MEDDOWCROFT *against* HOLBROOKE. 1788.

[Overruled, *Vincent* v. *Holt*, 1812, 4 Taunt. 455.]

A solicitor in Chancery may practise in the Equity side of the Exchequer without being admitted a solicitor in that Court (*a*).

The plaintiff brought an action against the defendant for 126l. 3s. 4d. the amount of his bill as an attorney and solicitor in the King's Bench, Common Pleas, Chancery, and Equity side of the Exchequer. To this there was a set-off, and the balance due to the plaintiff was 25l. 1s. 6d. for which a verdict was found, subject to a reduction, if the Court should think fit, of such part as was charged for business done in the Equity side of the Exchequer, he not being a solicitor of that Court, though he had been admitted in Chancery. A rule having been obtained to shew cause why the verdict should not be rectified, by reducing the sum from 25l. 1s. 6d. to 3l. 4s.,

Bond and Cockell, Serjeants, shewed cause, arguing that the plaintiff did not come within the meaning of the 24th section of the statute of 2 Geo. 2, c. 23. It is not necessary that an attorney should be admitted in the same Court in which he occasionally acts. If he be admitted in one Court, he may act in another, by consent of an attorney of that other. Solicitors in Courts of Equity ought to have this privilege as well as attorneys in Common Law Courts. But a consent in writing is unnecessary, in Courts of Equity, where the proceedings are in the names of the clerks in Court.

Lawrence and Runnington, Serjeants, in support of the rule, contended that the plaintiff was strictly bound by the Act, the third section of which prohibits any person from acting as solicitor in any Court of Equity without being admitted in such Court, which prohibition is not relaxed by the 10th section, which relates only to attorneys; but even if it extended to solicitors, **[51]** a consent in writing was necessary, which the plaintiff had not obtained.

LORD LOUGHBOROUGH.—The statute of the 2 Geo. 2, c. 23, is a penal law, and ought to be strictly construed. The 3d and 7th sections are confined to persons who practised before the Act passed, and therefore cannot refer to the 24th, as to the present case. The words of the 24th section are, "without being admitted and inrolled as aforesaid." The answer is, the plaintiff has been admitted, and inrolled in Chancery; and being so admitted, he was entitled to practise of course on the Equity side of the Exchequer. A previous consent in writing is necessary in a Court of Law, but would have been useless, where the proceedings are in the name of the clerk in Court.

Rule discharged without costs.

STEEL *against* HOUGHTON ET UXOR. 1788.

[Dictum approved, *Neill* v. *Devonshire*, 1882, 8 App. Cas. 156; *Smith* v. *Andrews*, [1891] 2 Ch. 703; *Hanbury* v. *Jenkins*, [1901] 2 Ch. 420; *Simpson* v. *Attorney-General*, [1904] A. C. 491.]

No person has, at common law, a right to glean in the harvest field. Neither have the poor of a parish legally settled (as such) any such right.

Trespass for breaking and entering the closes of the plaintiff, at Timworth in the county of Suffolk, treading down grass and corn, &c. and taking and carrying away corn, barley in the straw, &c. done by the wife.

Plea.—Justification, that the premises had been sown with barley, and the crop lately reaped, and carried off the land; "Wherefore the defendants, being parishioners and inhabitants of the said parish of Timworth, legally settled therein, and being poor and necessitous, and indigent persons, after the crop growing in the year aforesaid, in and upon the said close, in which, &c. had been reaped, cut down, taken and carried away by the said plaintiff from and off the said close, in which, &c. to wit, at the said times when, &c. the said Mary (the defendant) entered into the said close, in

(*a*) [Dub. *Vincent* v. *Holt*, 4 Taunt. 452. Where it was held that a solicitor of the Equity side of the Exchequer is not entitled to practise in Chancery.]

which, &c. to glean and gather the straw containing ears of barley, remaining and being dispersed and scattered abroad in the said close, in which &c. after the said crop had been so reaped, cut down, taken and carried away as aforesaid, being the gleanings of the said crop so remaining dispersed and scattered abroad in and upon the said close, in which, &c."

To this there was a general demurrer.

This cause was argued in Easter term 1787, by Le Blanc, Serjt., for the plaintiff, and Lawrence, Serjt., for the defendants; [52] and on a second argument in Trinity term 1787, by Bolton, Serjt., for the plaintiff, and Rooke, Serjt., for the defendants.

These arguments were fully entered into by the Court, who in this term gave judgement as follows:

LORD LOUGHBOROUGH:—When the claim of a right to glean was first brought before the Court, it was laid indefinitely to be in poor, necessitous, and indigent persons, I was then of opinion against the claim.

1st, I thought it inconsistent with the nature of property which imports exclusive enjoyment.

2dly, Destructive of the peace and good order of society, and amounting to a general vagrancy.

3dly, Incapable of enjoyment, since nothing which is not inexhaustible, like a perennial stream, can be capable of universal promiscuous enjoyment.

This right is now claimed by poor persons legally settled; but in this form also it is equally liable to objection. There can be no right of this sort enjoyed in common, except where there is no cultivation, or where that right is supported by joint labour; but here neither of those criteria will apply. The farmer is the sole cultivator of the land, and the gleaners gather each for himself, without any regard either to joint labour or public advantage. If this custom were part of the common law of the realm, it would prevail in every part of the kingdom, and be of general and uniform practice; but in some districts it is wholly unknown, and in others variously modified and enjoyed.

Although the division of parishes is of very high antiquity, yet a right to a maintenance by settlement was first introduced by the statute of the 43 of Eliz. In ancient times tithes were divided into three parts—the first for the maintenance of religion, the second for the church, and the third for the poor; but the third division was a matter of charity rather than of right. When by the second Lateran Council, in the 12th century (A.D. 1139), tithes were appropriated to particular parishes, they were not considered as making in any part a provision for the poor, which might be claimed as a right.

Although the law of Moses has been cited for a foundation for this claim, the political institutions of the Jews cannot be obligatory on us, since even under the Christian dispensation the relief of the poor is not a legal obligation, but a religious duty.

[53] The authority in our law upon which the right to glean is supported, is a dictum of Sir Matthew Hale, in the Trials per Pais; but though I entertain the highest respect for the authority and character of that great Judge, yet it would be doing injustice to his memory, to take every hasty expression of his at Nisi Prius as a serious and deliberate opinion. In truth, that dictum imports no more than that the question could not be raised without being put upon the record.

The consequences which would arise from this custom being established as a right, would be injurious to the poor themselves. Their sustenance can only arise from the surplus of productive industry; whatever is a charge on industry, is a very improvident diminution of the fund for that sustenance; for the profits of the farmer being lessened, he would be the less able to contribute his share to the rates of the parish; and thus the poor, from the exercise of this supposed right in the autumn, would be liable to starve in the spring.

GOULD, J.—Supposing a general right of leasing (lesing) in England, I think it must be in the case stated in these pleadings, which is after the crop is reaped and carried away, and for the poor and indigent parishioners. If there be such a general right, it must be by the common law of the land; and though it should be admitted that in certain places there may be particular regulations of its exercise by custom, that will not derogate from the general right, any more than special modes of descent

in certain districts will derogate from the course of descent by the common law, which will be intended to prevail, unless a custom is shewn to the contrary.

In the case of *Worlledge* v. *Manning* (*a*)[1], in this Court, it was well observed by my brother Walker (a very learned and accurate lawyer), that it was a singular task to be called upon to prove the general common law of the land: that depends on general knowledge, it being universally exercised, or so understood. **[54]** Speaking for myself, I have always understood this custom to prevail in such parts of this country where I have been conversant, and never heard it doubted; and I cannot but impute the reason of so few passages in the books of our law recognising it, to the conviction of its being a right too well established and too notorious to be disputed.

The first passage which I shall mention is that in Trials per Pais (8th edition, p. 534). In trespass against one for gleaning on his ground, per Hale, Norfolk, Summer Assizes, 1668, "The law gives licence to the poor to glean, &c. by the general custom of England; but the licence must be pleaded specially, and cannot be given in evidence on, Not guilty."

This opinion is cited by Lord Chief Baron Gilbert, in his Law of Evidence (p. 250, 4th edit.); and after allowing that it ought to be pleaded, he says, "It had been a sufficient justification, for by the custom of England the poor are allowed to glean after the harvest; which custom seems to be built on a part of the Jewish law, that allowed the poor to glean, and made the harvest a general time of rejoicing."

Here the opinion of Hale is recognised by a learned Chief Baron, who affirms the right to be by the custom of England.

The next author who mentions it, is that eminent Judge, Mr. Justice Blackstone, a text writer, and with great deliberation: his words are (3 Comm. 212 and 213). "It hath been said, that by the common law and custom of England the poor are allowed to enter and glean upon another's ground, without being guilty of trespass." For this he refers to Gilbert, and Tri. per Pais, supra; and then adds, "Which humane provision seems borrowed from "the Mosaical law;" and refers to Leviticus and Deuteronomy. This is in substance the same as is said by Gilbert.

I will read the texts in Leviticus.

Leviticus, c. xix., vv. 9, 10. "And when ye reap the harvest of your land, thou shalt not wholly reap the corners of thy field; neither shalt thou gather the gleanings of thy harvest; and thou shalt not glean thy vineyard, neither shalt thou gather all the grapes of thy vineyard; thou shalt leave them for the poor and stranger: I am the Lord your God."

In Leviticus, c. xxiii., v. 22, there is the same prohibition to gather the gleaning of the harvest, and conclusion, "Thou shalt **[55]** leave them unto the poor and to the stranger; I am the Lord your God."

From what better fountain could it be drawn than the Holy Scriptures? It was evidently founded on charity, and fit to be received in every country. It might be liable to be abused; but that would be redressed by the law, and the party abusing become a trespasser ab initio, as in other cases of abuse of a legal right or licence, the known case of coming into an inn or tavern, &c.

From Selden (*a*)[2], it appears that the actual property was vested in the poor, unless

(*a*)[1] *Worlledge* against *Manning*, East. 26 Geo. 3, C. B.

Trespass for breaking and entering closes, &c. taking corn, &c.

Justification—That the said closes had been sown with wheat, barley, &c. That the crop was reaped, and after it was carried off the land, the defendant, being a poor, necessitous, and indigent person, entered, &c. to glean and gather the straw containing ears of corn remaining and being dispersed and scattered abroad in the said closes, &c. after the crop had been reaped and carried away, &c. being the gleanings of the said crop, for the necessary support of him the said defendant, &c.

Demurrer, &c.

Judgment for the plaintiff.*

(*a*)[2] De jure et naturali et gentium juxta discip. &c. Ebræ. lib. 6, c. 6.

* [See Loft's Edition of Gilbert's Law of Evidence, p. 509. Where it is said that the Court gave judgment for the plaintiff in this case on general demurrer, because it was not averred in the plea that the defendant was an inhabitant at the time of the gleaning, of the parish where the lands gleaned were situate, and see *Selby* v. *Robinson*, 2 Tr. 758.]

they absolutely neglected the collection, and then it belonged to the owner of the field; and it did not accrue to the poor as a donation but a legal right.

It was thought to be of so sacred a nature, that it was exempted from tithes (Seld. Hist. of Tithes, vol. vi. p. 1087).

It hath been said the established provision for the poor by the stat. 43 Eliz. hath had the effect of abolishing this right, supposing it to have existed. But Lord Hale, Gilbert, and Blackstone had no such idea; they consider it as a subsisting right, without regard to that provision.

Indeed there seems to me to be no ground to support such a notion. I think ever since the settlement of parishes, the poor inhabitants were esteemed as parishioners, and their necessities to be relieved by the parish to which they belonged.

Under the Saxon constitution, they were restrained to vills, and the inhabitants were to be in pledge, or in manupast; the policy of which was admirable, to restrain them from becoming vagabonds, in subjecting those who received them, if they suffered them to continue above three nights, to answer for their misdeeds.

After the institution of parishes, we find in that ancient treatise the Mirrour (*a*) this paragraph: "It was ordained that the poor should be sustained by the parsons, rectors of churches, and by the parishioners, so that none should die for want of sustenance." This necessarily supposes the residence of the poor. This is strongly enforced by the statute 15 R. 2, c. 6, which, reciting that damages happen to parishioners by approbation of benefices of the same places, enacts, that "upon a **[56]** licence of appropriation of a parish church, the Ordinary shall ordain a convenient sum to be distributed yearly of the profits of the church, by the appropriators, to the poor parishioners, in aid of their living and sustenance."

The effect of the 43d of Eliz. is to establish a more clear and strict obligation on parishes for the maintenance of the poor; and the very description of the officers is overseers of the poor of the same parish. Since that Act, modes of obtaining settlements in parishes, and for removing or sending the poor thither, have been introduced; but before, it seems the settlement was by birth, and the provisions were first made by the Stat. 22 H. 8 (22 H. 8, c. 12, Rastall's edition), for sending vagrant or wandering persons to the parish where born, if it could be known, otherwise where they last dwelled for three years; and by the 39 Eliz. (39 Eliz. c. 4, Rastall's edition), where born, if known; if not, then to the parish where they last dwelled for the space of one year; and if neither known, then to the parish where they last passed without punishment; so that it is evident they were restrained in point of residence, and the place of birth was the primary object; and there, according to the Mirrour, confirmed by the Act of 15 Ric. 2, their wants and necessities were to be provided for. In this light the recital in the 15th R. 2 of damages to the parishioners, and the provision for future appropriations in aid of the poor, are clear and intelligible.

The Stat. 39 Eliz. rendered begging and wandering abroad inexcusable, but affords no ground for construction to take away the charitable and humane (as Blackstone calls it) provision for the poor, permitting them to gather the derelict ears of corn, after the owner has carried away the crop. Nor is there a colour to say, that the practice has been discontinued since that statute, or that any such idea occurred to either of those lawyers whose opinions have been quoted.

The etymology of the names which this custom has received in England, plainly proves, that the custom itself was known both in Germany and France. Minshew, in voce Glean, explains them thus:—The French, Glainer, quasi Granèr, i.e. Colligere Grana; the Belgic, Arenlesen; the Teutonic, Ahrlesen, ex Ahr, Spica, and Lesen, i.e. Colligere; and goes on with the Spanish, &c. Then follows—A Gleaner, or Leaser of Corn; French, Glaneur; Teutonic, Ahrlesen; Belgic, Ahrenleser; English, A Leaser.

[57] It is clear to me, the word leasing was brought from the Germans, and gleaning from the Normans; and that from ahr proceeds ahrish, used in many parts of England for stubble.

Plato says, "Qui intelligit nomina, res etiam intelligit;" and Isidorus, "Nomina rerum si nescis, perit cognitio rerum."

In the case of *The King* v. *Price*, 4 Burr. 1927, Mr. Justice Hewit says, "The right of leasing does appear in our books (he must mean in Trials per Pais, and Gilbert);

(*a*) Ch. 1, p. 14. This passage is cited in 3 Inst, 103.

but it must be under proper circumstances and restrictions." I presume he means after harvest or clearance of the crop, and in a proper manner and time; or, in case of a custom, that such custom is to be observed.

With respect to the exercise of this right, the case upon this record states, that what the defendants did, was after the crop was carried. This corresponds with Lord Chief Baron Gilbert's expression of after the harvest. As to the times of beginning it, it appears by Selden, as already mentioned, that it ought not to be delayed; for a palpable neglect would be a desertion of it. If no precise time were limited, our law would call it a convenient time.

By an Act of Parliament passed in the year 1786, for inclosing the common fields of Basingstoke, the gleaning or leasing is to begin after the crop is carried. Times are mentioned, one for wheat, and another for other species of grain, for the exercise of this right; and the owners of the land are restrained under penalties (a strong circumstance to shew their sense of the right of the poor) from putting in cattle or hogs, within those respective times. On the other hand, the poor are restrained, by a summary penalty, from breaking the fences (which, it might be apprehended, from the former open state, they might be apt to do) and are confined to pass through the gates.

This seems to have been a prudent regulation to prevent disputes. I will recite the provisions made by the Act.

"And whereas the poor people of the town of Basingstoke aforesaid have, time immemorial, claimed, exercised, and enjoyed the privilege of gleaning or leasing, in, over, and upon the said common fields, when and as soon as the corn has been carried from the same, in the time of harvest, in every year, which privilege the owners and proprietors of the said common fields are desirous of continuing to the said [58] poor people, under proper regulations; be it therefore further enacted, that the poor people of Basingstoke aforesaid may, and they are hereby authorized, from time to time, and at all times after the passing of this Act, to enter and go into and upon all and every the lands in the said common fields, to glean or lease in the time of harvest; provided that none of the said poor people do or shall enter into and upon any such land for the purpose aforesaid, until the crop or crops growing therein shall be cleared or carried off by the owners or occupiers of such land, and the owners of the tithe, and that none of such poor people do or shall continue to glean or lease in any such land for any longer time than six days, if the same shall have been sown with wheat, and three working days if sown with any other corn, to be computed from the time of clearing and carrying off the same as aforesaid; and in case any of such poor people do or shall, at any time after the said intended division and inclosure shall take place, glean or lease, or enter for that purpose into any of the new allotments to be made by virtue of this Act, before the crop or crops growing therein shall be cleared or carried off as aforesaid, or shall break, or tread down, pull up, prostrate, destroy, or damage any hedge or fence belonging to any of the said new allotments as aforesaid, in going to or returning from any such land to glean or lease, or, under pretence of going to or returning from any such land to glean or lease, shall go into or return out of any inclosure, by any other way than the gate or way through which the corn shall have been carried out of or from such inclosure, or over any stile within the same, every person so offending shall, for every such offence, forfeit and pay any sum not exceeding five shillings, as the justice before whom such information and complaint shall be exhibited (as hereinafter mentioned) shall think meet, over and above such penalties as are inflicted on the said offenders or offender, for either of the offences aforesaid, by any law or statute now in force.

"And, in order that the said poor people may not be deprived of such privilege as aforesaid, by cattle or swine being turned into the said lands during the time of their being authorized to glean or lease as aforesaid, be it further enacted, that in case any owner or occupier of the lands within which the said poor persons are authorized to glean or lease [59] as aforesaid do, or shall permit or suffer any cattle or swine to be turned into or remain in or upon any such land, to depasture or feed therein, before the expiration of the time hereinbefore allowed for gleaning or leasing in such land, every such owner or occupier shall, for every day or less time such cattle or swine shall be depasturing or feeding as aforesaid, forfeit and pay for every head of cattle the sum of two shillings, and for every swine the sum of one shilling."

The Act calls it a privilege, but says it had been claimed and exercised from time

immemorial. What is this but a right? the enjoyment of which, the landholders secure to the poor, by penalties on themselves.

Upon the whole, therefore, I am of opinion, that judgment ought to be for the defendants.

HEATH, J.—This is a demurrer to a plea of the defendant's, who justifies the trespass of his wife in the plaintiff's close, under a claim of gleaning.

On these pleadings the general question is, "Whether the indigent and necessitous poor of a parish have a right to glean after the crop is carried away?"

It is our province to take notice of all general customs. This is usually not attended with much difficulty, as the evidence of such customs is to be found in our books, and is matter of general practice. Although it is insisted on, that this custom of gleaning is coeval with the constitution, and derived from the most remote antiquity; yet the first mention of it is in the Trials per Pais, a mere extrajudicial opinion of Lord Chief Justice Hale, "That by the custom of England the poor have a right to glean." The next author who mentions it, is Lord Chief Baron Gilbert, who, in copying the above passage with a marginal reference, says, that the poor are "allowed to glean," which implies a licence and permission, rather than a right. Mr. Justice Blackstone has received the same passage into his Commentaries, not as a clear and undeniable rule of law, but with expressions of distrust and doubt, and gives no opinion of his own. The whole weight then of legal authority to prove this custom rests on the dictum of Sir Matthew Hale.

It has been argued in favour of this claim, that no corn is claimed but what is abandoned by the owner; as if the owner had cast it from him, and it became the property of the poor by [60] a sort of occupancy. By the law of England, no property can be lost by abandonment, for the owner may at any time resume the possession. Here there can be no abandonment, as the owner never parted with the possession.

Such a custom as will support the plea, must be universal, and every where the same, otherwise it is void for its uncertainty. If it exists only in particular counties or districts (such as the custom of being discharged from the payment of tithes of wood in some hundreds in the wilds of Kent and Sussex, or the custom of gavelkind), it is partial, and no part of the general customs of the realm. From the best inquiries I have been able to make, I find that this custom is not universal. In some counties it is exercised as a general right, in others, it prevails only in common fields, and not in inclosures, in others it is precarious, and at the will of the occupier. In the county where this action was brought, it never in practice extended to barley; nor is the time ascertained. In some counties the poor glean whilst the corn is on the ground; here the usage is laid to be after the crop is harvested.

The practice of gleaning was originally eleemosynary. But it is the wise policy of the law, not to construe acts of charity, though continued and repeated for never so many years, in such a manner as to make them the foundation of legal obligation. If A. and his ancestors have from time immemorial repaired a bridge or a highway, there is no obligation on him to continue the repair, unless he is so bound by the tenure of lands, or the like.

Wherever there is a right, the law provides a remedy, if that right be obstructed. But suppose the owner of a field were to set fire to the stubble, or to flood it, and prevent the poor from gleaning, what remedy could they have? No action on the case has ever been brought for such an injury, and according to the reasoning on the Statute of Westminster 2d (13 Ed. 1, c. 24) no action on the case would lie.

Tithes are due of right, and by the general usage of the realm; but the parson had no remedy at common law till they were set out, therefore the consent of the occupier of the land was necessary to be obtained before the parson could take a single sheaf. The case of tithes is much stronger than that of gleaning, because the church was originally endowed by the [61] owners of lands, and the parson, in consideration of that endowment, undertook the cure of souls; so that there was a valuable consideration for the right of tithes, which is wanting with respect to gleaning. Yet the wisdom of our ancestors left it to the conscience of the occupier of the land, whether or not he would set out his tithes, though that conscience was to be corrected by the authority of the Spiritual Court.

I shall next consider what force this custom derives from being a Jewish institution. Every institution which is to be found in the law of Moses was not enforced by the Judge, many of them being left to the consciences of men with temporal blessings

on those who observed them. The right of gleaning is given by the same law as well to the "stranger" as the "fatherless and poor." We have already infringed it, as we have decided that the stranger has no right to glean in the case of *Worlledge* v. *Manning*.

The law of Moses is not obligatory on us. It is indeed agreeable to Christian charity and common humanity, that the rich should provide for the impotent poor; but the mode of such provision must be of positive institution. We have established a nobler fund. We have pledged all the landed property of the kingdom for the maintenance of the poor, who have in some instances exhausted the source.

The inconvenience arising from this custom being considered as a right by the poor, would be infinite; and in doubtful cases, arguments from inconvenience are of great weight. It would open a door to fraud, because the labourers would be tempted to scatter the corn in order to make a better gleaning for their wives, children and neighbours. It would encourage endless disputes between the occupiers of land and the gleaner. It would raise the insolence of the poor, and leave the farmer without redress. Experience shews that during the time of harvest, the poor employ their time in gleaning, to the great detriment of husbandry. In many places the farmer ploughs the land while the shocks of corn are upon the ground. Is the cultivation of the country to stand still while the labourers are gleaning?

It has been alleged as a reason for this claim, that the poor ought to have a share of benefit, at the time of general rejoicing. To this it may be answered, that they receive from the advanced price of labour, a recompense in proportion to their industry. **[62]** But to sanction this usage, would introduce fraud and rapine, and entail a curse on the country.

To conclude, as there is no evidence of this custom of gleaning prevailing uniformly throughout the kingdom, as the practice of it is uncertain and precarious, and as it would be attended with great public inconvenience, if it were enforced as a right, I am of opinion, that it is not part of the general law of the land; that the plea is therefore bad, and judgment must be given for the plaintiff.

WILSON, J.—I am of the same opinion with my Lord Chief Justice, and my brother Heath, on the question now before the Court.

No right can exist at common law, unless both the subject of it, and they who claim it, are certain. In this case both are uncertain. The subject is the scattered corn which the farmer chooses to leave on the ground, the quantity depends entirely on his pleasure. The soil is his, the culture is his, the seed his, and in natural justice his also are the profits. Though his conscience may direct him to leave something for the poor, the law does not oblige him to leave any thing. The subject then is uncertain and precarious.

Next, the persons claiming this right, are vague and undefined. The term poor is merely relative. Before the statute of the 43d of Eliz. there was no method of legally ascertaining who were of that description. Since that statute, justices and overseers are to determine what persons are of the number of poor, to whom also must be added the qualification of a settlement. It cannot be urged that the demurrer admits that the claimants are poor, because a demurrer admits nothing but what is well pleaded, and here the matter is ill pleaded on account of its uncertainty.

They who claim this right then, are equally uncertain and precarious.

The practice also of gleaning is itself uncertain and changeable. In some counties it is entirely excluded, in others partially admitted, and in others modified with every possible variety.

The law of Moses is not binding on us, except so far as we have thought proper to adopt it. There are many precepts of the Gospel which the law of England does not enforce as obligations. It is the duty of every man to "honour his father and mother," but the law of England has no method to compel **[63]** such honour. Charity to the poor is also a Christian duty, but it must be voluntary, and cannot be compelled.

But if there be a right, there must also be a remedy if that right be infringed. Now if a rich man were to glean in a harvest field, to the exclusion of the poor, they could have no remedy. So if a farmer were to give permission to his brother, or friend of another parish, to glean his fields, the poor of his own parish could have no remedy in law, for what they might think a prior right.

Next, the authorities are to be considered. The passage cited from the Trials per

Pais, contains a dictum, but not a judicial opinion of Sir Matthew Hale. Every one who hears me must acknowledge the impropriety of construing all the conversation which passes between a Judge and the counsel at Nisi Prius, as legal decision. It would in this instance be a want of respect to the memory of Hale, to argue that he meant to give a serious opinion on the right of gleaning, when his dictum tends only to prove that such a right must be pleaded, and not given in evidence under the general issue. Gilbert and Blackstone have copied from Hale. In the case of *The King* v. *Price*, 4 Burr. 1927, Mr. Justice Yates says, "As to the right of leasing it will be time enough to determine that point when it comes directly in question." This is a full answer to the argument "that there are no cases on this subject, because the custom was too well established to admit of a question."

But it has been farther argued, that the farmer having abandoned the leavings of his crop, the poor are entitled to them.

Now supposing a right could arise from abandonment, it would be in the first occupier, the property would be as in a state of nature, the poor could not have any exclusive right. But the truth is, there can be no abandonment, while the property remains on the soil of the owner. It might with as much reason be urged, that a man had abandoned the property of his horse, who having right of common, had turned him out to pasture.

For these reasons therefore, I am of opinion that the law should not interfere in this case, but that every man's conscience should be his law.

Judgment for the plaintiff.

[64] ELMES *against* WILLS. 1788.

Where there is a promise "to pay a bill of exchange within a fixed time, if during that time no proof be brought of its being already paid," though the promise be broken (no proof being brought within the time), and the plaintiff in an action on the bill with an insimul computassent, gives evidence under the insimul computassent of the special promise, yet the defendant may also prove under that count, that the debt for which the bill was originally given was paid, and thereby avoid the promise by shewing it was without consideration.

Assumpsit, by the indorsee of a bill of exchange against the drawer, the bill being refused acceptance—2d, count for money paid—3d, money had and received—4th, insimul computassent.—

Plea general issue, and set-off.—

This cause came on to be tried before Mr. Justice Gould, at Hertford Assizes in the summer 1787.

It appeared in evidence, that the plaintiff and defendant had mutual dealings together, and had applied to one Rawnsley to settle their accounts, who accordingly adjusted all matters in dispute, except the bill on which the action was brought. This, the defendant said, he could prove he had paid. Upon which, it was agreed that the bill should be deposited in the hands of Rawnsley, and if the defendant brought proof of the payment within a month, the bill should be delivered up to him, if not, he promised to pay it to the plaintiff. No proof being brought by the defendant within the month, the bill was delivered to the plaintiff, who brought his action upon it.

The counsel for the defendant offered to give evidence that the original debt was paid, for which the bill was given, and that the defendant could not within the month find the witness by whom it might have been proved according to the agreement, he having absconded to avoid an arrest.

But this evidence the Judge refused to admit, holding that the defendant was bound by his agreement to pay the bill, if he did not bring the necessary proof within the month (*a*).

In Michaelmas term last a rule was obtained to shew cause why a new trial should not be granted, on the ground that this evidence ought to have been admitted. Lawrence, Serjt., shewed cause against the rule, and Rooke, Serjt. argued in favour of it.

(*a*) See 1 Lutw. 663. Cro. Jac. 381.