certainty distinguishable; and in every case of this description in which the evidence is left to the jury, they must be led by a cautious and discriminating direction of the Judge to distinguish, as well as they can, degrees of things which run more or less into each other.

It is clear, according to the authorities, that the bank in this case were not bound to more than ordinary care of the deposit entrusted to them, and that the negligence for which alone they could be made liable would have been the want of that ordinary diligence which men of common prudence generally exercise about their own affairs.

The case resembles very closely one that was mentioned by the

counsel for the respondent, which was decided in the Supreme Judicial Court of Massachusetts, the case of *Foster* v. *The Essex Bank*. The plaintiff in that case deposited with the bank, for safe custody, a cask containing a quantity of gold doubloons. This was placed with other deposits in a vault in the bank, and the agent of the plaintiff was in the habit of coming to the bank to see that his deposit was safe. There was no evidence how the vault was secured. Whenever the plaintiff gave orders to the bank (which he frequently did) to deliver some of the gold doubloons deposited, the cask was opened by the cashier or chief clerk, who delivered the doubloons pursuant to the orders. The cashier and chief clerk, both of whom had previously sustained a fair reputation, fraudulently took from the cask doubloons to the amount of 32,000 dollars, with which they absconded. The action was tried upon the general issue, and the jury found a special verdict. The court, after argument, gave judgment for the defendants. The Chief Justice, who delivered the opinion of the court, entered fully into the law of bailments applicable to the case, holding that "as far as the bank was concerned, the deposit of the gold was a mere naked bailment for the accommodation of the depositor, and without any advantage to the bank which could tend to increase its liability beyond the effect of such a contract." "That the bank was answerable only for gross negligence or for fraud, which will make a bailee of any character answerable, and that gross negligence certainly could not be inferred from anything found by the verdict, as the same care was taken of the plaintiff's property as of other deposits, and of the property belonging to the bank itself." And the court held that the bank was not responsible for the fraud or felony of the cashier and clerk, as when they abstracted the plaintiff's gold from the cask they were not acting within the scope of their employment; "and the bank was no more answerable for their act than it would have been if they had stolen the pocket-book of any person who might have laid it upon the desk while he was transacting some business at the bank."

Their Lordships entertain no doubt that it was the duty of the Judge at the close of the plaintiff's case, upon the application of the counsel for the defendant, to have ordered a nonsuit, or if the plaintiff refused to be nonsuited, to have directed the jury to find a verdict for the defendant, as there was an entire failure of evidence of the want of that ordinary care which the bank was bound to bestow upon the plaintiff's deposit.

But the Judge having refused to nonsuit, the defendant thereupon went into his case, and called witnesses, and having done so the counsel for the appellants contend that there being evidence on both sides, the question could not be withdrawn from the jury, and that as the Judge could not have nonsuited at that stage of the trial it was not competent to the Supreme Court to give a judgment of nonsuit. It is not, however, correct to say that the Judge could not have nonsuited the plaintiff after the defendant had entered upon his case, as it was decided in the case of
[* 30] *Davis* v. * *Hardy*, 6 B. & C. 225, that the evidence given by a defendant may be used for the purpose of a nonsuit.

The defendant's evidence added to the plaintiff's case the important fact that in the strong room in which the plaintiff's debentures were kept, there were, besides the boxes of other customers, bills, securities, and specie, the property of the bank, to a very considerable amount. It may be admitted not to be sufficient to exempt a gratuitous bailee from liability that he keeps goods deposited with him in the same manner as he keeps his own, though this degree of care will ordinarily repel the presumption of gross negligence. But there is no case which puts the duty of a bailee of this kind higher than this, that he is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description. This was in effect the question left to the jury in *Doorman* v. *Jenkins*, where Lord DENMAN told them that "it did not follow from the defendant's having lost his own money at the same time as the plaintiff's, that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own, and that the fact relied upon was no answer to the action if they believed that the loss occurred from gross negligence."

No one can fairly say that the means employed for the protection of the property of the bank and of the plaintiff were not such as any reasonable man might properly have considered amply sufficient. But the appellants' counsel insisted that the fact appearing for the first time in the defendant's case, that the bank, after Fletcher had abused the confidence reposed in him, had introduced additional precautions to prevent the recurrence of a similar act of dishonesty, amounted to an admission that their former safeguards were not such as prudent men ought to have been satisfied with.

This argument goes the length of contending that if a gratuitous depositary does not multiply his precautions so as not to omit anything which can make the loss of property entrusted to him next to impossible, he is guilty of gross negligence.

Their Lordships are clearly of opinion that the plaintiff failed upon his own evidence to prove a case of negligence against the bank, and that the evidence produced by the defendant showed more strongly the absence of any such negligence for which they would have been liable. They will, therefore recommend to her Majesty that the judgment appealed from be affirmed, and the appeal be dismissed with costs.

ENGLISH NOTES.

Where certificates of shares were deposited for safe custody with a banking company, which undertook to receive the dividends for a small commission, the company was held to be a bailee for reward and liable upon that footing for negligence. *In re United Service Company, Johnston's Claim* (L. J. 1870), L. R., 6 Ch. 212, 40 L. J. Ch. 286.

AMERICAN NOTES.

The doctrine of the principal case is generally held in this country. The leading case is *Foster* v *Essex Bank*, 17 Massachusetts, 479 ; 9 Am. Dec. 168 (A. D. 1621), in which the Court pronounced the case to be unprecedented, and it was held that where a cask containing a quantity of gold coin was deposited in a bank for safe-keeping, in accordance with practice, and the gold was fraudulently taken out by the cashier, the bank was not liable therefor to the depositor. This doctrine has also been adjudged in more recent years under the National Banking Act. *Scott* v. *Nat. Bank of Chester*, 72 Penn. St. 471 ; 13 Am. Rep. 711 ; *Nat. Bank* v. *Ocean Bank*, 60 New York, 278 ; 19 Am. Rep. 181 ; *First Nat. Bank* v. *Graham*, 79 Penn. St. 106 ; 21 Am. Rep. 49 ; *First Nat. Bank* v. *Rex*, 89 Penn. St 308 ; 33 Am. Rep. 767 ; *Turner* v. *First Nat. Bank*, 26 Iowa, 562 ; *Chattahooche Nat. Bank* v. *Schley*, 58 Georgia, 369 ; *Merchants' Nat. Bank* v. *Guilmartin*, Georgia Supreme Court, 17 Lawyers' Reports Annotated, 322. But see to the contrary, *Wiley* v. *First Nat. Bank*, 47 Vermont, 546 ; 19 Am. Rep. 122 ; *Whitney* v. *First Nat. Bank*, 55 Vermont, 155 ; 45 Am. Rep. 598.

In *Merch. Nat. Bank* v. *Guilmartin*, *supra*, it was held that the bank was not liable for a special deposit, received through the cashier for gratuitous safe-keeping and return to the depositor on demand, although the cashier stole or fraudulently appropriated it to his own use, provided the bank exercised due diligence in the selection and retention of the cashier, and his fraudulent act was without the knowledge or consent of the other officers. Citing the principal case, and *Preston* v. *Prather*, 137 United States, 604.

But a bank is liable in such case for gross negligence. *Pattison* v. *Syracuse*

Nat. Bank, 80 New York, 82; 36 Am. Rep. 582; *First Nat. Bank* v. *Graham*, 85 Penn. St. 91; 27 Am. Rep. 628, affirmed by the United States Supreme Court, 100 United States, 699. The Court in the last case observed:

"Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application.

"They are also liable for the acts of their servants while such servants are engaged in the business of their principal, in the same manner and to the same extent that individuals are liable under like circumstances. *Merchant's Bank* v. *State Bank*, 10 Wall. 645. An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the objects of its creation or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance and for libel. In certain cases it may be indicted for misfeasance or non-feasance touching duties imposed upon it in which the public are interested. Its offences may be such as will forfeit its existence. *P. W. & B. R. Co.* v. *Quigley*, 21 How. 209; 2 Wait Actions and Defences, 337, 338, 339; Angell & Ames on Corp., §§ 186, 385; Cooley on Torts, 119, 120.

"Recurring to the case in hand, it is now well settled that if a bank be accustomed to take such deposits as the one here in question, and this is known and acquiesced in by the directors, and the property deposited is lost by the gross carelessness of the bailee, a liability ensues in like manner as if the deposit had been authorized by the terms of the charter. *Foster* v. *Essex Bank*, 17 Mass. 479; *Lancaster Co. Nat. Bank* v. *Smith*, 62 Penn. St. 47; *Scott* v. *National Bank of Chester Valley*, 72 id. 471; s. c. 13 Am. Rep. 711; Thomp. N. B Cas. 864; *First Nat. Bank of Carlisle* v. *Graham*, 79 Penn. St. 106; s. c. 21 Am. Rep. 49; Thomp. N. B Cas. 875; *Turner* v. *First Nat. Bank of Keokuk*, 26 Iowa, 562; Thomp. N. B. Cas. 454; *Smith* v. *First Nat. Bank of Westfield*, 99 Mass. 605; *Chattahooche Nat. Bank* v. *Schley*, 58 Ga. 369; Thomp. N. B. Cas. 379. The only authorities in direct conflict with these adjudications, to which our attention has been called, are *Wiley* v. *Nat. Bank of Vermont*, 47 Vt. 546; s. c. 19 Am. Rep. 122; Thomp. N. B. Cas. 905; and *Whitney* v. *Nat. Bank of Brattleboro*, 50 Vt. 389, s. c. 28 Am. Rep. 503.

"The case first cited (*Foster* v. *Essex Bank*) was argued exhaustively by the most eminent counsel of the time and decided by a court of great judicial learning and ability. Their opinion is marked by careful elaboration. The special deposit there was a cask containing gold coin. While it was maintained that the bank would have been liable for its loss by gross negligence, it was held that such negligence in that case had not been shown.

"Here gross negligence is conclusively established. The depositor kept an account in the bank. The cashier cut off and collected the coupons and placed the proceeds to her credit. The bonds therefore entered into the legitimate and proper business of the institution. But it is unnecessary to pursue this view of the subject further, because we think there is another ground free from doubt upon which our judgment may be rested.

"The 46th section of the Banking Act of 1864, re-enacted in the Revised Statutes of the United States, § 5228, declares that after the failure of a

National bank to pay its circulating notes, etc., 'it shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep moneys belonging to it, *and to deliver special deposits*.' This implies clearly that a National bank, as a part of its legitimate business, may receive *such* '*special deposits*,' and this implication is as effectual as an express declaration of the same thing would have been. *United States* v. *Babbit*, 1 Black, 61.

"The phrase '*special deposits*,' thus used, embraces deposits such as that here in question. *Pattison* v. *Syracuse Nat. Bank*, Court of Appeals, New York (recently decided, and not yet reported). In that case it was said, 'a reference to the history of banking discloses that the chief, and in some cases the only deposits received by the early banks were special deposits of money, bullion, plate, etc., for safe-keeping and to be specifically returned to the depositor; and such was the character of the business done by the Bank of Venice (the earliest bank) and the old Bank of Amsterdam, and the same business was done by the Goldsmiths of London and the Bank of England, and we know of none of the earlier banks where it was not done.'

"It would undoubtedly be competent for a National bank to receive a special deposit of such securities as those here in question either on a contract of hiring or without reward, and it would be liable for a greater or less degree of negligence accordingly.

"We do not mean that it could convert itself into a pawnbroker's shop. That subject involves topics alien to the case before us, and which in this opinion it is unnecessary to consider."

To the same effect *Bank* v. *Zent*, 39 Ohio St. 105; 3 Browne's Nat. Bank Cas. 693; *Wylie* v. *Northampton Nat. Bank*, 119 United States, 361; 3 Browne's Nat. Bank Cas. 188.

Bankers are liable for the theft by their cashier of government bonds held by them as gratuitous bailees, to which such cashier had access, where they failed to look after such bonds, or to discharge him after being notified that he was speculating in stocks, he not being known to have any property other than his salary. *Gray* v. *Merriam*, Illinois Sup. Ct., 35 North Eastern Reporter, 810; affirming 46 Illinois Appeals, 337.

Section III. — *Bank-notes.*

No. 4. — MILLER *v.* RACE.

(K. B. 1758.)

No. 5. — SOLOMONS *v.* BANK OF ENGLAND.

(K. B. 1791.)

RULE.

Property in a bank-note passes like that in cash, by delivery; and a person taking it *bonâ fide* and for value is entitled to the property, although the note has been stolen from a former owner.

The holder of a bank-note is *primâ facie* entitled to prompt payment from the bank.

But where the bank had been informed that a £500 note of theirs had been fraudulently obtained, and on its being presented by the plaintiff three years later required him to give an account of it, and it appearing that the plaintiff was the agent of a principal abroad who only accounted for it by saying that he had received it from a man of whom he knew nothing in payment for goods; this was held evidence to go to the jury of the principal's privity to the original fraud.

Miller v. Race.

1 Burr. 452-459 (also 1 Smith's Leading Cases).

It was an action of trover against the defendant, upon [* 453] a bank note, for the payment of twenty-one * pounds ten shillings to one William Finney or bearer, on demand.

The cause came on to be tried before Lord Mansfield at the sittings in Trinity term last at Guildhall, London; and upon the trial it appeared that William Finney, being possessed of this bank-note on the 11th of December, 1756, sent it by the general post, under cover, directed to one Bernard Odenharty, at Chipping Norton in Oxfordshire; that on the same night the mail was

No. 4. — Miller v. Race, 1 Burr. 453, 454.

robbed, and the bank-note in question (amongst other notes) taken and carried away by the robber; that this bank-note, on the 12th of the same December, came into the hands and possession of the plaintiff, for a full and valuable consideration, and in the usual course and way of his business, and without any notice or knowledge of this bank-note being taken out of the mail.

It was admitted and agreed, that, in the common and known course of trade, bank-notes are paid by and received of the holder or possessor of them, as cash; and that in the usual way of negotiating bank-notes, they pass from one person to another as cash, by delivery only and without any further inquiry or evidence of title, than what arises from the possession. It appeared that Mr. Finney, having notice of this robbery, on the 13th December, applied to the Bank of England, "to stop the payment of this note:" which was ordered accordingly, upon Mr. Finney's entering into proper security "to indemnify the bank."

Some little time after this, the plaintiff applied to the bank for the payment of this note; and for that purpose delivered the note to the defendant, who is a clerk in the bank; but the defendant refused either to pay the note, or to redeliver it to the plaintiff. Upon which this action was brought against the defendant.

The jury found a verdict for the plaintiff, and the sum of £21 10*s.* damages, subject nevertheless to the opinion of this Court upon this question — "Whether under the circumstances of this case, the plaintiff had a sufficient property in this bank-note, to entitle him to recover in the present action?"

Mr. Williams was beginning on behalf of the plaintiff, —

But Lord Mansfield said, "that as the objection came from the side of the defendant, it was rather more proper for the defendant's counsel to state and urge their objection."

Sir Richard Lloyd, for the defendant.

The present action is brought, not for the money due upon the note; but for the note itself, the paper, the evidence of the debt. So that the right to the money is *not the [*454] present question; the note is only an evidence of the money's being due to him as bearer.

The note must either come to the plaintiff by assignment, or must be considered as if the bank gave a fresh, separate, and distinct note to each bearer. Now the plaintiff can have no right by the assignment of a robber. And the bank cannot be consid-

ered as giving a new note to each bearer; though each bearer may be considered as having obtained from the bank a new promise.

I do not say whether the bank can, or cannot stop payment; that is another question. But the note is only an instrument of recovery.

Now this note, or these goods (as I may call it), was the property of Mr. Finney, who paid in the money; he is the real owner. It is like a medal which might entitle a man to payment of money, or to any other advantage. And it is by Mr. Finney's authority and request that Mr. Race detained it.

It may be objected, that this note is to be considered as cash "in the usual course of trade." But still, the course of trade is not at all affected by the present question, about the right to the note. A different species of action must be brought for the note, from what must be brought against the bank for the money. And this man has elected to bring trover for the note itself, as owner of the note; and not to bring his action against the bank for the money. In which action of trover, property cannot be proved in the plaintiff; for a special proprietor can have no right against the true owner.

The cases that may affect the present are, 1 Salk. 126, M. 10 W. III., *Anonymous, coram* HOLT, C. J., at *nisi prius* at Guildhall. There Lord Chief Justice HOLT held, "that the right owner of a bank bill, who lost it, might have trover against a stranger who found it; but not against the person to whom the finder transferred it for a valuable consideration, by reason of the course of trade which creates a property in the assignee or bearer." 1 Ld. Raym. 738, S. C. In which case the note was paid away in the course of trade; but this remains in the man's hands, and is not come into the course of trade. H. 12 W. III., B. R. 1 Salk 283, 284, *Ford* v. *Hopkins*, per HOLT, C. J., at *nisi prius* at Guildhall. "If bank notes, exchequer notes, or million lottery tickets, or the like are stolen or lost, the owner has such an interest or property in them, as to bring an action, into whatsoever hands they are come. Money or cash is not to be distinguished but these notes or bills are distinguishable, and cannot be reckoned as cash; and they have distinct marks and numbers on them." Therefore,
[*455] the true owner may seize *these notes wherever he finds them, if not passed away in the course of trade.

1 Strange, 505, H. 8 G. I. In Middlesex, *coram* PRATT, C. J.

No. 4. — Miller v. Race, 1 Burr. 455.

Armory v. *Delamirie*, a chimney sweeper's boy found a jewel. It was ruled "that the finder has such a property as will enable him to keep it against all but the rightful owner, and, consequently, may maintain trover."

This note is just like any other piece of property until passed away in the course of trade. And here the defendant acted as agent to the true owner.

Mr. Williams *contra*, for the plaintiff.

The holder of this bank-note, upon a valuable consideration has a right to it even against the true owner.

1. The circulation of these notes vests a property in the holder, who comes to the possession of it, upon a valuable consideration.

2. This is of vast consequence to trade and commerce; and they would be greatly incommoded if it were otherwise.

3. This falls within the reason of a sale in market overt; and ought to be determined upon the same principle.

First. He put several cases, where the usage, course, and convenience of trade, made the law; and sometimes, even against an Act of Parliament. 3 Keb. 444, *Stanley* v. *Ayles*, per HALE, C. J. at Guildhall; 2 Strange, 1000, *Lumley* v. *Palmer*; where a parol acceptance of a bill of exchange was holden sufficient against the acceptor. 1 Salk. 23.

Secondly. This paper credit has been always, and with great reason, favoured and encouraged. 2 Strange, 946, *Jenys* v. *Fowler et al.*

The usage of these notes is, "That they pass by delivery only: and are considered as current cash; and the possession always carries with it the property." 1 Salk. 126, pl. 5, is in point.

A particular mischief is rather to be permitted, than a general inconvenience incurred. And Mr. Finney, who was robbed of this note, was guilty of some laches in not preventing it.

Upon Sir Richard Lloyd's argument, a holder of a note might suffer the loss of it, for want of title against a true owner; even if there was a chasm in the transfer of it through one only out of five hundred hands.

Thirdly. This is to be considered upon the same foot as a sale in market overt.

2 Inst. 713, "A sale in market overt binds those that had right."

But it is objected by Sir Richard, "that there is a substantial

[*456] difference between a right to the note, and a *right to the money." But I say the right to the money will attract to it a right to the paper. Our right is not by assignment, but by law, by the usage and custom of trade. I do not contend that the robber, or even the finder of a note, has a right to the note; but after circulation, the holder upon a valuable consideration has a right.

We have a property in this note; and have recovered the value against the withholder of it. It is not material what action we could have brought against the bank.

Then he answered Sir Richard Lloyd's cases; and agreed that the true owner might pursue his property, where it came into the hands of another, without a valuable consideration, or not in the course of trade; which is all that Lord Chief Justice Holt said in 1 Salk. 284.

As to 1 Strange, 505. He agreed that the finder has the property against all but the rightful owner; not against him.

Sir Richard Lloyd in reply: —

I agree that the holder of the note has a special property; but it does not follow that he can maintain trover for it, against the true owner.

This is not only without, but against the consent of the owner.

Supposing this note to be a sort of mercantile cash; yet it has an ear-mark by which it may be distinguished; therefore trover will lie for it. And so is the case of *Ford* v. *Hopkins*.

And you may recover a thing stolen from a merchant, as well as a thing stolen from another man. And this note is a mere piece of paper; it may be as well stopped, as any other sort of mercantile cash (as, for instance, a policy which has been stolen). And this has not been passed away in trade; but remains in the hands of the true owner. And therefore it does not signify in what manner they are passed away, when they are passed away; for this was not passed away. Here the true owner, or his servant (which is the same thing) detains it. And, surely, robbery does not devest the property.

This is not like goods sold in market overt; nor does it pass in the way of a market overt; nor is it within the reason of a market overt. Suppose it was a watch stolen; the owner may seize it (though he finds it in a market overt), before it sold there. But there is no market overt for bank-notes.

No. 4. — Miller v. Race, 1 Burr 456, 457.

I deny the holder's (merely as holder) having a right to the note, against the true owner, and I deny that the possession gives a right to the note.

Upon this argument on Friday last, Lord MANSFIELD then said that Sir Richard Lloyd had argued it so ingeniously * that (though he had no doubt about the matter), it [*457] might be proper to look into the cases he had cited, in order to give a proper answer to them, and therefore the Court deferred giving their opinion, to this day. But at the same time, Lord MANSFIELD said, he would not wish to have it understood in the city, that the Court had any doubt about the point.

Lord MANSFIELD now delivered the resolution of the Court.

After stating the case at large, he declared that at the trial, he had no sort of doubt, but this action was well brought, and would lie against the defendant in the present case; upon the general course of business, and from the consequences to trade and commerce; which would be much incommoded by a contrary determination.

It has been very ingeniously argued by Sir Richard Lloyd for the defendant. But the whole fallacy of the argument turns upon comparing bank-notes to what they do not resemble, and what they ought not to be compared to, viz. to goods, or to securities, or documents for debts.

Now they are not goods, not securities, nor documents for debts, nor are so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money, to all intents and purposes. They are as much money as guineas themselves are; or any other current coin, that is used in common payments, as money or cash.

They pass by a will which bequeaths all the testator's money or cash; and are never considered as securities for money, but as money itself. Upon *Lord Aylesbury's* will [*Popham* v. *Bathurst*, in Chy. November, 1748], £900 in bank-notes was considered as cash. On payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes.

So on bankruptcies, they cannot be followed as identical and distinguishable from money; but are always considered as money or cash.

It is pity that reporters sometimes catch at quaint expressions

that may happen to be dropped at the bar or bench; and mistake their meaning. It has been quaintly said, "that the reason why money cannot be followed is, because it has no ear-mark;" but this is not true. The true reason is, upon account of the currency of it, it cannot be recovered after it has passed in currency. So, in case of money stolen, the true owner cannot recover it, after it has been paid away fairly and honestly upon a valuable and *bonâ fide* consideration; but before money has passed in currency, an action may be brought for the money itself.

[*458] There was a case in 1 G. I. at the sittings, * *Thomas* v. *Whip*, before Lord Macclesfield, which was an action upon assumpsit, by an administrator against the defendant, for money had and received to his use. The defendant was nurse to the intestate during his sickness; and, being alone, conveyed away the money. And Lord Macclesfield held that the action lay. Now this must be esteemed a finding at least.

Apply this to the case of a bank-note. An action may lie against the finder, it is true; (and it is not at all denied) but not after it has been paid away in currency. And this point has been determined, even in the infancy of bank-notes; for 1 Salk. 126, M. 10, W. III. at *nisi prius*, is in point. And Lord Chief Justice Holt there says that it is "by reason of the course of trade; which creates a property in the assignee or bearer." (And "the bearer" is a more proper expression than assignee.)

Here an innkeeper took it, *bonâ fide*, in his business from a person who made an appearance of a gentleman. Here is no pretence or suspicion of collusion with the robber; for this matter was strictly inquired and examined into at the trial: and is so stated in the case, "that he took it for a full and valuable consideration, in the usual course of business." Indeed if there had been any collusion, or any circumstances of unfair dealing, the case had been much otherwise. If it had been a note for £1000 it might have been suspicious; but this was a small note, for £21 10*s.* only; and money given in exchange for it.

Another case cited was a loose note [1] in 1 Lord Raym. 738, ruled by Lord Chief Justice Holt at Guildhall, in 1698; which proves nothing for the defendant's side of the question; but it is exactly agreeable to what is laid down by my Lord Chief Justice Holt, in

[1] *Ex relatione* of another person

the case I have just mentioned. The action did not lie against the assignee of the bank-bill; because he had it for valuable consideration.

In that case, he had it from the person who found it; but the action did not lie against him, because he took it in the course of currency; and therefore it could not be followed in his hands. It never shall be followed into the hands of a person who *bonâ fide* took it in the course of currency, and in the way of his business.

The case of *Ford* v. *Hopkins*, was also cited: which was in Hil. 12 W. III. *coram* HOLT, C. J., at *nisi prius*, at Guildhall; and was an action of trover for million-lottery tickets. But this must be a very incorrect report of that case; it is impossible that it can be a true representation of what Lord Chief Justice HOLT said. It represents him as speaking of bank-notes, exchequer-notes and million-lottery tickets, as like to each other. Now no two things can be more *unlike to each other, than a [*459] lottery-ticket and a bank-note. Lottery tickets are identical and specific; specific actions lie for them. They may prove extremely unequal in value; one may be a prize; another, a blank. Land is not more specific than lottery-tickets are. It is there said, "that the delivery of the plaintiff's tickets to the defendant, as that case was, was no change of property." And most clearly it was no change of the property; so far the case is right. But it is here urged as a proof "that the true owner may follow a stolen bank-note, into what hands soever it shall come."

Now the whole of that case turns upon the throwing in bank-notes, as being like to lottery tickets.

But Lord Chief Justice HOLT could never say, "that an action would lie against the person who, for a valuable consideration, had received a bank-note which had been stolen or lost, and *bonâ fide* paid to him;" even though the action was brought by the true owner; because he had determined otherwise, but two years before; and because bank-notes are not like lottery-tickets, but money.

The person who took down this case certainly misunderstood Lord Chief Justice HOLT, or mistook his reasons. For this reasoning would prove (if it was true as the reporter represents it), that if a man paid to a goldsmith £500 in bank-notes, the goldsmith could never pay them away.

A bank-note is constantly and universally, both at home and abroad, treated as money, as cash; and paid and received, as cash;

and it is necessary, for the purposes of commerce, that their currency should be established and secured.

There was a case in the Court of Chancery [*Walmsley* v. *Child*, 1 Ves. 341, 3 Burr. 1524], on some of Mr. Child's notes, payable to the person to whom they were given, or bearer. The notes had been lost or destroyed many years. Mr. Child was ready to pay them to the widow and administratrix of the person to whom they were made payable; upon her giving bond with two responsible sureties (as is the custom in such cases) to indemnify him against the bearer, if the notes should ever be demanded. The administratrix brought a bill; which was dismissed because she either could not or would not give the security required. No dispute ought to be made with the bearer of a cashnote; in regard to commerce, and for the sake of the credit of these notes; though it may be both reasonable and customary to stay the payment, till inquiry can be made, whether the bearer of the note came by it fairly, or not.

Lord MANSFIELD declared that the Court were all of the same opinion, for the plaintiff; and that Mr. Justice WILMOT concurred.

Rule — That the *postea* be delivered to the plaintiff.

Solomons v. The Bank of England.

13 East, 135 *n*–138 *n* (s. c. 12 R. R. 341–346).

[* 135 *n*] * Trover for a bank-note of £500. At the trial before Lord KENYON, C. J., at Guildhall, it appeared that the note in question had been fraudulently obtained by some person by means of a forged draft, from Batson and Company, who acquainted the bank therewith; and therefore when it was presented for payment at the bank some time afterwards by the plaintiff, it was stopped, and the plaintiff was informed by the bank of all the circumstances, and required to give an account how he came by it; this was on the 2d of February, 1790. It appeared that he had received the note from Hymen and Hendricks, his correspondents, Jews living at Middleburgh, in a letter (which was read), dated 27th of January, 1790, wherein they informed him that they should draw upon him for the amount at some future period. The plaintiff, on presenting the note at the bank, had inquired whether it were a good one, it being of three years' standing. In consequence of what then passed, he, by the desire of the bank, wrote to his correspon-

No. 5. — Solomons v. The Bank of England, 13 East, 135 n., 136 n.

dents at Middleburgh, to learn how they came by the note; the only answer, however, which was communicated to the bank was in a letter from those correspondents to the plaintiff that they had received it from a man dressed in such a way, in payment for goods, and that they knew nothing of him. Another letter was read on the part of the plaintiff from the same persons, dated 11th of April following; telling the plaintiff that they would not be amused by him any longer; that they should either draw upon him for the amount of the note, or expected that he would immediately return it to them, in case the bank would not pay it. The note was stated to have been received by the plaintiff in reduction of a balance[1] due upon his correspondent's account. It further appeared in evidence that bank-notes of so large an amount as this were not usually current at Middleburgh.

Lord KENYON, C. J., before whom this case was tried at Guildhall, stated to the jury that, inasmuch as it did not appear that the * plaintiff himself had paid a valuable consideration for [* 136 *n*] the note before notice, he should consider him as the agent of Hymen and Hendricks; and with respect to them he was by no means satisfied in his own mind that they had properly accounted for their possession of it; whereupon the plaintiff's counsel desired to be nonsuited; which was done.

Bearcroft obtained a rule to show cause why that nonsuit should not be set aside, on the ground that the holder of a bank-note was entitled to the payment of it on the mere production thereof, it being equivalent to money; and that no suspicion or fraud whatever would warrant a withholding of it, unless the fraud were brought home to the holder himself. That in this case there was no evidence whatever to impute fraud to the plaintiff, and that the proof of it lay affirmatively on the defendants, and not negatively on the holder of the note.

Erskine and Piggott showed cause. They admitted from *Miller* v. *Race*, 1 Burr, 452, p. 626, *ante*; *Grant* v. *Vaughan*, 3 Burr. 1516; *Peacock* v. *Rhodes*, Dougl. 633, and other cases, that *primâ facie* the bearer of a bank-note was entitled to receive the money merely on

[1] How this fact was did not appear with certainty on the evidence; namely, whether the balance due from Hymen and Co. to the plaintiff had accrued at the time when the note was first received by the plaintiff, or in the course of the transaction after notice by him of all the circumstances. But what is stated above is the evidence which was given of the plaintiff's conversation with the bank officers, on being interrogated by them concerning his title to the note.

the score of his possession, and that no other person was entitled to the note, unless he were also entitled to the money; and that whoever impeached his title must take the burden of proof upon himself. But the principle of all the cases was that the party standing upon his possession was a *bonâ fide* holder for a valuable consideration; and therefore the case did not apply to establish this plaintiff's right, who appeared upon the evidence not to be a holder for a valuable consideration before notice. It appears plainly from the letters that on the 2d of February, 1790, when he was informed by the bank of all the facts relative to the note, he had not then advanced any consideration for it to his correspondents, from whom he only received it on the 27th of January preceding, and who then informed him that they should draw upon him for the amount at some future period. It is as plain that on the 11th of April he had not advanced anything on the note; for they wrote to desire him either to pay the money or return the note. If after notice he thought proper to pay the money, the most he can claim is to stand in the shoes of Hymen and Hendricks, from whom he received it. Now as to them, sufficient evidence was given to call on them to show more especially how they came by it. If the plaintiff, in order to avert the verdict which he saw hanging over his head, thought proper to be nonsuited, there is no ground for this Court to interfere; there being evidence enough to warrant the suspicion intimated by the learned Judge.

Bearcroft, in support of the rule, contended that upon settled principles of law, and on the broad ground of policy, the plaintiff was entitled to recover; and that there was no evidence here to warrant the intimation of opinion given by his Lordship to the jury, to avert the consequences of which the plaintiff had, in deference to that opinion, submitted to a nonsuit. In one point of [* 137 *n*] view the case was of great * moment as it affected public policy, which was deeply interested in sustaining the credit of the bank abroad as well as here, which could only be done by giving the same currency to bank-notes as to the cash itself which they represented, and for which they were always taken by the public. But if once the bank were permitted to withhold payment upon the same grounds as would warrant it in the case of bills of exchange, the confidence of foreigners would be greatly shaken, and the circulation of these notes very much diminished. But in point of law also it appears, from the cases alluded to on

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the other side, that the bare possession of a bank-note is sufficient to entitle the possessor to payment, unless it appear by positive evidence that he himself came by it fraudulently. Any fraud committed by any other person previously, in obtaining the note, is not sufficient, unless it be also shown that the possessor was privy to it. The burden of proof in all such cases rests upon those who object to the payment of it. Now here it was even proved on the part of the plaintiff, which was not necessary for him to do, that he had *bonâ fide* received this note from his correspondents at Middleburgh, upon account, and in reduction of his balance. His title, therefore, was at all events unimpeached, whatever theirs might be. But even supposing the plaintiff's title rested ultimately upon theirs, it was not sufficient for the bank to call upon them to show how they came by the note. They were not bound to disclose anything. They had a right to receive payment, till the bank had given evidence of their being concerned in the fraud by which the note was originally obtained; and no such evidence was given. At all events that would not affect the plaintiff, who, so far from there being any evidence of his colluding with Hendricks and Co., appears from the letters to have been suspected by them of an intention to cheat them by not returning either the money or the note.

Lord KENYON, C. J. It is very certain that both policy and convenience require that bank-notes should have the freest currency, and no other impediment ought to be put in the way of it than such as mere justice requires. This is doing no more than would be the case even upon payment of money itself. For if this party had received money contrary to conscience, it might have been recovered back again. As this case is now situated, I am glad that the opinion which I now hold will not prevent the party from making another appeal to the laws of the country, if he find that he can better his case. There is no doubt but the holder of a bank-note is entitled *primâ facie* to prompt payment; but if another party has been plundered of it before, and has applied to the bank, can any impropriety be imputed to them for suspending the payment, till it is ascertained that the party tendering it for payment is not contaminated with the guilt? Upon this evidence I think Solomons must be considered to be in the same situation as Hendricks and Co. Now when they were informed of the circumstances, and applied to in order to give information from whom they received the note, they refused to give any satisfactory account of

[*138 *n*] it. Under such * circumstances it is impossible to say that there was not some suspicion thrown upon them of their being privy to the fraud; and that was all that I told the jury, to whom I was about to leave the question of fact for their decision, when the plaintiff, on such intimation of my opinion, desired to be nonsuited.

Ashhurst, J. This is an application to our discretion. My Lord says he left the question of fraud to the jury; and what objection is there in point of law to it? On the evidence of suspicion which was given with respect to this note, the plaintiff ought to have given every possible account how his correspondents came by it, in order to clear them from the imputation of fraud; and this was not done: the suspicion, therefore, remains as it did before.

Buller, J. The plaintiff must be considered merely as the agent of Hymen and Hendricks, and must stand or fall by their title. It is certainly enough in the case of a bank-note to show possession until the title is affected by evidence on the other side. Then see whether there was not evidence of that sort here, and whether it has been answered. It is proved by the defendants that the bill had originally been improperly obtained; that these parties had notice given them of it, and were applied to in order to learn how they came by it; that notes of this large amount are not usually current in the country where they reside, and therefore more easy to be remembered from whom received; and yet they have not thought proper to give any account of it. This was certainly evidence enough to be left to the jury, which was offered to be done, whether these parties were not involved in the fraud.

Grose, J. I agree entirely with the plaintiff's counsel that bank-notes are to be considered as cash; and that the holder has a right in the first instance to say that he will not tell how he came by it: but on the other hand the bank may take upon them the onus of fixing fraud upon the holder; and then it will be incumbent on him to clear himself from it. Now there were circumstances proved here to raise a reasonable presumption of fraud in these parties; and the plaintiff's counsel were so aware of this, and that the jury would probably decide against them, that they rather chose to be nonsuited. There is no ground, therefore, for the Court to interfere; especially as the party may, if he think proper, bring another action.

Rule discharged.

ENGLISH NOTES.

A cheque or order on bankers payable to bearer stands on a similar footing as regards negotiability to bank-notes. *Grant* v. *Vaughan* (1764), 3 Burr. 1516. The regulation of the Post Office, which provides that post-office orders will be paid upon the signature of bankers presenting the order written or stamped upon it, without the signature of the payee, does not make these documents negotiable. *Fine Art Society limited* v. *The Union Bank of London* (C. A. 1886), 17 Q. B. D. 705, 56 L. J. Q. B. 70.

The pledgee of a negotiable instrument may hold it against the true owner, until he is paid off the amount of his advance. *Collins* v. *Martin* (1797), 1 Bos. & P. 648, 4 R. R. 752, *et v.* Bills of Exchange Act 1882 (45 & 46 Vict. c. 61), s. 27 (3).

With respect to cheques it is now provided by the same statute, ss. 76, 77, & 81, that in the case of cheques which, in addition to a general or special crossing, bear the words "not negotiable," the person taking the same shall not have and shall not be capable of giving a better title than that which the person from whom he took it had.

In the case of a negotiable instrument — contrary to that of an ordinary chattel — possession is *primâ facie* evidence of property. And in an action for conversion, where the plaintiff claims title against the possessor, the burden is on the plaintiff to prove *mala fides* or want of consideration. *King* v. *Milsom* (N. P. 1809), 2 Camp. 5, 11 R. R. 646.

Various classes of instruments which have been from time to time recognized as negotiable, will be considered hereafter under the title "Negotiable Instruments," and *Goodwin* v. *Roberts* (1876), 1 App. Cas. 476, as the ruling case. See also *Sheffield* (Earl of) v. *London and Joint Stock Bank* (No. 7, p. 661, *infra*).

AMERICAN NOTES.

The ruling cases are cited by Mr. Daniel (Neg. Inst. § 1680, etc.), who says "of the holder of a bank-note," "he can rest secure in its possession, as the evidence of his right to recover, until the defendant shows that he was in privity with the fraud, or acquired the note *malâ fide*, or with notice. This distinction between bank-notes and other negotiable instruments is not admitted in England; but in the United States it is upheld by high authority, and seems to us clearly the correct doctrine. Bank-notes pass as cash, and are seldom identified by any particular ear-marks; and it is next to impossible for a trader to remember where, or when, or from whom, or for what consideration, he received any particular notes in his cash drawer. And to require him to do so would be an intolerable burden." To this it may be added that in this country there are many thousands of banks, issuing notes for sums of

one dollar upward, all of a different mechanical design, which is a very different situation from that in England. Mr. Daniel cites *Worcester County Bank* v. *Dorchester, &c. Bank*, 10 Cushing (Mass.), 488; 57 Am. Dec. 120; *Wyer* v. *Dorchester, &c. Bank*, 11 Cushing, 51; 59 Am. Dec. 137; *Louisiana Bank* v. *Bank of U. S.*, 9 Martin (Louisiana), 398. In the latter Massachusetts case both principal cases were cited to support the decision that the burden was on the bank to show bad faith. This doctrine is followed in *Clark* v. *Thayer*, 105 Massachusetts, 218.

NO. 6. — SUFFELL *v.* BANK OF ENGLAND.

(C. A. 1882.)

RULE.

THE number of a Bank of England note is an essential part of it; and an alteration by erasing the number and substituting another is a material alteration which avoids the instrument.

Suffell v. Bank of England.

9 Q. B. D. 555-575 (s. c. 51 L. J. Q. B. D. 401, 47 L. T. 146, 30 W. R. 932).

[555] Appeal from the judgment of Lord COLERIDGE, C. J., on further consideration (reported 7 Q. B. D. 270).

The question was whether the fraudulent alteration of the number of a Bank of England note was an alteration in such a material particular as to vitiate the note and prevent an innocent holder from recovering thereon.

The plaintiff, who carried on the business of a money-changer at Brussels, purchased *bonâ fide* in April, 1880, sixteen Bank of England notes, ten being for £20 each, and six for £50 each. These notes had been regularly issued by the bank and formed part of fifty notes of £50 each, bearing date the 2nd of [*556] July, *1878, numbered 50,501 to 50,550, and of fifty notes of £20 each bearing date the 3rd of September, 1878, and numbered 56,201 to 56,250, which had been given by the Bank of England in April, 1879, in exchange for three bank-notes of £1000 each and one for £500, which had been fraudulently obtained from Smith, Payne, & Co., the bankers. Between the time when these notes of £50 and £20 each had been so received in exchange and the time when they were sold to the plaintiff they were altered by changing the figure 5 to a 3 in the numbers by which they were so numbered. The alteration was

made fraudulently, and for the purpose if possible of preventing the notes from being traced, as payment of the notes had been stopped at the bank, and a notice of this with their numbers had been issued.

The Bank of England having refused to pay, the plaintiff brought this action on the notes, which was tried before Lord COLERIDGE, C. J., at the Guildhall sitting in April, 1881. The jury having been discharged, the cause was reserved for further consideration, and judgment was afterwards given by Lord COLERIDGE, C. J., for the plaintiff.

The defendants appealed.

April 25. Cohen, Q. C., and Webster, Q. C. (H. D. Greene, with them), for the defendants. The alteration of the number of a Bank of England note is a material alteration. The number is to identify the note and to enable it to be traced, and without it there would be no mode by which payment of the note could be stopped and notice given of its being stopped. It is essential also for enabling the bank to ascertain what notes are out in circulation. A Bank of England note is different from other promissory notes, and is not to be governed by the same rule as ordinary mercantile contracts. It is made a legal tender for sums above £5 by 3 & 4 Wm. IV. c. 98, s. 6, and by 7 & 8 Vict. c. 32, s. 4, the bank is bound to issue a note in exchange for bullion, and the bank of course would be bound to issue it in the usual form, and therefore with a number on it, so that it could be taken as a tender. By 24 & 25 Vict. c. 98, s. 17, it is forgery to engrave, *inter alia*, any number intended to resemble any part of a Bank of England note, and by s. 12 of that Act it is also forgery to alter any such * note. In *Reg.* v. *Keith*, 24 L. [* 557] J. M. C. 110, where the prisoner was indicted under 11 Geo. IV. & 1 Wm. IV. c. 66, s. 18, which resembles this s. 12 of 24 & 25 Vict. c. 98, for engraving part of a note purporting to be that of a banking company, it was held that every part of what was usually circulated as a note of such company was part of the note within the statute. In the present case, the number on the notes was altered intentionally, and in order to make the notes represent different notes from those that were issued on the day they were dated. That would make them different instruments, and would be such a material alteration as would vitiate the instruments, although the alteration might not affect the

contract. *Pigot's Case*, 11 Co. Rep. 26; *Master* v. *Miller*, 4 T. R. 320; 1 Sm. L. C. 8th ed. p. 857; 2 R. C. 669; 2 R. R. 399; *Mackintosh* v. *Haydon*, Ry. & M. 362; *Burchfield* v. *Moore*, 3 E. & Bl. 683; 23 L. J. Q. B. 261; *Davidson* v. *Cooper*, 13 M. & W. 343; 13 L. J. Ex. 276; Leake on Contracts, p. 808. The cases of *Gardner* v. *Walsh*, 5 E. & Bl. 83; 24 L. J. Q. B. 285, *Catton* v. *Simpson*, 8 A. & E. 136, and *Aldous* v. *Cornwell*, L. R., 3 Q. B. 573; 37 L. J. Q. B. 201, only show that the alteration to vitiate the instrument must be a material alteration. Where there is an alteration of the contract the alteration is necessarily material, but there is no decision, binding at least on the Court of Appeal, that the alteration must alter the contract in order to be material in the sense of vitiating the instrument. On the contrary, if the effect of the alteration is to change the instrument, or its operation, it is a material alteration within the meaning of the rule, but not so if the alteration merely adds something which the law would imply, and which is therefore superfluous. *Calvert* v. *Baker*, 4 M. & W. 417; *Knill* v. *Williams*, 10 East, 431; 10 R. R. 349; *Kershaw* v. *Cox*, 3 Esp. 246; *Trapp* v. *Spearman*, 3 Esp. 57; *Tidmarsh* v. *Grover*, 1 M. & S. 735; 14 R. R. 563; and *Simmonds* v. *Taylor*, 4 C. B. (N. S.) 463; 27 L. J. C. P. 248. That last case was decided before 21 & 22 Vict. c. 79, had made the crossing of a cheque a part of the cheque, and when therefore the effacing the crossing did not affect its validity.

[* 558] * April 27. W. G. Harrison, Q. C., and C. H. Anderson, for the plaintiff. To be a material alteration within the meaning of the rule laid down by *Master* v. *Miller*, 4 T. R. 320; 1 Sm. L. C. 8th ed. p. 857; 2 R. C. 669; 2 R. R. 399, it must be material to the contract. "Material," said the Master of the Rolls, in Ireland, in *Caldwell* v. *Parker*, Ir. Rep. 3 Eq. 519, at p. 526, "when applied to words for this purpose means, I think, having an effect on some contract or right contained in or arising out of the instrument itself. It does not mean capable of possibly affecting some right or contract which is not created by the instrument." In that case there had been a deed of indemnity given by a debtor to indemnify his sureties against any loss in respect of their being his sureties, and, after the deed had been executed, one of the sureties had drawn a pen through his own signature and that of another surety. The sureties were simply covenantees, and the deed imposed no liability on them. The

MASTER OF THE ROLLS therefore held that such alteration of the deed was not a material one, and did not avoid the deed. In *Trapp* v. *Spearman*, 3 Esp. 57, Lord KENYON, who was one of the Judges in *Master* v. *Miller*, decided that the alteration of a bill of exchange by the addition of the words, "when due at the Cross Keys, Blackfriars Road," was not such as would invalidate the bill in an action on it against the acceptor. In a note to *Cordwell* v. *Martin*, 1 Camp. 81, it is stated, "Words written on a bill which do not affect the responsibility of the parties will not vitiate it," citing *Marson* v. *Petit* (King's Bench sittings after Michaelmas Term, 47 Geo. III.). The cases of *Henfree* v. *Bromley*, 6 East, 309; 2 Smith, 400; *ante*, p. 504; 8 R. R. 491, *Waugh* v. *Bussell*, 5 Taunt. 707; 15 R. R. 624; *Trew* v. *Burton*, 1 Cr. & M. 533, *Collins* v. *Prosser*, 1 B. & C. 682, and *Sanderson* v. *Symonds*, 1 Brod. & B. 426, furnish instances of alterations which have been held to be immaterial and not to vitiate the instrument, and in those cases the alteration did not vary the contract, or at least was not considered to do so by the Judges who decided them. In *Mollett* v. *Wackerbarth*, 5 C. B. 181, the alteration, which altered the rights of one of the parties, was held to be a material alteration of the contract, and that therefore it avoided it. In the present *case the number on the Bank of England [*559] note is immaterial. It is equally a promise to pay the sum mentioned in it whether there be a number or not on the note. It is the same note which the bank issued, and issued for value received, and the bank therefore ought to be bound to pay it. The removal of the number is no more than would be the act of clipping a sovereign, an unlawful act which might subject the person committing it to punishment, but which would not destroy the validity of the note or sovereign in the hands of a *bonâ fide* and innocent holder.

Cohen, Q. C., replied.

April 28. JESSEL, M. R. This is an appeal from the decision of the LORD CHIEF JUSTICE of England in a case which raises the very important question, what is the effect of an alteration in the number of a note of the Bank of England as regards the liability of the bank to pay such note to a person who is an innocent holder of it for value. The question is one depending partly upon general law, and partly upon special considerations affecting the peculiar nature of a Bank of England note. It appears to me

that the attention of the Lord Chief Justice was not directed to the very important distinction there is between a Bank of England note and an ordinary promissory note, for if it had been I think it is by no means probable that his decision would have been to the same effect that it was. Another point which I think I ought to remark upon is this, that a very large number of cases were cited in the Court below which are not technically binding upon this Court, but which were certainly to a great extent binding on that Court, and it may well be that in differing from the judgment of the Lord Chief Justice, we may be at liberty to do so by reason of that distinction.

I will first of all consider the general law on the subject, which I take to be settled now beyond dispute. The leading case, and which from the time of James I. has always been so treated, is *Pigot's Case*, 11 Co. Rep. 26, and whatever may be said of the first resolution in *Pigot's Case*, no doubt has ever been raised as to the second resolution, which is this, "that when any deed is altered in a point material by the plaintiff himself, or [* 560] by any stranger without the * privity of the obligee, be it by interlineation, addition, rasing, or by drawing of a pen through a line or through the midst of any material word, the deed thereby becomes void." So that even if a single word which is material is erased it destroys the instrument. It was next decided that such rule of law which applied to deeds applied to documents not under seal. The case which decided this was the well-known case of *Master* v. *Miller*, 4 T. R. 320; 1 Sm. L. C. 8th ed. p. 857; 2 R. C. 669; 2 R. R. 399, decided in the year 1791. There Lord Kenyon, who was Lord Chief Justice of the Queen's Bench, held that the rule which applied to instruments under seal applied to documents not under seal, "because," he said, "no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event, when it is detected." Then he added, "The cases cited which were all of deeds were decisions which applied to and embraced the simplicity of all the transactions at that time; for at that time almost all written engagements were by deed only. Therefore, those decisions which were indeed confined to deeds applied to the then state of affairs, but they establish this principle that all written instruments which were altered or erased should be thereby avoided." Ashurst, J., said this: "Now I cannot see any reason why the principle

on which a deed would have been avoided should not extend to the case of a bill of exchange. All written contracts whether by deed or not are intended to be standing evidence against the parties entering into them. There is no magic in parchment or in wax. And a bill of exchange, though not a deed, is evidence of a contract as much as a deed; and the principle to be extracted from the cases cited is that any alteration avoids the contract." I will not read the elaborate judgment of BULLER, J., because he was in the minority, and when you want to find out the principle of a decision, it is only necessary to refer to the judgments of the Judges who were in the majority, and whose decision it really was. I will therefore pass on to the judgment of GROSE, J., which on this point is very plain. "Pigot's is the leading case," he said; "from that I collect that when a deed is erased whereby it becomes void, the obligor may plead *non est factum*, and give the matter in evidence, because at the time of plea pleaded it was not his deed; and, secondly, that when * a deed is [*561] altered in a material point by himself or even by a stranger, the deed thereby becomes void. Now the effect of that determination is, that a material alteration in a deed causes it no longer to be the same deed. Such is the law respecting deeds; but it is said that the law does not extend to the case of a bill of exchange; whether it does or not must depend on the principle on which this law is founded. The policy of the law has been already stated, namely, that a man shall not take the chance of committing a fraud, and when that fraud is detected recover on the instrument as it was originally made. In such a case the law intervenes, and says that the deed thus altered no longer continues the same deed, and that no person can maintain an action upon it. In reading that and the other cases cited, I observe that it is nowhere said that the deed is void merely because it is the case of a deed, but because it is not the same deed. A deed is nothing more than an instrument or agreement under seal; and the principle of those cases is that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument. And this principle is founded on great good sense because it tends to prevent the party in whose favour it is made from attempting to make any alteration in it. This principle, too, appears to me as applicable to one kind of instrument as to another." I have

read those portions of the judgments, because they state distinctly what the law is. I may mention that that case of *Master* v. *Miller*, 4 T. R. 320; in error, 5 T. R. 367; 2 H. Bl. 141; 2 R. C. 669; 2 R. R. 389, went to the Exchequer Chamber, and there Eyre, C. J., said: "When it is admitted that the alteration of a deed would vitiate it, the point seems to me to be concluded; for by the custom of merchants a duty arises on bills of exchange from the operation of law in the same manner as a duty is created on a deed by the act of the parties." And Macdonald, C. B., added: "I see no distinction as to the point in question between deeds and bills of exchange, and I entirely concur with my Lord Chief Justice in thinking there would be more dangerous consequences follow from permitting alterations to be made on bills than on deeds." The result therefore is that the law as settled by those cases applied to all instruments in writing without [* 562] * distinction for this purpose between an instrument under seal which is a deed and an instrument without a seal which is not a deed. The only other case in the Exchequer Chamber, and which is strictly binding on this Court, is the case of *Davidson* v. *Cooper*, 13 M. & W. 343; 13 L. J. Ex. 276, where the action was not on a bill of exchange, but on a guarantee not under seal.

The doctrine in *Master* v. *Miller*, 4 T. R. 320; in error, 2 H. Bl. 141; 2 R. C. 669; 2 R. R. 389, has been applied since to various kinds of instruments not under seal, such as bought and sold notes; and it has been fully recognized to be the law of England, and that it is the law is not disputed by the respondent, the plaintiff in this action. The only question we have to determine therefore is, what is a "material alteration," it being indisputable according to the authorities that if there be such a material alteration in the instrument, the instrument is avoided as against the person who would otherwise be liable upon it. The cases are all of extreme hardship, because they assume that the plaintiff is a *bonâ fide* holder for value, and they all assume that the defendant, without any merit of his own, gets rid of an obligation, at all events as regards that plaintiff, on that instrument.

Now I will first consider whether the alteration in the present case was a material alteration, without regard to the cases on the subject, which are numerous and conflicting, and are besides not technically binding upon this Court. It is alleged on the part of

the respondent that in order to be a material alteration within this rule the alteration must in the case of a contract affect the contract, and that where there is no contract but rights are conferred otherwise than by way of contract, those rights must be interfered with. Those are the suggested limits. Upon these two questions arise. First of all, whether those limits are in themselves reasonable and such as should be adopted by the Court of Appeal in all cases; and secondly, whether, if they are reasonable and ought to be adopted. the adoption ought to be limited to the class of cases to which the decisions have been applied. It does not appear to me to be necessary for us now to decide whether those cases have been rightly decided which limit the materiality *in the case of an ordinary com- [* 563] mercial contract to the subject which affects the contract itself. Whenever it becomes necessary so to decide it will become necessary also to consider whether in the case of such contract there is anything that can by any rational person be treated as material which does not affect the contract. An illustration will point out what I mean. In an ordinary case it may be said that the number put on a bill of exchange or on a cheque will not affect the contract, and may not be a material alteration; but take the case of a debenture issued by a company, or a bond issued by a turnpike trust, or a foreign government, and that the bond is paid according to the number drawn by lot, which is a very common mode of payment; there, although the number would not affect the contract on the face of the instrument, it really would affect the contract in another way, and I should think there would be no doubt in the world that in such a case an alteration in the number would be a material alteration in the instrument. It therefore appears to me, before one can consider the question as to whether the alteration is an alteration affecting the contract one must know exactly what the instrument is, what the alteration is, and what the general effect is, and it may well be that in the majority of these cases (although they may not be all rightly decided, for some of them conflict with others), they may be well decided and yet they may not enable one to decide such a case as this where other considerations arise beside the mere question of contract between the parties.

Now, a Bank of England note is not an ordinary commercial contract to pay money. It is in one sense a promissory note in

terms, but no one can describe it as simply a promissory note. It is part of the currency of the country. It has long been made so by Act of Parliament, it is a legal tender for any sum above £5, and it must be issued to any one who brings a certain quantity of bullion to the bank, and demands it, as he has a right to do, for the purpose of using it as currency. It is protected in a way no other instrument is protected, against alteration or mutilation, and its preservation in a pure state, to use a term as applied to deeds by some learned Judges, is certainly a matter of the utmost importance. It is admitted that the usage of putting the [* 564] number * on the note, dates from a long period and is a custom universally known. One must consider the operation of the Act of Parliament which says that any man who produces at the Bank of England a certain quantity of gold bullion shall be entitled to receive bank-notes. Could it be contended that the bank wanting to buy bullion and not wanting to increase the circulation of notes, could give to the person who brought the bullion notes without numbers? The man who received the notes in such an unusual form could not make use of them as currency, because no one would take them: and I take it, the Act means a note in the ordinary form in which the bank issues Bank of England notes. I do not mean to say that the Bank of England might not alter its ordinary form, but I mean that it could not comply with the terms of that Act of Parliament unless it issued to the man who so brought bullion notes in the accustomed and ordinary form, so that they would enable him to use them as currency. The number on notes has another important use. It enables the person who receives notes to trace them and so to detect crime as well as to guard against the commission of crime by reason of the knowledge that the notes may be so traced. But the utility of the number does not stop there. We have been told there is a relation between the date and the number which enables the bank more easily, no doubt, to detect forgery if the bank found that relation altered, and also to enable it to keep a register of the notes issued against the notes coming in, so as to ascertain the amount for which the bank is liable. Therefore, knowing the use made of the number, the mode in which it is regarded by the public, and in which it is utilized by the bank, no one could say that the number was not a material part of the note, and, indeed, when I read the judgment of the Lord Chief

JUSTICE of England that was obviously his opinion. If, therefore, there is nothing to restrict the generality of the terms used to which I have referred, I should say it was quite clear that the alteration of the number was an alteration of the note in a material part.

I now come to the consideration of the authorities on which alone the LORD CHIEF JUSTICE determined this case. They related only to ordinary mercantile instruments, and it by no means follows that the same considerations which enabled the Judges to * decide what was a material alteration of an [*565] ordinary mercantile instrument, would even by those Judges have been treated as sufficient to enable them to decide what was a material alteration in the case of a Bank of England note, which, as I have stated, is something more than a mercantile instrument. But what they did decide is this. They said where the alteration made merely states that which the law would otherwise imply, that is not a material alteration. I think there would be very little difficulty in acceding to that in the case of ordinary mercantile documents. Then they said, where the alteration does affect the contract either by increasing or decreasing the amount of the obligation of the contracting party sued, that is a material alteration; and then, in some cases, they stated where there is an alteration in a matter which, though it does not directly affect the contract still indirectly does so, that is, affects the position of the parties to the contract, that is a material alteration. With the exception of *Caldwell* v. *Parker*, Ir. Rep. 3 Eq. 519, in which there is the *obiter dictum* of the MASTER OF THE ROLLS in Ireland, I cannot find any case in which the doctrine has been laid down in terms such as those stated by the LORD CHIEF JUSTICE of England in the course of his judgment in the present case, viz.: "It has always been held that the alteration which vitiates an instrument must be a material alteration, *i. e.*, must be one which alters or attempts to alter the character of the instrument itself, and which affects or may affect the contract which the instrument contains or is evidence of." And his Lordship then cites certain cases as "clear authorities to show that an immaterial alteration will not do." I am by no means satisfied that what is so stated is incorrect as regards an ordinary commercial instrument which contains nothing but a contract. As I said before, it is difficult to see how in such a case an altera-

tion could be material if the alteration did not affect the contract; but there may be such a case, and I expressly reserve to myself the right of saying if such a case should ever occur it has not been decided by the authorities referred to. Again, I agree that the case of *Caldwell* v. *Parker* goes somewhat further, but I decline to say anything disrespectful of that case, except [*566] that I disagree with it. It was a decision arrived at by * the Master of the Rolls in Ireland, as he states with great doubt, and, at all events, it is not a decision which is binding on this Court. It seems to me on the whole, therefore, that there is no authority binding upon us to limit the materiality of an alteration so as to exclude this case from the general law, and that there are very strong and, to my mind, unanswerable reasons for holding this case to be within the general law, and that whatever hardship our decision may inflict upon the plaintiff we are bound to hold, as we do, that the defendants should succeed in this appeal.

Brett, L. J. In this case the plaintiff, for value and with perfect innocence, bought several bank-notes which had been issued by the Bank of England, and the question is whether the plaintiff, the *bonâ fide* proprietor of these notes, can recover from the bank the sum for which those notes were issued; or whether the bank, although they had received full value for the issue of every one of these notes, can nevertheless decline to pay the sum which by the issue in each case they undertook to pay to the person who should present the note. If the Bank of England be not bound to pay such sum to the plaintiff it is obvious that a great hardship will be inflicted upon the plaintiff, who will lose his money. And it equally follows that the bank will escape their liability to pay the very sum which by the note when it was issued they undertook to pay. I ought to state that after these notes were issued the number of each of them was altered by a person in whose possession such note was for the moment. How these notes came into the possession of such person does not seem to be disclosed, but according to the facts found by the Lord Chief Justice, such person purposely altered one of the figures in the number of each of the notes with a fraudulent intention and for the purpose of preventing its being traced. It seems to me that the material point is that such alteration was purposely done. It has been argued for the plaintiff, that al-

though that was purposely done, it does not relieve the bank from its liability to pay an innocent holder: first, because the alteration was done by a stranger to the note, and, secondly, because the alteration, by whomsoever it was done, does not affect the contract contained * in the note, and there- [* 567] fore is an immaterial alteration. On the other side, it has been contended that the alteration was made in the bank-note by a person who was in possession of it, and who therefore, whether he had or not stolen it, could have forced the bank if there had been no alteration to pay it, and assuming the alteration does not alter the contract contained in the note, yet it is such as would have affected its identity, using the word "identity" in a manner which I will presently consider. It was further urged that where the instrument is either not a contract at all, or is a contract and something more than a contract, an alteration made of that instrument may be material although it does not affect the contract contained in it, and that in this case there is a material alteration, although it does not affect the contract.

Now, I think it is clear that a Bank of England note itself contains a contract which is ambulatory by reason of the mere passing of it from hand to hand. It is a contract to pay the amount of the note to whomsoever may present it, and such person can enforce that contract by an action. But then I think that such bank-note is something more than an instrument containing a contract, or what is evidence of a contract only, it is a thing which is in itself valued as money and as currency. I agree with the argument on the part of the plaintiff that the alteration in this case has not in any way affected the contract. The number on the note is no part of the contract, and therefore if the rule of law insisted upon by the plaintiff be a true rule, viz., that it is only an alteration which affects the contract which vitiates an instrument, then the plaintiff would be entitled to recover. The question therefore must be whether that rule applies further than to an alteration of a contract in an instrument, and if it does whether the alteration in these notes which does not affect the contract contained in them, is nevertheless a material alteration. I think the plaintiff is also right in this, that whatever the instrument may be to which the rule is applicable the rule is only applicable where the alteration is material, leaving open the

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question to be considered what is a material alteration. I incline to think, but it is not necessary to determine this now,
[* 568] that where an instrument contains only a contract, * or can only be used as evidence of a contract, no alteration of such an instrument which does not alter or affect the contract, can be a material alteration. But I think the rule is not confined to instruments which contain only a contract. I think it is applicable to instruments which contain no contract at all; and if that be true, then it follows of course with regard to instruments which contain no contract at all, that the alteration, which is to be a material alteration, cannot be confined to an alteration of what affects the contract. I incline to think with regard to instruments which either contain the contract and something more, or which do not contain the contract at all, that the rule may be thus stated: whenever any instrument is purposely altered by a person in lawful possession of it in a material part of it, the instrument is void for the purpose of enabling any person to sue on it or to defend himself by using it as a direct defence depending on its obligatory force as an instrument. I put in those cautionary words myself, because I am not sure that, although an instrument may be avoided for the purposes which I have mentioned, nevertheless it may be used for other and collateral purposes, as for instance, by way of proving or enforcing an admission where the instrument itself is not used either for the purpose of its being sued upon or for the purpose of its being used as a direct defence in the terms which I have stated. But whenever it is within the terms which I have stated, then it seems to me any material alteration in it avoids it for those purposes although that alteration does not alter any contract in it. That, however, leaves open the question what is a material alteration in such an instrument. Any alteration of any instrument seems to me to be material which would alter the business effect of the instrument if used for any ordinary business purpose for which such an instrument or any part of it is used.

If that be true, then the question arises whether the alteration of the number of a Bank of England note comes within that definition. I have already stated that in my opinion such alteration does not alter or affect the contract contained in the note, but the number does seem to me to be a material part of the instrument,

and to be used in ordinary business as a material part of that instrument for business purposes. It is put there by the Bank of * England for purposes as I might say within the [* 569] bank itself. I am not sure whether if that were the only purpose for which it is used an alteration of it could be said to be a material alteration within the definition I have stated; but it is important in a business sense, and it is certainly used or may be used by everybody into whose hands the note comes. It seems to me that as long as all their notes are marked with a number the defendants could not issue any particular bank-note without a number, and for this reason, because the person entitled to demand from them the issue of a note is entitled to have a note which will pass as currency without question or doubt, which would not be the case with respect to a bank-note without a number originally upon it. The number is also most undoubtedly useful for the purpose of tracing the note in case of accident, and I will not say that there are not other business purposes for which such number may be used. It seems to me that these instances are enough to show that the number is a part of the note used in ordinary business for a business purpose. Then it seems to me that an alteration of part of such an instrument as that is within the definition and is a material alteration. I do not rely upon the alteration of the identity of the note, if " identity " is to be used in the sense that the alteration alters the physical appearance of the document, because it seems to me that an alteration on the face of an instrument which is admitted to be an immaterial alteration does nevertheless alter the " identity," if identity is used in the sense of physical appearance. My view is that in *Sanderson* v. *Symonds*, 1 Brod. & B. 426, the judges used the word " identity " as meaning identity in the case of a contract, and that therefore it really only came to the same thing as saying that there must be an alteration of the contract which is a material alteration of the effect of the contract. If there is an alteration which affects the legal effect of the contract it is obvious that the two contracts then are not identical, and I cannot help thinking that is what the judges there meant.

The question is whether we are right in extending the rule to such an alteration as we are now considering in a Bank of England note. It has been argued that the doctrine has been

[* 570] confined to * cases where the instrument contained a contract, and it was stated that in the case relied on, *Master* v. *Miller*, 4 T. R. 320; 1 Sm. L. C. 8th ed. p. 857; 2 R. C. 669; 2 R. R. 389, there was a contract and an alteration of the contract. The action there was brought upon a bill of exchange, and the alteration was in the date of such bill. Therefore the action was brought upon an instrument containing a contract, and to my mind containing nothing else, and the alteration altered the effect of that contract, therefore so far as the decision goes, it is only a binding authority upon a Court of co-ordinate jurisdiction that an alteration in a contract which alters the effect of that contract is a material alteration, and vitiates that instrument. It seems to me that the principle laid down in *Master* v. *Miller*, extends in its application beyond an instrument which contains only a contract. The words which Lord KENYON uses are certainly larger than would apply only to contracts, because the words are "All written instruments which were altered or erased," and one must here read "in a material part," "should be thereby avoided." I do not think that the judgment of ASHURST, J., applies to other than instruments containing a contract. With regard to BULLER, J., it is immaterial to consider what he said because his opinion did not prevail, but I think that that which GROSE, J., says is very material. "A deed," he says, "is nothing more than an instrument or agreement under seal, and the principle of these cases" — that is, of the cases previous to *Master* v. *Miller*, — "is that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument." He afterwards shows that he intended to extend this to something more than an agreement, because he says, "This principle too appears to me as applicable to one kind of instrument as to another." I think, therefore, that he intended to comprise within the doctrine instruments which were not contracts as well as those which were only contracts. Then the case cited to us of an alteration in an award, namely, *Henfree* v. *Bromley*, 6 East, 308; *ante*, p. 504; 8 R. R. 491, certainly carried the matter beyond an alteration in instruments which were mere agreements, for the alteration there certainly did not affect the contract, and yet it was held that it avoided the instrument. The case which I ventured to suggest of an [* 571] alteration in the statement of the * consideration given

at the time of the giving of a bill of sale certainly would not alter the contract, because whatever the consideration was the contract would be the same, but I cannot doubt myself that where there is such an alteration of such statement as would affect the validity of the registration of the bill of sale it must be within the principle laid down, and would be an alteration which would avoid the bill of sale. Both principle and authority seem to me to show that the doctrine is to be applied to all instruments in which there is a material alteration, and that the alteration may be material although there may be no contract in the instrument, or if there be, it does not alter such contract. I am, however, inclined to admit that if the instrument contains nothing but a contract, and has no legal or business effect whatever except as a contract, that then there could be no material alteration in the document unless that alteration did alter the contract. With regard to what was expressed by the MASTER OF THE ROLLS in Ireland in *Caldwell* v. *Parker*, Ir. Rep. 3 Eq. 519, at p. 526, I can only say that I cannot as at present advised bring my mind to think that that case was decided according to law.

COTTON, L. J. In this case the plaintiff is a *bonâ fide* holder for value of certain Bank of England notes, on which he sues the Bank of England. There is no imputation on him with regard to the way in which he took those notes, but the question which we have to consider is this, whether in consequence of certain alterations which were made in those notes, intentionally, and evidently for the purpose of preventing them being traced, the plaintiff, in accordance with the rules of law long established in this country, has lost his right to sue upon them. Now the rule which is relied upon by the Bank of England is that which is laid down in *Pigot's Case*, 11 Co. Rep. 26, namely, that a deed is void when it is altered in a point material. That was only as regards a deed, but the rule so laid down was afterwards extended in *Master* v. *Miller*, to instruments not under seal, and following that case, it has been well established that the principle so laid down extends to negotiable instruments, and that a *bonâ fide* holder for value cannot * recover on them when there [* 572] has been an alteration in the instrument coming within such principle. The question is, whether a material alteration is confined to an alteration which is material because it alters the

contract in the instrument. Now that certainly is not the language of the rule in *Pigot's Case*, 11 Co. Rep. 26, nor of the rule as adopted and applied to instruments not under seal, in *Master* v. *Miller*, and, with the exception of the case in Ireland, *Caldwell* v. *Parker*, Ir. Rep. 3 Eq. 519, no case has been referred to in which the judges have so restricted the rule that the materiality must be material in the sense of altering the contract. I do not think it necessary to consider that case of *Caldwell* v. *Parker*, but I agree in thinking that it is not a right decision, and I certainly do not feel bound to follow it.

Now, that being so, there is no decision, certainly no series of decisions, that the material alteration is restricted in the way contended for by the plaintiff, and one does not find from the judgments from which one must gather the principle on which the cases were decided, that the rule was so limited. GROSE, J., puts his judgment in *Master* v. *Miller*, on this, not an alteration of the contract but an alteration of the instrument, so that it is no longer to be considered as the same instrument. "A deed," he says, "is nothing more than an instrument or agreement under seal, and the principle of those cases is that any alteration in a material part of any instrument or agreement, avoids it because it thereby ceases to be the same instrument." Of course, it is not every small alteration in an instrument which will prevent it being the same. It must be a material alteration, so that the party defending himself may be able to say that it is not the same instrument as that which he executed or to which he put his hand. Then what was said by DALLAS, L. C. J., in *Saunderson* v. *Symonds*, 1 Brod. & B. 426, at p. 430, was this: "The original rule was not intended so much to guard against fraud as to insure the identity of the instrument and prevent the substitution of another without the privity of the party concerned." Not to prevent an alteration which would make a different [* 573] contract, but to insure the * instrument being in substance the same, and to prevent the parties substituting that which was not the same but a different instrument. The judgment of RICHARDSON, J., 1 Brod. & B. at p. 432, is somewhat more ambiguous, because he says "the ground on which the cases have turned is that the alteration has varied the identity of the contract," using that ambiguous word "contract," which may either mean the instrument containing the contract or the con-

tract contained in the instrument. Then there is the case of *Knill* v. *Williams*, 10 East, 431; 10 R. R. 349, where the only alteration in the promissory note was the addition to "value received" of the words "for the good-will of the lease and trade of Mr. F. Knill." It was argued by Mr. Harrison, when I called his attention to that case, that the alteration there was an alteration of the contract, and therefore came within the principle for which he was contending. But when one looks at the judgments of Lord ELLENBOROUGH and GROSE and BAYLEY, JJ., that is not the ground of their decision. Lord ELLENBOROUGH says, by way of illustration, "If a bond, for example, were conditioned for the payment of money generally, could it afterwards be introduced by way of recital that the money had been advanced out of a particular fund which might afterwards be made use of for other purposes?" Clearly showing, that the principle of his decision was that the alteration must be such an alteration of the instrument as would make it substantially different, and which although it would not affect the contract, would affect the rights of the parties in other matters. Then he says, "The effect of the alteration is to narrow the value from value received in general to the value expressed; which I cannot say is not a material alteration." Then what GROSE, J., says, is this: "The question is whether the alteration introduced made it a different note. If it be material, it is a different note; and it certainly is material, for it points out the good-will and trade of F. Knill as the particular consideration for the note, and puts the holder upon inquiring whether that consideration had passed." BAYLEY, J., says: "The case of *Master* v. *Miller* decided that an alteration in a material part of a bill after it has issued makes a new stamp necessary, and this was a material alteration, for it was evidence of a fact which, if necessary to be inquired into, must otherwise have been proved by * different evidence." So that even if [* 574] it could be said that that was an alteration in a particular contract in that case, that is not the ground on which the judges put their decision.

Then there is the case of *Simmonds* v. *Taylor*, 4 C. B. (N. S.) 463; 27 L. J. C. P. 248, as to a crossed cheque. There the Exchequer Chamber decided that the erasing of the crossing did not vitiate the cheque. That decision was on the ground that the erasing was not a material alteration even if the crossing was

part of the cheque, but that it was not part of the cheque, but a mere superadded direction to the banker, and did not come within the statute of 19 & 20 Vict. c. 25. The erasing the crossing did not avoid the instrument as it was no alteration of the instrument but only a removal of a superadded direction; that decision, therefore, cannot in my opinion assist the plaintiff. No doubt there is a long string of cases which do as a rule deal with the question whether the contract contained in the instrument has been altered or not, as the test by which to decide whether the alteration be a material one within the rule in *Pigot's Case*, 11 Co. Rep. 26, and the plaintiff did, as he was entitled to do, rely on that most strongly; but the question whether an alteration of an instrument is a material one must, in my opinion, depend upon the nature of the instrument and the uses to which it is to be put, and, although in these cases, the proper test may have been whether the contract contained was altered or not, it by no means follows, unless it has been so laid down, that the rule is that the alteration in the contract is essential, and that no other alteration will do. In my opinion that conclusion would be incorrect. The question here is whether the alteration, although not an alteration of the contract, is nevertheless an alteration of the instrument in a material way. Having regard to the nature of the instrument and the purpose for which it is used, one cannot see why one is to confine the alteration which has been laid down in general terms as a material alteration in the two cases to which I have referred (*Pigot's Case* and *Master* v. *Miller*) to an alteration of the contract. In my opinion it is not a question of the alteration of the contract, but a question of the alteration of the instrument in a material way. Now, in this case we [* 575] have a * well-known thing, viz., a Bank of England note, which is under an Act of Parliament part of the circulating medium of the country, and as regards the issue of which the Bank of England is subject to restrictions in its operation. What has been done is this, certain numbers which are always stamped on the notes of the Bank of England before they are issued have been altered by a holder, undoubtedly intentionally and for a particular purpose. Now can it be said that such numbers are not an essential part of the note? They have been recognized as essential for years, so that no one would take a Bank of England note if such numbers were not upon it. The numbers, with the

date, enable the Bank of England and the public to identify the notes. Persons wishing to protect themselves as far as they can against the loss of Bank of England notes make a memorandum of the date and numbers, and in case of loss they give notice to the bank of the numbers of the notes which have been lost, and the bank then stops them and endeavours to prevent their circulation by sending round notice of the numbers of the notes stopped to persons likely to take them. The numbers are therefore essential for this purpose and also for the protection of the bank against forgery, because it enables it to see whether it has issued a note of that date and number which is presented to it for payment. By these numbers the bank can know what notes are still in circulation, because when they come in they are not issued again. Therefore the existence of the numbers on the notes affords both to the bank and the public a most material protection. Having regard then to the nature of the instrument and to the purpose for which these numbers are used and are put on the note, I am of opinion that they must be considered as an essential part of the note, and that by altering them the person who did it has made a material alteration of the instrument within the rule laid down by the cases to which I have referred, and therefore that the defence of the Bank of England in this case must prevail. *Judgment reversed.*

ENGLISH NOTES.

In *Leeds and County Bank limited* v. *Walker* (1883), 11 Q. B. D. 84, 52 L. J. Q. B. 590, the plaintiff bank had taken from the defendant two £100 bank of England notes, and in consideration of these notes, had delivered up to the defendant certain acceptances and paid him the balance of value in cash. One of the notes had been altered as to number and date, but this was unknown to the defendant and not perceived by the plaintiff bank. On this note being presented at the Bank of England, the alteration was perceived and payment refused. The plaintiff bank then brought this action to recover the value of the note from the defendant. Subsequently to action brought, the Bills of Exchange Act 1882 (45 & 46 Vict. c. 61) received the Royal Assent. By s. 89 (1) it is enacted that the provisions of the Act relating to bills of exchange shall apply "with the necessary modifications" to promissory notes; and by s. 64 it is enacted: "Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself

made, authorised, or assented to the alteration, and subsequent indorsers. Provided that, where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour." The action was tried by DENMAN, J., without a jury, and was subsequently heard by him on further consideration. He decided that, on the authority of *Suffell* v. *Bank of England*, the note, prior to the Statute, would clearly have been worthless; that s. 64 of the Act was not retrospective; that the words "with necessary modifications" in s. 89 excepted Bank of England notes from the operation of the Act; and that if s. 64 did apply, the alteration was "apparent" within the meaning of the proviso, although it might not be obvious to everybody. The Bank of England had therefore rightly refused payment; and the plaintiffs having, under a common mistake, paid the defendant for a worthless document, were entitled to recover the amount.

AMERICAN NOTES.

The principal case is cited in 2 Daniel on Negotiable Instruments, § 1400, giving the decision of the court below. Where the number of a negotiable bond was changed, but it did not appear that the numbering was required by statute or affected the holder's rights, it was held immaterial. *Commonwealth* v. *Emigrant Sav. Bank*, 98 Massachusetts, 12; 93 Am. Dec. 126; *Birdsall* v. *Russell*, 29 New York, 239; *Plock* v. *Cobb*, 64 Alabama, 427; *City of Elizabeth* v. *Force*, 29 New Jersey Equity, 592.

SEC. IV. — *Notice of equitable rights.*

No. 7. — SHEFFIELD (EARL OF) *v.* LONDON JOINT STOCK BANK.

(H. L. 1888.)

RULE.

BANKERS receiving from a customer securities for advances, while, by reason of the course of business carried on by the customer and known to the bankers, they have reason to believe that the customer was not the owner of, or entitled to deal as he did with, those securities, cannot, even though the securities are negotiable, hold them

against the title of the true owner. The owner is entitled to redeem the securities from the bank on the same terms on which he would have been entitled as against the customer.

Sheffield (Earl of) v. London Joint Stock Bank.

13 App. Cas. 333–350 (s. c. 57 L. J. Ch. 986–994; 58 L. T. 735; 37 W. R. 33).

Appeal from a decision of the Court of Appeal, reported [333] as *Easton* v. *London Joint Stock Bank*, 34 Ch. D. 95; 56 L. J. Ch. 569. For the present purpose the following brief statement of the evidence given at the trial before PEARSON, J., will suffice.

* The appellant gave Edward Easton authority to bor- [* 334] row, first £20,000 and afterwards £6000 upon the security of stocks in the Grand Trunk Railway Company of Canada, and foreign railway and canal bonds belonging to the appellant. To raise these sums the appellant gave Easton the bonds and the stock certificates, together with transfers of the stocks executed by the appellant, blanks being left for the names of the transferees. These stocks, transfers and bonds were deposited by Easton with Lewin Mozley, a money-dealer in the city of London, who lent Easton first £20,000, and afterwards £6000 upon their security. Some of these stocks, transfers and bonds were deposited by Mozley with the London Joint Stock Bank, some with the Capital and Counties Bank, and some with the Royal Bank of Scotland, together with other securities belonging to Mozley's customers, as security for large loan accounts running between Mozley and the banks. The transfers were filled in with the names of officials or nominees of the banks, and registered with the Grand Trunk Company. The Court of Appeal, on the authority of *Goodwin* v. *Roberts*, 1 App. Cas. 476, 45 L. J. Ex. 748, held that the bonds were to be treated as negotiable securities between the parties.

Evidence was given of the nature of Mozley's business and of his dealings with the banks, and the banks endeavoured (without success) to prove a custom in the city that money-dealers were at liberty to deposit their customers' securities *en bloc* as security for their own debts to the banks. Of the effect of this evidence the Court of Appeal and this House took different views. The Lords Justices held that the banks, though they had reason to

believe that the securities belonged to Mozley's customers, yet having the legal title to the securities, and believing that Mozley had authority to deal with them as his own, were in the position of purchasers for value without notice. In this House, as will be seen from the judgments, their Lordships, being of opinion that the banks either actually knew, or had reason to believe, that the securities did or might belong, not to Mozley, but to his customers, held that the banks were bound to inquire into the extent of Mozley's authority to pledge the securities.

Early in May, 1883, Mozley went into liquidation. At [* 335] that * date the London and Joint Stock Bank held some of the stocks, and some unsaleable bonds; the Capital and Counties Bank held some of the bonds; and the Royal Bank of Scotland held both stocks and bonds. Some of the appellant's securities were sold by the banks to repay themselves.

On the 28th of May, 1883, Easton and the appellant applied to the banks and to John Young, the trustee in Mozley's liquidation, offering to redeem the appellant's securities upon payment of the amount due to Mozley in respect of his loans to Easton, but this offer was refused.

Easton and the appellant afterwards brought an action against the banks and Young, claiming first, a declaration that they were on the 28th of May, 1883, entitled to redeem the stocks and bonds on payment of the sums then due from Easton to Young as Mozley's trustee in liquidation; secondly, damages against the banks for selling securities belonging to the appellant; and thirdly, redemption of such securities as might remain unsold.

Pearson, J., dismissed the action on the grounds that Lord Sheffield entrusted the securities to Easton to deal with them as if they were his own; that Easton must be treated, not as Lord Sheffield's agent, but as an ordinary principal in obtaining a loan from Mozley; that Easton well knew the method by which Mozley conducted his business, and that the securities when deposited by Mozley in the various banks with whom he dealt, would become a security for the entire amount of Mozley's indebtedness from time to time to these banks.

The Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) affirmed this decision, on the ground that the banks who acquired the complete legal title to the securities (at least so far that Lord Sheffield was estopped from denying their legal title), were pur-

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chasers without notice of the equitable right on which Lord Sheffield insisted on in the action. Against these decisions the Earl of Sheffield alone appealed, Easton being made a respondent, but taking no part in this appeal.

1887. Nov. 25, 28; Dec. 5, 7, Rigby, Q. C., and Grosvenor Woods for the appellant: —

The Court of Appeal held in our favour that the appellant only authorized Easton to pledge his securities for the two sums of £20,000 and £6000, and the question is whether that Court was right in holding that the respondent banks were purchasers for value without notice. The result of the evidence is that the banks knew, or at least had good reason to believe, that the securities were not Mozley's own. Having acted without "due caution" they took the securities at their peril, and cannot retain them, whether negotiable or not, against the true owner. *Haynes* v. *Foster*, 2 Cr. & M. 237; *Foster* v. *Pearson*, 1 Cr. M. & R. 849. The banks were bound to show *that they believed the securities were Mozley's, and were induced by that belief to lend their money. *Cooke* v. *Eshelby*, 12 App. Cas. 271; 56 L. J. Q. B. 505; 2 R. C. 398. This they entirely failed to show. Their knowledge of Mozley's business and the whole tenour of his transactions with them put the banks on inquiry as to what his authority really was. The judgments below go the length of saying that any representation of an agent as to his authority binds the principal. [*336]

Cookson, Q. C. (Rawlins with him), for the London Joint Stock Bank, respondents: —

This bank held registered stock and bonds payable to bearer and transferable by delivery, which were and are of no value, and no question as to negotiability arises in their case. The real state of the facts is, as PEARSON, J., found, that Easton, and not Lord Sheffield, was the principal in the transaction. Lord Sheffield authorized Easton to borrow £26,000 in any way that he could; Easton applied through Mozley to the banks, which Lord Sheffield knew of and authorized: Mozley's course of dealing was to pledge all his securities *en masse* to the bank, as securities for his own indebtedness, and Easton was aware of his course of dealing, and knew that he was pledging Lord Sheffield's securities for his own full indebtedness. The Court of Appeal took an incorrect view of the facts. It was essential to Lord Sheffield to have

the £26,000, and he gave Easton *carte blanche* to raise it how he could. Easton and Lord Sheffield were co-plaintiffs below, and Lord Sheffield did not repudiate Easton till the middle of the action. The bank had the legal estate in the inscribed securities, and Lord Sheffield has no equity as against it. The bank knew that the securities might not be Mozley's own, but had no notice of a title in Lord Sheffield inconsistent with Mozley's dealings in pledging them as security for his own account. He had the *jus disponendi*. The legal title being in the bank the onus is upon the appellant to show how he can undo his own act. It is not enough to say that its securities were known not to be Mozley's own, for Lord Sheffield had put him in a position to pledge them for his own debt; he had notice of what was being done, and knew the risk that he was running, but, as appears [*337] *from the evidence and correspondence, left the matter entirely in the hands of Easton, who was acquainted with Mozley's course of business. This was the view taken by PEARSON, J. If Easton were sole plaintiff his case would have been a hopeless one, and Lord Sheffield cannot be in a better position. *Cooke* v. *Eshelby*, 12 App. Cas. 271; 56 L. J. Q. B. 505; 2 R. C. 398, is quite a different case. No knowledge that the limit was being exceeded was or could be brought home to the bank; but the bank having the legal title need not show that they acted with "due caution." See *Foster* v. *Pearson*, 1 Cr. M. & R. 849, 855, per PARKE, B. See also *Perry Herrick* v. *Attwood*, 25 Beav. 205; 2 De G. & J. 21; 27 L. J. Ch. 121; *Briggs* v. *Jones*, L. R., 10 Eq. 92, and *Roffe* v. *Roscoe*, not reported, in the Court of Appeal in 1879, cited in *France* v. *Clark*, 22 Ch. D. 830; 26 Ch. D. 257, 264; 52 L. J. Ch. 362; 53 L. J. Ch. 585.

Napier Higgins, Q. C. (F. Thompson with him), for the Capital and Counties Bank, respondents: —

The bonds held by this bank were transferable by manual delivery, and were therefore negotiable securities. The doctrine of notice does not apply to negotiable securities. *Goodwin* v. *Roberts*, L. R., 10 Ex. 337; 1 App. Cas. 467, 492-3; 45 L. J. Ex. 748, in the Exchequer Chamber, per COCKBURN, C. J., and in the House of Lords, per Lord HATHERLEY. *Gill* v. *Cubitt*, 3 B. & C. 466; 3 L. J. K. B. 48, is no longer considered as law. To get rid of the title of the bank the appellant must show *mala fides* or such gross negligence as in the opinion of the court is tantamount to

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mala fides, and of this there is no evidence. The securities being negotiable the bank does not lose its rights even by negligence, apart from *mala fides*, and there is no duty to inquire. Byles on Bills, p. 123 (12th ed.); *Goodman* v. *Harvey*, 4 A. & E. 870; 6 L. J. K. B. 260; *Crook* v. *Jadis*, 5 B. & Ad. 909; 3 L. J. K. B. 87.

Cozens-Hardy, Q. C. (P. S. Stokes with him), for the Royal Bank of Scotland, respondents, with whom had been deposited both stock and bonds, relied on similar arguments, and also on the fact that they had dealt not with Lewin Mozley, but with his relative Frederick Mozley in the ordinary course of business.

G Cave for the respondent Young.

* Rigby, Q. C., in reply. [* 338]

The House took time for consideration.

1888, March 12. Lord HALSBURY, L. C.: —

My Lords, this is an appeal from an order of the Court of Appeal affirming the judgment of PEARSON, J. The action was substantially brought to redeem certain securities deposited with the respondents by a Mr. Mozley. Mozley had deposited them with the respondents as security for his, Mozley's indebtedness to them, and no question arises as between Mozley himself and the banks; but Mozley had received them from one Easton, who had received them from Lord Sheffield, to whom they belonged; and the first question in debate is the extent of authority conferred upon Easton by Lord Sheffield. PEARSON, J., was of opinion that the authority conferred was such as to make Easton complete master of them, and enabled him to dispose of them as he might think fit. My Lords, I think Lord Sheffield neither intended to give nor did give any such authority. He limited Mr. Easton's authority to obtaining an advance by what may roughly be called a pledge of these securities to the extent of £20,000.

The nature of the transaction as between Lord Sheffield and Mr. Easton is, I think, clearly disclosed by Mr. Easton's letter of the 27th November, 1882. That letter is as follows: — "Gravetye, East Grinstead, 27th November, 1882. — Dear Lord Sheffield, — In accordance with our conversation on Saturday last I now beg to write you particulars of the way in which I propose you should enable me to raise the £20,000 you so kindly and generously said you would let me have if you could manage it. Mr. Lewin Mozley, of 31 Lombard Street (whose business it is to carry out such transactions on a very large scale, in conjunc-

tion with some of the principal joint stock banks) will advance me that sum for six months on the deposit of Grand Trunk Preference Stock (2nd and 3rd) of the present value of £26,000, or £27,000, and will pay the dividends as they fall due into your account at Coutts'. He will require blank transfers of the stock signed by you, and an order on Coutts' to deliver to the holder of the transfer the stock certificates."

[* 339] * For the carrying out of this transaction which was a loan secured by what in form was a transfer of the legal estate, but in substance and according to the intention of the parties was a pledge, it was necessary that blank transfers of the several securities should be executed, and Lord Sheffield accordingly executed these blank transfers.

Now, as to the authority conferred upon Easton, it appears to me that Easton himself, on the 28th of November, accurately described his own authority. "I am authorized," he says, "to pledge for six months, and I undertake that the stock shall be re-transferred at the end of that time."

My Lords, I entirely agree with the Court of Appeal upon this question, and without minutely going through the correspondence, it is enough to say that no part of it seems to alter the arrangement made by the letters to which I have referred. So much for the actual authority. Now, the question really argued before your Lordships was, whether, assuming the authority of Easton to be thus limited, the circumstance shows a right in the banks to retain these securities, not only for the £20,000 or £26,000 thus advanced, but as security for the whole of Mozley's indebtedness to them. The banks clearly and rightly had the legal estate, they were purchasers for value, and the whole question resolves itself into a very simple question of fact: had the banks notice of the infirmity of Mozley's title to pledge the securities of his customers for the whole of his own indebtedness?

I think the effort of the banks to prove a custom (which failed) is conclusive against them to show that they knew the nature of Mozley's business. I do not draw the most unfavourable inference which might be drawn from the answer of one of the witnesses, that he made a point never to inquire, when he dealt with money-brokers or lenders, where the securities came from. I think it was only a somewhat infelicitous phrase by which the gentleman in question sought to express his meaning that it was

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no business of his to inquire about Mozley's authority. I have no doubt he and his bank and all the other banks *bonâ fide* believed that as a matter of law they were entitled to deal with Mozley in taking from him these securities as security for his, Mozley's, debt, although they had been deposited with Mozley by his own customers as security for the differ- [*340] ent sums which they had borrowed from him.

I must say I can entertain no doubt that as a matter of fact the banks did know the nature of Mozley's business, and, singularly enough, each of the learned judges in the Court of Appeal came to that conclusion, although with all respect, they do not accurately represent what the course of business was. COTTON, L. J., says in terms: "Now I come to the conclusion, and I think we all did at the hearing, and so stated, that the banks must be taken to have known that the securities on pledge with them were, or the greater part of them were, securities taken by Mozley in the ordinary course of his business; that, I think, was the result." The LORD JUSTICE then goes on to describe what was the course of Mozley's business in a way to which I cannot assent.

Mozley himself describes, in answer to PEARSON, J., what was his course of business. "Supposing," says PEARSON, J., "that £14,000 worth of securities were deposited by the gentleman who borrowed that £14,000, they were deposited by him simply as security for £14,000?" Mozley, in his answer, says: "Upon his repayment of that £14,000 I was bound to return him any securities which he had deposited." He adds, "I lent money upon them, and up to the extent I lent upon them I could use them again." If this was the course of business, which the banks knew, how can it be said that it would not be contrary to good faith for the banks to retain the securities, not only for the amounts borrowed upon them by the owners, but for what Mozley owed to them?

There is a phrase in the judgment of FRY, L. J., in dealing with this part of the case which is ambiguous, but which, understood in one sense, I should assent to. He says: "The result of that course of business is equivalent to a notice to this effect, that the securities were not the property of Mozley, but that he had power to dispose of them so as to raise from the bank the entire sum it was intended to raise." It is obvious to ask "intended by whom?" Not certainly by Mozley's customers, if

Mozley told the truth about the mode in which his business was conducted, and I think his account is confirmed by the [* 341] acknowledged * practice of the bank to release particular securities in pursuance of the demands of his (Mozley's) customers. But I do not believe Mozley's business could have lasted a month if the banks had not allowed this system to continue by exchanging securities. Mozley was, as he says himself, entitled to pledge them to the extent to which he had advanced money upon them, and the conclusion I draw from the facts proved is that the banks knew very well the system of money-lending pursued by Mozley, and trusted to him that he would not over-pledge, so to speak, the securities of his customers. Otherwise the very first security refused to Mozley's customer upon his tendering the amount advanced upon it would have brought the whole business to a very speedy end.

My Lords, if this is the true view of the facts it is impossible to contend that the bank is entitled to the position of purchasers for value without notice. I think they had actual knowledge, but if they had reason to think that the securities might be Mozley's own, or might belong to somebody else, I think they were bound to inquire. My Lords, I have said nothing upon the different character of the securities, since I think it is quite immaterial whether they were negotiable or not; the principles applicable to this case are equally applicable, and if the facts are as I have suggested, the banks, as holders of a negotiable security, would be in no better position by reason of the negotiability of a security as to which they had knowledge or notice that it belonged to somebody else.

For these reasons I move your Lordships that the judgment of the Court of Appeal and that of Pearson, J., be reversed, and that the plaintiff is entitled to the declaration he asks and the redemption of such bonds and securities as remain unsold, and an inquiry as to the value of the stocks and bonds sold, such value to be ascertained as at the time when the plaintiff demanded their redemption upon his tendering the amount of the debt and interest due upon them.

Lord Watson: —

My Lords, Lewin Mozley, a professional money-dealer in the city, lent to one Easton, first the sum of £20,000, and [* 342] then an * additional sum of £6000, upon the security of

stocks of the Grand Trunk Railway of Canada, and foreign railway and canal bonds. These securities belonged to the appellant, Lord Sheffield, who gave Easton no authority to use them except for the purpose of securing these two sums. Mozley obtained an advance from each of the three respondent banks upon a running mass of securities, which included part of the appellant's property. The appellant signed transfers of the railway stocks to persons who were in reality the nominees of the banks, on their being sent to him for execution by Easton; and these transfers, with the certificates of the stock and the railway and canal bonds, were delivered to the banks by Mozley. The bonds have been held by the Court of Appeal, upon the authority of *Goodwin* v. *Robarts*, 1 App. Cas. 476; 45 L. J. Ex. 505, to be negotiable instruments, and I see no reason to differ from that conclusion. The banks had thus the full legal title to the securities, and Mozley having become insolvent, they asserted their right to hold them, not merely against the sums for which they were impledged by Easton, but against the several balances due to them in account with Mozley. Hence the present litigation. It is conceded that the respondents are purchasers for value, and the only question in this appeal is whether they are also purchasers without notice of the appellant's interest.

The evidence discloses that it is customary for persons in Mozley's position to get large advances from banks in the city of London, by transferring their customers' securities in mass, to cover the whole advance; they engaging to keep the securities up to a certain limit of value; the bank, on the other hand, stipulating for the right to realise, at any time, for its own protection. It is, moreover, an essential condition of these transactions that the money-lenders shall be permitted to withdraw, from time to time, such securities as may be required in the course of their business, upon the footing of immediately restoring them, or substituting other equivalent securities for them. In fact, great part of their business consists in lending, at a higher rate of interest, moneys which they borrow from the banks, at a lower rate, upon the securities which they take from their own borrowers; and it is necessary to the continuance of *such a course of dealing that they shall be able to get [*343] back a customer's securities from the bank, whenever he has the right, and is prepared, to release them. It was held by

the Court of Appeal (in my opinion rightly) that the practice thus prevailing between money-lenders and the banks has not grown into a proper commercial custom. In the language of COTTON, L. J., 34 Ch. D. 106, there is " no such general custom proved as would bind any one dealing with a money-dealer, unless it was shown that he had notice of the practice, and he was proved to have dealt with him on the footing of that practice. "

The evidence also establishes that, in the case of the advances for which the appellant's property was pledged to them, the respondents recognised and dealt with Mozley as a member of the money-lending class, and that he was permitted to exercise the usual privilege of withdrawing securities, and replacing them with others. But it is proved, and not disputed, that the appellant had no knowledge of the practice, and that he was not aware, before Mozley became bankrupt, that his property had been pledged for any greater amount than he had authorized Easton to borrow on its security.

Mozley, accordingly, stood in this position. In a question with the appellant he had a perfect right to use his own interest in the securities as a source of credit; and he had no authority and no right to deal with the appellant's interest by way of pledge or otherwise. At the same time the appellant, by his own acts, had invested Mozley with an apparent dominion and authority which would have enabled him effectually to dispose of the securities to persons who had no occasion to suspect his limited title.

In my opinion the character of the transactions between the respondents and Mozley was, of itself, sufficient to notify to them that his interest was limited. The bank officials, when examined before the judge of first instance, substantially admitted that they knew that the bulk of the securities lodged by Mozley were those of his customers; and, apart from the admission, it is matter of plain inference that they must have had that knowledge.

[* 344] Yet none of the respondents made any inquiry, either as * to where the securities came from, as to the interest of Mozley in such of them as belonged to his customers, or as to his authority, from the original pledgors, to deal with their interests as well as his own. In these circumstances the case appears to me to be narrowed to this issue: Were the respondents justified

in assuming, without inquiry, that Mozley had the appellant's authority to pledge the securities for their full value against the advances which they made to him?

Had it not been that the learned Judges of the Court of Appeal were of a different opinion I should have entertained no doubt that the respondents were not entitled to rely upon Mozley's having authority to pledge the securities to their full extent. That appears to me to be a necessary inference from the principles regarding notice which were applied by the Court of Exchequer in *Foster* v. *Pearson*, 1 C. M. & R. 849, and, more recently, by this House in *Cooke* v. *Eshelby*, 12 App. Cas. 271, 56 L. J. Q. B. 505, 2 R. C. 398. The LORDS JUSTICES seem to have accepted, as sufficient, the explanation given by the bank officials, that they believed Mozley had full power to deal with all the securities which he brought to them; although they assign no reason for their belief except the fact that they took the securities from him in the ordinary course of business; or, in other words, in the ordinary course of their dealing with a money-lender. COTTON, L. J., said, 34 Ch. D. 111: "It is true that they knew, and that was at first my doubt, that they (*i. e.* the securities) were not to a very great extent the property of Mozley, but they knew it was the practice of Mozley and similar money-lenders to deal with their customers on the footing of mortgaging *en bloc*, to secure their own debt, that on which they advanced their money to their customers." That reasoning is logical, and might have been conclusive, if it had been shown that it was customary for money-lenders to deal with their borrowers on the terms stated by his Lordship. But I can find no trace of such a custom in the evidence. What the respondents actually knew, was, that Mozley, in common with the rest of his class, was in use so to deal not with his customers, but with their securities, which is a very different matter. The course of dealing proved * is [*345] between the money-lender and the bank, and not between him and his customer, a practice which cannot affect the latter, unless he is aware of its existence.

It appears to me that the effect of the judgment appealed from is to deprive the appellant of his interest in these securities by virtue of a practice which admittedly ought not to affect him; and I therefore concur in the judgment which has been moved by the LORD CHANCELLOR.

No. 7. — Sheffield (Earl of) v. London Joint Stock Bank, 13 App. Cas. 345, 346.

Lord BRAMWELL: —

My Lords, I will state what appear to me to be the facts and conclusions of fact in this case. The appellant authorized Mr. Easton, on two separate occasions, to pledge his — the appellant's — property for two separate sums of £20,000 and £6000. He did not authorize him to pledge them for any other or different debt. They were pledged for other and different debts, and, consequently, were pledged without the authority of the appellant. It is therefore unnecessary to consider what Mr. Easton or Mozley knew or did. I think there is no ground for imputing fraud to any one, but unless the appellant authorized what was done he is not bound by it. Nor is it any use speculating as to whether he would have authorized it had it been explained to him that what was done was the usual and best way of raising money. He might or might not have authorized it. But he did not. What he did, however, as to his shares, was to execute a transfer of them, which was duly registered; the legal estate in them became vested in some of the respondents, who, being purchasers for value, acquired a title which could not be set aside unless they had notice of the infirmity of the title of those from whom they claimed. So of the other property. Treating it as passing from hand to hand by delivery, the appellant can make good no claim to it except by proof of such notice. The only question then is, was there proof of or evidence on which we ought to find such notice?

I have used the expression "notice of the infirmity of the title," but I wish to guard against the notion that I think it precise and accurate; nor would it be right to say "notice that possibly the pledgor had no power to pledge as he did," [*346] * because that is always possible. The expression should be something like this: "Notice of the infirmity of the pledgor's title, or of such facts and matters as made it reasonable that inquiry should be made into such title." I dare say that this, like most definitions of such a character, is incomplete, but I think it correct for the present case. Now I cannot doubt that the pledgees had such notice. They must have known — I might say, certainly have believed — that the property was not Mozley's. I dare say they thought that in point of law he could validly do what he did. But he could not. It seems to me, then, that they cannot hold this property except for what the appellant authorized it to be pledged, and that the judgment should be

No. 7. — Sheffield (Earl of) v. London Joint Stock Bank, 13 App. Cas. 346, 347.

reversed. It is remarkable that the respondents relied on neither of the judgments below. The Court of Appeal overruled PEARSON, J., I think rightly. There is no evidence that the appellant knew of any such practice as Mozley adopted. With respect to the judgment of the Court of Appeal it seems to me wrong, and founded on the Court's forgetting that at the same time that the bankers lent their money they had the notice I have mentioned.

Lord MACNAGHTEN: —

My Lords, in this case Lord Sheffield seeks to redeem securities in the hands of the three banks who are respondents to the appeal. In order to raise a certain sum of money, and on certain terms defined in writing, Lord Sheffield placed the securities in question at the disposal of one Easton, with whom he was associated in some Egyptian speculation. Easton procured the required advance from Mozley, a money-dealer. Mozley divided the securities and deposited them in three lots, together with securities belonging to other customers of his, in order to cover his accounts with the several banks. Lord Sheffield now appeals after two adverse decisions. PEARSON, J., who tried the case and the Court of Appeal have both rejected his claim. Their decisions are based on different and independent grounds. The Court of Appeal has held that the banks were purchasers for value without notice, and that they are therefore entitled to rely upon the legal title which they unquestionably obtained.

* PEARSON J.'s view was that Lord Sheffield entrusted [* 347] his securities to Easton to deal with them as if they were his own; that Easton was aware of Mozley's way of raising money; that he therefore could not complain of what Mozley did; and that Lord Sheffield has no better right than Easton to question the title of the banks. Both these views have been presented to your Lordships, though PEARSON, J.'s, view was somewhat modified at the bar.

The learned counsel for the appellant did not dispute the fact that the banks obtained the legal title, nor did they draw any distinction between the different classes of securities which were the subject of this action. They relied entirely on the knowledge which in their view of the evidence was brought home to the banks. The managers of the several banks were examined. Their evidence varies slightly in detail. The admissions in one case may seem to be more candid or more complete — that comes

probably from the way in which the questions were put. The effect of the evidence in the three cases is practically the same. Mozley's business was well known. He was a money-dealer. He lent money to his customers on securities which they deposited with him. He pledged those securities to the banks who supplied him with the money. He got money as cheaply as he could and disposed of it on the best terms he could make. His profit was derived from the difference or margin between the rate at which he lent money and the rate at which it was procured. The banks knew that in most cases, if not in all, the securities which he deposited with them were not his own absolute property. That information was conveyed by the nature and extent of his business. And moreover his customers for the most part were persons on the Stock Exchange, and it was the usual practice for the banks on settling-days to deliver out to him the securities which he required to be released for the convenience of his customers on an undertaking to redeposit securities of equal value in the course of the day. On the other hand the letters of deposit which the banks took from Mozley purported to charge not merely Mozley's interest in the securities but the securities themselves, and to make the whole mass in deposit liable for Mozley's indebtedness. That, as one of the managers says, was "the general banking practice." Beyond that the bank officials
[* 348] * did not care to inquire. One of them with equal candour and simplicity say, "We make a point never to inquire when we deal with money-brokers and money-dealers." It would not be fair to scan that answer too closely. Whatever it means — whether it implies absolute faith in the scrupulous regularity of the whole class of money-dealers, or the shadow of a suspicion of a possible alternative, or whether it be merely an off hand and perhaps injudicious disclaimer of curiosity in a matter which the witness took to be no concern of his — there is no difference in the result. The banks knew that the person who dealt with them as owner was not acting by right of ownership. They took for granted that he had authority, but for some reason or other they did not choose to inquire what that authority was. They relied either on some assumed custom or general usage of bankers or on Mozley's representations. If they relied on a custom the answer is, no such custom is proved. The Court of Appeal has held, and held rightly, that the evidence falls far short of any-

No. 7. — Sheffield (Earl of) v. London Joint Stock Bank, 13 App. Cas. 348, 349.

thing of the kind. If they relied on Mozley's representations it turns out now that in this case his representations were not well founded, and as loss has occurred the loss must fall on those who trusted without inquiry to the representations which he made.

The learned Judges of the Court of Appeal have come to the conclusion that the banks had notice that the securities in question did not or might not belong to Mozley, but they held that the effect of that notice was neutralized by Mozley's representation that he had power to deal with them as his own on the ground that the notice and the representation must be taken together. No authority was cited in favour of that proposition. It is difficult to see how it can be supported on principle. It is obvious that in every case where a person deals as owner with property which is not his to the knowledge of the person who deals with him there must be a simultaneous and concurrent representation of authority honestly believed in or else there must be actual fraud and dishonesty.

Feeling the difficulty of supporting the view of the Court of Appeal the learned counsel for the respondents fell back on PEARSON, J.'s, view of the case. That view, as submitted to your Lordships, was somewhat disguised or modified, but in substance * the argument came round to PEARSON, J.'s, [* 349] view. In fact when once the alleged custom was out of the way there was no alternative. There is no room for a middle course between PEARSON, J.'s, view and the view of the Court of Appeal. On this part of the case it is sufficient to say that the respondents are met by the correspondence between Lord Sheffield and Easton, which so far from authorizing Easton to deal with the securities as his own or to allow Mozley to raise money on them in what was termed "his own way," expressly limited and defined the object for which they were placed in his hands.

For these reasons I agree in the motion proposed by the LORD CHANCELLOR.

[A discussion took place as to the form of the order, and the order set out below was eventually drawn up.]

Order of the Court of Appeal and judgment of Pearson, J., reversed: Declared that the appellant is entitled to the declaration asked in the statement of claim, and to the redemption of such bonds and securities as remain unsold,

and to an inquiry as to the value of the stocks and bonds sold, such value to be ascertained as at the time when the appellant demanded their redemption upon his tendering the aggregate amount of the principal moneys and interest due in respect of the several loans of £20,000 *and* £6000 *in the statement of claim mentioned, and to accounts of what was, at the date of the said demand for redemption, due from the respondent Easton to the trustee in the liquidation of Lewin Mozley for principal and interest in respect of the said loans respectively, and to payment by the respondents, the London Joint Stock Bank, Limited, and the Royal Bank of Scotland, to the appellant of the difference between the said values of the stocks which were the securities for the loan of* £20,000 *and the amount which shall be found to have been due as aforesaid in respect of that loan, with* * *interest on such difference at the rate of* £4 *per cent per annum from the date of the said demand, and to payment by the respondents, the Capital and Counties Bank, Limited, and the Royal Bank of Scotland, to the appellant of the difference between the said values of the bonds which were the securities for the loan of* £6000 *and the amount which shall be found to have been due as aforesaid in respect of that loan, with interest on such difference at the rate aforesaid from the date of the said demand: Ordered, that without prejudice to any question between the respondents, the London Joint Stock Bank, Limited, and the Royal Bank of Scotland, or between the respondents, the Capital and Counties Bank, Limited, and the Royal Bank of Scotland, the said respondents do respectively contribute to the said respective payments in the proportions of the said values of the several portions of the respective securities for the respective loans held by them respectively: And that any question as to how, as between the same three respondents, or any of them, such payment or contribution ought to be made, be determined by the Chancery Division of the High Court of Justice: The respondents (other than Young) to pay the costs of the appellant both in this House and below, and repay to the appellant any costs paid by him to the respondents: Cause remitted to the Chancery Division.*

[* 350]

Lords' Journals, 12th March, 1888.

ENGLISH NOTES.

The question whether the securities in question in this case were negotiable was not essential to the ultimate decision of the case. The cases turning upon the question whether an instrument is negotiable, will be dealt with hereafter under the ruling case of *Goodwin* v. *Roberts* (H. L. 1876), 1 App. Cas. 476, 45 L. J. Ex. 748. (Title "Bond.")

As to what is "value" to support the title to a negotiable instrument, an important case is *The London and County Banking Co. limited* v. *The London and River Plate Bank limited* (C. A. 1888), 21 Q. B. D. 535, 57 L. J. Q. B. 601. In that case the manager of the defendant bank stole certain negotiable securities belonging to that bank, and sold them through an intermediary, who was a party to the fraud. These securities ultimately came into the possession of the plaintiff bank, who had no notice of the fraud. The manager through the same intermediary subsequently obtained the securities from the plaintiffs by fraud, and restored them to the defendant bank, the directors of which had no knowledge that the securities had ever been out of their possession. A portion of the restored securities were not the bonds actually stolen, but bonds of a like kind and value. It was held that, there being no evidence to the contrary, the defendant bank accepted the securities in discharge of their manager's obligation to restore them, and that this constituted sufficient value to entitle that bank to retain them.

For some time considerable misapprehension existed as to the limits of the decision in the ruling case. This was set at rest by the decision in *London Joint Stock Bank* v. *Simmons* (H. L. 1892, appeal in the action of *Simmons* v. *London Joint Stock Bank*), 1892, App. Cas. 201, 61 L. J. Ch. 723, where the House of Lords established that there must exist a knowledge of circumstances leading to belief of a wrongful dealing by the customer, to oust the title of the bank as purchaser for value of a negotiable security. In this action of *Simmons* v. *London Joint Stock Bank*, a broker, in fraud of the owner, pledged negotiable instruments of that owner together with instruments belonging to other persons with the bank as a security for an advance, and then absconded. There was no evidence that the bank knew whether the instruments belonged to the broker or to other persons, and it was admitted that the advances made by the bank were made in the belief that the brokers who brought the securities had made sufficient advances on them to justify them in obtaining the amounts which they from time to time obtained from the bank. Lord HERSCHELL, after explaining at length the distinction between the case and *Lord Sheffield's Case*,

stated that he desired to rest his judgment on the broad and simple ground that he found, as a matter of fact, that the bank took the bonds in good faith and for value. Lord MACNAGHTEN (1892, A. C. 225) makes the following observations upon *Lord Sheffield's Case*. That case, he says, "depended on its own peculiar circumstances. The settled law relating to negotiable instruments was not in question. No one impugned it. No one cavilled at it. No one, as I understood the argument, thought of reviving qualifications long since exploded. But there it was held that the bank knew, or ought to have known, that the securities which the money-lender Mozley was depositing with them had been pledged to him by his several customers, that they were not his own, and that he could not pledge them for their full value. There was no want of good faith on the part of the bank in taking them in security to the extent of Mozley's pledgable interest. But there was, as it seems to me, a want of good faith in claiming to retain them for more than that limited interest, whatever it might turn out to be." The same learned Lord went on, in reference to his own observations in *Lord Sheffield's Case*, upon "representations" (p. 675, *ante*), to explain that he had not meant to convey that if the bank had received from Mozley explanations which a reasonable man could possibly accept, the bank might not have held the securities for their full value; and that he might have better expressed himself by saying that "whereas it had been suggested that the memorandum of charge neutralized the knowledge otherwise properly attributable to the bank, it seemed to me that that knowledge must prevail over any inference to be derived from the memorandum."

AMERICAN NOTES.

It is generally held in this country, in accordance with *Goodman* v. *Harvey*, 4 Ad. & Ell. 870, and contrary to *Gill* v. *Cubitt*, 3 B. & C. 466 (although some States at first followed the latter), that mere suspicious circumstances, or even carelessness, unless so gross as to amount to bad faith, will not import notice of prior equities on the transfer of a negotiable instrument. *Murray* v. *Lardner*, 2 Wallace (U. S. Supreme Ct.) 110; *Shaw* v. *Railroad Co.*, 101 United States, 564; *Hamilton* v. *Vought*, 34 New Jersey Law, 191; *Phelan* v. *Moss*, 67 Pa. St. 59; 5 Am. Rep. 402; *Comstock* v. *Hannah*, 76 Illinois, 530; *Wells* v. *Sutton*, 85 Indiana, 70; *Farrell* v. *Lovett*, 68 Maine, 326; *Breckenridge* v. *Lewis*, 81 Maine, 349; 30 Am. St. Rep. 353; *Trustees* v. *Hill*, 12 Iowa, 474; *Fox* v. *Bank*, 30 Kansas, 441; *Colson* v. *Arnot*, 57 New York, 253; *Frank* v. *Lilienfeld*, 33 Grattan (Virginia), 377; *Schoen* v. *Houghton*, 50 California, 528; *Henry* v. *Eppinger*, 34 Michigan, 29; *Citizens' Nat. Bank* v. *Hooper*, 47 Maryland, 88; *Rowland* v. *Fowler*, 47 Connecticut, 347; *Freeman's Nat. Bank* v. *Savery*, 127 Massachusetts, 75; 34 Am. Rep. 345; *Witte* v. *Williams*, 8 South Carolina, 290; 28 Am. Rep. 294; *Kelley* v. *Whitney*, 45 Wisconsin, 110; 30

Am. Rep. 697; *Greneaux* v. *Wheeler*, 6 Texas, 526; *Johnson* v. *Way*, 27 Ohio St. 374; *Kitchen* v. *Loudenback*, 48 Ohio St. 177; 29 Am. St. Rep. 540; *Edwards* v. *Thomas*, 66 Missouri, 483; *First Nat. Bank* v. *Johns*, 22 West Virginia, 520; 46 Am. Rep. 506; *Merch. Nat. Bank* v. *Hanson*, 33 Minnesota, 40; 53 Am. Rep. 5; *Bank* v. *McClelland*, 9 Colorado, 610. See Daniel on Negotiable Instruments, sect. 775, and note with references, 90 Am. Dec. 695, and note, 11 Am. St. Rep. 309. But the rule of *Gill* v. *Cubitt* apparently still obtains in Vermont, *Gould* v. *Stevens*, 43 Vermont, 125; 5 Am. Rep. 265; in Kentucky, *Adkins* v. *Blake*, 2 J. J. Marshall, 40; in Tennessee, *Merritt* v. *Duncan*, 7 Heiskell, 164.

If the indorsee of a negotiable instrument before maturity knew, or if such facts came to his knowledge as if inquired into would inform him of an equity in the matter, he takes *cum onere*. "If anything appears to a party calculated to attract attention or stimulate inquiry, he is affected with knowledge of all that inquiry would have disclosed." So where a negotiable note is secured by a mortgage, the fact that one half the land has been released is some evidence to charge a purchaser of the note before maturity with knowledge that there has been a partial payment on the note. *Hulbert* v. *Douglas*, 94 North Carolina, 122. So in *Bank* v. *Rider*, 58 New Hampshire, 512, in respect to an indorsement in a firm name by one partner without the knowledge or assent of the other. In *Edwards* v. *Thomas*, 66 Missouri, 468, it was held that positive and direct testimony is not necessary to charge the latter with notice; it may be inferred from facts proven, but mere circumstances sufficient to put a prudent man on inquiry will not do. So it was held that the fact that the name of the party accommodated appeared as last indorser did not import notice that the indorsement, made by an agent, was not for the benefit of his principal, but for that of a third party.

In *Ormsbee* v. *Howe*, 54 Vermont, 182; 41 Am. Rep. 841, it appeared that Preston was accustomed to "get this wire clothes-line on to people in a fraudulent way," take their notes, and transfer them to Healey. The court: "We think the case discloses that Healey understood Preston's methods; that he knew that Preston deliberately proposed to practise fraud if necessary to get rid of his wares through the forms of sale, and that he became a general purchaser of his notes knowing his fraudulent purpose and the likelihood that such purpose would often have to be carried out in order to get the notes. He was not only put upon inquiry, but we think upon the facts found that he bought the notes in bad faith." The holding that he was "put upon inquiry" results from the adoption of the doctrine of *Gill* v. *Cubitt*, and probably would not be followed in most of the other States.

As to notice implied from buying notes greatly below their face value, see *Smith* v. *Jansen*, 12 Nebraska, 125; 41 Am. Rep. 761, and *Bailey* v. *Smith*, 14 Ohio St. 396; 84 Am. Dec. 385 and note, 403.

In *Griffith* v. *Shipley*, Maryland Supreme Court, 14 Lawyers' Reports Annotated, 405, it was held that where a note-shaver purchased a note at twenty per cent discount (requesting the seller to keep still about it), with knowledge that it was given for "hulless oats" to a company which he knew was engaged in selling such oats, and the seller of the notes knew the oats were worthless, proof of those facts is sufficient to justify a finding that he was not a *bonâ fide* purchaser.

No. 8. — Robarts v. Tucker. — Rule.

A note cannot be said to be purchased in good faith by a bank, when it is made by a farmer known to the cashier, who had never engaged in any business requiring a discount to the amount of the note, $200, and was executed two hundred miles from home, and was purchased from a stranger, at an usurious rate, without inquiry as to prior equities. *Canajoharie Nat. Bank* v. *Diefendorf*, 123 New York, 191; 10 Lawyers' Reports Annotated, 676, with note. The Court said: "Greater caution in avoiding the most natural information could not have been exhibited by the plaintiff if the cashier had known the notes were obtained by fraud or crime, and desired to remain in ignorance of those facts. His conduct exhibited something more than negligence. He exhibited a studious desire to avoid any information which might throw light upon the origin of the notes, or the existence of equities in favour of the maker. Henderson displayed a cautious reticence in recommending the paper he had to dispose of, and the cashier, with a delicacy as novel as it was considerate appreciated his situation, and refrained from putting any questions which might embarrass his vendor in negotiating a successful sale." That "gross negligence, though non-conclusive, was evidence of bad faith" "is conceded even by the case of *Goodman* v. *Harvey*, 4 Ad. & Ell. 870, the leading case in England in upholding the rights of the holders of commercial paper."

The principal case is cited with approval in Pomeroy's Equity Jurisprudence, section 695.

Section V. — *How affected by forgery.*

No. 8. — ROBARTS *v.* TUCKER.

(Exch. Ch. 1851, appeal from)

TUCKER *v.* ROBARTS.

(Q. B. 1849)

No. 9. — BANK OF ENGLAND *v.* VAGLIANO.

(H. L. 1891, appeal from)

VAGLIANO *v.* BANK OF ENGLAND.

(Q. B. & C. A., 1888, 1889.)

RULE.

Bankers paying a bill accepted by a customer payable to payee whose indorsement has been forged, cannot by reason of their general authority to pay the customer's bills, claim repayment from him of the money.

No. 8. — Robarts v. Tucker, 16 Q. B. 560, 561.

But where the customer has accepted a bill which is altogether fictitious (although believing it to be genuine), he is estopped from setting up, as against the bankers, the fictitious nature of the bill; and is liable to the bank on his representation that the bill is genuine,— the circumstance that the signature of a real person purporting to be named as payee has been forged being an immaterial detail in the transaction.

Robarts v. Tucker.

16 Q. B. 560–580 (s. c. 20 L. J. Q. B. 270–273; 15 Jur. 987).

Assumpsit. The first count of the declaration stated; [560] That the defendants below, plaintiffs in *error, before [*561] and at the time of the promise next after mentioned, were bankers, and carried on the trade and business of bankers; and thereupon, to wit, on 1st January, 1830, in consideration that the said Company at the request of defendants would retain and employ defendants as the bankers of the Company, and would lend, pay and advance to defendants divers moneys of the Company, defendants undertook and promised the Company to act as and be the bankers of the Company, and, to the extent of such moneys as should be so lent, paid and advanced to defendants as aforesaid by the Company, to pay, to the lawful holders thereof, all such bills of exchange as should be accepted by the Company, or by the trustees, or any two of them, of the said Company, as such trustees, payable at the banking-house and place of business of defendants, and all such cheques and drafts as should be drawn by the Company on defendants, and not to pay any such bill of exchange, cheque or draft as aforesaid to any person or persons not the lawful holder or holders thereof and entitled and able to receive payment of and give a discharge for the same respectively; and also to keep and render just and faithful accounts to and with the Company, and to debit and charge the Company only with such bills of exchange, drafts and cheques so accepted by the Company or the trustees thereof, or any two &c., payable at the said banking-house and place of business of defendants as aforesaid, and so drawn on them, the defendants, by the Company as aforesaid respectively, as should be paid by the defendants to the lawful holder or holders thereof respectively. Averment, that the Company, confiding, &c., did afterwards, to wit, on &c., and from

thence continually until the commencement of this suit, [*562] * retain and employ defendants as the bankers of them the Company, and did then, and on divers days and times between that day and 1st January, 1847, lend, pay and advance to defendants divers moneys of them the Company, to wit, to the amount of £100,000: Yet defendants, not regarding, &c., afterwards, to wit, on 16th January, 1840, then having moneys so lent, paid and advanced by the Company as aforesaid sufficient in that behalf, to wit, to the amount of £20,000, wrongfully and unjustly paid to certain persons, to wit, Messrs. Jones, Loyd and Company, then not being the lawful holders thereof and entitled and able to receive payment thereof and give a discharge for the same, a certain bill of exchange theretofore accepted by two of the trustees of the said Company as such trustees payable at the banking-house and place of business of the defendants; to wit, a bill of exchange for £5000, dated 20th December, 1839, drawn by one William James Tate on and addressed to the trustees of the said Company by the description of The Trustees of the Pelican Life Office, London, payable seven days after sight to Elizabeth Isherwood, widow, Miriam Isherwood, spinster, &c. (other payees were named), or order, and (to wit, on 6th January, 1840) accepted for the said trustees by John Petty Muspratt and William Stanley Clarke, two of the said trustees of the said Company, as such trustees, payable at the said banking-house and place of business of the defendants and whereof the said E. Isherwood, &c. (the payees before named), were then the lawful holders. And that defendants further disregarded their said promise, &c., in this, to wit, that defendants did not keep and render just and faithful accounts to and with the Company, in this, to wit, that defendants, to wit, on 31st [*563] January, * 1840 accounted to the Company, and stated that there was due from defendants to the Company, on the balance of all sums so lent, &c., by the Company to the defendants as aforesaid, and of all sums for bills of exchange, cheques and drafts as aforesaid, paid by defendants for the said Company, a small sum of money, to wit, £11,790 16*s.* 5*d.* only, whereas a much larger sum was such balance, to wit, £16,790, and was then due as such balance from the defendants to the Company. Further averment, that defendants, further disregarding, &c., did not nor would debit and charge the Company only with such bills of exchange, drafts and cheques respectively so accepted by the Com-

pany and by the said trustees and any two of them as such trustees as aforesaid, payable at the said banking-house, &c., of defendants, and so drawn on defendants by the Company respectively as aforesaid, as defendants had paid to the lawful holders thereof respectively; but, on the contrary, defendants, to wit, on 6th January 1840, did debit and charge the Company with a certain bill of exchange and its amount, accepted by two of the trustees of the said Company as such trustees, to wit, J. P. Muspratt and W. S. Clarke, payable at the banking-house and place of business of the defendants, which defendants had not paid to the lawful holders thereof, to wit, the bill of exchange and sum of £5000 aforesaid.

The second count was for money lent, money received by defendants to the use of the Company, and on an account stated.

The defendants pleaded, among other pleas, which it is not necessary to specify, the following: —

Plea 1. Non Assumpsit.

Plea 4. To the first breach in the said count: That * Messrs. Jones, Loyd and Company were entitled and able [* 564] to receive payment and give a discharge for the bill of exchange in the said breach mentioned: conclusion to the country. Issue thereon.

5. To the same breach: That defendants paid to the said Messrs. Jones, Loyd and Company the amount of the bill of exchange in that breach mentioned by the authority of the said Company: verification. Replication: *De injuriâ*. Issue thereon.

To the second count: Payment, and set-off: which were traversed. Issues thereon.

On the trial[1] before Erle, J., at the London Sittings after Michaelmas Term, 1849, a bill of exceptions was tendered by the

[1] This was the second trial of the cause. On the first trial, before Lord Denman, C. J., at the London sittings after Hilary Term, 1848, the same evidence was given as was afterwards produced at the second trial. The jury found a verdict for the defendants. A rule nisi for a new trial was obtained on the ground of misdirection; which was argued in Hilary Term, 1849 (11th January), before Lord Denman, C. J., Patteson, Coleridge and Wightman, JJ. Sir John Jervis, Attorney-General, Shee, Serjt., and Barstow for the defendants; Martin and Bramwell for the plaintiff. The Court took time to consider. The nature of the judgment renders it unnecessary to report the arguments. Lord Denman, C. J., in the same term (January 29th), delivered judgment as follows: —

"We have considered this case very fully, and we are of opinion that there was not evidence that I could properly lay before the jury of any circumstance to exempt the bankers from the ordinary liability to the duty of inquiring whether, in fact, the right persons had indorsed the bill."

Rule Absolute.

plaintiffs in error (defendants below) to the ruling of the learned Judge. A verdict was found for the plaintiff below, with nominal damages on the first count, and £5000 on the second.

Judgment having been entered for the plaintiff below, defendant in error, in the Queen's Bench, error was brought in the Exchequer Chamber. Joinder in error.

[*565] *The bill of exceptions set forth the whole evidence given at the trial; which consisted exclusively of admissions seventy-six in number. By the first six admissions it appeared that the defendants below were bankers to the Company, and that they had money in their hands belonging to the Company, against which they claimed to set the payment of a bill of exchange which was in the following form: —

Manchester, December 20, 1839.

£5000 . 0 . 0. At seven days' sight pay to Mrs. Elizabeth Isherwood, widow, Miriam Isherwood, spinster, Anne Magdalene Isherwood, spinster, also Anna Maria Isherwood, now the wife of Charles Bellairs, or order, the executrixes of the late John Isherwood, Esq., five thousand pounds in full for loss under Policy No. 11012.

W. J. Tate.

To the Trustees of the
Pelican Life Office.

That the following indorsements were on it: —

Elizabeth Isherwood, Miriam Isherwood, Anne Magdalene Isherwood, Anna Maria Bellairs, J. K. Winterbottom. Pay Messrs. Jones, Loyd and Company or order: per pro. Bank of Stockport.

John Jackson, Manager.

Rd. Jones, Loyd and Company.

and that the first four signatures were forged by John Kenyon Winterbottom.

The bill of exceptions then set out other admissions, in substance as follows: —

7. That, in the case of a party, whose life was assured with the said Pelican Company, dying in the country, it was the usual and long established practice of the Company to pay the money assured or payable under the policy, by a bill of exchange drawn by the local agent of the said Company on the said Company (or [*566] on the *trustees or directors thereof), payable to the per-

sons entitled to the money or their order, pursuant to a "Leave to draw" sent to the agent for that purpose, and which was the only authority of the agent to draw such bill; and that it was the practice of the Company, when such bill was presented to the directors for acceptance, and before the same was accepted, that a clerk of the Company should compare the bill with the cheque kept by the said Company of the "leave to draw," and should ascertain that the payees or payee named therein were or was the persons or person entitled to receive the sum mentioned in the bill, and that the said bill was otherwise duly and regularly drawn in conformity with the "leave to draw," and that the bill appeared to bear the signatures of the payees indorsed thereon. And (8) That, according to the practice of the Company, no bill of exchange was accepted by them or on their behalf unless the names or name of the payees or payee appeared to be previously indorsed thereon.

9. That the aforesaid practice of the said Company was not communicated by them or by their authority to Messrs. Robarts, Curtis and Company; and that they, in dealing with the bills accepted by the said Company, examined and dealt with such bills in the same manner in all respects as they examined and dealt with the bills of their other customers.

10. That it was also the established rule and usage of the Company that in no case, either in town or country, should a loss be paid upon a policy granted by them without the policy being at the same time delivered to the Company or their local agent.

11. That the said bill of exchange was drawn by the local agent of the Pelican Company, and accepted by * the [* 567] said Company in conformity with their aforesaid practice; and that Messrs. Robarts, Curtis and Company examined and dealt with the said bill in the same manner in all respects as they would have done if it had been the acceptance of any other customer.

12. That the said bill of exchange was drawn by Mr. William James Tate, the agent of the Pelican Company at Manchester, for payment of a loss upon a policy of insurance dated 19th April, 1814, effected by John Isherwood, formerly of Marple Hall in the county of Chester, Esquire, on his own life for £5000. 13. That the said John Isherwood died on 23d May, 1839.

14. That the said John Kenyon Winterbottom was, at the

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death of the said John Isherwood, and for many years had been, a solicitor and attorney of high reputation residing at or near Stockport, in the county of Chester, aforesaid; and that he was at the death of the said John Isherwood, and for many years had been, his country solicitor. 15. That the said Elizabeth Isherwood, Miriam Isherwood, Anne Magdalene Isherwood and Anna Maria Bellairs were the executrixes of John Isherwood, and proved his will on 5th December, 1839; and that J. K. Winterbottom acted as their attorney upon their obtaining such probate, and acted as the attorney of the family of the said John Isherwood after his death.

16. That, on 3d June, 1839, the said J. K. Winterbottom called at the office of the said W. J. Tate, as agent of the Pelican Company, and informed him of the death of John Isherwood, of which W. J. Tate was then unaware, and requested to be furnished with the blank certificates, that the cause of the death of John Isherwood and of his burial might be filled in preparatory to the Pelican Company paying the amount of the said insurance.

[* 568] * The admissions then showed that all the formalities required by the Company before settling a loss were fulfilled by J. K. Winterbottom.

22. That, all the requisites of the Pelican Company's office having been complied with, the official "leave to draw" was issued by the Company, and sent by them to W. J. Tate at Manchester. 23. The said leave to draw was as follows: —

No. 129

Pelican Life Office, Lombard Street,
London, 11th December, 1839.

Leave to draw a bill for payment of loss in the Department of the Manchester Agent.

Sir,

You will please to draw one Bill, as per margin, on the Trustees of the Pelican Life Office, payable to Mrs. Elizabeth Isherwood, widow, Miriam Isherwood, Ann Magdalene Isherwood, spinsters, the executrixes of John Isherwood deceased, or order, at seven days' sight in full for loss under Policy No. 11012, £5000 insured on the life of John Isherwood deceased. I am, &c.

At 7 days sight for £5000, say for five thousand pounds sterling.

By Order of the Board
H. Lillie.

The probate of the will of Mr. Isherwood is now returned. Before the bill will be accepted, a formal renunciation, in the shape of a letter to the Board of Directors signed by Miss Anna Maria Isherwood, now Bellairs, and also by her husband, should be forwarded. The policy is to be delivered up to you to be cancelled; and you will send it to me in your next. You are requested to be careful that the bill be drawn conformable to the above instruction on the proper stamp.

It then appeared that an entry was made in the books of the Company to the effect that such a "leave to draw" had been issued,

25. That, on 20th December, 1839, J. K. Winterbottom called upon W. J. Tate at his office at Manchester, produced the said policy, and delivered it to Tate; and thereupon Tate drew the said bill of exchange in *conformity with the said [*569] "leave to draw," and gave it to Winterbottom in return for the said policy, and also returned to him the probate. And, Tate having in the first instance drawn the bill without the words "or order," Winterbottom said that those words must be put in or he could do nothing with it, or words to that effect; whereupon Tate inserted the words "or order," and at the same time expressly informed Winterbottom that the bill would be required to be indorsed by all the payees, and that Winterbottom could not sign it for them by procuration. 26. That Winterbottom signed no receipt and produced no authority.

27. That, on 3d January, 1840, Winterbottom sent the said bill of exchange to the Stockport Bank at Stockport, and afterwards received its value from them. 28. That the bill, when so sent, bore the following indorsements: "Elizabeth Isherwood, Miriam Isherwood, Anne Magdalene Isherwood, Anna Maria Bellairs, J. K. Winterbottom." 29. That the Stockport Bank indorsed the said bill to Messrs. Jones, Loyd & Co. of Lothbury in the city of London, bankers, the agents in London of the Stockport Bank, and received the money on the account of the Stockport Bank.

30. That afterwards, viz., on 6th January, 1840, a clerk of Messrs. Jones, Loyd & Co. presented the said bill, so indorsed, for acceptance at the office of the Pelican Company in Lombard Street. 31. That, in compliance with the said practice of the Pelican Company, the said bill of exchange was by one of the clerks of the said Company, duly authorized by them in that behalf, examined and compared with the said cheque of the said "leave to draw;"

and such clerk examined the indorsements of the names [* 570] of the payees, and was * satisfied that all the requisites of the said Company had been complied with: and the same bill was then accepted by two of the then directors of the said Company, payable at the said Messrs. Robarts, Curtis & Co., the bankers of the said Pelican Company; and in accepting such bill the then usual course of business of the said Company was observed and followed. 32. That after they had accepted the said bill, and on 7th January, 1840, the Pelican Company returned the same to a clerk of Jones, Loyd & Co., and did not see it or have any information about it till it was returned to them by Robarts, Curtis & Co. as after mentioned.

33. That, on the morning of 16th January, 1840, the said bill of exchange was, through the clearing-house, presented by Jones, Loyd & Co. to Robarts, Curtis & Co. for payment, and the amount was paid by them to Jones, Loyd & Co. through the said clearing-house. 34. The amount so paid by Robarts, Curtis & Co. to Jones, Loyd & Co. is the amount which they claim to be entitled to charge against the said Company.

35. That the practice of the clearing house is as follows (viz.): a clerk from each banking firm in London connected with the clearing-house attends there twice a day; and the bills and cheques on that day payable by each firm to any other firm so attending are exchanged, and the balance only paid by each firm; and that, before any bill of exchange is honoured or paid at or through the clearing-house, the clerk of the firm from whom payment is demanded submits the same to his employers at home, who direct that the same shall be honoured or dishonoured as they see fit.

36. That neither the said company nor Robarts, Curtis [* 571] & Co. had any knowledge of the said forgery * until 31st July, 1840; when Thomas Bradshaw Isherwood and his wife, on behalf of his mother and sisters, the executrixes of John Isherwood, called at the Company's office, and, after looking attentively at the signatures of the names of the payees indorsed on the said bill, stated to Horatio Lillie, then acting as secretary of the Company, that they believed that they were forgeries.

The admissions then showed that the payment of this bill of exchange was debited to the Pelican Company in their pass-book, and that the pass-book passed alternately from the custody of the

defendants to that of the Company and back again, several times before the forgery was discovered; that the bill was given up to the Company as a voucher; and that the Company entered the payment in their books to the credit of the defendants. The admissions detailed the manner in which the forgery was discovered, and that the Company paid to the Isherwood family, under threats of legal proceedings, the amount of the loss, and claimed the £5000 from the defendants, who denied their liability.

61. That the general custom and course of business of London bankers in respect of bills of exchange have remained unaltered from the commencement of 1840 to the present time; and that, according to the general custom and course of business in respect of bills of exchange accepted by a customer payable at his banker's, such bills are seen for the first time by the bankers, or any one acting on their behalf, on the day on which the same are payable; and that, according to the same general custom, &c., such bills, if not paid at or before five o'clock in the afternoon of the day on which they are presented for payment, are in fact dishonoured. * 62. That said bill of exchange for £5000 was [* 572] not seen by the firm of Robarts, Curtis & Co., or by any one belonging to or acting on behalf of the said firm, until the same bill was presented for payment at the clearing-house on the said 16th day of January, 1840; and that all the payees named in the said bill of exchange were then resident in the country at a considerable distance from London, and were respectively strangers to the said firm.

63. That, on the said 16th day of January, 1840, the usual course of business of the bank of Robarts, Curtis & Co., as to the examination of bills of exchange and the indorsement thereon, when bills of exchange payable there were presented for payment, was, that every such bill of exchange was examined by one of the principal clerks employed by Robarts, Curtis & Co. in their banking-house; and that every vigilance and precaution compatible with the usual course of the business of a banker in London were exercised by Robarts, Curtis & Co., with a view to ascertain that the bill of exchange for the time being under examination was regular in form; and, if the acceptance appearing thereon was the acceptance of any customer of the said bank, that the acceptance was the genuine acceptance of such customer; and also that, in the case of any indorsements or indorsement appearing on such bill of ex-

change, some or one of such indorsements if more than one, or such only indorsement if only one, corresponded with the names or name appearing in such bill of exchange as the payees or payee thereof, and that all such indorsements, if more than one, appeared to be regular and in accordance with the usual method of transfer of bills of exchange, and, so far as the party examining [* 573] the same was able to judge, * were genuine; and, in the case of the last indorsement being special or restrictive, that the party or parties presenting such bill of exchange for payment was or were the special indorsee or special indorsees named thereon. 64. That, after such examination as aforesaid, every such bill of exchange was, according to the usual course of business of the said bank, unless some defect was apparent in some or one of the particulars before mentioned, cancelled for payment and paid.

65. That, according to the usual course of business of Robarts, Curtis & Co., one of the principal clerks of the said firm (namely, Thomas London, who has been in the service of the said firm and of their predecessors for forty-eight years) examined the said bill of exchange for £5000, and was satisfied that the same was regular in form, and that the acceptance thereof was the genuine acceptance of two of the directors of the said Company, and that the indorsements appearing first in order on the back of the same bill of exchange corresponded with the names appearing in the body of the bill as the names of the payees thereof; and that all the indorsements appeared to be regular and in accordance with the usual method of transfer of bills of exchange; and, so far as the party examining the same was able to judge, were genuine; and that Messrs. Jones, Loyd & Co., to whom the said bill appeared to have been specially indorsed, presented the same for payment.

The rest of the admissions are not material to this report.

The bill of exceptions then set forth the direction of the learned Judge as to each issue separately. It was, in effect, that, as matter of law, the issues, the burden of which lay on the plaintiff, [* 574] were proved by the admitted * facts; and that there was no evidence for the consideration of the jury in support of those issues the burden of proving which lay on the defendant; and that the plaintiff was entitled to recover on both counts. It concluded in the following terms: "And he did not leave to the

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jury for their consideration any matter touching either of the said several premises, but directed the jury to assess nominal damages for the plaintiff upon each of the breaches in the first count mentioned, and also to return their verdict for the plaintiff on the first issue as to the count for money lent, with £5000 damages. Whereupon the counsel for the defendants made their exceptions," &c.

Sir Frederick Thesiger,[1] for the plaintiffs in error (defendants below). A banker, at whose house a bill is made payable by one of his customers, does not warrant absolutely that he will pay the bill to the right party; that would make his undertaking co-extensive with that of the acceptor himself. The banker is bound to know his customer's handwriting; and consequently if he pays a forged acceptance he does it in his own wrong. *Smith* v. *Mercer*, 6 Taunt. 76, 16 R. R. 576. But he is not bound to know the indorser's writing. *Forster* v. *Clements*, 2 Camp. 17, 11 R. R. 650, is distinguishable from the present case; for there the banker, who had no effects in his hands, was a volunteer. *Hall* v. *Fuller*, 5 B. C. 750, 4 L. J. K. B. 297, was the case of a cheque; and the banker ought to know the customer's cheque. But, if he has used due skill and diligence in endeavouring to ascertain the genuineness * of the indorsement of a stranger, he has [* 575] done his duty; and the customer has no right to complain if the banker is deceived and pays the bill though the indorsement be forged. [Maule, J. Certainly the customer has no right to complain of the payment; and he would have no right to complain though the banker exercised neither skill nor diligence in ascertaining the genuineness of the indorsement before paying the bill, or even paid it knowing it to be forged. Bankers may spend their own money in paying forged bills. But what you want is a case in which a banker has been permitted to debit his customer with such a payment; and I apprehend that there never was one. Alderson, B. You reason as if the customer bailed money to the banker to be kept with reasonable diligence, and returned *in specie*. But the customer lends money to the banker, and the banker promises to repay that money, and, whilst indebted, to pay the whole or any part of the debt to any person to whom his creditor, the customer, in the ordinary way requires

[1] The case was argued before Maule, Cresswell, Williams and Talfourd JJ., and Parke, Alderson, and Platt, BB.

him to pay it. PARKE, B. That is undoubtedly so; and it follows that the ruling of the learned Judge, that there was evidence to prove the promise in the first count, is wrong. There was no evidence of the contract, there alleged, not to pay any such bill, cheque or draft to any person not being the lawful holder thereof and entitled and able to give a discharge for the same. And the contract laid, "to debit and charge the Company only with such bills of exchange, drafts and cheques" "as should be paid by the defendants to the lawful holder or holders thereof respectively," was not proved; for bankers are entitled to debit their customers with the payment of bills, drafts and cheques paid to a [* 576] person who by the law merchant * had given a lawful discharge for them. A person possessed of a bill payable to bearer or indorsed in blank, may give a discharge for it though not the lawful holder. The learned Judge ought not to have ruled in favour of the plaintiff below on the first count; and the defendant in error cannot retain the nominal damages assessed on that count. But he may perhaps obviate the necessity of a *venire de novo* by entering a remittance of those damages; the real question arises on the count for money lent.]

As to that count: It is true that an acceptance, though it admits the genuineness of the drawer's signature, does not in general admit the genuineness of an indorsement, though on the bill before acceptance. *Smith* v. *Chester*, 1 T. R. 654, 1 R. R. 345; *Carvick* v. *Vickery*, 2 Doug. 653; *Robinson* v. *Yarrow*, 7 Taunt. 455; *Bosanquet* v. *Anderson*, 6 Esp. 43; *Cooper* v. *Meyer*, 10 B. & C. 468, 8 L. J. K. B. 171. But in the present case there are special circumstances. The bill was drawn by the Company's servant on the Company. Such an instrument is in effect a promissory note. *Miller* v. *Thomson*, 3 M. & G. 576, 11 L. J. C. P. 21. If it had been indorsed by the Isherwoods to whose order it was payable, that would have been a drawing; and it might then have been treated as a bill drawn by them on the Company. The Company in fact never accepted drafts drawn on them till they were indorsed. By accepting a draft which purported to be drawn by the Isherwoods, the Company would have been precluded from disputing that it was drawn by them. Under the circumstances, this bill was equivalent to one drawn by the Isherwoods. [MAULE, J. When a man accepts a bill drawn on him and makes it [* 577] * payable at a banker's, he directs the banker to pay

that particular bill; and, such a direction having been given, it is immaterial whether the bill be what it purports to be or not; but how does that apply to a forged indorsement?] The practice was such that the Company by accepting admit that they have satisfied themselves of the genuineness of the indorsement. [WILLIAMS, J. That would be evidence against them that the indorsement was genuine, if that was in dispute; but does it preclude them from proving that it was forged? PARKE, B. It would not do so unless it amounted to a prior authority to pay this particular bill without inquiry, or to a subsequent admission that the indorsement was genuine, in reliance on which the bankers were induced to alter their position. Can any evidence of either be shown here? MAULE, J. There is a complete failure of any evidence that the practice of the Company, or their opinion that the indorsement was genuine, had ever been communicated to the bankers. It is no more than if the acceptor of a bill were to write in his private memorandum book that he was quite satisfied that the indorsement on the bill was genuine and that the bankers might safely pay it. How could that private opinion of the customer vary the obligation of the bankers?] It is a hardship on a banker if he must either pay the bill at once at the peril of an indorsement proving to be a forgery, or dishonour the bill at the risk of an action from the customer. *Marzetti* v. *Williams*, 1 B. & Ad. 415, 9 L. J. K. B. 42, No. 10, p. 746 *infra*. [MAULE, J. I apprehend that bankers have a right to take a reasonable time to make inquiries.] The holder of a bill of exchange is entitled to know on the very day on * which it becomes due, whether [* 578] it is to be honoured or not. *Cocks* v. *Masterman*, 9 B. & C. 902, 8 L. J. K. B. 77. [MAULE, J. It may possibly happen that the day may not afford sufficient time for making reasonable inquiries, as when the bill is presented by a stranger, and the indorsements necessary to give him title are by persons unknown to the bankers. In such a case, I conceive the banker would be justified in refusing to pay till he had more information as to whether the presenter was holder or not. A refusal to deliver up goods to the owner, on the ground that the holder must have time to ascertain whether he is the owner, is no conversion. It has been held that a banker, who was in funds when an acceptance of his customer was presented, was by law entitled, if the funds had been recently paid in, to a reasonable time to inquire whether the funds were

adequate to answer the order. A customer whose acceptance had been dishonoured under such circumstances failed in his action. *Whitaker* v. *The Bank of England*, 1 C. M. & R. 744, S. C. 5 Tyr. 268.] The present case is analogous to *Young* v. *Grote*, 4 Bing. 253; 5 L. J. C. P. 165.

Sir Fitzroy Kelly, for the defendant in error, offered to remit the damages on the first count; and he was not called upon to argue.

Parke, B. We are all agreed in opinion. If this were the ordinary case of an acceptance made payable at a banker's, there can be no question that making the acceptance payable there is tantamount to an order, on the part of the acceptor, to the [* 579] banker to pay the bill to the * person who is according to the law merchant capable of giving a good discharge for the bill. Therefore, if the bill is payable to order, it is an authority to pay the bill to any person who becomes holder by a genuine indorsement. And, if the bill is originally payable to bearer, or if there is afterwards a genuine indorsement in blank, it is an authority to pay the bill to the person who seems to be the holder. The bankers cannot charge their customer with any other payments than those made in pursuance of that authority. If bankers wish to avoid the responsibility of deciding on the genuineness of indorsements, they may require their customers to domicile their bills at their own offices, and to honour them by giving a cheque upon the banker.

Such being the general case, is there anything appearing on the bill of exceptions to distinguish the present case from the ordinary one? Is there any evidence of an authority to pay this particular bill? We are all of opinion that there is none. Reliance is placed on the evidence which shows that the company were accustomed to take precautions before accepting a bill. But that custom was never communicated to the bankers; and there is no evidence, direct or indirect, of any communication to the bankers from which an authority to pay this bill without examination could be inferred.

Then reliance is placed on *Young* v. *Grote*, 4 Bing. 253, 5 L. J. C. P. 165. In that case the customer had signed blank cheques, and left them with his wife to fill up. She filled them up in such a manner that the holder was enabled to add to the amount; and it was held that the bankers who had paid this larger [* 580] amount might charge their customer * with it. This was

in truth considering that the customer had by signing a blank cheque given authority to any person in whose hands it was to fill up the cheque in whatever way the blank permitted. It is enough to say that is not the present case.

We think, therefore, that the plaintiffs below were entitled to recover on the count for money lent. The special count, as has been intimated in the course of the argument, misstates the banker's undertaking; and there was no evidence to prove it; so that the plaintiff below was not entitled to recover nominal damages on that count.

We think that the learned Judge was right in his ruling as to the money counts, and wrong in his ruling as to the special count. The judgment may be suspended for the present, till the defendants in error consider whether they can by entering a *remittitur* obviate the necessity of a *venire de novo*, and how the judgment should be entered.

The rest of the Court concurred.

The parties having come to an agreement as to the costs of the trial and writ of error, no subsequent application was made to the Court as to the form of judgment.[1]

Bank of England (appellants) v. Vagliano.

Vagliano (plaintiffs) v. Bank of England.

60 L. J. Q. B. 145–173; 1891, App. Cas. 107–172.

This was an appeal from the judgment of the Court of [145][2] Appeal (reported 23 Q. B. D. 243; 58 L. J. Q. B. 357), in which a judgment of CHARLES, J. (reported 22 Q. B. D. 103, 58 L. J. Q. B. 27), was affirmed by COTTON, L. J., LINDLEY, L. J., BOWEN, L. J, FRY, L. J., and LOPES, L. J,; *dissentiente* Lord ESHER, M. R.

The facts were briefly these: —

The plaintiff in the action claimed to be entitled to be credited by the defendant bank with a sum of £71,500 with which the bank had debited him in respect of certain bills, which bore the genuine signature as acceptors of the plaintiff's firm. The bills purported to be drawn by one Vucina, who was a correspondent of the plaintiff's firm, but they were in fact wholly fictitious bills

[1] Reported by C. Blackburn, Esq.

[2] The pages marked in the statement of the case are those of the Law Journal report.

fabricated by a clerk in the employ of the plaintiffs, who by placing them before Mr. Vagliano along with forged letters of advice obtained the acceptance of the firm. The payee named in the bills was "Petridi": There was a person of this name who had some business with the firm, but this person had no concern with the transaction. After obtaining the acceptance of the firm the clerk forged the signature of the payee and obtained payment of the bills at the counter of the bank. Both the Courts below had decided in favour of the plaintiff's claim against the bank.

The Attorney-General (Sir R. E. Webster, Q. C.) and H. D. Greene, Q. C. (Pollard and Reginald Bray with them), for the appellants. The payee, indorser, and indorsee to these bills were fictitious and non-existent persons. The words "fictitious and non-existent" mean not that there are no such persons in existence in fact, but that they are fictitious and non-existent with reference to the bills. Petridi is a very common name, and there is no mention of Constantinople on any of the bills, which might have identified the payee with the firm proved to exist there. There was no evidence that Vagliano relied upon his knowledge of the existence of that firm. This question depends on the construction of the Bills of Exchange Act 1882 (45 & 46 Vict. c. 61), s. 7, sub-s. 3. That Act, by section 97, sub-s. 2, [*146] *preserves the rules of common law, including the law merchant, where not inconsistent therewith. In order to find out the meaning of "fictitious and non-existent," the decisions before the Act must be looked at. In *Stone* v. *Freeland*, 1 H. Bl. 317 n., the name of the payee was that of a real firm with whom the acceptor had dealings, but it was held fictitious because the acceptor intended to indorse himself. In *Collis* v. *Emmett*, 1 H. Bl. 313, it was held that if there be no person who can by any possibility give an order, the bill is payable to bearer. This must mean where there is no person who has a right to give the order. It cannot be that merely because there is in existence a person of the name put in the bill, the bill is not to be payable to bearer. Here the forger never intended C. Petridi & Co. of Constantinople as the payees; he never intended them to indorse. He put the name in with the intention of himself indorsing. In *Gibson* v. *Minet*, 1 H. Bl. 569, 589; 1 R. R. 754, the name of the payee was John White, a common name, and the drawer indorsed; see also *Gibson* v. *Hunter*, 2 H. Bl. 288. In *Mead* v.

Young, 4 T. R. 28; 2 R. R. 314, it was held that indorsement by a person of the same name as the payee was forgery. Would it not have been so held here if any firm bearing the name of Petridi had indorsed, no such firm having the right to do so? In *Cooper* v. *Meyer*, 10 B. & C. 468; 8 L. J. K. B. 171, the drawer and payee were real firms whose names were put in the bills without authority and signed by Darby, but the Judges speak of them as not being real persons. They must mean that they were not real in relation to the bills. In *Phillips* v. *Im Thurn*, 18 C. B. N. S. 694; 35 L. J. C. P. 220, the evidence only showed that no such person as Carlos Raffo was known in Lima. In *The London and South Western Bank* v. *Wentworth*, L. R., 5 Ex. D. 96; 49 L. J. Ex. 657, S. H. Head was a real person whose name was put in to give credit to the bill, yet he was treated as fictitious because, there being no real drawer, there could be no person designated by him whose order would be necessary to give title to the bill.

This being the state of the law before the Act of 1882 was passed, it was enacted by section 7, sub-section 3, that "where the payee is a fictitious or non-existent person the bill may be treated as payable to bearer." The Court of Appeal has read into these sub-sections "with the knowledge of the acceptor." The words are not there, and their insertion is inconsistent with the intention of the legislature. The part of the Act where the clause occurs deals not with the liability of the acceptor, but with the form and interpretation of the bill. The knowledge of the acceptor has nothing to do with the matter. In other parts of the Act where knowledge is material (*e. g.* section 50) it is expressed to be so. Can it be that when the drawer puts in a fictitious name as payee, the question whether the bill is payable to bearer or not depends on the knowledge of the acceptor? The acceptor by acceptance honours the name of the drawer. If the drawer directs the acceptor to pay to the order of the payee, and the payee is fictitious, that is a direction to pay to the bearer. If Vucina had drawn the bills, Vagliano would be entitled to charge him, and Vucina could not object to the indorsement, because, the payee being fictitious, the acceptor, as well as every one else, may treat the bill as payable to bearer. It surely cannot be said that Vagliano's right to debit Vucina would depend on his knowing at the time of accepting that the payee was ficti-

tious. If the drawer has used a fictitious name the acceptor runs no risk by paying the bill if right in form, — that is, if indorsed with the name of the payee. *Phillips* v. *Im Thurn.* There seems to be no difference between an ordinary acceptor and an acceptor for honour. It is for the drawer and no one else to say whether a bill is to be payable to order or bearer: his intention must decide. But how can the intention of the forger affect the question? How can a fictitious drawer appoint a real payee? Bowen, L. J., thought that *Gibson* v. *Hunter*,* was an authority that the knowledge of the acceptor was material, but all that was decided was that the facts were so loosely stated that no judgment could be given. The view that such knowledge is material appears in *Fennett* v. *Farnell*, 1 Camp. 130, 133 n., 180, and the editor's notes to that case.

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The bank were guilty of no negligence in paying the bills. They acted as the agents of Vagliano, and it was his act that caused them to pay. In the case of three-day bills, there is not much time to make inquiries. The very case has been decided in the bank's favour in *Price* v. *Neal*, 3 Burr. 1354. As to the point that it was negligent to pay such large amounts over the counter the evidence of Mr. Disney is clear that he called Ziffo's attention to the matter, and was recommended to pay the bills if properly advised. Credit ought to have been given to this positive evidence, against the mere statement of Ziffo that he did not remember the conversation. Ziffo was a most confidential clerk, and the bank were justified in relying upon his advice.

There was negligence by Vagliano, and the Courts below were wrong in holding that it was outside the transaction. *The Bank of Ireland* v. *Evans's Trustees*, 5 H. L. Cas. 389, 408, 413, is the leading authority on this point. The expression there used is that the negligence must be "in or immediately connected with the transaction." The seal of a corporation had been put to a document without the knowledge of the corporation. Here Vagliano signed the acceptances himself. Other authorities in point are *The Merchants of the Staple* v. *The Bank of England*, L. R., 21 Q. B. D. 160; 57 L. J. Q. B. 418; *Swan* v. *The North British Australasian Company*, 2 H. & C. 175; 32 L. J. Ex. 273; *Baxendale* v. *Bennet*, L. R., 3 Q. B. D. 525; 47 L. J. Q. B. 624; *Arnold* v. *The Cheque Bank*, L. R., 1 C. P. D. 578; 45 L. J. C. P. 562; and *Roberts* v. *Tucker*, 16 Q. B. 560; 20 L. J. Q. B. 270. No

stress was laid in the Courts below on the letters of indication sent to the bank. In dealing with the question of negligence it was treated too much as a question of personal negligence by Vagliano himself. The correspondence, if examined, would have shown that the genuine letters never referred to the forged letters, although they always referred to the last preceding genuine letter, and this should have aroused suspicion.

[The following cases were cited as to the liability of banks to customers where there has been negligence on the part of the latter. *Young* v. *Grote*, 4 Bing. 253; 5 L. J. C. P. 165; *The Halifax Union* v. *Wheelwright*, L. R., 10 Ex. 183; 44 L. J. Ex. 121; *Orr* v. *The Union Bank of Scotland*, 1 Macq. 513, and *Ireland* v. *Livingston*, L. R., 5 H. L. 395; 41 L. J. Q. B. 201.]

Sir Charles Russell, Q. C., and Finlay, Q. C. (Hollams with them), for the respondents. The rule is that a bank paying bills for a customer is liable if it pays on a forged indorsement. But further, the appellants were guilty of negligence. In the first place, there was negligence in paying over the counter instead of insisting on paying through a bank, a precaution which would have given some protection in fact. Secondly, they ought to have noticed that in some cases the bills purported to have been indorsed at Constantinople three days before they were accepted in London, the interval being less than the course of post.

Vagliano is not estopped by his conduct. *Robarts* v. *Tucker*. The letters of indication did not mislead the bank. They amounted to no more than would be conveyed by the acceptances. The bank was directed to pay on a genuine indorsement; the letter was merely to indicate the genuineness of the acceptance. It would not relieve the bank if it paid on a forged indorsement of a genuine bill. Why, then, should it do so where the bill is forged? Then as to the irregularities in the correspondence, — namely, the want of references in the genuine to the forged letters, — these points would not be attended * to by a [* 148] prudent man unless there were something else to excite suspicion. This correspondence was left to Glyka, and he was trusted. There was no evidence as to the general practice of merchants, and the burden lay upon the bank to prove negligence.

But if there was negligence on Vagliano's part, it was not in relation to the transaction. *The Bank of Ireland* v. *Evans's Trustees*.

The payee was not a fictitious person. Glyka meant Vagliano and everybody to understand that C. Petridi & Co. of Constantinople was meant, and the bills were indorsed as by that firm. It is not sufficient to show that the payee is fictitious; he must be fictitious to the knowledge of the acceptor. This was the law before the Act of 1882, and the Court of Appeal were right in their interpretation of section 7, sub-section 3, as preserving the old rule. *Cooper* v. *Meyer*, and *Gibson* v. *Hunter*.

The Attorney-General, in reply. *Cur. adv. vult.*

1891 Mar. 5 [A. C. 113 [1]], Lord Halsbury, L. C. : —

The simple question in this case is whether the plaintiff's bankers have paid away the plaintiff's money under such circumstances as enable him to refuse to acknowledge the payments as made on his behalf. Each of the parties is innocent of any wilful default. They are both free from any suspicion of bad faith; but the banker has paid away and placed to the debit of his customer a sum of £71,500, while the customer was not [* 114] * conscious of, and certainly never intended to authorize, the payment of that sum on his behalf.

The authority to pay, which was relied upon by the bankers as justifying the payments, was written documents in the form of bills of exchange, and, though they were not really bills of exchange at all, it is important to bear in mind what a real bill of exchange would import to the mind of a person to whom it was sent for payment.

Now, apart from the particular machinery by which this transaction was effected, it will not be denied that a principal who has misled his agent into doing something on his behalf which the agent has honestly done, would not be entitled to claim against the agent in respect of the act so done: and upon this branch of the case the question is whether the agent was misled into doing the act by the default of the principal. See *Ireland* v. *Livingston*.

I will treat the transaction, for the sake of clearness, as if it were a single payment. Could it be doubted that if the two parties met, and by word of mouth the customer had said to his banker: " There is a bill coming due to-morrow of such and such an amount; it is drawn on me by a customer of mine, named

[1] The pages in these judgments are those in 1891, App. Cas.

Vucina, and will be presented for payment at your bank to-morrow," — such a statement was calculated to put the banker off his guard, and be likely to induce him to act as he did act? Does it make any difference that the words were not spoken, but upon its face the document reaching the banker's hands by the act of the customer, in which phrase I include the course of Vagliano's business, said this as plainly as if the words had been spoken? Vucina, in fact, had not drawn any such bill. There was no transaction between Vagliano and Vucina such as the instrument in question purported to effect, and yet this was the written statement which, upon the face of the instrument, Vagliano made to the bank.

Further, by a separate and independent writing, Vagliano told the bank that such a bill of exchange for such an amount was becoming due, and would have to be paid out of his account. No such bill of exchange existed, although a false document corresponding * in all particulars was accredited by [* 115] Vagliano in writing his acceptance upon it.

In estimating the effect upon an agent's mind, it must, of course, be remembered that, though I have here for clearness spoken of it as a single transaction, it is a transaction repeated forty-three times and spread over a considerable period. The false documents were paid, duly debited to the customer and duly entered in his pass-book, and, so far as the banker could know or conjecture, brought to his knowledge on every occasion upon which the payment was made and the bills returned. Further, on each occasion when these false documents were, by what I have called the act of the customer, permitted to reach the bank for payment, they were accompanied with a considerable number of other genuine bills of exchange, many of them drawn by Vucina, and regularly entered in the notice of bills about to become due, together with the false documents in question.

It seems to me impossible to dispute that this was, in fact, a misleading of the banker. I pass by for the moment the question whose default it was, for the purpose of considering the proposition which has found favour with one of your Lordships, and which I will not dispute, that the carelessness of the customer, or neglect of the customer to take precautions unconnected with the act itself, cannot be put forward by the banker as justifying his own default. In order to make the cases of *The Bank of Ireland*

v. *The Trustees of Evans's Charities*, and *The Mayor, &c. of the Merchants of Staple of England* v. *The Bank of England*, authorities in this case, it would be necessary to assume that the plaintiffs in those cases had, by some voluntary act of their own, given credit and the appearance of genuineness to the particular powers of attorney which were forged in those cases, and if they had, I very much doubt whether the decision would have been what it was; but no such fact appeared; all that the parties whose negligence was relied on had done was to leave their seal carelessly in the custody of the person who abused his trust. These decisions, therefore, do not seem to me to touch this case.

But how can it be said in this case that the default is [* 116] * unconnected with the act? The very thing which the banker does is induced by the fault of the customer. Was not the customer bound to know the genuineness of Vucina's draft? Was not the customer bound to know whether there was any real transaction between himself and Vucina effected by the instrument in question? Was not the customer bound to know the content of his own pass-book? Was not the customer bound to know the state of his account with Vucina? It certainly is very strange that it should be suggested that, without any responsibility on his part, he should be entitled to accredit forty-three documents to his bankers as genuine bills, when he had the means of knowledge I have indicated that no one of them was a bill of exchange at all or represented any transaction between Vucina and himself.

The bankers paid upon these documents, and they paid a person who was not entitled to receive the money. There was no person entitled to receive it. The fact that it reached their hands as representing a mercantile transaction in which somebody was to be paid, was itself a misleading of them; and that it did reach their hands purporting to represent such a transaction arose from the mode in which Mr. Vagliano's business was conducted by those responsible for it.

I have designedly avoided calling these documents bills of exchange. They were nothing of the sort. But if they had got into the hands of an innocent owner for value without notice, Vagliano would undoubtedly have been responsible upon them, for he had given them a genuineness as against himself by accepting them.

Now, when it is insisted that the bankers are responsible

because they did not pay the person indicated as payee, one is induced to inquire whether Mr. Vagliano, or any other merchant, would have expected that any inquiry should be made as to the genuineness of Petridi's signature. Suppose they had been genuine signatures of Petridi's, and the bills had been dishonoured while the bankers were making inquiries, would not Mr. Vagliano have had grave ground for complaint against the bankers who had allowed his credit to be thus disturbed? I think each of the parties to the transaction must be taken to have known the ordinary course of mercantile affairs, and it is manifest that
* no banker could hesitate to pay such bills as came [* 117] to him, so accredited as they were by Mr. Vagliano's acceptance, without throwing the whole mercantile world into confusion.

I am not intending to throw any doubt upon the propriety of the decision in *Robarts* v. *Tucker*, nor am I prepared to assent to the proposition that it is a harsh decision. A customer tells his banker to pay a particular person; the banker pays some one else, and it would seem to follow as a perfectly just result that the banker should be called upon to make good the amount he has so erroneously paid. But what relation has such a decision to a case where a thing which bears the form and semblance of a known commercial document like a bill of exchange gets by the act of the customer into the hands of the banker where there is no real drawer, no real transaction between himself and the supposed drawer, and where, as a matter of fact, there is no person who, in the proper and ordinary sense of the word, is a payee at all?

It seems to me that if all these circumstances, acting upon and inducing the bankers to make the payments they did make, are acts which are the fault of the customer, it is the customer, and not the banker, who ought to bear the loss. I think, under these circumstances, the banker did what was usual and customary with bankers, and what both customer and banker knew to be usual and customary with bankers, as far as the payment without inquiry as to the genuineness of the indorsement by Petridi & Co. was concerned. But I propose to deal separately with the alleged negligence of the bankers, or, at all events, the unusual course pursued by the bankers in cashing these bills across the counter and paying to the person presenting the document for payment without inquiry.

I do not know what is the usual course among bankers, and I should doubt whether in such a matter it would be possible to affirm that any particular course was either usual or unusual, in the sense that there is some particular course to be pursued when circumstances occur necessarily giving rise to suspicion. I can well imagine that on a person presenting himself whose [* 118] appearance and demeanour were calculated to * raise a suspicion that he was not likely to be intrusted with a valuable document for which he was to receive payment in cash, I should think it would be extremely probable that, whether the document were a cheque payable to bearer for a large amount, or a bill, the counter clerk and banker alike would hesitate very much before making payment. However, I will assume the course pursued in this case to be somewhat unusual, and that this is proved by the bankers themselves, though the counter clerk gives a different reason why the clerks called the attention of their immediate superior to the circumstance, and he, in his turn, called the attention of Mr. Vagliano's representative. In doing so it appears to me to have relieved the bankers from any accusation of having hastily or carelessly paid these bills. What could the banker know of the particular transactions of Messrs. Vagliano? But Mr. Vagliano, when it was communicated to him or to his representative, would be surely the best person to judge whether there was anything calculated to give rise to suspicion in the facts to which I have referred.

It has been sought to minimize the effect of that communication to Mr. Vagliano's representative, first, by treating him as a clerk to whom such a communication ought not to have been made; and, secondly, by suggesting that Mr. Ziffo possibly indicated that he was a person not fit to be trusted, since he took a very strange view of what was or was not calculated to cause suspicion and enforce inquiry as to these bills. But what had the bankers to do with Mr. Ziffo's capacity for business? He was Mr. Vagliano's confidential clerk, duly accredited as such. After one or two of the bills had been presented and paid in the manner I have referred to, Mr. Disney thinks it right to call the attention of Mr. Ziffo to the fact, and Mr. Ziffo replies to the information that they are presented over the counter and invariably taken in bank notes: "I suppose if they are properly advised you must pay them." Here is information given of the very fact

relied on to the confidential representative of Mr. Vagliano, and it is suggested to be negligence in the bank that, after receiving the answer I refer to, they continued to pay these bills when properly advised by Mr. Vagliano himself.

I must add here that I think that the witness truly explained * his inadvertent use of the word "indorsed," [* 119] and meant to say "advised." Now, it appears to me, that whatever case might be suggested against the bank is completely answered by the bank having communicated these facts to a person occupying such a position in Mr. Vagliano's house, and that his answer was such as to allay any suspicion or uneasiness on the part of the bank.

I have not stopped to examine minutely the contrast between Mr. Ziffo's evidence and the bank's official, Mr. Disney, because, if one comes to examine it carefully, there is no real contradiction. One witness is positive as to communications actually made, and the other only meets that positive assertion by alleging a want of memory of any such communication.

One other point has been made at your Lordship's bar, but I think under circumstances which do not entitle it to consideration. It is said that the course of post ought to have been known to the bankers, and that the date of the indorsements ought of itself to have raised suspicion. Possibly, if there was evidence sufficient to prove exactly what the facts are as to the course of post (and, notwithstanding the evidence of one witness, I am not satisfied that we have the facts accurately as to the course of post), a serious doubt might arise; but it is enough to say for the purposes of this case that that point appears neither to have been pressed nor argued at a time when, by proper evidence, the matter could have been left beyond doubt, and the circumstances of excuse for not observing the dates, if such excuses existed, could have been properly determined. I can find no evidence that that point was really pressed. It is not noticed in any of the judgments, and though, to my mind, it is a singular argument coming from the mouth of Mr. Vagliano, whose suspicions one would have thought would have been aroused by the dates found on the documents afterwards appearing, it is enough for me to say that I decline to consider a topic which has been neither really argued nor properly fortified by evidence as a material circumstance to consider in this case.

I should be content to rest my judgment here, and to express my opinion that for these reasons the judgment of the Court below should be reversed, although I regret to say [*120] that * on this branch of the case my view is at variance with that of all the learned Judges who have hitherto treated this question.

I have hesitated long before I was able to acquiesce in the view of my noble friend Lord Herschell and that of the Master of the Rolls, that the same conclusion could be arrived at by a consideration of the Bills of Exchange Act, 1882. One difficulty I have had in the determination of that question is in applying to the instruments with which I have been dealing an enactment which deals with bills of exchange. For reasons I have already given, it seems to me difficult to treat them as bills of exchange at all; but, as against the person now insisting on their possessing the quality of such instruments, and remembering that it was his act by which they are put into circulation in that character, it does not seem unreasonable that, applying the doctrine of estoppel to him, one may consider whether as against him they may not possess qualities which, in their inception, they did not possess.

The 7th section, upon two of the sub-sections of which this question turns, commences thus: "(1) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty." And the 3rd sub-section: "(3) Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer."

Now, in the first instance, before dealing with the application of these sub-sections to the facts in debate, I must say that I cannot acquiesce in the view which the majority of the Court of Appeal appear to have entertained, that they were at liberty to import into that 3rd sub-section that it was a condition of its application that the acceptor should be aware that the payee was a fictitious or non-existing person.

It seems to me that, construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction, and I am wholly unable to adopt the view that where a statute is expressly said to codify the law, you are at liberty to go outside the code so created, because before the existence of that code another law prevailed.

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* To return to the construction of the language of the [* 121] two sub-sections, — for I think both should be read together, — it seems to me that what the Legislature was enacting was in substance this : That where a bill was not payable to bearer the person to whom payment was intended to be made was to be named or otherwise indicated upon the face of the instrument with reasonable certainty ; but where there was no real payee, the bill might be treated as payable to bearer.

The language which the Legislature has employed to express this law has been subjected to very minute verbal criticism. If the substance of the matter is looked at, and it is remembered that what the Legislature was dealing with was what was to appear upon the face of the instrument, and contemplated the case of there being no one to whom payment could properly be made, no person on the face of the instrument having any rights under the bill, no person, therefore, capable of giving a discharge to the acceptor for having paid at the demand of the drawer, it would seem that the reason of the thing would apply equally to a real person whose name was forged, as to a person who had no existence.

In truth, if strictly construed, the words " fictitious person " are a contradiction. One may pretend there is a person when there is not. One may assume a character which does not belong to one, but to satisfy the word " fictitious " as applicable to a person is assuming in one part of the proposition what is denied in the other. Some of the characters in Sir Walter Scott's novels may be fictitious in the sense that no such persons so named ever lived ; but if real names are taken, and events and conduct and character attributed by the writer to those real names, are the characters less " fictitious " because persons of those names identified with a totally different history and different qualities did, in point of fact, exist at one time ?

One singular result of treating the section in the way the Court of Appeal have adopted would be that one must dive into the mind of the hypothetical forger to determine whether the character be fictitious or not; and this may be done, though it is not necessary to find the forger's intention from the language or anything that appears upon the face of the instrument itself, but * you may judge from previous commercial transactions [* 122] of the parties who was likely to be meant as giving plausi-

bility to the forgery. But if it can be alleged (as it can be here), that the forger selected a name which would give plausibility to his forgery, and be likely to deceive those into whose hands his forged instrument should come, that is not the name of a fictitious person, although that person had no power to deal with the bill, and was not in any respect the real payee, any more than if the name had been selected of a person who had never been heard of or existed before; whereas, if it is pure imagination, then it is the name of a fictitious person.

I have come to the conclusion that, however expressed, the real meaning of the sub-section is to imply the unreality of any person who is named upon the face of the instrument as the payee of the bill. The statute itself uses the phrase "payee." That cannot mean in truth the payee, because by the hypothesis there is no payee, and dealing as the statute was with the form of the instrument, and enacting that if a name which appeared as payee on the face of the instrument was a fictitious person, the bill may be treated as payable to bearer, it expressed in popular words, though perhaps not very felicitously chosen, its meaning accordingly.

For these reasons I am of opinion that on this ground also the judgment of the Court below was wrong and ought to be reversed, and I so move your Lordships.

The Earl of Selborne, —

If the bills in question in this case had been genuine, really signed by Vucina in favour of C. Petridi & Co., and if the indorsements only had been forged, the case would have been governed by *Robarts* v. *Tucker*. But the signatures of Vucina were forged; the use of the name of C. Petridi & Co. as payees was part of the fiction; they were not in any true sense payees; and the bills were, nevertheless, accredited by the plaintiffs to the bank as genuine, and as coming forward, like other genuine bills of Vucina, for payment in due course, on days specified in the plaintiffs' letters of [* 123] advice; and their * payment, as such, was expressly directed by the plaintiffs. When I speak of the plaintiffs' letters of advice, I do not forget that the effect of acceptances payable upon the face of the bills at the Bank of England might, perhaps, have been the same; but in this case there were both; and I think it unnecessary to consider whether the addition of the one form of direction to the other made any difference. If it did not, the effect of the letters of advice cannot on that account be less. This state

of things appears to me to raise a question which was not decided in *Roberts* v. *Tucker*, or in any other case cited at the bar. It is (as *Roberts* v. *Tucker* was) a question between the plaintiffs as principals and the bank as their agent, and not between any parties to the bills.

If the plaintiffs misled the bank upon a material point, however innocently, and although they were themselves deceived by the fraud which had been committed, I think that they, and not the bank, ought to bear the loss which has been the consequence. Here there was never any real holder of these bills, by whom they could have been indorsed, or any outstanding liability from which a discharge was necessary. Your Lordships have to deal with the case of an agent, not claiming any title to or interest in the bills, but instructed by his principal to pay them. It is convenient to speak of them as bills; but, properly speaking, they had not (though they seemed to have, and were represented by the plaintiffs as having) that character; they were accepted as such; but there was no real drawer, and no real payee; and they were never negotiated. It is not (as I understand) disputed that there might, as between banker and customer, be circumstances which would be an answer to the *primâ facie* case that the authority was only to pay to the order of the person named as payee upon the bill, and that the banker can only charge the customer with payments made pursuant to that authority. Negligence on the customer's part might be one of those circumstances; the fact that there was no real payee might be another; and I think that a representation made directly to the banker by the customer upon a material point, untrue in fact (though believed by the person who made it to be true), and on * which the [* 124] banker acted by paying money which he would not otherwise have paid, ought also to be an answer to that *primâ facie* case. If the bank acted upon such a representation in good faith, and according to the ordinary course of business, and a loss has in consequence occurred which would not have happened if the representation had been true, I think that is a loss which the customer, and not the bank, ought to bear.

I should be of that opinion on general principles; and the application of those principles is fortified to my mind, in this particular case, by the circumstances under which the forgeries were committed, and the facts that the plaintiffs had large dealings with

Vucina going on at the same time with the forgeries, in the course of which they accepted many of his genuine bills, all which were in like manner accredited to and made payable at the bank; and that there were documents in the plaintiffs' possession (the true and forged letters of advice from Vucina, and the forged bills themselves when returned by the bank), from which, if attention had been paid to them, the fraud might have been discovered in an early stage.

I do not see how it can be open to dispute that it was material to the bank to know whether these were genuine or forged bills; or (subject to the consideration of some matters which I postpone) that, in paying the bills as they did without inquiring into the genuineness of the indorsements (which for the present I assume to have been regular upon the face of them), the bank acted in good faith, and according to the usual, and practically necessary, course of business; or that, if the bills had really been Vucina's, and if C. Petridi & Co. had been real payees, no loss would have been incurred. If it were the duty or the practice of bankers, without special reasons for suspicion, to refuse or delay payment of foreign bills appearing on their face to be regular, and regularly advised for payment by their customers, until they could ascertain by inquiry the genuineness of every foreign indorsement, it must continually happen that the bills would not be paid at the proper time and place, and *bonâ fide* holders might treat them as dishonoured. It was admitted that it is not in the ordinary course of business to make such inquiries; and I should say that [* 125] business could not go on if it were so. No * doubt there is, in the ordinary course of business, the possible risk, which occurred in *Robarts* v. *Tucker*, of a general bill being stolen, and presented for payment, with a forged indorsement. Between that case and one like the present there is this very substantial difference, that the acceptor, in that case, has not in any way contributed to mislead the bankers; and when there is a real *bonâ fide* payee, the acceptor remains liable to him; but if, when there is no such payee, the person who signs as drawer indorses the bill with the name of a pretended payee, there is no outstanding liability from which a discharge is needed for the acceptor's protection. The risk of a genuine bill being stolen, and presented with a forged indorsement, is one which, being of rare occurrence, and distributed over a large amount of business, bankers may be will-

ing to run. But they are entitled to judge for themselves what risks they will run, and the customer is not, in my opinion, entitled to tell the banker (in effect) that the risk is an ordinary one, and, when it turns out to be otherwise, to put upon him another which, if the truth had been known, the banker, with his eyes open, would not have undertaken. When, as in this case, the customer accredits the bills as genuine, and as coming forward in due course against him for payment on certain days, the banker must, I think, be considered to undertake the risk incident to bills of that description, and no more. If this would be true of a single bill, much more of a series of bills of large amount, all successively authenticated to the banker in like manner by the customer who orders them to be paid. The judgment under appeal puts upon the bank a risk which it never was called upon, and never agreed, to undertake.

It seems to me also clear (as a matter of fact and without reference to the question under the Bills of Exchange Act) that the Constantinople firm of C. Petridi & Co. were never, in any true sense, payees of these bills, and that their genuine indorsements could never have appeared upon them without an additional fraud. The suggestions at the bar, as to conceivable ways in which such indorsements might have been obtained, were, in my judgment, irrelevant to the real facts, with reference to which, and not to merely imaginable possibilities, this case ought to be
*determined. In *Stone* v. *Freeland*, and *Cooper* v. *Meyer*, [*126] a real firm, Butler & Co., and a real person, Woodman, were named as payees; but the Courts did not hold that enough to make the firm or the person so named a real payee.

If the question were merely one of legal estoppel against the acceptor, it may be true that the estoppel would be only against denying the genuineness of the drawer's signature; or, if the acceptor knew that there was no real payee, against insisting that the bill must receive an indorsement which he knew to be impossible. But there are authorities, relevant so far as general principles are concerned, which, even as between parties to a negotiable instrument, seem to me to go beyond legal estoppel. I cannot but think it an extension of that doctrine to hold (as was done in *Cooper* v. *Meyer*) that when the bill is payable to the drawer's order, the acceptor (because he is supposed to know the drawer's signature) is bound by the subsequent indorsement of the person who forged the signature as drawer, as well as by that original

signature. And I am not convinced that estoppel is a sufficient explanation of the cases in which the drawer of a cheque has been held bound by fraudulent alterations, for which the state of the paper afforded space. The drawer was ignorant of, and could hardly be held bound to anticipate, the subsequent fraud. But, if it were universally true that the liability of an acceptor to a *bonâ fide* holder of a bill, in all such cases, depends upon legal estoppel, I do not think it would follow that the discharge of a banker, or other agent employed by the acceptor to pay the bill, must depend, under similar circumstances, upon that principle only

If in the present case the plaintiffs, instead of making their acceptances payable at the Bank of England, had directed (in the same terms) a managing clerk in their own office, ignorant of the fraud, to pay those acceptances, and to take for that purpose the necessary money from their cash-box, and if the clerk so authorized had paid the bills, exactly as the Bank of England did (not, indeed to Glyka himself, but to some one acting for him, and presenting them in any manner not irregular), I cannot doubt [* 127] that the clerk so acting in good faith would have * been exonerated. A banker undertakes to do what is in the proper course of a banker's business, and so far differs from an agent who is not a banker; but beyond this I see no principle for putting him in a worse position than any other agent.

In *Bennet* v. *Farnell*, Lord ELLENBOROUGH held that, when the payee was fictitious, and the acceptor did not know it, the bill was neither to order nor to bearer, but was completely void. If, in such a case, the acceptor had directed his bankers to pay the bill, and the bankers had paid it in good faith upon an indorsement regular upon its face, though fictitious in fact, the bankers would have been, in my judgment, entitled to credit in account for what they so paid. Whatever might have been, before the Bills of Exchange Act of 1882, the materiality of the acceptor's knowledge or ignorance on such a point, as between himself and a *bonâ fide* holder of the bill, I should not have thought it material, as between him and his bankers, paying the bill under such circumstances. I have come to this conclusion, without resting my opinion upon the statute of 1882. Assuming the present case not to be expressly ruled by that statute, it is also (in my judgment) not ruled by any former authority. And I cannot but think that the statute, so far as it does rule certain other cases *in pari materia* and not well

distinguished from this in principle, is as proper to be taken into account as any of the authorities which preceded it, as to the acceptor's knowledge or ignorance, where there is not a real payee.

But it was insisted that, in paying these bills as they did, the bank deviated from the proper course of business, and ought to be held affected with notice that the indorsements were fraudulent. The first point relied upon for that purpose was that the bills, drawn as they were for large sums, were all presented and paid across the counter and not through any bankers. This was admitted to be "unusual" in the evidence for the bank; but it was not, as I read the evidence, either admitted or otherwise proved that it was irregular or sufficient in itself to excite a suspicion that there was something wrong, although it was unusual in the sense of not often happening. No authority was produced to show that it was irregular according to the law * merchant; and [* 128] if not, and if the payments were *bonâ fide* made without any actual suspicion on the part of the officers of the bank, I cannot think it enough to defeat their right to charge the plaintiffs with those payments that they did not take a precaution not required by the law merchant, and on which they could not have insisted without the risk of the bills being treated by *bonâ fide* holders as dishonoured. In *Roberts* v. *Tucker* payment through a banker was no protection to the defendants.

Some of these bills, were, in fact, referred by the counter clerks of the bank, before payment, to Mr. Disney, the principal in the private drawing office of the bank, not (as I understand the evidence) because of any suspicion, but because they had received general instructions that any cheques or bills of large amount should be so referred. Mr. Disney (the truth of whose evidence I see no reason to doubt) thought that if the bill was advised (as it was), the counter clerk must pay it; and Mr. Ziffo, the plaintiffs' out-door manager, to whom (on his coming to the bank on other business in June, 1887) Mr. Disney mentioned the fact that such bills had been presented across the counter and paid in bank-notes, expressed the same opinion. This happened when not more than four of the bills, amounting altogether to £3000, had been presented and paid. When, from time to time, the plaintiffs' pass-book was sent to them, the bills then paid and debited in it against the plaintiffs were returned with it, and they remained from thenceforth in the plaintiffs' possession. It was apparent, upon the face

of them, that all those bills had been paid across the counter; but no objection was taken by the plaintiffs on that or any other ground, and similar bills, to a continually increasing and ultimately very large amount, were afterwards from time to time advised, and came forward and were paid in like manner. I cannot hold that these circumstances are sufficient to deprive the bank of any right which they would otherwise have had to charge those payments to the plaintiffs' account.

The other point urged at your Lordships' bar (but not apparently before either of the Courts below) was that, according to [* 129] * the statement of Mr. Kurz, the plaintiffs' deputy manager, in cross-examination, the course of post between London and Constantinople was four days; and nineteen out of the forty-three forged bills paid by the bank purported to be indorsed at Constantinople on the third day before the date of acceptance in London. No question was put on that subject to any other witness, and of the dates appearing on the bills the plaintiffs also had notice when they were returned. One of those of which the indorsement was on the third day before acceptance, was the fifth in the whole series. I think it would not be right in this state of the evidence, and upon a point which, though open upon the plaintiffs' pleading (in their reply), was for some reason not pressed in the Courts below, to treat the bank as having had notice that the indorsements were not regular.

The judgments in the Courts below, of the weight of which (as well as of the opinions agreeing with them, which I know some of your Lordships to entertain) I am fully sensible, seem to have been addressed to two questions only,— that of the proper construction and effect of section 7, sub-section 3, of the Bills of Exchange Act of 1882, and that of negligence on the plaintiffs' part. As to the Bills of Exchange Act, I am not satisfied that CHARLES, J., and the majority of the Judges in the Court of Appeal were wrong in holding that the words of the statute, "Where the payee is a fictitious or non-existing person," do not extend to the case of a real person falsely represented as payee upon a forged bill, though in principle the cases seem to me much the same. The difficulty to my mind arises out of the fact that the Legislature has here described "a *person*" as "fictitious or non-existing," instead of saying, "Where the payee is fictitious or non-existing;" and it has been increased rather than removed by reference to

other parts of the statute, particularly sections 5 (sub-section 2), 24, 41 (sub-section 1), 46 (sub-section 2), 50 (sub-section 2), and 54 (sub-section 2).

I cannot, however, agree with the opinion that in the cases which do fall within the 3rd sub-section of section 7, knowledge on the part of the acceptor that the payee is a fictitious or non-existing person is still necessary. Such a qualification of the express words of the statute cannot properly, in my judgment, *be implied from the earlier authorities, which treated [*130] knowledge as necessary. Those authorities were, no doubt, within the view of the Legislature; and all reference to the necessity of knowledge being here omitted, I think the omission must be taken to have been deliberate and intentional, and that there is no sound principle on which what is so omitted can be supplied by construction. I think it right to add that in point of principle it seems to me neither unjust nor unreasonable that the rights and liabilities of third parties should in such a case depend upon the facts rather than upon an inquiry into the acceptor's state of mind. I am glad that the majority of your Lordships have seen your way with the MASTER OF THE ROLLS to put a construction upon sect. 7, sub-sect. 3, of the Act of 1882, which makes its operation co-extensive with its principle.

As to the other point, my opinion does not rest upon mere negligence, but on what seems to me higher ground. Upon that ground I find myself compelled, notwithstanding my sincere respect for the opinions from which I differ, to give my voice in the appellants' favour. The amount in controversy is large; the question is one of much importance both to the parties and to bankers and their customers generally, and it is not, in my judgment, covered by any previous authority. The case of *Robarts* v. *Tucker* is, no doubt, law, but I am not for extending it, as it seems to me to be extended, by the order under appeal.

Lord WATSON: —

The bank and Vagliano Brothers appear to me to have been equally innocent, in this sense, that they entertained no suspicion that the forged documents which have given rise to this action were other than genuine bills of exchange; and also that nothing wittingly done, or omitted to be done by them, in the conduct of their respective businesses, as bankers and financiers, can reasonably be regarded as the proximate occasion of Glyka's forgeries, or

of the success which attended them. Which of these inno-
[*131] cent parties must bear the loss resulting * from Glyka's frauds is the only question to be determined in this appeal.

It seems to have been assumed by all the learned Judges in the Courts below, that, in making payment of the bills in question on behalf of the acceptors, the bank was under the same legal obligation to ascertain the identity of the payee which was held to attach to the defendants in the case of *Robarts* v. *Tucker*. That assumption, which is really the basis of the judgments appealed from, does not appear to me to be well-founded.

The decision of the Queen's Bench in *Robarts* v. *Tucker* has, ever since its date, been accepted in mercantile practice as determining the obligations incumbent upon bankers who agree to retire acceptances on account of their customers. It casts upon them the whole duty of ascertaining the identity of the person to whom they make payment with the payee whose name is upon the bill. They may pay in good faith to the wrong person, in circumstances by which the acceptor himself, or men of ordinary prudence might have been misled; but they cannot take credit for such a payment in any question with the acceptor. It has been said by one of the learned Judges that the rule is a harsh one, and it is possible that in some instances it may operate harshly; but it appears to me to be settled beyond dispute, and I see no reason for suggesting any doubt that it puts a reasonable construction upon the contract constituted by the agreement of the banker to pay his customers' acceptances when they fall due. In the absence of any special stipulations, it construes the arrangement so constituted as importing that, on the one hand, the customer is to furnish or repay to the banker the funds necessary to meet his obligations as acceptor, and that on the other hand the banker undertakes to apply the money provided by the customer, or advanced on his account, so as to extinguish the liability created by his acceptance. Accordingly, no payment made by the banker which leaves the liability of the acceptor undischarged can be debited to the latter.

The *ratio* of the judgment in *Robarts* v. *Tucker* does not carry the liability of the banker beyond this point, that his
[*132] * undertaking to retire bills genuine in their inception on behalf of acceptors who, by signing in that character, became immediately indebted to the payees, implies an obligation on his part to discharge their debt, which he can only do by making

payment to the proper creditor. It would obviously require a considerable extension of the principle in order to make it apply to documents purporting to be bills of exchange, in which the drawer's signature is a forgery, the payee a person who is not intended to be a holder, and the genuine signature of the acceptor has been procured by fraud. His signing such a document creates no legal obligation against the acceptor; although it is possible that he may be estopped from pleading his non-liability, if and when the document has come into the hands of a *bonâ fide* holder for value. I venture to doubt whether the payee, whose name was fraudulently inserted, could ever occupy that position; because the occurrence of his own name in the original tenor of the bill would be sufficient notice to him that something was wrong, and called for inquiry. At the time when Glyka's bills were presented for payment they did not raise, and never had raised, any liability against Vagliano Brothers, although the latter informed the bank that they were liable and willing to pay; and when the bills had been paid by the bank and returned to them, there remained no debt due by Vagliano Brothers, which would have been the consequence of the bank's making an erroneous payment of a genuine bill.

The risk of error attending the payment of bills supposed to be genuine, but which are wholly counterfeit with the exception of the drawee's signature, is materially greater than the risk attending the payment of honest bills. In the latter case the danger of imposition can only arise from the document of debt having been stolen or fraudulently obtained from the true owner; whereas, in the former, the document, never having been in the possession of a real owner, will, almost as matter of certainty, be used for the purpose of deceiving the acceptor, or the bank acting as his agent. In the ordinary course of business, it is very difficult for a banker, who has no reason for suspecting fraud, to make an exhaustive inquiry in the case of each bill as to the identity of the person by whom it is presented without * exposing [* 133] himself to claims of damage. But experience has shown that the number of genuine bills which get into dishonest hands and are erroneously paid is comparatively insignificant, and does not materially affect profits derived from the business of retiring bills on account of the acceptor.

Again, it is wellnigh impossible that a regular system of appropriating genuine bills, in all of which the drawee, payee, and

acceptor are the same, and of obtaining payment by means of forged indorsations, could be carried on for any length of time without discovery. If the series of documents forged by Glyka had been genuine drafts by Vucina in favour of Petridi & Co., it is hardly conceivable that even the ingenuity of Glyka would have enabled him to get possession of no less than forty-three of these bills, and to obtain payment of their contents at intervals extending over a period of eight months. In that case it is probable, if not certain, that detection would have followed at an early stage of his frauds; because the real payee would have discovered the loss of each bill as it fell due, and would have taken measures to stop payment.

It appears to me to be beyond dispute that the bank paid Glyka's spurious bills under the belief that they were genuine commercial drafts, and that their payment was attended with no greater risk of error than is incidental to the cashing of genuine bills. It would be ridiculous to suggest that the bank would have dealt as they did with these bills, had it not been for the existence of that erroneous belief. The very fact that no payee complained of having lost a bill payable at their office, or of their having made payment to the wrong person, was well calculated to assure the bank that they had made and were making payment of all Vagliano Brothers' acceptances to the proper creditors.

It is, in my opinion, unnecessary to consider what would have been the precise extent of the implied obligation of the bank to Vagliano Brothers with reference to these forged bills, if the latter had been unconnected with the belief upon which the bank acted, because that belief was induced and warranted by their representations. Their acceptances, if genuine, were in themselves [* 134] distinct assurances, upon which the bank was * entitled to rely, that each bill bearing their signature was a real draft upon them by their correspondent Vucina; and the notes sent by them to the bank from time to time, directing payment of the bills, were so many renewals of the same representation, strengthened by the further assurance that their acceptances were genuine. Throughout these transactions the bank acted in good faith as the agents of Vagliano Brothers; and the errors into which they were betrayed were mainly, if not wholly, attributable to their having treated the bills as genuine, in reliance upon the representations of their principals, which were untrue. I think that,

in these circumstances, Vagliano Brothers cannot be permitted to cast upon the bank liability for errors arising from their own representations. These representations were, no doubt, made in the honest belief that they were true; but that circumstance cannot, in my opinion, avail Vagliano Brothers in the present question with their agents.

These considerations are sufficient for the disposal of this appeal; but on considering the opinions which have already been expressed, and are yet to be delivered by your Lordships, I think it right to state my own opinion with regard to the construction of section 7, sub-section 3, of the Bills of Exchange Act, 1882. Upon that point I concur in the reasoning of my noble and learned friend, Lord Herschell. I think that the language of the sub-section, taken in its ordinary significance, imports that a bill may be treated as payable to bearer, in all cases where the person designated as payee on the face of it is either non-existing, or, being in existence, has not, and never was intended to have, any right to its contents. The enactment has reference to real bills only, and has no direct application to these documents of Glyka's manufacture, which were not bills in their inception, and never acquired the force of bills by virtue of estoppel. But the fact that the payees were fictitious within the meaning of the statute affords a good answer to Vagliano Brothers' contention that the bank was bound to deal with these documents on the same footing as if they had been real bills, and ought not to have paid except upon genuine indorsations by Petridi & Co.

* For these reasons I concur in the judgment which has [* 135] been moved by the Lord Chancellor.

Lord Bramwell: —

The plaintiffs are merchants, and agents or bankers for foreign traders. They kept a banking account with the defendants. That is to say, they, the plaintiffs, paid to their credit with the defendants money, technically lent it, and doubtless delivered to them other assets, drew checks on them, and addressed accepted bills to them for payment. The plaintiffs claim of the defendants a large balance. The defendants admit the credit side of the account, but say they have paid bills accepted by the plaintiffs addressed to them, the defendants. It is immaterial, but this is not technically a set-off, for the defendants never could have maintained an action against the plaintiffs in respect of these payments. The plaintiffs

never owed the bank anything. I say this is immaterial, but it is as well to be technical. Set-off or not, there is no doubt but that the defendants have, as they allege, paid bills accepted by the plaintiffs, and addressed payable at the defendants', equal to the amount claimed; but they have paid them to persons who could not have enforced payment of them from the plaintiffs. They were bills on which the plaintiffs were not liable to any holder, unless he claimed under Petridi's indorsement, and which, if presented to them, they need not and possibly would not have paid. The drawing and indorsements on them were forgeries, or fictitious. It is for the defendants to establish that they have a right to charge the plaintiffs with the amount of these bills.

The first ground on which they claim this right is that the plaintiffs by their conduct, wilful, careless, or unskilful, or all, enabled the fraud to be committed as to the whole or part, the part after the first one or two, — in effect, that the plaintiffs caused the defendants to pay these bills. I think it is necessary for the defendants to show that the plaintiffs caused them to pay these bills as they did. It is not enough to show that they gave occasion to their doing so, that different conduct would have prevented the fraud and the payment by the defendants.

[* 136] * I think the result of the authorities, *Robarts* v. *Tucker*, *Young* v. *Grote*, *The Bank of Ireland* v. *Evans' Trustees*, and *The Merchants, &c. of England* v. *The Bank of England*, is that the conduct of the bank's customer, to enable the bank to charge the customer, must be conduct directly causing the payment.

Now there is no doubt that there were many ways in which the plaintiffs might have detected the forgeries. The forged letters which advised the forged bills omitted to advise some which were genuine. Yet the latter were accepted by the plaintiffs. The letters of the plaintiffs to Vucina did not mention the forged bills. The plaintiffs signed a letter to Vucina, in which the balance against him was in blank; that balance seems to have appeared in different amounts in the plaintiffs' books at different times. Then the forged bills were all indorsed on the part accepted, unlike the genuine bills. The bills after payment, had they been examined by the plaintiffs, would have shown that they had not been paid through a banker. The indorsements would have been known to the plaintiffs' clerks and to the plaintiffs to bear impossible dates. It would have been seen that Pasqua appeared

to leave the bills for acceptance, and yet not to be holder for payment. Maratis was a fictitious name, and would not be known to the plaintiffs. Vucina's account became very large, the balance against him unusually large, but no notice was taken; and what was much pressed was that Glyka was enabled to steal, and did steal, the forged bills after their acceptance. It was not the duty of any one exclusively, apparently, to give out bills accepted to those who called for them. I suppose, as that call might be made at any time in the day, any clerk might go to the leather case, take out the bill, and give it out. It was kept in the room where Glyka sat. Whether this was negligence I cannot say — I really do not know. No witness said it was; it may be unusual — I say sincerely, I do not know; I cannot of my own knowledge or reasoning say it was, and there is no evidence. All these things put together make it wonderful that the fraud could be practised; most wonderful * that it could be practised to the [* 137] extent it was without earlier discovery, but do not, in my opinion, give the defendants a right to charge the plaintiffs with the amounts paid for these bills, as payment caused by them.

A great deal has been made of the advice notes the plaintiffs sent to the defendants of bills becoming due, with a request to the defendants to pay them. In my judgment, these advice notes in no way help the defendants. They mean nothing more than the very acceptances themselves meant. The bills are accepted, payable at the defendants', but to whom? To those who could give a discharge for them and were entitled to enforce payment. That is all the advice notes mean. Suppose a genuine bill really drawn by Vucina, and really payable to Petridi, and suppose a forgery of Petridi's name, can it be suggested that the advice note would enable the defendants to charge the plaintiffs with that bill if they paid it? Certainly not. With all respect, it is a mistake to suppose that by that, or by the very acceptance itself, any more or other representation is made by the plaintiffs to the defendants than that they, the plaintiffs, are estopped to any one interested to deny that Vucina drew the bill. The plaintiffs are not estopped from saying that they are not liable to pay the bill unless it is indorsed by Petridi. I am afraid, though, that that memorandum operates strongly on some opinions.

The other ground on which the defendants claim to charge the plaintiffs with the amount of these bills is that Petridi & Co.,

the payees, were fictitious persons within the meaning of the Bills of Exchange Act, section 7, sub-section 3, and that the defendants therefore might pay them to a *de facto* bearer. I differ on both points. It must be borne in mind that the Bills of Exchange Act is "An Act to codify the law relating to bills of exchange," not to alter or amend it; and by section 97 the rules of common law, including the law merchant, "save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange."

Then, were Petridi & Co. fictitious or non-existent persons? There was a firm of that name, — a firm as identifiable as N. M. Rothschild & Co., as Glyn, Mills, Currie & Co., as the Bank [*138] *of England itself would be identifiable if their names appeared as payees of a bill of exchange; and, to my mind, that shews they were not fictitious or non-existing persons It is asked, What if the payee were John Smith? Well, if there were nothing to identify a particular John Smith as payee when all "the surrounding circumstances" were looked at, it may be that he might be treated as a non-existent person. But what if it was shewn that the bill was delivered to a particular John Smith, in payment of a debt due to him from the drawer, could any holder of it treat it as payable to bearer, Smith's name being forged as indorser? Certainly not. But then it is said that that is not the case here. That the bill was not delivered to Petridi & Co., nor intended to be so; that, in the intention of the makers of the bill, Petridi was a sham, and so fictitious or non-existent; that Petridi & Co. are not fictitious nor non-existent; that they exist in the flesh yet they are fictitious *qua* payees, constructively fictitious; that if Yucina had drawn the bill, Petridi was real and existent. But inasmuch as Glyka did not mean Petridi to have the bill he was non-existent This beats me. They are at the same time real and unreal. They are that which is said to be an impossibility, being and not being at the same time. The bill means one thing or another, according to the intent of the drawer. That the drawee has, or has not, a right to Petridi's indorsement, according as that intent is one thing or another. Because the argument would be the same if Yucina had really drawn the bills, but not intended Petridi to have them; a possibility, if Yucina will forgive me. That if Glyka had intended to commit his fraud through the innocent agency of Petridi,

Petridi would be real and not fictitious. If the argument is good, it would show that a *bonâ fide* holder of these bills, not claiming through Petridi, might have enforced payment from the plaintiffs. It is said that such a payment, *i. e.*, to himself, is according to the intention of the drawer. So it is of the drawer *de facto*, but not of him whom, by the bill itself, the drawee has a right to suppose is the drawer. The plaintiffs are estopped to deny that Vucina is the drawer, but they are not estopped to deny that Vucina meant, that Petridi and his assigns should receive the amount of the bill, and that it should not be paid unless indorsed by Petridi.

This argument, as I have said, makes the effect of a bill [139] depend, not on the meaning of the writing, but on the intent of the maker. A bill payable to the Bank of England is payable to a fictitious person if the drawer intends to forge their name and give it to another person. A payee is real or fictitious at the option of the holder within the Act. But it was shown that a bill drawn like these might get into the hands of Petridi & Co., though not so intended, who might take it for value, and be entitled to maintain an action against the plaintiffs. Would Petridi be fictitious then? It is asked, What difference does it make to the plaintiffs that there is a C. Petridi & Co., when, if the payee had been actually fictitious or unreal, and the name was put on the back of the bill, it might be treated as payable to bearer? The answer is obvious. If the payee is a known person, the drawee can well believe that the drawing is genuine; he knows he cannot be made to pay without that person's indorsement. He knows that before presentment for acceptance the bill has been in ordinary course, or at all events will be in the hands of a responsible person if a good name is used. His holding and indorsement are a guarantee that the bill is in right hands. Take this very case. Glyka could not have got Petridi's indorsement. I do not mean could not in point of law, but could not practically. Without that, the plaintiffs were not bound to pay the bill. I have no doubt that Glyka chose Petridi's name to avoid suspicion. If it had been a strange name it might have attracted attention and caused some inquiry.

An argument is used which, with all submission, I think very feeble. It is said that the statute says "fictitious or non-existing," and that fictitious is needless on the plaintiffs' construction. I do

not agree. But what is the value of such an argument? Nothing; unless there is no other. A prudent draftsman does not accurately examine whether a word will be superfluous; he makes sure by using it.

A word on the case of *Cooper* v. *Meyer*. It is somewhat remarkable. The question was important; the judgment is singularly short, and nothing is said by Mr. Justice PARKE, [* 140] I think the * decision right. Lord TENTERDEN says, when the drawer is a real person, his indorsement may be disputed. But if there is no such person, and (Mr. Justice BAYLEY also says) if the acceptor accepts without knowing there is such a person as the supposed drawer, the acceptor undertakes to pay to the signature of the person who actually drew the bills. Further, I should say that as the bills were accepted for the accommodation of Darby, with no knowledge of any such person as the drawer, the acceptor authorized the indorsement as he authorized the drawing by Darby. The Court did not say that no indorsement was necessary, or that any one but Darby could have indorsed. This case does not help the defendants.

I say, then, that Petridi & Co. were not fictitious or non-existent, and that the bill could not be treated as payable to bearer. But supposing it could, by whom could it be so treated? By the holder in due course; by the person who could maintain an action. Not by a man who stole it; not by a man who could maintain no action on it. The enactment is for the benefit of the holder — the honest holder who is embarrassed by the difficulties of there being no actual existing payee. Section 5, sub-section 2 says that when drawer and drawee are the same person, or the drawee fictitious, or a person not having capacity to contract, the holder may treat the instrument as a bill or a promissory note — surely that means a holder for value. Suppose A. draws on a fictitious person, indorses it to B. for his (B.'s) accommodation, who negotiates it and has to take it up. B. could not say, "The statute says I may treat his as a promissory note." The answer would be, "You are not a holder for value." Now, in this case the money was always paid by the defendants to Glyka, or Glyka's agents. Glyka had no right to "treat" the bill in any way. It was in his possession by a theft. He clearly stole it after it was accepted.

The enactment, I say, is for the benefit of the holder, not of the acceptor; it gives rights against him. The plaintiffs could not,

even if Petridi is considered as fictitious, treat these bills as payable to bearer. How could they? How can an acceptor treat a bill as payable to bearer? But if he cannot, if the section does not apply to him, neither does it apply to his agent for * payment, his banker at whose house it is made payable. [*141] How can it be said that the plaintiffs have given a mandate to the defendants to pay these bills without Petridi's indorsement, to pay them to a person who had no right to receive the money, who could not have compelled the plaintiffs to pay them? These bills, as the acceptance was not "payable at the bank, and not elsewhere," might have been presented to the plaintiffs. Had they been, the plaintiffs could have refused payment, perhaps would. No one could have maintained an action against the plaintiffs on these bills. How can it be right that the defendants should have paid them? If a clerk of the plaintiffs had paid this bill, I agree that he would not be liable unless suspicion had been created. But the duty of a clerk is different from that of a banker. The defendants have deprived them of this right to refuse payment by electing to pay. Let it not be supposed I find fault with them, I do not in the least, but so it is.

I am of opinion that this case is governed by *Roberts* v. *Tucker*. I own to a prejudice in favour of that case. I do not agree with the notion that a banker is entitled to make inquiries as to whether he should pay, as there suggested. He must honour or dishonour the bill on presentment. The case was decided on no such ground, but on this: that the customer's mandate is to pay only to such person or persons as can give a discharge of the instrument. I am afraid, however, that a dislike of that case has a good deal to do with opinions unfavourable to the plaintiffs. Lord ESHER says that it is a harsh case. I have heard able arguments on both sides. On the one side, that the banker sees the person who presents the instrument. On the other, that the banker's customer knows the parties to whom he gives his acceptance or cheque. There are two remarks to be made. One is, that the banker can bargain with his customer if he likes (I do not mean by Act of Parliament, but he can make his stipulation with his customer) that he will not be liable in such cases as the present. The other is, that bankers do not make such a bargain: yet they and banking, I am glad to say, flourish.

* I have said nothing of the defendants paying this [*142]

enormous amount over the counter to strangers. I have no doubt, as a matter of knowledge and of reasoning, that this was most unusual. There is, besides, cogent evidence that it was. The paying cashier inquired of his principal if the bill should be paid when first presented. The principal, according to his own account, thought it a thing to mention to the plaintiffs' clerk when the instances had been few. I have no doubt that (especially when the cases multiplied), instead of a gossiping intimation not enough to reach Ziffo's mind (as Mr. Justice CHARLES finds), for the protection of themselves there ought to have been a formal communication to the plaintiffs. If Mr. Disney was satisfied with what he says Ziffo said to him, he is a very strange person. The thing is absurd. "I suppose you must pay if they have been advised." How could the advice that the bills would be presented for payment remove the suspiciousness of the presentment when it took place? True, the plaintiffs might have seen that the bills had been paid over the counter, but they trust to the defendants having properly paid. But I have not referred to this as a ground on which the defendants should fail. I have no doubt there was gross carelessness, but a carelessness to the bank's own hurt, a carelessness of precautions for their own good.

If, however, on some ground which I cannot see, the whole conduct of the parties is to be looked at; if it is to be said that the bank may charge Vagliano with payments they need not have made, then I think that must, at least, be limited to those payments which were reasonably, rightfully and carefully made, and not to such as those in question.

I rely also on, and agree with, the judgments of the Judges who have decided in favour of the plaintiffs; also on that of the MASTER OF THE ROLLS, except that part which holds that C. Petridi & Co. were fictitious.

This is my opinion; and I am glad to think it is also that of my noble and learned friend Lord FIELD. I am sorry that it is not shared in by any other noble and learned Lord who heard [* 143] the case. We are probably wrong, but * it is some comfort to me to think that the head-note of our opinion may be expressed in the most abstract form, — namely, "A banker cannot charge his customer with the amount of a bill paid to a person who had no right of action against the customer, the acceptor." But I think the head-note which will represent the decision of

your Lordships should be in a strictly concrete form stating the facts, and saying that on them it was held that judgment should be for the appellants. I think the judgment for the respondents should be affirmed.

Lord HERSCHELL: —

I propose to deal at the outset with the question of the construction of the Bills of Exchange Act, which gave rise to a difference of opinion in the Court below.

The facts material to this part of the case I take to be these. The bills in question purported to be drawn by Vucina, but were, in fact, entirely the production of Glyka, a clerk in the service of Vagliano Brothers, the respondents. He fraudulently procured the necessary forms to be printed, and filled them up, inserting the name of Vucina as drawer, and of C. Petridi & Co. as payees. A firm of C. Petridi & Co. carries on business at Constantinople, and had been the payee of some genuine bills previously drawn by Vucina upon Vagliano Brothers. I think there can be no doubt that this fact suggested to Glyka the insertion of the name of C. Petridi & Co., but I do not believe that he made this choice with the idea that it would assist his fraud. I entertain no doubt, under the circumstances disclosed by the evidence, that Vagliano Brothers would equally have accepted the bills if any other name had been inserted, and that Glyka knew this. It was, of course, never intended by Glyka that Petridi & Co. should be the persons to whom the bill should be paid. The name was inserted merely to make the bills complete in form. The bills were accepted by Vagliano Brothers, payable at the Bank of England, who were requested by Vagliano Brothers to pay them at maturity. They were presented for payment with indorsements to all appearances regular, these having been written by Glyka, and were paid to the persons presenting them at maturity.

* The conclusion at which the majority of the Court of [* 144] Appeal arrived with reference to the construction of the subsection of the Bills of Exchange Act with which your Lordships have to deal, is thus stated: "The word 'fictitious' must in each case be interpreted with due regard to the person against whom the bill is sought to be enforced. If the drawer is the person against whom the bill is to be treated as a bill payable to bearer, the term 'fictitious' may be satisfied if it is fictitious as regards himself, or, in other words, fictitious to his knowledge.

If the obligations of the acceptor are in question, and the acceptor is the person against whom the bill is to be so treated, 'fictitious' must mean fictitious as regards the acceptor, and to his knowledge. Such an interpretation is based on good sense and sound commercial principle."

The conclusion thus expressed was founded upon an examination of the state of the law at the time the Bills of Exchange Act was passed. The prior authorities were subjected by the learned Judges who concurred in this conclusion to an elaborate review, with the result that it was established to their satisfaction that a bill made payable to a fictitious person or his order, was, as against the acceptor, in effect a bill payable to bearer, only when the acceptor was aware of the circumstance that the payee was a fictitious person, and further, that his liability in that case depended upon an application of the law of estoppel. It appeared to those learned Judges that if the exception was to be further extended, it would rest upon no principle, and that they might well pause before holding that section 7, subsection 3, of the statute was "intended not merely to codify the existing law, but to alter it and to introduce so remarkable and unintelligible a change."

With sincere respect for the learned Judges who have taken this view, I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was
[* 145] *probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used, instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it

by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence. I am, of course, far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground.

One further remark I have to make before I proceed to consider the language of the statute. The Bills of Exchange Act was certainly not intended to be merely a code of the existing law. It is not open to question that it was intended to alter, and did alter it in certain respects. And I do not think that it is to be presumed that any particular provision was intended to be a statement of the existing law, rather than a substituted enactment.

Turning now to the words of the subsection, I confess they appear to me to be free from ambiguity. "Where the payee is * a fictitious or non-existent person" means [* 146] surely, according to ordinary canons of construction, in every case where this can, as a matter of fact, be predicted of the payee.

I can find no warrant in the statute itself for inserting any limitation or condition. I am putting aside for the present the question by whom a bill answering the description of the subsection may be treated as payable to bearer, and I am accepting too, for the moment, the meaning attributed by the majority of the Court of Appeal to the word "fictitious," — namely, a creation of the imagination, — confining myself to the question in what cases a bill purporting on the face of it to be payable to order may be treated as payable to bearer? I find it impossible, without doing violence to the language of the statute, to give any other answer than this, — In all cases in which the payee is a fictitious

or non-existent person. The majority of the Court of Appeal read the section thus: Where the payee is a fictitious or non-existent person, the bill may, as against any party who had knowledge of the fact, be treated as a bill payable to bearer. It seems to me that this is to add to the words of the statute and to insert a limitation which is not to be found in it or indicated by it. It is said that when the acceptor is the person against whom the bill is to be treated as payable to bearer, "fictitious must mean fictitious as regards the acceptor, and to his knowledge." With all respect, I am unable to see why it must mean this. I confess I cannot altogether follow the meaning of the words fictitious "as regards" the acceptor. I have a difficulty in seeing how a payee, who is, in fact, a "fictitious" person, in the sense in which that word is being used, can be otherwise than fictitious as regards all the world, — how such a payee can be "fictitious" as regards one person and not another. The truth is, the words "as regards" the acceptor are treated as equivalent to the words "to the knowledge of" the acceptor. But I do not think these expressions are synonymous. It seems to me that to import into the statute after the words "fictitious person" the words "as regards" the acceptor or drawer, as the case may be, and then to interpret those words as meaning "to the knowledge of," only tends to obscure the fact that the condition that the payee must be fictitious to the [*147] knowledge of the person sought to be charged * as upon a bill payable to bearer is being introduced into the enactment.

For the reasons I have given I find myself compelled to the conclusion, notwithstanding my respect for those who have expressed a contrary view, that in order to establish the right to treat a bill as payable to bearer, it is enough to prove that the payee is in fact a fictitious person, and that it is not necessary, if it be sought to charge the acceptor, to prove in addition that he was cognisant of the fictitious character of the payee.

If the conclusion which I have indicated as being, in my opinion, the sound one, involved some absurdity or led to some manifestly unjust result, I might perhaps, even at the risk of straining the language used, strive to put some other interpretation upon it. But I cannot see that this is so, or that the interpretation I have adopted does any violence to good sense, or is otherwise than in accordance with sound commercial principle. I will assume that,

as the law stood at the time the Bills of Exchange Act was passed, a bill drawn to the order of a fictitious payee could have been treated as a bill payable to bearer only as against a party who knew that the payee was fictitious. This decision even was arrived at a little more than a century ago, and was dissented from by distinguished Judges, and it is obvious from the observations of Lord ELLENBOROUGH in *Bennett* v. *Farnell* that by some eminent lawyers at least it was regarded rather as a departure from strict principle which ought not to be further extended, than as an embodiment of sound commercial principle.

But is it impossible to take any step beyond this without violating sound principle and working injustice? Let me draw attention for a moment to the relative position and rights of the drawer and acceptor of a bill of exchange. A drawee who accepts a bill does so, either because he has in his hands moneys of the drawer, or expects to have them before the bill falls due; or because he is willing to give the credit of his name to the drawer, and to make him an advance by payment of his draft. It is immaterial to the acceptor to whom the drawer directs him to make payment; that is a matter for the choice of the drawer *alone. The [* 148] acceptor is only concerned to see that he makes the payment as directed so as to be able to charge the drawer. It is in truth only with the drawer that the acceptor deals; it is at his instance that he accepts; it is on his behalf that he pays; and it is to him that he looks either for the funds to pay with, or for reimbursement, if he holds no funds of the drawer at the time of payment.

In the ordinary case, where the payee designated in the bill is a real person intended by the drawer to receive payment, either by himself or by some transferee, the acceptor can only charge the drawer, if he pays the person so designated, or some one deriving title through him. If payment be made to any other person, the drawer's liability on the bill is not discharged by payment; he will or may remain liable to the real payee, or those claiming under him; and the acceptor, having paid otherwise than according to the directions of the drawer, cannot justify the use of his funds in making the payment, or claim to be reimbursed by him. But now, suppose the drawer inserts as payee the name of a fictitious person, requests the drawee to accept a bill so drawn, indorses the payee's name, and puts the bill into circulation. He certainly

intended it to obtain currency and to be paid at maturity, and he, as certainly, did not intend it to be paid only to the payee named, or some one deriving title through him. Nor, as it seems to me, can it reasonably be said that he intended to direct the drawee to pay such person, and such person only.

What, then, is the position of a lawful holder of a bill so drawn? I do not understand it to be doubted that, even before the Bills of Exchange Act, such a holder could enforce payment of the bill against the drawer, for he not merely knew that the payee designated was a fictitious person, but was himself the author of the fiction. As against the drawer, then, such a bill could be treated as payable to bearer. But if it cannot be so treated as against the acceptor, the holder, who, it may be, bought or discounted it on the faith of the acceptance, relying on the credit of the acceptor, and unwilling to trust to that of the drawer alone, is deprived of that upon which he relied, of the liability which he regarded [*149] as his security for payment. The holder in such a *case suffers wrong. Would any injustice result if the bill could, as against the acceptor also, be treated as payable to bearer? The drawer must be taken to have intended the bill to be paid by the acceptor at maturity, but to whom? Not to the fictitious payee, or some one claiming through him. Why not then to the bearer, who can hold the drawer liable upon the bill, and treat it as payable to him? And, if it were the law that the acceptor was bound in such a case to pay the bearer, who would suffer? Not the drawer, for payment would have been made to a person who could compel him to make payment, and he could have no ground for complaint if the acceptor used his funds in thus discharging his liability on the bill, or in case he had not provided such funds if he were held liable to reimburse the acceptor. And how would the acceptor suffer in such a case? It was his object in accepting the bill to render himself liable to make payment to the person intended by the drawer to receive it, either out of moneys provided by him, or looking to him for reimbursement. His position under such circumstances would be precisely what it would have been if he had made payment to a real person designated as payee, or to those claiming under him. And it might, I think, fairly be said that he was making the payment in accordance with the intention of the drawer.

It may be that the right of the holder to treat such a bill, as against

an acceptor ignorant of the fictitious character of the payee, as a bill payable to bearer could not be established merely by an appeal to the law of estoppel, and that such estoppel would exist only against the drawer, who knew that the payee was a fictitious person. I will assume that this was the law prior to the recent statute. But why should not the Legislature have intervened with a positive enactment imposing this liability upon the acceptor, an enactment which, it seems to me, would wrong no one, and would prevent a holder for value from suffering wrong? Estoppel is not the only sound principle upon which a law can be based. The law of estoppel was not thought to afford sufficient protection to those dealing with the apparent owner of goods. The Legislature deemed it necessary to intervene, and the Factors Acts were passed, each of which added something to the protection of persons so dealing. Why, then, should it be thought * improbable that the Legislature should have created in the holder of a bill drawn payable to a fictitious person a new right against the acceptor. If I am correct in thinking that this added right would obviate and not entail injustice, that it would make the law more reasonable, and bring it more into conformity with the course of commercial transactions, I can see no reason for doubting that the Legislature so intended, if this be the plain natural meaning of the words they have used, or for endeavouring so to construe the language as to find in it no more than a statement of the previous law. [* 150]

I have dwelt at some length upon this point, because it appeared to me important to show that the words of the enactment might have their natural effect given to them without leading to results either unjust or commercially inconvenient. But I desired also to elucidate the principle upon which the enactment was, in my opinion, based; because this is not without its bearing upon the next question to be considered, and to which I will now pass. It is to my mind one of greater difficulty.

Even assuming, it is said, that where the payee is a "fictitious" person, the bill may be treated as against the acceptor as a bill payable to bearer, the word "fictitious" is only applicable to a creature of the imagination, having no real existence, whilst in the present case "C. Petridi & Co." was the name of a firm having a real existence, so that the payee here cannot be termed a fictitious person. But are the words "where the payee is a fictitious

person" incapable of legitimate application in any other case than that suggested? The first observation I have to make is, that if so, there was no necessity for the introduction of the word "fictitious" in the enactment; the word "non-existent" would have sufficed. It was argued that whilst a fictitious person is one who has never existed, a non-existent person is one who has existed but whose existence has ceased. But even if this be admitted, the word "non-existent" would have sufficed, for it can hardly be doubted that it is employed as suitably in reference to that which has never existed, as to that which, having existed, exists no longer.

Without, however, dwelling too much on this point, which may perhaps have an historical explanation, let me call [*151] attention to *the inconvenient complexity and strange and unmeaning distinctions to which, as it seems to me, the construction adopted by the Court of Appeal would give rise. If, for example, a drawer inserts after the words "Pay to the order of" a name which he invents, himself indorses that name, and puts the bill into circulation, it is within the terms of the statute, and may be treated as a bill payable to bearer. But if he inserts the first name that occurs to him, though he never intends a bearer of that name to be the payee, or that title shall only be made through him, but himself indorses this bill and puts it into circulation just as he did the other, this bill, as I understand the Court below, stands in a different position. The case is not within the statute, and if the bill can be treated, even as against the drawer, as a bill payable to bearer, this does not depend upon the words of the enactment, but must result from the rules of the common law, which, in so far as they are not inconsistent with the express provisions of the Act, are by section 97, sub-section 2, still to apply to bills of exchange.

It follows that, according to the view of the majority of the Court of Appeal, the Legislature has dealt by express enactment with one case of estoppel, that is to say, where the payee is a "fictitious person," in the sense which they attribute to those words; but has left the analogous case — where, though the payee was not fictitious in that sense, the name was inserted as a mere pretence, and without any intention that payment should be made to the person designated — undealt with, and the rights and liabilities upon the bill to be ascertained by an appeal to the rules of

the common law. Certainly a strange proceeding in a code of this description, and one for which it would be difficult to find a satisfactory explanation.

But this is not all. If I am right in thinking that in the case of a payee who is a fictitious person (whatever be the meaning of that expression), a bill may, as against the acceptor, be treated by a lawful holder as payable to bearer whether the acceptor knew of the fiction or not, why should this right and liability differ according as the name inserted as payee be a creature of the imagination or correspond to that of a real person, the drawer in neither case intending a person so designated to receive * payment, [*152] and in each case himself indorsing the bill in the name of the nominal payee before putting it into circulation? I am at a loss for any reason why this distinction should exist. It is true that there is this difference between the two cases, that in the one an indorsement by the named payee is physically impossible, whilst in the other it is not. But I do not think this difference affords a sound basis for a distinction between the respective rights and liabilities of the drawer, acceptor, and holder.

It seems to me that it would in each case be reasonable, and on the same grounds that the acceptor should be liable to the holder of the bill, indemnifying himself out of the funds of the drawer, or obtaining reimbursement from him.

It must be admitted, of course, that if the language of the statute is not reasonably capable of any other interpretation than that adopted by the majority of the Court of Appeal, if it will not allow of a construction which would cover the case we have been considering, then one must submit to the conclusion that the Legislature has left the law in this respect in an unsatisfactory position, and full of distinctions devoid of any sound principle. But are we compelled to this conclusion? Do the words, "where the payee is a fictitious person," apply only where the payee named never had a real existence? I take it to be clear that by the word "payee" must be understood the payee named on the face of the bill, for of course by the hypothesis there is no intention that payment should be made to any such person. Where then the payee named is so named by way of pretence only, without the intention that he shall be the person to receive payment, is it doing violence to language to say that the payee is a fictitious person? I think not. I do not think that the word "fictitious" is exclu-

sively used to qualify that which has no real existence. When we speak of a fictitious entry in a book of accounts, we do not mean that the entry has no real existence, but only that it purports to be that which it is not, that it is an entry made for the purpose of pretending that the transaction took place which is represented by it.

In his report of the case of *Stone* v. *Freeland*, the learned reporter speaks of there having been in that case "a fictitious [* 153] * indorsement." The facts were that a bill had been drawn payable to Butler & Co., and indorsed in that name. There was a house, Butler & Co., with whom Cox, the drawer, had dealings; but the bill had never been in their hands, and appeared to have been indorsed by Cox. Now, in what sense was the word "fictitious" here used? Not, surely, to convey the idea that the indorsement had no real existence, and was a mere creature of the imagination, but that it was put forward as being that which it was not.

These seem to me to be instances (and other illustrations might be given) of an analogous use of the word "fictitious" to that which, I think, may be attributed to it in the statute. Turning to the interpretation of the word "fictitious" in Dr. Johnson's Dictionary, I find amongst the meanings given are, "counterfeit," "feigned." It seems to me then that where the name inserted as that of the payee is so inserted by way of pretence only, it may without impropriety, be said that the payee is a feigned or pretended, or, in other words, a fictitious person. Stress was laid upon the fact that the words of the statute are, "where the payee is a fictitious person," and not "where the payee is fictitious." There is not to my mind any substantial difference in the meaning of the two phrases. And I cannot think that the Legislature intended the rights and liabilities arising upon mercantile instruments to depend upon nice distinctions such as this.

For the reasons with which I have troubled your Lordships at some length, I have arrived at the conclusion that whenever the name inserted as that of the payee is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing person, or of one who has no existence, and that the bill may in each case be treated by a lawful holder as payable to bearer.

No. 9. — Bank of England v. Vagliano, 1891. App. Cas. 153, 154.

I have hitherto been considering the case of a bill drawn by the person whose name is attached to it as drawer, whilst the bills which have given rise to this litigation were not drawn by Vucina, who purported to be the drawer, his name being forged *by Glyka. I think it was hardly contended on behalf [* 154] of the respondents that this made any difference. The bills must, under the circumstances, as against the acceptor, be taken to have been drawn by Vucina, and if they have been made payable to a fictitious person within the meaning of the statute, I do not think it is open to question that they may, as against the acceptor, be treated as payable to bearer, in every case in which they could have been so treated if Vucina had drawn them. If, in the present case, Vucina had himself drawn the bills, and inserted the name of C. Petridi & Co., as payees as a mere pretence, without intending any such persons to receive payment, it follows from what I have said that, in my opinion, they would have been bills whose payee was a fictitious person, and I do not think they can be regarded as any the less so, in view of the circumstances under which the name of C. Petridi and Co. was inserted.

Assuming, then, that the bills in question are within the sub-section of the Bills of Exchange Act which we are considering, and may, therefore, be treated as bills payable to bearer, the question remains, by whom may they be so treated? By a *bonâ fide* holder for value, certainly; and, in considering the construction of the section, I have thus far limited my attention to the case of such a holder. It is the case which ordinarily arises in the course of commercial transactions with negotiable instruments, and it is the one, therefore, which must be taken to have been primarily had in view in framing a law to determine the rights and liabilities in respect of such instruments. But I can see nothing in the words of the enactment to confine their application to this case.

It appears to me that the natural answer to the question which I have proposed is this: A bill within the sub-section may be treated as payable to bearer by any person whose rights or liabilities depend upon whether it be a bill payable to order or to bearer. I of course exclude the case of one who is a party to, or who has notice of, a fraud. At all events, I can see no reason why a banker, who has been requested to pay the bill by his customer, the acceptor, may not so treat it. Where the bill is, in truth, payable

to order,— that is to say, where the drawer intends that [* 155] payment should be made only to the person named * as the payee, or to some one deriving title through him,— then the direction to the banker must, since the decision in *Robarts* v. *Tucker*, be taken to be a direction to pay to such person only. But, where the payee is a fictitious person within the meaning of the sub-section, I think the direction to the banker must be taken to be to pay the bearer. It is by reason of his filling that character that the holder is entitled to demand payment of the acceptor. And when a banker has been instructed by the acceptor to pay such a bill on his behalf, it is to the person filling that character that he must be taken to have intended the payment to be made. If the holder were a *bonâ fide* holder for value, who, if payment had been refused, could hold the acceptor liable, I do not think this could be doubted; and, where the bill is one which might be treated as payable to bearer by a *bonâ fide* holder, so that the direction to the banker to pay the bill is a direction to pay the bearer, I do not think that the banker is any the less entitled to charge the payment of the bill against his customer, because the bearer, to whom payment is made, holds it under such circumstances that the acceptor could successfully resist a claim for payment by him. It cannot be doubted that this would be so where a bill was in terms payable to bearer, and I do not think there is any sound distinction in the relative position of banker and customer between this case and that of a bill which may be treated as payable to bearer.

I cannot think that the view I have indicated works any injustice. It is too late now to question the decision in *Robarts* v. *Tucker*. It has been long acted upon and regarded as law, though the decision certainly seems to have rested upon the assumption that it was possible for a banker to do that which would be, commercially speaking, absolutely impracticable,— namely, to investigate the validity of all the indorsements before he complied with the direction of his customers and paid the bill. In the case there dealt with, however, the complaint of the customer was that the banker had paid the wrong person, leaving him liable to pay the right one. Here the position of the customer is that, in spite of his direction to the banker to pay the bill, he ought not to [* 156] have made payment to any one. The * conclusion at which I have arrived is exclusively based upon the construction

of the terms of the statute, uninfluenced by these considerations; but I am glad to think that it leads to a result which cannot, in my opinion, be regarded as either unjust or commercially inconvenient.

The conclusion which I have indicated is sufficient to determine the case in favour of the appellants. I have not found it necessary therefore, to form a decisive opinion upon the other questions raised; but I do not desire to be understood as dissenting from the view entertained by some of your Lordships, that, apart from the provisions of the statute, the facts of the present case afford sufficient grounds for arriving at the same decision.

Lord MACNAGHTEN: —

It can hardly be denied that the business of Vagliano Brothers was conducted in rather a loose fashion. There was no check on the clerks. There was no effective supervision over the work of the office. But apart from the error committed in taking the forgeries of a clerk for the signatures of a correspondent whose bills the firm was in the habit of accepting, there was nothing, I think, in the conduct of the business, or in what Vagliano himself did or omitted to do, which can afford a plausible answer to the plaintiffs' claims.

On the other hand, the fact that the sums in question were paid over the counter ought not, I think, to prevent the bank from setting up any defence which would have been available if the money had been paid through another bank.

Putting aside these matters, to which a good deal of evidence was directed, the case lies in a narrow compass. But it is one of much difficulty. There is no authority which governs it. Very little assistance is to be derived from reported decisions. And it is by no means easy to apply to Glyka's fabrications rules of law intended for genuine bills of exchange, and principles applicable to honest commercial transactions.

There are, I think, two questions to be considered: 1. Is the bank entitled to be indemnified against the moneys paid in respect of these forged bills, although the bills may not have been paid according to their tenor? 2. Can the bank treat * the [*157] bills as payable to bearer, and so justify the payment as being in accordance with their customer's mandate?

As regards the first question, the following points are, I think, established.

No. 9. — Bank of England v. Vagliano, 1891. App. Cas. 157, 158.

(1.) The relation of banker and customer does not of itself, and apart from other circumstances, impose upon a banker the duty of paying his customer's acceptances.

If authority is wanted for this proposition it will be found in *Robarts* v. *Tucker*, where it was said by the Court, that "if bankers wish to avoid the responsibility of deciding on the genuineness of indorsements, they may require their customers to domicile their bills at their own offices, and to honour them by giving a cheque upon the bankers." That implies that bankers may refuse to pay their customers' acceptances, and that such refusal is not inconsistent with the relation of banker and customer, or a breach of the banker's duty to his customer.

(2.) If a banker undertakes the duty of paying his customer's acceptances, the arrangement is the result of some special agreement, expressed or implied. And such an agreement, in the absence of express stipulation to the contrary, must have reference solely to genuine bills of exchange. It cannot be supposed to contemplate any dealings with fictitious instruments.

(3.) Bankers who undertake the duty of paying their customers' acceptances cannot do otherwise than pay off-hand, and, as a matter of course, bills presented for payment which are duly accepted, and regular and complete upon the face of them.

It would be out of the question for a banker to adopt the suggestion made by one of the learned Judges in *Robarts* v. *Tucker*, and defer payment until satisfied by inquiry and investigation that all the indorsements on the bill are genuine. That is hardly a practical suggestion. A banker so very careful to avoid risk would soon have no risk to avoid.

(4.) In paying their customers' acceptances in the usual way, bankers incur a risk perfectly understood, and in practice disregarded. Bankers have no recourse against their customers if they pay on a genuine bill to a person appearing to be the holder, [* 158] but claiming through or under a forged indorsement. * The bill is not discharged; the acceptor remains liable: the banker has simply thrown his money away. That was the effect of the decision in *Robarts* v. *Tucker*. I do not think that that was a harsh decision. Nor do I see how the Court could have come to any other conclusion, unless it had taken quite a different view of the customer's mandate and the banker's obligation. At any rate the ground of the decision is now part of the statute law. The

Bills of Exchange Act, 1882, enacts, section 24, that, subject to certain provisions, which for the present purpose are immaterial, a forged or unauthorised signature on a bill is wholly inoperative, and that no right to retain the bill or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under that signature except in the case of an estoppel. Nothing but legislation could have relieved bankers from the liability attaching to them in accordance with the law as declared in *Robarts* v. *Tucker*. The fact that no such legislation has ever been promoted, or, I believe, advocated, on behalf of bankers in the case of bills of exchange, though the law has been relaxed as regards cheques, seems to show that in the case of genuine bills the liability is of little or no practical importance.

(5.) The drawee of a bill is bound to know the drawer's signature. It is his fault if he writes his acceptance on a forged instrument. And it is his act of acceptance which sends the bill forward for payment to the banker.

(6.) In the case of a counterfeit bill, the payee's signature must be forged unless the person named as payee is an accomplice in the fraud. And, therefore, if there is no accomplice, assuming *Robarts* v. *Tucker* to apply, an acceptance making the bill payable at a bank necessarily entails upon the banker the loss of the sum for which the bill purports to be drawn. The banker has no chance of escape. Relying on his customer's acceptance, he takes it for granted that the bill is genuine. Ignorant of any danger, beyond the possible risk of a theft having been committed and remaining still undiscovered, he pays the apparent holder as a matter of course.

* It seems to me that if these premises are well [* 159] founded, the bank is entitled to be indemnified by Vagliano Brothers in respect of the money paid on the forged bills which Vagliano accepted and directed the bank to pay.

If A. employs B. on his behalf to deal with articles of a certain description in a particular way, and then A., through inadvertence or otherwise, introduces among the articles with which B. is to deal, a dangerous counterfeit not distinguishable in appearance from its companions, I cannot doubt that A. is bound to indemnify B. against any loss resulting from his dealing with the counterfeit as if it was a genuine article within the scope of his employment. And it cannot, I think, make any difference that B. is bound by

the terms of his employment to bear every risk incident to his dealing with the genuine article.

There is, I think, a wide distinction between this case and *Robarts* v. *Tucker*, though in both it was the duty of the bankers to pay bills of exchange accepted by their customers to the person who, according to the law merchant, was capable of giving a good discharge, and in both the bankers were cheated out of their money. In the one case the customer's acceptance introduced to the bank a genuine mercantile instrument, though it had been tampered with by a thief without the fault or knowledge of the customer. In the other, the acceptance introduced a fraudulent counterfeit which the customer ought to have detected. In *Robarts* v. *Tucker* there was presented for payment a genuine bill having a forged indorsement. The bankers paid the wrong man, leaving the bill unpaid and the liability of the customer undischarged. They claimed credit all the same. But they did not pretend that they had done what they were told to do; nor could they allege that their employer had any hand in misleading them. Of course their claim was rejected. In the present case the bankers have not failed in the performance of any duty towards their customer. They undertook no duty, they accepted no mandate, in regard to pieces of papers which are not bills of exchange, and with which the law merchant has no concern. They [* 160] too have been cheated out of their money. * Whether they can say that they have done what they were told to do remains to be considered. At least, they can say that their employers were active, though no doubt unconscious, instruments, in carrying out the deception which led to their loss.

I now come to the second question, which depends upon the effect of section 7, sub-section 3, of the Act of 1882. The enactment, of course, was not directed to such a case as this. The provisions of the statute were meant for genuine bills of exchange. But if the argument on behalf of the bank is right, it happens to furnish a short answer to a claim which fails on broader and, I think, more satisfactory grounds.

On behalf of the bank it was pointed out that these pretended bills, being duly accepted and regular and complete on the face of them, were presented for payment apparently in due course; and it was said that, although no doubt at the time they were taken to be payable to order, and to be duly indorsed by the payee, yet

when it turns out that the payee was a fictitious person, they may be treated as payable to bearer; and so the payment is justified though all the indorsements are inoperative.

On behalf of Vagliano Brothers it was contended that a bill payable to a fictitious person is not payable to bearer unless the acceptor is proved to have been aware of the fiction; and further it was contended that nothing but a creature of the imagination can properly be described as a fictitious person.

I do not think that either of these contentions on behalf of the respondents can be maintained.

Before the Act of 1882, the law seems to have been as laid down by Lord ELLENBOROUGH in *Bennett* v. *Farnell*, that "a bill of exchange made payable to a fictitious person or his order, is neither in effect payable to the order of the drawer nor to bearer, unless it can be shown that the circumstance of the payee being a fictitious person was known to the acceptor." The Act of 1882, section 7, sub-section 3, enacts that "Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer." As a statement of law before the Act, that would have been incomplete and inaccurate. The omission of the qualification required to make it complete and accurate as *the law [*161] then stood, seems to show that the object of the enactment was to do away with that qualification altogether. The section appears to me to have effected a change in the law in the direction of the more complete negotiability of bills of exchange, — a change in accordance, I think, with the tendency of modern views, and one in favour of holders in due course, and not, so far as I can see, likely to lead to any hardship or injustice.

Then it was said that the proper meaning of "fictitious" is "imaginary." I do not think so. I think the proper meaning of the word is "feigned," or "counterfeit." It seems to me that the "C. Petridi & Co.," named as payees on these pretended bills, were, strictly speaking, fictitious persons. When the bills came before Vagliano for acceptance, they were fictitious from beginning to end. The drawer was fictitious; the payee was fictitious; the person indicated as agent for presentation was fictitious. One and all, they were feigned or counterfeit persons put forward as real persons, each in a several and distinct capacity, whereas, in truth, they were mere make-believes for the persons whose names appeared on the instruments. They were not, I think, the less fictitious

because there were in existence real persons for whom these names were intended to pass muster.

In the result, therefore, I think that on both grounds the bank is entitled to succeed. Nor is that conclusion altogether to be regretted. An opposite conclusion would, I think, go a long way to encourage mischievous negligence on the part of persons called upon to accept bills of exchange. To an acceptor it would be a matter of indifference whether the drawer's signature were genuine or not. If it were genuine the transaction would be completed in regular course. If it were not genuine the loss would fall not on the acceptor whose negligence had led to it, but on the banker, who could have no means of detecting the forgery, and must have been thrown off his guard by the carelessness of his employers.

Lord Morris agreed with the opinion arrived at by Lord Herschell.

[163–172] Lord Field agreed with the conclusion arrived at by Lord Bramwell, that the decision under appeal ought to be affirmed.

The judgments of the Court of Appeal and of the Queen's Bench Division were accordingly reversed and judgment entered for the defendants with costs in this House and below; and the cause remitted to the Queen's Bench Division.

ENGLISH NOTES.

The principle of the former of the above ruling cases is now embodied in the codifying statute, The Bills of Exchange Act 1882 (45 & 46 Vict. c. 61), s. 24, which enacts that, subject to the provisions of the Act — *i. e.*, as to estoppels against the acceptor and the protection given, by s. 60, to bankers paying drafts on them to order on demand, is as follows: "Where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority. Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery."

The following may be mentioned as among the cases subsequent to *Robarts* v. *Tucker* illustrating the principle: *Orr* v. *Union Bank*

(H. L. 1854), 1 Macq. 513; *Morris* v. *Bethell* (1869), L. R., 5 C. P. 47; *Arnold* v. *Cheque Bank* (1876), 1 C. P. D. 578, 45 L. J. C. P. 562; *McKenzie* v. *British Linen Co.* (H. L. 1881), 6 App. Cas. 82.

The latter branch of the rule for which the appeal case *Bank of England* v. *Vagliano* is assigned as the authority, is supported by the judgments in that case of Lord HALSBURY, L. C., Lord SELBORNE, Lord WATSON, and Lord MACNAGHTEN. These judgments, with the exception of that of Lord SELBORNE, were also based, as another ground, upon the terms of the Bills of Exchange Act 1882, section 7, sub-section 3. The judgments of Lords HERSCHELL and MORRIS, which concurred in the same result, were based on the terms of the Act exclusively. It will be seen that the judgments of the six Lords above mentioned (being the majority, — against Lords BRAMWELL and FIELD, dissenting) were in favour of the bank.

AMERICAN NOTES.

The doctrine of the first branch of the rule is elementary, and familiar in this country. *Welsh* v. *German Am. Bank*, 73 New York, 424; *Indiana Nat. Bank* v. *Holtsclaw*, 98 Indiana, 85; *Seventh Nat. Bank* v. *Cook*, 73 Penn. St. 483; *Dodge* v. *Nat. Exch. Bank*, 20 Ohio St. 246 (citing *Robarts* v. *Tucker*); *Graves* v. *Am. Ex. Bank*, 17 New York, 205; *Nat. Bank* v. *Millard*, 10 Wallace (United States Supreme Ct.), 152.

As to the second branch: Acceptance guarantees the genuineness of the drawer's signature. *Bank of Commerce* v. *Union Bank*, 3 New York, 230; *Bank* v. *Bank*, 9 Wheaton (United States Supreme Ct.), 904; *Williams* v. *Drexel*, 14 Maryland, 566; *Ellis* v. *Ins. Co.*, 4 Ohio St. 628; *Peoria R. Co.* v. *Neill*, 16 Illinois, 269.

In *White* v. *Cont. Nat. Bank*, 64 New York, 316; 21 Am. Rep. 612: plaintiff accepted and paid to defendant a bill drawn on him, which had been fraudulently raised before acceptance, deposited with defendant, credited to the depositor, and presented by defendant for acceptance. Held, that as the defendant did not act upon any admission of plaintiff expressed or implied as to its genuineness, but upon the apparent title and genuineness, and the responsibility of the transferors, plaintiff owed it no duty in respect to the forgery, and could recover.

The doctrine of *Robarts* v. *Tucker* was expressly approved in *Dodge* v. *Nat. Ex. Bank*, 20 Ohio St. 234; 5 Am. Rep. 648, and both are cited with approval in Morse on Banks, sect. 474.

Mr. Daniel says (Neg. Inst. sect. 1361): "When the holder has received the bill after its acceptance, the acceptor stands toward him as the warrantor of its genuineness, and receiving the bill upon faith in the acceptor's representation, there is obvious propriety in maintaining his right to hold the acceptor absolutely bound. Indeed the acceptor, being the primary debtor, stands just as the maker of a genuine promissory note. But when the holder of an unaccepted bill presents it to the drawee for acceptance or pay-

ment, the very reverse of this rule would seem to apply; for the holder then represents, in effect, to the drawee, that he holds the bill of the drawer, and demands its acceptance or payment as such. If he indorses it, he warrants its genuineness; and his very assertion of ownership is a warranty of genuineness in itself. Therefore should the drawee pay it or accept it upon such presentment, and afterwards discover that it was forged, he should be permitted to recover the amount from the holder to whom he pays it, or as against him to dispute the binding force of his acceptance, provided he acts with due diligence." Disapproving Price *v.* Neal, 2 Burr. 1355; Bank *v.* State of Georgia, 10 Wheaton (U. S. Sup. Ct.), 333, and cases in New York, Massachusetts, Minnesota, Missouri, and Ohio, and citing Am. Law Rev., April, 1875, p. 411.

Section VI. — *Duty and liability generally.*

No. 10 — MARZETTI *v.* WILLIAMS.

(K. B. 1830.)

No. 11. — HOPKINSON *v.* FORSTER.

(Ch. 1874.)

RULE.

A BANKER is under a legal duty, by implied contract, to the customer, to pay his cheque, after a reasonable time for satisfying himself that he has sufficient funds of the customer in his hands for the purpose.

But the cheque is not an equitable assignment of the customer's balance; and the banker is not under any duty, at law or in equity, to a third person as holder of the cheque.

Marzetti v. Williams.

1 Barn. & Adol. 415-428 (9 L. J. K. B. 42).

[415] Declaration stated, that the plaintiff long before and at the time of the committing of the grievances thereinafter mentioned, was and from thence hitherto had been a trader, to wit, a wine merchant and a ship and insurance agent, and the trades and businesses of a wine merchant and ship and insurance agent used, exercised, and carried on, and still used, &c. to wit, at London. That the defendants before and at the time of committing the grievance by them thereinafter next mentioned, were,

and still were bankers, and the trade and business of bankers used, exercised, and carried on, and still used, &c. in the city of London, to wit, at, &c ; and, as such bankers, had been used to receive and take into their charge moneys, bills, notes, and other securities of divers persons, customers of and dealing with the defendants in the way of their trade and commerce in the city of London. That by the usage and custom of trade and commerce in the city of London, persons being bankers, and using the trade and business of bankers within the city of London, and receiving into their care and custody the moneys, bills, notes, and securities of persons being the customers of or dealing with such persons as bankers as aforesaid in the way of their trade and business of bankers, and having in their hands cash balances of such their customers and persons dealing with them as aforesaid, and not having lent or advanced money to discount any bills or bill, notes or note, or other negotiable * securities or made [* 416] any advances, or incurred, or entered into any engagements or contracts, or incurred or subjected themselves to any liabilities for or on account of such their customers or persons dealing with them as bankers as aforesaid, nor having any lien or claim on such cash balances, were bound, and it had been and was their duty as bankers as aforesaid, to honour and pay the drafts or cheques of such their customers and persons dealing with them, duly drawn for any part of such cash balances, when duly presented to such bankers for payment by any person or persons lawfully entitled to recover the money specified in such drafts or cheques. That long before and at the time of committing the grievance by the defendants thereinafter next mentioned, plaintiff was a customer of and dealt with the defendants in the way of their said trade and business of bankers, and at the time of committing the grievance, &c. had in their hands, as such bankers as aforesaid, a large cash balance, and much more than sufficient to pay and discharge the money specified in the draft or order thereinafter next mentioned, to wit, a cash balance of £109 19*s.* 6*d.*, and defendants had not lent or advanced to the plaintiff any money, nor discounted any bills or bill, notes or note, or other negotiable securities for, nor made any advances, nor entered into any engagements or contracts, or incurred or subjected themselves to any liabilities for or on account of the plaintiff, who was so a customer of and dealt with them as bankers as aforesaid, nor had they, or

any of them, any lien or claim on the said cash balance of the plaintiff so being in their hands as aforesaid. That whilst such cash balance was in the hands of the defendants as his bankers as aforesaid, to wit, on the 18th of December, 1828, to wit, at [*417] London * aforesaid, the plaintiff, according to the usage and custom of merchants, made and drew his certain draft or order in writing for the payment of money commonly called a cheque on a banker, bearing date the day and year last aforesaid, and then and there directed the said draft or order to the defendants, and thereby required them to pay to certain persons by the names, style, &c. of Sampson and Hooper, or bearer, £87 7*s.* 6*d.*, the said sum of £87 7*s* 6*d* specified in the said draft or order being a less sum than the said cash balance of the plaintiff, so being in the hands of defendants as his bankers as aforesaid, and then and there delivered the said draft or order to the said Sampson and Hooper, who thereby then and there became, and were the bearers thereof, and from thence until, and at the time of the presentment and refusal thereinafter next mentioned, were lawfully entitled to the money therein specified. That afterwards, and whilst such cash balance of plaintiff, and which so exceeded the said sum of £87 7*s* 6*d* in the said draft or order mentioned, was in the hands of the defendants as his bankers as aforesaid, to wit, on, &c. at, &c. the said draft, &c. was duly presented for payment. Yet the defendants, not regarding their duty as such bankers as aforesaid, nor such usage and custom of trade as aforesaid, but contriving, &c. to injure the plaintiff in his credit and character as a trader, to cause it to be believed that he had drawn a draft or order upon them without having effects in their hands to pay and answer the same, &c. did not, nor would, when the said draft or order was so shown and presented to them for payment as aforesaid, honour the said draft or order, or pay to the said Sampson and Hooper, or either of them, the said sum of £87 7*s.* 6*d* [*418] * therein specified, but wholly refused so to do. The second count stated that the defendants were the plaintiff's bankers, and as such had been used to pay his cheques; and that at the time, &c. they, having sufficient money of his in their hands, and no lien or other lawful cause of refusal, did refuse to pay, &c. contrary to their duty as such bankers, and maliciously intending to injure the plaintiff. The third count stated the facts still more concisely, and there was a general averment of damage

No. 10. — Marzetti v. Williams, 1 B. & Ad. 418, 419.

to the plaintiff's circumstances and credit. A count was added in trover for bank-notes and pieces of money. Plea, not guilty. At the trial before PARKE, J., at the London sittings after Michaelmas term, 1829, it appeared that the plaintiff was a wine merchant and ship broker, that the defendants were bankers in London, and that the plaintiff kept a banking account with them. The amount of the balance due from the defendants to the plaintiff, on the evening of the 17th of December, 1828, was £69 19*s.* 6*d.* A few minutes before eleven o'clock on the morning of the 19th, a further sum of £40, being a bank of England note, was paid in to his account. On the same day, about ten minutes before three o'clock, a cheque drawn by the plaintiff in favour of Messrs. Sampson and Hooper, for £87 7*s.* 6*d.* was presented at the banking-house of the defendants for payment. The clerk, to whom it was presented, after having referred to a book, said there were not sufficient assets, but that the cheque might probably go through the clearing-house. The cheque was paid on the following day. Upon this evidence it was contended by the Attorney-General, first, that the plaintiff, having declared in tort as for a breach of duty, must be nonsuited, inasmuch as he had not proved any *dam- [*419] age. Secondly, that a banker was not bound to know that a particular sum had been paid in an hour or half an hour before the cheque of his customer was drawn. He must be allowed a reasonable time to ascertain the state of the account between him and them, and it was not to be supposed he could know without special notice that a sum paid in by a customer, was to be drawn out an hour or two afterwards; the state of the account in point of practice, being generally ascertained at the close of each day when the books were made up, it could only be expected that the clerk should look at the book at the time when the cheque was presented, and give an answer according to the state of the account as it then appeared. The learned Judge was of opinion, that a banker who received a sum of money belonging to his customer, became his debtor the moment he received it, and was bound to pay a cheque drawn by such customer after the lapse of such a reasonable time as would afford an opportunity to the different persons in his establishment of knowing the fact of the receipt of such money, and that the refusal to pay a cheque under such circumstances was a breach of duty for which an action would lie; and he directed the jury to find for the plaintiff, if they were of

opinion that such a reasonable time had intervened between the receipt of the money at eleven o'clock and the presentment of the cheque at three; observing also, that it could not be expected if a sum of money was paid to a clerk in a large banking-office, and immediately afterwards a cheque presented to another clerk in a different part of the office, that the clerk to whom the cheque was presented, should be immediately acquainted with the fact of the cash having been paid in, but a reasonable time [*420] *must be allowed for that purpose; and he told the jury, that in forming their judgment, whether such a reasonable time had elapsed, they must consider whether the defendants ought or ought not, between eleven and three o'clock, to have had in some book, an entry of the £40 having been paid in, which would have informed all their clerks of the state of the account The jury having found for the plaintiff on the first three counts. the Attorney-General asked whether they found that the defendant acted maliciously. The learned Judge said, there was no evidence of malice in fact; and if malice was a question for the jury, they must be taken to have negatived malice. A rule *nisi* for a new trial was obtained.

Brougham and Thesiger showed cause. The case was left to the jury most favourably for the defendants. They became debtors to the plaintiff the moment they received his money, and were bound to pay that debt. They refused, therefore, at their peril to honour the cheque. Assuming, however, that they were not bound to do so until a reasonable time had elapsed after the plaintiff had paid in the £40, the jury have found that, at the time when the cheque was presented, a sufficient interval had elapsed to enable the defendants and their clerks to know that that sum had been paid in. After verdict the defendants must be taken to have known at the time when they refused the cheque, that they had in their hands funds belonging to the plaintiff. Their refusal to pay it, therefore, was a wrongful act, the obvious and immediate tendency of which was injurious to the character of the plaintiff in his trade. [*421] It may be conceded that in order to support *an action, the consequences of any wrongful act must be to occasion some injury or loss to the plaintiff; but it is not essential, to support such an action, for the plaintiff to show damage in fact. It is sufficient if he sustain a damage in law. In many instances the law, from the injurious nature of the wrongful act, presumes damage.

Thus the mere publication of slander in certain cases is deemed to be injurious, and to confer a substantive right of action though no special loss or damage can be shown, upon the principle that the obvious and immediate consequence of the words uttered is to produce damage to the person of whom they are spoken. One among other instances is, where words are spoken of a man in his trade or profession. In that case the law presumes damage from the obvious tendency of the slander The act done by the defendants in this case was wrongful, and in its tendency was injurious to the credit of the plaintiff Upon principle, therefore, the action is maintainable without showing any special damage. If the defendants had said of the plaintiff that he was not worthy to be trusted for £80 an action might have been maintained against them, and it would not have been necessary to allege any special damage. The circumstance of the jury having negatived malice, makes no difference; for the refusal to pay the cheque was wrongful, and therefore, in a legal sense, malicious. It was not necessary to show malice in fact. *Bromage* v. *Prosser*, 4 B. & C. 247.

Sir James Scarlett, Attorney-General, Campbell, Justice, and Williams, *contra*. The action being brought in tort for a breach of duty, and not for a breach of contract, * was [* 422] not maintainable without showing special damage. The general principle is, that in order to maintain an action, there should be a damage to the plaintiff, the consequence of a wrongful act by the defendant. In those cases of slander where words are actionable in themselves, the law presumes malice as well as that a damage ensues from the obvious tendency of the slander; but in other cases where the words *per se* are not of that injurious tendency, actual damage must be proved. Here the jury have negatived malice, and although the refusal by a banker to pay the cheque of his customer may under circumstances be injurious, it is not necessarily so; actual damage, therefore, must be shown; and in this case none appeared. An action of tort lies where a man has a temporal loss or damage by the wrong of another. Com. Dig. *Action on the Case* (A.). But a mere breach of duty without any damage is no ground of action. A person who drives his carriage on the wrong side of a public highway is guilty of a wrongful act, but he is not liable to an action unless he occasion actual damage to another. In *Burnett* v. *Lynch*, 5 B. & C. 589, it was held that a lessee who by deed poll had assigned his interest to A., subject

to the performance of covenants contained in the lease, might maintain an action of tort against A. for having neglected to perform the covenants to paint and repair during the time he continued assignee, whereby the lessee was subjected to an action of covenant at the suit of his lessor, and had to pay damages. In that case there was an actual damage; but suppose the covenant had been broken, but the repair, &c. done before any action [*423] of covenant was brought * the lessee could not have maintained his action of tort without showing actual damage. If a right of action vests in such a case as the present, the moment a cheque is refused, great inconvenience will ensue; for if there be once a refusal, though it be countermanded within the next minute, the drawer may support an action, and subject the banker to the payment of costs. [PARKE, J. The action here is in form tort, but it is in substance founded on a contract by the banker to pay the cheques of his customer when the latter has funds in his hands. Upon breach of that contract a right of action vests without any special damage.] Where there is an express contract, a party may recover for a breach of it without showing actual damage. *Van Wart* v. *Woolley*, 1 Moody & Malk. 520; but there is no authority for saying that he may so recover for the breach of an undertaking implied by law.

Lord TENTERDEN, C. J. I think that the plaintiff is entitled to have a verdict for nominal damages, although he did not prove any actual damage at the trial. I cannot think there can be any difference, as to the consequences resulting from a breach of contract by reason of that contract being either express or implied The only difference between an express and an implied contract, is in the mode of substantiating it. An express contract is proved by an actual agreement; an implied contract by circumstances, and the general course of dealing between the parties, but whenever a contract is once proved, the consequences resulting from the breach of it must be the same, whether it be proved by direct or circumstantial evidence. The Attorney-General was [*424] compelled to admit, in this case, that if the * action were founded on an express contract, the plaintiff would have been entitled to recover nominal damages, although no actual damage were proved. Now this action is, in fact, founded on a contract, for the banker does contract with his customer that he will pay cheques drawn by him, provided he, the banker, has

money in his hands belonging to that customer. Here that contract was broken, for the defendants would not pay the cheque of the plaintiff, although they had in their hands money belonging to him, and had had a reasonable time to know that such was the fact. In this case a plaintiff might, for the breach of that contract, have declared in assumpsit. So in *Burnett* v. *Lynch*, the plaintiff might have declared as for breach of a contract. It is immaterial in such a case whether the action in form be in tort or in assumpsit. It is substantially founded on a contract; and the plaintiff, though he may not have sustained a damage in fact, is entitled to recover nominal damages. At the same time I cannot forbear to observe, that it is a discredit to a person, and therefore injurious in fact, to have a draft refused payment for so small a sum, for it shows that the banker had very little confidence in the customer. It is an act particularly calculated to be injurious to a person in trade. My judgment in this case, however, proceeds on the ground that the action is founded on a contract between the plaintiff and the bankers, that the latter, whenever they should have money in their hands belonging to the plaintiff, or within a reasonable time after they should have received such money, would pay his cheques; and there having been a breach of such contract, the plaintiff is entitled to recover nominal damages.

* Parke, J. I am of the same opinion. This action [* 425] being substantially founded on a contract, I think it can make no difference whether it is in form tort or assumpsit. There is no authority for any such distinction. This case, therefore, must be considered as if the action were founded on a contract by the bankers, to pay all drafts presented within a reasonable time after they receive such money, so as to allow them to pass it to their customer's account. It is admitted that, where there is a breach of an express contract, nominal damages may be recovered. The only difference, however, between an express and an implied contract, is as to the mode of proof. An express contract is proved by direct evidence, an implied contract by circumstantial evidence. Whether the contract be proved by evidence direct or circumstantial, the legal consequences resulting from the breach of it must be the same; one is, that wherever there is a breach of contract or any injury to the right arising out of that contract, nominal damages are recoverable. An extreme case may be put.

where a party, who had sustained no inconvenience, might bring an action; but the remedy, in that case, would be to deprive such party of costs.

Taunton, J. The defendants were guilty of a breach of duty, which duty the plaintiff at the time had a right to have performed. The jury have found that when the cheque was presented for payment, a reasonable time had elapsed to have enabled the defendants to enter the £40 to the credit of the plaintiff, and, therefore, that they must or ought to have known that they had funds belonging to him. That was sufficient to entitle the plaintiff to recover nominal damages, for he had a right to have his [*426] cheque *paid at the time when it was presented, and the defendants were guilty of a wrong by refusing to pay it. The form of the declaration, whether it be in tort or assumpsit, makes no substantial difference, nor can it be any real ground of distinction whether the foundation of the action be an express or an implied assumpsit. There are many instances where a wrong, by which the right of a party may be injured, is a good cause of action although no actual damage be sustained. Trespass, *quare clausum fregit*, is maintainable for an entry on the land of another, though there be no real damage, because repeated acts of going over the land might be used as evidence of a title to do so, and thereby the right of the plaintiff might be injured. So an action may be maintained by a commoner for an injury done to his common, without proving actual damage.[1] In *Wells* v. *Watling*, 2 Sir W. Black. 1233, which was an action by a commoner for surcharging the common, the evidence was, that the defendant, in the year 1777, turned on a greater number of sheep than he ought. There was no evidence that the plaintiff had turned on any sheep in that year. It was objected that the action was not maintainable, because the plaintiff, not having used the common during the period of the defendant's misfeasance, could not by possibility have sustained any damage. But it was held that the action was maintainable; Lord C. J. De Grey said, that it was sufficient if the right be injured, whether it be exercised or not; and Nares, J., observed, that in the case of the dippers at Tunbridge [*427] Wells, 2 Wils. 414, it was held that a *probable damage was a sufficient injury on which to ground an action.

[1] See note to *Mellor* v. *Spateman*, 1 Saund. 345, and *Young* v. *Spencer*, 10 B. & C. 145.

Here, independently of other considerations, the credit of the plaintiff was likely to be injured by the refusal of the defendants to pay the cheque; and as it was the duty of the defendants to pay the cheque when it was presented, and that duty was not performed, I think the plaintiff, who had a right to its being performed, is entitled to recover nominal damages. The case put in argument, of the holder of a cheque being refused payment, and called back within a few minutes and paid, is an extreme case, and a jury probably would consider that as equivalent to instant payment. That, however, is not the present case. Here the refusal to pay was not countermanded till the following day.[1]

PATTESON, J. I think the verdict was right. The action is in form founded in tort, but is in substance founded on a contract. The relation in which the parties stood to each other, viz. that of banker and customer, was created by their own contract, not by the general operation of law. *Green* v. *Greenbank*, 2 Marsh. 485, shows that the circumstance of the action being in form for a tort is immaterial, if the substantial ground of it be a contract. This action, therefore, lies, if the plaintiff could have brought assumpsit, and as it is quite clear that he could have maintained assumpsit for the breach of contract, he may on the same ground maintain this action of tort, unless there be some distinction in this respect between an express and an implied contract. * But [* 428] the only distinction between the two species of contracts is as to the mode of proof. The one is proved by the express words used by the parties, the other by circumstances showing that the parties intended to contract. As soon as it is made out, either by direct or circumstantial evidence, that there was such a contract, either of the parties may maintain an action against the other without showing any actual damage. The rule for entering a nonsuit must therefore be discharged. *Rule discharged.*

Hopkinson v. Forster.

L. R., 19 Eq. 74–76 (s. c. 23 W. R. 301).

This was an interpleader suit instituted by Messrs. [74] Hopkinson, bankers and army agents, for the purpose of ascertaining the rights of the claimants to a fund in their hands.

[1] An action on the case will lie for the possibility of a damage and injury; as for persuading A. not to come and sell his wares at the market of B., the lord of the market may have this action. Per Curiam, in *Weller* v. *Baker*, 2 Wils. 422.

No. 11. — Hopkinson v. Forster, L. R., 19 Eq. 74, 75.

The plaintiffs were the bankers of the defendant Forster, who, up to the 7th of May, 1867, was a cornet in the 3rd Dragoon Guards. The plaintiffs were also the agents of that regiment. On the 7th of May, 1867, Forster retired from the army, having sold his commission, and on the following day it became the duty of the plaintiffs, as agents of the regiment, out of moneys placed in their hands as such agents and held by them subject to the directions of the military authorities, to issue to Forster the sum of £365 18*s.* 6*d.*, the price of the commission. On that date a balance of £38 4*s.* 8*d.* was standing to Forster's credit on his private banking account.

[*75] *Various claims having been made to the proceeds of the sale of the commission, this suit was instituted, and the plaintiffs paid into Court the sums of £365 18*s.* 6*d.* and £38 4*s.* 8*d.*

The cause now came on to be heard. Amongst other claims made to the fund in Court, was one by the defendant Dr. Cullen which arose under the following circumstances: —

Dr. Cullen was assistant-surgeon in the regiment to which Forster belonged. In February, 1867, the regiment was quartered in India. On the 25th of that month Forster applied to Cullen to change a cheque for him, and Cullen accordingly advanced Forster £50, he giving Cullen a cheque for that amount, dated the same day, and drawn on the plaintiffs. On the 23rd of April, 1867, the plaintiffs received a letter from Forster in the following terms: —

"Before leaving India I drew some cheques on you, which I hope have been met before this by my commission money. If they have not, please let me know; also, how soon I may expect my commission. I also wish you to place £25 to Captain Fitzgerald's credit and £50 to Dr. Cullen's, as soon as possible."

The cheque was presented on the 23rd of May, 1867, and was dishonoured.

Mr. Chitty, Q. C., and Mr. Cracknall, for the plaintiffs.

Mr. A. T. Watson, for Dr. Cullen: —

First, the letter written by Forster created a charge in my favour.

[The Master of the Rolls. You can have no charge in equity without an intent to charge. The letter on which you rely was not written with any intent to charge the fund; it was a mere letter of instructions to the bankers.]

Secondly, the cheque itself constitutes a good equitable assignment. In *Keene* v. *Beard*, 8 C. B. N. S. 372; 29 L. J. C. P. 287, Mr. Justice BYLES says, with respect to a cheque, this: "In one respect it differs from a bill of exchange, it is an appropriation of so much money of the drawer's in the hands of the banker upon whom it is drawn for the purpose * of discharging a debt or liability [* 76] of the drawer to a third person; whereas it is not necessary that there should be money of the drawer's in the hands of the drawee of a bill of exchange." That shows my claim to be good, at all events, to the £38 4*s.* 8*d.*

Mr. Roxburgh, Q. C., Mr. Graham Hastings, Mr. Davey, Mr. Kisch, and Mr. Everitt, were for other defendants

[*Ex parte South*, 3 Sw. 392, and *Lariviere* v. *Morgan*, L. R., 7 Ch. 550, were referred to.]

Sir G. JESSEL, M. R.: —

A cheque is clearly not an assignment of money in the hands of a banker: it is a bill of exchange payable at a banker's. The banker is bound by his contract with his customer to honour the cheque, when he has sufficient assets in his hands; if he does not fulfil his contract he is liable to an action by the drawer, in which heavy damages may be recovered if the drawer's credit has been injured. I do not understand the expressions attributed to Mr Justice BYLES in the case of *Keene* v. *Beard*; but I am quite sure that learned Judge never meant to lay down that a banker who dishonours a cheque is liable to a suit in equity by the holder.

His Honour decided on the other claims to the £365 18*s.* 6*d.*, but held that the £38 4*s.* 8*d.* had been improperly paid into Court, there being no conflicting claims as to it, and he directed the latter sum to be repaid to the plaintiffs.

ENGLISH NOTES.

The Bills of Exchange Act 1882 (45 & 46 Vict. c. 61), s. 73, defines a cheque to be "a bill of exchange drawn on a banker payable on demand."

Bankers paying a cheque on a forged indorsement are protected by the 16 & 17 Vict. c. 59, s. 19, which enacts: "Any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to the banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on the banker to prove

that such indorsement, or any subsequent indorsement, was made by and under the direction and authority of the person to whom the draft or order was or is made payable, either by the drawer or any indorsee thereof." This section has been held to afford protection to the banker paying upon an indorsement in the name of the payee "per S. K., agent," although the agent had no authority. *Charles* v. *Blackwell* (1877), 2 C. P. D. 157, 46 L. J. C. P. 368; but not to afford protection to a banker other than the banker on whom the cheque is drawn, who takes a cheque upon the faith of a forged indorsement. *Ogden* v. *Benas* (1874), L. R., 9 C. P. 513, 43 L. J. C. P. 259; *Arnold* v. *Cheque Bank, Arnold* v. *City Bank* (1876), 1 C. P. D. 578, 45 L. J., Q. B. 562. In *Guardians of Halifax Union* v. *Wheelwright* (1875), L. R. 10 Ex. 183, 44 L. J. Ex. 121, the plaintiffs appointed the defendant their treasurer without remuneration. The moneys of the plaintiffs were paid into a bank, of which the defendant was manager, and were paid out on orders signed by the guardians, which were cashed like cheques payable to order. The bank paid certain orders on which the indorsements had been forged. It was held that as, under the circumstances of the case, the defendant was entitled to the same rights as the bank, he could rely on the provisions of the section as an answer to the plaintiff's claim.

By the 60th section of the Bills of Exchange Act 1882, the protection to bankers on whom a cheque is drawn is substantially re-enacted in more explicit terms as follows: "When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course although such indorsement has been forged or made without authority." This does not protect the payment by a banker of a crossed cheque on a forged indorsement to a person not a customer: for such payment would not be in the ordinary course of business. Such a payment, it seems, would not have been protected by the Act 16 & 17 Vict. c. 59, s. 19. *Smith* v. *Union Bank of London* (1875), 1 Q. B. D. 31, 45 L. J. Q. B. 149. See per Lord Cairns, 1 Q. B. D. p. 35.

Where a customer makes a bargain for a special credit against securities, to meet drafts, he is not entitled to specific performance of that agreement, but is entitled to general and substantial damages for the breach of it, and the measure of damages is not the principal money contracted to be paid and interest. *Larios* v. *Bonany y Gurety* (P. C. 1873), L. R., 5 P. C. 346.

In connection with crossed cheques, bankers enjoy an immunity not accorded to other persons. By the Bills of Exchange Act 1882 (45 & 46 Vict. c. 61), s. 82, it is enacted: "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." Effect was given to similar words in the Crossed Cheques Act 1876 (39 & 40 Vict. c. 81), s. 12 (which was repealed by the Bills of Exchange Act 1882), in *Matthiessen* v. *London and County Bank* (1879), 5 C. P. D. 7, 41 L. J. C. P. 529. An isolated transaction between a bank and an individual, who has a defective title to a crossed cheque, does not constitute the relation of banker and customer within the meaning of the section. *Matthews* v. *Williams, Brown, & Co.* (1894), 63 L. J. Q. B. 494.

In general there is no privity between a banker, to whom moneys or securities have been sent against the drafts or orders, and the holder of a draft or order. *Williams* v. *Everett* (1811), 14 East, 582, 13 R. R. 315; *Moore* v. *Bushell* (1857), 27 L. J. Ex. 3; *Citizens' Bank of Louisiana* v. *First National Bank of New York* (H. L. 1873, L. R., 6 H. L. 352), 43 L. J. Ch. 269. Where, however, there is a specific appropriation of funds with the assent, express or implied, of the paying banker, there is privity; and the holder of a bill may maintain an action against the banker. *De Bernales* v. *Fuller* (1810), 14 East, 590 n, 13 R. R. 321 n. This was a case where money was expressly paid into the defendant's bank for the specific purpose declared at the time by the payor, and not repudiated by the banker until afterwards, of taking up the bill. It is referred to by Maule, J., in *Warwick* v. *Rogers*, 5 M. & G. 340, as a decision placed on this ground; and is referred to in the judgment of the Judicial Committee in *Prince* v. *Oriental Bank Corporation* (1878), 3 App. Cas. 325, 334, 47 L. J. P. C. 42, as a case which has never been overruled. A similar distinction in other questions relating to specific appropriation will be found in the cases of *Farley* v. *Turner* (1857, V. C. Kindersley), 26 L. J. Ch. 710; *Re Barned's Banking Co., Massey's Case* (1870), 39 L. J. Ch. 635; and *Johnson* v. *Robarts* (Ch. Ap. 1875), L. R., 10 Ch. 505, 44 L. J. Ch. 678.

With *Hopkinson* v. *Forster* (No. 11 p. 755, *supra*) may be compared *Twycross* v. *Dreyfus* (C. A. 1877), 5 Ch. D. 605. In that case the plaintiff was a holder of Peruvian bonds by which the Peruvian government, upon the national faith, pledged the general revenue of the republic, and especially the free proceeds of the guano imported by the Peruvian government into the United Kingdom, after deducting certain

prior charges. The plaintiff brought an action, on behalf of himself and all other holders of the bonds, alleging that the Peruvian government had from time to time forwarded to the defendants large quantities of guano for the purpose of paying the interest on the bonds, which they refused to apply for that purpose, and threatened to apply in satisfaction of a lien claimed by themselves; and he claimed a declaration that he and the other bondholders had a claim upon the proceeds of the guano in priority to any claim by the defendants. It was, however, held upon demurrer that no fiduciary relation existed between the plaintiff and the defendants, who were merely the agents of the Peruvian government.

A banker who has carried the value of a cheque to the credit of the payee, becomes a holder for value of the cheque. *Ex parte Richdale, Re Palmer* (C. A. 1882), 19 Ch. D. 409, 51 L. J. Ch. 462, and the law of Scotland stands on a similar footing. *McLean* v. *Clydesdale Banking Co.* (H. L. 1883), 9 App. Cas. 95.

Upon the latter branch of the rule now under consideration the law of Scotland differs from the English law. The law in the two countries is stated in the Bills of Exchange Act 1882, s. 53, as follows: "(1) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument. This subsection shall not extend to Scotland. (2) In Scotland where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee."

AMERICAN NOTES.

The subject of the rule is considerably vexed in the United States, and the weight of authority seems to be that a check does not operate as an assignment of the fund, and the drawee is not subject to an action by the payee, a third person, unless he has certified or otherwise accepted or promised to pay the check. To this effect is the uniform holding of the United States Supreme Court, *Bank of Republic* v. *Millard*, 10 Wallace, 152; *Florence Mining Co.* v. *Brown*, 124 United States, 385; and the following: *Northumberland Bank* v. *McMichael*, 107 Penn. St. 460; 51 Am. Rep. 529; *Grammel* v. *Carmer*, 55 Michigan, 201; *Colorado Nat. Bank* v. *Bœttcher*, 4 Colorado, 185; 40 Am. Rep. 142; *Nat. Bank of Rockville* v. *Second Nat. Bank*, 69 Indiana, 479; 35 Am. Rep. 236; *First Nat. Bank of Canton* v. *Dubuque S. W. Ry. Co.*, 52 Iowa, 378; 35 Am. Rep. 280; *Ætna Nat. Bank* v. *Fourth Nat. Bank*, 46 New York, 82; 7 Am. Rep. 314; *Carr* v. *Nat. Security Bank*, 107 Massachusetts, 45; 9 Am. Rep. 6; *Case* v. *Henderson*, 23 Louisiana Annual, 49; 8 Am. Rep. 590; *Hawes* v. *Blackwell*, 107 North Carolina, 196; 22 Am. St. Rep. 870; *Creveling*

v. *Bloomsbury Nat. Bank*, 46 New Jersey Law, 255; *Dickinson* v. *Coates*, 79 Missouri, 251; 49 Am. Rep. 228; *Nat. Com. Bank* v. *Miller*, 77 Alabama, 172; 54 Am. Rep. 50; *Moses* v. *Franklin Bank*, 34 Maryland, 580; *Planters' Bank* v. *Merritt*, 7 Heiskell (Tennessee), 177. In *Lynch* v. *First Nat. Bank*, 107 New York, 171; 1 Am. St. Rep. 803, it was held that a bank is not liable to pay a check drawn thereon by a depositor to a third person unless it has accepted it in writing, observing: "The action arises upon the contract of assignment, and not upon the check." The argument based on want of privity is also pressed in *Bank of Republic* v. *Millard*, 10 Wallace (U. S. Supreme Ct.), 156, the court observing: "If it were true that there was a privity of contract between the banker and the holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor. If such a result should follow the giving of checks, it is easy to see that bankers would be compelled to abandon altogether the business of keeping deposit accounts for their customers."

In *Ætna Nat. Bank* v. *Fourth Nat. Bank*, 46 New York, 82; 7 Am. Rep. 314, the court said: "The relation of bank and customer in respect to deposits is that of debtor and creditor. When deposits are received they belong to the bank as a part of its general funds, and the banker becomes the debtor to the depositor, and agrees to discharge the indebtedness by paying the checks of the depositor, his creditor. The contract between the parties is purely legal, and has no element of a trust in it." Then follows a learned discussion of the question on principle and authority, in which stress is laid on the want of privity between the drawee and the bank.

Holding the contrary doctrine are *Union Nat. Bank* v. *Oceana County Bank*, 80 Illinois, 212; 22 Am. Rep. 185; *Gordon* v. *Muchler*, 34 Louisiana Annual, 608, overruling *Case* v. *Henderson*, *supra*, *Fogarties* v. *State Bank*, 12 Richardson Law (So. Car.), 518; 78 Am. Dec. 468; *Lester* v. *Given*, 8 Bush (Kentucky), 358; *Fonner* v. *Smith*, 31 Nebraska, 107; 28 Am. St. Rep. 510; *Dodge* v. *Nat. Bank*, 20 Ohio St. 234. These cases hold that there is an implied privity of contract between the bank and the payee. In the last case the Court say: "A bank however receives deposits on the express or implied promise to pay them out on the checks of the depositor, and the bank impliedly promises to pay such checks by whomsoever presented," &c. In *Hawes* v. *Blackwell*, 107 North Carolina, 196; 22 Am. St. Rep. 870, although the right of the payee or holder separately to sue the bank was denied, yet it was held that the drawer and he might sue together, subject to its right of set-off against the depositor, and to pay all his outstanding checks of which it has notice before the check in question.

See notes 19 Am. Dec. 422; 45 Am. Rep. 355; 19 Am. St. Rep. 609.

Mr. Daniel (Neg. Inst. secs. 1637–1641), prefers the English doctrine. His views are briefly expressed as follows: "The sole motive often, if not generally, inducing the depositor to place his funds in bank, is the desire to have them in safety where they may be checked on at convenience. The bank receives its reward in the use of the money and in the business attracted in checking it out. And it is the universal understanding between banks and

depositors, arising from the customs of trade, that the check of the latter is to be paid upon presentment, and so the holder receives the check. And the mutual understanding of the parties, although they have not individually concerted together, creates an implied privity, and completes the contract between them." He concludes that the holder may sue the drawer and the bank in one action, or he may sue the drawer on dishonour, or sue the bank for money had and received to his use. But this is not sustained by the great preponderance of the adjudications.

Mr. Morse (Banks and Banking, secs. 499, &c.) is of the same opinion. He says: "It is *the duty of the bank to pay the check*; it is bad faith on its part or negligence not to do it, and the check-holder is injured by its wrongful conduct. What more does the law require as the basis for a right of action? . . . Analyze all the cases in the books of contract or tort, and you will find in the crucible at last only these two bases of legal chemistry." "We hope that it will not be many years before it will cease to be possible to find this blot on the common law. No amount of deciding in the United States Supreme Court, nor in any other chamber of wisdom, can make the unjust just, and as surely as the Dred Scott decision is dead so surely will the decision in the *National Bank of the Republic* v. *Millard* die, with the judges who rendered it." Those judges are all dead but two, but the court still stick to the doctrine thus severely criticised.

It is generally considered that if the transferee presents the check and procures it to be certified, or the banker promises to place it to his credit, "or if he holds any other species of conversation which practically amounts to demanding and receiving a promise of a transfer of credit as equivalent to an actual payment, the effect will be the same as if he had received the money in cash, and the bank's indebtedness to him for the amount will be equally fixed and irrevocable." Morse on Banks and Banking, p. 321, quoted and approved in *National Bank* v. *Burkhardt*, 100 United States, 686; *Oddie* v. *Nat. City Bank*, 45 New York, 735; 6 Am. Rep. 160; *Am. Ex. Nat. Bank* v. *Gregg*, 138 Illinois, 596; 32 Am. St. Rep. 171; *Wasson* v. *Lamb*, 120 Indiana, 514; 16 Am. St. Rep. 344; *Titus* v. *Mechanics' Nat. Bank*, 35 New Jersey Law, 588. But even this is disputed, so far as a mere receiving of the check on deposit is concerned. *National, &c. Trust Co.* v. *McDonald*, 51 California, 61; 21 Am. Rep. 697; *First Nat. Bank* v. *Greenville Nat. Bank*, 84 Texas, 49; *Rapp* v. *National Bank*, 136 Penn. St. 436.

No. 12. — MACKERSY *v.* RAMSAYS, BONARS & CO.

(H. L. 1843.)

RULE.

BANKERS are responsible for money received by a correspondent bank employed by those bankers in the ordinary course of business, to execute the mandate of their customer.

No. 12. — Mackersy v. Ramsays, Bonars, & Co., 9 Cl. & F. 818-820.

Mackersy v. Ramsays, Bonars & Co.

9 Cl & Fin. 818-852.

The respondents were bankers in Edinburgh. In De- [818] cember, 1826, the appellant's brother, Lindsay Mackersy, opened an account with them, and a cash credit, formerly belonging to his father, was transferred to him. He continued to operate upon this cash credit from December, 1826, until the period of his own death in December, 1834.

The account between Mr. L Mackersy and the respondents was kept in the usual manner; that is to say, by means of a pass-book in which all the *operations in the account [*819] were entered, and which was examined, and the balance ascertained and settled periodically.

During this period Mr. L. Mackersy had occasion to draw bills upon Mr. W. Clelland, of Calcutta, and having no agent at Calcutta, he applied to the respondents to negotiate these bills for him. The respondents undertook the negotiation of these bills, and passed them, through their own London agents, to Calcutta, for acceptance and payment. The letter of L Mackersy, containing the first of these bills, was dated 10th August, 1829, and was in the following terms: "I beg leave to enclose my draft on William Lennox Clelland, Esq., barrister, Calcutta, for £100, of this date, payable at 30 days' sight; which be so good as forward for payment, placing the proceeds, when paid, to my credit — To Messrs. Bonars and Co."

The respondents, on the 12th of August, transmitted this bill to Messrs. Coutts and Co., in a letter in these words: —

"We enclose L. Mackersy's draft on W. L Clelland, Calcutta, *pro* £100; which we will thank you to forward for payment, and advise us when you hear it is paid."

And on the 24th of August, 1829, Messrs. Coutts forwarded the bill to Messrs. Palmer and Co., their then correspondents at Calcutta, in a letter, in which they said: —

"Enclosed we trouble you with two bills for collection, the proceeds of which you will please remit us, after making the usual deduction. £100 Lindsay Mackersy, at 30 days, on W. L. Clelland, Esq."

The bill, according to its own tenor and course of remittance, might be expected to be paid about the *month [*820]

of January, 1830. No intelligence of its payment having been received, the respondents, on the 18th of August, 1830, wrote to Messrs. Coutts asking for advice of its payment. This letter was answered by one dated 21st of that month, in these terms: —

"In a letter from Messrs. Palmer and Co., dated 21st December last, they inform us of the acceptance of your remittance, £100, L. Mackersy, at 30 days, on W. L. Clelland; and that, when paid, they would make us a remittance. Since then we have not heard from them on the subject."

The following letters afterwards passed between the parties. The respondents wrote to Messrs. Coutts and Co., on the 20th November, 1830, a letter to this effect: —

"By your letter of 21st August, you informed us that you had been advised of the acceptance of the bill on Mr. Clelland, Calcutta, *p.* £100, but had not received a remittance for the amount. The owner of the bill called on us a few days ago to inquire if any remittance has since been made."

On the 30th of November, 1830, the respondents wrote to Mr. Mackersy: —

"Messrs. Ramsays, Bonars, and Co., with compliments to Mr. Mackersy, in reply to their inquiry, Messrs. Coutts and Co. write: 'We have not received any farther advice from Calcutta regarding the bill on W. L. Clelland for £100.'"

Here the matter rested for some months, at the end of which time the respondents wrote to Messrs. Coutts and Co. a letter, dated 15th July, 1831, in which they said: —

"Mr L Mackersy has again been inquiring of us, whether [*821] you have yet received payment of his draft * on Mr. Clelland, *pro* £100, remitted you on 12th August, 1829. Be so good as to inform us if you have had any information from India on the subject."

The respondents on the 21st July, 1831, sent to Mr. Mackersy the result of this second inquiry: "We have received no communication from Calcutta, *pro* £100 on W. L. Clelland, which was forwarded for collection to Palmer and Co If we should not soon hear from their assignees, we will take an opportunity of writing them on this subject."

"Messrs. Ramsay, Bonars and Co.'s compliments to Mr. Mackersy, and send above an extract from Messrs. Coutts and Co.'s letter by last post, in reply to their inquiry about the bill on Mr. Clelland, Calcutta."

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Mr. Mackersy, on 10th February, 1832, sent to the respondents the second bill, which forms the subject of the present case. It was accompanied with a note to the following effect : —

"I beg leave to enclose draft (first and second of exchange) on W. L. Clelland, of Calcutta, dated 9th current at thirty days' sight, *pro* £100 ; which be so good as forward for payment, — 10th February, 1832." The respondents acknowledged the sending of this second bill in the following terms: "We have your letter of yesterday, covering your draft at thirty days on W. Clelland of Calcutta, *pro* £100, which we will forward for payment, and at maturity place to your credit."

The respondents transmitted this second bill to Messrs. Coutts and Co., enclosed in the following note : "Enclosed is Mr. Lindsay Mackersy's bill on William L. Clelland, Calcutta, at thirty days, for £100 ; which we will thank you to get forwarded for payment, advising us when the amount is received. * Please [* 822] inform us if you have yet had any communication from the assignees of Messrs. Palmer and Co. relative to the similar bill on Mr. Clelland, *pro* £100, forwarded for payment in August, 1829."

Messrs. Coutts and Co. sent this second bill to Messrs. Alexander and Co., their new agents at Calcutta, whom they likewise requested to make inquiry as to the fate of the former bill, 29th February, 1832.

On 4th December, 1832, Messrs. Coutts and Co. received a letter from Alexander and Co., dated 10th July, 1832, acknowledging the receipt of the second bill, and communicating information from the assignees of Palmer and Co., to the effect that the first bill had been paid to Palmer and Co. on 22d January, 1830, and that the amount was held by the assignees for Messrs. Coutts and Co.

Messrs. Coutts and Co. immediately transmitted this intelligence to the respondents, who again communicated it to Mr Mackersy, by the following letter : —

"We have the pleasure of sending you the above extract of a letter from Messrs. Coutts and Co., received last post, giving an account of the bill on Mr. Lennox Clelland, Calcutta, given to us for negotiation by you in August, 1829. When the amount is received, we will advise you."

"We have received this day (4th December, 1832), from Calcutta, a reply to our inquiry regarding the bill drawn 10th August,

1829, by Lindsay Mackersy on W. L. Clelland, *pro* £100; by which it appears that the amount, s. rupees 1,089, 12, 6, will be paid on our order. We shall send out immediately the required instructions for remittance to us."

Mr. Mackersy wrote, in answer, to the respondents as
[*823] follows: "I feel obliged for the information * contained in your letter of yesterday. You will of course take care that interest from the time at which bills on India are usually paid here, be also recovered, as my correspondent cannot be made to suffer on account of the failure of Messrs. Coutts and Co.'s correspondents. The bill was, I take for granted, paid when due by Mr. Clelland. I have an impression indeed that he advised me of the circumstance, and shall, if necessary, look through my letters to ascertain the fact, or write to him on the subject. I shall be glad to hear from you when you have advices of the payment of my other bill. With your permission I shall leave the balance of my cash account unsettled till then, but should you have any objections, it can be paid up whenever you wish it."

The respondents having received no tidings of the actual recovery by Messrs. Coutts and Co., during the year 1833, of the proceeds of either of the bills, they wrote to Messrs. Coutts and Co., on 11th February, 1834, as follows:—

"By your letter of 4th December, 1832, you informed us that the amount of L. Mackersy's bill on W. L. Clelland, of 10th August, 1829, £100, being s. rupees 1089, 12, 6, was to be paid in Calcutta to your order, and that you would immediately forward the necessary instructions for the remittance of this sum. Be so good as to inform us if you have had advice of this remittance; also if you have been advised of the payment of a similar bill *pro* £100, sent you for negotiation by our letter of 11th February, 1832."

Messrs. Coutts and Co, answered, "We have heard nothing from Calcutta regarding the bill on Mr. W. L. Clelland. 14th February, 1834."

The account current kept by Mr. Mackersy with the
[* 824] respondents was in the meantime open, and * transactions taking place upon the account, and which transactions were entered in the pass-book in the ordinary form.

Upon 14th March, 1834, the respondents wrote Mr. Mackersy, in regard to the account current and the India bills, as follows:—

"We were favoured with your letter of the 11th instant, and

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agreeably to your request send herewith your pass-book, which has been lying with us. The interest, you will observe, was added to the amount on 31st January last, when the sum due by you was £187 4*s.* 11*d.*, and was carried to your debit in a new account. If correct, be so good as sign and return to us the enclosed order for the amount. Having cancelled our receipts, we herewith return your vouchers. In reply to your inquiry as to the bills on the late Mr. Clelland, of Calcutta, we are sorry to have to say that no remittance on account of them has been received by Messrs. Coutts and Co. We wrote them, we may observe, on this subject, on the 11th February last, and their reply was, 'We have heard nothing from Calcutta regarding the bills on Mr. W. L. Clelland.'"

Mr. Mackersy retained the pass-book, but delayed sending the order for the balance until the 7th April, 1834, when he transmitted the order to the respondents, accompanied with the following note: —

"I have to apologise for not sooner returning the enclosed order for £187 4*s.* 11*d.*, being the balance due on my account with you, without reference to my two bills on late Mr. Clelland for £100 each, and interest thereon.

"I am surprised to learn that no remittance in payment of either of these bills has yet reached Messrs. Coutts and Co., as by your letter of 17th December, * 1832, you sent [* 825] me an extract from a letter of theirs, mentioning that, by advices from Calcutta, the amount was ready to be paid to their order. You will, of course, take care that interest is duly accounted for on those bills, which were paid by my correspondent at the time, and the non-remittance of which for so long a period has arisen, I presume, solely from the failure of Messrs. Coutts' agent in Calcutta. This is the more necessary as I have to account with minors, who are but slenderly provided for."

Alexander and Co. failed before they received Messrs. Coutts and Co.'s authority to obtain the proceeds of the first bill from the assignees of Palmer and Co. Alexander and Co. had, however, got payment of the second bill from Mr. Clelland before the bankruptcy.

This state of matters was communicated to the respondents by Messrs. Coutts and Co. in June, 1834; and the respondents immediately put Mr. Mackersy in possession of the information received from Coutts and Co.

Mr. Mackersy wrote to the respondents on 30th June, 1834,

and intimated his intention to claim the contents of the bills from the respondents; but he died in the month of December, 1834, without actually taking any proceedings.

Mr. Mackersy was succeeded in his property by his brother, the present appellant, Mr. William Mackersy.

The respondents continued their correspondence with Messrs. Coutts and Co. regarding the bills, and in the beginning of November, 1835, received a letter from Messrs. Coutts and Co. intimating that the proceeds of the first bill had been actually realised by them through their new agents in Calcutta, Messrs.
[* 826] * Gillanders and Co. In the accounts furnished by the Indian houses, or by the accountants on their bankruptcy, interest appeared to have been regularly calculated and allowed on the bills.

This information was forthwith communicated to the appellant, by the following letter from the respondents: —

"We have to inform you that Messrs. Coutts and Co. now advise us that they have received the proceeds of the bill *pro* £100 on Mr. W. L. Clelland, of Calcutta, handed to us by your late brother Mr. Lindsay Mackersy, for negotiation, and forwarded to India in 1829; amount £106 16 0. This sum accordingly, less commission

in London	£1	0	0			
And postages	1	4	6	2	4	6
Being				£104	11	6

we have placed, of this date, to the credit of your late brother's account."

In June, 1836, the respondents claimed a cash balance from the appellant upon his late brother's account. This balance he insisted ought to be reduced by the amount of the second bill and interest, but they refused to make the deduction.

On the 13th October, 1836, the respondents instituted proceedings against the appellant for payment of the balance due upon the cash account, amounting as at 11th May, 1836, to £97 19*s.* 11*d.*

The appellant put in pleas to the following effect: 1. That the pursuers were, in the circumstances condescended on, liable to the defender's brother for the interest on the first-mentioned India bill as claimed, as also for the principal sum contained in the second bill and interest: and the balance sued for is thereby
[* 827] extinguished. — 2. That at least the pursuers were * and

are bound to show that said sums of interest and principal have not been recovered by their correspondents and themselves, and that due diligence was used in these transactions by them and their correspondents, and to furnish the defender with documents and information sufficient to enable him to recover what was due on the said bills; and the defender is in the meantime entitled to retention of the sum sued for.

To these two pleas the respondents replied, "The pursuers are not, under the circumstances condescended on, responsible for any part of the loss which has arisen, or yet may arise, upon the India bills referred to by the defender."

The appellant afterwards added to the record the following plea: "Under the circumstances now discovered, it is sufficiently established that the pursuers, and those for whom they are answerable, did not employ due diligence in recovering the sums of money in question, and they are thus liable to make good the deficiency thence arising."

The respondents replied that, "The pursuers are not liable for any alleged negligence or irregularity on the part either of Coutts and Co., or of the Indian agents, in respect the pursuers fully discharged their duty by timeously transmitting the bills to Coutts and Co., with proper directions as to the purpose of their transmission, and have given the defender credit for all the sums actually received by them on account of the bills."

The defence, however, principally relied upon by the appellant on the argument, was that involved in his original pleas, viz: That the respondents become responsible for the contents of both bills from the time at which they were respectively paid by the acceptor in India, and that consequently the respondents were * now bound to give credit for the whole amount of [* 828] the second bill, together with interest upon the first bill.

The respondents maintained that this plea was inconsistent with the true nature of the arrangement under which they received the bills from Mr. Mackersy, it being clear from the correspondence that they merely took the bills for the purpose of negotiation, and upon the understanding that they were to be chargeable only for the proceeds of the bills when actually paid to them or to their immediate agents Messrs. Coutts and Co.; and they likewise founded upon a prior judgment in a similar case between *Miss Campbell* and the *Royal Bank of Scotland*, 2 Dunl. & Bell, 1010.

The LORD ORDINARY (Lord COCKBURN), on the 21st December, 1839, pronounced an interlocutor or judgment sustaining the appellant's defence. He appended the following note: —

"NOTE. — The pursuers found on the case *Campbell* against the *Royal Bank*, as lately decided by Lord MONCRIEFF. The LORD ORDINARY could not venture to differ from a deliberate judgment pronounced by that Judge on such a matter, without the greatest diffidence and reluctance. But in one vital fact the two questions are essentially different. It appears from Lord MONCRIEFF'S interlocutor and note (which are all that the LORD ORDINARY has seen of that case), that the bill there was given to the bank simply and exclusively for the gratuitous purpose of being negotiated. It was more an office of friendship than anything else that the bank undertook. Lord MONCRIEFF was of opinion, that in these circumstances, there being no blame attached to the negotiators, the money which was lost in the hands of the person whom they reasonably and prudently employed in Calcutta, perished to the owner.

[* 829] * "But here the defender (or his author) was the debtor of the pursuers, and they took from him two bills on Calcutta, on account of his debt, stating, 'We shall forward them for payment, and, at maturity, place to your credit.' They sent the bills to India through the house of Coutts and Co. of London; the intervention of which house, however, makes no difference in the case, because Coutts and Co. were employed solely by the pursuers, and were the agents as much as the persons in Calcutta to whom Coutts and Co. sent the bills. These were matters with which the defender had no right to interfere. He had given two bills on account of his debt; the creditors took these bills and engaged to negotiate them, for which negotiation both they and their foreign agent charge commission: now both bills were paid to persons empowered by the pursuers through Coutts and Co. to receive payment; at that moment the law placed them to the credit of the defender. But the interest of the first bill, and both principal and interest of the second, were lost in the hands of the Indian agents, who failed after receiving payment, but one of them not till about five months thereafter.

"The LORD ORDINARY thinks that, whatever the pursuers may make of Coutts and Co., the loss in settling between them and the defender must fall upon them. The substance of the opposite plea

is, that he had no right to be credited with the contents of the bill till they reached maturity, and that they could only do so by the money reaching the pursuers. In one view this is not sound, but in another it is, for the money did reach the pursuers when it was paid to their agents. — (Initialed) H. C."

The respondents carried this interlocutor before the Inner House, where it was reversed, and the Court * by [* 830] two interlocutors gave judgment for the respondents. The present appeal was then brought.

[After argument the following judgments were pronounced.]

Lord CAMPBELL: I am of opinion that the interlocutor [844] of the LORD ORDINARY was right, and that the judgment of the Court of Session which reversed it, cannot be supported. It appears that Ramsay and Co., in the way of their business as bankers, were employed for reward by a customer, with whom they had a cash account, to obtain payment of a bill of exchange drawn on a person in Calcutta, payable to their order. They did not become the owners of the bill, or discount it, but they were to receive payment of it for Mackersy, having a lien on the bill and its proceeds for any balance due to them from him. The payment was to be made to persons to be employed by them, to whom the bill must be indorsed. Mackersy was not to interfere with the proceeds of the bill till he was credited, or entitled to be credited by them for its amount. They employed as their * agents Coutts and Co., who employed Alexander and Co., [* 845] who duly received payment from the acceptor, and having given Coutts and Co. credit in account, five months afterwards became bankrupt. I conceive that these circumstances amount in point of law, to a payment to Ramsay and Co., and that they were bound to place the amount to the credit of Mackersy.

The general rule of law, that an agent is liable for a sub-agent employed by him, is not confined to cases where the principal has reason to suppose that the act may be done by the agent himself without employing a sub-agent; and here I conceive that the money is to be considered as received by Coutts and Co., whose correspondents actually received it at Calcutta, and credited them with the amount five months before their failure. Mackersy could not have interfered with the money either in the hands of Alexander and Co. or of Coutts and Co. There was no privity between him and either of those houses; but payment to Alexander and

Co. was payment to Coutts and Co., and payment to Coutts and Co. was payment to Ramsay and Co., the respondents. I approve of the expression of the LORD ORDINARY, when speaking of the receipt of the money by Coutts' correspondents at Calcutta, that "at that moment the law placed it to the credit of the defender."

The Judges of the First Division truly say that Ramsay and Co. had not become the owners of the bill. If by *vis major* or *casus fortuitus*, the bill had been destroyed before it reached Calcutta, or if Clelland the drawer had become insolvent before it was paid, the loss would not have been theirs. But they might, nevertheless, be agents to receive payment, and be liable for the amount when payment had been actually received.

[* 846] * We have been much pressed with the case of *Campbell* v. *The Bank of Scotland*, decided by Lord MONCRIEFF, a judge for whose opinion I should entertain as much deference as for the opinion of any judge in Scotland or England; but the facts of the case are not distinctly stated, so that we do not accurately know on what circumstances that judgment proceeded. If he had decided that in a case like this the bankers were not liable for the money received by their correspondents, I should have been bound to say, with all respect, that he had come to an erroneous conclusion.

I therefore move your Lordships that the interlocutors of the First Division of the Court of Session complained of be reversed, and that the interlocutor of the LORD ORDINARY, assoilzieing the defender with the costs, be affirmed.

Lord COTTENHAM: This case, though it does not appear to me to raise any question of difficulty, has acquired a considerable degree of importance from the manner in which the rule of law involved in it has been viewed in Scotland. That rule of law is of general application, and I do not find any special circumstances here which take the case out of its operation. The correspondence, if it proves any special contract, establishes only such an agreement as the law would have inferred from the dealings between the parties. The appellant, having an open cash account with Messrs. Ramsay, transmitted to them two bills, drawn by himself upon Mr. Clelland of Calcutta, and made payable to them. This is an authority to them to receive the money, which in the ordinary course of business they proceeded to do, and the money was paid in pursuance of the order. From the time the bills were sent

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to the pursuers, the *appellant did not interfere. It was [*847] not intended that he should do so, nor indeed could he have done so, as none of the intended agents acted under his authority; he therefore had no control over them. All that Mackersy undertook to do by the bills, has been accomplished. His debtor in Calcutta has, as directed, paid the sum for which the bills were drawn. In the ordinary course of business, therefore, the bankers to whom he delivered the bills and to whom they were payable, were bound to credit him with the amount received, and by these letters they in effect agreed to do so.

The money in the end was lost, not by any failure on the part of Mackersy or of the party who had by the bills been ordered to pay the amount to the bankers, the drawers, but by the insolvency of the person in Calcutta who had actually received the proceeds of the bills; and this loss, the Court of Session has said, is to fall upon the drawer.

The learned Judges below do not altogether agree as to the ground upon which this judgment is founded. Lord GILLIES thinks that the contract of the bankers was to give the credit only upon getting the payment themselves, which, as such transactions are always matters of account, would never happen; that is, if he means by payment, the receipt of the identical sum paid by the acceptor. The LORD PRESIDENT, indeed, puts the case upon much the same ground, saying that he could not hold that payment to Alexander and Co. in Calcutta, was the same thing as payment to the pursuer in Edinburgh. But Lord FULLARTON rather relies upon the admitted fact that the bankers did not discount the bills, saying, that the result of the cases quoted was, that unless there was some clear indication of the intention of the parties at the *time that the bills remitted should be taken by [*848] the bankers on discount or terms equivalent to discount, they must be treated as remitted to, and taken by, the bankers as mere agents; and that he thought that there was no such indication in this case. And Lord MACKENZIE says, the case turns upon this, that the bankers did not agree to take the bills as payment in India; and the interlocutor of Lord MONCRIEFF, in *Campbell* v. *The Royal Bank*, upon which this decision now under consideration appears to be principally rested, draws a distinction between the cases which were cited and the case before him, because in that case it must have been known that the agent could not himself have received the money.

Now, certainly, the present was not a case of discount, and there was no such special contract as is referred to by Lord MACKENZIE; and it must have been known to the appellant, that Messrs. Ramsay and Co. could not themselves go to Calcutta and receive the money. But none of these circumstances appears to me to be necessary, in order to entitle the appellant to have credit with Messrs. Ramsay for the proceeds of those bills, actually paid by his debtor, the acceptor of the bills. I cannot distinguish this case from the ordinary transactions between parties having accounts between them. If I send to my bankers a bill or draft upon another banker in London, I do not expect that they will themselves go and receive the amount, and pay me the proceeds; but that they will send a clerk in the course of the day to the clearing-house, and settle the balances, in which my bill or draft will form one item. If such clerk, instead of returning to the bankers with the balance, should abscond with it, can my bankers refuse to credit me with the amount? Certainly not. If [* 849] the * bill had been drawn upon a person at York, the case would have been the same; although, instead of the bankers employing a clerk to receive the amount, they would probably employ their correspondent at York to do so; and if such correspondent received the amount, am I to be refused credit because he afterwards became bankrupt whilst in debt to my bankers? If the balance were not in favour of my bankers, the question would not arise; so that my title to the credit would depend upon the state of the account between my bankers and their correspondent. The amount in money was received by the correspondent of my bankers at York; as between me and them, it was received by them, and nothing which might subsequently take place could deprive me of the right to have credit with them for the amount.

If this be so in a transaction between London and York, it must be the same in one between Edinburgh and Calcutta, not by virtue of any special contract, but as resulting from the letters which raised the undertaking to procure payment of the bill, if it should be accepted and honoured, and to credit the proceeds. It was accepted and honoured, and the proceeds received by those employed for the purpose by them; and the appellant's title to credit for the amount was thereby perfected. If there was any negligence in the conduct of the parties actually employed to receive

the money, it could only affect those by whom they were so immediately employed, for certainly they were not the agents of the appellant: over them he had no control. The money received by Alexander and Co. properly formed an item in the account between them and Messrs. Coutts and Co., their employers. If a larger balance had been due to them from Messrs. Coutts and Co. than the * amount of the money so received, they [* 850] would have been entitled to claim the whole, as in fact they did retain part.

To solve the question in this case, it is not necessary to go deeper than to refer to the maxim *qui facit per alium, facit per se.*

Ramsay and Co. agreed, for consideration, to apply for payment of the bill: they necessarily employed agents for that purpose, who received the amount; their receipt was in law a receipt by them, and subjected them to all the consequences. The appellant, with whom they so agreed, cannot have anything to do with the conduct of those whom they so employed, or with the state of the account between different parties engaged in this agency.

These principles and these consequences were so much and so properly felt, that they were scarcely disputed at the bar; but it was urged that the appellant had not put forward this case in the proceeding in such a manner as to entitle him to the benefit of it. I have for this purpose carefully examined the proceedings, and I think the objection is not well grounded. The defence states the fact of the two bills having been paid to Alexander and Co., the agents of Coutts and Co.; and the first plea in law raises the question, that under the circumstances Messrs. Ramsay are liable for the money so received. There is far too much in the papers about negligence, but I think there is quite sufficient to raise the question on which this case must depend; namely, the receipt by the agent being a receipt by the principal. The Lord Ordinary appears to me to have taken a very correct view of the case, in saying that both bills were paid to persons empowered by the pursuers to receive payment; at that moment the law placed * them to the credit of the defender. On these [* 851] grounds it appears to me that the interlocutors of the Court should be reversed, and that of the Lord Ordinary substituted in its place.

Mr. S. Graham asked if it was their Lordships' intention that the appellant should have his costs in the Court below.

Lord CAMPBELL: We pronounce the judgment which ought to have been pronounced by the First Division.

Lord BROUGHAM: I have no doubt about this. I shall take no part in the discussion on the merits, for I was not present at the argument; but I have no doubt that, your Lordships feeling it right to reverse the interlocutor of the Inner House, and to affirm the interlocutor of the LORD ORDINARY, the costs of the proceedings in the Inner House ought to be given. You never give the costs against a party coming to defend and sustain a decree in his favour; therefore the appellant never gets his costs here: but in this case we are putting ourselves in the place of the Court below, and giving those costs which the party ought to have had there I think that is quite right.

Lord COTTENHAM: We have affirmed the judgment of the LORD ORDINARY, and the necessary effect of our so doing is to give the costs of the hearing in the Court below.

The following order was afterwards entered on the journals:

"That the said interlocutors be reversed, and that the in-
[*852] terlocutor of the LORD ORDINARY, of *the 21st December, 1839 (mentioned in the appeal), be affirmed. And it is further ordered that the pursuers in the action in the Court of Session (respondents here) do pay, or cause to be paid, to the defender in such action (appellant here), the costs of the proceedings incurred by him in prosecuting the reclaiming note before the first division of the Court of Session. And it is further ordered, that the cause be remitted back to the Court of Session, to do therein as shall be just and consistent with this judgment." Lords' Journals, 9th March, 1843.

ENGLISH NOTES.

Branch banks in general form, with the head office, but one corporation or firm. *Prince* v. *Oriental Bank Corporation* (P. C. 1878), 3 App. Cas. 325, 47 L. J. P. C. 42.

It is no negligence for the corespondent to follow the ordinary course of business. *Russell* v. *Hankey* (1794), 6 T. R. 12, 3 R. R. 102.

AMERICAN NOTES.

The question whether a bank is absolutely liable for the negligence of its correspondent bank, in making a collection at another and distant place, is the subject of conflicting decisions in the United States. The state of the de-

cisions is well summarized in one of the latest cases. *First Nat. Bank* v. *Sprague*, 34 Nebraska, 318; 33 Am. St. Rep. 641; 15 Lawyers' Reports Annotated, 498, as follows: —

"The Courts, as well as the text-writers, differ widely upon the question presented. It is held by the Courts of the United States, New York, New Jersey, Ohio, Indiana, Minnesota, and perhaps others, following the English cases, that where a note or bill is received for collection by a bank, and by it remitted to a correspondent at a distance for presentment and demand, the latter is the agent of the transmitting bank only, which will be liable for the default of its correspondent. This view is also approved by Mr. Daniel in his work on Negotiable Instruments, vol. i. 324. The leading case holding thus is *Allen* v. *Merchants' Bank*, 22 Wend. 215; 34 Am. Dec. 289, in which, by a vote of fourteen to ten senators, the opinion of Chancellor Walworth in the same case was overruled, and which has then been followed and approved by the Court of Appeals in numerous cases. It will be observed too that since this rule was adopted by the Supreme Court of the United States, *Hoover* v. *Wise*, 91 U. S. 308, dissenting opinions were filed by Justices Miller, Clifford, and Bradley. Mr. Freeman, in a note to *Allen* v. *Merchants' Bank*, 34 Am. Dec. 315, while expressing a preference for the rule above stated, says: 'The preponderance of authority is against the principal case, and in favour of the rule that the liability of a bank, taking a note or bill for collection which is payable at a distance, extends merely to the selection of a suitable and competent agent at the place of payment, and to the transmission of the paper to such agent with proper instructions, and that the corresponding bank is the agent, not of the transmitting bank, but of the holder, so that the transmitting bank is not liable for the default of the correspondent, when due care has been used in selecting such correspondent. The foregoing proposition is sustained by the following cases: *Fabens* v. *Mercantile Bank*, 23 Pickering (Mass.) 330; 34 Am. Dec. 59; *Dorchester, &c. Bank* v. *New England Bank*, 1 Cushing (Mass.) 177; *Jackson* v. *Union Bank*, 6 Harris & Johnson (Maryland), 121; *Citizens' Bank* v. *Howell*, 8 Maryland, 530; 63 Am. Dec. 714; *East Haddam Bank* v. *Scovil*, 12 Connecticut, 303; *Lawrence* v. *Stonington Bank*, 6 Connecticut, 521; *Millikin* v. *Shapleigh*, 36 Missouri, 596; 88 Am. Dec. 171; *Daly* v. *Butchers', &c. Bank*, 56 Missouri, 94; 17 Am. Rep. 663; *Ætna Ins. Co.* v. *Alton City Bank*, 25 Illinois, 243; 79 Am. Dec. 328; *Bank of Louisville* v. *First Nat. Bank*, 8 Baxter (Tennessee), 101; 35 Am. Rep. 691; *Guelich* v. *National St. Bank*, 56 Iowa, 434; 41 Am. Rep. 110; *Stacy* v. *Dane Co. Bank*, 12 Wisconsin, 629; *Tiernan* v. *Commercial Bank*, 7 Howard, (Mississippi), 648; 40 Am. Dec. 83; *Bowling* v. *Arthur*, 34 Mississippi, 41; *Mechanics' Bank* v. *Earp*, 4 Rawle (Pennsylvania), 384; *Baldwin* v. *Bank of Louisiana*, 1 Louisiana Annual, 13; 45 Am. Dec. 72; *Hyde* v. *Planters' Bank*, 17 Louisiana, 560; 36 Am. Dec. 621; *Bank of Lindsborg* v. *Ober*, 31 Kansas, 599. The doctrine of these cases is expressly approved in Morse on Banking, 3d ed. c. 17. . . .

"Whatever may have been the reasons arising out of the business methods existing at the time, *Allen* v. *Merchants' Bank*, 22 Wendell (New York), 215; 34 Am. Dec. 289, was decided, for the rule adopted therein, the reason for such a

rule is wanting in view of the present changed conditions. Banks, as a general rule, have now no facilities for making collections at distant points not enjoyed by the business public at large. Formerly they may have enjoyed a monopoly of information relative to location, names, and credits of banks at distant or remote points. To-day, however, business men, by means of the information derived from the press and the numerous directories at their command, may collect their bills through the medium of banks at the place of payment as cheaply, safely, and expeditiously as their local banks.

"The theory of those cases which hold the remitting bank liable is, that the advantage of exchange between different points is a sufficient inducement for banks to assume the liability sought to be imposed. This may be conceded so far as the inconvenience and costs of collection is concerned, but to us it seems wholly inadequate as a consideration for an implied undertaking to insure against loss on account of the fraud or insolvency of a correspondent.

"The Supreme Court of Tennessee, in *Bank of Louisville* v. *First Nat. Bank*, 8 Baxter, 101; 35 Am. Rep. 691, after a thorough examination of the cases on the subject, summarizes as follows: 'The more reasonable and just construction of the undertaking of the bank in which the bill is deposited for collection is that when the bill is payable at another and distant place, the bank so receiving the bill discharges itself of liability by transmitting the same, in due time, to a suitable and reputable bank or other agent at the place of payment; and in such case it is manifest that a subagent must be employed, and the assent of the principal is implied, as it cannot be said that the receiving bank was expected or bound to send one of its own officers to the distant point of payment for the purpose of personally attending to the collection for the very inadequate compensation usually paid to banks for such service.' To the views thus expressed we give our unqualified assent."

To the same effect are also *Bank* v. *Cummings*, 89 Tennessee, 609; 24 Am. St. Rep. 618; *Ætna Ins. Co.* v. *Alton City Bank*, 25 Illinois, 243; 79 Am. Dec. 328; *Manuf. Nat. Bank* v. *Continental Bank*, 148 Massachusetts, 553; 12 Am. St. Rep. 598.

This view is very strongly advocated by Mr. Morse (Banks and Banking, 406–417), and he criticises the decision in *Allen* v. *Merchants' Bank* at considerable length.

On the other hand, the English rule is followed in *Streissguth* v. *National, &c Bank*, 43 Minnesota, 50; 19 Am. St. Rep. 213; 7 Lawyers' Reports Annotated, 363, citing the principal case; *German Nat. Bank* v. *Burns*, 12 Colorado, 539; 13 Am. St. Rep. 247; *St. Nicholas Bank* v. *State Nat. Bank*, 128 New York, 26; 13 Lawyers' Reports Annotated, 241; *Simpson* v. *Waldby*, 63 Michigan, 439; *Titus* v. *Mechanics' Nat. Bank*, 35 New Jersey Law, 588; *Reeves* v. *State Bank*, 8 Ohio St. 465; *Wingate* v. *Mechanics' Bank*, 10 Penn. St. 104; *Am. Express Co.* v. *Haire*, 21 Ind. 4; 83 Am. Dec. 334; *Exchange Nat. Bank* v. *Third Nat. Bank*, 112 United States, 276 (expressly approving *Van Wart* v. *Wooley*, 3 B. & C. 439); and *Power* v. *First Nat. Bank*, 61 Montana, 251 (approving the principal case), — a very exhaustive review of the authorities. And see note to *Allen* v. *Merchants' Bank*, 22 Wendell (New York), 215; 34 Am. Dec. 289, 307, and notes to the cases cited above from the American Decisions, American Reports, and

American State Reports, and in 7 Lawyers' Reports Annotated, 856; 13 id. 241; 8 id. 42.

Mr. Daniel (Neg. Inst. sect. 342) says, approving this latter view: "Any other rule opens the door to carelessness in the conduct of banking business, which should be conducted with every safeguard to the customer who intrusts his business to the keeping of such agents. If they are averse to dealing with distant and unknown parties, they should decline undertaking the collection or handling of the paper; and if they assume it, they should do so for sufficient compensation, and be held responsible."

END OF VOL. III.

NOTES
ON
ENGLISH RULING CASES
CASES IN 3 E. R. C.

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3 E. R. C. 1, TAPLING v. JONES, 20 C. B. N. S. 166, 11 H. L. Cas. 290, 11 Jur. N. S. 309, 23 L. J. C. P. N. S. 342, 12 L. T. N. S. 555, 13 Week. Rep. 617.

Easement of light and air.

Cited in Whelan v. R. 28 U. C. Q. B. 108, as to right to obstruct ancient lights.

Cited in note in 15 E. R. C. 280, on necessity of purchaser observing restrictive stipulations as to light known to him.

— Structural changes affecting right.

Cited in City Nat. Bank v. Van Meter, 59 N. J. Eq. 32, 45 Atl. 280, holding where complainant has acquired an easement over defendants land for the ingress of light and air to a window of his building, he does not surrender such right by tearing down the old building for the purpose of erecting a new one where it clearly appears from the plans for the new building that a window will be in substantially the same place as the window in the old building, National Provincial Plate Glass Ins. Co. v. Prudential Assur. Co. L. R. 6 Ch. Div. 757, 46 L. J. Ch. N. S. 871, 37 L. T. N. S. 91, 26 Week. Rep. 26, holding any substantial alteration in the plans of the window destroys the right; Dicker v. Popham, 63 L. T. N. S. 379, holding mere change in use of a room will not deprive party of his right to access of light; Newson v. Pender, L. R. 27 Ch. Div. 43, 52 L. T. N. S. 9, 33 Week. Rep. 243, 3 Eng. Rul. Cas. 57; Scott v. Pape, L. R. 31 Ch. Div. 554, 55 L. J. Ch. N. S. 426, 54 L. T. N. S. 399, 34 Week. Rep. 465, 50 J. P. 645; Ecclesiastical Comrs. v. Kino, L. R. 14 Ch. Div. 213, 49 L. J. Ch. N. S. 529, 42 L. T. N. S. 201, 28 Week. Rep. 544; Greenwood v. Hornsey, L. R. 33 Ch. Div. 471, 55 L. J. Ch. N. S. 917, 55 L. T. N. S. 135, 35 Week. Rep. 163,—holding the mere alteration of a building containing ancient lights without evidence of intention to abandon does not imply an abandonment of the statutory right under the Prescription Act.

Distinguished in Heath v. Bucknall, L. R. 8 Eq. 1, 38 L. J. Ch. N. S. 372, 20 L. T. N. S. 549, 17 Week. Rep. 755, holding where owner of a building having ancient lights replaces them by new, larger windows, the court will not interfere by injunction to restrain the owner of the servient tenement from obstructing; Fowlers v. Walker, 49 L. J. Ch. N. S. 598, 42 L. T. N. S. 356,

28 Week. Rep. 579, holding easement lost where cottages were pulled down and warehouse was erected, windows whereof were not proven to have been same.

Disapproved in Lanfranchi v. Mackenzie, L. R. 4 Eq. 421, 36 L. J. Ch. N. S. 518, 16 L. T. N. S. 114, 15 Week. Rep. 614, holding plaintiff not entitled to easement of increased light by reason of change in use of premises.

— Prescriptive right.

Cited in Feigenbaum v. Jackson, 8 B. C. 417, holding a right to the access and use of light to a house cannot be acquired under the Prescription Act by the lapse of time during which the owner of the house or his occupying tenant is also occupier of the land over which the right would extend; Re Cockburn, 27 Ont. Rep. 450, as to necessity of the enjoyment of easement of light resting on right; Colls v. Home & Colonial Stores [1904] A. C. 179, 73 L. J. Ch. N. S. 484, 53 Week. Rep. 30, 90 L. T. N. S. 687, 20 Times L. R. 475, as to time in which acquired under Prescription Act; Courtauld v. Legh, L. R. 4 Exch. 126, 38 L. J. Exch. N. S. 45, 19 L. T. N. S. 737, 17 Week. Rep. 466; Jordeson v. Sutton, S. & D. P. Gas Co. [1898] 2 Ch. 614, 67 L. J. Ch. N. S. 666, 79 L. T. N. S. 478, 47 Week. Rep. 222, 63 J. P. 137, 14 Times L. R. 567; Wheaton v. Maple, [1893] 3 Ch. 48, 62 L. J. Ch. N. S. 963, 69 L. T. N. S. 208, 41 Week. Rep. 677,—as to right to ancient lights depending on positive enactment.

Distinguished in Hall v. Evans, 42 U. C. Q. B. 190, holding to entitle one to easement of light he must have enjoyed the access or use of the light at the same place for the statutory period.

— Remedy for obstruction.

Cited in Straight v. Burn, L. R. 5 Ch. 163, 39 L. J. Ch. N. S. 289, 22 L. T. N. S. 831, 18 Week. Rep. 243, as to equitable protection of; Aynsley v. Glover, 44 L. J. Ch. N. S. 523, L. R. 10 Ch. 283, 32 L. T. N. S. 345, 23 Week. Rep. 457, 3 Eng. Rul. Cas. 19, affirming 43 L. J. Ch. N. S. 777, L. R. 18 Eq. 544, 31 L. T. N. S. 219, 23 Week. Rep. 47, holding enlarged windows need not be diminished to original size to get injunction.

Prescription.

Cited in Simpson v. Godmanchester Corp. [1897] A. C. 696, 66 L. J. Ch. N. S. 770, 77 L. T. N. S. 409, holding an easement, exercised for the benefit of the dominant estate, is not invalid merely because from the very nature of the right its exercise by the dominant estate confers some benefit upon other tenements; American Bank Note Co. v. New York Elev. R. Co. 129 N. Y. 252, 29 N. E. 302, holding when a trespasser defends by setting up a prescriptive right if he fails to show such right to the extent of the user claimed and proved his defense fails.

Increasing servitudes.

Cited in Frechette v. La Compagnie Manufacturiere de St. Hyacinthe, L. R. 9 App. Cas. 170, 53 L. J. P. C. N. S. 20, 50 L. T. N. S. 62, holding where plaintiffs, being entitled to a flow of water from their land, executed certain works which had the effect of accumulating the volume of water, they had no right to demand a free course for the increase of water sent down by them.

Right to change easement.

Cited in note in 15 L.R.A. 94, on right to change easement.

3 E. R. C. 19, AYNSLEY v. GLOVER, 44 L. J. Ch. N. S. 523, L. R. 10 Ch. 283, 32 L. T. N. S. 345, 23 Week. Rep. 457, affirming the decision of the Master of the Rolls, reported in 43 L. J. Ch. N. S. 777, L. R. 18 Eq. 544, 31 L. T. N. S. 219, 23 Week. Rep. 147.

Prescriptive ancient lights.

Cited in Backus v. Smith, 5 Ont. App. Rep. 348, as to acquirement by prescription; Smith v. Baxter [1900] 2 Ch. 138, 69 L. J. Ch. N. S. 437, 48 Week. Rep. 458, 82 L. T. N. S. 650, as to establishing title under lost grant.

Cited in note in 3 E. R. C. 33, on prescriptive right to ancient lights.

The decision of the Master of the Rolls was cited in Atty.-Gen. v. Queen Anne Garden & Mansions Co. 60 L. T. N. S. 759, 37 Week. Rep. 572, holding light required for a special purpose is not protected under the Prescription Act unless it has been previously used for that special purpose or a like purpose or there is a reasonable probability of its being so used; Moore v. Hall, L. R. 3 Q. B. Div. 178, 47 L. J. Q. B. N. S. 334, 38 L. T. N. S. 419, 26 Week. Rep. 401, holding right to ancient lights not to be measured by purpose for which light was actually used.

— Abandonment by structural change.

Cited in Dicker v. Popham, 63 L. T. N. S. 379; Warren v. Brown [1900] 2 Q. B. 722, 69 L. J. Q. B. N. S. 842, 49 Week. Rep. 208, 83 L. T. N. S. 318, 16 Times L. R. 549; Colls v. Home & Colonial Stores [1904] A. C. 179, 73 L. J. Ch. N. S. 484, 53 Week. Rep. 30, 90 L. T. N. S. 687, 20 Times L. R. 475,— as to abandonment of, by change of use of room; Fowlers v. Walker, 49 L. J. Ch. N. S. 598, 42 L. T. N. S. 356, 28 Week. Rep. 579, holding where the building was torn down and there was no evidence as to the position of the ancient lights the easement was lost.

The decision of the Master of the Rolls was cited in Greenwood v. Hornsey, L. R. 33 Ch. Div. 471, 55 L. J. Ch. N. S. 917, 55 L. T. N. S. 135, 35 Week. Rep. 163, holding the mere alteration of a building containing ancient lights without evidence of intention to abandon does not imply an abandonment of the statutory right under the Prescription Act.

Prescription under statute.

Cited in Re Cockburn, 27 Ont. Rep. 450; Dalton v. Angus, L. R. 6 App. Cas. 740, 50 L. J. Q. B. N. S. 689, 10 Eng. Rul. Cas. 98,—on easements under Prescription Acts; Gardner v Hodgson's Kingston Brewery Co. [1903] A. C. 229, 72 L. J. Ch. N. S. 558, 52 Week. Rep. 17, 88 L. T. N. S. 698, 19 Times L. R. 458, as to Prescription Act not taking away any modes of acquiring easements.

Effect upon easement of unity of possession.

Cited in note in 1 Brit. Rul. Cas. 477, on effect upon easement of unity of possession.

Injunction to protect easements.

Cited in note in 3 E. R. C. 54, 74, on right to enjoin obstruction of ancient light.

The decision of the Master of the Rolls was cited in Mattlage v. New York Elev. R. Co. 67 How. Pr. 232, 14 Daly, 1, holding that elevated railway company may be prevented by injunction from erecting stair cases over streets that intersect line of railroad which causes interception of light; Sklitzsky v. Cranston, 22 Ont. Rep. 590, holding injunction will issue to prevent obstruction to use of a way; Starkie v. Richmond, 155 Mass. 188, 29 N. E. 770; Lynch v. Union Inst. for Sav. 159 Mass. 306, 20 L.R.A. 842, 34 N. E. 364; Greer v.

Van Meter, 54 N. J. Eq. 270, 33 Atl. 794; Hall v. Evans, 42 U. C. Q. B. 190; Stanley v. Shrewsbury, L. R. 19 Eq. 616, 44 L. J. Ch. N. S. 389, 32 L. T. N. S. 248, 23 Week. Rep. 678; Holland v. Worley, L. R. 26 Ch. Div. 578, 54 L. J. Ch. N. S. 268, 50 L. T. N. S. 526, 32 Week. Rep. 749, 49 J. P. 7; Martin v. Price [1894] 1 Ch. 276, 63 L. J. Ch. N. S. 209, 7 Reports, 90, 70 L. T. N. S. 202, 42 Week. Rep. 262,—as to when injunction will issue.

— Mandatory writ to remove building.

The decision of the Master of the Rolls was cited in Tucker v. Howard, 128 Mass. 361, holding a court of equity will not compel an innocent plaintiff, whose right of passageway has been encroached upon by the building of a wall therein to his substantial injury, to sell his right at a valuation; but will compel the wrongdoer to restore the premises, as nearly as possible, to their original condition; Levi v. Worcester Consol. Street R. Co. 193 Mass. 116, 78 N. E. 853, holding injunctive mandate to restore condition of easement will not be granted if oppressive; Institution for Savings v. Puffer, 201 Mass. 41, 87 N. E. 563, to the point removal of erections wrongfully placed on land of person, if act has been done innocently and injury by removal would be greatly disproportionate to any gain to plaintiff, removal would not be ordered but plaintiff would be left to remedy at law.

The decision of the Master of the Rolls was disapproved in Mackey v. Scottish Widow's Fund Assur. Soc. Ir. Rep. 10 Eq. 114, holding court may order removal of completed building when it obstructs ancient lights.

— Damages in lieu of injunction.

The decision of the Master of the Rolls was cited in Cooper v. Laidler [1903] 2 Ch. 337, 72 L. J. Ch. N. S. 578, 51 Week. Rep. 539, as to when court will give damages instead of granting an injunction.

3 E. R. C. 37, YATES v. JACK, 12 Jur. N. S. 305, 35 L. J. Ch. N. S. 539, L. R. 1 Ch. 295, 14 L. T. N. S. 151, 14 Week. Rep. 618, reversing the decision of the Vice Chancellor, reported in 13 L. T. N. S. 17.

Ancient lights.

Cited in Burke v. Smith, 69 Mich. 380, 8 L.R.A. 184, 37 N. W. 838, as to the presumption to right to light; Martin v. Headon, L. R. 2 Eq. 425, 35 L. J. Ch. N. S. 602, 12 Jur. N. S. 387, 14 L. T. N. S. 585, 14 Week. Rep. 723, holding there is no distinction between right to light and air in regard to town and country houses; Dicker v. Popham, 63 L. T. N. S. 379, as to effect of change of use of premises on right to light.

— Quantity of light prescribed.

Cited in Hackett v. Baiss, L. R. 20 Eq. 494, 45 L. J. Ch. N. S. 13; Lanfranchi v. Mackenzie, L. R. 4 Eq. 421, 36 L. J. Ch. N. S. 518, 16 L. T. N. S. 114, 15 Week. Rep. 614,—as to amount of the user; Calcraft v. Thompson, 15 Week. Rep. 387, as to quantum of injury before the courts will interfere by granting relief generally; Ambler v. Gordon [1905] 1 K. B. 417, 74 L. J. K. B. N. S. 185, 53 Week. Rep. 300, 92 L. T. N. S. 96, 21 Times L. R. 205, holding sufficient amount of light for ordinary purposes all that plaintiff could acquire by prescription.

Criticised in Gort v. Clark, 18 L. T. N. S. 343, 16 Week. Rep. 569, on right to light beyond user.

— For special uses of building.

Cited in Younge v. Shaper, 27 L. T. N. S. 643, 21 Week. Rep. 135, holding the right conferred by statute is an absolute indefeasible right to the enjoyment of

light without reference to the purpose for which it is used; Cooper v. Straker, L. R. 40 Ch. Div. 21, 58 L. J. Ch. N. S. 26, 59 L. T. N. S. 849, 37 Week. Rep. 137, holding right conferred by statute is an absolute indefeasible right to the enjoyment of the light without reference to the purpose for which it has been used; Warren v. Brown [1900] 2 Q. B. 722, 69 L. J. Q. B. N. S. 842, 49 Week. Rep. 206, 83 L. T. N. S. 318, 16 Times L. R. 549, [1902] 1 K. B. 15, 71 L. J. K. B. N. S. 12, 50 Week. Rep. 97, 85 L. T. N. S. 444, 18 Times L. R. 55, holding as the plaintiff's ancient lights had been substantially interfered with by the defendant's building, and the user of the plaintiff's premises for the purpose of a special business requiring much light was not unreasonable, the plaintiffs were entitled to damages for the interference.

— Enlargements and structural changes.

Cited in Rolason v. Levy, 17 L. T. N. S. 641, as to duty of person intending to build so as to possibly obstruct ancient lights to give notice; Aynsley v. Glover, L. R. 18 Eq. 544, 43 L. J. Ch. N. S. 777, 31 L. T. N. S. 219, 23 Week. Rep. 147, L. R. 10 Ch. 283, 44 L. J. Ch. N. S. 523, 23 Week. Rep. 459, 32 L. T. N. S. 345, 3 Eng. Rul. Cas. 19, holding where owner of a building having ancient lights enlarges or adds to the number of windows, he does not thereby preclude himself from obtaining an injunction to restrain an obstruction of the ancient lights; Moore v. Hall, L. R. 3 Q. B. Div. 178, 47 L. J. Q. B. N. S. 334, 38 L. T. N. S. 419, 26 Week. Rep. 401, holding reasonable prospective alterations should be considered.

— Proof of obstruction to light.

Cited in Senior v. Pawson, L. R. 3 Eq. 330, 15 Week. Rep. 220, as to the evidence necessary to show obstruction to.

— Injunctive relief.

Cited in Dent v. Auction Mart Co. L. R. 2 Eq. 238, 35 L. J. Ch. N. S. 555, 12 Jur. N. S. 447, 14 L. T. N. S. 827, 14 Week. Rep. 709, holding in order to support an injunction to restrain obstructions of light and air, it is generally necessary and sufficient that the case be one in which substantial damages would be recovered in law; Lawrence v Horton, 59 L. J. Ch. N. S. 440, 62 L. T. N. S. 749, 38 Week. Rep. 555, holding a mandatory injunction will be granted for the removal of a building which obstructs ancient lights, notwithstanding that such building has been completed before the issue of the writ in the action; Colls v. Home & Colonial Stores [1904] A. C. 179, 73 L. J. Ch. N. S. 484, 53 Week. Rep. 30, 90 L. T. N. S. 687, 20 Times L. R. 475 (reversing [1902] 1 Ch. 302, 71 L. J. Ch. N. S. 146, 50 Week. Rep. 227, 85 L. T. N. S. 701, 18 Times L. R. 212); Smith v. Baxter [1900] 2 Ch. 138, 69 L. J. Ch. N. S. 437, 48 Week. Rep. 458, 82 L. T. N. S. 650; Higgins v. Betts [1905] W. N. 104 [1905] 2 Ch. 210, 74 L. J. Ch. N. S. 621, 53 Week. Rep. 549, 92 L. T. N. S. 850, 21 Times L. R. 552,—as to form of injunction against obstruction; Hulley v. Security Trust & S. D. Co. 5 Del. Ch. 578, as to when injunction will lie for obstruction to light and air.

Form of injunction against wrong use of right.

Cited in Atty.-Gen. v. Colney Hatch Lunatic Asylum, L. R. 4 Ch. 146, 38 L. J. Ch. N. S. 265, 19 L. T. N. S. 708, 17 Week. Rep. 240, as to form of injunction to restrain a nuisance.

Injunction to protect legal rights or easements.

Cited in Warren & F. R. Co. v. Clarion Land & Improv. Co. 54 Pa. 28, to the point that fact that damage by erection of building was completed before bill filed does not prevent relief by mandatory injunction; Hall v. Evans, 42 U. C.

Q. B. 190, as to its issuing when a clear legal right is invaded and there is no adequate compensation in damages; Sklitzsky v. Cranston, 22 Ont. Rep. 590, as to it issuing to prevent closing of a way.

3 E. R. C. 48, KELK v. PEARSON, L. R. 6 Ch. 809, 24 L. T. N. S. 890, 19 Week. Rep. 665, affirming 19 Week. Rep. 269.

Prescriptive amount of ancient lights.

Cited in Carter v. Grasett, 14 Ont. App. Rep. 685, as to the right to acquire by deed not differing from that acquired by prescription; Dickinson v. Harbottle, 28 L. T. N. S. 186, as to amount of diminution in light and air necessary in order to warrant injunction; Stanley v. Shrewsbury, L. R. 19 Eq. 616, 44 L. J. Ch. N. S. 389, 32 L. T. N. S. 248, 23 Week. Rep. 678, as to the amount of light possessor of ancient lights is entitled to; Scott v. Pape, L. R. 31 Ch. Div. 554, 55 L. J. Ch. N. S. 426, 54 L. T. N. S. 399, 34 Week. Rep. 465, 50 J. P. 645; Colls v. Home & Colonial Stores [1904] A. C. 179, 73 L. J. Ch. N. S. 484, 53 Week. Rep. 30, 90 L. T. N. S. 687, 20 Times L. R. 475; Leech v. Schweder, L. R. 9 Ch. 463, 43 L. J. Ch. N. S. 487, 30 L. T. N. S. 586, 22 Week. Rep. 633; Kine v. Jolly [1905] 1 Ch. 480, 74 L. J. Ch. N. S. 174, 53 Week. Rep. 462, 92 L. T. N. S. 209, 21 Times L. R. 128; London Brewery Co. v. Tennant, L. R. 9 Ch. 212, 43 L. J. Ch. N. S. 457, 29 L. T. N. S. 755, 22 Week. Rep. 172,—holding prescription act did not alter nature and extent of light prescribable.

Cited in note in 3 Eng. Rul. Cas. 47, on extent of right to ancient light.

Cited in Joyce Nuis. 60, on general doctrine as to easements of light, air, and prospect.

— Interference and obstruction.

Cited in Warren v. Brown [1900] 2 Q. B. 722, 69 L. J. Q. B. N. S. 842, 49 Week. Rep. 206, 83 L. T. N. S. 318, 16 Times L. R. 549, [1902] 1 K. B. 15, 71 L. J. K. B. N. S. 12, 50 Week. Rep. 97, 85 L. T. N. S. 444, 18 Times L. R. 55, denying that ordinary conditions of ordinary property is the measure of the easement; Ecclesiastical Comrs. v. Kino, L. R. 14 Ch. Div. 213, 49 L. J. Ch. N. S. 529, 42 L. T. N. S. 201, 28 Week. Rep. 544, as to what constitutes material interference with.

Grant of apparent easements.

Cited in Ruetsch v. Spry, 14 Ont. L. Rep. 233, holding where a person has purchased a house having apparent and continuous enjoyment of the lights he cannot be deprived of it by act of person from whom he purchased.

3 E. R. C. 57, NEWSON v. PENDER, 52 L. T. N. S. 9, 33 Week. Rep. 243, affirming the decision of the Vice Chancellor reported in L. R. 27 Ch. Div. 43.

Abandonment of ancient lights by change in buildings.

Cited in City Nat. Bank v. VanMeter, 59 N. J. Eq. 32, 45 Atl. 280, holding right not surrendered by tearing down old building for the purpose of erecting a new one where it clearly appears from the plans for the new building that a window will be in substantially the same place as was the window of the old building; Scott v. Pape, L. R. 31 Ch. Div. 554, 54 L. J. Ch. N. S. 914, 53 L. T. N. S. 598 (affirmed in 55 L. J. Ch. N. S. 426, 54 L. T. N. S. 399, 34 Week. Rep. 465, 50 J. P. 645), holding no alteration in the plane of the windows of the dominant tenement either by advancing or setting back the building will destroy the right so long as the owner of the dominant tenement can show that he is using through the new apertures in the wall of the new building the same or a

substantial part of the same light which passed through the old apertures into the old building; Smith v. Baxter [1900] 2 Ch. 138, 69 L. J. Ch. N. S. 437, 82 L. T. N. S. 650, 48 Week. Rep. 458, holding in an action to restrain the obstruction of ancient lights in respect of premises which have been rebuilt, evidence of the plaintiff's intention to preserve ancient lights upon the rebuilding is unnecessary.

Undertaking for damages to avoid interlocutory injunction.

The decision of the Vice Chancellor was cited in New Vancouver Coal Co. v. Esquimalt & N. R. Co. 6 B. C. 222, holding an undertaking as to damages ought to be given by a plaintiff who obtains an interlocutory order for an injunction not only when the order is made ex parte but even when it is made upon hearing both sides.

When injunction will be granted.

Cited in notes in 13 E. R. C. 108, on injunction to restrain breach of covenant; 13 E. R. C. 116, as to when interlocutory injunction will be granted; 15 E. R. C. 280, 281, on granting of mandatory injunction on interlocutory application.

3 E. R. C. 76, BLADES v. HIGGS, 20 Q. B. N. S. 214, 11 H. L. Cas. 621, 11 Jur. N. S. 701, 34 L. J. C. P. N. S 286, 12 L. T. N. S. 615, 13 Week. Rep. 927, affirming the decision of the Court of Exchequer Chamber, reported in 13 C. B. N. S. 844, which affirms the decision of the Court of Common Pleas, reported in 12 C. B. N. S. 501.

Property in animals feræ naturæ.

Cited in Payne v. Sheets, 75 Vt. 335, 55 Atl. 656; State v. Mallory, 73 Ark. 236, 67 L.R.A. 773, 83 S. W. 955, 3 Ann. Cas. 852,—holding the owner of land has, by virtue of such ownership, a special property right to take fish and wild game upon his own land subject to the limitation that it must always yield to the State's ownership and title held for the purposes of regulation and preservation for the common use; Long Point Co. v. Anderson, 18 Ont. App. Rep. 401; The Frederick Gering, Jr. v. R. 27 Can. S. C. 271,—as to right of property in wild animals.

The decision of Court of Exchequer Chamber was cited in Aldrich v Wright, 53 N. H. 398, 16 Am. Rep. 339, as to man having no absolute property in wild animals.

— As dependent on soil ownership of place of killing or taking.

Cited in James v. Wood, 82 Me. 173, 8 L.R.A. 448, 19 Atl. 160; Vroom v. Tilly, 99 App. Div. 516, 91 N. Y. Supp. 51; R. v. Petch, 38 L. T. N. S. 788, 14 Cox, C. C. 116; Rexroth v. Coon, 15 R. I. 35, 2 Am. St. Rep. 863, 23 Atl. 37,—holding in obtaining possession of an animal feræ naturæ, no title is gained by one who when so obtaining possession is a trespasser; Long Point Co. v. Anderson, 18 Ont. Rep. 487, holding deer shot by defendant on his own land belonged to him; R. v. Townley, L. R. 1 C. C. 315, 40 L. J. Mag. Cas. N. S. 144, 24 L. T. N. S. 517, 19 Week. Rep. 725, 12 Cox, C. C. 59, holding animals feræ naturæ killed upon the soil become the absolute property of owner of soil.

Cited in 1 Washburn, Real Prop. 6th ed. 16, on landowner's property in wild game killed thereon.

Distinguished in R. v. Roe, 22 L. T. N. S. 414, 11 Cox, C. C. 554, holding one picking up a wounded partridge in a dying state on the land of another not guilty under an indictment charging him with stealing "one dead partridge."

The decision of the Court of Common Pleas was cited in Sterling v. Jackson,

69 Mich. 488, 13 Am. St. Rep. 405, 37 N. W. 845, holding owner of fee to land has exclusive right of fowling upon his own land.

Retaking property by force.

Cited in Graham v. Green, 10 N. B. 330; Com. v. Donahue, 148 Mass. 529, 2 L.R.A. 623, 12 Am. St. Rep. 591, 20 N. E. 171,—holding one whose property is wrongfully taken by another may thereupon retake it from him, using no more than reasonable force; Napier v. Ferguson, 18 N. B. 255 (dissenting opinion), as to the right.

Right of trespasser to take possession of property.

Cited in Elwes v. Brigg Gas Co. L. R. 33 Ch. Div. 562, 55 L. J. Ch. N. S. 734, 55 L. T. N. S. 831, 35 Week. Rep. 192, as to the right.

3 E. R. C. 88, GUNDRY v. FELTHAM, 1 T. R. 334, 1 Revised Rep. 215.

License by necessity to enter on land.

Cited in Little v. Ince, 3 U. C. C. P. 528, as to pleading license.

— Pursuit of noxious animal.

Cited in Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339, as to right to enter upon land of another for purpose of killing mischievous vermin.

— Fox hunting.

Distinguished in Paul v. Summerhayes, L. R. 4 Q. B. Div. 9, 48 L. J. Mag. Cas. N. S. 33, 27 Week. Rep. 215, 39 L. T. N. S. 574, 14 Cox, C. C. 202, holding a huntsman in fresh pursuit of a fox is not justified in forcing an entry upon land against the will of the owner.

Demurrer.

Cited in Christmas v. Russell, 5 Wall. 290, 18 L. ed. 475, holding it admits all such matters of fact as are sufficiently pleaded.

3 E. R. C. 93, ABERDEEN ARCTIC CO. v. SUTTER, 4 Macq. H. L. Cas. 355, 6 L. T. N. S. 229, 10 Week. Rep. 516, affirming the decision of the Lord Ordinary, reported in 12 Sc. Sess. Cas. 2d series 470.

Right to fish.

Cited in notes in 60 L.R.A. 511, on right to fish; 12 E. R. C. 189, on public right of fishing in navigable and tidal waters.

3 E. R. C. 108, MAY v. BURDETT, 10 Jur. 692, 16 L. J. Q. B. N. S. 64, 9 Q. B. 101.

Liability of owner or keeper of vicious or wild animals.

Cited in Gooding v. Chutes Co. 155 Cal. 620, 23 L.R.A.(N.S.) 1071, 102 Pac. 819, 18 Ann. Cas. 671, holding that owner of camel which is used for purposes of exhibition is bound to keep it in such manner as will absolutely prevent occurrence of injury; Kelley v. Killourey, 81 Conn. 320, 129 Am. St. Rep. 220, 70 Atl. 1031, 15 Ann. Cas. 163, holding that one who provokes dog so that he bites him cannot recover damages therefor, even under section 4487 of General Statutes; Montgomery v. Koester, 35 La. Ann. 1091, 48 Am. Rep. 253, 1 Am. Neg. Cas. 111, holding that one who keeps dangerous animal knowing it to be such is bound at his peril to keep him safe from hurting innocent persons; Scott v. Grover, 56 Vt. 499, 48 Am. Rep. 814, 1 Am. Neg. Cas. 37, holding that injury caused by bull not known to be vicious escaping to adjoining owner's land through gap in fence that such owner should repair is not ground for action by such adjoining owner; Parrott v. Barney, 2 Abb. (U. S.) 197, Fed. Cas. No. 10,773; Garlick v. Dorsey, 48 Ala. 220; Parsons v. Manser, 119 Iowa, 88, 62

L.R.A. 132, 97 Am. St. Rep. 283, 93 N. W. 86; Vredenburg v. Behan, 33 La. Ann. 627, 1 Am. Neg. Cas. 349; Hill v. Balls, 27 L. J. Exch. N. S. 45, 2 Hurlst. & N. 299, 3 Jur. N. S. 592, 5 Week. Rep. 740,—as to the liability of owner; Bormann v. Milwaukee, 93 Wis. 522, 33 L.R.A. 652, 67 N. W. 924, holding an employee assumes the risk of injury by elk and deer kept by his employer, when he voluntarily engages to work inside of the enclosure in which they are kept; Filburn v. People's Palace & Acquarium Co. L. R. 25 Q. B. Div. 258, 59 L. J. Q. B. N. S. 471, 38 Week. Rep. 706, 55 J. P. 181, holding owner of elephant keeps the animal at his own risk; Baker v. Snell, [1908] 2 K. B. 825, 2 B. R. C. 1, 77 L. J. K. B. N. S. 1090, 24 Times L. R. 811, 52 Sol. Jo. 681, holding that owner of dog known to be savage is liable for injury done by dog, even though immediate cause of injury is intervening act of third person.

Cited in note in 2 Brit. Rul. Cas. 1421, on liability of keeper of dangerous animal in absence of negligence on his part.

Cited in 2 Cooley Torts, 3d ed. 694, on liability for injuries by vicious animals; 2 Cooley Torts, 3d ed. 706, on liability for injury by wild beast; 1 Kinkead Torts, 504, on liability for injury to person by animals feræ naturæ; 1 Kinkead Torts, 505, as to when owner or keeper is liable for injury to person by domestic animals; 1 Thompson Neg. 776, on liability of keeper of wild and vicious animals; 1 Thompson Neg. 774, on liability of keeper of animals for injury by them.

— Ground of liability.

Cited in Woodbridge v. Marks, 5 App. Div. 604, 40 N. Y. Supp. 728, holding that for injuries caused by bite of vicious dog owned by defendant action may be maintained without showing negligence; Molloy v. Starin, 113 App. Div. 852, 99 N. Y. Supp. 603, holding that keeper of wild animal, with knowledge of vicious propensity, is liable for injuries caused by it, without reference to his negligence and contributory negligence of person injured; Lynch v. McNally, 7 Daly, 126, holding action for injury caused by vicious dog not founded upon negligence but upon ground to harbor such an animal and to allow him to go freely about shows such a disregard for safety of others as to partake of the character of a wilful wrong; Earl v. VanAlstine, 8 Barb. 630, holding owner only liable on ground of some actual or presumed negligence; Nevill v. Laing, 2 B. C. 100, holding in an action for damages caused by the bite of a dog the "mischievous animal's act" does not preclude the defendant from showing the peaceful character of the dog, or his ignorance of its vicious disposition, but only raises a rebuttable presumption against him.

— Burden of proof.

Cited in Hussey v. King, 83 Me. 568, 22 Atl. 476, holding in action under statute to recover for an injury done by a dog kept by the defendant the plaintiff need not allege and prove in the first instance his own due care in the matter; Brooks v. Taylor, 65 Mich. 208, 31 N. W. 837; Popplewell v. Pierce, 10 Cush. 509,—holding a declaration charging that the defendant wrongfully kept a horse accustomed to bite mankind and that defendant knew it need not aver that the injury complained of was received through the defendant's negligence in keeping the horse.

— Scienter.

Cited in Decker v. Gammon, 44 Me. 322, 69 Am. Dec. 99, 1 Am. Neg. Cas. 300, holding that owner of domestic animal is not liable for injury done by it unless he knew that animal was accustomed to do mischief, provided animal was rightfully in place where injury was done; Emmons v. Stevane, 77 N. J. L. 570,

24 L.R.A.(N.S.) 458, 73 Atl. 544, 18 Ann. Cas. 812, holding that scienter need not be precisely similar, but that it is substantially so will suffice; Marble v. Ross, 124 Mass. 44; Speckmann v. Kreig, 79 Mo. App. 376; DeGray v. Murray, 69 N. J. L. 458, 55 Atl. 237; Muller v. McKesson, 73 N. Y. 195, 29 Am. Rep. 123; Molloy v. Starin, 191 N. Y. 21, 16 L.R.A.(N.S.) 445, 83 N. E. 588, 14 Ann. Cas. 57; Kelly v. Tilton, 2 Abb. App. Dec. 495; Van Rensselaer v. Bouton, 3 Keyes, 260; Mann. v. Weiland, 81* Pa. 243, 4 W. N. C. 6, 34 Phila. Leg. Int. 77; Meibus v. Dodge, 38 Wis. 300, 20 Am. Rep. 6; Vital v. Titrault, Montreal L. Rep. 4 S. C. 204; Wilmot v. Vanwart, 17 N. B. 456; Twigg v. Ryland, 62 Md. 380, 50 Am. Rep. 226,—holding owner of vicious animal with knowledge of its propensities liable for damages done by it; Woolf v. Chalker, 31 Conn. 121, 81 Am. Dec. 175, holding if a dog becomes mischievous and inclined to injure property his owner is bound to restrain him on the first notice and is liable for any injury he may thereafter commit to property of any kind; West Chicago Street R. Co. v. Walsh, 78 Ill. App. 595; Moss v. Pardridge, 9 Ill. App. 490,—holding owner of domestic animal not liable unless he has notice of its vicious propensities; Wood v. Vaughan, 28 N. B. 472; Price v. Wright, 35 N. B. 26,—holding that gist of action for injury by vicious dog is keeping of animal after knowledge of viciousness; McKenzie v. Blackmore, 19 N. S. 203, to the point that gist of action for injury by dog, is not keeping of animal, but keeping it after knowledge of its viciousness; Smith v. Cook, L. R. 1 Q. B. Div. 79, 45 L. J. Q. B. N. S. 122, 33 L. T. N. S. 722, 24 Week. Rep. 206, 2 Eng. Rul. Cas. 551, holding scienter is only evidence on question of negligence in keeping animal of bad propensities and is not decisive of it.

Cited in 1 Thompson Neg. 778, 799, on necessity for proving scienter in case of injury done by vicious animal.

Presumption of negligence in use of dangerous instrumentalities.

Cited in Memphis Consol. Gas & Electric Co. v. Letson, 68 C. C. A. 453, 135 Fed. 969, holding a company which for the purposes of gain creates or carries a deadly current of electricity must take care of it, and if it gets away because the wires are out of order and enters a residence and kills a customer without any fault on his part negligence is presumed and the company is bound to exculpate itself; Fletcher v. Rylands, L. R. 1 Exch. 265, 35 L. J. Exch. N. S. 154, 12 Jur. N. S. 603, 14 Week. Rep. 799, 1 Eng. Rul. Cas. 236, L. R. 3 H. L. 330, 4 Hurlst. & C. 263, 37 L. J. Exch. N. S. 161, 19 L. T. N. S. 220, holding one who for his own purposes brings upon his land and collects and keeps there anything likely to do mischief if it escapes, is prima facie answerable for all the damage which is the natural consequence of its escape.

3 E. R. C. 125, WARD v. HOBBS, L. R. 4 App. Cas. 13, 48 L. J. Q. B. N. S. 281, 40 L. T. N. S. 73, 27 Week. Rep. 114, affirming the decision of the Court of Appeal, reported in 47 L. J. Q. B. N. S. 90, L. R. 3 Q. B. Div. 150, 37 L. T. N. S. 654, 26 Week. Rep. 151, which reverses the decision of the Court of Queen's Bench, reported in L. R. 2 Q. B. Div. 331, 46 L. J. Q. B. N. S. 473.

Implied warranties and caveat emptor.

Cited in Peters v. Planner, 11 Times L. R. 169, as to effect of sale of goods "with faults."

Cited in notes in 34 L.R.A.(N.S.) 701, on warranty on sale of diseased animals; 23 Eng. Rul. Cas. 499, on implied extension from circumstances of express warranty of quality of goods sold.

Cited in Benjamin Sales, 5th ed. 1019, on liability for breach of warranty of soundness of animals.

Distinguished in Clarke v. Army & Navy Co-op. Soc. [1903] 1 K. B. 155, 72 L. J. K. B. N. S. 153, 88 L. T. N. S. 1, 19 Times L. R. 80, holding where vendor of a tin containing disinfectant powder knew that it was likely to cause danger to the person opening it, unless special care was taken and the danger was not such as would presumably be known to or appreciated by the purchaser that independent of any warranty it was duty of vendor to warn purchaser of the danger.

The decision of the Court of Appeal was cited in Doyle v. Union P. R. Co. 147 U. S. 413, 37 L. ed. 223, 13 Sup. Ct. Rep. 333, holding that in absence of warranty tenant takes risk of house being habitable; Milliken v. Chapman, 75 Me. 306, 46 Am. Rep. 386, holding that in cases of sale of commercial paper rule of caveat emptor applies; Bowe v. Hunking, 135 Mass. 380, 46 Am. Rep. 471, holding that landlord is not liable to tenant for injury from falling of defective stair, where tenant had opportunity to inspect at time of living and landlord supposed stair was safe.

— Sale at fair or market.

Cited in Gill v. M'Dowell, [1903] 2 Ir. K. B. 463, as to implied representations in sale made at a fair.

Cited in Benjamin Sales, 5th ed. 633, on implied conditions on sale of diseased animals in public market.

Action for breach of statutory duty.

Cited in Rothwell v. Milner, 8 Manitoba L. Rep. 472, holding where no specific right is created and vested in the plaintiff for his own benefit and advantage, and no specific duty in favor of the plaintiff has been imposed, but the statute merely prohibits a thing from being done under a penalty for doing it, an action for damages is not maintainable; The Eugene F. Moran, 212 U. S. 466, 53 L. ed. 600, 29 Sup. Ct. Rep. 339, holding that breach of rule that does not lead to injury does not make such wrongdoer liable for tort of third person merely because observance of rule might have prevented tort.

Distinguished in The Eugene M. Moran, 96 C. C. A. 144, 170 Fed. 928, holding that scow in tow may be charged with contributory fault for collision with another vessel of tow because of her failure to comply with rules as to lights adopted by supervising inspector of steam vessels.

Concealment of facts as fraud.

Cited in note in 6 Eng. Rul. Cas. 813, on nondisclosure of material facts as ground for rescission of contract.

Cited in Benjamin Sales, 5th ed. 490, on effect of failure to disclose defects in property sold; Benjamin Sales, 5th ed. 491, on fraud in sale of goods "with all faults."

3 E. R. C. 138, BLOWER v. GREAT WESTERN R. CO. 41 L. J. C. P. N. S. 268, L. R. 7 C. P. 655.

Liability of common carrier of animals or other thing of inherent risk.

Cited in Prussia, 88 Fed. 531, holding it not liable for loss resulting from inherent quality or defect of the thing carried; Swiney v. American Exp. Co. 144 Iowa, 342, 115 N. W. 212, holding that carrier of animal is prima facie liable when at time of delivery of animal to carrier it is in good condition and in injured condition at destination; Louisville, N. O. & T. R. Co. v. Bigger, 66 Misc. 319, 6 So.

234, holding that carrier is not liable for injury to animal inflicted upon itself provided suitable means of transportation was furnished and proper care exercised; Richardson v. Chicago & N. W. R. Co. 61 Wis. 596, 21 N. W. 49, on liability of carrier for injury to live stock; Rexford v. Smith, 52 N. H. 355, 13 Am. Rep. 42; Roussel v. Aumais, Rap. Jud. Quebec, 18 S. C. 474; Nugent v. Smith, L. R. 1 C. P. Div. 423, 45 L. J. Q. B. N. S. 697, 1 Eng. Rul. Cas. 218; Kendall v. London & S. W. R. Co. L. R. 7 Exch. 373, 41 L. J. Exch. N. S. 184, 26 L. T. N. S. 735, 20 Week. Rep. 886,—holding carrier not liable for injuries caused by inherent propensities of the animals.

Cited in notes in 37 L. ed. U. S. 294, on duty and liability as carrier of live stock; 5 Eng. Rul. Cas. 343, on exemption arising from inherent vice or natural deterioration.

Cited in 4 Elliott Railr. 2d ed. 298, 300, on nonliability of carrier for injuries to live stock arising from inherent nature of stock; 1 Hutchinson Car. 3d ed. 344, 357, on difference in liability of carrier of live stock based on their inherent nature; Porter Bills of L. 155, 156, on liability of carrier for injury to live stock occurring out of propensities of animals carried; Porter Bills of L. 184, on shipper's liability to carrier for injury by goods of dangerous character; 1 Thomas Neg. 2d ed. 230, on carrier's noninsurance against injured goods due to inherent defects or undisclosed dangers.

Liability of bailee for inherent risks.

Cited in Charest v. Manitoba Cold Storage Co. 17 Manitoba L. Rep. 539, holding it not liable if damages arise from an intrinsic principle of decay, naturally inherent in the commodity.

As to what goods railroads are common carriers.

Cited in 4 Elliott Railr. 2d ed. 150, as to what goods railroads are common carriers.

3 E. R. C. 143, MURPHY v. MANNING, L. R. 2 Exch. Div. 307, 46 L. J. Mag. Cas. N. S. 211, 36 L. T. N. S. 592, 25 Week. Rep. 540.

Cruelty to animals.

Cited in Com. v. Lewis, 7 Pa. Co. Ct. 558, 47 Phila. Leg. Int. 58, 25 W. N. C. 432, holding wanton or cruel ill treatment or abuse of animals under the statute is where pain is inflicted without necessity or good reason to justify the act.

— Operations on domestic animals.

Cited in Ford v. Wiley, L. R. 23 Q. B. Div. 203, 58 L. J. Mag. Cas. N. S. 145, 61 L. T. N. S. 74, 37 Week. Rep. 709, 16 Cox, C. C. 683, 53 J. P. 485, holding operation of dehorning cattle cruelty under statute.

Distinguished in Lewis v. Fermor, L. R. 18 Q. B. Div. 532, 56 L. J. Mag. Cas. N. S. 45, 56 L. T. N. S. 236, 35 Week. Rep. 378, 16 Cox, C. C. 176, 51 J. P. 371, holding a person who, with reasonable care and skill, performs on an animal a painful operation, which is customary and is performed bona fide for the purpose of benefiting the owner by increasing the value of the animal, is not guilty of the offense of cruelly ill-treating, abusing or torturing the animal within the meaning of the statute, even though the operation is unnecessary and useless.

3 E. R. C. 151, HOUGHTON v. FRANKLIN, 1 L. J. Ch. 231, 24 Revised Rep. 201, 1 Sim. & Stu. 390.

Commencement of annuities under will.

Cited in Wiggin v. Swett, 6 Met. 194, 39 Am. Dec. 716, holding when an

annuity is given by will with the direction that it be paid quarter yearly, the first payment is to be paid at the end of three months after the testator's death; Sullivan v. Winthrop, 1 Sumn. 1, Fed. Cas. No. 13,600; Einbecker v. Einbecker, 62 Ill. App. 616; Henry v. Henderson, 81 Miss. 743, 63 L.R.A. 616, 33 So. 960; Cooke v. Meeker, 42 Barb. 533; Bennet v. Hart, 30 Phila. Leg. Int. 132; Trott v. Wheaton, 5 R. I. 353; Kearney v. Cruikshank, 117 N. Y. 95, 22 N. E. 580,—holding if no time is stated in the will they commence from date of testators death.

Cited in 2 Thomas Estates, 1534, on commencement of annuity from date of testator's death.

3 E. R. C. 155, BLEWITT v. ROBERTS, 1 Craig & Ph. 274, 10 L. J. Ch. N. S. 342, 5 Jur. 979, 10 Sim. 491.

Duration of annuities.

Cited in Goodyear Shoe Machinery Co. v. Dancel, 56 C. C. A. 300, 119 Fed. 692, holding that under contract by which assignee of patent agreed to pay to assignor in each year while such patent "remains in force as valid patent sum of $5000 as annuity" right to such payments does not cease on death of assignor; Bates v. Barry, 125 Mass. 83, 28 Am. Rep. 207, holding that clause in will reading "I order that $500 per year for ten years be paid over to" A, in equal quarterly payments gives A annuity contingent on his living so long and not legacy payable in instalments; Re Forster, Ir. L. R. 23 Eq. 269, holding if a testator create an annuity de novo in favor of a particular person without words of limitation and without reference to any particular property as charged therewith the annuity is merely for the life of the annuitant; Barden v. Meagher, Ir. Rep. 1 Eq. 246, holding a simple gift of annuity not previously existing in absence of a sufficient expression of contrary intention creates an annuity for life of legatee only; Warren v. Wright, 12 Ir. Ch. Rep. 401, construing a certain annuity as a perpetual one; Drew v. Barry, Ir. Rep. 8 Eq. 260; Whitten v. Hanlon, Ir. L. R. 16 C. L. 298,—construing annuity as one for life; Stokes v. Heron, 12 Clark & F. 161, 9 Jur. 563, 3 Eng. Rul. Cas. 160, as to duration of annuity when gift does not refer to any particular property; Blight v. Hartnoll, L. R. 19 Ch. Div. 294, 51 L. J. Ch. N. S. 162, 45 L. T. N. S. 524, 30 Week. Rep. 513, holding the mere want of limitation of the last gift of an annuity does not show that the last taker is to have more than a life annuity.

Cited in note in 3 E. R. C. 184, 185, on presumption that testamentary annuity is intended to be for life of annuitant.

Distinguished in Bent v. Cullen, L. R. 6 Ch. 235, 40 L. J. Ch. N. S. 250, 19 Week. Rep. 368, holding where a testator gave to his wife £50 a year to be paid out of the interest, dividends, and produce arising from his personal property, and gave after her decease the said £50 to his two daughters and his granddaughter or the survivors it was a gift to the survivors of the principal which would produce the annuity of £50.

3 E. R. C. 160, STOKES v. HERON, 12 Clark & F. 161, 9 Jur. 563.

Duration of annuities.

Cited in Barden v. Meagher, Ir. Rep. 1 Eq. 246, as to when perpetual and when limited; Drew v. Barry, Ir. Rep. 8 Eq. 260; Sullivan v. Galbraith, Ir. Rep. 4 Eq. 582,—construing certain annuity as one for life; Hill v. Potts (Rattey), 31 L. J.

Ch. N. S. 380, 8 Jur. N. S. 555, 5 L. T. N. S. 787, 10 Week. Rep. 439, 2 Johns. & H. 634, holding where a testator gave all his property to R. except 500£ a year, which he gave to H. the 500£ a year was given to H. in perpetuity.

Cited in note in 3 E. R. C. 184, 185, on presumption that testamentary annuity is intended to be for life of annuitant.

Gift of corpus to produce annuity as gift of fund itself.

Cited in Huston v. Read, 32 N. J. Eq. 591, holding where an intention to give a perpetual annuity is apparent in the will, the legatee will be held entitled to the fund itself; Evans v. Walker, L. R. 3 Ch. Div. 211, 25 Week. Rep. 7, holding when there is a gift of an annuity to one for life, or to several for lives, and then a gift afterwards to another person, without any restriction, the last taker is to have the capital from which the annuity was produced; Re Taber, 51 L. J. Ch. N. S. 721, 46 L. T. N. S. 805, 30 Week. Rep. 883, on words indicating property from which an income is to be derivable, being an implied gift of the property; Bent v. Cullen, L. R. 6 Ch. 235, 40 L. J. Ch. N. S. 250, 19 Week. Rep. 368; Coward v. Larkman, 60 L. T. N. S. 1,—holding gift of the produce of a particular fund, whether it be interest or dividends is a gift of the principal in perpetuity; Audsley v. Horn, 1 De G. F. & J. 226, 29 L. J. Ch. N. S. 201, 6 Jur. N. S. 205, 8 Week. Rep. 150 (affirming 26 Beav. 195, 28 L. J. Ch. N. S. 293), as to when absolute interest in personalty is created by will.

Life or perpetual gifts.

Cited in Williams v. McConico, 36 Ala. 22, holding where property whether real or personal, is limited to one and his children there being no children, either when the will is made or when it takes effect the absolute property vests in the parent; Pinckney v. Pinckney, 1 Bradf. 269, holding that where entire interest in bequest is limited over on contingency first taker does not get unqualified ownership and effect of restriction is to render first taker incapable of defeating limitation by any act of his own.

Persons comprised in "issue" or like words descriptive of class.

Cited in Clifford v. Brooke, Ir. Rep. 10 C. L. 179, as to when estate tail is created; Re Hutchinson, 55 L. J. Ch. N. S. 574, 54 L. T. N. S. 527, holding "such issue" (of first takers) in a provision covering failure of first takers to appoint referred to all issue and not only to those to whom appointment might effectively have been made; Noblett v. Litchfield, 7 Ir. Ch. Rep. 575, holding if in a settlement there is contained a power of appointment to a class, and in default of appointment the estates are given over, the existence of the power does not prevent the vesting of the gifts and those persons to whom the estate is limited take vested interests, subject to be divested by execution of power of appointment.

Costs.

Cited in Re Goodhue, 6 Ont. Pr. Rep. 87, as to costs on appeal being recoverable out of estate.

3 E. R. C. 186, LONG v. HUGHES, 1 De G. & Sm. 364, 7 L. J. Ch. 105.

Abatement of legacies and annuities.

Cited in Ashton v. Ross [1900] 1 Ch. 162, 69 L. J. Ch. N. S. 192, 48 Week. Rep. 264, 81 L. T. N. S. 578, holding an annuitant under a will where the estate is insufficient is entitled to receive as from the death of the testator a dividend in proportion to the capitalized value of the annuity.

3 E. R. C. 189, STAFFORD v. BUCKLEY, 2 Ves. Sr. 170.

Inheritable and alienable annuities.

Cited in Meason's Estate, 4 Watts, 341, as to annuity granted out of personalty being personal hereditament; Hamilton v. Cadwalader, 3 Serg. & R. 519, as to annuity granted out of fee descending to heirs and not executors; Re Rivett-Carnac, L. R. 30 Ch. Div. 136, 54 L. J. Ch. N. S. 1074, 53 L. T. N. S. 81, 33 Week. Rep. 837, as to when grantee may alienate; Maharana Fattehsangji, etc., v. Dessai Kallianraiji, etc., L. R. 1 Ind. App. 34, as to what constitutes mere personal annuity.

Cited in note in 8 E. R. C. 230, on construction of grant of annuity.

Limitation over of personal chattel.

Cited in Cooper v. Cooper, 2 Brev. 355, holding personal chattel may not be given to one for life and on failure of issue remainder over to another by an executory devise; Rathbone v. Dyckman, 3 Paige, 9, holding that limitation over to mother, in case of death of daughter without issue, is valid as to personal estate.

Failure of "issue."

Cited in Anderson v. Jackson, 16 Johns. 382, 8 Am. Dec. 330; Paterson v. Ellis, 11 Wend. 259; Davidson v. Davidson, 8 N. C. (1 Hawks) 163; Hauer v. Shitz, 3 Yeates, 205; Henry v. Archer, Bail. Eq. 535; Clifton v. Haig, 4 Desauss, Eq. 330; Moffat v. Strong, 10 Johns. 12,—as to difference in the effect on devise of realty and bequest of personalty of a limitation upon "dying without issue;" Hall v. Chaffee, 14 N. H. 215, holding an indefinite failure of issue means the period where the issue or descendants of the first taker shall become extinct, whenever that shall happen, sooner or later.

Rule of construction as to words used more than once in a will.

Cited in Tomlinson v. Nickell, 24 W. Va. 148; Lloyd v. Rambo, 35 Ala. 709,—holding a word having a technical legal meaning, when accompanied in one clause by a context which shows an intention that it should be understood in a different sense, and used in another distinct clause, in reference to a different subject, without such explanatory context, must receive in the latter clause its technical meaning.

Limitation of estates tail in chattels.

Cited in Deane v. Hansford, 9 Leigh, 253, holding limitation over of personalty after limitation to person and heirs of his body, void; Bailey v. Seabrook, Rich. Eq. Cas. 419, as to limitation of one fee estate after another being void; Henry v. Archer, Bail. Eq. 535, Riley Ch. 247, holding that under bequest of personalty to child and issue and on its death without living issue, to others, issue living at child's death take as purchasers.

Election by married woman.

Cited in Pratt v. Taliaferro, 3 Leigh, 419, as to when valid at common law.

Rents as realty.

Cited in Hopkins v. Hopkins, 3 Ont. Rep. 223, holding rent issuing out of land is a tenement, and partakes of the nature of land and devise thereof was avoided by interest of attesting witness.

Estate.

Cited in Lambert v. Paine, 3 Cranch, 97, 2 L. ed. 377, holding it comprises both land and inheritance.

Assignments at common law.

Cited in Hoyle v. Logan, 15 N. C. (4 Dev. L.) 492, on champertousness of assignments at common law.

Cited in 3 Page Contr. 1934, on ineffectiveness of assignment of contract at common law.

Power to sell trust property.

Cited in 2 Beach Trusts, 1066, on manner in which power to sell trust estate is conferred on trustee; 1 Devlin Deeds, 3d ed. 755, on power of sale of trustees as appendant to legal estate or collateral.

3 E. R. C. 197, PHILLIPS v. GUTTERIDGE, 3 Ge G. J. & S. 332, 8 Jur. N. S. 1196, 32 L. J. Ch. N. S. 1, 11 Week. Rep. 12, affirming the decision of the Vice Chancellor, reported in 4 De G. & J. 531.

Annuities charged on corpus.

Cited in Einbecker v. Einbecker, 162 Ill. 267, 44 N. E. 426; Delaney v. Van-Aulen, 84 N. Y. 16,—holding intention of testator is to be determined before making up deficiency in annuity out of corpus of estate; Pearson v. Helliwell, L. R. 18 Eq. 411, 31 L. T. N. S. 159, 22 Week. Rep. 839, holding where an annuity is, by will, expressly charged on the corpus of an estate, subsequent words tending to show that the testator contemplated that it should abate in the event of the income of the property being insufficient, did not deprive annuitant of the right to have the corpus applied to making good any deficiency of income to meet the annuity.

Distinguished in Machray v. Higgins, 8 Manitoba L. Rep. 29, holding where testator's intention was to charge the payment of the annuity upon each year's income, a deficiency of one year could not be made up from the surplus of another.

Extinguishment of mortgage as extinguishment of debt.

Cited in note in 18 Eng. Rul. Cas. 562, on merger of mortgage in fee.

The decision of the Vice Chancellor was cited in Dean v. Macarthur, 9 Manitoba L. Rep. 391; Finlayson v. Mills, 11 Grant, Ch. (U. C.) 218; Fraser v. Gunn, 29 Grant, Ch. (U. C.) 13; Hart v. McQueston, 22 Grant, Ch. (U. C.) 133,—as to when payment of mortgage extinguishes debt.

3 E. R. C. 202, CARMICHAEL v. GEE, L. R. 5 App. Cas. 588, 49 L. J. Ch. N. S. 829, 43 L. T. N. S. 227, 29 Week. Rep. 293.

Making up depleted or deficient annuity funds.

Cited in Merritt v. Merritt, 48 N. J. Eq. 1, 21 Atl. 128; Almon v. Lewin, 5 Can. S. C. 514; Koch v. Heisey, 26 Ont. Rep. 87; Merritt v. Wright, 21 N. B. 135,—holding if there is a direct legacy of an annuity then prima facie the annuitant is entitled to have that made good, not only out of the income but out of the capital unless there are words sufficient to cut down the claim of the person to the annuity only; Re Irwin, 4 D. L. R. 803, holding that where from will testator's intention appears to be that annuities should be charged only upon income of his estate, corpus cannot be charged therewith; Kimball v. Cooney, 27 Ont. App. Rep. 453, holding that will directing executors to take so much of estate as will make $200 per year and put it at interest, which amount is to be paid to widow yearly, empowers use of corpus of estate if necessary for purpose of making payment; Willson v. Tyson, 61 Md. 575; Re Campbell [1902] 1 K. B. 113, 71 L. J. K. B. N. S. 160, 85 L. T. N. S. 708, 18 Times L. R.

86,—as to deficiency being made up out of corpus if income is insufficient; Re McKenzie, 4 Ont. L. Rep. 713, holding that under will directing executor to make up deficiency to annuitants when there are funds to do it with, corpus of annuity fund may be resorted to.

Distinguished in Machray v. Higgins, 8 Manitoba L. Rep. 29, holding where intention of testator was to charge the payment of the annuity upon each years income, a deficiency could not be made upon from the surplus of another year.

3 E. R. C. 215, TULLETT v. ARMSTRONG, 9 L. J. Ch. N. S. 41, 4 Myl. & C. 390, affirming the decision of the Master of the Rolls, reported in 1 Beav. 1, 2 Jur. 912, 8 L. J. Ch. N. S. 19, 4 Myl. & C. 377.

Restraints upon anticipation of estate to woman.

Cited in Nixon v. Rose, 12 Gratt. 425, holding a bequest of slaves to trustees for the separate use of a married daughter, placing the disposition of such property in the discretion of the trustees, prevented the alienation of the property by the cestui que trust during coverture; Borden v. James, 40 N. S. 48, holding the restraint on alienation imposed on the separate property of a married woman did not apply to the provisions of her will; Hutchinson v. Maxwell, 100 Va. 169, 57 L.R.A. 384, 93 Am. St. Rep. 944, 40 S. E. 655, on the right to restrain the alienation of separate estate by a married woman; Baggett v. Meux, 13 L. J. Ch. N. S. 228, 1 Colly. Ch. Cas. 138, 8 Jur. 391, holding a restraint against anticipation on a gift of real estate to a married woman in fee for her separate use was valid; Hauser v. St. Louis, 28 L.R.A.(N.S.) 426, 96 C. C. A. 82, 170 Fed. 906, holding that limitation upon power of alienation may be imposed upon grant of fee in trust for married woman.

Cited in note in 28 L.R.A.(N.S.) 428, on validity of limitation upon power of alienation imposed upon equitable estate of married woman.

Cited in 1 Beach Trusts, 651, 653, on limitations of married woman's equitable estate; Underhill Am. Ed. Trusts, 371; 1 Beach Trusts, 667, 668, 670, 671,—on restraints upon anticipation of married women.

The decision of the Master of the Rolls was cited in Cook v. Kennerly, 12 Ala. 42, to the point that separate estate may be so secured to married woman, that she has no power to alienate it; Robinson v. Randolph, 21 Fla. 629, 58 Am. Rep. 692, holding a restraint on the right of a daughter to dispose of her real estate may be annexed to the separate equitable estate although the devise took effect while she was feme sole; Reid v. Safe Deposit & T. Co. 86 Md. 464, 38 Atl. 899, holding the income of a trust in the hands of a trustee was not subject to attachment for the debts of the widow, where a restraint was in the trust on anticipation; Re Bown, L. R. 27 Ch. Div. 411, 53 L. J. Ch. N. S. 881, 50 L. T. N. S. 796, 33 Week. Rep. 58, holding a restraint on anticipation did not invalidate an absolute devise in trust for the use of a married woman; Cruger v. Cruger, 5 Barb. 225, 4 Edw. Ch. 433, on right to restrain the anticipation of a separate estate to the use of a married woman; Scarborough v. Borman, 9 L. J. Ch. N. S. 48, 4 Myl. & C. 377, 4 Jur. 38; Averett v. Lipscombe, 76 Va. 404; Christian v. Keen, 80 Va. 369,—on right to impose a restraint on power of married woman to alienate an estate to her separate use; Stogdon v. Lee [1891] 1 Q. B. 661, 60 L. J. Q. B. N. S. 669, 64 L. T. N. S. 494, 39 Week. Rep. 467, 55 J. P. 533, on a restraint upon anticipation as of no effect unless the estate is given for the separate use of the woman; Re Teague, L. R. 10 Eq. 564, 22 L. T. N. S. 742, 18 Week. Rep. 752; Re Ellis, L. R.

17 Eq. 409, 43 L. J. Ch. N. S. 444, 22 Week. Rep. 448,—on the effect of a restraint on anticipation on an absolute gift for the separate use of a married woman.

The decision of the Master of the Rolls was distinguished in Brown v. Macgill, 87 Md. 161, 39 L.R.A. 806, 67 Am. St. Rep. 334, 39 Atl. 613, holding a woman could not in contemplation of marriage create a trust for herself reserving the income, without liability to creditors or power of anticipation.

— Suspension on becoming discovert.

Cited in Radford v. Carwile, 13 W. Va. 572, on death of husband as vesting in married woman an absolute right to separate estate fees of restraints on anticipation; Re Wheeler [1899] 2 Ch. 717, 68 L. J. Ch. N. S. 663, 81 L. T. N. S. 172, 48 Week. Rep. 10, 15 Times L. R. 545, holding the restraint on anticipation of estate to separate use of a married woman was removed by the death of the husband.

The decision of the Master of the Rolls was cited in Martin v. Fort, 27 C. C. A. 428, 54 U. S. App. 316, 83 Fed. 19; Temple v. Ferguson, 110 Tenn. 84, 100 Am. St. Rep. 791, 72 S. W. 455,—holding the death of a husband of a woman having a separate estate to her sole and separate use, vested such estate in her absolutely.

— Revival of restraints upon a subsequent marriage.

Cited in Phillips v. Grayson, 23 Ark. 769, holding a gift of a slave in trust for the benefit of a married daughter of the testatrix, to be held by her during life for her separate use, did not on the death of her first husband with a subsequent remarriage become subject to the debts of the second husband; Cole v. O'Neill, 3 Md. Ch. 174, holding a restriction in a settlement of property by a husband upon his wife, for her separate use free from any control of her husband was operative as against the marital rights of her second husband; Staggers v. Matthews, 13 Rich. Eq. 142; Brown v. Foote, 2 Tenn. Ch. 255; Burdick v. Goddard, 11 R. I. 516,—holding the restraints upon anticipation imposed upon an estate to a married woman for her separate use were upon her remarriage after the death of her first husband, revived.

Cited in 2 Beach Trusts, 1274, on making restraint on married woman's power of alienation operative during future marriages.

The decision of the Master of the Rolls was cited in Hawkes v. Hubbard, L. R. 11 Eq. 5, 40 L. J. Ch. N. S. 49, 23 L. T. N. S. 642, 19 Week. Rep. 117, holding that a trust to a married woman for her separate use, without power of anticipation was revived on her remarriage after the death of her husband.

Restraint against charge of separate estate.

The decision of the Master of the Rolls was cited in Clarke v. Windham, 12 Ala. 798, on right to enforce a limitation on a will on a married woman's right to charge an estate separate to her use with her debts or those of husband.

Restrictions on right of alienation.

Cited in Lampert v. Haydel, 96 Mo. 439, 2 L.R.A. 113, 9 Am. St. Rep. 358, 9 S. W. 780, holding a father on a devise of property for the use of his sons might restrain the alienation of the income thereof.

The decision of the Master of the Rolls was cited in Roberts v. Stevens, 84 Me. 325, 17 L.R.A. 266, 24 Atl. 873, holding a testator might so give his son the annual income for life from a trust estate so that the life tenant cannot alienate; Harding v. St. Louis L. Ins. Co. 2 Tenn. Ch. 465, holding a trust deed creating a trust for the benefit of the grantor was ineffective.

Creation of inalienable separate estate in married women.

Cited in Fears v. Brooks, 12 Ga. 195, holding a will by its terms created a

separate estate in married daughters of testator, not subject to alienation; Beaufort v. Collier, 6 Humph. 487, 44 Am. Dec. 321, holding same in case of a devise in a will for the use of testator's sister; Cooney v. Woodburn, 33 Md. 320, on the creation of a separate estate for the use of a married woman.

Cited in 1 Beach Trusts, 648, on separate estate of married woman in equity.

The decision of the Master of the Rolls was cited in McNeill v. Arnold, 17 Ark. 154, holding that trust in slaves conveyed to trustee for separate use of wife, and upon her death to be divided among heirs, is executed upon her death and action for recovery of slaves must be brought in name of heirs; Bristol v. Skerry, 64 N. J. Eq. 624, 54 Atl. 135; Metropolitan Bank v. Taylor, 53 Mo. 444, (dissenting opinion),—on the creation of a separate estate for the use of a married woman.

The decision of the Master of the Rolls was distinguished in Hughes's Estate, 7 W. N. C. 539, 36 Phila. Leg. Int. 286, holding where, upon the youngest daughter coming of age, the estate was to be divided among them to their separate use free of debts of husbands, the daughters married at such time would take subject to the restraint on anticipation.

The decision of the Master of the Rolls was disapproved in Funk's Estate, 144 Pa. 444, 22 Atl. 965, 28 W. N. C. 557, 48 Phila. Leg. Int. 462, (affirming 9 Pa. Co. Ct. 113, 27 W. N. C. 473, 47 Phila. Leg. Int. 465), holding the marriage of a cestui que trust of a fund devised for her separate use vested such fund in her absolutely.

Rights of married woman with reference to separate estate.

Cited in Whitesides v. Cannon, 23 Mo. 457, holding where a trust is created for a married woman's separate use she might contract debts chargeable to her separate estate; Nix v. Bradley, 6 Rich. Eq. 43, holding the marriage of a woman having an absolute interest in property for her separate use would not attach the marital rights of the husband to it; Child v. Pearl, 43 Vt. 224, holding a parol gift by a husband to wife of a house for her sole and separate use was not affected by her subsequent remarriage after death of first husband; Place v. Spawn, 7 Grant, Ch. (U. C.) 409, holding the trustees of an estate to the separate use of a married woman might under her direction execute a mortgage on the trust property for the purpose of raising funds; Adams v. Loomis, 24 Grant, Ch. (U. C.) 242, holding a wife might make a valid conveyance of her separate estate without her husband joining therein; Robert v. West, 15 Ga. 122; Nickell v. Handly, 10 Gratt. 336; Racouillat v. Sansevain, 32 Cal. 376,—on right of married woman to deal with her separate estate as a feme sole; Castree v. Shotwell, 73 N. J. Eq. 590, 68 Atl. 774, holding that property held in trust for married daughter of testator cannot be subjected to payment of attorney fees for services in advising her as to management of fund.

The decision of the Master of the Rolls was cited in Adams v. Gamble, 12 Ir. Ch. Rep. 102; Maiben v. Bobe, 6 Fla. 381,—holding a married woman might dispose of an estate devised to her separate use as a feme sole there being as restrictions on her so doing; Liptrot v. Holmes, 1 Ga. 381, holding that on death of feme covert, intestate, her separate estate vests in her legal representatives; Phillips v. Graves, 20 Ohio St. 371, 5 Am. Rep. 675, holding the separate estate of a married woman was chargeable with the purchase price of a piano purchased by her and for which she acknowledged herself indebted; Hooton v. Ransom, 6 Mo. App. 19, holding that where note is executed by married woman and husband, court of equity has,—after she becomes discovert no jurisdiction to reject her separate property to payment of note, as remedy is at law; Moore v. Jackson, 22 Can. S. C. 210, holding the separate estate of a married woman was

chargeable with the payment of notes executed by her; Noyes v. Blakeman, 3 Sandf. 531; Sims v. Georgetown College, 1 App. D. C. 72,—on the nature and extent of a married woman's interest in an estate to her separate use; Scott v. Scott, 13 Ind. 225, on the right of a married woman to alienate her separate estate; Wilson v. Bailer, 3 Strobh. Eq. 258, 51 Am. Dec. 678, on a gift to the sole and separate use of a woman as being good as against an after-taken husband; Fitzpatrick v. Dryden, 30 N. B. 558, holding that courts of equity treat feme covert as feme sole with respect to property held for her separate use; Taylor v. Meads, 34 L. J. Ch. N. S. 203, 4 De G. & S. 597, 5 New Reports, 348, 11 Jur. N. S. 166, 12 L. T. N. S. 6, 13 Week. Rep. 394; Wright v. Garden, 28 U. C. Q. B. 609,—on right of married woman to deal with her separate estate as a feme sole.

Termination of coverture as affecting married woman's rights.

Cited in Clapp v. Ingraham, 126 Mass. 200, on married woman's disabilities as terminating with her coverture.

Husband as trustee for wife.

The decision of the Master of the Rolls was cited in Kent v. Kent, 20 Ont. Rep. 445, holding a conveyance by husband of lands direct to his wife made him a trustee thereof for her benefit.

3 E. R. C. 243, HOPE v. CARNEGIE, L. R. 4 Ch. 264, 20 L. T. N. S. 5, 17 Week. Rep. 363, affirming the decision of the Vice Chancellor, reported in L. R. 7 Eq. 254.

Right to appeal on a question of costs.

Cited in Sancton v. Reed, 27 N. B. 1, holding an appeal would not lie from a refusal of court to allow costs where the question of costs rested in the discretion of the court; Sayre v. Harris, 18 N. B. 677, on the right to appeal on the question of costs; Taylor v. Dowlen, L. R. 4 Ch. 697, 38 L. J. Ch. N. S. 680, 21 L. T. N. S. 70, 17 Week. Rep. 779, holding an order that trustees shall pay the costs of a suit personally is not appealable.

Appealability of discretionary matters.

Cited in note in 3 Eng. Rul. Cas. 254, on nonappealability of discretionary matters.

Remedy to compel full accounting by wife as administratrix.

Cited in Murcheson v. Donohoe, 6 Ont. Pr. Rep. 138, as instance of the remedy of plaintiff seeking to have an administratrix of husband's estate bring in certain accounts in suit in which her husband was joined as defendant.

When substituted service can be made.

The decision of the Vice Chancellor was cited in Chatham Harvester Co. v. Campbell, 12 Ont. Pr. Rep. 666, holding that order for substituted service of notice of motion to commit to prison cannot be made except where no doubt exists that notice has come to knowledge of person against whom application is made; Mills v. Mercer Co. 15 Ont. Pr. Rep. 276, holding that to bring officer of litigant corporation into contempt for refusal to answer questions upon his examination for discovery, he must be personally served.

3 E. R. C. 248, GARDNER v. JAY, L. R. 29 Ch. Div. 50, 54 L. J. Ch. N. S. 762, 52 L. T. N. S. 395, 33 Week. Rep. 470.

Review of exercise of discretion.

Cited in Colonial Invest. Co. v. Ledbetter, 40 N. S. 504, holding that exercise

of discretion in granting jury in case of equitable nature is reviewable; Hewitt v. Hudson's Bay Co. 20 Manitoba L. Rep. 320, holding that under statute on appeal from order of referee though made in exercise of discretion, judge should consider matter independently and exercise his own discretion.

"Judicial discretion" defined.

Cited in Hubbard v. Hubbard, 77 Vt. 73, 67 L.R.A. 969, 107 Am. St. Rep. 749, 58 Atl. 969, 2 Ann. Cas. 315, on what meant by the "judicial discretion" vested in a court.

Right to have a trial by jury.

Cited in Haist v. Grand Trunk R. Co. 22 Ont. App. Rep. 504, holding an issue as to the effect of the payment and receipt and its procurement by fraud might be tried by the judge in action to recover alleged damages; Commee v. Canadian P. R. Co. 12 Ont. App. Rep. 744; Clairmonte v. Prince, 30 N. S. 258,—on right to have a jury trial of a cause of action; Commee v. Canadian P. R. Co. 11 Ont. Pr. Rep. 149, holding that where difficult and complicated questions of law and fact would arise at trial, order of master in chambers striking out notice of jury trial will be sustained.

Distinguished in Masse v. Masse, 11 Ont. Pr. Rep. 81, holding on an action of ejectment court would not strike out a notice for a jury.

3 E. R. C. 255, HARLOCK v. ASHBERRY, L. R. 19 Ch. Div. 84, 51 L. J. Ch. N. S. 96, 45 L. T. N. S 602, 30 Week. Rep. 112.

Security for costs on appeal.

Cited in Donnelly v. Ames, 17 Ont. Pr. Rep. 106, holding security for costs properly required on appeal where several of appellants resided abroad and the others had no property subject to execution in the province.

3 E. R. C. 259, DAGNINO v. BELLOTTI, L. R. 11 App. Cas. 604, 55 L. T. N. S. 497.

3 E. R. C. 262, MERRY v. NICKALLS, 42 L. J. Ch. N. S. 479, L. R. 8 Ch. 205, 28 L. T. N. S. 296, 21 Week. Rep. 305.

Costs or stay of proceedings pending appeal.

Cited in Patton v. Alberta Coal Co. 2 Terr. L. Rep. 294, holding an execution for costs would be stayed unless the advocates gave personal undertaking to repay them in case appeal succeeded; Cooper v. Cooper, L. R. 2 Ch. Div. 492, 45 L. J. Ch. N. S. 667, 24 Week. Rep. 628, holding proceedings would be stayed on appeal where the applicant makes a payment of the costs pending the stay.

Distinguished in Adair v. Young, L. R. 11 Ch. Div. 136, 40 L. T. N. S. 598. L. R. 12 Ch. Div. 13, making the costs of the application for stay of proceedings pending appeal the costs in the appeal where the appellant the beneficiary of such order.

3 E. R. C. 265, WILSON v. CHURCH, 28 Week. Rep. 284, L. R. 12 Ch. Div. 454.

Stay of proceedings pending appeal.

Cited in McDonald v. Murray, 9 Ont. Pr. Rep. 464, permitting plaintiff to proceed with a new trial pending an appeal where he showed inconvenience by the delay and that he might lose important oral evidence by it; Weldon v. Parks, N. B. Eq. Cas. 433, holding a court will stay proceedings under a judgment pending an appeal where necessary to prevent the appeal if successful from being

nugatory; Robertson v. Miller, 3 N. B. Eq. 78, on right to stay execution pending an appeal; Dunlop v. Haney, 7 B. C. 300, to the point that fund involved in litigation should be retained until appeal in case has been determined; Huggard v. Ontario & S. Land Corp. 1 Sask. L. R. 421, holding that court has jurisdiction to preserve property which is subject matter of action pending decision of case, where money has been paid into court.

3 E. R. C. 272, RE ST. NAZAIRE CO. L. R. 12 Ch. Div. 88, 41 L. T. N. S. 110, 27 Week. Rep. 854, reversing the decision of the Vice Chancellor, reported in 36 L. T. N. S. 358, 25 Week. Rep. 424.

Right to have a rehearing of an order or judgment of court.

Cited in Robertson v. Miller, 2 N. B. Eq. 494, holding a party to a suit not appearing in, could not have a rehearing of as much of the judgment as ordered him to pay costs.

Jurisdiction of court to grant a rehearing or modify judgment.

Cited in Kimpton v. McKay, 4 B. C. 196, holding until formally entered a reargument of the decision of the court orally delivered may be had; Walker v. Robinson, 15 Manitoba L. Rep. 445, holding a referee in chambers has no power to rescind his own order not made ex parte; McNabb v. Oppenheimer, 11 Ont. Pr. Rep. 214, holding a judge in chambers has no power to rescind his own order for a writ of ca. sa.; Port Elgin Public School Bd. v. Eby, 17 Ont. Pr. Rep. 58, holding trial judge had no power to vary his judgment against petitioner as to costs he having made no mistake and no clerical error therein; Grant v. Grant, 36 N. S. 547, holding an order of the court not drawn up at the time a judgment was delivered might be varied by the court in so making up; Preston Bkg. Co. v. Allsup & Sons [1895] 1 Ch. 141, 64 L. J. Ch. N. S. 196, 12 Reports 51, 71 L. T. N. S. 708, 43 Week. Rep. 231, holding court would not hear an order which was in effect an application to rehear a previous order; Ex parte Brown, L. R. 20 Q. B. Div. 693, 58 L. T. N. S. 911, 36 Week. Rep. 584, 5 Morrell, 83, holding an order of court charging costs was not subject to being rescinded by the court; Smith v. Smith, L. R. 7 P. D. 84, 51 L. J. Prob. N. S. 31, 46 L. T. N. S. 696, 30 Week. Rep. 688, holding court would not vary its order for costs in divorce proceedings where such order made absolute and the order correctly expressed the judge's meaning at the time; Re Crown Bank, L. R. 44 Ch. Div. 634, 59 L. J. Ch. N. S. 739, 62 L. T. N. S. 823, 39 Week. Rep. 45, holding court might properly dismiss a petition for the winding up of a company where the order for its winding up had been given out but not passed and entered; Jackson v. Canadian P. R. Co. 1 Sask. L. R. 84, to the point that judge had no jurisdiction to reconsider his own order or rescind it; London County v. Dundas [1904] P. 1, 19 Times L. R. 670; O'Brien v. R. Ir. L. R. 26 C. L. 451; Snyder v. Arenburg, 27 N. S. 247,—on power of judge to rehear actions tried and decided by him; Re Swire, L. R. 30 Ch. Div. 239, 53 L. T. N. S. 205, 33 Week. Rep. 785; Charles Bright & Co. v. Sellar [1904] 1 K. B. 6, 72 L. J. Ch. N. S. 921, 89 L. T. N. S. 431, 52 Week. Rep. 148, 20 Times L. R. 12,—on judge of the High Court as having no jurisdiction to rehear.

Distinguished in Synod v. De Blaquiere, 10 Ont. Pr. Rep. 11, holding a court might properly reopen a case on a petition for leave to produce newly discovered evidence although the judgment has been affirmed on appeal; Re MacAlester, Ir. L. R. 25 Eq. 258, holding a land judge has power to rescind orders made by him.

3 E. R. C. 282, JONES v. OGLE, 42 L. J. Ch. N. S. 334, L. R. 8 Ch. 192, 28 L. T. N. S. 245, 21 Week. Rep. 236.

Apportionable dividends or income.

Distinguished in Capron v. Capron, L. R. 17 Eq. 288, 43 L. J. Ch. N. S. 677, 29 L. T. N. S. 826, 22 Week. Rep. 347, holding rent was apportionable from day to day where the will indicated no restriction to accruing rents.

"Periodical payments" defined.

Cited in Re Supreme Legion S. K. 29 Ont. Rep. 708, defining what constituted "periodical payments;" Re Cox, L. R. 9 Ch. Div. 159, 47 L. J. Ch. N. S. 735, 27 Week. Rep. 53, holding on facts the profits of a business were not within the meaning of an apportionment act, "periodical payments."

"Trading company" may include what.

Cited in Re Griffith, L. R. 12 Ch. Div. 655, 41 L. T. N. S. 540, holding the words "trading or other public companies" in section of apportionment act did not include a private partnership.

Will takes effect as of what date.

Cited in Re Swenson, 55 Minn. 310, 56 N. W. 1115, on will as taking effect as of what date.

Income, what constitutes.

Cited in Re Assessment Act, 9 B. C. 209, holding the earnings of railway locomotive engineers who receive pay according to the number of miles they run their locomotives are not "income" within the meaning of an assessment act.

Construction of will as affected by subsequent legislative act.

Cited in Baldwin v. Kingstone, 18 Ont. App. Rep. 63 (affirming 16 Ont. Rep. 341), holding an act abolishing primogeniture did not apply to a will taking effect before its passage; Re Bridger, [1893] 1 Ch. 44, [1894] 1 Ch. 297, 62 L. J. Ch. N. S. 146, 67 L. T. N. S. 549, 41 Week. Rep. 104, holding a gift in a will of residue of estate as may be given for charitable purposes will include real as well as personal where the testator died after the passage of an act extending scope of charitable devises; Re March, L. R. 27 Ch. Div. 166, 54 L. J. Ch. N. S. 143, 51 L. T. N. S. 380, 32 Week. Rep. 941, holding a will executed before the passage of the married woman's act would be construed in accordance with laws at that time, although testator did not die until after the passage of the act: Re Rayer [1903] 1 Ch. 685, 72 L. J. Ch. N. S. 230, 51 Week. Rep. 538, 87 L. T. N. S. 712, on how construction of a will affected by subsequent legislative act.

3 E. R. C. 288, BEAVAN v. BEAVAN, L. R. 24 Ch. Div. 649 note, 52 L. J. Ch. N. S. 961, 49 L. T. N. S. 263, 2 Swabey & T. 652, 32 Week. Rep. 363 note.

Apportionment of delayed profits.

Cited in Re Housman, 4 Dem. 404, holding delay in making a conversion of assets directed by will should inure to the benefit of the estate as a whole.

Cited in note in 25 E. R. C. 48, on time of conversion of property as affecting relative rights of life tenant and remaindermen.

Charging principal for unrealized income.

Followed without discussion in Re Chesterfield, L. R. 24 Ch. Div. 643, 52 L. J. Ch. N. S. 958, 49 L. T. N. S. 261, 32 Week. Rep. 361, 3 Eng. Rul. Cas. 293.

Cited in Re Clark, 6 Ont. L. Rep. 551, holding the principal reducible by accumulated rents, computed at 4½ per cent only from time leases terminated and not from time devises vested; Miller v. Dahl, 10 Manitoba L. Rep. 97,

holding that tenant for life cannot be compensated for loss of income, unless there is fund out of which compensation can be given; Re Hobson, 55 L. J. Ch. N. S. 422, 53 L. T. N. S. 627, 34 Week. Rep. 70, on the apportionment between capital and income where the conversion of residuary interest was delayed because having no present but a prospective future value.

— Rate of interest allowable pending conversion of corpus into investable funds.

Cited in Re Hengler [1893] 1 Ch. 586, 62 L. J. Ch. N. S. 383, 3 Reports, 207, 68 L. T. N. S. 84, 41 Week. Rep. 491, holding 4 per cent the rate of interest chargeable pending the conversion of estate; Re Woods [1904] 2 Ch. 4, 73 L. J. Ch. N. S. 204, 90 L. T. N. S. 8, on the rate of interest allowable pending the postponement of the conversion of the estate.

Mode of charging expenses of carrying unproductive assets of prospective value.

Cited in Re Martens, 16 Misc. 245, 39 N. Y. Supp. 189, 1 Gibbons, Sur. Rep. 608, holding where it appears that unproductive land having a prospective value is carried by the trustees of the estate for the benefit of the remainderman, the expenses of carrying it are chargeable to the principal of the trust estate and not to the income.

3 E. R. C. 293, RE CHESTERFIELD, L. R. 24 Ch. Div. 643, 52 L. J. Ch. N. S. 958, 49 L. T. N. S. 261, 32 Week. Rep. 361.

Charging principal with unrealized income.

Followed without discussion in Re Flower, 62 L. T. N. S. 216; Re Godden [1893] 1 Ch. 292, 62 L. J. Ch. N. S. 469, 3 Reports, 67, 68 L. T. N. S. 116, 41 Week. Rep. 282.

— Computation and rate.

Cited in Re Clarke, 6 Ont. L. Rep. 551, holding the principal reducible by accumulated rents, computed at 4½ per cent only from time leases terminated and not from time devises vested; Re Hobson, 55 L. J. Ch. N. S. 422, 53 L. T. N. S. 627, 34 Week. Rep. 70, on how apportionment made between income, unrealized because of delay in conversion of unproductive assets, and the principal; Re Goodenough [1895] 2 Ch. 537, 65 L. J. Ch. N. S. 71, 13 Reports, 454, 73 L. T. N. S. 152, 44 Week. Rep. 44, holding 3 per cent the rate of interest allowable pending the conversion of unproductive assets; Re Hengler [1893] 1 Ch. 586, 62 L. J. Ch. N. S. 383, 3 Reports, 207, 68 L. T. N. S. 84, 41 Week. Rep. 491, holding 4 per cent the rate chargeable pending the conversion of unproductive assets; Re Whiteford [1903] 1 Ch. 889, 72 L. J. Ch. N. S. 540, as an instance where 3 per cent was taken as the basis and adopting same rate.

Mode of charging expenses of carrying unproductive assets of prospective value.

Cited in Re Cameron, 2 Ont. L. Rep. 756, holding where a portion of the income belonging to life tenant is taken to pay taxes on and preserve the unproductive portion of the estate, the life tenant is entitled to a first charge on such assets for part of income thus expended; Re Morley [1895] 2 Ch. 738, 64 L. J. Ch. N. S. 727, 13 Reports, 680, 73 L. T. N. S. 151, 44 Week. Rep. 140; holding the amount of income expended in keeping down the premiums and interest on policies which were for the life of another than testator ought to be recouped to the tenant for life with interest at 4 per cent out of the property preserved thereby.

Rights of life tenant of unproductive personalty.

Cited in Re Searle [1900] 2 Ch. 829, 69 L. J. Ch. N. S. 712, 83 L. T. N. S. 364, 49 Week. Rep. 44, on rights of life tenant of unproductive personalty; Miller v. Dahl, 10 Manitoba L. Rep. 97, holding that tenant for life cannot be compensated for loss of income unless there is fund out of which compensation can be given.

3 E. R. C. 301, REDE v. OAKES, 4 De G. J. & S. 505, 10 Jur. N. S. 1246, 34 L. J. Ch. N. S. 145, 11 L. T. N. S. 549, 5 New Reports, 209, 13 Week. Rep. 303. Reversing the decision of the Master of the Rolls reported in 32 Beav. 555, 9 Jur. N. S. 765, 13 W. R. 420.

Right to specific performance of contract for sale of land.

Cited in Townshend v. Goodfellow, 40 Minn. 312, 3 L.R.A. 739, 12 Am. St. Rep. 736, 41 N. W. 1056, refusing to compel the specific performance of a contract for the sale of land in favor of the vendor, there being such uncertainty about the title as to affect its marketable value; Wollenberg v. Rose, 45 Or. 615, 78 Pac. 751, holding that vendee who has contracted for purchase of land is entitled to marketable title, and one subject to suits to set aside some deeds conveying land to vendor is not marketable.

Cited in Pomeroy Spec. Perf. 2d ed. 278, on necessity that title be free from reasonable doubt to render contract specifically enforcible; Pomeroy Spec. Perf. 2d ed. 285, on refusal of specific performance of contract where title involves future litigation; Pomeroy Spec. Perf. 2d ed. 424, on failure of title to one or more of separate lots as bar to specific performance.

Conditions of sale of trust estate.

Cited in 2 Beach Trusts, 1100, on conditions of sale of trust estate.

3 E. R. C. 310, KER v. WAUCHOPE, 1 Bligh, 1.

Affirmance and denial of same fact or right.

Cited in Sioux City v. Chicago & N. W. R. Co. 129 Iowa, 694, 113 Am. St. Rep. 501, 106 N. W. 183, holding city which in action involving the title to real estate alleged that in reliance on title asserted, it had conveyed to its co-defendant, could not thereafter claim the land of its co-defendant; Brown v. O'Brien, 11 Tex. Civ. App. 459, 33 S. W. 267, holding where counsel in case withdraws his objection that the authority of a guardian is not shown he cannot afterwards claim a deed did not pass title for want of such authority; Norton v. Wochler, 31 Tex. Civ. App. 522, 72 S. W. 1025, holding that one who recovered judgment on ground that trade in which note was given had not been cancelled, is estopped from claiming its cancelation as defense to his liability on notes.

Election of rights.

Cited in Campbell v. Kauffman Mill Co. 42 Fla. 328, 29 So. 435, holding that person who has election between several inconsistent courses of action will be confined to that which he first adopts; Haack v. Weicken, 42 Hun, 486, holding a devisee by electing to take under a will, waived a right to have a deed reformed, such act being inconsistent with provisions of will; Van Dyke's Appeal, 60 Pa. 481, 26 Phila. Leg. Int. 285, holding under a will devising land in one state to daughters of testator and that in another state to sons, which latter devise was defectively executed so as not to operate, the daughters would be compelled to make an election; Melchoir v. Burger, 21 N. C. (1 Dev. & B. Eq.) 634, on when a person is put to an election under the terms of a will; Re

Chesham, L. R. 31 Ch. Div. 466, 55 L. J. Ch. N. S. 401, 54 L. T. N. S. 154, 34 Week. Rep. 321, holding that doctrine of compensation engrafted upon the doctrine of election is confined to case of taking against instrument giving rise to election; Hamilton v. Hamilton [1892] 1 Ch. 396, 61 L. J. Ch. N. S. 220, 66 L. T. N. S. 112, 40 Week. Rep. 312, holding that doctrine of election rests upon presumption of general intention in authors of instrument that effect shall be given to every part of it; Re Vardon L. R. 28 Ch. Div. 124, holding that doctrine of election is founded upon rule that person cannot take under and against same instrument.

Cited in note in 10 Eng. Rul. Cas. 335, 336, 340, 341, on necessity of election by heirs of foreign land claiming under will of person domiciled within state or country.

Conjectural constructions of wills.

Cited in Lynes v. Townsend, 33 N. Y. 558, on court as not being at liberty to follow conjectures in construing a will.

Stare decisis.

Cited in Schafer v. Farmers' & M. Bank, 59 Pa. 144, 98 Am. Dec. 323, 26 Phila. Leg. Int. 278, 1 Legal Gaz. 60, on the adherence of the courts to the rule of stare decisis.

3 E. R. C. 315, GANDY v. GANDY, L. R. 30 Ch. Div. 57, 54 L. J. Ch. N. S. 1154, 53 L. T. N. S. 306, 33 Week. Rep. 803.

Affirmance and denial of same fact or right.

Cited in Sioux City v. Chicago & N. W. R. Co. 129 Iowa, 694, 113 Am. St. Rep. 501, 106 N. W. 183, holding that where city, in former action involving title to real property asserted its title and alleged that in reliance thereon it had conveyed portion of tract to co-defendant, it was estopped from claiming land of co-defendant; Porter v. Purdy, 41 Can. S. C. 471, holding that act of lessor under option in lease giving notice that he would not renew was valid exercise of option entitling him to possession although appraisement of improvements to be paid for by him was invalid; Lovitt v. King, 43 Can. S. C. 106 (dissenting opinion), on estoppel of person from claiming advantage by assuming inconsistent position; Stephens v. Riddell, 21 Ont. L. Rep. 484, holding that one who having escaped liability by establishing assignment, could not afterwards attack validity of assignment; Manley v. O'Brien, 8 B. C. 280, holding where on a trial plaintiff had induced a verdict recognizing defendants' right to timber on land, he could not afterwards contend that defendant had no right to dispose of the timber.

Separation agreement as preclusive of alimony.

Cited in Bishop v. Bishop [1897] P. 138, 66 L. J. Prob. N. S. 69, 76 L. T. N. S. 409, 45 Week. Rep. 467, holding an acceptance of a specific sum by a wife for maintenance in return for her agreement to withdraw a petition for divorce did not preclude her from obtaining a higher rate of alimony on a dissolution of the marriage on a first petition of the wife because of subsequent misconduct of the husband.

Distinguished in Wood v. Wood, 57 L. J. Ch. N. S. 1, 57 L. T. N. S. 746, 36 Week. Rep. 33, 57 L. J. Ch. N. S. 7, holding where wife petitions for a judicial separation, she has a right to have alimony pendente lite, the husband refusing to continue an allowance made under a deed of separation.

Effect of deed of separation as final condonation.

Cited in Rose v. Rose, 52 L. J. Prob. N. S. 25, L. R. 8 Prob. Div. 98, 48 L. T. N. S. 378, 31 Week. Rep. 573, holding the subsequent adultery of the husband did not revive the wife's right to complain of the cruelty committed before the deed of separation entered into by them.

Right of stranger to a contract to maintain an action thereon.

Cited in Real Estate Loan Co. v. Molesworth, 3 Manitoba L. R. 16, holding upon a bill for the foreclosure of a mortgage, by an assignee thereof a personal order could not be made against a purchaser of the mortgagor who had not assumed payment of; Mitchell v. London Assur. Co. 15 Ont. App. Rep. 262, holding a mortgagee of property might maintain an action on a policy of insurance taken out by the mortgagor for the benefit of the mortgagee; Henderson v. Killey, 14 Ont. Rep. 137, holding an agreement by a new firm to pay notes given by one member of old firm to a retiring partner might be enforced by the latter by an action in the name of such other partner as trustee; Keller v. Ashford, 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494, on right of mortgagee to maintain an action on a covenant in a deed whereby the grantee assumes the payment of the mortgage; Dawson v. Dawson, 23 Ont. L. Rep. 1, 20 Ann. Cas. 780, to the point that contract cannot be enforced except by party to contract, as general rule; Babarfald v. Macintosh, 12 C. L. R. (Austr.) 159 (dissenting opinion); Clarke v. Birley, L. R. 41 Ch. Div. 422, 58 L. J. Ch. N. S. 616, 60 L. T. N. S. 948, 37 Week. Rep. 746; Gillies v. Commercial Bank, 10 Manitoba L. Rep. 460; Henderson v. Killey, 17 Ont. App. Rep. 456; Moot v. Gibson, 21 Ont. Rep. 248; Armstrong v. Lye, 27 Ont. Rep. 511 (dissenting opinion): Agricultural Sav. & L. Co. v. Liverpool & L. & G. Ins. Co. 3 Ont. L. Rep. 127,— on right of stranger to a contract to maintain an action on same.

Cited in notes in 25 L.R.A. 279, 280, on right of third party to sue upon contract made for his benefit; 1 Eng. Rul. Cas. 704, on right of action arising out of contract with a third person; 12 Eng. Rul. Cas. 815, on right of wife to sue upon separation agreement between her trustee and husband.

Cited in Stearns Suretyship, 272, on right of party for whose benefit contract is made to enforce it in his own name.

Distinguished in Drimmie v. Davies [1899] 1 Ir. Ch. 176, holding a covenant to pay an annuity to a third person might be enforced by the personal representatives of such third person.

— Action by child on settlement agreement between parents.

Cited in Faulkner v. Faulkner, 23 Ont. Rep. 252, holding an action, was not maintainable by a child in a covenant in a mortgage to its mother to educate it, for a breach of the covenant.

Distinguished in Andrews v. Moodie, 17 Manitoba L. Rep. 1, holding where defendant agreed to pay his wife's costs to her solicitor who was present when such agreement was made, there was such an equitable assignment of wife's claim for costs that the solicitor might maintain an action thereon.

Right of amendment of pleadings.

Cited in Foulds v. Chambers, 11 Manitoba L. Rep. 300, holding a person for whose benefit a reversion has been assigned to trustees although not entitled to bring an action in his own name might have leave to amend by joining trustees as parties plaintiff; Edgar v. Caskey, 4 D. L. R. 460, holding that firm of real estate brokers, in action for specific performance of contract to sell lands, may be permitted at trial to amend their statement of claim so as to show that agreement was made in name of member of firm for its benefit.

Validity of separation agreements.

Cited in 1 Beach Trusts, 719, 721, 725, on validity of voluntary separation of husband and wife.

3 E. R. C. 329, DEVAYNES v. NOBLE, 1 Meriv. 572, 15 Revised Rep. 151.

Appropriation of payments.

Cited in Pickering v. Day, 3 Houst. (Del.) 474, 95 Am. Dec. 291; Bobe v. Stickney, 36 Ala. 482,—on the application of payments where the debtor owes the same creditor more debts than one; United States v. Irving, 1 How. 250, 11 L. ed. 120; Boody v. United States, 1 Woodb. & M. 150, Fed. Cas. No. 1,636; Philadelphia Nat. Bank v. Dowd, 2 L.R.A. 480, 38 Fed. 172; First Nat. Bank v. National Surety Co. 66 L.R.A. 777, 64 C. C. A. 601, 130 Fed. 401; Chesapeake Bank v. Swain, 29 Md. 483; Baker v. Stackpoole, 9 Cow. 420, 18 Am. Dec. 508; Pattison v. Hull, 9 Cow. 747; Allen v. Culver, 3 Denio, 284; Stone v. Seymour, 15 Wend. 19; Grant v. Lathrop, 77 Hun, 159, 28 N. Y. Supp. 407; Heilbron v. Bissell, Bail. Eq. 430; Emery v. Tichout, 13 Vt. 15 (dissenting opinion); Smith v. Loyd, 11 Leigh, 512, 37 Am. Dec. 621; Wade v. Kendrick, 37 Can. S. C. 32; City Discount Co. v. McLean, L. R. 9 C. P. 692, 43 L. J. C. P. N. S. 344, 30 L. T. N. S. 883; Gillies v. Commercial Bank, 10 Manitoba L. Rep. 460; Re Wood [1894] 2 Ch. 577, 63 L. J. Ch. N. S. 772, 8 Reports, 817,—on rules for appropriating payments; Gass v. Stinson, 3 Sumn. 98, Fed. Cas. No. 5, 262, on the appropriation of indefinite payments; Jones v. United States, 7 How. 681, 12 L. ed. 870, holding that payments upon running account kept at Post Office Department between Federal government and postmaster should be credited upon earlier balances; Conduitt v. Ryan, 3 Ind. App. 1, 29 N. E. 160, holding that in absence of application by parties law will see that items are paid in order of date; Newell v. Hadley, 206 Mass. 335, 29 L.R.A.(N.S.) 908, 92 N. E. 507, to the point that as between two cestuis que trust order of drawings on bankrupt's bank account is order of application; Dows v. Morewood, 10 Barb. 183, holding that payments in absence of application by either party will be applied upon earliest items; McGhee v. Montgomery, 85 S. C. 207, 65 S. E. 721, holding that where individual starts account and forms partnership and account is continued, subsequent payments simply credited on account are applied to oldest items; Frontenac v. Breden, 17 Grant, Ch. 645, holding that rule that general payments are appropriated first to earliest items on either side of account does not entitle surety to claim that concealed item, should be deemed satisfied by moneys paid by debtor; Kirkett v. McGuire, 7 Ont. App. 53, holding that in partnership transactions payments in absence of appropriation by parties will be applied to earlier items; McKenzie v. McBean, 4 U. C. Q. B. O. S. 137, on sufficiency of evidence to show application of credit by one who was guarantor; Re Boys, L. R. 10 Eq. 467, 39 L. J. Ch. 655, holding a promissory note given by a principal and surety for a definite sum and payable on a fixed day is presumed to be given in consideration of advances at date of note rather than future ones.

Cited in note in 3 E. R. C. 554, on appropriation of payments.

Cited in Parsons Partn. 4th ed. 421, 425, on appropriation of payments after change in partnership; Parsons Partn. 4th ed. 426, on wrong of debtor as affecting application of payments after change in partnership; Parsons Partn. 4th ed. 522, on application of payments on accounting between partners before a master.

— On mutual itemized accounts.

Cited in Gass v. Stinson, 3 Sumn. 98, Fed. Cas. No. 5,262; United States v. Bradbury, 2 Ware, 150, Fed. Cas. No. 14,635; Whetmore v. Murdock, 3 Woodb. & M. 390, Fed. Cas. No. 17,510; Rickerson Rolling-Mill Co. v. Farrell Foundry & Mach. Co. 23 C. C. A. 302, 43 U. S. App. 452, 75 Fed. 554; Dennington v. Kirk, 57 Ark. 595, 22 S. W. 430; Thurlow v. Gilmore, 40 Me. 378; Martin v. Mechanies' Bank, 6 Harr. & J. 235; Neidig v. Whiteford, 29 Md. 178; Hersey v. Bennett, 28 Minn. 86, 41 Am. Rep. 271, 9 N. W. 590; National Park Bank v. Seaboard Bank, 44 Hun, 49; Shedd v. Wilson, 27 Vt. 479; Chapman v. Com. 25 Gratt. 721; London & County Bkg. Co. v. Ratcliffe, L. R. 6 App. Cas. 722, 51 L. J. Ch. N. S. 28, 45 L. T. N. S. 322, 30 Week. Rep. 109; Merriman v. Ward, 1 Johns. & H. 371; Siebel v. Springfield, 9 L. T. N. S. 324, 12 Week. Rep. 73,—holding payments will be applied by law to items in order of priority; Harrison v. Johnston, 27 Ala. 445, holding a general payment to a commission merchant with whom debtor has a running account will be referred to his existing indebtedness and not to future advances; Fairchild v. Holly, 10 Conn. 175, holding in an action on a book account neither party having appropriated the payments to any particular items, they will be appropriated to the items in the account which first accrued; McKenzie v. Nevius, 22 Me. 138, 38 Am. Dec. 291, holding payments will be appropriated to the oldest items of account where on settlements the balances are carried forward to new accounts; People use of C. H. Little Co. v. Grant, 139 Mich. 26, 102 N. W. 226, holding creditor to have elected that payments apply to the extinguishment of the items of the account in order of time where credit is entered on a general account and a statement thereof rendered to the debtor; Dey v. Anderson, 39 N. J. L. 199; Anderson v. Daley, 38 App. Div. 505, 56 N. Y. Supp. 511; Moss v. Adams, 39 N. C. (4 Ired. Eq.) 42; United States v. Wardwell, 5 Mason, 82, Fed. Cas. No. 16,640,—holding that payments on running accounts are deemed to be made towards items that are first due; Capen v. Alden, 5 Met. 268; Griffith v. Crocker, 18 Ont. App. Rep. 376; German L. E. St. Matthew's Congregation v Heise, 44 Md. 453,—on the appropriation of payments made on a running account.

Cited in Benjamin Sales, 5th ed. 797, 798, on rule for appropriation of payments where account current is kept between the parties.

Distinguished in The Mecca [1897] A. C. 286, 8 Asp. Mar. L. Cas. 266, 66 L. J. Prob. N. S. 86, 76 L. T. N. S. 579, 13 Times L. R. 339, 45 Week. Rep. 667, as not applying where no account is current between the parties; Dougall v. Lornie, 1 Sc. Sess. Cas. (5 Series) 1187, holding indefinite payments on a tradesman's account are not to be ascribed to the items in order of date so as to preclude the debtor from subsequently challenging any item in it; Thompson v. Hudson, L. R. 6 Ch. 320, 24 L. T. N. S. 301, 19 Week. Rep. 645 (reversing 40 L. J. Ch. N. S. 28, L. R. 10 Eq. 497, 23 L. T. N. S. 278, 18 Week. Rep. 1081), holding a payment made to a creditor to whom debtor was indebted on three accounts was to be appropriated to the three debts ratably where there had been a composition with creditor agreeing to receive a smaller sum in settlement, with payments in instalments; Smith v. Betty [1903] 2 K. B. 317, 72 L. J. K. B. N. S. 853, 89 L. T. N. S. 258, 52 Week. Rep. 137, 19 Times L. R. 602, holding a sum received by counsel but not accounted for could not be set off as against items owed to counsel but barred by statute of limitations.

— On banking accounts.

Cited in Scammon v. Kimball, 92 U. S. 362, 23 L. ed. 483, holding a banker,

a director in an insurance company can set off against its demand for money deposited with him, the money due on its policies issued to and held by him; Pittsburg v. Rhodes, 230 Pa. 397, 79 Atl. 634, holding that rule as to application of payments applies to banks; Kinnaird v. Webster, L. R. 10 Ch. Div. 139, 48 L. J. Ch. N. S. 348, 39 L. T. N. S. 494, 27 Week. Rep. 212, holding payments made by a depositor who had overdrawn his account were to be applied first to the payment of the notes secured by the surety which had fallen due; Parkinson v. Wakefield, 5 Times L. R. 562, holding payments into an account would be appropriated to the satisfaction of overdrafts where the securities given for such right of overdrafting, were disturbed; Pennell v. Deffell, 4 De G. M. & G. 372, 23 L. J. Ch. N. S. 115, 18 Jur. 273, 1 Week. Rep. 499; Henniker v. Wigg, 4 Q. B. 792, Dav. & M. 160,—on payments into a bank account as going to satisfy withdrawals in order of priority; Williams v. Rawlinson, 3 L. J. C. P. 164, 3 Bing. 71, 10 J. B. Moore, 362, Ryan & M. 233, 28 Revised Rep. 584, holding payments properly applied to oldest items to exonerate a bondsman for the bank; Bannatyne v. MacIver, 2 B. R. C. 735, holding that person loaning money to agent who had no authority to borrow is entitled to credit for such sums as appears were used by agent to pay indebtedness of principal.

Distinguished in Lacey v. Hill, L. R. 4 Ch. Div. 537, holding in the case of fraudulent overdrawings from a bank, moneys paid in could not be appropriated to the satisfaction of such fraudulent withdrawals; Blackburn Bldg. Soc. v. Cunliffe, L. R. 22 Ch. Div. 61, 31 Week. Rep. 98, L. R. 9 App. Cas. 857, 54 L. J. Ch. N. S. 376, 52 L. T. N. S. 225, 33 Week. Rep. 309, as not applying to show how payments of money overdrawn on banker's account were applied; Re London & General Bank [1895] 2 Ch. 673, 64 L. J. Ch. N. S. 866, holding profits entered in a balance sheet were not paid by appropriation of moneys paid into current accounts.

— On special bank accounts.

Cited in National Mahaiwe Bank v. Peck, 127 Mass. 298, 34 Am. Rep. 368, holding where a note of a depositor is not included in the general account with the bank any balance due from him to the bank when the note becomes payable is not to be applied in satisfaction of the note, except at election of bank.

— Overdrafts by trustee on commingled funds or misuse of special funds.

Cited in Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; Boone County Nat. Bank v. Latimer, 67 Fed. 27; Windstanley v. Second Nat. Bank, 13 Ind. App. 544, 41 N. E. 956; Quinn's Estate, 16 Phila. 249, 40 Phila Leg. Int. 171; Harper v. Harper, 2 B. C. 15; Stussi v. Brown, 5 B. C. 380; Re Hallett, 63 L. J. Q. B. N. S. 67, which was reversed in [1894] 2 Q. B. 237, 63 L. J. Q. B. 573, 9 Reports, 278, 70 L. T. N. S. 361, 42 Week. Rep. 305, 1 Manson. 25; Ex parte Hardcastle, 44 L. T. N. S. 523; Bailey v. Jellett, 9 Ont. App. Rep. 187; Re Miller [1893] 1 Q. B. 327, 62 L. J. Q. B. N. S. 324, 68 L. T. N. S. 367, 41 Week. Rep. 243, 57 J. P. 469,—on presumption that trustee having commingled funds drew against his own part; Hewitt v. Hayes, 205 Mass. 356, 137 Am. St. Rep. 448, 91 N. E. 332, holding that cestui que trust must accept from deposit in bank his share as determined by date of defaulting trustee as against other beneficiaries of such defaulter; Bank of New South Wales v. Goulburn Valley Butter Co. [1902] A. C. 543, 71 L. J. P. C. N. S. 112, 87 L. T. N. S. 88, 18 Times L. R. 735, 51 Week. Rep. 367, holding in the absence of knowledge on the part of the bank of any irregularity, a transfer by a trustee of funds of his principal to his own account which was

overdrawn amounted to a satisfaction of such overdrawal; Re Stenning [1895] 2 Ch. 433, 13 Reports, 807, 73 L. T. N. S. 207, holding where a solicitor paid client's money into his account which was overdrawn it will be presumed that the withdrawals of the funds would affect the clients in the order of their priority.

Cited in 2 Beach Trusts, 1533, on application of payments in case of mingled trust funds.

Distinguished in Heidelbach v. National Park Bank, 87 Hun, 117, 33 N. Y. Supp. 794, holding a depositor is presumed to have drawn his own rather than funds of which he is the trustee; Re Mulligan, 116 Fed. 715, holding as between trustee and cestui que trust the rule that checks drawn are to be charged against the deposits according to the priority of the latter did not apply; Re Oatway [1903] 2 Ch. 356, 72 L. J. Ch. N. S. 575, 88 L. T. N. S. 622; Hallett's Estate, L. R. 13 Ch. Div. 696, 49 L. J. Ch. N. S. 415, 42 L. T. N. S. 421, 28 Week. Rep. 732,—holding a trustee drawing on a fund in which his own money and that of the trust is mingled must be taken to have drawn his own money in preference to the trust money; Hancock v. Smith, L. R. 41 Ch. D. 456, 58 L. J. Ch. N. S. 725, 61 L. T. N. S. 341, 37 Week. Rep. 459, holding a judgment creditor could have no claim on a balance in bank to credit of depositor which was money received for clients, where drawings out in excess of such balance had been made; Mutton v. Peat [1899] 2 Ch. 556, 68 L. J. Ch. N. S. 668, 48 Week. Rep. 62, 69 L. J. Ch. N. S 484 [1900] 2 Ch. 79, 82 L. T. N. S. 440, 48 Week. Rep. 486, holding bank with whom depositor had a current account and a loan account could not apply trust funds paid to the credit of the current account to the satisfaction of items of the loan account which was overdrawn.

— On accounts with survivors of a partnership or successors to accountant.

Cited in Allcott v. Strong, 9 Cush. 323; Forst v. Kirkpatrick, 64 N. J. Eq. 578, 54 Atl. 554; Morgan v. Tarbell, 28 Vt. 498; Glazebrook v. Harvey, 1 Va. Dec. 265; Gallagher v. Ferris, Ir. L. R. 7 Eq. 489; Pemberton v. Oakes, 6 L. J. Ch. 35, 4 Russ. Ch. 154; Hooper v. Keay, L. R. 1 Q. B. Div. 178, 34 L. T. N. S. 574, 24 Week. Rep. 485; Anning's Claim, 38 L. T. N. S. 53; Re Hamilton, 25 Week. Rep. 760; Schoonover v. Osborne Bros. 108 Iowa, 453, 79 N. W. 263,—holding payments made on a running account which was continued unchanged by the successor of the firm will be appropriated to the oldest items, though made to such successor of the firm; Jones v. United States, 7 How. 681, 12 L. ed. 870, holding same in case of payments on a running account between the post office department and a postmaster; Birkett v. McGuire, 31 U. C. C. P. 430, holding that payments made without special appropriation must be applied on firm indebtedness, where firm is dissolved and one partner continues to deal with creditor of firm, and in so dealing separate and firm accounts are blended; Re Batesman, 42 L. J. Ch. N. S. 577, holding a former shareholder in a corporation is exonerated from liability for a debt to bank where before the winding up of the concern enough money was paid to the bank to cancel what was due bank when shareholder left company; Spiers v. Houston, 4 Bligh, N. R. 515, holding payments made by a principal after the alteration of a firm and in transactions with firm are applicable to the satisfaction of a balance due to the old firm at the date of the alteration.

— As between secured and unsecured debts.

Cited in Williams v. Reed, 3 Mason, 405, Fed. Cas. No. 17,733; Sanford v. Van

Arsdall, 53 Hun, 70, 6 N. Y. Supp. 494,—on the application of payments as between secured and unsecured debts; Buchanan v. Kirby, 5 Grant, Ch. 332; Re Brown, 2 Grant, Ch. 111,— holding that payments made apply upon debt secured by mortgage where only general application was made, even though other debts were due; Re Browne, 2 Grant. Ch. 590, holding that payments made after mortgage given for part of debt, where accounts were afterwards rendered commencing with balance of debt not included in mortgage, apply on original debt including that part covered by mortgage; Russell v. Davey, 7 Grant, Ch. 13, holding that mortgage was intended to cover floating balance, where creditor in rendering accounts for subsequent indebtedness and payments did not bring in old debt.

— To interest or principal.

Cited in Stanley v. Westrop, 16 Tex. 200, holding a general payment could not be applied without the consent of the debtor to the payment of usury; Marye v. Strouse, 6 Sawy. 204, 5 Fed. 483, holding in the absence of appropriations by the debtor payments may be appropriated to the payment of interest.

— Right of debtor or creditor to apply.

Cited in Morse v. Woods, 5 N. H. 297, holding an agent employed to receive payments for his principal cannot appropriate money received to pay what may be due him from the principal without the consent of the latter; Buster v. Holland, 27 W. Va. 510, holding that debtor has first right to make application of payment as between different debts; McArthur v. McMillan, 3 Manitoba L. Rep. 377, holding that in absence of direction by debtor as to application of payment creditor may make application as and when he pleases.

— Time for making application.

Cited in Haynes v. Waite, 14 Cal. 446, holding that if debtor at time of or previous to payment, neglects to designate to which of several debts he applies his payment creditor may make application any time before suit; McKenzie v. Gordon, 7 N. S. 153, holding that creditor has reasonable time to decide to credit of which of two accounts he will place sum of money paid, without application of it by debtor; Reg. v. Ogilvie, 6 Can. Exch. 21, holding that option of creditor to appropriate payment to particular debt must be exercised at time of payment and cannot be so appropriated at time of trial; Fox v. Allen, 14 Manitoba L. Rep. 358, holding that debtor may direct application of credit at time of payment and is bound thereby; Seymour v. Pickett [1905] 1 K. B. 715, 74 L. J. K. B. N. S. 413, 92 L. T. N. S. 519, 21 Times L. R. 302, holding a creditor might make an appropriation of a check drawn by debtor who had made no appropriation, although made for first time by creditor when a witness in his own behalf.

Cited in Benjamin Sales, 5th ed. 803, on necessity of debtor's electing as to appropriation of payments at time of making.

Presumption as to the appropriation of payments or claims.

Cited in Franklin Bank v. Cooper, 36 Me. 221, holding on the allowance of a set-off claim by the jury in a suit upon several distinct indebtments it will be presumed the amount to have been allowed ratably upon each of the indebtments; Reynolds v. Patten, 5 Misc. 215, 25 N. Y. Supp. 100, on it being presumed that both debtor and creditor intended to appropriate payments to the extinguishment of earlier rather than later debts; Peter Adams Co. v. National Shoe & Leather Co. 23 Abb. N. C. 172, 9 N. Y. Supp. 75, on it being presumed that checks are paid in the order drawn, out of the earlier instead of later deposits.

Cited in 3 Page Contr. 2189, on following presumed mutual intention of parties in application of payments by law.

Distinguished in Cohnfeld v. Tanenbaum, 176 N. Y. 126, 98 Am. St. Rep. 653, 68 N. E. 141 (reversing 58 App. Div. 310, 68 N. Y. Supp. 1023), holding a check drawn by a guardian upon guardians' account and given in payment of a debt of a corporation of which he was manager, gave presumptive notice that funds were not those of the corporation.

Presumption as to order of withdrawal of money deposited in bank.

Cited in Cohnfeld v. Tanenbaum, 58 App. Div. 310, 68 N. Y. Supp. 1023, holding in deposit of trust funds of different cestuis que trustent sum first paid in is presumptively first drawn out.

Distinguished in Pyfer v. Wales, 56 Ill. App. 446, holding where depositor holds money in fiduciary capacity and deposits it with his own, presumption is he draws own money in preference to trust money.

Time bank bills.

Cited in Curtis v. Leavitt, 15 N. Y. 9 (dissenting opinion), on right of bank to issue time notes.

Waiver of right to control appropriations of payments.

Cited in Haynes v. Waite, 14 Cal. 446, holding a debtor lost right of making appropriation of payments where he failed to make a designation when making the payments.

Liability for partnership debts.

Cited in Allen v. Wells, 22 Pick. 450, 33 Am. Dec. 757, holding the separate property of each member of a copartnership is liable to be attached for debts due from the copartnership; Bardwell v. Perry, 19 Vt. 292, 47 Am. Dec. 687; Bank of Toronto v. Hall, 6 Ont. Rep. 644; Beresford v. Browning, L. R. 20 Eq. 564, 33 L. T. N. S. 118; Parker v. Gregg, 23 N. H. 416,—on the liability of partners on a partnership account as being joint and several.

Liability of estate of deceased partner for partnership debts.

Cited in Troy Iron & Nail Factory v. Winslow, 11 Blatchf. 515, Fed. Cas. No. 14,199, holding that suit cannot be maintained against representative of deceased partner if surviving partner is solvent; Marr v. Southwick, 2 Port. Ala. 351, holding a bill would not lie in equity to subject the assets of the estate of a partner to the payment of a judgment in favor of a foreign creditor, where it appears that there is a solvent creditor whom the judgment can reach; Camp v. Grant, 21 Conn. 41, 54 Am. Dec. 321, holding a creditor of a partnership may maintain an action against the estate of a deceased partner although the surviving partner is within the jurisdiction of the court and solvent; Woolfolk v. Bennett, 15 Ga. 213, holding the creditors of a partnership could not on the death of a partner sue his personal representative the partnership not being insolvent; Sale v. Dishman, 3 Leigh, 548, Hammersly v. Lambert, 2 Johns. Ch. 508.—holding an action may be maintained against the representatives of a deceased partner on a partnership debt, the surviving partner being insolvent; Lawrence v. Leake & W. Orphan House, 2 Denio, 577, holding that creditor of firm, one member of which has died, cannot sustain suit in chancery against representative of deceased partner without showing that surviving partners are insolvent; Re Sperry, 1 Ashm. (Pa.) 347, holding the estate of a deceased partner where no solvent partner surviving is liable equally to the claim of joint and separate creditors; Jackson v. King, 12 Gratt. 499, holding a creditor of a partnership might lose his remedy against the estate of a deceased partner by his laches on prosecuting

his claim against the surviving partner; Ross v. Everett, 12 Ga. 30, on right of joint creditor to maintain an action against representative of a deceased partner; Re Clapp, 2 Low. Dec. 226, Fed. Cas. No. 2,784; Irby v. Graham, 46 Miss. 425; Monroe v. Newport Steam Factory, 6 R. I. 154, 75 Am. Dec. 688; Union Bank v. Hodges, 11 Rich. L. 724 (dissenting opinion); Washburn v. Bank of Bellows Falls, 19 Vt. 278; Powell v. White, 11 Leigh, 309; Sherman v. Kreul, 42 Wis. 33; Kendall v. Hamilton, L. R. 3 C. P. Div. 403,—on liability of estate of deceased partner for firm debts.

Liability of deceased or retired partner of firm on subsequent transactions.

Cited in Regester v. Dodge, 19 Blatchf. 79, 6 Fed. 6, 61 How. Pr. 107, holding a member of an old firm was not liable for a debt contracted by such firm where it had been dissolved and a new firm formed who assumed the liabilities of the old firm and that the liability of retiring members should be terminated; Royal Bank v. Christie, 8 Clark & F. 214, holding the estate of a deceased partner could not be held liable for debts due a bank, where the business continued after his death and payments were made generally on account; Re Sherry, L. R. 25 Ch. Div. 692, 53 L. J. Ch. N. S. 404, 50 L. T. N. S. 227, 32 Week. Rep. 394, holding the estate of a surety of an account at a bank is not liable for an overdraft where after death of surety payments are made exceeding the amount of the overdraft; Friend v. Young [1897] 2 Ch. 421, 66 L. J. Ch. N. S. 737, 16 Eng. Rul. Cas. 193, holding estate of deceased partner was not liable for debts contracted subsequent to his death.

Distinguished in Taylor v. Post, 30 Hun, 446, holding a mortgage given to a firm to secure advances does not entitle the successor of the firm to the benefit thereof.

— Where business is continued by testamentary direction.

Cited in Richter v. Poppenhusen, 57 Barb. 309, 39 How. Pr. 82, 9 Abb. Pr. N. S. 263, holding the assets of a deceased partner was liable for debts contracted after his death where by his will he directed a share of his capital to be left in the business.

Liability of estate of joint obligor or debtor.

Cited in United States v. Cushman, 2 Sumn. 426, Fed. Cas. No. 14,908, holding an action might be obtained to satisfy a joint judgment out of the assets of the estate of a deceased obligor, the survivors being insolvent; Valernio v. Thompson, Fed. Cas. No. 16,813, holding the consul of a foreign nation may be sued alone on a contract executed by him jointly with another person; United States v. Price, 9 How. 83, 13 L. ed. 56 (dissenting opinion) on liability of estate of surety on a joint and several bond.

Distinguished in Carpenter v. Provoost, 2 Sandf. 537, holding the representatives of a surety in a joint bond not liable at law for the debt by reason of the survivorship of the principal obligor are not liable in equity; Browning v. Baldwin, 40 L. T. N. S. 241, 27 Week. Rep. 644, holding the estate of a guarantor of a bank account was liable for balance due the bank on overdrafts at the time of guarantor's death.

Adoption of the law merchant.

Cited in Pettee v. Orser, 6 Bosw. 23, 18 How. Pr. 442, on the adoption of the law merchant at common law.

Object of bank depositor's pass book.

Cited in National Dredging Co. v. Farmers' Bank, — Del. —, 16 L.R.A.(N.S.)

593, 69 Atl. 607, on the object of a depositor's pass book; R. v. Bank of Montreal, 10 Ont. L. Rep. 117, on estoppel of depositor by entries in pass book.

Rights in respect to deposit in bank.

Cited in Bank of Northern Liberties v. Jones, 42 Pa. 536, holding a deposit in a bank by a depositor as "agent" is not liable to attachment for the debt of the "agent."

Liability of depositary as for conversion.

Cited in Mourse v. Prime, 7 Johns. Ch. 69, holding a trustee not liable for breach of trust where at all times he held sufficient shares of the stock to deliver to owner.

Election to treat wrongful use of deposited funds as a debt.

Cited in Ex parte Watson, L. R. 21 Q. B. Div. 301, holding that a deposit note of an incorporated building society given to take up a loan made before incorporation and invalid, was not binding on the society.

Construction of will of money.

Cited in Dadney v. Cottrell, 9 Gratt. 572, holding under words "and all the money" in a will, the money in a savings bank passed.

Payment by crediting items.

Cited in Crocker v. Whitney, 71 N. Y. 161, holding where a bank took notes indorsed by customer and discounted by bank and charged them to customers account as they matured, it amounted to a payment.

Proper parties to action.

Cited in Bower v. Société des Affréteurs du Great Eastern, 17 L. T. N. S. 494, holding a director of a corporation was a proper party to an action against the corporation.

Notice of dissolution of partnership by death of partner.

Cited in Parsons Partn. 4th ed. 387, on notice of dissolution of partnership by death of partner.

Rights of creditors of firm and partners.

Cited in Smith v. Mallory, 24 Ala. 628, holding that partnership creditors are not entitled to share pari passu with separate creditors in estate of deceased partner, when it is insufficient to pay separate debts, and insolvent surviving partner has funds in his hands; Cleghorn v. Insurance Bank, 9 Ga. 319, holding that it is only when legal recourse of joint creditors against separate estate of debtor is terminated, that joint creditors are postponed in favor of separate creditors; Doggett v. Dill, 108 Ill. 560, 48 Am. Rep. 565, holding that individual creditors have priority as to individual property over claim against firm.

Cited in Parsons Partn. 4th ed. 330, on relative rights of creditors of firm and partners.

Silence of depositor as admission of correctness of account.

Cited in National Dredging Co. v. Farmers' Bank, 6 Penn. (Del.) 580, 16 L.R.A. (N.S.) 593, 130 Am. St. Rep. 158, 69 Atl. 607, holding that silence of depositor after time to examine pass book will be regarded as admission that entries are correct; Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657, holding a depositor cannot dispute the correctness of a balance shown by the pass book where the bank is misled to its prejudice by his failure to report within a reasonable time errors therein.

Liability of firm for acts of partners.

Cited in Re Ketchum, 1 Fed. 815, to the point that employment of member of firm is presumed to be employment of firm.

Cited in Parsons Partn. 4th ed. 123, on liability of firm for wrongful dealing with money by one partner.

Liability of agent for loss of money.

Cited in Gore Bank v. Hodge, 2 U. C. C. P. 359, holding that if agent dealt with money so as to destroy its identity, risk of future loss would be his.

3 E. R. C. 357, VYNIOR'S CASE, 8 Coke, 81 b.

Power to revoke written instrument.

Cited in Clayton v. Liverman, 19 N. C. (2 Dev. & B. L.) 558; Eggers v. Anderson, 63 N. J. Eq. 264, 55 L.R.A. 570, 49 Atl. 578, holding that a will cannot be made irrevocable; Greer v. McCrackin, Peck (Tenn.) 301, 14 Am. Dec. 755, on the power to revoke a written will, orally.

Cited in 3 Washburn Real Prop. 6th ed. 472, on ambulatory nature of will until testator's death.

Power to revoke submission to arbitration.

Cited in Brown v. Leavitt, 26 Me. 251; Power v. Power, 7 Watts, 205; Bingham v. Guthrie, 19 Pa. 418; Shroyer v. Bash, 57 Ind. 349,—holding that at common law agreement to arbitrate was revocable until executed by award; Zehner v. Lehigh Coal & Nav. Co. 29 Pittsb. L. J. N. S. 205, holding that concessions in agreement for arbitration, that plaintiff is owner of land, and that same have been damaged, constitute consideration preventing revocation; Alford v. Tiblier, McGloin (La.) 151, holding agreement to arbitrate not revocable; People ex rel. Union Ins. Co. v. Nash, 13 N. Y. Civ. Proc. Rep. 301; People ex rel. Union Ins. Co. v. Nash, 111 N. Y. 310, 2 L.R.A. 180, 7 Am. St. Rep. 747, 18 N. E. 630,—holding that an agreement to submit to arbitration may be revoked at any time before submission, although the agreement provides against revocation; Re Rouse, L. R. 6 C. P. 211, holding that it was competent for either party to revoke a submission to arbitration; Randall v. Thompson, L. R. 1 Q. B. Div. 748, 45 L. J. Q. B. N. S. 713, 35 L. T. N. S. 193, 24 Week. Rep. 837 (dissenting opinion), on the right to revoke a submission to arbitration.

— What constitutes revocation.

Cited in Williams v. Branning Mfg. Co. 153 N. C. 7, 31 L.R.A.(N.S.) 679, 138 Am. St. Rep. 637, 68 S. E. 902, 21 Ann. Cas. 954, holding that mere issuance of summons upon cause of action which has been submitted to arbitration does not affect revocation of arbitration.

— Revocation as breach of covenant or bond to arbitrate.

Cited in Union Ins. Co. v. Central Trust Co. 157 N. Y. 633, 44 L.R.A. 227, 52 N. E. 671, holding that where a party who has covenanted to pay an award, revokes the submission he breaks the covenant and forfeits any pledge which he has made to pay the award; Miller v. Junction Canal Co. 41 N. Y. 98 (dissenting opinion), on liability of party to arbitration agreement to damages for breach of agreement; Craftsbury v. Hill, 28 Vt. 763, holding that revocation of submission is breach of agreement in arbitration bond; Hatheway v. Cliff, 7 N. B. 267, holding that persons on the same side may revoke a joint submission to arbitration, and such revocation will be a forfeiture of the arbitration bond.

What constitutes arbitration.

Cited in Curtiss v. Beardsley, 15 Conn. 518; Toledo S. S. Co. v. Zenith Transp.

Co. 106 C. C. A. 501, 184 Fed. 391,—holding that to constitute arbitration, matter must be one in dispute between parties.

Necessity of pleading that which is implied from that already averred.

Cited in Pugh v. United States, 5 Ct. Cl. 113 (dissenting opinion), on the necessity of pleading what the law implies from that already pleaded; Lloyd v. Rowe, 20 N. J. L. 680, on the necessity of averring notice to the executor, where a request to return a part of the legacy is averred specially.

Amount to be recovered when bond is forfeited.

Cited in Bank of Upper Canada v. Widmer, 2 U. C. Q. B. (O. S.) 275, on the amount to be recovered where a bond is destroyed or cancelled.

3 E. R. C. 371, FILMER v. DELBER, 3 TAUNT. 486, 12 Revised Rep. 688.

Power of agent to bind principal to a reference to arbitration.

Cited in Fogg v. Dummer, 58 N. H. 505, holding that the selectmen of a town have authority to enter into an agreement to submit matters regarding the town where the town has no other authorized agent.

— Of an attorney to bind client.

Cited in Wade v. Powell, 31 Ga. 1, holding that the attorneys had, with the sanction of the court, the power to make a reference, without the plaintiff's consent; Oakes v. Halifax, 13 N. S. 98, holding same as to power to enter in an agreement to refer to an arbitrator; Wilson v. Huron & Bruce Counties, 11 U. C. C. P. 548, holding that an attorney has power to consent to the alteration of the order of reference.

Cited in Weeks Attys. 2d ed. 460, on binding effect of attorney's act in referring cause.

3 E. R. C. 374, WILLESFORD v. WATSON, 42 L. J. Ch. N. S. 447, L. R. 8 Ch. 473, 28 L. T. N. S. 428, 21 Week. Rep. 350, affirming the decision of the Vice Chancellor, reported in L. R. 14 Eq. 572, 26 L. T. N. S. 15, 20 Week. Rep. 278.

Power of parties to agree to submit to arbitration.

Cited in McDougall v. Grieve, Newfoundl. Rep. (1884–96) 312, on the right to make arbitration a condition precedent to the right to commence suit; Johnson v. Montreal & O. R. Co. 6 Ont. Pr. Rep. 230, holding that it was competent for the parties to agree to submit to arbitration and make a contract comprehensive enough to cover all the points to be determined; Law v. Garrett, L. R. 8 Ch. Div. 26, 38 L. T. N. S. 3, 26 Week. Rep. 426, holding that it was competent for the parties to agree to submit all their disputes to a foreign court and a domestic court would enforce the agreement.

— Stay of proceedings in a suit, in order to enforce agreement to arbitrate.

Cited in Lyon v. Johnson, L. R. 40 Ch. Div. 579, 58 L. J. Ch. N. S. 626, 60 L. T. N. S. 223, 37 Week. Rep. 427; Compagnie du Sénégal v. Woods, 53 L. J. Ch. N. S. 166, 49 L. T. N. S. 527, 32 Week. Rep. 111,—holding that a court in its discretion may stay proceedings and order the question submitted to arbitration under the agreement.

— Grounds for court refusing to stay proceedings.

Cited in Re Curry, 12 Ont. Pr. Rep. 437, holding that the failure to provide for an appeal from the award did not give any grounds for the court's refusing to extend the time set for the arbitration; Wade-Gery v. Morrison, 37 L. T. N. S. 270, holding that it was no objection to the court enforcing an agreement to ar-

bitrate, that the arbitrator could not award ejectment, but a court would enforce that award.

— Liberal construction of agreement to arbitrate.

Cited in Cruickshank v. Corbey, 5 Ont. App. Rep. 415, holding that all clauses of an agreement to submit to arbitration should be liberally construed.

— Failure of agreement to arbitrate.

Cited in Mitchell v. Lister, 21 Ont. Rep. 22, holding that where the contract of reference provided that the questions in dispute should be referred to some person upon which parties should agree and they could not agree on any person, the agreement failed.

— Conflict of laws.

Cited in note in 5 E. R. C. 888, on presumption that parties to contract intended to adopt law of place where arbitration contract was made.

Scope of arbitration and questions to be determined by the arbitrators.

Cited in Woodward v. McDonald, 13 Ont. Rep. 671, holding that where the agreement provided that all questions should be decided by the arbitrators, they had power to decide all disputes necessary and proper to cause the matter to be settled; Plews v. Baker, L. R. 16 Eq. 564, 43 L. J. Ch. N. S. 212, holding that one of the partners was entitled to have the validity of the notice to arbitrate determined by arbitrators; Gillett v. Thornton, L. R. 19 Eq. 599, 44 L. J. Ch. N. S. 398, 23 Week. Rep. 437, holding that a reference to an arbitrator is a reference of all matters in dispute and includes a determination of what matters are included in the agreement to arbitrate; De Ricci v. De Ricci [1891] P. 378, on what language is necessary to give the arbitrator complete power to adjust all questions arising.

Distinguished in Piercy v. Young, L. R. 14 Ch. Div. 200, 42 L. T. N. S. 710, 28 Week. Rep. 845, holding that whether the matters in dispute are within the agreement for arbitration is one which the court will decide and not leave to the arbitrator.

Enforcement of agreement to arbitrate where questions involve charges of fraud.

Cited in Minifie v. Railway Passengers' Assur. Co. 44 L. T. N. S. 552, holding that where there was a charge of fraud involved, the company was entitled to a stay of proceedings and submission of the disputes to arbitration the same as though there were no such charges to be tried.

Disapproved in Russell v. Russell, L. R. 14 Ch. Div. 471, 49 L. J. Ch. N. S. 268, 42 L. T. N. S. 112, holding that where a charge of fraud is made the court will in general refuse to send the dispute to arbitration.

Restraining arbitrator from acting.

Cited in Direct Cable Co. v. Dominion Teleg. Co. 28 Grant, Ch. (U. C.) 648, holding that before an award has been a rule of court, a court of equity could restrain an arbitrator from entering upon his duties as arbitrator where he was improperly appointed.

3 E. R. C. 389, CALEDONIAN R. CO. v. GREENOCK & W. BAY R. CO. L. R. 2 H. L. Se. App. Cas. 347.

Validity of agreement to submit to arbitration as condition precedent to suit.

Cited in Nolan v. Ocean Acci. & G. Corp. 5 Ont. L. Rep. 544, holding that a provision in an insurance policy to submit all disputes to arbitration as a

condition precedent to a recovery upon the policy, was legal as not against public policy.

Power of courts to declare invalid that which the legislature has ratified.

Cited in Montreal v. Canadian P. R. Co. 33 Can. S. C. 396 (dissenting opinion), on the power of a court to hold invalid an agreement ratified by the legislature.

3 E. R. C. 399. HOCH v. BOOR, 49 L. J. Q. B. N. S. 665, 43 L. T. N. S. 425.

Compulsory reference of issues of fact.

Cited in Shields v. MacDonald, 14 Ont. App. Rep. 118, holding that a court had power to make a compulsory order referring not only questions of accounts, but all issues of fact in an action to a referee; Sacker v. Ragozine, 44 L. T. N. S. 308, holding that where charges of fraud could not very well be determined without examination of prolonged accounts, that a reference of the charges to an arbitrator was right as to such charges as could not be separated.

Cited in note in 3 E. R. C. 404, on compulsory reference of long account.

3 E. R. C. 406, WADE v. DOWLING, 4 El. & Bl. 44, 18 Jur. 728, 23 L. J. Q. B. N. S. 302, 2 Week. Rep. 567.

Validity of an award signed by only a majority of the arbitrators.

Cited in Washburn v. White, 197 Mass. 540, 84 N. E. 106, holding that the price agreed upon by arbitrators was not binding where fixed by a majority of the arbitrators unless so provided in agreement to arbitrate; Helps v. Roblin, 6 U. C. C. P. 52, holding that an award made by two of three arbitrators and signed at different times and places by the two after the time for making it had expired, was void; Toronto v. Leak, 23 U. C. Q. B. 233, holding that an award made by two of the three arbitrators without discussing all of the matters with the third was void; Anglin v. Nickle, 30 U. C. C. P. 72, holding same where the final award was drawn up from a sketch made while the three were in consultation, but dissented from by one; Re Johnson, 40 U. C. Q. B. 359, on the validity of an award made by two of the three arbitrators; Kelly v. MacDonald, 2 Has. & War. (Pr. Edw. Isl.) 173, holding that an award must be set aside when signed by only two of the three arbitrators without consulting the third, and outside the province; Hubbard v. Union F. Ins. Co. 44 U. C. Q. B. 391; Purdy v. Burbridge, 3 N. S. 150,—holding that where submission gives authority to any two of arbitrators to make award, presence of three at time award is signed is not necessary.

Distinguished in Freeman v. Ontario & Q. R. Co. 6 Ont. Rep. 413, holding that where the three arbitrators received all the evidence, and after discussing it, one of them expressed his dissent from the views of the others, and they then signed an award in each other's presence, such award was valid.

— Of an award signed by all but at different times and places.

Cited in Ritchie v. Snowball, 26 N. B. 258, holding that an award signed at different times by the three arbitrators was not valid; Nott v. Nott, 5 Ont. Rep. 283, holding that where two arbitrators signed the formal award drawn up from the minutes agreed on by all three, and they then kept it and the third signed it in the presence of one of the others, the award was invalid.

Distinguished in Little v. Aikman, 28 U. C. Q. B. 337, holding that executors signing a deed to property of the estate need not sign the same at the same time and in each other's presence; Wrightson v. Hopper, 15 L. T. N. S. 566, holding

that where two valuers were to be appointed and if they could not agree, they were to appoint a third, and they agreed upon a third but signed his appointment at different times, this did not avoid his appointment.

Award invalid because of some extrinsic fact.

Cited in Carveth v. Fortune, 12 U. C. C. P. 360, holding evidence to show that the arbitrators took into consideration and decided upon matters not submitted to them was admissible to set aside the award; Mulligan v. Wright, 16 U. C. Q. B. 408, on the power to set aside an award of arbitrators by proving some extrinsic defect.

Effect upon award if arbitrator exceeds his authority.

Cited in Borrowe v. Milbank, 5 Abb. Pr. 28, holding that where an arbitrator exceeded his authority, the award will be set aside, whether he acted through mistake or not; Re Kenny, 3 N. S. 14, holding that selection of third person as arbitrator by appraisers after disagreement of such appraisers appointed by parties, is compliance with statute.

3 E. R. C. 409, ANNING v. HARTLEY, 27 L. J. Exch. N. S. 145.

Sending back an award for correction.

Cited in Re Trythall, 5 B. C. 50, holding that where the conduct of the arbitrators was such as to invalidate the award, it should not be set aside as void, but should be sent back for correction.

—Notice to the parties in such case.

Cited in Re Manley, 2 Ont. Pr. Rep. 354, holding that where the award of the arbitrators had been sent back for correction and the arbitrators took evidence without notice to both parties, the award must be sent back again, as the notice was indispensable.

Validity of an award signed by the arbitrators at different times and places.

Cited in Ritchie v. Snowball, 26 N. B. 258, holding an award signed by all the three arbitrators but at different times and places was void; Nott v. Nott, 5 Ont. Rep. 283, holding that where the three arbitrators agreed upon the award and then two of them signed it in each other's presence the next day and the other signed it later in the presence of one of the others, the award was void.

3 E. R. C. 414, RANDALL v. RANDALL, 7 East, 81, 3 Smith, 90, 8 Revised Rep. 601.

Responsiveness of award to the submission.

Cited in Green v. Ford, 17 Ark. 586; North Yarmouth v. Cumberland, 6 Me. 21; Whittemore v. Whittemore, 2 N. H. 26; Ott v. Schroeppel, 5 N. Y. 482 (reversing 7 Barb. 431),—on an award being void if all matters submitted are not passed upon; Karthaus v. Ferrer, 1 Pet. 222, 7 L. ed. 121, holding that if submission be of all actions real or personal, award is good; Boston & L. R. Corp. v. Nashua & L. R. Corp. 139 Mass. 463, 31 N. E. 751, holding that an award must be coextensive with the submission unless the parties otherwise agree, else it is not binding; Muldrow v. Norris, 12 Cal. 331; McNear v. Bailey, 18 Me. 251; Ott v. Schroeppel, 3 Barb. 56,—holding that where the arbitrators omit to make an award on all matters submitted the award made will be void; Jones v. Welwood, 71 N. Y. 208, holding that partial award in any case will only be sustained when matters omitted are not necessarily dependent upon

other points; Morse v. Hale, 27 Vt. 660, holding that where two matters are submitted to arbitrators and only one of them is awarded upon, the award will be void; Cleal v. Elliott, 1 U. C. C. P. 252, holding an award bad which did not determine all matters submitted; Benedict v. Parks, 1 U. C. C. P. 370, holding that where arbitrators were empowered, among other things to determine of, for, upon and concerning certain lot of land award is void which is silent upon that point.

Distinguished in Jackson v. Ambler, 14 Johns. 96, holding that an award is good though it does not appear therefrom that it was coextensive with the submission, where it covered all matters brought before the arbitrators; Emery v. Hitchcock, 12 Wend. 156, holding where the arbitrators award a lump sum and indorse it upon the submission, the award is good, though they do not state that it is upon all matters submitted; Rickards v. Rickards, 9 N. S. 227, holding that an award will not be set aside because the awards on all matters were not made separately where such was not provided for in the submission; Baby v. Davenport, 2 U. C. Q. B. 65, holding that an award on only a part of the matters submitted where the others were withdrawn from submission by mutual consent, was good.

Certainty and finality of award.

Cited in Kelly v. Sulivan, 2 Has. & War. (Pr. Edw. Isl.) 34, holding that an award which is not final, and is uncertain is void and must be set aside; Hazen v. Addis, 14 N. J. L. 333, holding that award by arbitrators must be certain and final; Bancroft v. Grover, 23 Wis. 463, 99 Am. Dec. 195, holding that certainty to common intent is all that is necessary in award; Ontario v. Dominion of Canada, 28 Can. S. C. 609, to the point that finality is essential element to validity of all arbitrators' award.

Distinguished in Clement v. Comstock, 2 Mich. 359, holding that a submission being general, a general award professing to be upon all matters is by intendment valid unless the contrary is shown.

Objections to avoid award of arbitrators.

Cited in Adams v. Adams, 8 N. H. 82, holding that a report of referees under a rule of court is when presented for acceptance open to every objection whether the grounds of objection appear on the face of the report; Butler v. New York, 1 Hill, 489, holding that an award good by intendment in a court of law cannot be collaterally impeached on the ground that the arbitrators transcended or fell short of the limits of submission; Hull v. Alway, 4 U. C. Q. B. O. S. 375, holding that award by arbitrators will be sustained, even though there is error in recital, if it is capable of being sustained on another ground than that set forth in recital.

3 E. R. C. 416, HEWITT v. HEWITT, 4 Perry & D. 598, 1 Q. B. 110.

Award set aside as uncertain and ambiguous.

Cited in Calvert v. Carter, 6 Md. 135, holding that certainty to common intent is all that is necessary in award; Harris v. Social Mfg. Co. 8 R. I. 133, 5 Am. Rep. 549, on an award being set aside for uncertainty and ambiguity.

3 E. R. C. 429, BOURKE v. LLOYD, 12 L. J. Exch. N. S. 4, 10 Mees. & W. 550, 2 Dowl. P. C. N. S. 452.

Cited in Bourke v. Lloyd, 3 E. R. C. 429, 12 L. J. Exch. N. S. 4, 10 Mees. & W. 550, referring to an earlier stage of the case.

Validity of a general award made upon reference of several issues.

Cited in Wood v. Moodie, 3 U. C. Q. B. 79, holding that an award was void where it made a general award and decreed that the defendant should pay a certain amount; Mullen v. Martin, 1 Ont. Pr. Rep. 191, holding that award by arbitrators is valid if there is reasonable inference of finding on each issue.

3 E. R. C. 432, PHILLIPS v. HIGGINS, 20 L. J. Q. B. N. S. 357, 2 Lowndes, M. & P. 355.

Sufficiency of findings in award.

Cited in Mullen v. Martin, 1 Ont. Pr. Rep. 191, holding that award of arbitrators is valid, if there is reasonable inference of finding on each issue.

3 E. R. C. 436, POPE v. BRETT, 2 Wms' Saund. 292, 2 Keb. 736.

Award of arbitrators conditional on party's or stranger's action.

Cited in McKeen v. Allen, 17 N. J. L. 506, holding that an award that upon the payment of a stated sum of money to another, the latter was to deliver up a bond of a certain date, was void for uncertainty; Gratz v. Gratz, 4 Rawle, 411, holding that an award of arbitrators in the division of real estate that the partition should be carried out according to the plan prepared by a certain person was void for uncertainty.

Partial invalidity as affecting validity of whole award.

Cited in Walker v. Walker, 28 Ga. 150, holding that award good in part and bad in part, if inseparable, is void; Thrasher v. Haynes, 2 N. H. 429, holding that where a gross sum is awarded and the award was founded upon matters not submitted, the whole award will be void; Hale v. Woods, 9 N. H. 103, holding that if award is void for all that is to be done on one part, it is void for whole; Davis v. Cilley, 44 N. H. 448, 84 Am. Dec. 85, holding that if that part of the award which is bad may be corrected without injustice to either party, a court of equity will correct it; Dalrymple v. Whitingham, 26 Vt. 345, to the point that breach of valid provision of award bad in part, but separable, is breach of bond for performance of award; Boyd v. Durand, 5 U. C. Q. B. O. S. 122 (dissenting opinion), on total invalidity of award, where consideration for act directed by award to be done by one party fails.

— Where unjust to one party.

Cited in Marks v. Northern P. R. Co. 22 C. C. A. 630, 44 U. S. App. 714, 76 Fed 941; Clement v. Durgin, 1 Me. 300; Nichols v. Rensselaer County Mut. Ins. Co. 22 Wend. 125; Emms v. Neill, 8 N. B. 438,—holding that if an award is void in part so that one person can not have the advantage intended him as a recompense for what he is to do to the other, the whole award is void; Gordon v. Tucker, 6 Me. 247; Porter v. Buckfield Branch R. Co. 32 Me. 539,—holding an award may be good in part and bad in part, and valid for the amount awarded if by annulling that part, the rights of neither party are impaired; Com. v. The Pejepscut, 7 Mass. 399, on an award, void in part, being upheld, if the invalid part does not work an injustice in being disregarded; Whitcher v. Whitcher, 49 N. H. 176, 6 Am. Rep. 486, holding that if the award be held bad in part so as to affect the justice of the case between the parties, the whole will be held bad.

Certainty of award.

Cited in Lee v. Onstott, 1 Ark. 206, holding that award must be so plainly expressed that there is no uncertainty in what manner and when parties are to

put it in execution; Gentry v. Barnet, 2 J. J. Marsh. 312, holding that certainty to common intent is all that is necessary in award; Re Montgomery, 2 Ont. Pr. Rep. 98, holding that award directing one party to pay other certain sum per acre for wheat now growing is sufficiently certain, where the number of acres of wheat is not in dispute.

3 E. R. C. 441, LEE v. ELKINS, 12 Mod. 585.

Partial validity of award.

Cited in Thrasher v. Haynes, 2 N. H. 429, holding that whole award is void where gross sum is awarded and it appears that award was founded in part upon matters not submitted; Stanley v. Chappell, 8 Cow. 235, holding that award that one shall pay money, or give security, is valid for money, though void for security; Smith v. Sweeny, 35 N. Y. 291, to the point that other party to award cannot allege invalidity, where acts were performed in accordance with contract, although performance was executed by strangers; Nichols v. Rensselaer County Mut. Ins. Co. 22 Wend. 125, holding that party will not be compelled to perform award when he cannot have benefit which it was intended he should receive; Com. v. The Pejepscut, 7 Mass. 399, to the point where award is void as to one party, performance of void thing is necessary before party in whose favor void part was made can enforce award.

Certainty in award.

Cited in Gentry v. Barnet, 2 J. J. Marsh. 312, holding that certainty to common extent is all that is necessary in award; Chawe v. Strain, 15 N. H. 535, holding that award of arbitrators is valid where authority to settle value of work was given, if award determines amount and directs payment.

Cited in note in 3 Eng. Rul. Cas. 424, on necessity that award decide all matters submitted and be certain and final.

3 E. R. C. 450, CANDLER v. FULLER, Willes, Rep. 62.

Authority of arbitrators to award costs of arbitration.

Cited in Vose v. How, 13 Met. 243, holding that arbitrators have not the authority to award the costs of arbitration where the submission does not give it, and the matter is not pending in court; Joy v. Simpson, 2 N. H. 179; Spofford v. Spofford, 10 N. H. 254,—on the right of referees to award costs of reference; Porter v. Buckfield Branch R. Co. 32 Me. 539; Peters v. Peirce, 8 Mass. 398; Morrison v. Buchanan, 32 Vt. 289,—holding that an arbitrator has no power to award the costs of arbitration unless expressly given by the submission.

Distinguished in Dickerson v. Tyner, 4 Blackf. 253, holding that the arbitrators have the authority to award the costs of arbitration, under the statute, though not authorized by the submission.

Partial invalidity of award as affecting validity of whole award.

Cited in Becker v. Boon, 61 N. Y. 317 (dissenting opinion), on an award void in part as being totally void.

Person bound to perform acts or conditions precedent.

Cited in McIntire v. Clarke, 7 Wend. 330, holding party bound to give security required by contract before bringing action thereon; Mouck v. Stuart, 4 U. C. Q. B. 203, holding an obligor to convey must prepare and tender the deed; Paul v. Blackwood, 3 Grant, Ch. 394, holding that under contract to convey land by good and sufficient deed of conveyance vendor is bound to prepare and execute deed.

3 E. R. C. 455, BUCCLEUCH v. METROPOLITAN BD. OF WORKS, 41 L. J. Exch. N. S. 137, L. R. 5 H. L. 418, 27 L. T. N. S. 1, reversing the decision of the Exchequer Chamber, reported in 39 L. J. Exch. N. S. 130, L. R. 5 Exch. 221, which reverses the decision of the Court of Exchequer, reported in 37 L. J. Exch. N. S. 177, L. R. 3 Exch. 306.

Setting aside award of arbitrators.

Cited in Re False Creek Flats Arbitration, 1 D. L. R. 363, holding that misconduct of arbitrators, as regards power of court to set aside award does not necessarily imply any improper motive to arbitrators; Re Vancouver, V. & E. R. Co. 5 D. L. R. 722, holding that where arbitrators promised that they would make it appear on face of award, as to whether remaining land was injuriously affected by railroad award may be set aside, for failure to do so.

Cited in note in 3 E. R. C. 503, on setting aside award of arbitrators.

The decision of the Exchequer Chamber was cited in Lemary v. McRae, 16 Ont. App. Rep. 348, holding that an award could not be set aside for errors of the arbitrator which were errors of judgment as to matter within his authority, and not as to his jurisdiction.

The decision of the Court of Exchequer was cited in Cockburn v. Imperial Lumber Co. 26 Ont. App. Rep. 19, holding that award by arbitrators, of one sum, which includes matters outside of jurisdiction, is void.

Admissibility of testimony of arbitrators in actions respecting award.

Cited in Zorkowski v. Astor, 13 Misc. 507, 34 N. Y. Supp. 948, on the admissibility of testimony of referee respecting award; Oelbermann v. Merritt, 123 U. S. 356, 31 L. ed. 178, 8 Sup. Ct. Rep. 151, on the right of an arbitrator to be a witness; Re Gilbert & St. J. Horticultural Asso. 1 N. B. Eq. 432, on when the evidence of an arbitrator will be admitted to explain award; Rickards v. Rickards, 9 N. S. 227, on the admissibility of the testimony of the arbitrator to impeach the award; O'Rourke v. Railways Comr. L. R. 15 App. Cas. 371, 59 L. J. P. C. N. S. 72, 63 L. T. N. S. 66, holding that the testimony of the arbitrators was inadmissible to explain or contradict the award; Clippens Oil Co. v. Edinburgh & Dist. Water Trustees [1901] 3 Sc. Sess. Cas. [3 Fraser] 1113, on the admissibility of the testimony of an arbitrator concerning an award.

Distinguished in Re Whiteley & Roberts [1891] 1 Ch. 558, 60 L. J. Ch. N. S. 149, 64 L. T. N. S. 81, 39 Week. Rep. 248, holding that evidence of an admission of an arbitrator made out of court that he made his award improperly was inadmissible to set aside the award.

—As to what was brought before him for consideration.

Cited in Evans v. Clapp, 123 Mass. 165, 25 Am. Rep. 52, holding that a referee is a competent witness as to what was in controversy before him and what matters entered into his decision; Re Fairley, 25 N. B. 568, on the admissibility of an arbitrator's testimony as to what was awarded; Re Southampton, 12 Ont. L. Rep. 214, holding that evidence of an arbitrator as to the basis on which the valuation of the assets and liabilities was made is admissible; Atlantic & N. W. R. Co. v. Leeming, Rap. Jud. Quebec, 3 B. R. 165, holding that the testimony of an arbitrator is admissible as to a matter taken into consideration by them if the matter was distinct from the questions arising in the award.

The decision of the Exchequer Chamber was cited in Ruckman v. Ransom, 35 N. J. L. 565, holding that where award appears upon face to be within

submission, it is not competent in suit at law to show that arbitrator exceeded authority.

—As to what he considered in making the award.

Cited in Lemay v. McRae, 16 Ont. Rep. 307, on the admissibility of testimony of arbitrator, as to what he considered in making the award; Pontiac Pacific Junction R. Co. v. Sisters of Charity, Rap. Jud. Quebec, 20 C. S. 567, holding that where the award is clear and minute the testimony of one of the arbitrators is inadmissible to show that he considered other lands than those described; Re Atty. Gen. [1898] 2 Ir. Q. B. 719, holding that the testimony of the arbitrators was admissible to show what matters they took into consideration in making the award.

—As to the exercise of discretion on matters submitted.

Cited in Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585, 51 L. ed. 636, 27 Sup. Ct. Rep. 326, holding that the testimony of the members of the state board of taxation was inadmissible as to the confusion existing in their minds in making the assessment of the railroads; Re Christie & T. Junction, 22 Ont. App. Rep. 21, holding that the examination of the arbitrator must be limited to matters of fact in connection with the reference and not the reasons and grounds for making the award; Kelly v. MacDonald, 2 Has. & War. (Pr. Edw. Isl.) 173, holding that a court has no power to inquire as to whether the discretion of the arbitrators was properly exercised.

Enforcement of valid part of award partially void on its face.

Cited in Re Graves, 21 Manitoba L. Rep. 417, holding that award which is bad in part can only be held good as to remainder of it when bad part is clearly separable from good.

Distinguished in Falkingham v. Victorian R. Comrs. [1900] A. C. 452, 69 L. J. P. C. N. S. 89, 82 L. T. N. S. 506, holding that where the award was a lump sum and it did not appear on its face that it included matters not within the jurisdiction of the arbitrators as fixed by the submission the award was good.

The decision of the Exchequer Chamber was cited in Collins v. Water Comrs. 42 U. C. Q. B. 378, holding that if that part of the award which is void on its face is severable from the good part, the former only may be set aside; Re Egleston, 45 U. C. Q. B. 479, holding that where a part of an award was void because the arbitrators had exceeded their authority, and that part was severable from the rest, the latter should be enforced.

The decision of the Exchequer Chamber was distinguished in Tully v. Chamberlain, 31 U. C. Q. B. 299, holding in this case the parts were not separable, and therefore all the award was void.

Construction of submission and award as question of law.

Cited in Truesdale v. Straw, 58 N. H. 207, holding that the construction of a submission and an award, as to whether certain matters were outside the submission is a question of law.

Certainty of award.

Cited in Ontario & Q. R. Co. v. Vallieres, Rap. Jud. Quebec, 36 C. S. 349, on the certainty as to the items requisite in an award.

Cited in note in 3 E. R. C. 426, on necessity that award decide all matters submitted and be certain and final.

Consequential damage for injuries caused by maintenance of railroad or public work.

Cited in New York Elev. R. Co. v. Fifth Nat. Bank, 135 U. S. 432, 34 L. ed. 231, 10 Sup. Ct. Rep. 743, holding that the owner of a building along a street upon which has been built an elevated railroad may recover for inconvenience and discomfort independent of that caused by the trains; Moore v. New York Elev. R. Co. 130 N. Y. 523, 14 L.R.A. 731, 29 N. E. 997, holding that the loss of privacy caused by the erection of an elevated street railroad was an element of damage; Great Western R. Co. v. Warner, 19 Grant, Ch. (U. C.) 506, holding an award good which allowed for the decreased value of the land not taken for the railroad; Re Canada Southern R. Co. 41 U. C. Q. B. 195, holding that where a part of a man's land is taken by a railroad company, damages may be allowed for injuries done to the remainder of his land; Masson v. Robertson, 44 U. C. Q. B. 323, holding that an award of damages for increased risk of fires from railroad was proper; Green v. Belfast Tramways Co. Ir. L. R. 20 Q. B. 35, holding that the plaintiff was entitled to recover for injuries through loss of lateral support to his land by reason of a railway cut on the adjoining property.

Cited in 4 Dillon Mun. Corp. 5th ed. 2935, on abutting owner's right to compensation for loss of trade due to lowering of roadway.

Distinguished in St. Catharines R. Co. v. Norris, 17 Ont. Rep. 667, holding that damages for loss of trade caused by the maintenance of a railroad could not be allowed.

The decision of the Court of Exchequer was cited in Glasgow Union R. Co. v. Hunter, L. R. 2 H. L. Sc. App. Cas. 78, holding that compensation could not be had for injuries to land from the noise and smoke of trains whether a part of the land is taken or not.

— Under statutes.

Cited in Rhodes v. Airdale Drainage Comrs. L. R. 1 C. P. D. 402, 45 L. J. C. P. N. S. 861, 35 L. T. N. S. 46, 24 Week. Rep. 1053, holding that damage which would have been actionable was recoverable alone under the act authorizing the drainage in this case.

Cited in note in 1 E. R. C. 663, on nonliability for damage necessarily arising from exercise of powers granted by statute.

Distinguished in Ontario & Q. R. Co. v. Taylor, 6 Ont. Rep. 338, holding that in making an award for the injuries to that part of land not taken, damages cannot be allowed for a possible injury under the statute in this case.

Damages for injurious effect on land without taking.

Cited in American Bank Note Co. v. New York Elev. R. Co. 129 N. Y. 252, 29 N. E. 302, on the right to recover damages where no part of the land is taken; R. v. Barry, 2 Can. Exch. 333, holding that the construction of a railway siding on a sidewalk contiguous to land gives rise to injuries for which damages should be allowed; Delaplaine v. Chicago & N. W. R. Co. 42 Wis. 214, 24 Am. Rep. 386; Re Scott, 6 Manitoba L. Rep. 193,—on the award of damages for injuries to lands injuriously affected; dissenting opinion in M'Carthy v. Metropolitan Bd. of Works, L. R. 8 C. P. 191 (affirming L. R. 7 C. P. 508), on the right to compensation for land injuriously affected.

Distinguished in dissenting opinion in Pion v. North Shore R. Co. 14 Can. S. C. 677 (reversing 12 Quebec L. R. 205), on the allowance of damages for interruption of access to land, though no part of the land is taken.

— Where part of tract or tracts is taken.

Cited in Lincoln v. Com. 164 Mass. 368, 41 N. E. 489, holding that if land adjoining that taken, and owned by the same owner is injuriously affected by the improvement made, the owner is entitled to compensation; Paradis v. R. 1 Can. Exch. 191; Vezina v. R. 17 Can. S. C. 1; Straits of Canseau M. R. Co. v. R. 2 Can. Exch. 113,—holding that where a part of land is taken, damages for the other part not taken should be assessed with reference also to the loss that may occur through the operation of the railroad; Collins v. Water Comrs. 42 U. C. Q. B. 378, on damages for lands taken and for those injuriously affected; Holt v. Gaslight & Coke Co. L. R. 7 Q. B. 728, 41 L. J. Q. B. N. S. 351, 27 L. T. N. S. 442, holding that where the gas company took a part of the meadow, leased by the plaintiff for a rifle range, the latter was entitled to compensation for the shutting off of the range; R. v. Sheward, L. R. 5 Q. B. Div. 179, L. R. 9 Q. B. Div. 741, 49 L. J. Q. B. N. S. 716, on the right to compensation for injury to business where land is taken; Caledonian R. Co. v. Walker, L. R. 7 App. Cas. 259, 46 L. T. N. S. 826, 30 Week. Rep. 569, 46 J. P. 676, on the right to compensation for injuries to land through the taking of a part thereof; Cowper-Essex v. Acton Local Board, 58 L. J. Q. B. N. S. 594, L. R. 14 App. Cas. 153, 61 L. T. N. S. 1, 39 Week. Rep. 209, 53 J. P. 756 (reversing 17 Q. B. Div. 447, which reversed 14 Q. B. Div. 753), holding that where lands were taken for sewage purpose, injuries to other lands held by the same person by reason of the construction of the sewage, could be allowed; London, T. & S. R. Co. v. Gower's Walk Schools, L. R. 24 Q. B. Div. 326, 59 L. J. Q. B. N. S. 162, 62 L. T. N. S. 306, 38 Week. Rep. 343, holding that where the compensation clauses of a statute attach, the party whose land is injuriously affected is entitled to full compensation for all damages in respect of the deterioration of his property; R. ex rel. Moore v. Abbott [1897] 2 Ir. Q. B. 362, on the right to compensation for injurious effect of land by intended user of that taken.

The decision of the Court of Exchequer was cited in Austin v. Augusta Terminal R. Co. 108 Ga. 671, 47 L.R.A. 755, 34 S. E. 852, on the recovery of damages for land injuriously affected where a part of the land is taken.

The decision of the Exchequer Chamber was cited in Paradis v. Reg. 1 Can. Exch. 191, on the right to compensation where a part of land is taken and injury results to the rest.

Rights of riparian owners in navigable waters.

Cited in Lewis v. Johnson, 76 Fed. 476; Revell v. People, 177 Ill. 468, 43 L.R.A. 790, 69 Am. St. Rep. 257, 52 N. E. 1052; American Dock & Improv. Co. v. Public Schools, 35 N. J. Eq. 181; Mulry v. Norton, 100 N. Y. 424, 53 Am. Rep. 206, 3 N. E. 581,—on the rights of riparian owners; Nugent v. Mallory, 145 Ky. 824, 141 S. W. 850, holding that littoral owner has right to water frontage belonging to land; Home for Aged Women v. Com. 202 Mass. 422, 24 L.R.A.(N.S.) 79, 89 N. E. 124, holding that grant by state to owner of property bounded by tide water extending his title certain distance into sea, will be construed strictly against him; Morrill v. St. Anthony Falls Water-Power Co. 26 Minn. 222, 37 Am. Rep. 399, 2 N. W. 842, holding that a riparian owner has the right to use the water flowing past his land, but only in such a way as not to impede navigation or other public rights; Sage v. New York, 10 App. Div. 294, 41 N. Y. Supp. 938 (dissenting opinion), on meaning of term water frontage; Saunders v. New York C. & H. R. R. Co. 71 Hun, 153, 23 N. Y. Supp. 927, 30 Abb. N. C. 88, holding that the legislature could not grant the right to a railroad to construct its track through navigable water and cut off the plaintiff's access to his land: Shepard's

Point Land Co. v. Atlantic Hotel, 132 N. C. 517, 61 L.R.A. 937, 44 S. E. 39; Philadelphia & R. Terminal R. Co's Appeal, 1 Pa. Super. Ct. 63 (dissenting opinion); Providence Steam-Engine Co. v. Providence & S. S. S. Co. 12 R. I. 348, 34 Am. Rep. 652,—on the rights of riparian owners on a navigable stream; Folsom v. Freeborn, 13 R. I. 200, holding that a riparian owner had the right to free access to his riparian estate; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548, holding that the rights of riparian owners do not consist in a title to the soil of the stream or a right to build thereon, but a right of access; Byron v. Stimpson, 17 N. B. 697, holding owner on sea has right of unobstructed access; Compagnie DuChemin DeFer DuNord v. Pion, 12 Quebec L. Rep. 205, holding that railroad company authorized by government to construct railroad upon bank of river need not indemnify adjoining owners for taking away their access to river.

Cited in Freund Police P. 428, on easements of riparian owner; 2 Washburn Real Prop. 6th ed. 346, on right to maintain wharf.

Distinguished in Sage v. New York, 154 N. Y. 61 (affirming 10 App. Div. 294, 41 N. Y. Supp. 938), holding that the riparian rights of an owner of the Harlem upland are subordinate to the right of the City of New York under its charter and rights granted it; Eisenbach v. Hatfield, 2 Wash. 236, 12 L.R.A. 632, 26 Pac. 539, holding that under the state statutes and constitution a riparian owner has no special or peculiar rights in the navigable waters as an incident to their estate.

The decision of the Exchequer Chamber was cited in United States v. Bain, 3 Hughes 593, Fed. Cas. No. 14,496, on the power of the English crown to alien the lands held in trust for the public without the consent of Parliament.

—Actionable interference with access.

Cited in Mobile Transp. Co. v. Mobile, 153 Ala. 409, 13 L.R.A.(N.S.) 352, 127 Am. St. Rep. 34, 44 So. 976, holding that wrongful exclusion from the shore is sufficient to give right to compensation; San Francisco Sav. Union v. R. G. R. Petroleum & Min. Co. 144 Cal. 134, 66 L.R.A. 242, 103 Am. St. Rep. 72, 77 Pac. 823, 1 Ann. Cas. 182; Garitee v. Baltimore, 53 Md. 422; Re New York, 168 N. Y. 134, 56 L.R.A. 500, 61 N. E. 158,—holding that where riparian rights are taken away, there must be compensation paid therefor; Brookhaven v. Smith, 188 N. Y. 74, 9 L.R.A.(N.S.) 326, 80 N. E. 665, 11 Ann. Cas. 1, on the right to recover for interference with enjoyment of riparian rights; Kingsland v. New York, 35 Hun 458, holding that the benefits and advantages of the water front was property vested in the land owners for which compensation must be paid if they were destroyed; Rumsey v. New York & N. E. R. Co. 133 N. Y. 79, 15 L.R.A. 618, 28 Am. St. Rep. 600, 30 N. E. 654, holding same where railroad was built in front of riparian property; Chapman v. Oshkosh & M. River R. Co. 33 Wis. 629, holding that riparian owner is entitled to recover for injury to riparian rights caused by bridge built by railroad company; Lyon v. Fishmongers' Co. L. R. 1 App. Cas. 662, 46 L. J. Ch. N. S. 68, 35 L. T. N. S. 569, 25 Week. Rep. 165, 23 Eng. Rul. Cas. 141, holding that a riparian owner was entitled to compensation for the obstruction of his free access to the water.

Cited in notes in 34 L.R.A.(N.S.) 431, on right to obstruct wharf rights in navigable waters for public purposes, without compensation; 40 L.R.A. 593, on right of owner of upland to access to navigable water.

Cited in 1 Farnham, Waters, 292, on riparian owner's right of access to water.

Distinguished in Taylor v. Com. 102 Va. 759, 102 Am. St. Rep. 865, 47 S. E. 875, holding that where the right of access was not cut off or interfered with, a

riparian owner could not recover for the maintenance of an artesian well in the stream.

The decision of the Exchequer Chamber was cited in Stevens v. Paterson & N. R. Co. 34 N. J. L. 532, 3 Am. Rep. 269, 3 Legal Gaz. 217, holding that the state being the owner of the land in all navigable water could grant the same to any one without making compensation to the owner of the shore.

Law of privacy.

Cited in note in 31 L.R.A. 283, on law of privacy.

3 E. R. C. 504, HENFREE v. BROMLEY, 6 East 309, 8 Revised Rep. 491, 2 Smith, 400.

Authority of arbitrator to act further after award is made.

Cited in Dudley v. Thomas, 23 Cal. 365; Woodbury v. Northy, 3 Me. 85, 14 Am. Dec. 214,—holding that after the award is executed and ready for delivery, the arbitrator has not power even to correct a mistake in it; Porter v. Pillsbury, 35 Me. 278; Flannery v. Sahagian, 134 N. Y. 85, 31 N. E. 319; Rogers v. Carrothers, 26 W. Va. 238; Helps v. Roblin, 6 U. C. C. P. 52,—holding that an arbitrator after he has executed an award, has no power to alter or amend the award; Sanford v. Sanford, 3 N. S. 266, holding that they cannot make a new award in such case; Baker v. Booth, 2 U. C. Q. B. O. S. 407, on the right of an arbitrator to retract an award after he has completed and published it and it is ready for delivery.

— Alteration of award by arbitrators as affecting its validity.

Cited in Colson v. Arnot, 57 N. Y. 253, 15 Am. Rep. 496 (dissenting opinion), on the effect of an alteration of a completed award by the arbitrator or another.

— Validity of an award made as a substitute for earlier one.

Cited in Holden v. McCarthy, 5 U. C. Q. B. O. S. 99, holding that the award first delivered was the true award, though the second was under seal, where the submission did not require a seal; Kelly v. MacDonald, 2 Has. & War. (Pr. Edw. Isl.) 173, holding that where the first award was destroyed after being signed, a second one made was void.

Distinguished in Baby v. Davenport, 2 U. C. Q. B. 65, holding that where the arbitrators made a partial award according to the agreement of the parties, reserving the right to complete it, the second award made was valid.

Alteration of written instrument by stranger as affecting its validity.

Cited in People v. Graham, 1 Sheldon, 151, 6 Park Cr. 135, on the alteration of a written instrument in some material particular, as a forgery; Rees v. Overbaugh, 6 Cow. 746, holding that if a stranger tears off the seals to a deed it will not vitiate the deed; Brown v. Jones, 3 Port. (Ala.) 420; Nichols v. Johnson, 10 Conn. 192; Lee v. Alexander, 9 B. Mon. 25, 48 Am. Dec. 412; Pope v. Chafee, 14 Rich. Eq. 69,—holding that the unauthorized alteration of a written instrument by a stranger will have no effect; Waring v. Smith, 2 Barb. Ch. 119, holding same where the contents can be ascertained as they originally existed; Gleason v. Hamilton, 64 Hun, 96, 19 N. Y. Supp. 103, holding same as to an unauthorized alteration of a mortgage by an attorney of the mortgagee; Yeager v. Musgrave, 28 W. Va. 90, holding that if a stranger alters a deed, bond or other agreement in a part not material it does not avoid the agreement; Bigelow v. Stilphen, 35 Vt. 521, holding same as to a material alteration of a note; Boyd v. McConnell, 10 Humph. 68, holding such alteration will not avoid the note; Cutts v. United States, 1 Gall. 69, Fed. Cas. No. 3,522; Waterous Engine Works

Co. v. McLean, 2 Manitoba L. Rep. 279; Pattison v. Rykert, 1 Ont. Elect. Cas. 428,—on the effect of an alteration of a written instrument by an unauthorized third person; Bank of Upper Canada v. Widmer, 2 U. C. Q. B. O. S. 275, holding that a mere alteration of a specialty will not destroy it.

Cited in note in 2 Eng. Rul. Cas. 694, on invalidity of instrument materially altered by stranger.

— By a party to the instrument.

Cited in United States v. Spalding, 2 Mason, 478, Fed. Cas. No. 16,365, holding as to bonds where the seals were torn off by the obligee through the fraud of the obligor, that the obligor could recover on them; Suffell v. Bank of England, L. R. 9 Q. B. Div. 555, 3 Eng. Rul. Cas. 640, 51 L. J. Q. B. N. S. 401, 47 L. T. N. S. 146, 30 Week. Rep. 932, 46 J. P. 500, holding that the material alteration of a note by the holder vitiated them even as against a bona fide holder for value.

Distinguished in Weeks v. Hall, 1 N. B. 433, holding that an alteration in the conditions of a bail bond, avoided the bond.

3 E. R. C. 508, SMITH v. JOHNSON, 15 East, 213, 13 Revised Rep. 449.

Conclusiveness of award as to all matters embraced within submission.

Cited in Curley v. Dean, 4 Conn. 259, 10 Am. Dec. 140, holding that an award is conclusive as to all matters submitted and decided by the award; Warfield v. Holbrook, 20 Pick. 531, holding that an award was a bar to any action upon a note submitted to the arbitrators, if within the submission; Gardener v. Oden, 24 Miss. 382, holding all matters pertaining to partnership accounts were concluded by submission of the firm accounts; New York Lumber & Woodworking Co. v. Schneider, 119 N. Y. 475, 24 N. E. 4, holding that an award is a complete bar to the maintenance of an action upon the original right or cause, or upon matters embraced therein.

— As to matters not presented to the arbitrators.

Cited in Bunnel v. Pinto, 2 Conn. 431, holding that an award was a bar to all matters embraced within the submission though through mistake not brought to the attention of the arbitrators; Stipp v. Washington Hall, 5 Blackf. 473, holding that by failing to submit any demand within the scope of the reference, the party forfeits his claim to it; Veghte v. Hoagland, 29 N. J. L. 125, holding that where damages are entire, an award upon them, although part are omitted, extinguishes the whole; Page v. Foster, 7 N. H. 392; Ott v. Schroeppel, 5 N. Y. 482,—holding that an award made under a general submission is final as to all matters within the submission though not urged before the arbitrators; Peeler v. Norris, 4 Yerg. 331, on the right to withhold matters in dispute so as to avail of them in a future action; Robinson v. Morse, 26 Vt. 392, holding that an award is a bar to a suit afterward brought on notes or other matters intentionally withheld from the arbitrators and included in the submission; Ramsay v. Hamilton, 4 N. B. 511, on the right of a plaintiff to withdraw matters from the consideration of the referees where it is within the scope of the reference; Bennett v. Murray, 5 N. S. 614, holding that a court will not allow a setoff of a matter within the scope of a previous reference between the parties, the object of which was to make a final settlement.

Cited in notes in 3 Eng. Rul. Cas. 511; 11 Eng. Rul. Cas. 235,—on conclusiveness of award as to matters not submitted.

Disapproved in King v. Savory, 8 Cush. 309, holding that where the matter was not submitted to the arbitrators it did not bar a future action upon it, if

the party acted in good faith; Buck v. Buck, 2 Vt. 417, holding that where the submission is by parol, matters then existing but not laid before the arbitrators nor adjudicated by them are not barred by the award.

Conclusiveness of judgment.

Cited in Pinney v. Barnes, 17 Conn. 420, holding that a former judgment in a suit between the same parties upon the same cause of action, is a bar to a subsequent one, though the former is inadequate.

Vacation of award.

Cited in note in 3 E. R. C. 522, on setting aside award.

3 E. R. C. 512, PEDLEY v. GODDARD, 7 T. R. 73, 4 Revised Rep. 382.

Objections to report of referees made under rule of court.

Cited in Adams v. Adams, 8 N. H. 82, holding that a report of referees made under a rule of court is when presented for acceptance open to every objection whether the objection appear on its face or not.

Matters appearing on face of award as defenses to attachment for nonperformance of award.

Cited in Elmendorf v. Harris, 5 Wend. 516, holding that matters appearing on the face of the award may be relied on to resist an attachment for not performing the award, at any time when motion is made.

Time for objection to award.

Cited in Crooks v. Chisholm, 4 U. C. Q. B. O. S. 120, holding that it is too late to object to award after lapse of four terms from publication, and attachment granted for nonperformance.

Cited in note in 3 E. R. C. 519, on setting aside award.

Finality of award as affecting its validity.

Distinguished in M'Kinstry v. Solomons, 2 Johns. 57, holding that where the award provided that should any errors be found in it, the plaintiff should refund that much, did not affect its finality where the merits are not involved.

Assignment of error of irregular judgment.

Cited in Hanly v. Holmes, 1 Mo. 84, on the right to assign for error an irregular judgment.

3 E. R. C. 523, HOPKINSON v. ROLT, 9 H. L. Cas. 514, 7 Jur. N. S. 1209, 34 L. J. Ch. N. S. 468, 5 L. T. N. S. 90, 9 Week Rep. 900, affirming the decision of the Lord Chancellor, reported in 3 De G. & J. 177, which affirms the decision of the Master of the Rolls, reported in 25 Beav. 461.

Lien for future advances as against prior transferee or encumbrancer of equity of redemption.

Referred to as a leading case in Hyman v. Hauff, 138 N. Y. 48, 33 N. E. 735, holding rule that lien of mortgage for future advances will be postponed as to advances after notice of other encumbrances applies only where advances were plainly optional and notice actual.

Cited with special approval in Blackley v. Kenny, 16 Ont. App. Rep. 522, holding a mortgagee, who assented to voluntary conveyance of equity of redemption to mortgagor's wife, was not entitled to priority for advances after notice of conveyance.

Cited in National Bank v. Gunhouse & Co. 17 S. C. 489, holding mortgage to secure future advances is postponed to a later mortgage as to all indebtedness contracted after notice of the second mortgage; Newfoundland v. Newfoundland

R. Co. L. R. 13 App. Cas. 199, 57 L. J. P. C. N. S. 35, 58 L. T. N. S. 285; Dawson v. Bank of Whitehaven, L. R. 4 Ch. Div. 639,—on same point: Daun v. London Brewery Co. L. R. 8 Eq. 155, 38 L. J. Ch. N. S. 454, 20 L. T. N. S. 601, holding rights under first and second mortgages to secure advances, after notice, are regulated by respective dates of the advances; Ladue v. Detroit & M. R. Co. 13 Mich. 380, 87 Am. Dec. 759, holding, on different reasoning that where mortgage operates as mere security, that optional advances made subsequent to the recording of a deed from mortgagor will not be entitled to priority; Finlayson v. Crooks, 47 Minn. 74, 49 N. W. 398, holding fact that advances were optional and made with actual notice of another lien precluded mortgagee from claiming priority at least in absence of a special equity; Heintze v. Bentley, 34 N. J. Eq. 562, holding, if a first mortgagee have knowledge of existence of a second incumbrance, he will not be entitled to priority for subsequent optional advances; Ackerman v. Nunsicker, 85 N. Y. 43, 39 Am. Rep. 621, holding optional or obligatory advances under a mortgage, though made subsequent to docketing of a judgment are entitled to priority where there was no notice; Ackerman v. Hunsicker, 21 Hun, 53, holding that mortgage to secure future advances is subject to all incumbrances recorded to time it is made; McClure v. Roman, 52 Pa. 458, holding obligations incurred under security of a judgment note took no priority over a later judgment of even date; Pierce v. Canada Permanent Loan & Sav. Co. 24 Ont. Rep. 426, holding that under registry laws mortgage recorded takes priority of former mortgage as to advances made on first mortgage subsequent to time of recording second mortgage; Cook v. Royal Canadian Bank, 20 Grant, Ch. (U. C.) 1, holding, where bank permitted belief that stock would be transferred on a certain payment, that it could not continue to make discounts, which would be a charge on the stock; Hudson's Bay Co. v. Kearns, 3 B. C. 330, holding a grantee for security could not register his title so as to obtain priority for his advances over a known prior mortgage; Cosgrave Brewing & Malting Co. v. Starrs, 5 Ont. Rep. 189, on absence of right to make further advances on security of a first mortgage after notice of a second mortgage; Hutson v. Valliers, 19 Ont. App. Rep. 154 (dissenting opinion), on effect of registration of later mortgage to postpone subsequent advances under an earlier registered mortgage; Pierce v. Canada Permanent Loan & Sav. Co. 25 Ont. Rep. 671 (reversing 24 Ont. Rep. 426), holding subsequent registered mortgagee was junior to advances made thereafter on a prior registered mortgage within the amount secured thereby; West v. Williams [1898] 1 Ch. 488 [1899] 1 Ch. 132, 68 L. J. Ch. N. S. 127, 79 L. T. N. S. 575, 47 Week. Rep. 308, holding rule that lien of mortgage for future advances will be postponed as to advances made after notice of another mortgage applies where there was a covenant to make the advances; Hughes v. Britannia Permanent Benefit Bldg. Soc. [1906] 2 Ch. 607, 75 L. J. Ch. N. S. 739, 95 L. T. N. S. 327, 22 Times L. R. 806, holding, where first mortgagee had notice of a second mortgage he could not rely on express contract entitling him to add what was subsequently advanced on mortgages on other estates; London & C. Bkg. Co. v. Ratcliffe, L. R. 6 App. Cas. 722, 51 L. J. Ch. N. S. 28, 45 L. T. N. S. 322, 30 Week. Rep. 109, holding, where owner deposited title deeds with bank to secure sums due or to become due, that bank could not make fresh advances after notice of a contract to convey; Bradford Bkg. Co. v. Briggs, L. R. 29 Ch. Div. 149, L. R. 31 Ch. Div. 19, L. R. 12 App. Cas. 29, 52 L. T. N. S. 643, 33 Week. Rep. 730, 56 L. J. Ch. N. S. 364, 56 L. T. N. S. 62, 35 Week. Rep. 521, holding an association, whose articles gave first lien on shares for debts from shareholders, was not entitled to priority as to money

becoming due after notice of a deposit of shares to secure a loan; Menzies v. Lightfoot, L. R. 11 Eq. 459, 40 L. J. Ch. N. S. 561, 24 L. T. N. S. 695, 19 Week. Rep. 578, holding, where a second mortgage was taken simultaneously with a first and words "subject to the security" were used, that first mortgagee was not entitled to priority as to advances made after notice though first mortgage specified that advances were not to exceed a certain sum; Union Bank v. National Bank, L. R. 12 App. Cas. 53, 56 L. T. N. S. 203, holding disponee, possessing property on an ex facie absolute title of ownership, but in security only of advances made and to be made to disponor, will not be protected as to advances after notice of conveyance of reversionary right for a consideration.

Cited in notes in 18 Eng. Rul. Cas. 529, on priority of mortgagee over subsequent mortgagee in respect to advances after notice of later mortgages; 3 E. R. C. 554, 555, on effect of assignment on rights as to future advances.

Distinguished in Re Newfoundland R. Co. Newfoundl. Rep. (1884-96) I. appx., where priorities were in question arising out of the same clauses in the same contract.

Disapproved in Robinson v. Consolidated Real Estate & F. Ins. Co. 55 Md. 105, holding judgment to secure future advances as agreed on was prior to mechanics' lien, though advances were not to be made until after building was commenced.

The decision of the Lord Chancellor was cited in Bank of Montgomery County's Appeal, 36 Pa. 170, holding that mortgage covering future advances is lien on property for future advances only from date of such advances.

Notice to discharge secondary liability for future debts.

Cited in Burgess v. Eve, L. R. 13 Eq. 450, 41 L. J. Ch. N. S. 515, 26 L. T. N. S. 540, 20 Week. Rep. 311, on right to withdraw a general guaranty to a bank on paying up all that was due at the time of giving notice.

Effect of mortgage.

Cited in London & C. Bkg. Co. v. Ratcliffe, L. R. 6 App. Cas. 722, 51 L. J. Ch. N. S. 28, 45 L. T. N. S. 322, 30 Week. Rep. 109, on right of mortgagor to sell mortgaged estate subject to then existing charge; Carter v. Grasett, 14 Ont. App. Rep. 685, on mortgagor as owner in equity, though the property is still subject to the mortgage debt.

Right of tacking applied to mortgages.

Cited in Ladue v. Detroit & M. R. Co. 13 Mich. 380, 87 Am. Dec. 759, on English doctrine of tacking based on theory that mortgagee is possessed of legal title.

Effect of difference of opinion on rights as to appeal costs.

Cited in Anderson v. Morice, L. R. 1 App. Cas. 713, 46 L. J. C. P. N. S. 11, 35 L. T. N. S. 566, 25 Week. Rep. 14, 23 Eng. Rul. Cas. 302, on effect of difference of opinion on rights as to costs.

Contradiction on contract by custom.

Cited in note in 8 E. R. C. 356, on right to contradict terms of express contract by custom or otherwise.

3 E. R. C. 556, HOGG v. BROOKS, L. R. 15 Q. B. Div. 256, 50 J. P. 118.

Mortgagee of lease as assignee.

Cited in Jamieson v. London & C. Loan & Agency Co. 23 Ont. App. Rep. 602, on mortgagee of lease as assignee of term

3 E. R. C. 558, LEVY v. LOVELL, L. R. 14 Ch. Div. 234, 49 L. J. Ch. N. S. 305, 42 L. T. N. S. 242, 28 Week. Rep. 602, reversing the decision of the Vice Chancellor, reported in 48 L. J. Ch. N. S. 357, L. R. 11 Ch. Div. 220, 27 Week. Rep. 428.

Effect of attachment process on goods to create lien.

Cited in National City Bank v. Torrent, 130 Mich. 259, 89 N. W. 938, holding debt was "secured" when garnishee proceedings had been instituted; Ex parte Sear, L. R. 17 Ch. Div. 74, 44 L. T. N. S. 887, holding an attachment of goods on a writ out of the Tolzey Court of Bristol is under the custom of the Court a mere process giving no specific lien on the goods; Ex parte Nelson, L. R. 14 Ch. Div. 41, 49 L. J. Bankr. N. S. 44, 42 L. T. N. S. 389, 28 Week. Rep. 554, on the effect of service of writ of attachment; Smith v. Perpetual Trustee Co. 11 C. L. R. (Austr.) 148, holding that writ of foreign attachment taken out by creditor does not create charge for debt over property.

3 E. R. C. 569, Stanley v. Grundy, L. R. 22 Ch. Div. 478, 52 L. J. Ch. N. S. 248, 48 L. T. N. S. 106, 31 Week. Rep. 315.

Liability of mortgagee in possession for rents.

Cited in note in 18 E. R. C. 431, on liability to account of mortgagee entering into possession, for receipt of rents and profits.

3 E. R. C. 573, BIDDLE v. BOND, 6 Best. & S. 225, 11 Jur. N. S. 425, 34 L. J. Q. B. N. S. 137, 12 L. T. N. S. 178, 13 Week. Rep. 561.

Denial of bailor's title by bailee.

Referred to as leading case and distinguished in Valentine v. Long Island R. Co. 102 App. Div. 419, 92 N. Y. Supp. 645, where carrier asserted title in itself.

Cited in Sedgwick v. Macy, 24 App. Div. 1, 49 N. Y. Supp. 154, as to when bailee can set up title of third person in action against him by bailor; Nudd v. Montayne, 38 Wis. 511, 20 Am. Rep. 25, holding general rule is that one who has received property from another as bailee or agent must restore or account for it to him from whom he has received it, but rule has been relaxed by some modern authorities; Wells v. American Exp. Co. 55 Wis. 23, 42 Am. Rep. 695, 11 N. W. 537, holding jus tertii enforceable even as against contract of bailment; Hegan v. Fredericton Boom Co. 18 N. B. 165, holding boom company which receives lumber from person who furnishes marks is not necessarily estopped to show third person is owner; Elgin Loan & Sav. Co. v. National Trust Co. 7 Ont. L. Rep. 1, holding bailee may interplead when claim is made upon the property or adverse interest alleged to exist therein; Hastings v. Ponton, 5 Ont. App. Rep. 543, holding taint of illegality attaching to receipt of money by one as agent will not enable him to deny he received it for use of principle, so long as it has not been claimed from him by some one really entitled to it; Mason v. Great Western R. Co. 31 U. C. Q. B. 73, on right of bailee to set up jus tertii; Rogers v. Lambert, L. R. 24 Q. B. Div. 573, 59 L. J. Q. B. N. S. 250, 38 Week. Rep. 542, 62 L. T. N. S. 694, [1891] 1 Q. B. 318, 60 L. J. Q. B. N. S. 187, 64 L. T. N. S. 406, 55 J. P. 452, 39 Week. Rep. 114, holding bailee is estopped from disputing his bailor's title unless he claims to defend under authority of alleged title holder; Henderson v. Williams, 64 L. J. Q. B. N. S. 308, [1895] 1 Q. B. 521, 14 Reports, 375, 72 L. T. N. S. 98, 43 Week. Rep. 274, 11 Eng. Rul. Cas. 105, holding warehouseman estopped to deny bailor's title where he admitted he held goods at latter's order and disposal.

Cited in notes in 12 L.R.A.(N.S.) 259, on duty of carrier to recognize demands

of stranger on property delivered for transportation; 33 L.R.A.(N.S.) 683—686, 689, 698, on right to assert against bailor, hostile, adverse, paramount title of third person; 3 E. R. C. 579, 581, on estoppel of bailee by attornment; 11 E. R. C. 120, on estoppel of warehouseman or bailee by giving receipt.

Cited in Benjamin Sales, 5th ed. 866, on estoppel of warehousemen to set up rights of unpaid seller after attornment; 2 Cooley Torts, 3d ed. 877, on right of bailee to deliver to real owner property received from one not entitled to possession; 4 Elliott Railr. 2d ed. 281, on seizure under legal process as excuse for nondelivery of goods by carrier; 4 Elliott Railr. 2d ed. 61, on bill of lading issued to true owner of goods as muniment of title; 2 Hutchinson Car. 3d ed. 834, on duty and liability of carrier when adverse claim to property is set up: Porter Bills of L. 355, on immateriality of manner in which bailor obtained possession of goods.

Distinguished in Wellington v. Chard, 22 U. C. C. P. 518, where plea amounted to absolute divesting of plaintiff's interest and property under statutable authority; Kingsman v. Kingsman, L. R. 6 Q. B. Div. 122, 50 L. J. Q. B. N. S. 81, 44 L. T. N. S. 124, 29 Week. Rep. 207, 45 J. P. 357, where distinction was drawn between cited case and case of assignor and assignee.

—Attornment under stress of action or superior demand.

Cited with special approval in Brill v. Grand Trunk R. Co. 20 U. C. C. P. 440, holding bailee cannot set up title of third person except upon latters right and title and by his authority.

Cited in Palmtag v. Doutrick, 59 Cal. 154, 43 Am. Rep. 245, holding bailee can set up title of third person in action by bailor when he defends on such title and by authority of such third person; Dodge v. Meyer, 61 Cal. 405, to same effect; City Bank v. Smith, 20 U. C. C. P. 93, holding like principle applicable where a man resists payment of note or bill, on ground some other person has better title than that of plaintiff; Cleveland C. C. & St. L. R. Co. v. Moline Plow Co. 13 Ind. App. 225, 41 N. E. 480, holding showing by bailee that he has in good faith or by legal process yielded possession to rightful owner is good defense; National Newark Banking Co. v. Delaware, L. & W. R. Co. 70 N. J. L. 774, 66 L.R.A. 595, 103 Am. St. Rep. 825, 58 Atl. 311, holding bailee who delivers goods to true owner, at his demand is not answerable to bailor, and rule is especially applicable to common carriers; The Idaho, 93 U. S. 575, 23 L. ed. 978, holding common carrier may show as excuse for nondelivery pursuant to his bill of lading, that he has delivered goods upon demand to true owner; Domville v. Kevan, 13 N. B. 33, holding obligation of bailee to account for property to him from whom he has received it does not exist where third person claiming the property has superior title, to bailor; Ross v. Edwards, 14 Ont. Pr. Rep. 523, on attempt to maintain trover against warehouseman by one who knows another's title to the property; Great Western R. Co. v. McEwan, 30 U. C. Q. B. 559, holding bailee can have no better title than bailor had, also that after notice to bailee of title of third person and demand upon him by such third person he may set up latter's title against bailor's claim; Leese v. Martin, L. R. 17 Eq. 224, 43 L. J. Ch. N. S. 193, 29 L. T. N. S. 742, 22 Week. Rep. 230, holding it is not enough that bailee has become aware of title of third person or that adverse claim is made upon him, so that he may be entitled to an interpleader; Ross v. Edwards, 11 Reports 574, 73 L. T. N. S. 100, holding bailee is discharged when there is an eviction by title paramount.

Distinguished in Ex parte Davies, L. R. 19 Ch. Div. 86, 45 L. T. N. S. 632, 30 Week. Rep. 237, where auctioneer elected to sell goods for trustee with knowl-

edge of adverse claimant's title, and did not show claimant had better title than trustee.

Availing one's self of title of assignee.

Cited in O'Callaghan v. Cowan, 41 U. C. Q. B. 272, holding plaintiff had no right to seek to avail himself of assignee's title in absence of evidence that he was suing under and by authority of assignee.

3 E. R. C. 583, WILLIAMS v. MILLINGTON, 1 H. Bl. 81, 2 Revised Rep. 724.

Rights and liabilities of auctioneer.

Cited in Elison v. Wulff, 26 Ill. App. 616, holding auctioneer liable to purchaser for breach of contract of sale; Veazie v. Williams, 8 How. 134, 12 L. ed. 1018, holding auctioneer is usually general agent for owner, and may be agent of buyer after the sale for some purposes, but until sale he acts for vendor alone; Ryan v. Salt, 3 U. C. C. P. 83, holding it was question for jury upon evidence whether defendant had clothed auctioneer with authority to sell, having once placed property in his hands; Wolfe v. Horne, L. R. 2 Q. B. Div. 355, 46 L. J. Q. B. N. S. 534, 36 L. T. N. S. 705, 25 Week. Rep. 728, holding auctioneer responsible to buyer for neglect to deliver; Wood v. Baxter, 49 L. T. N. S. 45, holding that extent of contract entered into by auctioneer when he sells goods must be determined upon evidence as to conduct and declarations of auctioneer, nature of subject matter of sale, and surrounding circumstances; Davis v. Artingstall, 49 L. J. Ch. N. S. 609, 42 L. T. N. S. 507, 29 Week. Rep. 137, holding auctioneer has not merely custody of goods, but an interest in and possession of them; Consolidated Co. v. Curtis & Son [1892] 1 Q. B. 495, 61 L. J. Q. B. N. S. 325, 40 Week. Rep. 426, 56 J. P. 565, 25 Eng. Rul. Cas. 162, holding auctioneer who sells and delivers in ordinary course is more than mere broker or intermediary.

Cited in note in 11 Eng. Rul. Cas. 668, on lien of auctioneer on proceeds of sale of goods.

Cited in Benjamin Sales, 5th ed. 692, on time for delivery by auctioneer of goods sold; Benjamin Sales, 5th ed. 792, on auctioneer as agent entitled to receive payment for goods sold; Tiffany Ag. 226, on scope of authority of auctioneer as agent.

— Right to sue or defend.

Cited in Ennis v. Waller, 3 Blackf. 472, on right of auctioneer to maintain action for goods sold and delivered against buyer; Tyler v. Freeman, 3 Cush. 261, holding replevin maintainable by auctioneer against third party who obtains goods from buyer illegally; Hulse v. Young, 16 Johns. 1, holding action for goods sold and delivered maintainable by auctioneer in his own name; Wakefield v. Gorrie, 5 U. C. Q. B. 159, on right of auctioneer employed to sell goods of another to sue in his own name.

Cited in Tiffany Ag. 389, on right of auctioneer to sue in his own name for goods sold.

Right of agent to sue or defend in own name.

Referred to as leading case in Lewis v. Peck, 10 Ala. 142, holding agent to collect note may sue subagent for proceeds thereof; Root v. H. Muhr's Sons, 19 Phila. 428, 44 Phila. Leg. Int. 144, 19 W. N. C. 403, holding agent interested in contract only to extent of his commissions cannot maintain action thereon.

Cited in Armstrong v. Vroman, 11 Minn. 220, Gil. 142, 88 Am. Dec. 81; Robinson v. Garth, 6 Ala. 204, 41 Am. Dec. 47,—holding that sheriff may maintain

action for breach of contract of sale of land under execution; Ministerial & School Fund v. Parks, 10 Me. 441, holding that in general, a mere servant or agent, with whom contract is made on behalf of another cannot support an action thereon; Underhill v. Gibson, 2 N. H. 352, 9 Am. Dec. 82, holding sufficient consideration to principal in a promise, under seal, does not authorize an agent to sue in his own name, and same rule has been often adopted where promise is not under seal; De Forest v. Fulton F. Ins. Co. 1 Hall, 84, holding commission merchant may insure property held by him for his principal in his own name and recover upon the contract; Atkinson v. Farmer, 6 N. C. (2 Murph.) 291, 4 N. C. (1 Car. Law Repos.) 280, holding cited case does not contradict general rule that one shall not be compelled to become debtor of another; Baltimore & P. S. B. Co. v. Atkins, 22 Pa. St. 522, holding when agent has beneficial interest in performance of contract made with himself for another, or special property in subject-matter of the agreement, he may support action in his own name thereon; Jarvis v. Cayley, 11 U. C. Q. B. 282, holding sheriff may sue in assumpsit for price of goods or lands sold by him under writ.

Distinguished in Buckbee v. Brown, 21 Wend. 110, holding suit cannot be maintained by dock master in his own name to recover wharfage.

Agent's possession as basis of right.

Cited in Mitchell v. Georgia & A. R. Co. 111 Ga. 760, 51 L.R.A. 622, 36 S. E. 971, holding mere agent or servant, having no special property therein, cannot, on bare possession alone, maintain an action to recover goods from person wrongfully in possession; Jarvis v. Pinckney, Riley, L. 123, 3 Hill. L. (S. C.) 123, holding that person in command of cargo as salvor may maintain action for injury thereto while in his possession.

— Action by principal.

Cited in Williams v. Ocean Ins. Co. 2 Met. 303, holding action may be brought upon contract insuring vessel by owners thereof where one part owner procures policy which is payable to him.

Duty of plaintiff to show right to maintain action.

Cited in Miller v. Wiley, 16 U. C. C. P. 528, holding general rule is that plaintiff or demandant in every action must show a title to maintain it.

Diverse rights of action between shipper and carrier.

Cited in Southern Exp. Co. v. Craft, 49 Miss. 480, 19 Am. Rep. 4, on questions arising in suit by person who shipped money by express to recover for its loss by the carrier, where consignor and consignee were different persons.

3 E. R. C. 588, DAVIS v. BOWSHER, 2 Revised Rep. 650, 5 T. R. 488.

Lien of banker.

Cited in Lehman v. Tallassee Mfg. Co. 64 Ala. 567, holding rule is broadly stated, that bank or banker has lien on all moneys and funds of customer, coming into his possession in course of their dealings for balance of general account due from customer; Maitland v. Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620, holding bank entitled to lien upon all securities for money of its customers in its hands for advances to such customers, in ordinary course of business; Millikin v. Shapleigh, 36 Mo. 596, 88 Am. Dec. 171, holding banker not entitled to lien where drafts were received under special circumstances taking it out of general rule; Wyckoff v. Anthony, 9 Daly, 417, holding where securities are specially pledged to broker or banker he has no lien upon them for general balance or payment of any other claim; National Bank v. Bonsor, 38 Pa. Super. Ct.

275, holding that bank, making advances on faith of check deposited for collection, is entitled to lien upon proceeds; Bank of United States v. Macalester, 9 Pa. St. 475, holding bank cannot divert deposit for special purpose from such purpose on ground of overdraft of account opened for general purposes; Morgan v. Bank of North America, 8 Serg. & R. 73, 11 Am. Dec. 575, holding stockholder in bank bound by regulation that stock of bank should not be transferred while stockholder was indebted to bank; Reed v. Penrose, 36 Pa. 214, 2 Grant's Cas. 472 (dissenting opinion), as to whether banker is bound to answer checks of depositor when he holds depositor's notes or bonds past due; Van Ames v. Bank of Troy, 5 How. Pr. 161, 8 Barb. 312, holding as general rule, banker has general lien on securities in his hands belonging to customer, for general balance due from latter; Sparhawk v. Drexel, 12 Nat. Bankr. Reg. 450, Fed. Cas. No. 13,204, 1 W. N. C. 560, holding banker has general lien upon securities on hand, not converted into actual cash, also that special circumstances which will prevent attachment of general lien must be such as are incompatible with its existence or continuance; Brandas v. Barnett, 3 E. R. C. 592, 12 Clark & F. 787, 3 C. B. 519, holding exchequer bills taken to be turned over and locked up by customer not subject to general lien.

Cited in notes in 3 Eng. Rul. Cas. 612; 16 E. R. C. 125,—on general lien of banker; 11 E. R. C. 669, on lien of banker on securities deposited; 16 E. R. C. 130, on right to claim lien so as to interrupt performance of actual contract between the parties.

Cited in 2 Bolles Banking, 741, 749, on right of bank to apply deposit to extinguish depositor's indebtedness; 1 Morse Banks, 4th ed. 596, on lien of bank on money and funds of depositor in its possession; 1 Morse Banks, 4th ed. 598, on lien of bank on special deposit; 2 Morse Banks, 4th ed. 970, on lien of bank for general balance on property deposited specifically.

Distinguished in Lawrence v. Stonington Bank, 6 Conn. 521, drawing distinction between sending notes for collection from one bank to another, and payment of notes to banker, and obtaining discount on part of them; Neponset Bank v. Leland, 5 Met. 259, where notes were pledged specifically.

— Of other custodian or depositary.

Cited in Hodgson v. Payson, 3 Harr. & J. 339, 5 Am. Dec. 439, holding factor has lien on draft drawn in favor of his principal for engagements upon which he is bound unless relieved by principal; Dennett v. Cutts, 11 N. H. 163, holding attorney has lien on note of client for general balance; Bank of State v. Levy, 1 McMull. L. 431, holding bill broker privileged to retain securities in his hands as creditor in possession, on account of responsibilities brought upon himself in direct line of his agency; Hunn v. Boowne, 2 Caines, 38 (dissenting opinion), on right of vendor to detain goods until price be paid.

Cited in 2 Elliott Railr. 2d ed. 892, on waiver of mechanic's lien against railroad.

3 E. R. C. 592, BRANDAO v. BARNETT, 12 Clark & F. 787, 3 C. B. 519, reversing the decision of the Court of Exchequer Chamber reported in 6 Man & G. 630, which reversed the decision of the Court of Common Pleas reported in 1 Man & G. 908.

Banker's general lien.

Cited in Wood v. Boylston Nat. Bank, 129 Mass. 358, 37 Am. Rep. 366, holding that bank had lien on proceeds of note left by attorney for collection where it had no knowledge of agency; Muench v. Valley Nat. Bank, 11 Mo. App. 144.

holding that bank has lien on all funds held by it for payment of note discounted by it for depositor; Falkland v. St. Nicholas Nat. Bank, 21 Hun, 450, holding lien is secured to bankers upon accounts of their customers, for payment of any indebtedness owing from latter; Grant v. Taylor, 3 Jones & S. 338, holding that banker or broker has general lien but such lien is not favored as against balance of account; Cox v. Canadian Bank, 21 Manitoba L. Rep. 1, holding that bank had general lien on negotiable paper pledged as security by agent of corporation; Re Williams, 7 Ont. L. Rep. 156, holding bank has lien on all moneys, funds and securities of depositor for general balance of his account; Freedman v. Dominion Bank, Rap. Jud. Quebec 37 C. S. 535, holding that bank has no lien on bills offered for discount; Misa v. Currie, L. R. 1 App. Cas. 554, 45 L. J. Q. B. N. S. 852, 35 L. T. N. S. 414, 24 Week. Rep. 1049, 4 Eng. Rul. Cas. 317, on customary lien of bankers for balance due.

Cited in note in 26 L. ed. U. S. 694, on banker's lien.

Cited in 1 Morse Banks, 4th ed. 596, on lien of bank on money and funds of depositor in its possession; Tiffany Ag. 466, on banker's lien on property of customer for balance due on general account.

Distinguished in Brown v. New Bedford Inst. for Sav. 137 Mass. 262, holding English decisions allowing bankers lien for general balance inapplicable to case of savings bank taking security for specific note.

The decision of the Court of Exchequer Chamber was cited in Commercial Bank v. Page, 13 N. B. 326, holding that bankers have lien on all negotiable securities placed in their hands by customers.

The decision of the Court of Common Pleas was cited in Van Namee v. Bank of Troy, 5 How. Pr. 161, holding that bank receiving note from another bank where it was deposited for collection does not obtain lien upon proceeds as against original payee; Van Amee v. Bank of Troy, 8 Barb. 312, holding that bank to whom note is sent for collection by another bank cannot retain proceeds on lien if it is informed that bank sending it is not owner.

— Special deposits or securities held.

Cited in VanZandt v. Hanover Nat. Bank, 79 C. C. A. 23, 149 Fed. 127, holding general banker's lien does not attach upon securities deposited with banker for special purpose; Sparhawk v. Drexel, 12 Nat. Bankr. Reg. 450, Fed. Cas. No. 13,204, 1 W. N. C. 560, holding banker has general lien upon securities on hand, not converted into actual cash, also that special circumstances which will prevent attachment of general lien must be such as are incompatible with its existence or continuance; Reynes v. Dumont, 130 U. S. 354, 32 L. ed. 934, 9 Sup. Ct. Rep. 486, holding general lien does not arise upon securities accidentally in possession of bank, or not in its possession in course of its business as such, nor where securities are in its hands under circumstances, or where there is particular mode of dealing, inconsistent with such general lien; Rex v. Royal Bank, 2 D. L. R. 762, holding that general lien of banker upon negotiable securities does not extend to securities deposited for special purpose; London Chartered Bank v. White, L. R. 4 App. Cas. 413, 48 L. J. P. C. N. S. 75, holding bankers have general lien on all securities deposited with them as bankers by a customer, unless there be express contract or circumstances that show implied contract inconsistent with lien; Leese v. Martin, L. R. 17 Eq. 224, 43 L. J. Ch. N. S. 193, 29 L. T. N. S. 742, 22 Week. Rep. 230, holding bankers had no general lien upon boxes and contents deposited with them, where bailor could open boxes and take them away; Bock v. Gorrissen, 16 E. R. C. 113, 2 DeG. F. & J. 434, 30 L. J.

Ch. N. S. 39, 7 Jur. N. S. 81, 3 L. T. N. S. 424, 9 Week. Rep. 209, holding lien negatived by correspondence of parties.

Cited in 1 Morse Banks, 4th ed. 598, on lien of bank on special deposit.

Distinguished in Jeffryes v. Agra M. Bank, L. R. 2 Eq. 674, 35 L. J. Ch. N. S. 686, 14 Week. Rep. 889, where case was not that of deposit of security for specific purpose.

The decision of the Court of Exchequer Chamber was cited in Petrie v Myers, 54 How. Pr. 513, to the point that bank has lien on securities which may happen to be in its hands for any purpose; Wyman v. Colorado Nat. Bank, 5 Colo. 30, 40 Am. Rep. 133; Maitland v. Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620; Sparhawk v. Drexel, 1 W. N. C. 560; Cornwell v. Kinney, 1 Handy (Ohio) 496,—holding that banker has general lien upon any securities of his customers, for balance due.

Lien upon deposit for special purpose.

Cited in Stumore v. Campbell & Co. [1892] 1 Q. B. 314, 61 L. J. Q. B. N. S. 463, 66 L. T. N. S. 218, 40 Week. Rep. 101, holding depositee could not rely on lien where money was deposited for special purpose.

Cited in note in 16 Eng. Rul. Cas. 129, on lien upon property delivered for special purpose.

Distinguished in Webb v. Whinney, 18 L. T. N. S. 523, 16 Week. Rep. 973, where bankers were expressly given lien on chest.

Lien of agent.

Cited in Tiffany Ag. 469, on necessity of inconsistent agreement to exclude lien of agent; Tiffany Ag. 471, on ownership of principal as essential to lien of agent.

Rights acquired by lien upon property.

The decision of the Court of Common Pleas was cited in Troop v. Hart, 7 Can. S. C. 512 (dissenting opinion), on right to lien upon goods or property as giving right of action for conversion.

Unauthorized pledge with knowledge of pledgee.

Cited in Fisher v. Brown, 104 Mass. 259, 6 Am. Rep. 235, holding pledgee of stock having knowledge it belongs to another party than pledgor holds it subject to trust.

Judicial recognition of mercantile usage.

Cited in Cross v. Currie, 5 Ont. App. Rep. 31, on engrafting of exceptions upon common law where questions relate to mercantile usage; Goodwin v. Robarts, L. R. 10 Exch. 337, holding custom of trade becomes law by judicial recognition thereof; Bechuanaland Exploration Co. v. London Trading Bank [1898] 2 Q. B. 658, 3 Com. Cas. 285, 67 L. J. Q. B. N. S. 986, 79 L. T. N. S. 270, 14 Times L. R. 587, holding court will recognize securities as negotiable if there be sufficient evidence of custom of so treating them, though custom be recent.

Cited in note in 16 Eng. Rul. Cas. 125, on judicial recognition of mercantile usage.

The decision of the Court of Exchequer Chamber was cited in State v. Hodge, 50 N. H. 510, 4 Legal Gaz. 310, to the point that general rules as to law merchant may be provided by statute so as to permit judicial notice to be taken of them.

Change of title on judgment for conversion.

The decision of the Court of Exchequer Chamber was cited in Miller v. Hyde, 161 Mass. 472, 25 L.R.A. 42, 42 Am. St. Rep. 424, 37 N. E. 760 (dissenting opinion); Steam Stonecutter Co. v. Windsor Mfg. Co. 17 Blackf. 24, Fed. Cas.

No. 13,335, to point that taking judgment and satisfaction for conversion of property vests title in defendant from time of conversion; Pacaud v. McEwan, 30 U. C. Q. B. 550, holding that recovery in replevin of full value of goods vests by operation of law property in goods in defendant; Brinsmead v. Harrison, L. R. 6 C. P. 584, 40 L. J. C. P. N. S. 281, 24 L. T. N. S. 798, 19 Week. Rep. 956, holding mere recovery, without satisfaction, has not effect of changing property.

Negotiability of instruments.

Cited in note in 5 Eng. Rul. Cas. 220, on negotiability of bonds.

The decision of the Court of Common Pleas was cited in Crouch v. Credit Foncier, L. R. 8 Q. B. 374, 42 L. J. Q. B. N. S. 183, 29 L. T. N. S. 259, 21 Week. Rep. 946, 10 Eng. Rul. Cas. 394, on the doctrine of negotiability

Title of bona fide holder of negotiable paper.

The decision of the Court of Exchequer Chamber was cited in Rock Springs Nat. Bank v. Luman, 6 Wyo. 123, 42 Pac. 874 (dissenting opinion), on title acquired by bona fide holder of negotiable paper.

Sufficiency of plea.

The decision of the Court of Common Pleas was cited in Phelan v. Phelan, 1 U. C. C. P. 275, on sufficiency of plea.

3 E. R. C. 613, GIBLIN v. M'MULLEN, 38 L. J. P. C. N. S. 25, L. R. 2 P. C. 317, 21 L. T. N. S. 214, 5 Moore P. C. C. N. S. 434, 17 Week. Rep. 445.

Gratuitous deposits with bank for safe keeping.

Cited in Leese v. Martin, L. R. 17 Eq. 224, 43 L. J. Ch. N. S. 193, 29 L. T. N. S. 742, 22 Week. Rep. 230, holding, where there was no special duty or contract as to boxes deposited for safe keeping and customer kept the keys and had access to the boxes, a gratuitous bailment was created.

Distinguished in Ex parte Johnston, L. R. 6 Ch. 212, 40 L. J. Ch. N. S. 286, 24 L. T. N. S. 115, 19 Week. Rep. 457, holding, where bank received shares of stock as a part of transaction by which they undertook to receive dividends for a commission that a bailment for a reward was created.

— Liability as to loss by misconduct of employees.

Cited in Merchants' Nat. Bank v. Guilmartin, 88 Ga. 797, 17 L.R.A. 322, 15 S. E. 831, holding bank is not liable for loss of special deposit, to keep which it receives no compensation, by theft of cashier or other servant, provided it has not been guilty of gross negligence in any respect.

Cited in 1 Bolles Banking, 284, on liability of bank directors for incompetent cashier in office; 1 Morse Banks, 4th ed. 229, 232, on liability of bank for loss through employe.

Distinguished in Cutting v. Marlor, 78 N. Y. 454 (affirming 17 Hun, 573, which affirmed 6 Abb. N. C. 388, 57 How. Pr. 56), holding, where bank was at least a bailee for hire, that there was an obligation to exercise at least ordinary care; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181, 7 Legal Gaz. 134 (affirming 48 How. Pr. 148), where question as to authority of manager of bank to receive special deposit of bonds was involved.

—Sufficiency of evidence in actions to recover for loss.

Cited in Smith v. First Nat. Bank, 99 Mass. 605, 97 Am. Dec. 59, holding whole testimony did not furnish such evidence as would warrant a jury in finding that there was gross negligence by bank and that loss of bonds resulted therefrom.

Cited in 1 Thomas Neg. 2d ed. 108 on rebuttal by proof of loss or injury consistent with due care of bailee.

Care required of bank in gratuitous undertakings.

Cited in Walker v. Manhattan Bank, 25 Fed. 247, holding that bank holding special deposit from agent is not liable upon agent's conversion of deposit on its redelivery to him; Ray v. Bank of Kentucky, 10 Bush, 344, holding that unless depositor directly assented to or ratified transfer of special deposit account to new bank before loss, old bank would remain liable; Pattison v. Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582, holding that bank receiving bonds for safe keeping was liable for loss by being stolen from safe in daytime by someone coming in from street.

Cited in notes in 32 L.R.A. 773, on care required of bank in keeping special deposit; 9 E. R. C. 283, on liability of bank as gratuitous bailee.

Cited in 1 Bolles Banking, 441, on greater care required from bank in keeping special deposit if compensation is received; 1 Morse Banks, 4th ed. 427, on care required of bank in keeping special deposit; 1 Thomas Neg. 2d ed. 127, on liability of bank for loss of securities pledged with it as collateral.

Liability of bailee.

Cited in Fidelity Invest. Co. v. Carico, 1 Colo. App. 292, 28 Pac. 1131, holding that gratuitous bailee is bound to that degree of care which prudent man would take of his own property; Maynard v. Buck, 100 Mass. 40, holding an instruction that party was bound to use same care in regard to cattle, which he undertook to drive for hire, that men of ordinary prudence would exercise over their own property in like circumstances was proper; Booth v. Litchfield, 62 Misc. 279, 114 N. Y. Supp. 1009, holding that gratuitous bailee is liable for gross negligence; Reynolds v. Witte, 13 S. C. 5, 36 Am. Rep. 678, on liability of principal for wilful misappropriation of securities by his agent; Fry v. Quebec Harbour Comrs. Rap. Jud. Quebec 9 S. C. 19, holding warehouseman not liable for loss resulting from danger known to bailor; Fitzgerald v. Grand Trunk R. Co. 4 Ont. App. Rep. 601, holding that railroad might by contract relieve itself from liability for loss of petroleum carried by it; Re Tilsonburgh, L. E. & P. R. Co. 24 Ont. App. 382, holding that person to whom municipal debentures in aid of railway are delivered in trust is not mere bailee with duty only of keeping them safe without gross negligence; Cosentino v. Dominion Exp. Co. 16 Manitoba L. Rep. 563 (dissenting opinion), on liability of gratuitous bailee as only for gross negligence; Harris v. Sheffield, 10 N. S. 1, holding that bailee without reward, is liable only for gross negligence or breach of faith; Sievert v. Brookfield, 37 N. S. 115 (dissenting opinion), on liability of person for negligence in relation to goods entrusted to him as bailee.

Cited in notes in 29 L.R.A. 95, on liability of bailee for wrongful appropriation by servant; 13 Eng. Rul. Cas. 128, on liability of innkeeper for property of guest.

Cited in 2 Beach Trusts, 1134, on duty of trustee to exercise care and diligence; Tiffany Ag. 411, on duties of gratuitous agent to principal.

Distinguished in Holmes v. Thompson, 38 U. C. Q. B. 292, holding that one to whom money is intrusted under special contract is liable for loss caused by breach of contract, regardless of question of negligence.

"Gross negligence."

Cited in Mark v. Hudson River Bridge Co. 103 N. Y. 28, 8 N. E. 243, on various definitions of gross negligence; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278, 7 Legal Gaz. 134, 19 Am. Rep. 181; Cushing Sulphite Fibre Co. v. Cushing, 2 N. B. Supp. Eq. 539,—on meaning of gross negligence; Carlisle v. Grand Trunk R. Co. 25 Ont. L. Rep. 372, 1 D. L. R. 130, holding that gross negligence for which

alone gratuitous bailee can be made liable, in care of goods, must be such as reasonable man would have considered insufficient means of protection; Re National Bank [1899] 2 Ch. 629, on observations justifying the expression "gross negligence."

Cited in notes in 4 Eng. Rul. Cas. 692; 18 E. R. C. 657,—on liability for negligence of person undertaking service for reward on "gross negligence."

Cited in 1 Thompson Neg. 20, on definition of gross negligence.

Sufficiency of evidence generally.

Cited in Free v. Buckingham, 59 N. H. 219, holding mere scintilla of evidence is not sufficient to sustain an award, but it will not be set aside as against the evidence if there appear to have been any substantial proof.

—Evidence required to be submitted to jury.

Cited in Hepner v. United States, 213 U. S. 103, 53 L. ed. 720, 27 L.R.A.(N.S.) 739, 29 Sup. Ct. Rep. 474, 16 Ann. Cas. 960, holding that court may direct verdict in favor of government plaintiff in action of debt to recover penalty where it appears by undisputed testimony that defendant has committed offense out of which cause of action arose; Judd v. New York & T. S. S. Co. 54 C. C. A. 238, 117 Fed. 206, holding that question is one for jury where reasonable men might fairly differ as whether carrier exercised due care for protection of plaintiff's goods; United States v. American Surety Co. 161 Fed. 149; Polhemus v. Prudential Realty Corp. 74 N. J. L. 570, 67 Atl. 303; Bowditch v. Boston, 4 Cliff. 323, Fed. Cas. No. 1,719,—holding that cause should be submitted to jury only when jury can properly proceed to find verdict for party introducing evidence, upon whom burden of proof is imposed; Schuylkill & D. Improv. & R. Co. v. Munson, 14 Wall. 442, 20 L. ed. 867, 5 Legal Gaz. 25, 29 Phila. Leg. Int. 156; Marion County v. Clark, 94 U. S. 278, 24 L. ed. 59; Mt. Adams & E. P. Inclined R. Co. v. Lowery, 20 C. C. A. 596, 43 U. S. App. 408, 74 Fed. 463; Paine v. Grand Trunk R. Co. 58 N. H. 611,—holding in every case there is a preliminary question for judge, not whether there is literally no evidence but whether there is any upon which jury can properly proceed to find a verdict; Patton v. Southern R. Co. 27 C. C. A. 287, 42 U. S. App. 567, 82 Fed. 979; Merchants' Nat Bank v. State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008 (dissenting opinion),—on same point; Bowditch v. Boston, 101 U. S. 16, 25 L. ed. 980 (affirming 4 Cliff. 323, Fed. Cas. No. 1,719), holding, whenever in trial of a civil case it is clear that evidence does not warrant a verdict and that if rendered it would be set aside, judge should direct finding by jury; United States v. Huckabee, 16 Wall. 414, 21 L. ed. 457, on sufficiency of evidence to go to jury; Mercantile Mut. Ins. Co. v. Folsom, 18 Wall. 237, 21 L. ed. 827, 6 Legal Gaz. 281, holding motion for nonsuit was not discretionary but exceptionable; Baldwin v. Shannon, 43 N. J. L. 596, holding power to order non-suit or direct a verdict does not depend on absence of all testimony, but test is whether there is any testimony from which jury can reasonably conclude that facts are proved; Levine v. D. Wolff & Co. 78 N. J. L. 306, 138 Am. St. Rep. 617, 73 Atl. 73, holding that whether warehouseman bestowed due care upon goods, destroyed by fire, is question for jury, where he kept goods two days and nights in stable upon wagon; Moxley v. Canada A. R. Co. 14 Ont. App. 309; Ockley v. Masson, 6 Ont. App. Rep. 108, to the point before evidence is left to jury, there is preliminary question for judge, not whether there is no evidence, but whether there is any upon which jury can properly proceed to find verdict; Longdon v. Bilsky, 22 Ont. L. Rep. 4, holding that in action for malicious prosecution it is proper for court to withdraw case from jury where evidence showed probable cause; Geller v. Loughrin, 24 Ont. L. Rep. 18, holding

that in action against magistrate for damages for false imprisonment case should be submitted to jury where it was clear that defendant was acting in his capacity as magistrate; Garland v. Toronto, 23 Ont. App. Rep. 238, 244, holding that there must be evidence on which jury may reasonably and properly conclude that there was negligence to justify its submission to jury: McEdwards v. Ogilvie Mill Co. 5 Manitoba L. R. 77, holding nonsuit should have been entered where jury could not properly have found for plaintiff; Deery v. Cray, 10 Wall. 263, 19 L. ed. 887, on effect of mortgage where there was no title in mortgagor; Oakes v. Blois, 22 N. S. 167, holding that in action for false imprisonment, where there was evidence of defendant's active agency in procuring plaintiff's arrest, case should have gone to jury; Howe v. Hamilton & N. W. R. Co. 3 Ont. App. Rep. 336, holding that in action for injury to person by negligence of railroad company, nonsuit should not be granted where there is evidence from which negligence might reasonably be inferred; James v. Crockett, 34 N. B. 540; Storey v. Beach, 22 U. C. C. P. 164,—upholding judgment of nonsuit in action against surgeon for negligence, where evidence for plaintiff was weak, amounting only to conjecture whether there was negligence and evidence for defendant was of most favorable character; Nightingale v. Union Colliery Co. 9 B. C. 453, holding that power which judge has to take case from jury should be exercised only when it is clear plaintiff could not hold verdict in his favor.

Cited in note in 15 E. R. C. 69, on right to withdraw civil action from jury for insufficiency of proof.

3 E. R. C. 626, Miller v. Race, 1 Burr. 452, 1 Smith, Lead. Cas. (Hare & W.) 463.

Status of bank-notes as currency or money.

Cited in Latham's Case, 1 Ct. Cl. 149, holding that one contracting with government must accept treasury notes in payment of money due on contract where they are in current use at time of payment; Seawell v. Henry, 6 Ala. 226, holding that offer of bank notes is good as tender where no objection is made, though the bank issuing them is, in fact, suspended; Haynes v. Wheat, 9 Ala. 239, to the point that bank notes are money for purpose of tender unless objection is made at time of tender; Corbett v. State, 31 Ala. 329, holding that bank bills may be subject of larceny from storehouse, under Code; Waring v. Lewis, 53 Ala. 615, holding that payment to executor in bank notes operates an extinguishment of debt; Corbit v. Bank of Smyrna, 2 Harr. (Del.) 235, 30 Am. Dec. 635, holding that bank bills are good as tender unless objected to at time of tender; Lee v. Louisville & N. R. Co. 2 Ga. App. 337, 58 S. E. 520 (dissenting opinion), on bank bill as money in ordinary business transactions; Dougherty v. Western Bank, 13 Ga. 287, to the point that bank notes are treated as money, in ordinary business transactions; Boyd v. Olvey, 82 Ind. 294, holding that where bank notes have been received as money they will be considered as such though not strictly "money;" Louisiana Bank v. Bank of United States, 9 Mart. (La.) 398, holding that possession is prima facie evidence of property in bank note; Greeson v. State, 5 How. (Miss.) 33, holding that bank bills are subject of larceny and robbery; Farwell v. Kennett, 7 Mo. 595, holding that bill drawn payable "in currency" is not bill of exchange under statute allowing damages in cases of dishonored bills; Spencer v. Blaisdell, 4 N. H. 198, holding that bank bills may be attached by virtue of writ and may be seized and sold upon execution; State v. Calvin, 22 N. J. L. 207, holding that bank notes are not "goods

or chattels" under statutes against receiving stolen "goods or chattels;" Currie v. White, 45 N. Y. 822 (dissenting opinion), on distinction between bank notes, part of currency and ordinary bills of exchange or checks; Hutchinson v. Reed, Hoffm. Ch. 316, to the point that bank notes cannot be followed as identical and distinguishable from money; Long v. Bank of Yanceyville, 81 N. C. 41, holding that statute of limitation does not apply to bank bills which circulate as money; Anderson v. Hawkins, 10 N. C. (3 Hawks) 568, holding that bank notes are to be considered as money in action by one who received counterfeit bank note in exchange for genuine ones; Howe v. Hartness, 11 Ohio St. 449, 78 Am. Dec. 312, holding that bank bills are not legal tender if objection is made at time of tender; Jones v. Overstreet, 4 T. B. Mon. 547, holding that bank notes pass under name of currency, in will; Laughlin v. Harvey, 52 Pa. 30, holding that congress had power to issue treasury notes and make them legal tender; State v. Finnegean, 127 Iowa, 286, 103 N. W. 155, 4 Ann. Cas. 628, holding that proof of larceny of bank notes is not a fatal variance where indictment charged larceny of "certain money being lawful money of the United States;" Borie v. Trott, 5 Phila. 366, 21 Phila. Leg. Int. 68, holding act making "Treasury notes" legal tender to be constitutional; Pindall v. Northwestern Bank, 7 Leigh, 617, holding that debtor making payment by bank note which turns out to be counterfeit is still liable for debt, if note is returned in reasonable time; Rodgers v. Bass, 46 Tex. 505, holding payment in confederate money valid where such money was in common circulation in business transactions; Johnston v. State, Mart. & Y. (Tenn.) 128, holding that indictment for playing faro for money is not sustained by proof of playing for bank bills; Danville v. Sutherlin, 20 Gratt. 555, holding that confederate notes were money and a loan thereof came within the usury laws; Klauber v. Biggerstaff, 47 Wis. 551, 32 Am. Rep. 773, 3 N. W. 357, holding that "currency" in certificate of deposit means money and includes bank notes in general circulation; United States Bank v. Bank of Georgia, 10 Wheat. 333, 6 L. ed. 334, holding that bank notes are good tender as money unless specially objected to and bank is concluded by receiving its own bills and crediting them as cash, though they had in fact been fraudulently altered; Re St. Boniface Election, 13 Manitoba, L. R. 75, holding that bank notes are to be considered as money, in passing upon nature of proof required where they are not produced in court; Conn v. Merchants' Bank, 30 U. C. C. P. 380, holding that for all business purposes, bank notes are treated as money; Johnston v. South Western Railroad Bank, 3 Strobh. Eq. 263 (dissenting opinion), on legal qualities of bank bills; Briscoe v. Bank of Kentucky, 11 Pet. 257, 9 L. ed. 709 (dissenting opinion); on bank notes being considered as money for business purposes; Lichfield Union v. Greene, 26 L. J. Exch. N. S. 140, 1 Hurlst. & N. 884, 3 Jur. N. S. 247, 5 Week. Rep. 370, holding that payment by a bank in its own bank notes constituted payment; Goodwin v. Robarts, L. R. 10 Exch. 337, on banker's notes as currency; Camidge v. Allenby, 21 E. R. C. 48, 6 Barn. & C. 373, 9 Dowl. & R. 391, 1 Harr. & R. 267, 5 L. J. K. B. N. S. 95, 30 Revised Rep. 358, on banker's notes taken as money being payment.

Cited in 2 Morse Banks, 4th ed. 1053, on bank bills as legal tender; 2 Morse Banks, 4th ed. 1079, on bank bills passing under a bequest of money or cash.

Distinguished in Foquet v. Hoadley, 3 Conn. 534, holding that Treasury notes are not money or cash; Bank of United States v. Sill, 5 Conn. 106, 13 Am. Dec. 44, holding that one half of a negotiable bank bill is not negotiable; Frontier Bank v. Morse, 22 Me. 88, 38 Am. Dec. 284; Ontario Bank v. Lightbody, 13 Wend. 101, 27 Am. Dec. 179,—holding that accepting bank notes of insolvent bank

does not constitute payment, though both parties were without notice of the insolvency at time payment was made; United States v. Moulton, 5 Mason, 537, Fed. Cas. No. 15,827, holding that bank notes are "personal goods" within statute against stealing and purloining on the high seas; Re Cypress Election, 8 Manitoba L. Rep. 581, holding that bank notes are not included in term "current money" as used in statute providing for deposit in "current money of Canada."

— Transfer of.

Cited in New Hope Delaware Bridge Co. v. Perry, 11 Ill. 467, 52 Am. Dec. 443, holding that bank notes are negotiable by delivery without indorsement; Jackson v. New York & C. R. Co. 48 Me. 147 (dissenting opinion), on title to bank notes passing by delivery.

Cited in note in 10 L.R.A.(N.S.) 527, on effect of transfer, without indorsement, of bank notes.

— Right of holder to payment.

Cited in Robinson v. Bank of Darien, 18 Ga. 65, holding that bank notes become the property of innocent holder who gives valuable consideration for them though they were fraudulently put into circulation.

— Right of holder of lost or stolen banknotes.

Cited in Waters v. Bank of State, R. M. Charlt. (Ga.) 193, holding that owner of lost bank note may recover from the bank issuing it, upon giving indemnity against liability on the original note; Myer v. Dorchester & M. Bank, 11 Cush. 51, 59 Am. Dec. 137, holding that possessor of stolen bank bill need not show how it came into his possession in order to recover thereon; State v. Corpening, 32 N. C. (10 Ired. L.) 58, to the point that bona fide holder of bank note is entitled to it against owner from whom it had been stolen; Sancil v. Seaton, 28 Gratt. 601, 26 Am. Rep. 380, holding that finder of bank note has title and right of possession against third party and may maintain action for such possession; Cooke v. United States, 12 Blatchf. 43, Fed. Cas. No. 3,178, on question of liability of the government on treasury notes complete in form but fraudulently put into circulation.

Cited in Zane Banks, 558, on holder's loss of cause of action where lost bank note passes to bona fide holder.

Bank notes and commercial paper distinguished.

Cited in McIntyre v. Kennedy, 29 Pa. 448, as distinguishing "bank notes" from "checks;" State v. Bank of Tennessee, 5 Baxt. 1, on bank notes being treated as money as distinguished from ordinary promissory notes.

What constitutes money.

Cited in Hatch v. First Nat. Bank, 94 Me. 348, 80 Am. St. Rep. 401, 47 Atl. 908, holding certificate payable in "current funds" to be payable in money and negotiable; Woodruff v. Mississippi, 162 U. S. 291, 40 L. ed. 973, 16 Sup. Ct. Rep. 820, holding that interest coupon of bond payable in gold coin is payable in legal currency where such coupon states that it is payable in currency; Swift v. Whitney, 20 Ill. 144, holding that court may assess damages on certificate of deposit, payable in currency; Black v. Ward, 27 Mich. 191, 15 Am. Rep. 162, holding that note payable in "Canada currency" is payable in money and negotiable; Green v. Sizer, 40 Miss. 530, holding that "Confederate money," "cotton money" and "Mississippi Treasury notes" are money and action indebitalis assumpsit may be maintained for their recovery; Crocker v. Wolford, 5 Phila. 340, 2 Pittsb. 453, holding that money is general term embracing every description of coin or bank note recognized by common consent as representative

value in exchange of property or payment of debts: State v. Moseley, 10 S. C. 1, holding that Confederate money received by sheriff on execution discharges lien of execution when such was common currency; United States v. Boyd, 15 Grant, Ch. (U. C.) 138, holding that postage stamps are not equivalent to money and may be followed by the owner: State v. Quackenbush, 98 Minn. 515, 108 N. W. 953, on meaning of "current money."

Title of innocent possessor or payee of money.

Cited in Wiley v. Allen, 26 Ga. 568; Merchants' Loan & T. Co. v. Lamson, 90 Ill. App. 18; Courtial v. Lowenstein, 78 Mo. App. 485,—holding that stolen money cannot be recovered from bona fide holder without notice; Atlantic Bank v. Merchants' Bank, 10 Gray, 532 (dissenting opinion); St. Louis Union Soc. v. Mitchell, 26 Mo. App. 206,—on same point; Rice v. Jones, 71 Ala. 551; Smith v. Des Moines Nat. Bank, 107 Iowa, 620, 78 N. W. 238; Gammon v. Butler, 48 Me. 344; Crews v. Garneau, 14 Mo. App. 505; Sanborn v. First Nat. Bank, 115 Mo. App. 50, 90 S. W. 1033; Charlotte Iron Works v. American Exch. Nat. Bank, 34 Hun, 26; Stephens v. Board of Education, 79 N. Y. 183, 35 Am. Rep. 511,—holding that money received in good faith in the course of business cannot be recovered by the true owner from whom it had been wrongfully appropriated: Wasson v. Hawkins, 59 Fed. 233, holding that money and bank notes may be followed by owner where they have not been circulated or negotiated, or if person to whom they have passed had notice of trust; Beam v. Copeland, 54 Ark. 70, 14 S. W. 1094, holding that administrator of one supposed to be dead because of absence, will be protected as to fund expended in good faith, prior to time of learning that owner of fund was alive; Principles & Authorities, 4 N. C. (1 Car. L. Repos. 442), to the point that reason why money could not be followed was because of currency of it and not because it had not "ear marks:" State v. Omaha Nat. Bank, 66 Neb. 857, 93 N. W. 319, holding that the state cannot recover from one who takes money in due course of business without knowledge that payor had obtained it fraudulently from the state; Walker v. First Nat. Bank, 43 Or. 102, 72 Pac. 635, holding that creditor receiving money in payment of a debt is not liable to true owner of the money therefor, where he had no knowledge that the money did not belong to his debtor; Bank of Charleston v. Bank of State, 13 Rich. L. 291, holding that where teller of one bank unlawfully loaned funds of his bank to the teller of another bank to replace funds abstracted by him, which was counted with other funds of the bank, the former bank could not recover the amount from the latter; Banque Franco-Egyptienne v. Brown, 34 Fed. 162, holding that purchaser of corporation bonds cannot follow moneys paid to promoters into hands of creditors to whom paid, though creditors had notice that moneys were to be used for specified purposes; Holly v. Missionary Soc. 180 U. S. 284, 45 L. ed. 531, 21 Sup. Ct. Rep. 395 (affirming 34 C. C. A. 649, 92 Fed. 745), holding that moneys misappropriated by agent cannot be followed and recovered from innocent third party; Gore Bank v. Hodge, 2 N. C. C. P. 359, on liability of agent for loss by burglary of moneys belonging to his principal and mingled with his own.

Cited in note in 25 L.R.A.(N.S.) 632, on title of one taking money from thief or embezzler.

Distinguished in Chapman v. Cole, 12 Gray, 141, 71 Am. Dec. 739, holding that owner of gold coin issued by private individual may recover it from one to whom it was paid by mistake; Moss v. Hancock [1899] 2 Q. B. 111, 68 L. J. Q. B. N. S. 657, 80 L. T. N. S. 693, 47 Week. Rep. 698, 15 Times L. R. 353, 19 Cox, C. C.

324, holding that gold coin sold as a curiosity may be recovered by owner from whom stolen by the vendor.

Negotiable papers.

Cited in McLaughlin v. Waite, 5 Wend. 404, 21 Am. Dec. 232 (affirming 9 Cow. 671), holding that finder of lottery ticket cannot recover thereon where lottery agent has notice that he came into possession of the ticket by finding; Judah v. Harris, 19 Johns. 144, holding that promissory note payable "in bank notes current in city of New York" is negotiable note within statute; Wilson v. Rucker, 1 Call. (Va.) 500, holding that military certificate for pay as army officer which is lost and afterward sold to bona fide purchaser without notice by the finder, may be recovered by the owner; Baily v. Smith, 14 Ohio St. 396, 84 Am. Dec. 38, holding that a mortgage is not a negotiable instrument so as to prevent defences where in the hands of innocent purchaser; Union Invest. Co. v. Wells, C. R. [1906] A. C. 497, 39 Can. S. C. 625, 11 Ann. Cas. 33, on characteristics of negotiable instruments; London & C. Bkg. Co. v. London & River Plate Bank, L. R. 20 Q. B. Div. 232, L. R. 21 Q. B. Div. 535, 57 L. J. Q. B. N. S. 601, 61 L. T. N. S. 37, 37 Week. Rep. 89, holding American railway company share certificate not to be a negotiable instrument.

Cited in notes in 4 E. R. C. 335, on negotiability of bills of exchange; 5 Eng. Rul. Cas. 219, on negotiability of bonds; 18 Eng. Rul. Cas. 263, on mortgage as negotiable instrument.

Cited in 2 Dillon Mun. Corp. 5th ed. 1350, on negotiability of municipal bonds.

Rights of innocent holder of negotiable paper tainted with fraud.

Cited in Tucker v. New Hampshire Sav. Bank, 58 N. H. 83, 42 Am. Rep. 580, holding that owner cannot recover municipal bonds pledged as collateral security for his own debt by agent to whom he had given their custody; Voss v. Chamberlain, 139 Iowa, 569, 19 L.R.A.(N.S.) 106, 130 Am. St. Rep. 331, 117 N. W. 269, holding that under statute, transferee of negotiable paper need not show that he paid for it in order to hold it against payee from whom it was obtained by fraud; Cothran v. Collins, 29 How. Pr. 113, holding maker of note protected as against owner by payment to holder thereof after due where note had been stolen, even though paid under circumstances which would cause suspicion; Van Duzer v. Howe, 21 N. Y. 531, holding acceptor of bill in blank liable to bona fide holder, though filled with sum exceeding the amount authorized; Perkins v. Challis, 1 N. H. 254; Phelan v. Moss, 67 Pa. 59, 5 Am. Rep. 402, 28 Phila. Leg. Int. 117; McSparran v. Neeley, 91 Pa. 17,—holding that fraud in obtaining signature of maker cannot be set up against innocent holder for value though taken under circumstances which might have aroused suspicion; Bush v. Crawford, 7 Nat. Bankr. Reg. 299, Fed. Cas. No. 2,224, 9 Phila. 392, 29 Phila. Leg. Int. 305, holding that holder of partnership note may recover thereon though negotiated by a partner for his individual purpose, where holder acted in good faith and had no actual notice; Wasson v. Hawkins, 59 Fed. 233, holding that money and checks deposited in bank when known by its officers to be insolvent may be recovered in equal amount from receiver who holds the amount among the general funds; Long Island Loan & T. Co. v. Columbus, C. & I. C. R. Co. 65 Fed. 455, holding negotiable railroad bonds payable to bearer valid in the hands of bona fide holder though they were fraudulently disposed of by president of the railroad for his own purposes; Murray v. Lardner, 2 Wall. 110, 17 L. ed. 857, holding that purchaser of coupon bonds in good faith obtains good title thereto regardless of the title of his vendor; Brooklyn City & N. R. Co. v. National Bank, 102 U. S. 14, 26 L. ed. 61, holding that indorsee of note as collateral security for an exist-

ing debt takes it free from any defenses available between the parties of which he had no notice; Scollans v. E. H. Rollins & Sons, 179 Mass. 346, 88 Am. St. Rep. 386, 60 N. E. 983, on title of innocent purchaser of registered city bonds indored in blank; Hall v. Page, 4 Ga. 428, 48 Am. Dec. 235; Nixon v. Brown, 57 N. H. 34,—on title of innocent holder of bank bills, checks, notes and other negotiable instruments; Mann v. Merchants' Loan & T. Co. 100 Ill. App. 224: Colson v. Arnot, 57 N. Y. 253, 15 Am. Rep. 496 (dissenting opinion),—on title of purchaser of negotiable paper from the thief or finder thereof.

Distinguished in Wardell v. Howell, 9 Wend. 170, holding that creditor taking a note as collateral security for an existing debt is not a bona fide holder in the course of business as against an accommodation indorser; Smith v. Jansen, 12 Neb. 125, 41 Am. Rep. 761, 10 N. W. 537, holding that one purchasing notes at a small percent of their face value is not a purchaser in good faith; Stalker v. M'Donald, 6 Hill, 93, 40 Am. Dec. 389; Coddington v. Bay, 20 Johns. 637, 11 Am. Dec. 342 (affirming 5 Johns. ch. 54),—holding that owner of notes may recover them from one who takes them from agent of owner as security for agent's antecedent debt, though such indorsee was without notice; Millard v. Barton, 13 R. I. 601, 43 Am. Rep. 51, holding that maker may set up defenses to note in hands of third person where note was not taken in the usual course of business or for full face value; Saltus v. Everett, 20 Wend. 267, 32 Am. Dec. 541, holding that owner of goods may recover them from innocent purchaser from one holding a fraudulent bill of lading; Crouch v. Credit Foncier, L. R. 8 Q. B. 374, 10 Eng. Rul. Cas. 394, 42 L. J. Q. B. N. S. 183, 29 L. T. N. S. 259, 21 Week. Rep. 946, holding that innocent purchaser for value of non-negotiable instrument cannot recover thereon.

Bona fide purchasers for value.

Cited in Commercial Bank v. Page, 13 N. B. 326, holding that one taking a negotiable note as collateral security is a bona fide holder for value; Holly v. Domestic & F. Missionary Soc. 34 C. C. A. 649, 92 Fed. 745, holding that one who takes check, innocently in payment of debt is bona fide holder, and is not liable to one claiming that part of money used to pay check was trust funds.

Cited in Joyce Defenses, Com. Pap. 508, 511, on who are bona fide holders of lost or stolen instruments.

—Rights of.

Cited in Matthews v. Poythress, 4 Ga. 287, holding that purchaser of bill transferable by delivery, who takes it before maturity, from one who has no title, acquires good title; Adkins v. Blake, 2 J. J. Marsh. 40; Wheeler v. Guild, 20 Pick. 545, 32 Am. Dec. 231; Jones v. Nellis, 41 Ill. 482, 89 Am. Dec. 389,—holding that purchaser of negotiable paper before maturity for valuable consideration and in good faith, takes good title as against owner; Bay v. Coddington, 5 Johns. Ch. 54, holding that person receiving negotiable paper, in usual course of trade from agent or factor, who has no authority or right to transfer them, but without notice of fact, may hold them against true owner; Colson v. Arnot, 57 N. Y. 253, 15 Am. Rep. 496 (dissenting opinion), on right of purchaser of stolen negotiable bonds; State v. Spratanburg & U. R. Co. 8 S. C. 129, holding that holders of interest coupons attached to railroad bonds are not entitled to priority of payment over principal debt upon insolvency of company; Weathered v. Smith, 9 Tex. 622, 60 Am. Dec. 186, holding that note payable to bearer, placed in hands of agent of payee for special purpose may be recovered by payee where it is transferred after it is due by agent.

Cited in note in 19 L.R.A.(N.S.) 109, on rights of owner of negotiable paper,

payable to bearer, or indorsed in blank, as against bona fide purchaser from one unlawfully in possession.

Cited in Joyce Defenses Com. Pap. 519, on effect on rights of indorsee of indorser's want of title.

—Notice or bad faith.

Cited in Matthews v. Poythress, 4 Ga. 287; Hamilton v. Marks, 63 Mo. 167; Hamilton v. Vought, 34 N. J. L. 187; Johnson v. Way, 27 Ohio St. 374,—holding that one who takes negotiable paper in good faith in the course of business may recover thereon regardless of equities existing between the parties, though circumstances were such as would excite suspicion; Goodman v. Simonds, 20 How. 343, 15 L. ed. 934, holding that indorsee of negotiable instrument as collateral security takes it free from equities between the parties of which he had no notice though taken under circumstances which might cause suspicion as to rights of his indorser; Hinckley v. Union P. R. Co. 129 Mass. 52, 37 Am. Rep. 297, holding that one paying overdue interest coupon after he has had notice that it has been stolen is liable to the true owner for the sum so paid; Farrington v. Park Bank, 39 Barb. 645, holding that one taking past due and dishonored note may maintain action thereon but subject to equities existing between the parties; Pringle v. Phillips, 5 Sandf. 157, holding proof of actual bad faith not necessary to defeat title of purchaser for value from fraudulent vendee.

Cited in note in 29 L.R.A.(N. S.) 385, on circumstances sufficient to put purchaser of negotiable paper on inquiry.

Distinguished in Hall v. Dale, 8 Conn. 336, holding defenses available against note in hands of innocent holder if taken under circumstances which would excite suspicion in a prudent and careful person; Emerson v. Crocker, 5 N. H. 159, holding that one taking demand note ten months after its date does not obtain good title as against true owner; Hall v. Wilson, 16 Barb. 548, holding that one taking a note upon a usurious contract is not a bona fide holder so as to be entitled to recover thereon where the note had been stolen; Shaw v. North Pennsylvania R. Co. 101 U. S. 557, 25 L. ed. 892, 8 W. N. C. 221, 37 Phila. Leg. Inst. 135, holding that purchaser of bill of lading who has reason to believe that his vendor is not the true owner thereof, obtains no title to the goods as against the true owner.

Presumption and burden of proof as to bona fide transfers.

Cited in Sheffield v. Johnson County Sav. Bank, 2 Ga. App. 221, 58 S. E. 386, holding that a showing of partial failure of consideration does not throw upon holder of promissory note the burden of showing good faith; Lord v. Wilkinson, 56 Barb. 593, holding that where bank purchases negotiable notes in the course of business after it has once had notice that the notes were stolen, the question of good faith is for the jury; Smith v. Sac County, 11 Wall. 139, 20 L. ed. 102 (dissenting opinion); Marion County v. Clark, 94 U. S. 278, 24 L. ed. 59,—on possession of negotiable instrument as being prima facie evidence of title thereto without any showing that value was paid therefor.

Distinguished in Anderson v. Long, 1 Mo. 365, holding that purchaser of note must prove good faith and purchase for value in action to recover on note which would be subject to defenses as between the parties.

Mode of transfer of negotiable paper.

Cited in Zeller v. Harris, 1 Mich. N. P. 75, on title to negotiable note passing by delivery; Morrow v. Vernon Twp. 35 N. J. L. 490, holding that bounty note

given by township to J. or bearer, provided township be relieved of one man in draft, is chose in action not assignable at law; Matthews v. Hoagland, 48 N. J. Eq. 455, 21 Atl. 1054, holding that actual delivery of negotiable bonds, with words or acts indicating present actual gift, constitutes valid gift inter vivos; Greneaux v. Wheeler, 6 Tex. 515, holding that promissory note payable to bearer is transferable by delivery and may be held by bona fide holder for value.

Distinguished in Ritchie v. Summers, 3 Yeates, 531, on holder of note payable to order having no title thereto unless indorsed by payee; Hull v. Planters' & M. Bank, 6 Ala. 761, holding that the transfer of negotiable notes by separate deed of assignment, without the delivery of the notes, is an assignment of a chose in action only; Winfield v. Hudson, 28 N. J. L. 255, holding certificate of indebtedness issued by municipal corporation assignable by indorsement.

Nonconsensual transfers of property.

Cited in Rawls v. Deshler, 1 Sheldon, 48, 28 How. Pr. 66, on consent of owner as necessary to divest his title to property.

Distinguished in McMahon v. Sloan, 12 Pa. 229, 51 Am. Dec. 601, holding that sale by borrower of a borrowed article confers no title in purchaser as against true owner.

Giving indemnity as precedent to recovery on lost paper.

Cited in Barclay v. Lehigh Coal & Nav. Co. 33 Pa. Super. Ct. 217, holding that payee of lost check cannot recover against maker without indemnity where check was sent under agreement that payment was to be made in that manner.

Rights and liabilities of finder of property.

Cited in note in 37 L.R.A. 117, on rights and liabilities of finder of property.

Trover to recover note.

Cited in Kaul v. Henke, 2 Pa. Dist. R. 236, holding that trover will lie against one receiving note wrongfully or without proper authority.

3 E. R. C. 634, SOLOMONS v. BANK OF ENGLAND, 13 East, 135 note, 2 Revised Rep. 341.

Status of bank-notes as money.

Cited in Klanber v. Biggerstaff, 47 Wis. 551, 32 Am. Rep. 773, 3 N. W. 357, holding that "currency" in certificate of deposist means "money" and includes bank notes in general circulation.

Title to lost or stolen bank-notes.

Cited in Coffin v. Anderson, 4 Blackf. 395, holding that one guilty of gross negligence in taking bank notes obtained from owner by forgery obtains no title as against such owner; Wyer v. Dorchester & M. Bank, 11 Cush. 51, 59 Am. Dec. 137, holding that holder of bank bill proved to have been stolen may recover thereon without proving how he came into possession thereof; Atlantic Bank v. Merchants Bank, 10 Gray. 532 (dissenting opinion), on possession of bank note or bill as conclusive evidence of ownership.

Cited in 2 Morse Banks, 4th ed. 1070, on effect of loss of entire bank bill.

Effect of delay in presenting bank-note.

Cited in Dougherty v. Western Bank, 13 Ga. 287, holding that statute of limitations does not run against bank notes.

Cited in Zane Banks, 563, on limitation of action for bank's refusal to pay its circulating notes.

Rights of taker of stolen or voidable commercial paper.

Cited in Munroe v. Cooper, 5 Pick. 412; Wallace v. Branch Bank, 1 Ala. 565,—holding that where note is put in circulation by fraud, holder is bound to show himself bona fide possessor; Hascale v. Whitmore, 19 Me. 102, 36 Am. Dec. 738, holding that purchaser from one without notice takes good title though he had full knowledge of want of consideration between the parties; Hinckley v. Union P. R. Co. 129 Mass. 52, 37 Am. Rep. 297, holding that promisor who pays an overdue interest coupon to holder thereof after notice that it has been stolen, is liable to the true owner; Rogers v. Morton, 12 Wend. 484; Woodhull v. Holmes, 10 Johns. 231,—to the point that holder of note put into circulation by fraud is bound to show himself bona fide possessor; McLaughlin v. Waite, 5 Wend. 404, 21 Am. Dec. 232, holding that payment of prize to finder of lottery ticket is no bar to action by owner where vendor of ticket knew that person receiving prize was mere finder of ticket; Talman v. Gibson, 1 Hall, 344, holding that maker may set up fraud of holder in obtaining note as defense to action thereon by holder though liable to true owner; Bank of Montreal v. Cameron, 17 U. C. Q. B. 636, holding, in action by indorsee against acceptor of bill, that plea that acceptance was obtained by fraud and that indorsee gave no consideration for the bill good as against demurrer; Hall v. Dale, 8 Conn. 336, on title of holder of negotiable paper taken in due course of business as against true owner; Canadian Co-Operative Co. v. Trauniczek, 1 Sask. L. R. 143, holding that fact that note is indorsed in blank by payee does not preclude such payee from suing thereon if note is produced from custody of payee.

— Title of agent.

Cited in Nisbet v. Lawson, 1 Ga. 275, holding that agent having negotiable paper for collection may sue thereon in his own name; Bennett v. Parker, 1 Mich. N. P. 225, on same point; Mitchell v. Georgia & A. R. Co. 111 Ga. 760, 51 L.R.A. 622, 36 S. E. 971, holding that agent cannot under Code bring action for injury to chattel in his possession unless he has property either general or special in chattel; Cover v. Myers, 75 Mo. 406, 32 Am. St. Rep. 394, 23 Atl. 850, on title in agent being no better than that of his principal.

— Notice or bad faith.

Cited in Hall v. Wilson, 16 Barb. 548, holding that purchaser of note for full consideration may recover thereon in the absence of proof of bad faith; Pringle v. Phillips, 5 Sandf. 157, holding proof of actual mala fides not necessary to defeat title of holder of negotiable instrument for value.

Cited in note in 29 L.R.A.(N.S.) 370, on circumstances sufficient to put purchaser of negotiable paper on inquiry.

— Taker for pre-existing debt.

Cited in Coddington v. Bay, 20 Johns. 637, 11 Am. Dec. 342, holding that one taking negotiable paper as security for pre-existing debt not yet due is not a bona fide holder for value as against the true owner thereof; Gooderham v. Hutchison, 5 U. C. C. P. 241, holding that one taking a note or bill for a pre-existing debt takes it for a good consideration; Currie v. Misa, L. R. 10 Exch. 153, 44 L. J. Exch. N. S. 94, 23 Week. Rep. 450, 4 Eng. Rul. Cas. 317 (dissenting opinion), on pre-existing debt as consideration for transfer of negotiable paper.

Distinguished in Bank of St. Albans v. Gilliland, 23 Wend. 311, 35 Am. Dec. 566, holding that taking a note for a precedent debt is taking it for value where it is taken in satisfaction of the debt which is thereby canceled.

3 E. R. C. 640, SUFFELL v. BANK OF ENGLAND, 51 L. J. Q. B. N. S. 401, 47 L. T. N. S. 146, L. R. 9 Q. B. Div. 555, 30 Week. Rep. 932, reversing the decision of the Lord Chief Justice, reported in L. R. 7 Q. B. Div. 270, 46 J. P. 500.

Material alterations.

Cited in Wylie v. Missouri P. R. Co. 41 Fed. 623, holding that alteration of serial number of railroad bonds by wrongdoer did not affect validity; Pattison v. Rykert, 1 Ont. Elect. Cas. 428, holding that addition of word "treating" to election petition, which has effect of adding charge of corrupt practice, is material alteration; Baxter v. Bilodeau, 9 Quebec L. Rep. 268, holding that dating of note by maker as of different day than that on which he signs it does not avoid it; Re Commercial Bank, 10 Manitoba L. Rep. 171, holding that alterations that alter or affect contract itself cannot be otherwise than material; Maxon v. Irwin, 15 Ont. L. Rep. 81, holding that erasure of word renewal on margin of renewal note, which erasure was not apparent did not affect validity of note; Hebert v. LaBanque Nationale, 40 Can. S. C. 458, holding that alteration of note by adding rate of interest renders instrument void; Carrique v. Beaty, 24 Ont. App. Rep. 302, holding that addition of name of third person to note discharged accommodation maker; Gogain v. Drackett, 2 Sask. L. R. 253, holding that alteration of instrument in material part by one of parties without consent of other party renders instrument void; Reg. v. Bail, 7 Ont. Rep. 228, holding that alteration of $2 Dominion note to one of $20 by addition of cypher, was forgery; Stevenson v. Davis, 21 Ont. Rep. 642, holding that erasure of words "and assigns" in conveyance of land avoided conveyance; Re Howgate & Osborn's Contract [1902] 1 Ch. 451, 71 L. J. K. B. N. S. 279, 86 L. T. N. S. 180, holding that where name of grantee was by mistake erroneously inserted in deed, a subsequent erasure and substitution of his right name, is not a material alteration.

Rights of taker of negotiable instruments showing alteration.

Cited in Swaisland v. Davidson, 3 Ont. Rep. 320, holding that experienced banker taking notes which bear indications of material alterations is not an innocent holder and cannot collect thereon; Leeds & County Bank v. Walker, L. R. 11 Q. B. Div. 84, 52 L. J. Q. B. N. S. 590, 47 J. P. 502, holding that one taking a materially altered bank note without knowledge of its invalidity may recover from the one paying it to him.

Cited in notes in 2 E. R. C. 692, on invalidity of instrument materially altered; 3 E. R. C. 660, on effect of altering number of bank note.

Cited in 2 Dill. Mun. Corp. 5th ed. 1546, on validity, in hands of bona fide holder, of stolen and altered negotiable municipal bond; Hollingsworth Contr. 577, on discharge of contract by alteration or loss of written instrument.

Judgment of majority of judges as decision.

Cited in Stewart v. Bank of Montreal, 41 Can. S. C. 516, on judgment of majority of judges as decision.

3 E. R. C. 661, SHEFFIELD v. LONDON JOINT STOCK BANK, L. R. 13 App. Cas. 333, 57 L. J. Ch. N. S. 986, 58 L. T. N. S. 735, 37 Week. Rep. 33, reversing the decision of the Court of Appeal, reported in 56 L. J. Ch. N. S. 569, L. R. 34 Ch. Div. 95.

Title of taker of negotiable instrument from agent or trustee.

Cited in Bank of Nova Scotia v. Richards, 33 N. B. 412, holding that one taking drafts from agent whose authority is questioned and where there are

other circumstances sufficient to put him upon inquiry, is charged with notice as to authority and defenses; Duggan v. London & C. Loan & Agency Co. 18 Ont. App. Rep. 312, to the point that delivery of bill of exchange by person who has no title, confers title on bona fide holder; Cumming v. Landed Banking & Loan Co. 20 Ont. Rep. 382, holding that where securities held in trust, are pledged by trustee the pledgee is charged with notice of their trust character; Duggan v. London & C. Loan & Agency Co. 20 Can. S. C. 481 (reversing 18 Ont. App. 305), holding that one transferring shares for security for loan, the transfer expressing on its face that it was in trust, may recover such stock by payment of his loan, from one to whom the broker had transferred them in trust for his own loans; Murphy v. Butler, 18 Manitoba L. Rep. 111, holding that where broker sells goods without disclosing principal for whom he is acting and he is known to purchaser as broker, there is no right of set-off; Taliaferro v. First Nat. Bank, 71 Md. 200, 17 Atl. 1036, holding that owner may recover non-negotiable securities from one to whom pledged by agent of owner for agent's own debt, where not endorsed, and agent's power of attorney gave notice of his power; Young v. MacNider, Rap. Jud. Quebec 4 S. C. 208, holding that where agent of estate to whom matured bonds are entrusted for safe keeping pledges them to broker for loan to himself personally, representatives of estate can resume possession of them by revendication in hands of broker; Venables v. Baring Bros. [1892] 3 Ch. 527, 61 L. J. Ch. N. S. 609, 67 L. T. N. S. 110, 40 Week. Rep. 699, holding that one who takes negotiable bonds as collateral security without notice that they had been stolen, has good title thereto; Hone v. Boyle, Ir. L. R. 27 Eq. 137; Bentinck v. London Joint Stock Bank [1893] 2 Ch. 120, 62 L. J. Ch. N. S. 358, 3 Reports, 120, 68 L. T. N. S. 315, 42 Week. Rep. 140,—holding that bank taking stocks and shares from broker without notice that he was not the owner thereof, and in the usual course of the business as customarily carried on, obtains good title as against the true owner.

Cited in Underhill Am. Ed. Trusts, 499, on rights of transferee of negotiable instrument as against prior equities.

Distinguished in Scollans v. E. H. Rollins & Sons, 173 Mass. 275, 73 Am. St. Rep. 284, 53 N. E. 863, holding that non-negotiable instrument may be recovered by owner from purchaser from one who obtained them feloniously from the owner; Smith v. Rogers, 30 Ont. Rep. 256, holding that bank taking stock certificates, indorsed so as to pass by delivery under usage of stock exchanges, from broker in the usual course of business obtains good title, though broker had no authority to transfer; London Joint Stock Bank v. Simmons [1892] A. C. 201, 61 L. J. Ch. N. S. 723, 66 L. T. N. S. 625, 41 Week. Rep. 108, 56 J. P. 644 (reversing (1891) 1 Ch. 270, 60 L. J. Ch. 313, 63 L. T. N. S. 789, 39 Week. Rep. 449), holding that bank, taking securities en bloc from broker, without making inquiry, in pledge for his debt, obtains good title though some of them were pledged in fraud of the owner.

— Notice of equities and defenses.

Cited in Union Bank v. Spinney, 38 Can. S. C. 187, on notice presumed from facts sufficient to put a person upon inquiry.

Cited in Benjamin Sales, 5th ed. 33, on notice which will deprive pledgee of protection given by the factor's acts.

The decision of the Court of Appeal was cited in Colonial Bank v. Hepworth, L. R. 36 Ch. D. 36, 56 L. J. Ch. N. S. 1089, 57 L. T. N. S. 148, 36 Week. Rep. 259, on bona fide purchasers without notice.

Estoppel by investing another with indicia of ownership.

Cited in Breckenridge v. Lewis, 84 Me. 349, 30 Am. St. Rep. 353, 24 Atl. 864, holding that one signing blank instrument is liable to innocent holder upon promissory note written over the signature; Ryman v. Gerlach, 153 Pa. 197, 26 Atl. 302, 31 W. N. C. 494 (dissenting opinion), on owner as being estopped to assert title to stock in hands of purchaser from one in whom he had invested all the indicia of ownership.

The decision of the Court of Appeal was cited in Fitzpatrick v. Dryden, 30 N. B. 558, on estoppel to assert title to property where owner has permitted another to hold himself out as the owner; Williams v. Colonial Bank, L. R. 38 Ch. Div. 388, 57 L. J. Ch. N. S. 826, 59 L. T. N. S. 643, 36 Week. Rep. 625, as being reversed in the House of Lords.

Negotiable instruments.

Cited in Baker v. Davie, 211 Mass. 429, 97 N. E. 1094, holding that certificate of stock is not governed by law as to negotiable instruments.

Cited in notes in 3 E. R. C. 639, 4 E. R. C. 620, on negotiable instruments; 5 E. R. C. 222, on negotiability of bonds.

3 E. R. C. 681, ROBARTS v. TUCKER, 16 Q. B. 560, 15 Jur. 987, 20 L. J. Q. B. N. S. 270, reversing the decision of the Court of Queen's Bench, reported in 13 Jur. 703.

Liability of bank paying forged instrument.

Cited in National Dredging Co. v. Farmers' Bank, 6 Penn. (Del.) 580, 16 L.R.A.(N.S.) 593, 130 Am. St. Rep. 158, 69 Atl. 607, holding that where forged checks have been paid and charged in account returned to depositor, he is under no duty to bank so to conduct examination that it will necessarily lead to discovery of forgery; Jordan Marsh Co. v. National Shawmut Bank, 201 Mass. 397, 22 L.R.A.(N.S.) 250, 87 N. E. 740, holding that where negligence of depositor is not proximate cause of payment of forged checks by bank, bank is liable for amount paid on checks; Harmon v. Old Detroit Nat. Bank, 153 Mich. 73, 17 L.R.A.(N.S.) 514, 126 Am. St. Rep. 467, 116 N. W. 617, holding that where bank pays forged check, fact that check came through other banks does not relieve it of investigation as to identity of original presenter with payee named in check; Dodge v. National Exch. Bank, 20 Ohio St. 234, 5 Am. Rep. 648, holding bank liable for payment to third person upon forgery of payee's name, though check was delivered to the third person under belief that he was the payee; Armstrong v. National Bank, 46 Ohio St. 512, 6 L.R.A. 625, 15 Am. St. Rep. 655, 22 N. E. 866, holding that where depositor is by fraud induced to draw check payable to a fictitious person, the bank is not protected in paying it to one forging the fictitious name; United Secur. L. Ins. & T. Co. v. Central Nat. Bank, 185 Pa. 586, 4 Atl. 97, 42 W. N. C. 145, holding bank liable for payment of check drawn to order of a creditor whose name is forged by agent of the drawer who obtains the money thereon for his own use; First Nat. Bank v. Pease, 168 Ill. 40, 48 N. E. 160; Tolman v. American Nat. Bank, 22 R. I. 462, 52 L.R.A. 877, 84 Am. St. Rep. 850, 48 Atl. 480,—holding that bank paying out customer's money upon forged indorsement of his check, is liable therefor; Bank of Williamson v. McDowell County Bank, 66 W. Va. 545, 36 L.R.A.(N.S.) 605, 66 S. E. 761, holding that in taking forged check without inquiry as to identity of payee and forwarding it for collection with bank's own unrestricted indorsement it warrants genuineness of signature; Agricultural Sav. & L. Asso. v. Federal Bank, 6 Ont. App. Rep. 192 (affirming 45 U. C. Q. B. 214), holding that bank

paying out money on forged indorsements is not protected in such payments; Ellis v. Ohio Life Ins. & T. Co. 4 Ohio St. 628, 64 Am. Dec. 610, on bank not being protected in paying out customer's money upon forged check; Bank of England v. Vagliano Bros. [1891] A. C. 107, 3 Eng. Rul. Cas. 695, 64 L. T. N. S. 353, 60 L. J. Q. B. N. S. 145, 39 Week. Rep. 657, 55 J. P. 676 (reversing L. R. 23 Q. B. Div. 243, 58 L. J. Q. B. N. S. 357, 61 L. T. N. S. 419, 37 Week. Rep. 640, 53 J. P. 564, which affirmed L. R. 22 Q. B. Div. 103), holding that bank, paying a fictitious bill accepted by a customer in the belief that it is genuine, is protected in such payment.

Cited in notes in 27 L.R.A. 637, on drawee's duty to know signature of drawer; 50 L.R.A. 78, as to who must bear loss on check or bill issued, or indorsed to imposter; 3 E. R. C. 744, 745, as to how rights of bankers are affected by forgery.

Cited in 2 Morse Banks, 4th ed. 848, on liability to true owner, of bank paying check on forged endorsement; 2 Morse Banks, 4th ed. 866, on liability as between bank and drawer in case of fraudulent alteration of check after signature.

Distinguished in Woods v. Thiedemann, 1 Hurlst. & C. 478, 10 Week. Rep. 846, holding that bank paying draft against goods represented by bill of lading, at the request of a customer is protected in such payment though the bill of lading prove to be fictitious.

— Liability of acceptor or party to bank.

Cited in Chism v. First Nat. Bank, 96 Tenn. 641, 32 L.R.A. 778, 54 Am. St. Rep. 863, 36 S. W. 387, holding drawee liable for amount paid under forged indorsement of name of fictitious person to whom payee was induced by fraud to indorse a draft; Ryan v. Bank of Montreal, 14 Ont. App. Rep. 533 (affirming 12 Ont. Rep. 39), on liability of acceptor of bill where indorsement is forged.

Cited in Magee Banks, 297, on rights against drawer of bank paying a check on a forged indorsement.

— Liability on "raised" bills or checks.

Cited in Lehman v. Central R. & Bkg. Co. 12 Fed. 595, holding that carrier is not liable for loss caused by raising bill of lading by forgery because it allowed shipper to fill in blank in own handwriting; Beltz v. Molsons Bank, 40 U. C. Q. B. 253, holding that bank cannot charge a customer with money paid upon a check void because of material alteration; Halifax Union v. Wheelwright, L. R. 10 Exch. 183, 44 L. J. Exch. N. S. 121, 32 L. T. N. S. 802, 23 Week. Rep. 704, holding that one paying orders which had been fraudulently increased in amount is protected where such alteration was made possible by the negligent drawing of the orders.

Cited in note in 21 L.R.A.(N.S.) 406, on duty to see spaces on commercial paper are filled so as to prevent raising.

Distinguished in Scholfield v. Londesborough [1896] A. C. 514, 75 L. T. N. S. 254, 45 Week. Rep. 124, 65 L. J. Q. B. N. S. 593, affirming [1895] 1 Q. B. 536, holding acceptor not liable for additional sum inserted in bill after acceptance though stamp on bill as accepted was much larger than necessary and there were blank spaces which facilitated the alteration.

Disapproved in Simmons v. Atkinson & L. Co. 69 Miss. 862, 23 L.R.A. 599, 12 So. 263, holding maker not liable on note materially altered though in hands of innocent holder and though it contained blank spaces which made alteration easy.

Reciprocal rights of bank and customer.

Cited in Jones v. Bank of Montreal, 29 U. C. Q. B. 448, on relation of customer to bank as to funds deposited.

Duty of bank as to paying notes out of customer's deposit.

Cited in Bedford Bank v. Acoam, 125 Ind. 584, 9 L.R.A. 560, 21 Am. St. Rep. 258, 25 N. E. 713, holding that where note is payable at a bank, the bank has a right to pay it when due and presented out of the general funds of the maker on deposit there; Merchants' & P. Bank v. Meyer, 56 Ark. 499, 20 S. W. 406, on same point; Nineteenth Ward Bank v. First Nat. Bank, 184 Mass. 49, 67 N. E. 670, holding that payment of note by writing check for remittance, and stamping note paid by bank having authority to pay note out of maker's deposit, is good payment as against assignee of maker; Central Bank v. Thein, 76 Hun, 571, 28 N. Y. Supp. 232, on duty of bank to pay note in its hands when due out of funds which the maker had on deposit.

Cited in Zane Banks, 296, on right of bank to apply deposit on note made by depositor.

Distinguished in Grissom v. Commercial Nat. Bank, 87 Tenn. 350, 3 L.R.A. 273, 10 Am. St. Rep. 669, 10 S. W. 774, holding that bank has no authority to pay his customers note out of funds deposited in the bank, though the note is due and is payable at the bank.

Effect of alteration of instrument.

Cited in Greenfield Sav. Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67, holding that material alteration of note by one of the makers avoids it as against other makers who do not consent thereto, even in hands of innocent holder.

Bills and checks made out in blank.

Cited in Arnold v. Cheque Bank, L. R. 1 C. P. Div. 578, 45 L. J. C. P. N. S. 562, 34 L. T. N. S. 729, 24 Week. Rep. 759, as giving an erroneous ground for an earlier decision on right to fill blanks in a check.

Effect of acceptance of bills.

Cited in LaBanque Nationale v. Lemaire, Rap. Jud. Quebec 41 C. S. 37, on estoppel of acceptor of bill to set forging of his signature; Ryan v. Bank of Montreal, 12 Ont. Rep. 39, holding that acceptance of bill by procuration admits drawer's handwriting, but it does not admit endorsement was authorizedly made.

Cited in note in 4 E. R. C. 635, on estoppel of acceptor to deny genuineness and validity of drawer's signature.

3 E. R. C. 695, BANK OF ENGLAND v. VAGLIANO BROS. [1891] A. C. 107, 55 J. P. 676, 60 L. J. Q. B. N. S. 145, 64 L. T. N. S. 353, 39 Week. Rep. 657, reversing the decision of the Court of Appeal, reported in 58 L. J. Q. B. N. S. 357, L. R. 23 Q. B. Div. 243, 61 L. T. N. S. 419, 37 Week. Rep. 640, 53 J. P. 564, which affirms the decision of the Court of Queen's Bench, reported in 58 L. J. Q. B. N. S. 27, L. R. 22 Q. B. Div. 103.

Liability of bank paying check drawn to fictitious payee.

Cited in Trust Co. v. Hamilton Bank, 127 App. Div. 515, 112 N. Y. Supp. 84, holding that drawee bank, accepting forged bill and subsequently paying it upon forged indorsement of fictitious payee's name, cannot recover such payment from an innocent holder to whom paid; Snyder v. Corn Exch. Nat. Bank, 221 Pa. 599, 128 Am. St. Rep. 780, 70 Atl. 876, holding that check made payable to a person who has no dealings with maker, and whose name is subsequently forged by a clerk, is payable to a fictitious payee and bank paying it is protected; Chism v.

First Nat. Bank, 96 Tenn. 641, 32 L.R.A. 778, 54 Am. St. Rep. 863, 36 S. W. 387, holding that drawee bank paying draft upon forged indorsement of fictitious person to whom payee was induced by fraud to endorse it, is not protected by such payment from liability to payee; London Life Ins. Co. v. Molson's Bank, 8 Ont. L. Rep. 238, holding that checks drawn to fictitious payee are payable to bearer, though drawer thought payee was a real person, and bank paying such checks can recover from the maker; Clutton & Co. v. Attenborough, affirming [1895] 2 Q. B. 306; [1897] A. C. 90, 66 L. J. Q. B. N. S. 221, 75 L. T. N. S. 556, 45 Week. Rep. 276, 65 L. J. Q. B. N. S. 122, 73 L. T. N. S. 496, 44 Week. Rep. 114, 60 J. P. 54, holding that money paid in good faith to holder of check payable to fictitious payee cannot be recovered by maker after the fraud is discovered though he thought payee was a real person.

Cited in note in 50 L.R.A. 80, as to who must bear loss on check or bill issued, or indorsed to impostor.

Distinguished in Central Nat. Bank v. National Metropolitan Bank, 31 App. D. C. 391, 17 L.R.A.(N.S.) 520; Land Title & T. Co. v. Northwestern Nat. Bank, 196 Pa. 230, 50 L.R.A. 75, 79 Am. St. Rep. 717, 46 Atl. 420, holding bank protected in paying check upon forged indorsement where the one committing the forgery and receiving the money was in fact the person to whom drawer gave the check in belief that he was the payee; Vinden v. Hughes [1905] 1 K. B 795, 74 L. J. K. B. N. S. 410, 53 Week. Rep. 429, 21 Times L. R. 324, holding that check drawn in favor of a customer whom drawer thought he owed, is not drawn in favor of a fictitious payee though he did not in fact owe him, and a clerk forged the payee's indorsement and cashed the check.

Liability on bill fraudulently altered.

Cited in Imperial Bank v. Bank of Hamilton, 31 Can. S. C. 344, holding bank certifying check not liable to innocent holder for increased amount to which it was subsequently raised, though blank spaces existing when certified facilitated the alteration; Scholfield v. Londesborough [1896] A. C. 514, 65 L. J. Q. B. N. S. 593, 75 L. T. N. S. 254, 45 Week. Rep. 124 (affirming [1895] 1 Q. B. 536), holding acceptor of bill not liable for larger sum fraudulently inserted after acceptance, though blanks in bill when accepted facilitated the alteration.

Distinguished in National Dredging Co. v. Farmers' Bank, 6 Penn. (Del.) 580, 16 L.R.A.(N.S.) 593, 130 Am. St. Rep. 158, 69 Atl. 607, on negligence in furnishing facilities for the perpetration of a fraud as estoppel.

Liability of bank paying forged checks.

Cited in Bartlett v. First Nat. Bank, 156 Ill. App. 415, holding that payment made to one claiming through forgery of endorsement of real owner may ordinarily be recovered back by drawee who paid in ignorance of forgery; Bank of Williamson v. McDowell County Bank, 66 W. Va. 545, 36 L.R.A.(N.S.) 605, 66 S. E. 761, holding that in taking forged check without inquiry as to identity of payee and forwarding it for collection with bank's own unrestricted indorsement, it warrants genuineness of signature; Jordan Marsh Co. v. National Shawmut Bank, 201 Mass. 397, 22 L.R.A.(N.S.) 250, 87 N. E. 740, holding that where negligence of depositor is not proximate cause of payment of forged checks by bank, bank is liable for amount paid on checks.

Cited in note in 3 E. R. C. 745, as to how rights of bankers are affected by forgery.

The decision of the Court of Appeal was cited in Citizens' Nat. Bank v. City Nat. Bank, 111 Iowa, 211, 82 N. W. 464, holding that where bank which is neither drawee or drawer pays check upon forged indorsement, and then indorses to

drawee bank for collection which has funds of drawer and pays check, bank which indorsed for collection is liable to drawee bank; Tolman v. American Nat. Bank, 22 R. I. 462, 52 L.R.A. 877, 84 Am. St. Rep. 850, 48 Atl. 480, holding that under negotiable instrument act, bank paying check upon forged indorsement of payee's name may be compelled to return money to drawer's credit; Rex v. Bank of Montreal, 10 Ont. L. Rep. 117, holding that Crown might recover from bank money paid on forged checks of department, where clerk in department forged same, and forgeries were not discovered for some months.

Bills or checks drawn to fictitious persons as payable to bearer.

Cited in Boles v. Harding, 201 Mass. 103, holding that under statute check made payable to order of fictitious person cannot be treated as payable to bearer, unless maker knew when he delivered instrument, that name was fictitious.

Cited in notes in 39 L.R.A. 429, on use of fictitious name as affecting validity of instrument; 22 L.R.A.(N.S.) 500, 503–506, as to when negotiable instrument is deemed payable to order of fictitious person within rule which regards such instrument as payable to bearer.

Cited in Crowford Neg. Inst. L. 3d ed. 21, as to when negotiable instrument is payable to bearer.

The decision of the Court of Appeal was cited in Armstrong v. Pomeroy Nat. Bank, 46 Ohio St. 512, 6 L.R.A. 625, 15 Am. St. Rep. 655, 22 N. E. 866; Seaboard Nat. Bank v. Bank of America, 51 Misc. 103, 100 N. Y. Supp. 740; Shipman v. Bank of State, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371,—holding that negotiable paper payable to fictitious person cannot be treated as payable to bearer, unless it was put into circulation by maker with knowledge of fact.

Liability of one making forgery possible.

The decision of the Court of Appeal was cited in Powers v. Jewett Pub. Co. 154 Mass. 172, 28 N. E. 142, holding that corporation is not liable for president's act in forging certificates of stock and issuing them, where he was not proper officer to issue them.

Estoppel of acceptor of bill or check to deny genuineness of drawer's signature.

Cited in notes in 4 E. R. C. 634, 636; 11 E. R. C. 100,—on estoppel of acceptor to deny genuineness and validity of drawer's signature.

The decision of the Court of Appeal was cited in First Nat. Bank v. Northwestern Nat. Bank, 152 Ill. 296, 26 L.R.A. 289, 43 Am. St. Rep. 247, 38 N. E. 739, holding that if drawee of bill of exchange pays it in usual course of business he will be afterwards estopped to deny genuineness of drawer's signature; First Nat. Bank v. Northwestern Nat. Bank, 40 Ill. App. 640, holding that bank is bound to know signatures of its depositors.

Duty of bank to pay depositor's checks.

Cited in Carpenter v. National Shawmut Bank, 109 C. C. A. 55, 187 Fed. 1, on duty of bank to pay depositor's checks.

Negotiable instrument.

Cited in Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108, on pledge of the general credit of the maker as essential to a negotiable instrument.

Negotiable Instruments Law.

Cited in Vanderford v. Farmers' & M. Nat. Bank, 105 Md. 164, 10 L.R.A.(N.S.) 129, 66 Atl. 47, on purposes of negotiable instrument laws.

Construction of statute.

Cited in Bell v. Westmount, Rap. Jud. Quebec 15 C. S. 580; Hebert v. Clouatre, Rap. Jud. Quebec 41 C. S. 249; R. v. Petrie, 7 B. C. 176,—holding that in construing statute court should first examine its language to ascertain its meaning and only resort to previous law to remove ambiguity or doubt; Hopper v. Dunsmuir, 12 B. C. 18; Rainey v. Rainey, 12 B. C. 494,—holding that court has no power to read into statute words of limitation not found there; DeLaval Separator Co. v. Walworth, 13 B. C. 74, on same point; Shawinigan Carbide Co. v. Doucet, 42 Can. S. C. 281 (dissenting opinion), on consideration of history of law as proper in construing statute; Trimble v. Miller, 22 Ont. Rep. 500, to the point that literal construction should be given to every word in act; Hebert v. Clouatre, 6 D. L. R. 411; Re Marriage Laws, 6 D. L. R. 588, to the point that statute must be construed in light of pre-existing law; Macpherson v. Vancouver, 14 B. C. 326, holding that statute should be construed by interpreting language used, and not by minute examination of prior decisions; Parks v. Canadian N. R. Co. 21 Manitoba L. Rep. 103, holding that history of legislation may be taken into consideration in construction of Dominion Railway Act.

The decision of the Court of Appeal was cited in Delpit v. Cote, Rap. Jud. Quebec 20 S. C. 372, holding that language of statute should first be examined to ascertain its meaning, resort being had to previous law only to remove ambiguity.

— Revisions or codifications.

Cited in American Bank v. McComb, 105 Va. 473, 54 S. E. 14; Griffiths v. Winnipeg Electric R. Co. 16 Manitoba L. Rep. 512; McDonough v. Cook, 19 Ont. L. Rep. 267; Arthur v. Central Ontario R. Co. 11 Ont. L. Rep. 537; Bank of Montreal v. R. 38 Can. S. C. 258, affirming 10 Ont. L. Rep. 17; Ikezoya v. Canadian P. R. Co. 12 B. C. 454; Carruthers v. Canadian & P. R. Co. 16 Manitoba L. Rep. 336; Erdman v. Walkerton, 20 Ont. App. Rep. 444; Central Agency v. Les Religieuses, Rap. Jud. Quebec 27 C. S. 281,—on same point; Hinton Electric Co. v. Bank of Montreal, 9 B. C. 545; R. v. Snelgrove, 39 N. S. 400,—holding Criminal Code supplanted common law procedure; Richards v. Market Exchange Bank Co. 81 Ohio St. 348, 26 L.R.A.(N.S.) 99, 90 N. E. 1000, to the point that statute intended to embody in Code branch of law, should be construed by first examining language of statute, uninfluenced by previous state of law; Miller v. Grand Trunk R. Co. Rap. Jud. Quebec 21 C. S. 346 (affirmed in C. R. 1906 A. C. 163), holding that civil code must be interpreted according to expressions contained therein; Campbell v. Beyer, Rap. Jud. Quebec 30 C. S. 86, holding that code is regarded as a statute; Northern Crown Bank v. International Electric Co. 24 Ont. L. Rep. 57, holding that Bills of Exchange Act is codification and should be construed in light of history of law; Conservators of River Thames v. Smeed, D. & Co. [1897] 2 Q. B. 334, holding that statute consolidating and amending the law is to be interpreted generally as it stands without recourse to the former law except upon special grounds; Northwestern Constr. Co. v. Youngs, 13 B. C. 297, on the construction of the companies act; Robinson v. Canadian P. R. Co. [1892] A. C. 481, 61 L. J. P. C. N. S. 79, 67 L. T. N. S. 505; Re English Bank [1893] 2 Ch. 438, 62 L. J. Ch. N. S. 578, 3 Reports, 518, 69 L. T. N. S. 14, 41 Week. Rep. 521,—holding that act codifying the law should be construed as it stands without reference to the previous law except upon some special ground.

Cited in Benjamin Sales, 5th ed. 954, on interpretation of codifying statute.

Distinguished in Re Budgett [1894] 2 Ch. 557, 63 L. J. Ch. N. S. 847, 8 Reports, 424, 71 L. T. N. S. 72, 42 Week. Rep. 551, holding that in interpreting a statute consolidating and amending the law, recourse may be had to the previous statute and decisions to ascertain the intention of the legislature.

The decision of the Court of Appeal was cited in Boyd v. Mortimer, 30 Ont. Rep. 290, to the point that Bill of Exchange Act (53 Vict. Ch. 33) was declaratory of prior law.

3 E. R. C. 746, MARZETTI v. WILLIAMS, 1 Barn. & Ad. 415, 9 L. J. K. B. N. S. 42.

Banker and depositor, relation between.

Cited in Thompson v. Riggs, 6 D. C. 99, holding that relation between banker and depositor is that of creditor and debtor and the only obligation is that implied by law from the deposit of the money.

Cited in Zane Banks, 201, on nature of relation between bank and depositor.

— Right of action for money.

Cited in Downes v. Phœnix Bank, 6 Hill, 297, holding that customer cannot maintain action against bank to recover money deposited without previous demand therefor.

— Liability and measure of damages for refusal to pay checks.

Cited in Ætna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314, holding that depositor, alone, can sue for failure of bank to pay his check when presented and he has sufficient funds on deposit to meet it; Citizens' Nat. Bank v. Importers' & T. Bank, 119 N. Y. 195, 23 N. E. 540, holding that bank refusing to pay check drawn by customer who has sufficient funds to meet it, is liable for at least nominal damages to drawer; Wiley v. Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655, holding same and that special damages may also be recovered if alleged and proven; Harker v. Anderson, 21 Wend. 372, on same point; Levy v. Curtis, 1 Abb. N. C. 189, holding agent entitled to at least nominal damages in action against employer for maliciously refusing to honor drafts drawn upon him which he had authorized; Birchall v. Third Nat. Bank, 17 Phila. 139, 41 Phila. Leg. Int. 478, holding that banker who dishonors check of depositor when he has enough of funds to meet it, is liable in damages for loss of credit; Burt v. North Philadelphia Trust Co. 45 Pa. Super. Ct. 320, holding that judgment in assumpsit against banker for funds on deposit is bar to subsequent action to recover for injury to depositor's credit because of refusal of bank to pay checks; Todd v. Union Bank, 4 Manitoba L. R. 204, holding that where title to funds deposited is in dispute, a bank is entitled to reasonable time to decide upon a course of action, and question what is reasonable time is for the jury; Flack v. National Bank, 8 Utah, 193, 17 L.R.A. 583, 30 Pac. 746, on liability of bank for failure to pay customer's check out of his funds on deposit; Svendsen v. State Bank, 64 Minn. 40, 31 L.R.A. 552, 58 Am. St. Rep. 522, 65 N. W. 1086; Rolin v. Steward, 23 L. J. C. P. N. S. 148, 14 C. B. 595, 2 C. L. R. 959, 18 Jur. 536, 2 Week. Rep. 467,—holding that substantial damages may be recovered against banker for dishonoring checks of a customer having sufficient funds in the bank to pay them; King v. British Linen Co. 1 Sc. Sess. Cas. 5 Series [1 Fraser] 928, holding bank liable for general and substantial damages for failure to pay customer's checks out of his deposit and special damage need not be proven; Prehn v. Royal Bank, L. R. 5 Exch. 92, 39 L. J. Exch. N. S. 41, 21 L. T. N. S. 830, 18 Week. Rep. 463, holding that where bank has undertaken in letter of credit to accept plaintiff's drafts, it is liable to him for expenses in providing other means

of payment upon the bank's breach of its contract; Larios v. Gurety, L. R. 5 P. C. 346, holding plaintiff entitled to recover general and substantial damages for defendant's breach of contract to honor plaintiff's drafts up to a certain amount out of funds to be placed to his credit.

Cited in 1 Cooley Torts, 3d ed. 396, on liability of one for refusal to pay check; 1 Morse Banks, 4th ed. 577, on obligation of bank to honor checks; 2 Morse Banks, 4th ed. 805, on customer's right of action for refusal to honor his check; 2 Morse Banks, 4th ed. 808, on excuses for refusal of bank to honor check; Zane Banks, 241, on liability of bank drawer for dishonoring check.

Distinguished in Wittich v. First Nat Bank, 20 Fla. 843, 51 Am. Rep. 631, holding that depositor cannot recover from bank for unnecessary protest by payee of a check which bank told payee would be paid at close of banking hours according to custom and which payee then protested; Irvine v. Canadian Bank, 23 U. C. C. P. 509, holding bank protesting draft for nonacceptance, when in fact it was accepted, not liable in action therefor by acceptor for want of privity: Mennie v. Leitch, 8 Ont. Rep. 397, holding that for breach of contract to furnish money to a certain amount, the damage would be the difference between interest agreed upon and interest plaintiff had to pay elsewhere; Henderson v. Hamilton, 25 Ont. Rep. 641, holding that nontrading customer having money on deposit under special contract can recover only interest as damages for refusal to pay the money to him personally on demand.

Tortwise or contractual nature of liability for dishonoring checks or bills.

Cited in J. M. James Co. v. Continental Nat. Bank, 105 Tenn. 1, 51 L.R.A. 255, 80 Am. St. Rep. 857, 58 S. W. 261, holding that act of bank in refusing payment of a check is in no sense slander so as to be barred by the statute of limitations of actions for slander; Weller v. Western State Bank, 18 Okla. 478, 90 Pac. 877, on same point: Steljes v. Ingram, 19 Times L. R. 534, as distinguishing between claims in tort and claims in contract in cases arising from breach of a duty.

— Authority of bank to pay customer's note.

Cited in Grisson v. Commercial Nat. Bank, 87 Tenn. 350, 3 L.R.A. 273, 10 Am. St. Rep. 669, 10 S. W. 774, holding that making note payable at a certain bank does not of itself authorize the bank to pay the note, if presented when due, out of the maker's deposit.

— Liability of banker to holder of check.

Cited in Roberts v. Corbin, 26 Iowa, 315, 96 Am. Dec. 146, holding that payee of check may maintain action against bank refusing to pay it when presented and while drawer has funds on deposit to meet it; Ambler v. State Bank, 12 Rich. L. 518, 78 Am. Dec. 468 (dissenting opinion), on right of action by holder of check against bank for failure to pay check.

Cited in 2 Morse Banks, 4th ed. 907, on holder's right to sue drawee for nonpayment of check.

Distinguished in Grammel v. Carmer, 55 Mich. 201, 54 Am. Rep. 363, 21 N. W. 418, holding that payee of unaccepted draft cannot maintain action against drawer for refusing to pay it though he has funds belonging to drawer sufficient to pay it.

Check as assignment.

Cited in McGregor v. Loomis, 1 Disney (Ohio) 247, holding that check of customer who has funds in the bank to meet it operates as an equitable assignment of the amount thereof when presented, and the bank becomes liable for the amount to the holder; Harrison v. Wright, 100 Ind. 515, 50 Am. Rep. 805, hold-

ing that check does not operate is an equitable assignment of the funds deposited in the bank so as to give holder a preference over other creditors.

Liability of maker to holder of stale check.

Cited in Ansley v. State, 35 Ga. 8, on presumption that check will be paid if diligently presented where drawer has funds on deposit; Little v. Phenix Bank, 2 Hill, 425, holding that as between holder of check and drawer, mere delay in presenting it for payment will not discharge drawer, unless he has been prejudiced thereby; Brust v. Barrett, 16 Hun, 409, holding action by holder of check against drawer, ten years after check was drawn, barred by the statute of limitations.

Measure of damages for nonpayment of money.

Distinguished in Bethel v. Salem Improv. Co. 93 Va. 354, 33 L.R.A. 602, 57 Am. St. Rep. 808, 25 S. E. 304, holding that measure of damages for failure to pay money when due is the amount due with interest thereon: Memphis v. Brown, 1 Flipp. 188, Fed. Cas. No. 9,415, on same point.

Right to maintain action without showing special damages.

Cited in Parker v. Griswold, 17 Conn. 288, 42 Am. Dec. 739; Plumleigh v. Dawson, 6 Ill. 544, 41 Am. Dec. 199,—holding that special damage need not be show to entitle plaintiff to recover in action for diverting a watercourse; Peckham v. Holman, 11 Pick. 484, holding that action may be maintained against one selling unwholesome meat as wholesome without allegation of special damages; White v. The Mary Ann, 10 Cal. 462, 65 Am. Dec. 523; Bank of Kentucky v. Schuylkill Bank, 1 Pars. Sel. Eq. Cas. 180; Outlaw v. Hurdle, 47 N. C. (1 Jones, L.) 149,—holding that for breach of duty arising out of contract the law awards at least nominal damages; Norwich Union F. Ins. Soc. v. McAlister, 35 N. B. 691, on same point; Bragg v. Laraway, 65 Vt. 673, 27 Atl. 492, holding that action will lie for an entry upon the lands of another though no actual damage is shown; Webb v. Portland Mfg. Co. 3 Sumn. 189, Fed. Cas. No. 17,322, holding that a violation of a right is sufficient to sustain an action without a showing of actual damage; Jarvis v. Miller, 2 N. B. 311, holding sheriff liable to action for breach of duty without showing special damages; McLeod v. Boulton, 3 U. C. Q. B. 84, holding defendant liable in nominal damages in action of tort from breach of contract though special damages failed of proof; Brookline v. Mackintosh, 133 Mass. 215, on same point; Doan v. Warren, 11 U. C. C. P. 423, holding that action in substance for breach of contract may be maintained without showing actual damages; O'Beirne v. Wilson, 6 U. C. C. P. 366, on same point; Wills v. Carman, 14 Ont. App. Rep. 656, on right to nominal damages in actions for libel and slander where no actual damage is shown; Bushell v. Beavan, 3 L. J. C. P. N. S. 279, 1 Bing. N. C. 103, 4 Moore & S. 622, holding plaintiff entitled to nominal damages only for breach of contract where no actual damage was shown: Clifton v. Hooper, 8 Jur. 958, L. R. 6 Q. B. 468, 14 L. J. Q. B. N. S. 1, holding sheriff liable for neglect in serving writ without proof of actual damage.

Cited in note in 1 Eng. Rul. Cas. 552, 553, on right of action of member of class not specially injured for infringement of right belonging to such class.

Cited in 1 Cooley Torts, 3d ed. 86, on concurrence of wrong and damage as essential to tort.

Distinguished in Spangler v. Sellers, 5 Fed. 882, holding that to authorize recovery against attorney for negligence, it must be shown that the damages claimed resulted from such negligence; Hyde v. Bulmer, 18 L. T. N. S. 293, holding that plaintiff must allege and prove actual damage to entitle him to recover in suit for false representation; Smith v. Rochester, 38 Hun, 612 (dissenting opinion),

on right to injunction to restrain diversion of water where plaintiff suffered no damage.

Pleading and proof of special damages.

Cited in Goldzier v. Poole, 82 Ill. App. 469, holding that to recover more than nominal damages in action against attorney for negligence, the plaintiff must allege and prove the special damages; Mitchell v. Clarke, 71 Cal. 163, 60 Am. Rep. 529, 11 Pac. 882, holding that damages which are such as do not follow naturally from the breach of a contract must be specially pleaded.

Implied contracts.

Cited in Thompson v. Central Bank, 9 Ga. 413, holding that law implies a contract where a right exists on one side and a duty on the other, and an action will lie to enforce it; Hartford & N. H. R. Co. v. Kennedy, 12 Conn. 499; Heffron v. Brown, 155 Ill. 322, 40 N. E. 583; Woods v. Ayres, 39 Mich. 345, 33 Am. Rep. 396,—on difference between express and implied contracts being in the mode of proving them; Northern R. Co. v. Miller, 10 Barb. 260; Rose v. Wollenberg, 36 Or. 154, 59 Pac. 190,—on difference between express and implied contracts.

Cited in note in 11 L.R.A.(N.S.) 896, on implication of agreement to pay for services of relative or member of household.

Cited in Keener Quasi Contr. 4, on genuine contract resting on intention.

Effect of alteration of note.

Cited in Greenfield Sav. Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67, holding that alteration of promissory note by one of the makers by inserting words and figures in blank spaces so as to increase the amount avoids the note as to the other makers not consenting thereto, even in hands of bona fide holder.

Right of action as passing to assignee in bankruptcy.

Cited in Beckham v. Drake, 2 H. L. Cas. 579, 13 Jur. 921, 11 Mees. & W. 315, 12 L. J. Exch. N. S. 486, on right of action for breach of contract before bankruptcy as passing to the assignees in bankruptcy.

Liability arising from confidential relations.

Cited in Ferguson v. Porter, 3 Fla. 27, holding factor liable to principal for injury resulting from his departure from the principal's instructions; Emmons v. Alvord, 177 Mass. 466, 59 N. E. 126, on confidential relation of parties as giving wrongful character to an act which otherwise would not be wrongful in law.

Action for breach of duty.

Cited in Southern Exp. Co. v. McVeigh, 20 Gratt. 264, holding that action on case lies against party who has public employment such as common carrier, for breach of duty which law implies from employment.

Cited in Weeks Attys. 2d ed. 614, on action against attorney for negligence.

Co-existence of right and remedy.

Cited in 1 Cooley Torts, 3d ed. 23, on wrong being without a remedy.

3 E. R. C. 755, HOPKINSON v. FORSTER, L. R. 19 Eq. 74, 23 Week. Rep. 301.

Checks—Definition of, and nature.

Cited in Hawthorn v. State, 56 Md. 530; People v. Kemp, 76 Mich. 410, 43 N. W. 439, holding that a check is a bill of exchange drawn by a customer on his banker payable on demand; Weiand v. State Nat. Bank, 112 Ky. 310, 56 L.R.A. 178, 65 S. W. 617, holding that death of drawer operates as a revocation of an unpaid and unaccepted check; Pullen v. Placer County, 138 Cal. 169, 94 Am. St. Rep. 19, 71 Pac. 83, holding same, though payee was directed by drawer not to

present it until after his death, and bank paying it with notice of drawer's death is liable therefor to the estate.

Cited in 2 Morse Banks, 4th ed. 889, on nature of check.

— As assignments.

Cited in Pennell v. Ennis, 126 Mo. App. 155, 103 S. W. 147, holding that check drawn by depositor on his general account constitutes no assignment of the amount of the check either at law or in equity; Harrison v. Wright, 100 Ind. 515, 50 Am. Rep. 805; Covert v. Rhodes, 48 Ohio St. 66, 27 N. E. 94; Fourth Street Nat. Bank v. Yardley, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439,—holding that a check does not before acceptance constitute an equitable assignment of the amount represented by it so as to give the holder a preference over other creditors in the funds in the bank upon which drawn; Caldwell v. Merchants' Bank, 26 U. C. C. P. 294, holding that payee of check does not acquire a right of action against drawee as upon an equitable assignment of the funds in his hands; Lamb v. Sutherland, 37 U. C. Q. B. 143, holding that one who cashes a draft on another does not thereby become an equitable assignee of a debt owed by drawer to the drawer; Hall v. Prittie, 17 Ont. App. Rep. 306, holding that an order to pay a certain amount to a third party is not an equitable assignment of the amount and will not support an action by holder against drawee; Re Beaumont [1902] 1 Ch. 889, 71 L. J. Ch. N. S. 478, 50 Week. Rep. 389, 86 L. T. N. S. 410, holding that a person signing and handing over a check which is not paid during his lifetime does not thereby make a valid gift causa mortis, of the amount of such check; McDonald v. McDonald, 33 Can. S. C. 145 (dissenting opinion), on the same point; Donohoe-Kelly Bkg. Co. v. Southern P. Co. 138 Cal. 183, 94 Am. St. Rep. 28, 71 Pac. 93, holding that garnishment of funds in bank will take precedence over unaccepted checks drawn against it by the depositor.

Cited in notes in 3 E. R. C. 759, on check as equitable assignment and duty of bank to pay same; 9 E. R. C. 861, on check donatio causa mortis.

Cited in 2 Morse Banks, 4th ed. 917, on check as an equitable assignment.

Distinguished in Boyd v. Nasmith, 17 Ont. Rep. 40, holding that where payees of check took it to drawee bank and had it marked "good," the amount being charged to the drawer's account, the latter was discharged from the liability thereon, though bank failed before check was paid.

— Liability of bank for refusal to pay.

Cited in Wiley v. Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655, holding bank liable to depositor for refusal to pay his checks when he has funds on deposit sufficient to meet them; Burt v. North Philadelphia Trust Co. 45 Pa. Super. Ct. 320, holding that bank is not liable to depositor both in action of tort for refusal to pay check and of assumpsit for deposit.

Cited in 2 Bolles Banking, 625, 626, on consequence of bank's disregard of depositor's order to pay.

— Right of payee to sue drawee bank.

Cited in Brennan v. Merchants' & M. Nat. Bank, 62 Mich. 343, 28 N. W. 881; Creveling v. Bloomsbury Nat. Bank, 46 N. J. L. 255, 50 Am. Rep. 417; Cincinnati, H. & D. R. Co. v. Metropolitan Nat. Bank, 54 Ohio St. 60, 31 L.R.A. 653, 56 Am. St. Rep. 700, 42 N. E. 700; House v. Kountze Bros. 17 Tex. Civ. App. 402, 43 S. W. 561,—holding that holder of unaccepted check cannot maintain action thereon against bank; Schroeder v. Central Bank, 34 L. T. N. S. 735, 24 Week. Rep. 710, holding that payee of unaccepted check has no right of action against bank refusing to pay it, though drawer had funds in the bank sufficient to meet

it; Blackley v. McCabe, 16 Ont. App. Rep. 295, on same point; Boeltcher v. Colorado Nat. Bank, 15 Colo. 16, 24 Pac. 582, holding same, and holder of check could not recover the funds as trust funds where they had been deposited as general; Grammel v. Carmer, 55 Mich. 201, 54 Am. Rep. 363, 21 N. W. 418; Young v. Cashion, 19 Ont. L. Rep. 491,—holding that payee of draft cannot sue drawee before acceptance nor for non-acceptance.

Cited in 2 Bolles Banking, 766, on holder's right of action against drawee; 2 Morse Banks, 4th ed. 912, on right of holder of check deposited with bank to recover amount thereof from the bank.

Equitable assignment.

Cited in Putnam Sav. Bank v. Beal, 54 Fed. 577, holding that to constitute an equitable assignment there must be an appropriation or separation, mere intention to appropriate, though expressed, being insufficient; National Exch. Bank v. McLoon, 73 Me. 498, 40 Am. Rep. 388, holding that the assignment of part of an entire demand, or chose in action, is valid in equity where justice so demands; Holbrook v. Payne, 151 Mass. 383, 21 Am. St. Rep. 456, 24 N. E. 210, holding that an order drawn upon a town by a contractor for less than the amount due him, does not while unaccepted operate as an equitable assignment; Smith v. Perpetual Trustee Co. 11 C. L. R. (Austr.) 148, holding that letter addressed to trustees by testator in relation to income of fund did not constitute assignment of amount referred to where intention was not shown.

3 E. R. C. 763, MACKERSY v. RAMSAYS, B. & CO. 9 Clark & F. 818.

Liability of bank or collecting agent for acts of correspondent to whom paper is sent for collection.

Cited in Bailee v. Augusta Sav. Bank, 95 Ga. 277, 51 Am. St. Rep. 74, 21 S. E. 717; Simpson v. Waldby, 63 Mich. 439, 30 N. W. 199; Power v. First Nat. Bank, 6 Mont. 251, 12 Pac. 597; Titus v. Mechanics' Nat. Bank, 35 N. J. L. 588; St. Nicholas Bank v. State Nat. Bank, 128 N. Y. 26, 13 L. R. A. 241, 27 N. E. 849 (reversing 59 Hun, 383, 12 N. Y. Supp. 864), holding bank receiving commercial paper for collection, liable for loss from negligence or default of its correspondents or other agents employed by it to make the collection; Irwin v. Reeves Pulley Co. 20 Ind. App. 107, 48 N. E. 601 (dissenting opinion), on same point; Brown v. People's Bank, 59 Fla. 163, 52 L.R.A.(N.S.) 608, 52 So. 719, holding that bank receiving check for collection in another city is liable to depositor if bank it selects as agent for collection fails to remit when check is paid; Reeves v. State Bank, 8 Ohio St. 465, holding that where bank holding paper for collection sends it to another, payment to the latter is payment to the former for which it is liable; Kent v. Dawson Bank, 13 Blatchf. 237, Fed. Cas. No. 7,714; Streissguth v. National German-American Bank, 43 Minn. 50, 7 L.R.A. 363, 19 Am. St. Rep. 213, 44 N. W. 797; Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, 28 L. ed. 722,—holding bank liable for negligence of correspondent bank to whom customer's draft was sent for collection; Hoover v. Wise, 91 U. S. 308, 23 L. ed. 392, holding that where one holding paper for collection sends it to a subagent, the latter is his agent and not the agent of the owner of the paper; Gerhardt v. Boatmans' Sav. Inst. 38 Mo. 60, 90 Am. Dec. 407, holding that bank receiving promissory note from a depositor for collection is liable for failure of a notary public employed by the bank to protest it and give notice to indorsers; Landa v. Traders Bank, 118 Mo. App. 356, 94 S. W. 770, holding that where bank contracts to collect commercial paper for an agreed considera-

tion, it is liable for the default or negligence of an agent in making the collection; Guelich v. National State Bank, 56 Iowa, 434, 41 Am. Rep. 110, 9 N. W. 328, holding bank not liable for negligence or default of correspondent to whom it sent customer's commercial paper for collection where bank used due care in selecting such agent; Dale v. Hepburn, 11 Misc. 286, 32 N. Y. Supp. 269, holding that attorney employed by collection agency to collect a debt entrusted to it, is the agent of such agency, and cannot collect for his services, from the owner of the debt.

Cited in Magee Banks, 454, 455, on liability of initial banks for default of its correspondent.

Disapproved in Waterloo Mill Co. v. Kuenster, 58 Ill. App. 61, holding that where bank holding customer's commercial paper for collection transmits it to agent for collection the latter becomes the agent of the owner, and the first bank is not liable for its default.

Costs on reversal on appeal.

Cited in Lehigh Valley R. Co. v. McFarland, 44 N. J. L. 674, holding that upon reversal on appeal with an award of a venire de novo, plaintiff in error is not entitled to costs in appellate court nor to judgment for costs in court below; Folger v. The Robert G. Shaw, 2 Woodb. & M. 531, Fed. Cas. No. 4,899, on costs where judgment is reversed on appeal.