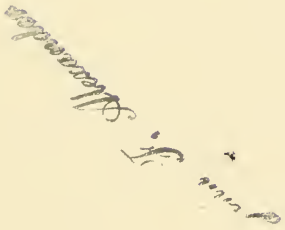

English Ruling Cases
CITED "E. R. C."

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
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WITH AMERICAN NOTES
BY
IRVING BROWNE

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EXECUTOR—INDEMNITY

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PREFACE TO VOLUME XII.

In this volume, in addition to assistance acknowledged in former volumes, the editor has been greatly assisted by Mr. Edward W. Manson, — who was also the compiler of the index to Vols. I.–X., — and by Mr. Austin F. Jenkin, the author of works on Local Government, &c. The English notes on "Highway," p. 505 *et seq.*, are by Mr. Jenkin.

R. CAMPBELL.

June, 1897.

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RULING CASES.

EXECUTOR.

No. 1. — FENTON *v.* CLEGG.

(EX. 1854.)

No. 2. — IN THE GOODS OF GAYNOR.

(PROB. 1869.)

RULE.

AN executor derives his title from the will, and he need not in general prove the will to clothe himself with that character.

The executor of the original testator must prove the will, in order that his executor may maintain the chain of representation.

Fenton v. Clegg.

23 L. J. Ex. 197–198 (s. c. 9 Ex. 680).

Leasehold. — Executor and Legatee. — Assent to Bequest. [197]

T. F. the elder bequeathed certain leasehold premises to T. F. the younger, in trust to sell the same, and out of the proceeds to retain for his own use £150, to reimburse himself for funeral expenses, &c., and to divide the surplus, if any, amongst the testator's children and grandchild. T. F. did not take out probate of his father's will, but entered into possession of the premises in question, and retained them till his death, having, by his will, bequeathed them to his executors, who demised them to the defendant. The plaintiff having taken out administration with the will annexed of T. F. the elder, and brought ejectment to recover the premises: — *Held*, that he was not entitled to recover, as the act of bequeathing the premises by T. F. the younger was evidence of the latter having elected to take the premises as legatee.

Ejectment by James Fenton, as administrator, with the will annexed, of the goods of Thomas Fenton the elder, to recover possession of a messuage at Bradford.

No. 1. — Fenton v. Clegg, 23 L. J. Ex. 197, 198.

At the trial, before CRESSWELL, J., at the last York Spring Assizes, the facts were these: — The action was brought to recover possession of a leasehold messuage in Bradford, under the following circumstances: Thomas Fenton the elder, the grandfather of James Fenton the plaintiff, being possessed of a leasehold estate in the premises in question for the remainder of a term of 999 years, commencing in 1766, by his will, dated the 21st of May, 1830, devised the same to his son, Thomas Fenton the younger, in trust to sell the same, and out of the money to retain for his own use £150 borrowed of him, and to reimburse himself for funeral expenses, proving the will, and the maintenance of the testator and his wife; and if there were any remaining surplus after the above payments were deducted, then the same to be equally divided amongst the testator's three children and James Fenton, the testator's grandchild, the plaintiff. Thomas Fenton the younger entered into possession of the premises in question, and retained the same until his death in 1839. He did not take out probate to his father, but bequeathed the messuage in question, in trust, to William Bakes and John Ackroyd. These parties demised the premises to Clegg, who underlet them to
[* 198] the other * defendant, Shackleton. For the plaintiff it was contended, that he was entitled to recover possession of the premises under the will of Thomas Fenton the elder, as Thomas Fenton the younger was merely executor of his father, and had not assented to take the premises in question as legatee. The learned Judge was of opinion that the devise by Thomas Fenton the younger was some evidence of assent by him to take the premises as legatee, and directed a verdict for the defendants, with leave to the plaintiff to move to enter a verdict for him, if the Court should think there was no evidence of an assent by him to take the premises as legatee.

Hugh Hill, for the plaintiff, now moved accordingly. — The devise by Thomas Fenton the younger of the term was no evidence of his assent to take the term as legatee. The property up to the time of his death was vested in him solely as executor. None of the trusts connected with the bequests to himself were other than trusts belonging to an executor. In Com. Dig., "Administration," C, 7, it is said, "But if the executor, being a legatee, enter into the term, but do not prove the will, that does not amount to an assent to have it as legatee."

No. 2. — In the Goods of Gaynor, 38 L. J. P. & M. 79.

[PARKE, B. — Here the executor bequeaths the term instead of selling it: surely that is evidence of his assenting to take the term as legatee.]

Where a negative interest only is given, there the entry of the executor is not evidence of assent to take as legatee. The law as to this point is stated in *Doe d. Sturges* v. *Tatchell*, 3 B. & Ad. 675; 1 L. J. (N. S.) K. B. 239, recognising *Doe d. Hayes* v. *Sturges*, 7 Taunt. 217 (17 R. R. 491). *Pannel* v. *Fenn*, Cro. Eliz. 347, is also in point.

[PARKE, B. — All the trusts are for the benefit of Thomas Fenton the younger, except the disposal of the surplus, and the accounting for that to somebody else.]

This act amounted to a breach of trust, because his duty was to sell.

[PARKE, B. — His entry upon the premises was some evidence of assent. But after that he shows his intention still more clearly by bequeathing the premises to another. There was no breach of trust.]

POLLOCK, C. B. — We are all of opinion that there ought to be no rule, as there was evidence of the executor, Thomas Fenton the younger, assenting to take the premises in his own right.

PARKE, B. — I am of the same opinion. The dealing with the term, by Thomas Fenton the younger, by devising it, was abundant evidence of assent. If there was any breach of trust, which there clearly was not, unless there was a surplus over and above the charges on the bequest, that must be inquired into elsewhere, but not in a Court of law. The act of bequeathing the term showed that the executor elected to take the term as devisee.

PLATT, B., and MARTIN, B., concurred. *Rule refused.*

In the Goods of Gaynor.

38 L. J. P. & M. 79-80 (s. c. L. R. 1 P. & D. 723).

Executor. — Administration. — 20 & 21 Vict. c. 79, s. 95. — Chain of Representation. [79]

A died in Ireland. B, his executor, proved his will in Ireland. B died, and C, his executor, proved his will in Ireland and had the Irish grant re-sealed in the principal registry of the Court of Probate in England. *Held*, that the chain of representation was not continued, and that C was not entitled to a grant of administration of the personal estate and effects in England of A's wife, who predeceased her husband.

No. 2. — In the Goods of Gaynor, 38 L. J. P. & M. 79, 80.

Bridget Gaynor, late of Athlone, in the county of Westmeath, Ireland, died intestate in 1841, leaving William Gaynor, her lawful husband, her surviving. She had no property in possession at the time of her decease, but was entitled to a sum of £200 on the death of Barbara Smith, who died in December, 1863.

William Gaynor died in 1848, without having taken out letters of administration of his wife's personal estate and effects, and by his will appointed John Gaynor sole executor and residuary legatee. John Gaynor proved the will in the Prerogative Court of the Archbishop of Armagh, in Ireland, and died in 1865, leaving a will whereof he appointed James John Gaynor, George Atkinson, and William Stanley executors. The executors proved the will in Ireland in September, 1865, and in May, 1869, the Irish probate was re-sealed in the principal registry of the Court of Probate in England.

M'Mahon now moved the Court to grant letters of administration of the personal estate and effects of Bridget Gaynor to William Stanley, executor of John Gaynor. He submitted that the chain of representation was complete, and referred to Williams on Executors, vol. 1, 5th ed., 274; *Shaw* v. *Storton*, 1 Freem. 102; *M'Mahon* v. *Rawlings*, 16 Sim. 429; *Fowler* v. *Richards*, 5 Russ. 39; *In the Goods of Powell*, 3 Hagg. Eccl. 195; *In the Goods of John Owen*, 2 Robert. 561; *Jermyn* v. *Baxter*, 5 Sim. 568; *Jossaume* v. *Abbott*, 15 Sim. 127; *Williams* v. *Bland*, 2 Col. 575; *Twyford* v. *Trail*, 7 Sim. 92; and *In the Goods of Tucker*, 2 Sw. & Tr. 123. *Cur. adv. vult.*

Judgment was delivered (on Aug. 5) as follows: —

Lord Penzance. — An application was made to the Court on Tuesday last for a grant in this case. The intestate, Bridget Gaynor, was the wife of William Gaynor. She predeceased him, and William Gaynor died in 1848, before this Court was established. William Gaynor made a will, whereof he appointed John Gaynor executor. John Gaynor proved the will in the [*80] Prerogative Court of Armagh, *in Ireland, but did not prove the will in England. He died, having made his will, by which he appointed three persons his executors. They have proved, and they now represent him, and this is an application on their part for a grant of administration of the estate of the deceased wife of William Gaynor, the first testator. The objec-

No. 2. — In the Goods of Gaynor, 38 L. J. P. & M. 80.

tion which was made to the grant in the registry was in conformity with the practice of the Court. The applicant being the executor of John Gaynor, and John Gaynor never having proved the will of his testator in this country, it was said that the chain of representation was broken. It was insisted upon the other side that the effect of John Gaynor having proved the will in Ireland, although it gave him no power over assets in England, was yet sufficient to continue the chain of representation, and that is the question for the Court to consider. Now, after the best consideration that I have been able to give to the case, I have come to the conclusion that the applicant is not entitled, and that the chain of representation is not continued. The matter may be simplified by considering it as if it arose during John Gaynor's life. Mrs. William Gaynor having died, her property passed to her husband. He died after having made his will, whereof he appointed John Gaynor executor. John Gaynor proved the will in Ireland. Question: Can he take a grant of administration of the goods of Mrs. William Gaynor without first proving William Gaynor's will in this country? And it seems to me that he cannot; for after all this system of taking the grant of probate to form the chain of representation is in fact nothing but following the interest. Under the Irish probate, John Gaynor had no control over the effects of William Gaynor, his testator, in England. That grant gave him no power to deal with such assets, and could certainly give him none. At the time of William Gaynor's death he was possessed of assets in England, namely, his wife's assets; and therefore if John Gaynor wished to possess himself of those assets, he must have taken a grant of probate of his testator's will in this country. Having obtained no such grant, he was entitled to no control over them. His executors cannot stand in a better position than he stood in. Whatever rights they have are transmitted rights. But if he had no rights himself — if he could not come to this Court and ask for this grant, *a fortiori* those to whom he has transmitted his rights cannot do it. There are a great many cases that throw considerable doubt upon the matter, but it seems to me that in principle the case of *Twyford* v. *Trail* — the marginal note in which runs thus: "A died in India. B, one of his executors, proved the will in India. B died, and C, his executor, proved his will in England. C is not the personal representative of A" — decides the question with which we are now

dealing. It was suggested that some sort of difference existed between the full rights of an executor, with which it was conceded the party here was not clothed, seeing that he had only taken the grant in Ireland, and a certain sort of partial rights sufficient to continue the chain of representation. The Court, with the object of avoiding superfluous grants, has very much considered that view of the case, to see if it rests upon any solid foundation, but I am unable to ascertain that it does. Therefore, I think that in this case the grant cannot go as moved for. The applicant, however, will have no difficulty in getting a grant, because it turns out that John Gaynor, as well as executor, was also residuary legatee, and therefore through that interest he will be entitled to take the grant in the ordinary way.

Grant of letters of administration refused.

ENGLISH NOTES.

Two causes have combined to destroy the importance of the actual decision in many of the cases referable to the first branch of the rule. The first of these is the statutes establishing the Probate Court (20 & 21 Vict., c. 77, s. 79, and 21 & 22 Vict., c. 95, s. 16), to be presently noticed, and the other the large powers of amendment of proceedings and the liberal interpretation put upon those powers by the Courts. See *Hunter* v. *Young* (C. A. 1879), 4 Ex. D. 256, 48 L. J. Ex. 689, 41 L. T. 142, 27 W. R. 637.

A useful summary of the older law is to be found in the last (1871) edition of Williams' notes to Saunders' Reports: "In actions by executors they ought all to join: Bro. Executors, 88; though some be within the age of seventeen years: Went. 95, Yelv. 130, *Smith* v. *Smith*; or have not proved the will: 1 Salk. 3, *Brookes* v. *Stroud*; or refused before the Ordinary: 9 Rep. 37 *a*, *Hensloe's Case*. But if one only bring an action either of debt upon bond, or assumpsit as well as tort, it seems settled that the defendant can only take advantage of it by pleading in abatement, after setting out the appointment of the executor by the will, that the other executor mentioned therein is alive not named. If the defendant plead the general issue, he is too late; he cannot come at the fact of there being another executor. An executor is appointed by the will, and therefore it is necessary to state that the testator made his will, and thereby appointed the co-executor, who is not joined, and then to aver that he is alive; but the defendant need not aver that he administered. 41 Ed. III., 22 *a*, pl. 10; s. c. Bro. Executors, 27; Yelv. 130, *Smith* v. *Smith*: Ast. Ent. 11; Com. Dig. Abatement (E 13). But where the defendant pleads in abatement

that he has one or more co-executors who ought to be joined, he must aver not only that he is alive, but that he administered; because it is only necessary to sue so many of the executors as have administered. Bro. Executors, 20, 88; Wentw. 95; 1 Lev. 161. *Swallow* v. *Emberson*; Clift. Ent. 15, pl. 36, 37; Lib. Plac. 1, pl. 8; Com. Dig. Abatement (F. 10); Willes' Rep. 42. *Alexander* v. *Mawson*. If a debtor makes his creditor and another his executors, and the creditor never intermeddles, but refuses, he may bring an action against the other executor. Sir Wm. Jones, 345, *Dorchester* v. *Webb*: 3 T. R. 557, *Rawlinson* v. *Shaw* [*s. c.* 1 R. R. 768]. With respect to actions of tort, such as trespass *quare clausum*, or for taking goods, trover, case for malfeasance, misfeasance, or non-feasance, and such like actions of tort, it seems fully and clearly established that if one only of two or more joint tenants, parceners, tenants in common, partners, executors, assignees of bankrupts, and others who regularly ought to join, bring any such actions, the defendant must plead in abatement, and cannot give it in evidence on the general issue or in any other way, or by pleading in bar, or in arrest of judgment, or though the matter be found specially, or appear upon the face of the declaration, or any other pleading of the plaintiff." For the last proposition numerous authorities are cited. The passage in commas is taken from the notes to *Cabell* v. *Vaughan*, 1 Wms. Saund. 483, 484, 485.

There are two cases noted by the subsequent editors, which may be more conveniently dealt with apart. They are *Brassington* v. *Ault* (1824), 2 Bing. 177, 9 Moore, 340, 3 L. J. (O. S.) C. P. 243, 27 R. R. 581; and *Doe d. Stace* v. *Wheeler* (1846), 15 M. & W. 623, 16 L. J. Ex. 312. See p. 10, *post*.

But it is clear that even apart from statute the executor must either prove or intermeddle before he is entitled to be considered as executor. *Rawlinson* v. *Shaw* (1790), 3 T. R. 557, 1 R. R. 768; *Brazier* v. *Hudson* (1836), 8 Sim. 67, 5 L. J. Ch. 296; *Mohamadu Mohideen Hadjiar* v. *Pitchey* (P. C. 1894), 1895, A. C. 437, 63 L. J. P. C. 90, 71 L. T. 99.

By the Court of Probate Act, 1857 (20 & 21 Vict., c. 77), s. 79, it is provided: "Where any person, after the commencement of this Act renounces probate of the will of which he is appointed executor, or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor." By the Court of Probate Act, 1858 (21 & 22 Vict., c. 95), s. 16, it is provided: "Whenever an executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor named in a will is cited to take pro-

bate, and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor." Where the executor has intermeddled he cannot renounce under the Act of 1857: *In the Goods of Badenach* (1864), 3 Swab. & T. 465, 33 L. J. Prob. 179, 10 Jur. (N. S.) 521, 11 L. T. 275; *Mordaunt* v. *Clarke* (1868), L. R. 1 P. & D. 592, 38 L. J. Prob. 45, 19 L. T. 610; *In re Stevens, Cooper* v. *Stevens* (26 Jan., 1897), 1897, 1 Ch. 422, 66 L. J. Ch. 155; nor can he renounce after he has taken probate: *In the Goods of Veiga* (1862), 32 L. J. Prob. 9. Although the executor has renounced, he may retract at any time until the renunciation is filed. *In the Goods of Morant* (1874), L. R. 3 P. & D. 151, 43 L. J. Prob. 16, 30 L. T. 74. The Court has jurisdiction, but will only exercise it in exceptional cases, to permit an executor to retract even after the renunciation is complete. *In the Goods of Gill* (1873), L. R. 3 P. & D. 113. *In re Lord and Fullerton's Contract* (C. A. 1895), 1896, 1 Ch. 228, 65 L. J. Ch. 184, 73 L. T. 689, it was held that there could not be a disclaimer by a trustee, who was also an executor, of part of the testator's estate. The trustee in that case renounced "the office of trustee and executor, and all interest in and power over the real and personal estate without the bounds of the United States of America." He had administered in America and was held a necessary party to a conveyance of real estate in England. This was also the rule of the common law: *Bolton* v. *Cannon* (1676), 1 Vent. 271, Pollexf. 125, where it is said: "An executor that does intermeddle cannot waive a lease, or any other part of the testator's estate, for he cannot assume the executorship for part, and refuse for part.'

Where a testator after directing that in case of failure of a certain legacy of £100 the amount should remain "at the disposal of my executors for distribution to such charities as they approve of," appointed three persons executors, and gave the residue to charities "in such proportions as my executors herein named may select," it was held by the Court of Appeal that, one of the executors having renounced, the power might be exercised by the other two. The Court regarded the question as a pure question of construction, and interpreted the latter clause by the context of the former clause above cited. *In re Mainwaring, Crawford* v. *Forshaw* (C. A. 1891), 1891, 2 Ch. 261, 60 L. J. Ch. 683, 65 L. T. 32, 39 W. R. 484.

The provision that death before taking probate determines the right of the executor is merely declaratory of the older law laid down in *Day* v. *Chalfield* (1683), 1 Vern. 200. In the original report this appears as an actual determination, but it has been shown by Mr. Raithby, in his

edition of Vernon, quoting an extract from the Register Book (1683, A. fo. 314), that it is only a *dictum*. That *dictum* is, however, consistent with the law in 1 Wms. Saund. 484, set out at the commencement of this note.

Having disposed of the statutory modifications of the effect of the first branch of the rule, it seems fitting to notice the various results which follow, by a reference to the decided cases bearing upon the subject. Before doing so, the reader may be reminded that in this respect an administrator presents a marked contrast. *Foster* v. *Bates*, No. 13 of "Administration," 2 R. C. 129 (12 M. & W. 226, 13 L. J. Ex. 88). In *Fenton* v. *Clegg*, the first principal case, the executor was permitted to assent to a legacy. So an assignment of a trust term before probate has been recognised as valid. *Brazier* v. *Hudson* (1836), 8 Sim. 67, 5 L. J. (N. S.) Ch. 296. Again, in *Wills* v. *Rich* (1742), 2 Atk. 285, Lord HARDWICKE said: "Notwithstanding a will is not proved, the executor, in the eye of the law, is considered as having some authority; for even before probate, he may so far act as to get in and receive his testator's estate, or release debts, or even bring actions for them, though at the trial, indeed, the law will oblige him to produce the probate, so that an heir-at-law or next of kin is very far from being justifiable in forcibly turning out an executor." The same view was expressed by Lord HOLT in *Wankford* v. *Wankford* (1699), 1 Salk. 299, 306. He says: "By administering, the executor has accepted of and taken upon him the whole administration, and is a complete executor. He is before probate entitled to receive all debts due to the testator, and all payments made to him are good, and shall not be defeated, though he dies and never proves the will. All the testator's goods are in his possession, though at what distance soever, and he may maintain trover for them; and as he may maintain a possessory action, so he may avow for rent where a reversion of a term comes to him; and for such rent as has accrued after the death of the testator, he may avow before probate, because the reversion is vested in him by the will; but for such arrears as accrued due in the testator's lifetime, he cannot avow without probate." These passages show the limitation on the rule respecting the authority conferred by the will. The title as representative is not complete until probate, or until the executor has intermeddled as already mentioned, but for the purpose of confirmation it is sufficient that there should be subsequent proof by any of the executors: *Wankford* v. *Wankford*, *supra*; or a grant of administration with the will annexed: *Brazier* v. *Hudson* (1836), 8 Sim. 67, 5 L. J. (N. S.) Ch. 296.

The titles "Administration," 2 R. C. 56 to 251, "Dead Body," 8 R. C. 462 to 478, and "Devastavit," 9 R. C. 320 to 350, may be referred to in connexion with the present subject.

In *Webster* v. *Spencer* (1820), 3 B. & Ald. 360, 22 R. R. 427, one of two executors alone proved the will, and received the amount of a debt appropriated to the payment of certain specific legacies, and permitted the money to be lent to a third person by whom it was paid to the defendant. The defendant admitted his liability to the proving executor, and that the money formed part of the testator's estate, but refused to pay it over to the proving executor. Both executors joined in an action of assumpsit, and an objection grounded on a misjoinder of parties was overruled. In marked contrast is *Brassington* v. *Ault* (1824), 2 Bing. 177, 9 Moore, 340, 27 R. R. 581. There three of four executors ordered goods to be sold as the property of their testator. The three brought an action for the price, but were not described in the declaration as executors, and an objection taken on the ground of the non-joinder of the fourth executor was overruled. The distinction between *Webster* v. *Spencer* and *Brassington* v. *Ault* depends upon the double position of an executor. He represents the estate of the testator, but he has also a common-law property. Where there is more than one executor, each possesses and may dispose of the entire property, as appears from *Simpson* v. *Gutteridge* and *Doe* v. *Wheeler*, cited below.

Each executor is possessed of the whole interest. There can accordingly be a valid assignment of leaseholds by one of two executors: *Simpson* v. *Gutteridge* (1816), 1 Madd. 609, 16 R. R. 276: or by two of three executors: *Doe d. Stace* v. *Wheeler* (1846), 15 M. & W. 623, 16 L. J. Ex. 312. This is in respect of legal interests. In respect of equitable interests it would seem that a several authority in executors cannot be regarded as established without considerable qualification. See *Re Ingham*, *Jones* v. *Ingham* (1892), 1893, 1 Ch. 352, 62 L. J. Ch. 100, 68 L. T. 152, 41 W. R. 435. There an executrix took possession of certain title deeds of a property in mortgage to the testator, and returned them to the mortgagor, who asked for them in order to raise sums of money sufficient to pay off his total indebtedness to the testator's estate. The mortgagor, concealing the fact that he had already charged the property, purported to execute a legal mortgage of the property in favour of, and handed over the deeds to a bank. After the death of the executrix, the bank sought to postpone the surviving executor, but the claim was dismissed, on the ground that the right which the bank might have had against the executrix did not bind her co-executor, and that the case must be decided by reference to his personal fraud or negligence. So too in *Hill* v. *Simpson* (1802), 7 Ves. 152, 6 R. R. 105, and *Re Cooper*, *Cooper* v. *Vesey* (C. A. 1882), 20 Ch. D. 611, 51 L. J. Ch. 862, persons claiming under an executor, as assignees of a beneficial interest, were not allowed to set up the title of the assignor as executor when their title was challenged.

The office of executor survives. *In the Goods of Reid* (1896), 1896, P. D. 129, 65 L. J. P. D. & A. 60, 74 L. T. 462.

The chain of representation depends on the statute 25 Ed. III., stat. 5, c. 5, and apart from this statute the executorship could not be assigned. *Bedell* v. *Constable*, Vaughan, 182. And the statute has been strictly interpreted so that the administrator of an executrix could not sue for double value without taking out administration *de bonis non*, even where the tenant had attorned to her. *Tingrey* v. *Brown* (1798), 1 Bos. & P. 310, 4 R. R. 805.

The second principal case is supported by numerous old authorities, of which *Isted* v. *Stanley* (1580), Dyer, 372 *a*, seems to be the earliest.

The chain of representation could always be maintained through a married woman even prior to the Married Women's Property Acts. *Barr* v. *Carter* (1797), 2 Cox, 429, 2 R. R. 98; *Birkett* v. *Vandercorn* (1831), 3 Hagg. Ecc. 750. But in the case of married women there was always this danger, that the grant to her executrix might be a limited grant; in that case the chain was broken. *In the Goods of Bayne* (1858), 1 Swab. & Tr. 132.

Where the chain of representation is broken, it is necessary to take out administration *de bonis non*. *Savage* v. *Blythe*, No. 8 of "Administration," 2 R. C. 110, and notes. In *In the Goods of Reid*, *supra*, probate of a will was granted to one of two executors, power being reserved of making a like grant to the other executor. The acting executor died before he had fully administered. At the date of his death, the other executor had not been heard of for fourteen years. The daughter of the testator, and his sole next of kin, with the assent of the executors of the acting executor, moved for a grant to herself of letters of administration *de bonis non*: but the application was refused on the ground that the proper course was to cite the non-proving executor, which the Court directed should be done by advertisement. On his failure to appear, his appointment would be disregarded pursuant to the Court of Probate Act, 1858, s. 16, and the estate and representation would *ipso facto* vest in the executors of the proving executor.

It should be observed that the position of an executor, so far as relates to his passive title, is different. If he has not taken upon himself the office, or in any way acted or intermeddled with the assets, he is not liable to be sued; and where an action is subsequently brought against him as executor, the cause of action for the purposes of the Statute of Limitations dates only from the time when he took upon himself the office by probate or intermeddling. *Douglas* v. *Forrest* (1828), 4 Bing. 686, 29 R. R. 695; *Mohamadu Mohideen Hadjiar* v. *Pitchey* (P. C. 1894), 1894, A. C. 437, 63 L. J. P. C. 90, 71 L. T. 99. Compare *Webster* v. *Webster* (1804), 10 Ves. 93, 7 R. R. 351. (See notes, p. 74, *post*.)

AMERICAN NOTES.

Mr. Schouler says (Executors and Administrators, sect. 194): "It is generally admitted in this country, as in England, that one's appointment as executor relates back so as to absolve him from all personal liability for acts committed before his appointment without a strict probate sanction; though this, by fair inference, affords immunity only as to acts which come properly within the authority and scope of a rightful representative. American legislation departs so far, however, from the older theory, that as we have elsewhere shown, no appointment as executor may be safely deduced from the will itself, even though the rightful probate of that will were unquestioned; for as American statutes so frequently provide, the will should be presented speedily for probate, nor should executor designated therein act as one having genuine authority, until he has been duly appointed by the Court and has qualified by giving bonds. Hence acts not of themselves justifiable in the prudent interest of the estate, pending one's full appointment, are not likely to be upheld as readily in this country as in England; and if because of his death or the proper refusal of the Court to appoint him, or his failure to qualify as the law directed, some one else should be appointed in his stead, his imprudent and officious dealings with the estate, meanwhile his needless transfers and hasty promises may involve him and his own estate in trouble, rather than bind the estate which he assumed to represent."

This is sustained by cases relating to administration: *Selleck* v. *Russo*, 46 Connecticut, 370; *Alvord* v. *Marsh*, 12 Allen (Mass.), 603; *Outlaw* v. *Farmer*, 71 North Carolina, 31; *Bellinger* v. *Ford*, 21 Barbour (N. Y. Sup. Ct.), 311; *Emery* v. *Berry*, 8 Foster (New Hampshire), 473. "An executor derives his office from a testamentary appointment." *Berry* v. *Hamilton*, 12 B. Monroe (Kentucky), 191; 54 Am. Dec. 515. "An executor may, immediately upon the death of his testator, take possession of his effects, and bring suits, though he cannot declare before probate, for the technical reason that he must make profert of his letters." *Arnold* v. *Arnold*, 13 Iredell Law (Nor. Car.), 174; 55 Am. Dec. 434. Title to the personalty vests in him upon the testator's death. *Johnson* v. *Connecticut Bank*, 21 Connecticut, 156. He may be sued before probate. *Marcy* v. *Marcy*, 32 ibid. 308. See an elaborate note, 55 Am. Dec. 437, as to the powers and rights of an executor before probate.

"As to the executor's title," says Mr. Schouler, the true theory appears to be (unless where the doctrine of relation applies), that the personal estate of the deceased vests in him before probate, as a sort of trustee for the creditors, legatees, and whoever else may be interested in the estate under the will;" citing *Clapp* v. *Stoughton*, 10 Pickering (Mass.), 463; *Shirley* v. *Healds*, 34 New Hampshire, 407.

Judge Redfield says (3 Executors and Administrators, p. 20): "By the English law an executor could do many, indeed most acts pertaining to his office, except maintaining and defending suits, before proof of the will or obtaining letters testamentary. But as in the American States an executor has no such authority under the will, we shall not enumerate these acts." He then sums them up as pertaining to the burial, the preservation of the prop-

erty, and the support of the family. He admits however that "all such acts, doubtless, as have been done in good faith by the executor, before receiving his letters testamentary, will be held entirely valid, his title, by the probate of the will and granting of letters testamentary, being made good and having relation back to the time of the decease of the testator."

The English doctrine that the executor of an executor shall perform the trusts reposed in the first executor is "completely abandoned in this country;" and where a sole executor dies, the estate must be in future represented by an administrator *de bonis non*. 3 Redfield on Exrs. and Admrs., p. 240; *Foster* v. *Wilbur*, 1 Paige (New York Chancery), 537.

No. 3. — STACKPOOLE *v.* HOWELL.

(CH. 1807.)

No. 4. — DIX *v.* REED.

(CH. 1823.)

RULE.

WHERE a legacy is given to a person who is appointed executor, if the legacy is given to him in that character, he must prove the will in order to entitle himself to the legacy. If the gift is made from some other motive, he may claim the legacy, although he does not prove.

Stackpoole v. Howell.

13 Vesey, 417–421 (9 R. R. 200).

Executor. — Legacy. — Whether Virtute Officii.

Presumption that a legacy to a person, appointed executor, is given [417] to him in that character, though not apparently connected, unless there are circumstances showing that it is intended for him personally.

In this case, the circumstances were rather the other way: the legacies, by codicils, to the persons appointed executors by the will, standing altogether, and equal in amount.

One of the executors, therefore, having renounced, not entitled to the legacies.

Sir Gregory Page Turner, by his will, dated the 17th of May, 1790, devised his real estates to his family in strict settlement; appointing the plaintiff and the defendants Howell and Maberly trustees to preserve contingent remainders; and, after bequeathing to the same trustees some small leasehold estates in Oxfordshire,

in trust for the persons, who would be entitled to his freehold estates of inheritance, so far as the rules of law and equity would admit, gave and bequeathed all his personal estate, the said leasehold estates excepted, after payment of his debts and legacies, funeral expenses, and the charges of his trustees and executors in performance of his will, or in consequence thereof, to Stackpoole, Howell, and Maberly, upon trust, that they, or the sur-
[* 418] vivor of them, * should, as soon as conveniently might be after his decease, invest the same in the purchase of real estates of inheritance, to be settled to the same uses as his real estate; with the usual directions for payment of the interest in the meantime to the persons who would be entitled to the rents, for the indemnity of the trustees, and for maintenance and advancement of his children; and after appointing his wife guardian, and declaring that, if any of his said trustees should die, or desire to be discharged from the trusts of his said will, the said trustees, or the survivor of them, should, with the consent of his wife, appoint another trustee, he appointed Stackpoole, Howell, and Maberly executors of his said will.

By a codicil, dated the 19th of May, 1790, the testator gave to his wife, for her own use, all his wearing apparel, watches, jewels, &c. He also gave her the sum of £2000. He then gave to the three persons, whom he had by his will appointed his trustees and executors, and to his steward, legacies in the following terms: —

"I also give to her brother Mr. Joseph Howell of Clune in the county of Norfolk the sum of £300. I also give to George Stackpoole Esq. of Grosvenor-Place London the like sum of £300. I also give to Mr. Thomas Astley Maberly of Hatton Garden Attorney at Law the like sum of £300. I also give to my Steward Mr. John Lamb of Blackheath Kent the sum of £100."

By another codicil, dated the 7th of August, 1800, the testator gave to his eldest son, for his own use, all his wearing
[* 419] apparel, watches, &c.; and to his * wife, during her natural life, the use and enjoyment of all his jewels and plate, and after her death he gave them to his eldest son for his own use. He then gave the following pecuniary legacies: —

"I give to my wife Dame Frances Page Turner the sum of £1000. I also give to her brother Joseph Howell of Market-Street in the county of Herts the sum of £200. I give and

No. 3. — Stackpoole v. Howell, 13 Ves. 419, 420.

bequeath to George Stackpoole Esq. of Grosvenor-Place London, the like sum of £200. I also give and bequeath to Thomas Astley Maberly Esq. of Bedford-Row Attorney at Law the like sum of £200."

Mr. Stackpoole renounced probate, but claimed the legacies given to him by the codicils, to obtain which was the object of the bill, as given to the plaintiff, not as executor, but as a mark of friendship and kindness.

Mr. Richards and Mr. Cooke, for the plaintiff, contended, that there is no authority, that a legacy to a person who happens also to be the executor shall not have effect unless he proves the will; that for that purpose it must appear to be a legacy to the executor, intended for him in that character; and upon condition that he shall not have the legacy unless he answers the description of executor.

Mr. Alexander and Mr. Daniel, for the defendants.

The only circumstance distinguishing this case is, that the appointment of executors is first made by the will, and the legacies are afterwards given by codicils. But the legacy must be understood to be given to the plaintiff, as executor, being previously appointed *executor; and, not acting, he has [*420] not complied with the condition upon which he was intended to take the testator's bounty. The case of *Read* v. *Devaynes*, 3 Bro. C. C. 94, where the legacies were held to be given to the executors in that character, is much weaker than this. These legacies being given to a person who is executor, the conclusion is, that they are given to him as executor. The codicils contain legacies to other persons, as well as these to the executors; but in both the codicils the legacies to the three executors are equal, and stand together, though, it is true, other legacies stand before and after them, which circumstance cannot have any effect. The inference, strong, if not necessary, from the manner in which these legacies are given, and their equal amount, is, that they are given in consideration of the character of the legatees; the single circumstance of resemblance among them.

Mr. Richards, in reply.

In *Read* v. *Devaynes*, the MASTER OF THE ROLLS considered the gift of the legacies and the appointment of executors as having connection with each other. It appears by the probate of the will that they are in the same sentence; and Lord ALVANLEY

united those circumstances. The proposition, now stated, is too broad. After the execution of the first of these instruments the testator does not notice these persons as his executors, the last codicil being executed after a lapse of ten years. The single circumstance is, that these legacies, though given with others, happen to stand together.

[*421] *The Master of the Rolls (Sir William Grant): — The question is, whether you must not find circumstances to show that the legacy was intended for the executor in a distinct character; otherwise the presumption *primâ facie* is, that it is given to him as executor. There is something in the circumstances that the testator has put these legacies together, and that in both the codicils the legacies to the executors are of precisely the same amount. It does seem as if the testator considered them in the character of executors only. I think the plaintiff is not entitled.

Dix v. Reed.

1 Simons & Stuart, 237–239. (24 R. R. 171.)

Executor. — Legacy. — Whether Virtute Officii.

[237] Testator named two persons to be his executors, and bequeathed to them £50 each, upon condition of their taking upon themselves a certain trust, and afterwards used these words, "I give to my cousin, T. K., £50, whom I appoint joint executor;" and the testator also gave to T. K.'s sisters legacies of £50 each. *Held*, that the legacy to T. K. was not annexed to the office of executor, and that he was entitled to it, although he had declined to act in the trusts of the will.

This case was heard on an exception to the Master's report; and the question was, whether Thomas King was entitled to a legacy of £50 reported to be due to him.

The suit was instituted for the purpose of establishing the will of Robert King Bird, and for an account of the testator's personal estate. The testator by his will expressed himself as follows: "To William Reed and John Baugley, I give £50 each, whom I nominate and appoint executors in trust to this my will; the said bequests to be upon condition of their taking upon them the trust hereinafter mentioned; that is to say, I give, devise and bequeath unto my friends William Reed and John Baugley upon trust, for the use and benefit of my son, Charles Clarke Dix, all my freehold estate in the parish of Almondsbury, County of Gloucester,

to hold to him, his heirs, executors and administrators." After giving various other legacies, the testator proceeds thus: "I give unto my cousin Thomas King, the sum of £50, whom I appoint as joint executor in trust in this my will." And in case of the death of Charles Clarke Dix under twenty-one without issue, the testator devised the freehold estate in the parish of Almondsbury to his cousin Thomas King, his heirs, executors, administrators, and assigns, subject to an annuity of £30 payable to Ann and Mary King, the sisters of Thomas King. In another part of the will the testator gave them legacies of £50 each.

*Reed and Baugley proved the will, but King declined [*238] to prove it, and never interfered in the execution of the trusts. It was, therefore, insisted that he was not entitled to the legacy of £50. The Master having reported this legacy to be due, this exception was taken to that part of the report.

Mr. Horne, Mr. Martin, and Mr. Rose, in support of the exception, cited *Stackpoole* v. *Howell*, 13 Ves. 417 (p. 13, *ante*), *Read* v. *Devaynes*, 3 Bro. C. C. 95, and the note to that case in Mr. Belt's edition of Brown's Chancery Reports. The testator seems to have united the two offices of executor and trustee; and a person who has assumed neither of these offices cannot be entitled to a legacy, which must be considered as annexed to the office.

Mr. Cooke against the exception: —

Thomas King did not take this legacy in his character of executor. In the bequest to the two first executors, who were strangers in blood to the testator, he expressly annexes the condition that they should execute a certain trust; but no such condition is annexed to the gift to Thomas King. On the contrary, the words used in giving the legacy to him are, "to my cousin, Thomas King." The motive of the gift was the relationship, and not the office; for Ann and Mary King, his sisters, who were related in the same degree to the testator, have legacies of the same amount; and Thomas King afterwards has a contingent interest devised to him in the real estate. The case of *Read* v. *Devaynes* is also reported in Mr. Cox's *reports (2 Cox, 285); and it [*239] appears there that, when the cause came on for further directions, the Court held the legatee to be entitled.

The Vice-Chancellor (Sir John Leach): —

I must hold that Thomas King is entitled to the legacy, and consider that the gift is rather to be intended to be in respect of

his relationship than of his office. The circumstance that the two other executors have the same legacies cannot be brought in aid of the exception; because those legacies are expressly annexed to the office of trustees of the real estate.

I consider the case, however, to be very doubtful. *Primâ facie* legacies to executors are considered as annexed to the office, and they are to show circumstances to repel the presumption.

Exception overruled.

ENGLISH NOTES.

In *Slaney* v. *Watney* (1866), L. R. 2 Eq. 418, 35 L. J. Ch. 783, 14 L. T. 657, 14 W. R. 818, where the testator gave a legacy payable at a future time, and made a subsequent gift to the executors of an immediate legacy "as an additional acknowledgment" for their trouble, the two gifts were connected together, and proof of the will was required as a condition to the right to the legacy.

In *Re Reeves' Trusts* (1877), 4 Ch. D. 841, 46 L. J. Ch. 412; 36 L. T. 906, 25 W. R. 628, the Master of the Rolls (Sir G. Jessel) considered that the fact that a legacy was payable at a future day rebutted the presumption that it should be deemed to have been given *virtute officii*.

Where the gifts to the executors are unequal the presumption is not, for this reason alone, rebutted, but it is a circumstance to be considered in determining the motive of the gift. *Re Appleton, Barber* v. *Tebbit* (C. A. 1885), 29 Ch. D. 893, 54 L. J. Ch. 954, 52 L. T. 906; *Cockerell* v. *Barber* (1826), 2 Russ. 585, 1 Sim. 23, 5 L. J. (O. S.) Ch. 77.

It may be stated as a general proposition that where a motive unconnected with the appointment is expressed, a legatee, although also appointed executor, may claim the legacy without proving the will. The following cases bear on this subject. A gift as a mark of respect: *Burgess* v. *Burgess* (1844), 1 Coll. 367, 8 Jur. 660; a gift "to my friend": *Re Denby* (1861), 3 De G., F. & J. 350, 31 L. J. Ch. 184, 5 L. T. 514, 10 W. R. 115; a gift as a remembrance: *Bubb* v. *Yelverton* (1871), L. R. 13 Eq. 131, 20 W. R. 164. In *Dix* v. *Reed*, the second principal case, the fact that the executor was referred to as "my cousin" was considered a sufficient indication of motive; and a similar conclusion was arrived at in *Crompton* v. *Bloxham* (1845), 2 Coll. 201, 14 L. J. Ch. 380, 9 Jur. 935, where the testator always referred to the non-proving executor as "my brother Charles Bloxham." So of a legacy given as "a token of my regard for them, and a small recompense" for their trouble. *Brydges* v. *Wotton* (1812), 1 Ves. & B. 134, 12 R. R. 200.

The presumption that the legacy is given *virtute officii* is not rebutted by the fact that the gift is combined with that to others who are not named executors. *Calvert* v. *Sebbon* (1841), 4 Beav. 222. There the gift was: "I give and bequeath to J. B. Price . . . £500; to E. T. Price the like sum of £500; to the said William Collins the sum of £500; and to the said R. M. Webster the sum of £500;" Collins and Webster were appointed executors, but renounced, and were held not entitled to their legacies.

An executor may entitle himself to a legacy given to him as executor by proving at any time. *Read* v. *Devaynes* (1791), 3 Bro. C. C. 94, 2 Cox, 285, 2 R. R. 48. But interest on the legacy will only be given from the time of proof of the will. *Angermann* v. *Ford* (1851), 29 Beav. 349, 7 Jur. (N. S.) 668, 4 L. T. 230, 9 W. R. 512. An executor manifesting an intention to act by taking active steps in the administration is entitled to his legacy, and on his death without proving the will, his estate is entitled to the legacy. *Harrison* v. *Rowley* (1798), 4 Ves. 212, 4 R. R. 199; *Lewis* v. *Mathews* (1869), L. R. 8 Eq. 277, 38 L. J. Ch. 510, 20 L. T. 905, 17 W. R. 841. But incapacity arising from bodily or mental infirmity is not regarded as an excuse for not proving. *Hanbury* v. *Spooner* (1843), 5 Beav. 630, 12 L. J. Ch. 434; *Re Hawkins* (1864), 33 Beav. 570, 34 L. J. Ch. 80, 10 Jur. (N. S.) 922, 10 L. T. 557, 12 W. R. 945. Mere proof of a will, however, will not of itself be sufficient, if the executor does not intend to act. *Harford* v. *Browning* (1787), 1 Cox, 302. *Parsons* v. *Suffery* (1821), 9 Price, 578, 23 R. R. 724, where the executor neither proved the will, nor manifested an intention to act, cannot be regarded as a satisfactory decision on this point, as the will contained a clear gift of the residue to the executors subject to certain payments.

A legacy to an executor *virtute officii* is not entitled to any special priority, and must abate proportionately with the other legacies. *Duncan* v. *Watts* (1852), 16 Beav. 204; *Debney* v. *Eckett* (1858), 4 Jur. (N. S.) 805. Where the residuary legatees moved before the accounts had been taken, that an executor, who was also a pecuniary legatee, should pay into Court the amount admitted by his answer, the executor was not permitted to retain the amount of his legacy, and to pay in the reduced sum. *Harding* v. *Harding* (1847), 16 L. J. Ch. 179.

Where a legacy given *virtute officii* fails, it falls into the residue and goes to the residuary legatee: *Parsons* v. *Suffery* (1821), 9 Price, 578, 23 R. R. 724; or the next of kin: *Barber* v. *Barber* (1838), 3 My. & Cr. 688, 8 L. J. Ch. 36, 2 Jur. 1029.

As to a power given to executors, whether *virtute officii* or not, see *Crawford* v. *Forshaw*, cited in notes to Nos. 1 and 2, at p. 8, *ante*.

No. 5. — Love v. Gaze, 8 Beav. 472. — Rule.

AMERICAN NOTES.

That a legacy to an executor *in eo nomine* is upon the implied condition precedent that he shall qualify and act as such, is held in *Billingslea* v. *Moore*, 14 Georgia, 370; *Kirkland* v. *Narramore*, 105 Massachusetts, 31; *Rothmaler* v. *Cohen*, 4 Desaussure (So. Car.), 215. Especially where it is expressed to be, "for care and trouble in executing that office." *Morris* v. *Kent*, 2 Edwards Chancery (New York), 175.

But an executor assenting to a bequest "in addition to commissions or allowances they would be entitled to by law," dying before probate, is entitled to take. *Scofield* v. *St. John*, 65 Howard Practice (New York), 292.

"It is an established rule that bequests to individuals who are executors are considered *primâ facie* to be given to them in that character; a presumption to be repelled by the nature of the legacies or other circumstances arising in the will." *Kirkland* v. *Narramore*, *supra*, citing *Stackpoole* v. *Howell*.

No. 5. — LOVE *v.* GAZE.

(CH. 1845.)

RULE.

SINCE the statute 11 Geo. IV. & 1 Will. IV., c. 40, the intention that the executor should take beneficially the residue that is undisposed of, must appear on the face of the will. Parol evidence is now inadmissible to show that the testator intended his executors to take the residue beneficially.

Love v. Gaze.

8 Beav. 472–478.

Executor. — Right to Residue.

[472] A testator appointed A and B his executors, and he gave them all his personal estate, "that is to say, for you to pay all as follows." He then gave several legacies, and afterwards said, "I wish all this to be paid in six months after my death." *Held*, under the 1 Will. IV., c. 40, that the executors did not take the unexhausted residue beneficially, but in trust for the next of kin.

The 1 Will. IV., c. 40, requires that the intention that the executor should take beneficially should appear by the will.

Parol evidence is now inadmissible to show that the testator intended his executors to take the residue beneficially.

The question in this cause was, whether the residue of the personal estate of William Wiseman belonged to his executors or to his next of kin.

No. 5. — Love v. Gaze, 8 Beav. 472–474.

By his will he appointed George Gaze and Charles Gaze to be his executors. He gave an annuity of £20 to the plaintiff, Kelah Love, and certain houses to his *nephew, John [*473] Gaze, and he willed and bequeathed George Gaze and Charles Gaze, his two executors, to them he gave all his money on mortgage, bonds, on houses or lands, all his money, clothes, all he was worth at his death, that is to say, for you to pay all as follows: He then gave several legacies, and afterwards expressed himself as follows: "I wish all this to be paid in six months after my death. I here declare this my last will and testament."

The legacies given by the will did not exhaust the personal estate given to the executors. The surplus was claimed by the next of kin, under the statute 1 Will. IV., c. 40,[1] on the ground that it was not expressly disposed of by the will, and that it did not appear that the executors were intended to take it beneficially. The *executors contended, that everything was [*474] by the will given to them; that the case was not within the provisions of the statute; and that the presumption in favour of the legal title of the executors ought to prevail, especially as it was supported by parol evidence taken in the cause.

Mr. Turner and Mr. G. L. Russell, for the plaintiff, and Mr. R. W. Moore, in the same interest. — Under the 1 Will. IV., c. 40, the executors are to be deemed trustees for the next of kin, "unless it shall appear by the will," &c., and that the executors were intended to take beneficially. Here, there is no such intention apparent on the face of the will. The gift to them is for a speci-

[1] The enactment is as follows: —

Whereas testators by their wills frequently appoint executors, without making any express disposition of the residue of their personal estate. And whereas executors so appointed become, by law, entitled to the whole residue of such personal estate, and Courts of equity have so far followed the law, as to hold such executors to be entitled to retain such residue for their own use, unless it appears to have been their testator's intention to exclude them from the beneficial interest therein, in which case they are held to be trustees for the person or persons (if any) who would be entitled to such estate under the Statute of Distributions, if the testator has died intestate. And whereas it is desirable that the law should be extended in that respect; be it therefore enacted, &c., That when any person shall die after the 1st day of September next after the passing of this Act, having, by his or her will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by courts of equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions in respect of any residue not expressly disposed of, unless it shall appear, by the will or any codicil thereto, the person or persons so appointed executor or executors was or were intended to take such residue beneficially.

No. 5. — Love v. Gaze, 8 Beav. 474, 475.

fied limited purpose, namely, to pay the particular legacies, and that purpose being performed, the beneficial interest in the residue is undisposed of. Before the Act, the expressions would not have been sufficient to entitle the executors to take for their own benefit. In *Braddon* v. *Farrand*, 4 Russ. 87, where the testatrix appointed an executor "to see that her will was put in force," Sir JOHN LEACH held, that the purpose of the appointment was "to confer an office and not a beneficial interest." This is a mere trust, and where the gift has been "on trust," the executors have always been held to be trustees only of the residue. *Robinson* v. *Taylor*, 2 Bro. C. C. 588; *King* v. *Denison*, 1 Ves. & B. 260 (12 R. R. 227); *Mullen* v. *Bowman*, 1 Colly. 197.

Parol evidence is inadmissible for the purpose proposed, first, because the defendants have not stated it in their answer, and, secondly, because before the statute it was admissible merely to rebut a presumption against the legal title of the execu-
[*475] tors; but now, by * the statute, the intention to benefit the executors must appear "by the will or any codicil thereto," and not by parol evidence.

Mr. Kindersley and Mr. Terrell, *contra*, for the executors. — The statute is inapplicable to this case. It provides only for the case in which the property is vested in the executor, by virtue of his appointment, and it does not apply to a case in which he takes it by virtue of an express gift. This is apparent from the preamble of the Act: "Whereas testators, by their wills, frequently appoint executors, without making any express disposition of the residue of their personal estate. And whereas executors so appointed become by law entitled to the whole residue," &c.; and subsequently, it is enacted, that where a person shall die having appointed an executor, &c. Again, he is to be a trustee "in respect of any residue not expressly disposed of," making no mention of the case where there is an express gift of the property to the executor. Here, there is an express bequest under which the executors take, and the Act, therefore, does not apply.

Upon the true construction of the words of this will the executors are entitled; for under the appointment the executors would take the whole personal estate: why, then, should the testator have superadded the subsequent words of gift, unless he intended giving to the executors something more than they previously had.

The evidence proves that the testator intended the executors to

No. 5. — Love v. Gaze, 8 Beav. 475–477.

take beneficially. This evidence is admissible, because the right still depends upon presumption, though the Act has shifted the burthen of proof from the next of kin to the executors. There is no objection * in regard to the pleadings, for in [*476] *Lynn* v. *Beaver*, Turn. & R. p. 66, Lord ELDON held, that "claiming the residue as executor, was sufficient to let in parol evidence in support of the legal title, without alleging a title by the effect of parol evidence."

Mr. Turner, in reply, contended, that the Act applied generally to all cases, and that executors, in every case, were to be trustees, unless a contrary intention appeared on the face of the will. That if it were otherwise, the Act would be almost inoperative.

The MASTER OF THE ROLLS received the evidence *de bene esse*, and said: This case involves a question of great importance as to the operation of the statute. Its operation will be limited indeed if the defendants succeed in the construction they contend for.

Where the residue is not expressly disposed of, and it does not appear by the will that the executors were intended to take such residue beneficially, they are to be deemed trustees for the next of kin. What is the meaning of an express disposition of the residue? It is said that the disposition of the bulk of the property, subject to certain defined payments, is an express disposition of the residue, or an express disposition of what remains after specific purposes are answered. Here the testator gives part of the property to one, other part to a second person, and then all he is worth at his death to his two executors, "that is to say, for you to pay all as follows," (which the defendants say means the several sums following,) in six months; and these sums are not equal to the whole bulk of the property after taking out the specific legacies given.

* Is this an express disposition of the residue within [*477] the meaning of this statute? The defendants contend it is, and say that the Act can only apply to a case where the executors take by virtue of their appointment as executors, and not when they take as legatees by virtue of a bequest to them. Before the Act, where executors took under a bequest, innumerable questions of presumption have arisen, and the Act was intended to relieve the profession and the public from these difficulties.

I will not give an opinion now, but will take some time to consider the question.

No. 5. — Love v. Gaze, 8 Beav. 477, 478.

The Master of the Rolls (Lord Langdale).

This will is inaccurately and unskilfully drawn. After giving an annuity and a specific legacy, it gives to the executors all the testator was worth at his death, with an intimation that the gift was for them to make certain payments, and nothing further is said, except that he wished the payments to be made in six months after his death. It was truly said, that a gift to the executors to enable them to pay the legacies was superfluous, because the law, which vested the estate in them independently of any gift, was sufficient for the purpose; and it was then argued, that the gift of the whole estate, avowedly for the purpose of their paying away only a part, cannot reasonably be imputed to anything but an intention to give the surplus to them beneficially.

The Act is so expressed as to exclude two distinct cases: first, the case where the residue is expressly disposed of; and, [*478] secondly, the case where it appears by * the will that the person appointed executor was intended to take the residue beneficially. In the case now under consideration the residue is not expressly disposed of, the word "residue" does not even occur in the will; and though the residue may be considered as involved or comprised in the general gift to the executors, and, in that way, may be considered as given to them, yet it does not appear that they were intended to take beneficially; nothing is said about it, and there might have been nothing to take.

Questions have sometimes arisen upon the exclusion of the executors, where there has been a general bequest of personal estate or of the residue of personal estate upon trusts not exhausting the whole property (*Robinson* v. *Taylor*, 2 Bro. C. C. 588, 1 Ves. Jun. 44; *Pratt* v. *Sladden*, 14 Ves. 193; *Dawson* v. *Clark*, 15 Ves. 409, 18 Ves. 247 (11 R. R. 188); *Southouse* v. *Bate*, 2 Ves. & B. 396; *Woollett* v. *Harris*, 5 Madd. 452); and circumstances apparently minute have been considered important for the determination of such questions, but the Act appears to me to require, that the intention for the executor to take beneficially should appear by the will, and as it does not so appear in this case, I am of opinion that the case is within the statute, that the parol evidence must be rejected, and that the residue belongs to the next of kin.

ENGLISH NOTES.

It is proposed in the outset of this note to give an outline of the rules adopted in Courts of equity before the statute.

As already pointed out, an executor in law is not only a representative of the estate, but his appointment is a gift of the estate; and further, where there is more than one executor each is possessed of the entire interest. The presumption against this legal right raised by Courts of equity, which permitted the introduction of direct parol evidence to rebut the presumption, may be thus stated. Proof of the will was not necessary. *Parsons* v. *Saffery* (1821), 9 Price, 578, 23 R. R. 724; *Griffiths* v. *Pruen* (1840), 11 Sim. 202; *Christian* v. *Devereux* (1841), 12 Sim. 264. This seems a logical outcome of the rule that proof of the will is not necessary to complete the title of the executor, but that he derives his title from the will itself. See *Fenton* v. *Clegg*, No. 1, p. 1, *ante*. A legacy to a sole executor raised what Lord Alvanley, M. R., called "a strong and violent presumption" against the right of the executor to the residue. *Clennell* v. *Lewthwaite* (1795), 2 Ves. Jun. 465, 2 R. R. 285. The same rule obtained in the case of a gift for care and trouble. *Whitaker* v. *Tatham* (1831), 7 Bing. 628, 5 Moore & Payne, 628, 9 L. J. (O. S.) C. P. 189. Where there was more than one executor, and all had equal legacies, there was a presumption raised that they were trustees of the residue. *Mackleston* v. *Brown* (1801), 6 Ves. 52, 5 R. R. 211; *Ommanney* v. *Butcher* (1823), T. & R. 260, 24 R. R. 42. But it would seem that the legacy must have been immediate in the sense that the enjoyment was not postponed. *Gascoyne* v. *Lynde* (1825), 4 L. J. (O. S.) Ch. 54. A clear gift expressed in language showing an intention that the executors were to take the residue beneficially, would not be construed to confer a legal interest only by reason of the trustees being also entitled to a legacy. *Parsons* v. *Saffery* (1821), 9 Price, 578, 23 R. R. 724; *Re Henshaw* (1865), 34 L. J. Ch. 98, 10 Jur. (N. S.) 837, 11 L. T. 17, 12 W. R. 1139. Where there was more than one executor, and unequal legacies were given, the presumption did not arise: *Rawlings* v. *Jennings* (1806), 13 Ves. 39, 9 R. R. 137; *Russell* v. *Clowes* (1846), 2 Coll. 648, 10 Jur. 732; and the same rule obtained where one of the executors was not given a legacy. *Mason* v. *Hawkins* (H. L. 1729), 4 Bro. P. C. 7; *Pratt* v. *Sladden* (1807), 14 Ves. 193. A gift to the wife of an executor was not sufficient to raise the presumption. *Fruer* v. *Bouquet* (1855), 21 Beav. 33. But a legacy to the next of kin did not exclude his claim to residue. *Attorney General* v. *Parkin* (1769), Amb. 566, 568; *Griffiths* v. *Hamilton* (1806), 12 Ves. 298, 310.

Amongst other provisions which raised a presumption that the executors took the property in trust and not beneficially, may be mentioned the following: A direction to keep accounts. *Gladding* v. *Yapp* (1820), 5 Madd. 56, 21 R. R. 277. That the person was appointed to see the will put in force: *Braddon* v. *Farrand* (1827), 4 Russ. 87, 6 L. J. Ch. 35; or that the gift of residue was to enable him to carry into effect the purposes of the will: *Barrs* v. *Fowkes* (1864), 2 H. & M. 60, 33 L. J. Ch. 484, 10 Jur. (N. S.) 466, 10 L. T. 232, 12 W. R. 666. So investment or trustee clauses raised the presumption. *Dean* v. *Dalton* (1789), 2 Bro. C. C. 634; *Woollett* v. *Harris* (1821), 5 Madd. 452; *Mullen* v. *Bowman* (1844), 1 Coll. 197, 13 L. J. Ch. 342, 8 Jur. 438.

The presumption was also raised where it appeared that the testator intended to dispose of the whole beneficial property away from the executors, but the disposition did not in fact exhaust the whole. *Lord North* v. *Purdon* (1752), 2 Ves. Sen. 495; *Ommaney* v. *Butcher* (1823), T. & R. 260, 24 R. R. 42.

Parol evidence was admissible to show an intention that the executor was to take beneficially. *Clennell* v. *Lewthwaite* (1795), 2 Ves. Jun. 465, 644, 2 R. R. 285; *Lynn* v. *Beaver* (1823), T. & R. 63, 23 R. R. 185. The parol evidence need not be restricted to the time of making the will, but must be to show the intention at that time only. *Clennell* v. *Lewthwaite*, *supra*; *Whitaker* v. *Tatham* (1831), 7 Bing. 628, 5 Moore & P. 628, 9 L. J. (O. S.) C. P. 189.

Where the executors take beneficially there is survivorship in the event of death without severance. *Hall* v. *Digby* (H. L. 1735), 4 Bro. P. C. 577; *Griffiths* v. *Hamilton* (1806), 12 Ves. 298. But where there was a gift to "the persons hereinafter appointed my executors," this was held to be a gift to them as individuals, and that the gift could not be construed as if "to my executors." *Hoare* v. *Osborne* (1864), 33 L. J. Ch. 586, 10 Jur. (N. S.) 382, 10 L. T. 20, 12 W. R. 397.

The statute 11 Geo. IV. and 1 Will. IV., c. 40, enacts by section 1: "When any person shall die after the 1st day of September [1830], having by his or her will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by Courts of equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions in respect of any residue not expressly disposed of, unless it shall appear by the will, or any codicil thereto, the person or persons so appointed executor or executors, was or were intended to take such residue beneficially." And by section 2: "Nothing herein contained shall affect or prejudice any right to which any executor, if this Act had not been passed, would have been entitled, in cases where there is not any person who would be entitled to the tes-

tator's estate under the Statute of Distributions in respect of any residue not expressly disposed of." The statute speaking of persons "entitled to the estate under the Statute of Distributions" excludes questions arising between the heir and the executor. See the observations of Lord Cairns, L. C., in *Williams* v. *Arkle*, cited below. The position of the heir was discussed in *Right* v. *Sidebotham*, No. 2 of "Descent," 9 R. C. 289, and the notes.

An important case on the interpretation of the statute, and qualifying as it does certain *dicta* in the ruling case, is *Williams* v. *Arkle* (H. L. 1875), L. R. 7 H. L. 606, 45 L. J. Ch. 590, 24 W. R. 215. The pith of the case on the question seems contained in the following passages from the judgment of Lord Cairns, L. C.: "Notwithstanding some *dicta* which appear to have fallen from Lord Langdale in the case of *Love* v. *Gaze*, I cannot entertain any doubt that this statute did not introduce any new rule for the construction of wills. It provides that an executor shall be a trustee for the next of kin, unless it shall appear by the will that he is to take the residue beneficially. That is to say, he shall no longer take the residue by implication of law. If the residue is given by the will to the executor the Court must decide the effect of the gift upon the construction of the will, and upon general principles applicable to that construction, just as before the statute it would have construed a similar gift of real estate. The statute, therefore, has of necessity no application where there is an express gift of residue. In my opinion the statute was intended to apply only in those cases where the rule or presumption of law could be held to operate, and that, where an express devise of residue is found, the meaning of that residuary bequest must be ascertained by the ordinary rules of construction. A contrary interpretation of the statute, which would in effect say that the words of a testator shall be construed, not according to the ordinary meaning, but according to an artificial rule of construction, raising a presumption which the law does not raise, and throwing a burden of proof where the law does not throw it, and thus giving by statute to one person what the law on ordinary principles of construction would or might give to another person would, as it seems to me, be opposed to the preamble and object of the statute. In this particular case the consequence of such an application of the statute would be strange indeed. It could only affect the residue of the personal estate, for the statute refers to personal estate only." In *Williams* v. *Arkle*, the realty clearly passed to the executors beneficially, and as the personalty was given in similar terms, the majority (Lord Cairns, L. C., and Lord Hatherley) held that there was a beneficial gift of the personalty to them. The determination of the House in this case affirmed the decision in both Courts below. The construction must be on the whole testamentary

dispositions of the testator, and codicils may explain the expressions used in the will, and an intention that executors are to take beneficially or as trustees be thus made to appear. *Shepherd* v. *Nottidge* (1862), 2 Johns. & H. 766, 7 L. T. 399; *Travers* v. *Travers* (1872), L. R. 14 Eq. 275.

These cases seem to exhaust all that can be extracted by way of principle from the decided cases, but the following may be noted as illustrating the methods of the Court in dealing with this matter of construction: *Juler* v. *Juler* (1860), 29 Beav. 34, 30 L. J. Ch. 142, 8 Jur. (N. S.) 1320; *Saltmarsh* v. *Barrett* (1861), 3 De G., F. & J. 279, 30 L. J. Ch. 853, 29 Beav. 474; *Harrison* v. *Harrison* (1864), 2 H. & M. 237, 33 L. J. Ch. 647; *Bird* v. *Harris* (1870), L. R. 9 Eq. 204, 39 L. J. Ch. 226, 23 L. T. 213.

The effect of section 2 of the statute is to leave the older law untouched in the case of the Crown. Where, according to the older law, the executors would have been regarded as trustees for the next of kin, and the gift fails for want of next of kin, the executors are trustees for the Crown. *Powell* v. *Merrett* (1853), 1 Sm. & G. 381, 22 L. J. Ch. 408, 17 Jur. 449; *Ducre* v. *Patrickson* (1860), 1 Dr. & Sm. 182, 29 L. J. Ch. 846, 6 Jur. (N. S.) 863; *Chester* v. *Chester* (1871), L. R. 12 Eq. 444, 19 W. R. 946. The claim of the Crown in this case rests on the principle of *Middleton* v. *Spicer*, No. 2 of "Crown," 8 R. C. 150, 161, 1 Bro. C. C. 201. Where, however, the executors would formerly have been entitled to retain the residue as against the next of kin, as by reason of a bequest of unequal legacies, the executors may hold the undisposed of residue as against the Crown. *Re Knowles, Roose* v. *Chalk* (1880), 49 L. J. Ch. 625, 43 L. T. 152, 28 W. R. 975. The right of the executors as against the Crown may be affected by the terms of a testamentary disposition. *Re Hudson* (1883), 52 L. J. Ch. 789, 48 L. T. 562, 31 W. R. 778. There the testatrix had in express terms of her will given the residue to her executors, but by a codicil revoked the gift, and instead thereof gave to each of them out of the residue a legacy of £500 for his trouble. It was held that the claim of the executors was limited to £500, and that the Crown took the residue in default of next of kin.

AMERICAN NOTES.

Universally in this country the distribution of all personalty not disposed of by a will is regulated by statute. *Paup's Adm'r* v. *Mingo*, 4 Leigh (Virginia), 163; *Twitty* v. *Martin*, 90 North Carolina, 643; *Matter of Tilford*, 5 Demarest (New York Surrogate), 524.

In *Grasser* v. *Eckart*, 1 Binney (Penn.), 575 (A. D. 1809), it was assumed that before those statutes the old English rule prevailed, but the Court

remarked: "I am satisfied that not one man in ten supposed, when he appointed an executor, that he thereby impliedly made him a gift of all his personal estate not particularly disposed of." "Although by the law of England the executor takes the undisposed surplus for his own benefit, yet the Courts have certainly availed themselves of all reasonable opportunities of getting over this rule, which was established at a time when personal estates were generally not of much value. They have adopted this principle, that where there are dispositions in the will which appear inconsistent with an intent that the executor should take the surplus for his own benefit, he shall take it as a trustee for the next of kin;" and the court upon construction of the will held that view in that case. The same Court held the same in *Wilson* v. *Wilson*, 3 ibid. 557, and the Court account for the ancient English rule on the ground that in England no compensation was allowed to the executor. These are very learned considerations of the subject.

Before the statutes the ancient English rule was adopted in Virginia (*Shelton's Ex'rs* v. *Shelton*, 1 Washington, 53), and in New Jersey (*Den dem. Snedekers* v. *Allen*, 1 Pennington, 44), the latter holding that the executor took the residue unless disposed of in express terms.

No. 6. — KIRKMAN *v.* BOOTH.

(CH. 1848.)

No. 7. — LAND *v.* LAND.

(CH. 1874.)

RULE.

To authorise executors to carry on a trade with the property of a testator held by them in trust, there ought to be the most distinct and positive authority and direction given by the will itself for that purpose.

Kirkman v. Booth.

18 L. J. Ch. 25–32 (s. c. 11 Beav. 273).

Executor. — Rights and Liabilities. — Carrying on Trade of Deceased.

A testator who was carrying on the business of a brewer, in partnership [25] with two other persons, made his will in 1802, and thereby gave all his real and personal estate to his son J. K. and three other persons, upon trust to allow his wife, during her life, to have the use of his furniture, plate, &c., of which an inventory was to be taken, and then upon trust, either out of the income or by sale or mortgage or other disposition of his real or personal estate, to raise, in the first place, £8000 for his younger children, and then to pay his

wife an annuity of £365 per annum during her life, and subject thereto, the testator directed his trustees to permit his son J. K. to take the annual produce and profits of his real and personal estate during his life, and after his decease it was given to the children of J. K. The testator then directed that in case his son should punctually pay the sum of £8000 as it became due, and also the annuity of £365, the trustees should permit him during his life to receive the annual produce and income of the testator's real and personal estate for his own use. The testator also appointed his four trustees and his wife his executors and executrix. The testator afterwards purchased the shares of his partners, and carried on the business in partnership with his son. He died on the 14th of September, 1803. All the executors proved the will. J. K., the son and last surviving executor, died in the year 1831, having become a bankrupt in the year 1816, up to which time he carried on the business. The executors took no precaution to preserve the brewery property for the benefit of the children of J. K.; and from the time of the bankruptcy of J. K. the brewery continued in the possession of his assignees until 1824, when the equity of redemption therein was released to the mortgagee. In 1815, J. K. made an absolute assignment of certain leasehold houses in consideration of £450. No inventory had ever been taken of the furniture, &c., bequeathed to the widow for her life, who died in the year 1824, and no part thereof, or of the proceeds thereof, was forthcoming. A debt of £2990 due from the testator's estate to one of his late partners had been converted into a debt of £5000, three per cent consols. A part of the testator's personal estate, at his death, consisted of canal shares, some of which the executors neglected to realise until the year 1810, and one of the executors had received several hundred pounds by way of commission for business done by him on account of the testator's estate. *Held*, on bill filed in the year 1845, by three of the children of J. K., deceased, against the personal representatives of the deceased executors, that the plaintiffs were entitled to an account and inquiry as to all the property which the testator possessed at his death, and what had become thereof, and what steps the executors took for the purpose of recovering or receiving any part of the property which without their wilful default they might have received.

Held, also, that, as to the furniture and converted debt, the Master ought to have liberty to state special circumstances, and that there ought to be a direction that if the Master could not satisfactorily take the inquiry, he should be at liberty to state the circumstances that created the difficulty.

To authorise executors to carry on or to permit to be carried on a trade, the property of a testator, which they hold in trust, there ought to be the most distinct and positive authority and direction given by the will for that purpose.

Joseph Kirkman, by his will, dated the 20th of April, 1802, bequeathed (*inter alia*) as follows: viz., "I give and devise all that my freehold messuage, known by the name of Pilkington, and all my estate and lands thereunto belonging, situate at Berkhampstead, in the county of Hertford, unto my wife, for the term of her natural life; and, after her death, I devise the same messuage,

estate, and lands at Berkhampstead; and after my decease, I devise all my freehold and copyhold, or customary and leasehold messuages and hereditaments, whatsoever and wheresoever, and all my equitable and other estate and interest in the contracts which I have entered into for the purchase of the land-tax, charged upon and payable for my said real estate, but subject to and *charged with the payment of my just debts, funeral [*26] expenses, and the legacies hereinbefore bequeathed, to the use of my son Joseph Kirkman, Thomas Owen, William Ashlin, and John Robins, their heirs, executors, administrators, and assigns, respectively, for all such estate, term and interest as I shall have therein respectively at my decease, upon the trusts hereinafter mentioned concerning the same; and I give and bequeath all shares and promissory notes in and from the Grand Junction Canal Navigation, of which I shall be possessed at my death, and all the share or shares, estate and interests which I have of and in the trade or business of a brewer, which I now carry on in partnership with John Bittleston and James Williamson, and my books, pictures, plate, linen, china, household goods and household furniture of every kind which shall be in or about both my dwelling-houses, the usual place of my residence in town and country at the time of my decease, and also all my stocks, monies, securities for money, and all other my personal estate not hereinbefore disposed of, subject to and charged with the payment of my debts, funeral expenses, and the legacies hereinbefore by me given, unto and to the use of my son Joseph Kirkman, and the said Thomas Owen, William Ashlin, and John Robins, their heirs, executors, administrators, and assigns respectively, for all such estates, term, and interest as I shall have therein respectively at my decease, and according to the several tenures and qualities of such estates and property respectively, upon the trusts hereinafter mentioned, viz., the books, pictures, plate, linen, china, household goods and household furniture of every kind, which shall be in both my said dwelling-houses at the time of my decease, upon trust from and after my decease to allow my said wife to have and enjoy the use thereof during her life, for her own absolute benefit, without any control whatsoever; and my will is, that so soon as conveniently may be after my decease, my said trustees do cause a true and exact inventory to be made and taken of all the said books, pictures, plate, linen,

china, household goods, and household furniture, and two copies to be made of such inventory; one to be delivered to my said wife, and the other to be kept by my trustees, which last copy shall be signed by my said wife at the foot of a receipt thereunder written, for the articles therein specified, at and before the time of her taking possession thereof; and I declare that my son Joseph Kirkman, and the said Thomas Owen, William Ashlin, and John Robins, their heirs, executors, administrators, and assigns, shall stand seised and be possessed of and interested in my said estate at Berkhampstead, and the said books, pictures, plate, linen, china, household goods and household furniture, (subject to the life estate and interest of my said wife therein,) and all other my said freehold, copyhold, and leasehold estates, shares and notes in the Grand Junction Canal Navigation, and personal estate whatsoever hereinbefore devised and bequeathed to them, upon trust, by and out of the rents and annual income of my said freehold, copyhold and leasehold estates, or by mortgage and sale thereof, or of any part thereof, or by all or any of the said means, or by and out of the annual produce of my said personal estate, or by sale or other disposition thereof, or of any part thereof, or by such other ways and means as they shall think fit, and more advisable, to raise and levy the sum of £8000 for the benefit and portions of all and every my child and children, living at my decease, or born afterwards, (other than and except my eldest son, the said Joseph Kirkman the younger,) equally to be divided between or amongst them, for the benefit of them; if more than one, share and share alike; and if there shall be but one such child, then for the benefit of such only child." The will then proceeded as follows: "and subject to the several trusts hereinbefore declared, I direct that my said son Joseph Kirkman, and the said Thomas Owen, William Ashlin, and John Robins, their executors, administrators, and assigns, shall stand and be possessed of and interested in my said real and my said residuary personal estate, upon trust, by and out of the rents, issues, and annual produce thereof, or by mortgage, sale, or other disposition thereof, or of any part thereof, or by all or any of the same means, or by such other ways and means as they shall think fit and more advisable, to raise and levy yearly one annuity of £365 free from taxes and clear of all other deductions whatsoever, and pay the same into the proper hands of my said dear wife; and subject to the trusts

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*hereinbefore declared for my said wife's benefit during [*27] her life, and subject to the payment of the said sum of £8000, and to every estate, trust, and interest hereinbefore mentioned, and all powers, provisoes and directions in this my will contained respecting my said real estate and my said residuary personal estate, I declare and direct that my said son Joseph Kirkman, and Thomas Owen, William Ashlin, and John Robins, their heirs, executors, administrators and assigns respectively, shall stand seised and be possessed of and interested in all my said real and all my residuary personal estate whatsoever, in trust, to pay to or permit and suffer my said son Joseph Kirkman and his assigns to receive and take the interest, dividends and annual produce, and the rents, issues and profits of the same real and personal estate, for and during the term of his natural life; and from and after his decease, subject to and charged and chargeable with all dower, right, title, and claim of dower and thirds, of freebench, and customary or widow's share, and thirds or moiety at the common law or by virtue of the Statute of Distribution, which any widow of my said son Joseph Kirkman may have, or claim out of and from or upon all or any of the said real and personal estates, in case my said son Joseph Kirkman during his life and at his death had been absolutely seised and possessed thereof in his own right, for any estate of inheritance or otherwise, and had died intestate and not indebted, in trust for all and every or such one or more of the children of my said son Joseph Kirkman, lawfully to be begotten, whether born in his lifetime or after his decease, at such time or times and in such parts, shares and proportions, and subject to such conditions, restrictions and limitations over, to or for the benefit of all or any of such children as he, my said son Joseph Kirkman, from time to time by any deed or deeds, writing or writings, to be by him sealed and delivered in the presence of and to be attested by two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, or any writing purporting to be his last will and testatment or codicil, to be signed and published by him, in the presence of and to be attested by three credible witnesses, shall direct or appoint; and in default of, and in the meantime, and until such direction or appointment shall be made, in trust for all and every the child and children of my said son Joseph Kirkman, lawfully to be begotten, in equal shares, if more than one

as tenants in common, and not as joint tenants, and for their respective heirs, executors, administrators and assigns for ever; and I do hereby direct, that in case my said son Joseph Kirkman, or his assigns, shall punctually pay the said sum of £8000 as portions for my younger children, when and as the same portions shall respectively become payable under the directions of this my will, and every part thereof, and the interest monies hereinafter directed to be paid in respect thereof, and also the said annuity of £365 to my said dear wife for her life, and every part thereof, at the times and in manner hereinbefore mentioned, and until default shall be made in some of the said payments, the trustees for the time being of this my said will shall from time to time and at all times permit and suffer or allow my said son Joseph Kirkman and his assigns, during his life, to receive and take the rents, issues, and annual produce and income of my said real and personal estate, and of every part thereof, (subject as hereinbefore mentioned,) to and for his and their own absolute use and benefit, without any hindrance, interruption or disturbance whatsoever; and in case my said son Joseph Kirkman shall with his own monies pay or advance the whole or any part of the principal of the said sum of £8000, then and in such case and to that extent he shall be and remain a creditor upon the real and personal estate hereinbefore made liable to the raising and payment thereof, and he or his executors, administrators or assigns shall and may have the amount of the principal so to be advanced by him raised and levied by the ways and means aforesaid, by and out of the said real and personal fund to and for his own use and benefit, together with the interest thereof." The testator then directed interest after his decease at the rate of £3 per cent per annum to be paid by his son Joseph Kirkman on such of the portions of his daughters and younger sons of and in the sum of £8000 as should not be payable at the testator's decease, or until the death [*28] of his wife, whichever event should first *happen, and after his wife's decease the testator directed £5 per cent to be paid on the portions so long as the same should not be payable; and he appointed his son Joseph Kirkman and the said Thomas Owen, William Ashlin, and John Robins, and his wife, executors and executrix of his will, and gave to each of them the sum of £100 on condition of their respectively acting in the trusts and execution thereof, but not otherwise.

No. 6. — Kirkman v. Booth, 18 L. J. Ch. 28.

The testator died on the 14th of September, 1803. All the executors joined in proving the will, and received the legacies given them thereby. Thomas Owen died in the year 1816, and his executors (the defendants, Richard Booth and Richard Owen) proved his will. On the 5th of November, 1816, a commission of bankrupt was issued against Joseph Kirkman, the son, and the defendants, George Thackrell and Benjamin Tomkins were chosen the assignees of his estate and effects. The testator's widow died in 1824; William Ashlin died in the year 1826 intestate; and the defendants, Ann Ashlin and Maria Fielder, became his legal personal representatives. John Robins died in May, 1831; and the defendants, James Reid and Thomas Bramall, proved his will shortly afterwards. Joseph Kirkman, the son, died in June, 1831, intestate, having as a trustee received no part of the testator's estate subsequently to his bankruptcy, and never having executed the power of appointment given him by the testator's will. Soon after Joseph Kirkman's death, his son (the plaintiff), William Kirkman, attained twenty-one, and the bill was filed in July, 1845, by William Kirkman and two of his sisters, who had subsequently attained their majority, against the legal personal representatives of the testator's executors, with the exception of the testator's widow; the other children of Joseph Kirkman, the son, and his assignees, seeking the execution of the trusts of the testator's will, and praying that accounts might be taken of the personal estate of the testator possessed by the executors, or which but for their wilful neglect or default might have been received by them, and that an account might be taken of the profits realised by the executors by the carrying on of the brewery business with the assets of the testator after his death, and that it might be declared that the testator's estate was entitled to the benefit of such profits. A like account was also prayed of the testator's freehold, copyhold, and leasehold estates, and the disposition thereof; and it was asked that the defendants might be charged with all losses resulting generally to the testator's real and personal estate from their wilful neglect or default; and that the amount of the testator's residuary real and personal estate which might have been realised by a sufficient investment thereof, according to the directions and trusts of the testator's will, and the amount to which the plaintiffs were entitled in respect thereof might be ascertained.

No. 6. — Kirkman v. Booth, 18 L. J. Ch. 28, 29.

The testator, at the date of his will, carried on the brewery business in copartnership with two other persons, but between that time and his decease he purchased the interest of his co-partners in the business for a sum of £26,000, payable in annual sums of £3000, and thereby he became sole owner of the business, and at the time of his death the brewery business was carried on by the testator and Joseph Kirkman, the son, who continued to carry on the same from the decease of the testator until the year 1816. Joseph Kirkman, the son, occasionally consulted his co-executors touching the same; they, however, took no precaution to preserve the property in the brewery for the benefit of the children of Joseph Kirkman, the son; neither did they take any steps to realise the brewery property. From the year 1803 to the year 1816 the brewery property was left under the sole control of Joseph Kirkman, the son, who made considerable profits therefrom, but no investments were ever made of such profits or of any part thereof. At the time of the bankruptcy of Joseph Kirkman, the son, the value of the brewery property was £10,000. In the year 1807 it was mortgaged for a sum of £7500, consisting of a sum of £4500 remaining due on a former mortgage originally made for £14,000, and a further sum of £3000 advanced by a person named Clarke. The brewery continued in the possession of the assignees from the date of the bankruptcy until the year 1824, and there was no attempt made during that period either to sell or mortgage the same. In the year 1824, the brewery premises having [* 29] become dilapidated, the * equity of redemption therein was released to the mortgagee. In the year 1815, W. Ashlin, one of the trustees, had become a creditor of Joseph Kirkman, the son, and in July of that year an assignment was executed by Joseph Kirkman, the son, alone to Ashlin, of certain houses, the property of the testator, situate near the brewery, for the residue of the unexpired term of years therein, in consideration of the sum of £450, consisting of £300, the amount of a debt then due to Ashlin by Joseph Kirkman, and of £150 cash paid to Joseph Kirkman by Ashlin, and the rent of those houses for the term of ten years then next ensuing was £75 a-year. The testator was, at his death, possessed of furniture, plate, linen, fixtures, &c., which he specifically bequeathed to his wife for life, and on her death the same legacies to form part of his residuary estate. The testator directed an inventory to be taken of the furniture, &c., by

the trustees, and signed by his wife; but that direction was not complied with, and no part of the furniture, &c., or of its proceeds was forthcoming. The executors also converted a sum of £2990 8*s.* 10*d.*, being the balance of a debt due from the testator's estate to one of his partners, into a debt of £5000, £3 per cent consolidated bank annuities. The testator, at his death, was also possessed of certain canal shares, some of which the executors did not realise until the year 1810, having previously paid out of the testator's estate the calls made from time to time in respect thereof, and by reason of the non-payment of the £8000 legacy given to the testator's younger children, no less than three suits in equity were instituted at different times against the trustees relative thereto, in none of which the trustees admitted assets, and which were eventually compromised by payment to the respective legatees of less sums than the full amount due in respect of their claims. The executor Robins had received a large sum of money in respect of commission charged by him for business done for the testator's estate as an auctioneer and estate agent.

Mr. Turner and Mr. J. Baily, for the plaintiffs, contended that the executors, having accepted the legacies given them by the will, as the condition of their administering the testator's estate, and being clothed with the execution of the trusts of the will, were not justified in leaving the testator's property in the possession of one only of their body, but on the contrary were all bound to take care of it for the *cestuis que trust;* that the plant, stock, and gear of the brewery were a wearing-out interest, producing a much larger income than could arise from permanent securities, and therefore ought to have been sold by them within a reasonable time after the testator's death; that if the testator had intended that the brewery business should be carried on by the trustees, he would also have intended that they should be indemnified in doing so, but inasmuch as at the date of his will he was in partnership with two other persons in that business, he could not at that time have intended that the trustees should carry on the business; that the enumeration in the will of the testator's property was simply for the purpose of vesting it in the trustees; that when the testator meant anything to be enjoyed in specie, he had clearly expressed himself to that effect, as in the instance of the gift of the furniture, &c., to his wife; that the testator never could have intended that the £8000 given to his younger children should be merely a

charge on the annual income of his estate, for until sale the testator directs the rents to go in aid of the sums directed to be raised out of his estates, and in a subsequent part of his will he speaks of the residue of his personal estate; that part of the testator's estate might have consisted of promissory notes; and if so, he could not have intended that any part of his estate should remain outstanding on such security, and that his son Joseph should receive the interest of £5 per cent arising from such security, instead of the interest to arise from the proper investment of the monies to be received by the trustees on such notes becoming due and payable; that the conversion of the leasehold premises ought to have taken place at the end of one year after the testator's death; that the fact of the youngest of the plaintiffs having attained the age of twenty-one years in 1841, was a complete answer to any observations that might be made relative to the lapse of time since the deaths of the respective executors and trustees; that in cases where the property bequeathed is of [*30] small value, executors *abstaining from filing a bill ought to receive the protection of the Court in every possible manner in which it could be afforded them, but the case was otherwise where the property bequeathed was considerable; that the plaintiffs were entitled to the inquiries sought against Robins's estate, notwithstanding his assets had been paid away or distributed, as his executors still continued to represent his estate, and must be parties to any suit instituted against the legatees of Robins.

Mr. Walpole and Mr. Micklethwait appeared for some of the defendants having the same interest as the plaintiffs.

Mr. Stinton appeared for the widow of Joseph Kirkman, the son.

Mr. Roupell and Mr. Francis Bayley, for the defendants, the personal representatives of William Ashlin, Thomas Owen, and John Robins, contended that a sale was only an alternative proceeding; that the testator's intention must be collected from the state of his affairs at the date of his will, although the state of things at his death must govern the construction of his will; that the gift of the brewery was of the brewery as it stood at the time of his death, and was a specific gift which the son Joseph was to take the produce of without interruption, subject, however, to the charges created by the will: and the duties of the trustees were only to take effect on the failure of the son Joseph to comply with the directions contained in the will; that the words used by the

No. 6. — Kirkman v. Booth, 18 L. J. Ch. 30.

testator in the present case were stronger than those found in *Pickering* v. *Pickering*, 2 Beav. 31, 8 L. J. (N. S.) Ch. 336, and *Collins* v. *Collins*, 2 Myl. & K. 703; that the fact of the brewery business being carried on at the testator's death in the name of the testator and his son Joseph, manifested an intention that the latter should carry it on after the testator's death; and he was put into possession of the business as the specific legatee of it, and if so, all question as to wilful default was at an end; that the transaction as regarded the lease of the houses to William Ashlin was between Joseph Kirkman, the son, and William Ashlin only, and the executor Thomas Owen had no knowledge thereof, neither was he privy to the conversion of the debt of £2990 8*s.* 10*d.* into a debt of £5000 consolidated bank annuities; and, therefore, as regarded Thomas Owen's estate, at least, there could be only a decree against his executors for a general account; that the executor, J. Robins, having died in the year 1831, and his estate having been afterwards administered in this Court, it ought to be held discharged from the plaintiffs' demands; that the present claim against the estate of the executor, William Ashlin, who died in the year 1826, was one of extraordinary hardship, and ought not to be countenanced by the Court; that as between Joseph Kirkman, the son, and William Ashlin, the transaction as to the leasehold houses, the term in which expired during Joseph Kirkman's lifetime, was a fair one if Joseph Kirkman, the son and tenant for life, had the right of enjoyment of them, there being no trust in the will for conversion; that as regarded the conversion of the balance of £2990 8*s.* 10*d.* into a stock debt of £5000 £3 per cent consolidated bank annuities, Joseph Kirkman, the son, received the whole of the testator's personal estate, and the rents and profits of his real estates, and W. Ashlin advanced to Joseph Kirkman, the son, £450 out of his own moneys on a particular transaction, and so far the stock was W. Ashlin's; but there was some mystery connected with that transaction which could not at the present distant date be explained; and as regarded the amount of commission paid to the executor, J. Robins, as an auctioneer and estate agent, the same must have been paid to some other auctioneer if he had not been employed.

Mr. Turner, in reply.

The case of *Knatchbull* v. *Fearnhead*, 3 Myl. & Cr. 122, was also cited in the course of the argument.

No. 6. — Kirkman v. Booth, 18 L. J. Ch. 30, 31.

Lord LANGDALE, M. R. — There is great difficulty as well as hardship in this case on both sides. The bill seeks an account of the estate of a testator, a large part of whose property consisted of stock in trade, who died forty-two years before the filing of the bill. Having appointed executors and trustees, one of them survived the testator thirteen years, the widow twenty-two years, Ashlin twenty-four years, Robins twenty-eight years, and [*31] the son, who was also an *executor, twenty-eight years; and the survivor died in the month of June, 1831. So that many years have elapsed since the last person who could have known anything personally about the matter died. It is easy to judge what likelihood there is of getting valuable information sufficient to enable the Court with a feeling that justice is done, to give or refuse anything that is asked on such an occasion as this. The testator's will, having regard to the situation in which his property was placed, is attended with no little obscurity. I think that the words of the will are such, that if we had no question of the trade, the son Joseph would have been entitled for his life to enjoy the leasehold property in the condition in which it was found; and, consequently, that I could not declare that the trustees and executors ought within a year after the testator's death to have converted that leasehold into money. It is not at all unlikely under the circumstances that have been stated, that the testator did contemplate the carrying on the trade by his son; but I am of opinion that the words of this will do not distinctly authorise it. The conjecture which may be made is derived from the fact of his not directing any sale of it, (the will having no specific direction for that purpose,) and of his having taken the son into partnership with him, and carried it on in their joint names. That gives rise to no more than a conjecture, but the Court cannot act on a mere conjecture; and I think it is here considered to be a rule that admits of no exception, that to authorise executors to carry on or to permit to be carried on a trade the property of a testator which they hold in trust, there ought to be the most distinct and positive authority and direction given by the will for that purpose. There is nothing of that kind here.

Now, these executors appear after the death of the testator to have not actively interfered, for a time at least, at all. According to their own statement, they permitted the son, then a young man, to possess the whole of the capital and stock in trade, and to

use the capital of the testator and a portion of his estate in carrying on that trade, subjecting the whole of it to all the risks belonging to trade, and those risks ultimately ended in a bankruptcy of the son, J. Kirkman, by which that which had been the property of the testator became vested in the assignees of the son. I do not intend to cast any imputation upon those gentlemen. Considering the words of this will, they may have been (as is suggested) advised that they might safely permit that to be done, or they might have been advised that it was a doubtful point whether it was allowed to be done or not by the will, and that the only mode by which they could relieve themselves from risk was to obtain the direction of a Court of equity. They may have been advised to that effect under circumstances which often induce trustees to undergo risks to which they ought never to have been exposed. So much of doubt there might be on the question, and so much expense in getting the opinion of the Court, that they may have said they would rather run the risk to which they were exposed than put the testator's estate to expense. Such a course is compassionate and considerate; but if it were the course of proceeding here, it cannot be used as an argument that they are not to undertake the risk. They could not be excused by that from the risk, because, if that were the case, they voluntarily undertook it.

Some part of the testator's property was engaged in trade, and some part was not; and I am of opinion that, notwithstanding the great length of time which has elapsed, the plaintiffs are entitled to have this matter fully inquired into. At the same time, I am also of opinion that considering that all the executors are dead, that there is no person now living who can personally give an account of the matter, that all who are here are strangers to it, the executors may very reasonably resist a declaration being made against them at this time, and may desire that they may have the means, if such means can be found (though we do not know where they are to be derived from), of giving every possible explanation which further inquiry may afford.

I think the plaintiffs are entitled to have an account and inquiry as to all the property which the testator possessed at the time of his death, what the executors and trustees have done with it, the circumstances in which it was placed, and what steps they took for the purpose of recovering or receiving any part of the

[*32] property, if they did anything (I am afraid, *looking at their answer, they did nothing), which, without their wilful default, they might have received. With respect to all the other matters, they are not much disputed, and the plaintiffs are entitled to the same inquiry about the converted debt, the inventory, and so on, and in all these things the Master ought to have liberty to state special circumstances, in order, as far as he can, to get out what were the facts of the case, and to come to some satisfactory conclusion. I think there ought to be in this case, as there has been in others, a direction that if the Master cannot satisfactorily take the inquiry, he shall have power to state the circumstances that create the difficulty, in order that these circumstances may come hereafter before the Court. The preparation of the minutes will require a considerable degree of care.

Land v. Land.

43 L. J. Ch. 311-312.

Administrator. — Rights and Liabilities. — Carrying on Trade of Deceased.

[311] In a suit instituted for the administration of the estate of an intestate trader by beneficiaries, where there are infants interested, the Court has no jurisdiction to authorise the administrator to carry on the trade of the intestate.

A house decorator had died intestate, leaving four infant children, and a widow, step-mother to the children. The widow took out letters of administration. The suit had been instituted by [*312] two of the infant children; by the widow as next *friend, against the eldest son as heir, and the youngest as customary heir, for administration of the intestate's real and personal estate. It was brought on as a short cause. In the proposed minutes was an inquiry whether it would be for the benefit of all parties that the intestate's business should be carried on.

Jan. 31. Mr. Villiers, for the plaintiff.

Mr. W. C. Renshaw, for the defendant.

The Master of the Rolls said he did not think that he had jurisdiction to authorise an administratrix to carry on the trade, but that the case might stand over for counsel to look for precedents.

Jan. 24. Mr. Villiers cited *Tinkler* v. *Hindmarsh*, 2 Beav. 348,

and said there were precedents in Seton where executors had been authorised to carry on a business.

The MASTER OF THE ROLLS (Sir G. JESSEL) said that *Tinkler* v. *Hindmarsh* was a creditor's suit, and the creditors could do what they liked with the property; that the powers of executors depended on the will by which they were appointed, and cases with regard to them did not apply to an intestacy, and that he could not make such an order in this suit, where there were infants interested.

The administratrix had better sell the business as soon as she could.

ENGLISH NOTES.

Where executors carry on the trade of the deceased, they are personally liable for the liabilities incurred, unless the liabilities have been contracted on a different footing. *Wightman* v. *Townroe* (1813), 1 M. & S. 412, 14 R. R. 475. This case must be read with caution, as it depends in part upon the law in *Waugh* v. *Carver* (1793), 2 H. Bl. 235, 14 R. R. 845 [overruled in principle by *Cox* v. *Hickman* (1860), 8 H. L. Cas. 268], but the authority of *Wightman* v. *Townroe*, so far as its operation is limited to the nature of the liability of the executors to persons contracting with them being strangers to the trust, is undoubted. *Barker* v. *Parker* (1786), 1 T. R. 287, 1 R. R. 201, 204, per Lord MANSFIELD; *Labouchere* v. *Tupper* (P. C. 1857), 11 Moo. P. C. 198, 5 W. R. 597; *Lucas* v. *Williams* (1861), 3 Giff. 150. The principle is also supported by those cases in which receivers and managers appointed by the Court in the exercise of its equitable jurisdiction have been held personally liable on contracts respecting a business carried on by them for the creditor. *Burt Boltou & Co.* v. *Bull* (C. A. 1894), 1895, 1 Q. B. 276, 64 L. J. Q. B. 232, 71 L. T. 810, 43 W. R. 180.

In addition to the ruling cases, the following may be cited as bearing on the necessity of a special authority: *Strickland* v. *Symons* (C. A. 1884), 26 Ch. D. 245, 53 L. J. Ch. 582, 51 L. T. 406, 32 W. R. 889; *Travis* v. *Milne* (1851), 9 Hare, 141, 20 L. J. Ch. 665. But where trustees are empowered to postpone the sale of the testator's effects, they are entitled to carry on the business for a reasonable time with a view to its sale as a going concern. *Re Chancellor, Chancellor* v. *Brown* (1884), 26 Ch. D. 42, 53 L. J. Ch. 443, 51 L. T. 33, 32 W. R. 465; *Re Smith, Arnold* v. *Smith* (1895), 1896, 1 Ch. 171, 65 L. J. Ch. 269; and see *In re Crowther, Midgley* v. *Crowther* (1895), 1895, 2 Ch. 56, 64 L. J. Ch. 537.

The trustees are not, without express authority, entitled to embark in the business more of the testator's property than was employed in it

at his death. *McNeillie* v. *Acton* (1853), 4 De G., M. & G. 744, 23 L. J. Ch. 11, 17 Jur. 1041.

The executors who by the authority of the testator carry on the testator's trade are (in respect of liabilities incurred in carrying on the trade from the death until an administration order is made in an action by creditors of the testator) entitled to be indemnified out of the testator's estate in priority to the creditors at the death. *Tinkler* v. *Hinchmarsh* (1840), 2 Beav. 348; *Dowse* v. *Gorton* (H. L. 1891), 1891, A. C. 190, 60 L. J. Ch. 745, 64 L. T. 809, 40 W. R. 17; *Re Brooke, Brooke* v. *Brooke* (1894), 1894, 2 Ch. 600, 64 L. J. Ch. 21, 71 L. T. 398. So too the receivers and managers who were the defendants in the case of *Burt Bolton & Co.* v. *Bull* (*supra*) were held entitled to be indemnified in the winding up from all liabilities properly incurred by them, in priority to the claim of the debenture holders, and to the costs of the action. *Strapp* v. *Bull Sons & Co.* (C. A. 1895), 1895, 2 Ch. 1, 64 L. J. Ch. 658, 72 L. T. 514, 43 W. R. 641.

In some cases the testator has directed that particular assets shall be employed in the trade. Where this has been done, the right of indemnity of an executor or of a person claiming through him (*e. g.*, a trustee in bankruptcy of the executor or creditors of the business claiming in an administration action) is limited to the particular fund. *Ex parte Garland* (1804), 10 Ves. 110, 7 R. R. 352; *Ex parte Richardson, Re Hodson* (1818), 3 Madd. 138, Buck. 202, 18 R. R. 204; *Thompson* v. *Andrews* (1832), 1 My. & K. 116, 2 L. J. Ch. 46; *Cuthbush* v. *Cuthbush* (1839), 1 Beav. 184, 8 L. J. Ch. 175, 3 Jur. 142; *Re Johnson, Shearman* v. *Robinson* (1880), 15 Ch. D. 548, 49 L. J. Ch. 745, 43 L. T. 372, 29 W. R. 168.

Where the executor is in default to the estate, or to the fund appropriated to the carrying on of the trade, his right of indemnity is gone, and the right of the trade creditors since the death to follow the estate or the fund falls with it. *Re Johnson, Shearman* v. *Robinson*, *supra*.

Where a long delay has occurred before interfering with executors who have carried on a trade without special authority, the beneficiaries will be taken to have acquiesced in the acts of the executors, and will be liable to indemnify the executors out of the trust estate against their personal liability. *Neate* v. *Pink* (1850), 3 Mac. & G. 476, 21 L. J. Ch. 574, 16 Jur. 69.

In carrying on the trade, the executors may employ an agent: *Wilkes* v. *Lister* (1807), 6 Esp. 78; and that agent may be one of their number: *Toplis* v. *Hurrell* (1854), 19 Beav. 423.

A licensed victualler appointed the brewer and distiller with whom he dealt as his executors, and directed them to carry on his trade. Supplies were furnished by them for that purpose. The Court directed

an inquiry whether the supplies were properly furnished at the ordinary market rate, and refused to limit the amount payable to the executors to the cost price of the articles supplied. *Smith* v. *Langford* (1840), 2 Beav. 362. This case was cited in argument in *Rowley* v. *Adams* (H. L. 1849), 2 H. L. Cas. 725, without any dissent from its doctrine being expressed by Lord COTTENHAM, L. C., Lord CAMPBELL or Lord LANGDALE. Lord BROUGHAM, who (*more suo*) addressed some observations to the House, was not present during the whole of the argument.

Where the testator was a member of a partnership, the surviving partners, and the executors who are not partners but have continued their testator's assets in the business, are not liable to account for profits made in respect of the value of a deceased partner's share unless there is an absolute contract for vesting in the survivors the share of the deceased partner or an option to take his share on certain conditions, and the surviving partners neglect to perform the conditions, or to liquidate the affairs of the partnership. *Vyse* v. *Foster* (1874), L. R. 7 H. L. 318, 44 L. J. Ch. 37, 31 L. T. 177, 23 W. R. 355.

In *Simpson* v. *Chapman* (1853), 4 De G., M. & G. 154, a testator was a member of a partnership at will in a bank, without any provision entitling the executor of a deceased partner to an interest in the goodwill of the concern. The bank was in excellent credit at the testator's death, and the partners were not required to subscribe large sums to the capital. At the testator's death, the property of the concern exceeded its liabilities by a very small amount. The testator kept a private account at the bank, and had overdrawn for an amount exceeding the balance due to him on capital account as a partner. After his death the surviving partners admitted into the firm his son, who was also an executor, but who was not admitted into the firm in that character. The business continued to be carried on without any separation or appropriation of the partnership assets as they existed at the testator's death. The son was held not accountable to the testator's estate for the profits which he had received as a partner in the bank.

AMERICAN NOTES.

The first principal case is approved in 3 Redfield on Wills, p. 257.

The American doctrine is in harmony with this rule. *Hooper* v. *Hooper*, 29 West Virginia, 276; *Estate of Rose*, 80 California, 166; *Estate of Wood*, 1 Ashmead (Penn.), 314; *Altheimer* v. *Hunter*, 56 Arkansas, 159; *Lucht* v. *Behrens*, 28 Ohio State, 231; 22 Am. Rep. 378; *Pitkin* v. *Pitkin*, 7 Connecticut, 307; 18 Am. Dec. 111; *Scholefield* v. *Eichelberger*, 7 Peters (U. S. Sup. Ct.), 586; *Smith* v. *Ayer*, 101 United States, 320; *Jones* v. *Walker*, 103 ibid. 444; *Laughlin* v. *Lorenz's Adm'r*, 48 Penn. State, 275; *Davis* v. *Christian*, 15 Grattan (Virginia), 11; *Stanwood* v. *Owen*, 14 Gray (Mass.), 195. In *Burwell* v. *Mandeville's Ex'r*, 2 Howard (U. S. Sup. Ct.), 560, the Court, by STORY, J.,

observed: "Nothing but the most clear and unambiguous language, demonstrating in the most positive manner that the testator intends to make his general assets liable for all debts contracted in the continued trade after his death, and not merely to limit it to the funds embarked in the trade, would justify the Court in arriving at the conclusion, from the manifest inconvenience thereof, and the utter impossibility of paying off the legacies bequeathed by the testator's will, or distributing the residue of his estate, without in effect saying at the same time that the payment may all be recalled, if the trade should be unsuccessful or ruinous." Citing *Ex parte Garland*, 10 Ves. 110; and *Pitkin* v. *Pitkin*, 7 Connecticut, 307; 18 Am. Dec. 111. In the Ohio case the Court said: "To allow personal representatives of estates to go beyond this, and without authority of law, or under the will, embark the assets of an estate in trade or business, however well intentioned they may be, and thereby subject the estate to all the hazards of the venture, would be to encourage that which it has been the especial policy of the law to prevent, — the employment of trust property in any other mode than is clearly authorised."

The executor however may continue the business long enough to wind it up advantageously. *Merritt* v. *Merritt*, 62 Missouri, 150. And he may continue the business in performance of the testator's covenant so to do. *Laughlin* v. *Lorenz's Adm'r*, 48 Penn. State, 275; *Davis* v. *Christian*, 15 Grattan (Virginia), 11. But in such case the creditors have no lien on the assets of the estate.

And so where the family and next of kin approve. *Poole* v. *Munday*, 103 Massachusetts, 174.

The rule applies as to an executor of a deceased member of a partnership. *Tompkins* v. *Weeks*, 26 California, 50; *Alsop* v. *Mather*, 8 Connecticut, 584; 21 Am. Dec. 703; *Stedman* v. *Feidler*, 20 New York, 437; *Thompson* v. *Brown*, 4 Johnson, Chancery (New York), 619.

"It is certainly not within the ordinary power of a Probate Court to empower an administrator to continue the mercantile business of the deceased." *Altheimer* v. *Hunter*, 56 Arkansas, 159.

No. 8. — BODY *v.* HARGRAVE.

(EX. CH. 1600.)

No. 9. — TILNEY *v.* NORRIS.

(K. B. 1701.)

No. 10. — HOPWOOD *v.* WHALEY.

(C. P. 1848.)

RULE.

THE liability of an executor (or administrator) for rent accrued after the testator's death, when he is sued in his representative capacity, is to satisfy the rent *de bonis testatoris*. When he is sued as assignee of the term, and when the rent reserved by the lease exceeds the value, he is liable, *de bonis propriis*, only for the amount of rent for which the premises could have been let.

An executor (or administrator who has entered) is liable, as assignee of the term, *de bonis propriis*, on a breach of covenant to repair, and irrespective of the value of the land, for dilapidations in his own time.

Body v. Hargrave.

2 Cro. El. 711-712 (s. c. *nom. Hargrave's Case*, 5 Co. Rep. 31 b).

Administrator. — Lease. — Liability for Rent.

Debt against an executor upon a lease for years, for rent incurred after the death of the testator, shall be in the *detinet* only.

Debt against the defendant, administratrix of Thomas [711] Hargrave, her husband, upon a lease to the said Thomas Hargrave by indenture for years, and how the defendant is administratrix unto him. And for rent arrear after his death the action was brought in the *debet et detinet*. Upon not guilty pleaded, it was found for the plaintiff; and now moved in arrest of judgment, that the declaration was not good; for that . . . this [712] declaration ought to have been in the *detinet*, and not in the *debet* and *detinet*, because she hath the term as administratrix,

and is not charged by her own contract, but by an act of the testator; and to that purpose was cited 19 Hen. VIII., pl. 8; 10 Hen. VII., pl. 5; and a precedent was shown in the Common Pleas, between *Barker and Kelsay*, where the action was brought in the *detinet* only; and GODFREY affirmed, that in one *Fenn's Case* in this Court, it was ruled, that the action ought to be brought in the *detinet*. GAWDY. The action is well brought in the *debet;* for this rent, though arrear after the death of the intestate, began first in the administratrix, and therefore the action well lies against her in the *debet:* for the reason why the action against an executor shall be in the *detinet* is, for that the debt grew due by the testator; and therefore it cannot be said, that the executor *debet*. But in an action against the heir, it shall be in the *debet* and *detinet*, because he is bound by special words in the obligation. And here the debt, which incurred in the time of the administratrix, is her debt. And in Dyer, 6 Edw. VI., pl. 81, the action is brought in the *debet* and *detinet*, for rent arrear in the time of the executor, and admitted to be good. — POPHAM *accord.* for she being charged with the rent in her time, it accrues by reason of the profits of the land which she herself received, and therefore she is charged, having *quid pro quo:* for if an executor hath a lease for years of land of the value of £20 per annum, rendering £10 per annum rent, it is assets in his hands only for £10 over and above the rent. — FENNER agreed to this opinion; and to that purpose cited 10 Hen. VI., pl. 11, that the husband shall be charged after the death of the *feme*, for rent arrear in his own time, because he received the profits of the land; so as the rent grew due in respect of the occupation and taking of the profits, and therefore she is chargeable, and not merely as administratrix. — CLENCH agreed with him. Wherefore it was then adjudged for the plaintiff. — NOTE. This judgment was afterwards reversed in the Exchequer Chamber for the point in law; for ALL THE JUSTICES of the Common Pleas, and BARONS of the Exchequer held, that she ought to be charged in the *detinet;* because she is charged only by the contract of the intestate.[1]

[1] The reversal of this judgment is not mentioned in the report of this case, 5 Co. Rep. 31 b; but it is there said by the editor to have been often denied to be law. Cro. Jac. 545; Cro. Car. 163; 1 Mod. 185; 1 Vent. 271; 1 Sid. 266, 342, 379; 2 Jones, 169. See 16 & 17 Car. II., c. 8.

No. 9. — Tilney v. Norris, 1 Ld. Raym. 553, 554.

Tilney v. Norris.

1 Ld. Raym. 553–555 (s. c. Salk. 309; Carth. 519).

Administrator. — Lease. — Liability for Repairs.

The personal representative of a lessee for years is his assignee. R. acc. Salk 316, pl. 25; D. arg. Dougl. 176. A covenant to repair binds an assignee.

An action of covenant was brought against an adminis- [553] trator for a breach of covenant in his own time for not repairing the premises. The *quære* arose upon the declaration, it being alleged generally, *quod status de et in præmissis legitime devenit* to the defendant;[1] whether the administrator of a lessee for years is not chargeable in his own right in this case for a breach of covenant in his own * time. And Mr. [* 554] Peere Williams argued for the plaintiff, that this was a covenant which ought to be performed upon the land, and runs with it, and binds the assignee. 5 Co. Rep. 16, *Spence's Case;* Moor. 399. *The Dean and Chapter of Windsor's Case*, 5 Co. Rep. 24, the same case. And the assignee of part shall be chargeable with this covenant. *Congham* v. *King*, Cro. Car. 222, pl. 8, W. Jon. 245, pl. 3. And for the same reason an executor or administrator shall be chargeable as tenant of the land, as every other possessor is, for a breach of covenant in their own time. And if the law should be otherwise, it would be a great hardship to the landlord, who (as is said in the case of *The Dean and Chapter of Windsor*, in 5 Co. Rep. 24 a, Cro. El. 457, pl. 1, 552, pl. 3) leased his land at a less rent for this consideration; for it may be, that the testator did not leave any assets; but that would be no hardship to the administrator, because he might waive the term, or assign it over, and discharge himself, if the premises were in so bad a condition as not to be worth being repaired. And there are many cases which will warrant this, as 5 Co. Rep. 31, *Hargrave's Case*. Debt against the administrator in the *debet* and *detinet* for rent incurred in the administrator's time; which case is the stronger, because it appeared that the defendant was administrator, upon the declaration. 2 Inst. 302. The executor or ad-

[1] And according to Carthew, 519, that the defendant entered, for if he had not entered he would not have been chargeable as assignee. *Vide* Salk. 316, pl. 25; Dougl. 438.

ministrator of a tenant for years shall be punished for waste done in their own time. And 1 Anders. 52, that the judgment for the damages shall be against them *de bonis propriis.* And there is no difference between permissive and voluntary waste, that will influence this case, because this breach of covenant is in nature of permissive waste; except that the case of waste is stronger, because treble damages are recoverable there, but single damages only in covenant. And if the executor assigns over, waste will lie against him in the *tenuit;* therefore it is not hard to support this action; and judgment shall be against him *de bonis propriis.* Office of Exec. 280. A man may be charged as executor barely, where he might be charged as assignee, as Allen, 42, debt will lie against an executor in the *detinet* for rent incurred in his own time. And therefore he admitted all the cases to be law, where in actions of covenant brought against executors for breaches in their own time, the judgments are *de bonis testatoris;* because in the said cases they are named executors, and charged as such; but in this case the defendant is charged as assignee, and as assignee he ought to be charged *de bonis propriis.* And for these reasons he prayed judgment for the plaintiff, and judgment was given for the plaintiff, *nisi,* &c., because no counsel attended for the defendant; though Holt, Chief Justice, said, that he had a mind to hear counsel of the other side. *Ex relatione m'ri Jacob.* Afterwards this was argued twice at the Chief Justice's cham-
[* 555] ber, by Mr. Peere Williams, and * by Serjeant Wright for the defendant; and after mature deliberation the plaintiff had judgment.

Hopwood v. Whaley.

18 L. J. C. P. 43–48 (s. c. *nom. Hopwood* v. *Bayley,* 6 C. B. 744; 6 D. & L. 342; 12 Jur. 1088).

Executor. — Lease. — Liability for Rent.

[43] When a lease for years, by which the rent reserved is more than the value of the premises, vests in an executor, the executor is liable as assignee for the amount of rent which the premises could have been let for.

To a declaration in debt on a lease, for rent at £90 a year for two years and three quarters, due from defendant as assignee, the defendant pleaded "that he ought not to be charged with the said rent otherwise than as executor of W., who died possessed of the term: that he, the defendant, entered upon the said premises as such executor, and that he had not at any time since the death of the said W. derived any profit or advantage as such executor or otherwise, by or

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from the said premises; that the said premises had not since the death of the said W. yielded any profit whatever; that the said premises did not vest in the defendant by * assignment or otherwise than as such executor, and [* 44] that he has no assets to be administered." Replication, "that the defendant did after his entry upon the said premises derive great profit and advantage by and from the said premises, which have yielded to him profit (to wit) to the amount of the said rent sought to be recovered." It was proved that the premises could have been let for £60 a year, and the jury found a verdict for the plaintiff for £165 (being rent at £60 a year for two years and three quarters). *Held*, that after verdict the plea must be taken to contain the allegation that the defendant could not have derived any profit whatever from the premises, and that the verdict was properly found for the plaintiff for £165.

Held, also, that the plea was to be construed as applicable distributively to each part of the sum demanded, in the first count of the declaration; and thus, though the action was debt and the only plea to the first count was found for the plaintiff, yet he was only entitled to a verdict for so much of the sum claimed in the first count as could have been derived from the premises.

Debt. The first count of the declaration stated that by an indenture of lease made between the plaintiff of the one part, and one William Whaley of the other part, a certain messuage and premises with the appurtenances were demised by the plaintiff to the said W. Whaley, his executors, administrators, and assigns, for twenty-one years from Christmas, 1834, at a rent of £90 a year, payable quarterly; that on the 8th of April, 1843, all the estate and interest of the said W. Whaley came to the defendant by assignment; that the defendant entered, &c., and that after the said assignment and during the said term, and whilst the defendant was possessed, to wit, on the 26th of March, 1846, the sum of £247 10*s.* for rent for two years and three quarters from June, 1843, became due and is in arrear, contrary to the form and effect of the said indenture, &c. The last count was for the same amount due on an account stated.

Pleas — First, to the last count, never indebted. Issue.

Lastly, as to the first count, the defendant says that he ought not to be charged with the said rent so due and owing as in the said first count mentioned or any part thereof, otherwise than as the executor of the last will and testament of the said William Whaley, deceased, because he says that the said William Whaley, since deceased, in his lifetime, to wit, on the 26th day of March, 1843, duly made and published his last will and testament in writing, and thereby constituted and appointed the defendant executor thereof, and afterwards and after the making of the said

indenture in the declaration mentioned, and during the term thereby granted, to wit, on the 27th of March, 1843, the said William Whaley died possessed of the said premises, and without revoking or altering his said will, after whose death, to wit, on the 20th of June, 1843, the defendant duly proved the said will, and took upon himself the burden of the execution of the same; and thereupon, afterwards, to wit, on the day and year last aforesaid, as such executor as aforesaid, entered into and upon the said demised premises and became and was possessed thereof for the residue of the said term by the said indenture granted and then yet to come and unexpired of and in the said demised premises with the appurtenances; and the defendant further saith, that he has not at any time since the death of the said William Whaley had, received, or derived any profit, interest, or advantage as such executor, or otherwise, by or from the said demised premises with the appurtenances or any part thereof; and that the said demised premises with the appurtenances or any part thereof have not since the death of the said William Whaley yielded any profit whatever; and the defendant further saith, that the estate and title, right and term of years of the said William Whaley of and in the said demised premises with the appurtenances or any part thereof did not at any time come to or vest in the defendant by assignment otherwise than as such executor as aforesaid, and that the said entry of the defendant in the declaration mentioned was made by him as such executor as aforesaid; and the defendant further says, that he has not, nor at the time of the commencement of this suit, or at any other time since, had any goods or chattels which were of the said William Whaley, deceased, at the time of his death [* 45] in the hands of the defendant to be administered. * And this the defendant is ready to verify, &c.

Replication to the plea to the first count, that the defendant did after his entry into and upon the said demised premises with their appurtenances, as in the said first count alleged, have, receive, and derive great profit, interest, and advantage by and from the said demised premises with their appurtenances, and every part thereof, which have yielded to him great profit, to wit, to the amount of the said rent in and by the said first count sought to be recovered. Issue.

This action was tried, before WILLIAMS, J., at the sittings for Middlesex, after Trinity Term, 1847, when it appeared by a lease

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dated February, 1835, that the plaintiff demised a messuage and premises, with the appurtenances, to William Whaley, for twenty-one years from Christmas, 1834, at £90 per annum, payable quarterly. William Whaley died in March, 1843, having paid the rent due up to Christmas, 1842. He left a will, appointing the defendant his executor, who duly proved the same. The defendant entered upon the premises, and occupied them during the month of May, 1843. In the month of June a sale took place on the premises, and the defendant paid rent up to June, 1843. Since April, 1843, the defendant had endeavoured but had been unable to find a tenant for the premises at the reserved rent, and had never received any profit from them. In Easter Term, 1846, the plaintiff recovered possession of the premises in ejectment, and by this action sought to recover from the defendant rent for two years and three quarters, from June, 1843, to March, 1846, at the rate of £90 a year, amounting to £247 10*s*. For the defendant it was contended that the question on the pleadings was whether the defendant had derived any profit or advantage from the premises since he became executor. The plaintiff proved that the premises might have been let to a tenant for £60 a year, and it was contended, first, that he was entitled to recover the whole sum; or, secondly, that he was at least entitled to recover rent at the rate of £60 a year, viz., £165.

The learned Judge left two questions to the jury — First, Did the defendant, in fact, derive any profit or advantage from the premises; and if so, to what amount? Secondly, Could the defendant by exercise of reasonable diligence have derived any profit or advantage from the premises; and if so, to what amount? To the first question the jury answered that the defendant had derived profit for one quarter of a year, to the amount of £22 10*s*. To the second question, that the defendant could have let the premises, by exercising due diligence, at £60 a year, for the period of two years and three quarters, amounting to £165. Upon this finding, the verdict was entered for the plaintiff for the full amount claimed, £247 10*s*., leave being reserved to the defendant to move to enter a verdict for him, or to reduce the amount.

A rule had been obtained, by Talfourd, Serj., in Michaelmas Term, 1847, calling upon the plaintiff to show cause why the verdict should not be set aside, and instead thereof a verdict entered for the defendant, or why the damages found for the said plaintiff

should not be reduced to the sum of £165, or to £22 10*s.*, or to the sum of 1*s.*

Channell, Serj., and Bramwell showed cause. — First, the only plea to the first count states that the defendant received no profit or advantage from the premises; the jury have found that he did, for one quarter of a year. The plea therefore is disproved, and so the verdict must be for the plaintiff. It was not incumbent on the plaintiff to show that the defendant had received profit, and the question of amount is not raised by the pleadings. The plaintiff is, therefore, entitled to the full amount of the rent reserved by the lease, and for the whole period, viz., £247 10*s.* Secondly, the plea to the first count must be taken to be a good plea after verdict, and then it must mean that the defendant did not receive and could not have got any profit or advantage from the premises; but the jury have negatived this, and have found that the premises were worth £60 a year, so the verdict must be for the sum of £165 at the least. *Rubery* v. *Stevens*, 4 B. & Ad. 241; 2 L. J. (N. S.) K. B. 46, shows that a plea of this kind means "that the demised premises were of no value whatever," and the replication here (as a similar replication did there) puts that allegation in issue. It will be said that the premises were of no value, as the defend-
[*46] ant *has received nothing, but he cannot so take advantage of his own negligence; he might have let them for £60 a year, and he is so far liable. *Hornidge* v. *Wilson*, 11 Ad. & E. 645; 9 L. J. (N. S.) Q. B. 72. It is as if the defendant had committed a *devastavit* to that extent. Acts of negligence or careless administration, which defeat the rights of creditors, amount to a *devastavit*. Executors must use due diligence, and not suffer the estate to be injured by their neglect. Williams on Executors, vol. 2, 1283, 2nd edit.

[Maule, J. — The plea says that the premises yielded no profit. That is not an allegation that the premises were of no value whatever.]

In *Tremeere* v. *Morrison*, 1 Bing. N. C. 99; 3 L. J. (N. S.) C. P. 260, Bosanquet, J., says: "The general rule is that the executor of a lessor is liable as assignee, except that with respect to rent his liability does not exceed what the property yields." That expression cannot be considered as favourable to the defendant. It means, as this plea does, "what the property could have been made to yield." If profit could have been made the defendant's liability

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attaches. Thirdly, it is quite consistent with the terms of this plea that the defendant had assets between the time of the death of his testator and the commencement of this suit. *Reid* v. *Lord Tenterden*, 4 Tyrw. 111, shows that a plea which does not negative the fact of such intermediate assets is no answer to the action. Lastly, the action is in debt, and the rule is drawn up for leave to reduce the damages to 1*s*. The damages are merely nominal in this form of action; and as there is no plea of *nunquam indebitatus* to the first count, the debt is admitted, and on this record no evidence of amount was necessary. In *Macintosh* v. *Weiller*, 1 Moo. & R. 505, it was doubted whether in an action of debt, the defendant pleading payment, and not appearing to support his plea, the plaintiff is bound to prove the amount of his debt.

Hayes (Talfourd, Serj., with him), for the defendant. — It is difficult to define the exact extent of an executor's liability. An executor cannot waive the term, unless he waives the executorship. *Billinghurst* v. *Speerman*, 1 Salk. 297. It is said in *Wollaston* v. *Hakewill*, 3 Man. & G. 297; 10 L. J. C. P. 303, "he may be charged as assignee whether he enter or not, and becomes liable *de bonis propriis*, — but he may discharge himself from personal liability by proving that he is no otherwise assignee than by being executor, and that he has never entered; and from all liability as executor by alleging that the term is of no value, and that he has fully administered all the assets." Here the defendant has entered, and his liability is to the extent of his profits. *Hargrave's Case*, 5 Co. Rep. 31 *b*; *Buckley* v. *Pirk*, 1 Salk. 316; 1 Wms. Saund. 111, n. *a*. In *Rubery* v. *Stevens* and *Hornidge* v. *Wilson* there had been a beneficial occupation, and to that extent the executor was held liable. In this case the executor has not been able to let, and in fact he proved that the premises had been a loss. The jury have found that with due diligence the defendant might have made £60 of premises for which the reserved rent is £90 a year. That is a strange finding, and if such had been done, the premises would have been permanently depreciated. *Remnant* v. *Bremridge*, 8 Taunt. 191; 2 Moore, 94 (19 R. R. 495), is not distinguishable, and shows that this defendant is not liable.

[Williams, J. — That is clearly a hasty judgment. The defendant was not sued as administrator, and it is there said, "If the defendant were not in possession he could not be liable to discharge the rent *de bonis propriis*; for, in the first place, he might

have pleaded that the premises were of less value than the rent; and, secondly, that he had no assets." That is not so.]

I take that to mean that the administrator may reduce his liability to the value of the premises. It was there proved that the defendant had derived no benefit whatever.

[MAULE, J. — It does not appear what the land was. It might have been a worn-out stone quarry.]

If the case had turned upon special circumstances they would have been reported. The premises here were not [*47] liable to poor-rates. The only difference in the two * cases is between a possession of eight months in that case, and of two years and three quarters in this. In *Reid* v. *Lord Tenterden*, it is said by BAYLEY, B., an offer to surrender has no retrospective operation. Lastly, there is no issue here upon due diligence. The jury were not asked if the defendant had used due diligence to let, but to let at £60 a year. The question is, Has there been a profit or no profit? The defendant proved there had been a loss.

[WILLIAMS, J. — Suppose the plea had been found for you, after verdict would it not have been said, the premises must have been found to have been of no value whatever? Suppose the executor wilfully abstains from receiving profits?]

The terms of the plaintiff's issue clearly are — the defendant has received profit; but it was not shown that the defendant had received a farthing.

[MAULE, J. — The issue is on you. Although you allege a negative the presumption is against you, and it is a matter within your own knowledge.]

The test of liability as upon a *devastavit* is not applicable to the facts of this case. If an executor has received assets and maladministered he is liable, otherwise not. Such is the rule of law. The jury really found here the executor had received none. In equity, due diligence is held to be necessary, because an executor is there looked upon as a trustee.

COLTMAN, J. — The case of *Remnant* v. *Bremridge* has not been generally approved of. Mr. Justice Patteson says in *Hornidge* v. *Wilson*, "That case is unintelligible to me as reported." Since the decision of *Rubery* v. *Stevens*, the law has been clear that an executor cannot discharge himself from liability as assignee, without showing that the premises have not been of any advantage whatever, and that he has no assets. It is difficult, therefore, to see

how the decision in *Remnant* v. *Bremridge* is to be sustained. It may be that the principle of law was erroneously applied to the real facts of that case, which principle is based on the presumption that there are no assets, that the premises were not of any value and produce no profit. In this case the plea must be understood in such a sense as will make it a good plea if possible, and then the averment that the defendant has derived no profit or advantage from the premises means that he neither did nor could have derived any profit or advantage whatever. If the plea does not mean that, it is no answer to the action. The replication puts the whole plea in issue, and the question therefore is, whether the defendant has or could have received profit or advantage to the extent of the rent or any part thereof. The facts of the case negative the view taken by the defendant, for the jury have found that by the exercise of reasonable diligence he might have got a rent of £60 a year for them. Then, as this is an action of debt, and the only plea to the first count is found against the defendant, it is said to be doubtful in such a state of the record, whether the plaintiff is not entitled to recover the whole amount of the rent for which the action is brought, namely, rent for two years and three quarters, at the rate of £90 a year. But I think that the plea is to be taken distributively, and that it means that the defendant could not receive the rent or any part thereof, and in this view the plaintiff will be entitled only to a verdict for that amount of rent and profit which might have been obtained by him, and that is found to be a rent of £60 a year for two years and three quarters, or £165.

Maule, J. — I am of the same opinion. The cases on this subject, where the rent reserved by a lease exceeds the value of the premises which come to an executor, are involved in some difficulty and perplexity. But on the decided cases as well as on principle, I should say, that an executor is liable in the character of assignee to the extent of the value of the premises when not more than the rent reserved; and if the value be more, still he is only liable to the rent reserved. After verdict, this plea is to be understood as meaning that the defendant had no special assets, that is, that he derived no value from the premises applicable to the payment of rent; the words of the plea are, "that he has not at any time since the death, &c., received or derived any profit, interest, or advantage as such executor or otherwise by or from the said demised premises with the *appurtenances. This is put in [*48]

issue by the replication; and the question is, how is the verdict to be entered, regard being had to the facts found? The jury have said, that by the exercise of reasonable diligence the defendant might have got a rent of £60 a year for two years and three quarters. It was proved that the defendant entered into the premises and took upon himself the management of them, and that he had the opportunity of making £60 a year by them. Whether he made the best use of this opportunity or not is of no consequence; he might have made that sum of them, and was at liberty to do so or not, as he pleased. Now, construing this state of facts with reference to the law and the defence attempted to be set up, the result is, "that the defendant has had profit and advantage to the extent found by the jury, which is £165." It is however suggested, that upon these pleadings the plaintiff is entitled to the whole of his demand, £247 10s. Looking at the abstract justice of the case, the defendant ought to be liable for £165 only; but a difficulty arises, because this is an action of debt; and there is no plea of never indebted to the first count, and thus the only plea to that count is found against the defendant. I think, that, looking at this plea, we may construe it as applicable distributively to the first count, and as alleging that to each part of the plaintiff's demand the defendant had no assets to meet such part. That is construing it in the nature of a plea of payment to the sum demanded beyond £165. Then to that extent the plea was proved, and it was disproved as to the residue.

Williams, J. — I have no doubt it was my duty, at the trial, to give the plea a sense which would make it good after verdict, namely, that the premises were worth nothing. But taking a more limited view of it, the facts proved warranted the verdict for £165. I have had considerable doubts whether the plea can be considered as distributive, but on the whole I think we may so take it, and that the verdict should be entered for £165.

Rule discharged.

ENGLISH NOTES.

The report in Coke (*Hargrave's Case*) does not mention the reversal of the judgment of the King's Bench in the Exchequer Chamber. The report in Coke, it seems, from the note to Cro. Eliz., was dissented from as often as cited. The numerous editors of Lord Raymond's reports have noted a variation in the report of *Tilney* v. *Norris* as given in Lord Raymond and in Carthew; namely, that the former does not state that

the defendants had entered. In regard to an executor this would be immaterial. The person to whom lands are demised must, no doubt, enter in order to be regarded as tenant for all purposes; but it is clear that an executor need not enter to perfect his title as assignee, proof of the will or intermeddling being sufficient. *Bolton* v. *Canham* (1676), Pollexf. 125, 1 Vent. 271; *Wollaston* v. *Hakewill* (1841), 3 Man. & G. 297, 3 Scott (N. C.), 593, 10 L. J. C. P. 303. In the former case intermeddling with part of the estate (apparently without proving), and in the latter proving the will, have been held sufficient to fix the executor with liability as assignee. In an action for use and occupation under the 11 Geo. II., c. 19, against executors, it is not necessary that there should have been an entry. *Atkins* v. *Humphrey* (1846), 2 C. B. 654, 3 D. & L. 612, 15 L. J. C. P. 120.

The subject matter of the present rule was briefly adverted to in the notes to *Barry* v. *Rush* and *Erving* v. *Peters*, Nos. 2 and 3 of "Devastavit," 9 R. C. 328.

For rent accrued in the lifetime of the testator, the executor is only liable *de bonis testatoris*, or as it used to be expressed, he could only be sued in the *detinet*, and not in the *debet* and *detinet*, for the debt was the testator's. 1 Roll. Abr. 603 (S), pl. 9; *Fruen* v. *Porter* (1670), 1 Sid. 379, pl. 10. This is confirmed by *Wigley* v. *Ashton* (1819), 3 B. & Ald. 101, 22 R. R. 316. There a husband and wife who was administratrix with the will annexed were sued in *assumpsit* upon promises by the testator to pay the rent, and also in *assumpsit* for use and occupation since the death of the testator. This was held to be a misjoinder of counts, as the liability for the rent in the testator's lifetime was only a liability to satisfy out of assets, while in an action for use and occupation the liability was personal. It was with a view to avoid the effect of this decision that the declaration was framed in *Atkins* v. *Humphrey*, *supra*. There the plaintiff declared in *assumpsit* "that the defendants, as executors . . . were indebted to the plaintiff in £100 for the use and occupation of certain . . . premises and appurtenances, of the plaintiff by the defendants, as executors as aforesaid, held of the plaintiff for a long time before then elapsed, under and by virtue of a certain demise thereof made to the [testator], and thereupon afterwards . . . in consideration of the last mentioned premises, the defendants, as executors as aforesaid, promised the plaintiff to pay him the last mentioned sum, yet they as executors as aforesaid, had not paid that sum, or any part thereof." This was held, on demurrer, a good declaration to charge the executors *de bonis testatoris*, under the statute 11 Geo. II., c. 19.

Remnant v. *Brembridge* (1818), 8 Taunt. 191, 2 Moore, 94, 19 R. R. 495, is certainly an authority that the special matter necessary to limit

the liability of the personal representative when sued as assignee could be given in evidence under the general issue. The criticisms on this case, however, in *Hopwood* v. *Whaley*, the third principal case, and in *Rubery* v. *Stevens*, there cited, seem to show that the safer course would have been to plead the matter specially. *Hopwood* v. *Whaley* was decided in the Common Pleas and *Rubery* v. *Stevens* in the King's Bench, but the Court of Exchequer also seem to have regarded an argumentative traverse of liability as permissible in this case. *Kearsley* v. *Oxley* (1864), 2 H. & C. 896.

The executor cannot get rid of his liability by an offer to surrender the lease, where the lessor refuses to accept it. *Bolton* v. *Cannon* (1676), 1 Vent. 271, Pollexf. 125; *Sleap* v. *Newman* (1862), 12 C. B. (N. S.) 116, 6 L. T. 386.

In *Ibbs* v. *Richardson* (1839), 9 A. & El. 849, 1 Perry & Dav. 618, 8 L. J. Q. B. 126, 3 Jur. 102, a testator died possessed of the residue of a term. The executors sublet the premises from year to year, subject to the determination of their own interest. At the expiration of the term the under-tenant refused to give up possession. The executors distrained on the goods of the under-tenant, and having obtained possession from their under-tenant offered the vacant possession to the lessor. This the lessor refused and claimed a quarter's rent. In an action for use and occupation, the lessor was held entitled to recover against the executors for the period between the expiration of the term and the day when possession was tendered. Here the possession of the under-tenant was referred to the executors, and their liability became fixed upon the principles of *Harding* v. *Crethorn* (1793), 1 Esp. 57, 5 R. R. 719; and *Henderson* v. *Squire* (1869), L. R. 4 Q. B. 170, 38 L. J. Q. B. 73, 19 L. T. 601.

The subject of "Dilapidations" and the extent of the liability have been discussed in 9 R. C. The ruling cases bearing on the subject are *Horsefall* v. *Mather*, *Gutteridge* v. *Munyard*, *Burdett* v. *Withers*, and *Lister* v. *Lane & Nesham*, Nos. 5, 6, 7, and 8 of "Dilapidations," 9 R. C. 463, 474. A covenant to repair runs with the land, and binds the assignees, although they are not named. *Martyn* v. *Clue*, and the other cases cited 9 R. C. 484. *Tilney* v. *Norris*, the second principal case, is confirmed by *Hornidge* v. *Wilson* (1840), 1 Ad. & El. 645, 3 P. & D. 641, 9 L. J. Q. B. 72; *Wollaston* v. *Hakewill* (1841), 3 Man. & Gr. 297, 3 Scott N. C. 593, 10 L. J. C. P. 303; *Sleap* v. *Newman* (1862), 12 C. B. (N. S.) 116, 6 L. T. 386.

The liability of an executor in respect of rent, and covenants, has been modified by Lord St. Leonards' Act, 22 & 23 Vict., c. 35. The provisions of section 27 are as follow: "Where an executor or administrator, liable as such to the rents, covenants, or agreements contained

in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be), of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed." Section 28 contains similar provisions respecting conveyances upon chief rent or rent-charge. It seems clear from the words used, and also from the scope of the enactments, that the provisions of sections 27 and 28 of Lord St. Leonards' Act are only intended to apply to the liability of the executor or administrator in his representative capacity; for if we refer the "such" to the last, and in this case only, antecedent, it is "liable as executor or administrator." Then as to its scope. An executor sued in his representative capacity could not, prior to the statute, get rid of his liability on the express covenant of his lessee, or on the covenant in law by the *reddendo*, by an assignment, unless the assignee were accepted by the lessor. *Coghill* v. *Freelove* (1691), 2 Vent. 309, 3 Mod. 325; *Vyvyan* v. *Arthur* (1823), 1 B. & C. 410, 2 Dowl. & Ry. 670, 1 L. J. (O. S.) K. B. 138, 25 R. R. 437; and the notes to *Thursby* v. *Duppa*, 1 Wms. Saund. 305, 306, ed. 1871. But as regards any claim against him as assignee, he could terminate his liability by assigning over even to a pauper, and although his assignee did not take possession. *Le Keux* v. *Nash* (1745), 2 Str. 1221; *Taylor* v. *Shum* (1797), 1 Bos. & P. 21, 4 R. R. 759; *Odell* v. *Wake* (1813), 3 Camp. 394, 14 R. R. 763; *Onslow* v. *Corrie* (1817), 2 Madd. 330. But, as already intimated, his liability remained for breaches during the continuance of

his interest. *Harley* v. *King* (1835), 5 Tyrwh. 692. Nor does the fact that section 27 speaks of a term "assigned to the testator or intestate" militate against this view. Each successive assignee during the continuance of his interest is liable to indemnify the original lessee against the rent and covenants notwithstanding, where there are several assignments, an express covenant to indemnify the immediate assignor. *Moule* v. *Garrett* (Ex. Ch. 1872), L. R. 7 Ex. 101, 41 L. J. Ex. 62, 26 L. T. 367, 20 W. R. 416; *Re Russell, Russell* v. *Shoolbred* (C. A. 1885), 29 Ch. D. 254, 53 L. T. 365. And in the case of the death of the assignee his estate continues liable, until an assignment over by the personal representative. *Rowley* v. *Adams* (1839), 4 My. & Cr. 534, 9 L. J. Ch. 34. Although in the last-mentioned case this liability would have ceased upon an assignment over. *Ibid.* The object of the sections is to enable the executor or administrator to divide the estate among the beneficiaries without having the protection of an administration under the direction of the Court; for prior to this statute the division of the property without providing for the liabilities mentioned in sections 27 and 28 would have been sufficient to entitle the sheriff to return a *devastavit*, or to be the foundation of a suggestion of a *devastavit* in an action of debt upon the judgment. Next as to the covenants respecting matters other than rent. If these covenants run with the land, or bind the assignee if named, the liability of the assignee only continues while there is privity of estate, that is until assignment over. *Vernon* v. *Smith* (1821), 5 B. & Ald. 1, 23 R. R. 257; *Williams* v. *Earle* (1868), L. R. 3 Q. B. 739, 37 L. J. Q. B. 231. But an original lessee would remain liable after an assignment over. *Coghill* v. *Freelove* (1691), 2 Vent. 209, 3 Mod. 325; *Auriol* v. *Mills* (1790), 4 T. R. 94, 2 R. R. 341. It is difficult to suppose that the statute was intended to apply to a liability which the executor or administrator could always get rid of by immediately assigning over, as well as to a real liability to the extent of the assets in case of his being sued as representative. Where the covenant is personal or collateral, it will not bind the assign although named. *Gorton* v. *Gregory* (Ex. Ch. 1862), 3 B. & S. 90, 31 L. J. Q. B. 302.

But to claim the benefit of the sections, the personal representative must assign (or convey) to a purchaser. This apparently means a purchaser for value. He must satisfy all demands up to the date of assignment, and set aside a sufficient sum to satisfy the contingent claim (if any). This would hardly afford the executor much protection if he is possessed of an onerous lease and an insolvent estate.

It would seem that it is not incumbent on a lessor or other person seeking to follow the assets into the hands of the beneficiaries, to make the executor or administrator a party in the first instance, but

the beneficiaries may add the personal representative. *Hunter* v. *Young* (C. A. 1879), 4 Ex. D. 256, 48 L. J. Ex. 689, 41 L. T. 142, 27 W. R. 637.

As regards the personal liability of the executor for the rent and repairs, he would as a trustee perhaps be entitled to be recouped. But it is the duty of the executors to take prompt steps to relieve, so far as possible, the estate of the testator from a charge of property of an onerous nature. *Rowley* v. *Adams* (1839), 4 My. & Cr. 534, 9 L. J. Ch. 34. The testator in that case was assignee of a lease the value of which was less than the rent reserved. And in administration proceedings the executors were ordered to take such steps as might be necessary to relieve the testator's estate from liability. This the executors sought to obey by offering to surrender the lease, but the lessor refused to accept a surrender. The executors took no further steps towards complying with the order, and Lord Cottenham, L. C., held that the executors were bound to exonerate the testator's estate from the liabilities to which it had been made subject in respect of the lease since the time at which they might have made such an assignment; and affirmed the order of Lord Langdale, M. R. Indeed before the Judicature Act, 1873, a creditor who had obtained a judgment against a personal representative, entitling him to execution *de bonis propriis*, was never restrained from enforcing that judgment as against the executors or administrators. *Terrewest* v. *Featherby* (1817), 2 Mer. 480, and the cases there cited in the notes; *Kent* v. *Pickering* (1832), 5 Sim. 569; *Burles* v. *Popplewell* (1839), 10 Sim. 383; *Lucas* v. *Williams* (1861), 3 Giff. 150. The principle of these cases has been applied since the Judicature Acts. *Payne* v. *Tanner* (1886), 55 L. J. Ch. 611, 55 L. T. 258, 34 W. R. 714. There the estate of an executor was fixed with liability on the ground that by a letter written by him, and his conduct in paying interest on the sum admitted by a letter, he had estopped himself from denying that he had assets of his testator to answer the claim of a beneficiary. This branch of the law of estoppel was discussed under *Barry* v. *Rush* and *Erving* v. *Peters*, Nos. 2 and 3 of "Devastavit," 9 R. C. 328.

AMERICAN NOTES.

On a covenant to pay rent, contained in a lease to a decedent, his estate is liable for the rent accruing after his death, and an action lies against his personal representatives therefor. *Alsup* v. *Banks*, 68 Mississippi, 664; *Montague* v. *Smith*, 13 Massachusetts, 405; *Yarborough* v. *Ward*, 34 Arkansas, 204; *Traylor* v. *Cabanne*, 8 Missouri Appeals, 131.

This is so whether the personal representative has entered on the land or not: *Howard* v. *Heinerschit*, 16 Hun (New York Supr. Ct.), 177; or if he has transferred the lease: *Pate* v. *Oliver*, 104 North Carolina, 458.

No. 1. — Curtis v. Vernon, 1 T. R. 587. — Rule.

Action lies against an executor for breach of the deceased lessor's covenant to rebuild in case of destruction by fire. *Chamberlain* v. *Dunlop*, 126 New York, 45; 22 Am. St. Rep. 807; citing *Tilney* v. *Norris*.

But a perpetual covenant for ground rent does not survive against an executor except as to breaches committed in the testator's lifetime. *Quain's Appeal*, 22 Penn. St. 510.

EXECUTOR DE SON TORT.

No. 1. — VERNON *v.* CURTIS

(EX. CH. 1792), IN ERROR FROM

CURTIS *v.* VERNON

(K. B. 1790).

No. 2. — HOOPER *v.* SUMMERSETT.

(EX. 1810.)

RULE.

AN executor *de son tort* cannot discharge himself unless he hands over the property to the rightful representative before proceedings are commenced.

Curtis and another v. Vernon, Executor of Palmer.

3 Term Reports, 587–590; 2 H. Bl. 18–26 (1 R. R. 774).

Executor de son Tort. — Liability.

[587] An executor *de son tort* cannot discharge himself from an action brought by a creditor by delivering over the effects to the rightful executor after the action is brought. Nor can he retain for his own debt of a higher nature by consent of the rightful executor given after the bringing of the action by the creditor.

Case on promises by the testator. Pleas, 1st, *Ne unques* executor. 2dly, *Plenè administravit*. 3dly, That Palmer died intestate, and that the defendant never was executor, nor ever possessed of any of his goods, save as executor of his own wrong; that after Palmer's death, and before the 14th of May, 1789,[1] administration was

[1] The day when the plea was filed.

granted to his widow, S. Palmer; and that on the 15th of May, 1789, the defendant delivered over to the administratrix all the goods, &c., belonging to the intestate which came to his hands. 4thly, That the defendant never was executor, &c., save as executor of his own wrong; that administration was granted to S. Palmer (as before); that the defendant recovered £3000 on a bond in this Court in the intestate's * lifetime; that no [* 588] goods or effects of the intestate ever came into the defendant's possession, except goods of the value of £794 13*s.* 9*d.*, which are not sufficient to satisfy his said debts; and that the administratrix on the 15th of May, 1789, assented to his retaining those goods in satisfaction of his debt.

To the two last pleas there was a general demurrer, and joinder in demurrer.

Wigley for the demurrer. — The third plea cannot be supported; because it appears from all the authorities on this subject that an executor *de son tort* cannot purge his tortious act after an action is brought against him by delivering over the goods, of which he has taken possession, to the rightful administrator; though he may discharge himself by delivering them over previous to the commencement of the action. *Keble* v. *Osbaston*, Hob. 49; *Bradbury* v. *Keynil*, Cro. Eliz. 565; Salk. 313; *Padyet* v. *Priest*, 2 T. R. 97 (1 R. R. 440). For in the language of one of those cases, "Having once made himself chargeable to the plaintiff's action, as being executor *de son tort*, he shall never afterwards discharge himself by matter *ex post facto*." And great inconveniences would ensue if the law were otherwise; for no person would incur any risk by making himself executor *de son tort*, since when he was sued by a creditor he would immediately discharge himself by delivering over the goods to the rightful administrator; and thus the creditor would be driven to the vexation and expense of two actions; and in case the debt was nearly barred by the Statute of Limitations before he commenced his first action, both those actions might be fruitless, from the delay occasioned by bringing the first. The 4th plea is also bad; because an executor *de son tort* cannot retain in satisfaction of his own debt; as that would not only enable him to take advantage of his own wrong, but would occasion a contention among the creditors to take possession of the intestate's effects without any authority in law. *Coulter's Case*, 5 Co. Rep. 30. Neither can he retain with the assent of the person who afterwards

becomes the rightful administrator, since that would be attended with the same inconvenience.

Wood, *contra*. — In support of the 3d plea: An executor *de son tort* cannot be charged with more than the value of those goods of the intestate of which he has taken possession; and he may discharge himself from being liable even thus far by delivering over the goods to the rightful administrator. 1 Mod. 213. Otherwise an executor *de son tort* might be doubly charged; first [* 589] by any creditor of the intestate for the value of * the goods taken, and 2dly, by the administrator in trover; for the first recovery would be no bar to the action of the administrator. And such executor is equally discharged by delivering over the goods to the right administrator whether the action be or be not commenced, provided the delivery be made before plea pleaded; as will appear by the reasoning of the cases cited on the next point. As to the fourth plea: If after action brought, and before plea pleaded, the executor take out letters of administration, he may plead a retainer for his own debt; though the taking administration does not abate the writ. *Whitehead* v. *Sampson*, Freem. 265; 2 Show. 373; *Baker* v. *Berisford*, 1 Sid. 76; 2 Ventr. 180; *Williamson* v. *Norwich*, Sty. 337; 1 Rol. Abr. 923, L. pl. 12; and *Vaughan* v. *Brown*, 2 Str. 1106; Andr. 328. If then the defendant himself might have retained in satisfaction of his own debt in the event of letters of administration having been granted to him even after the action was brought, and this he might have done as his debt was of a higher nature than the plaintiff's, it seems to follow that he may also retain with the assent of the rightful administrator; and that assent is stated in the plea.

Wigley, in reply, observed that the case in Mod. did not show that the executor *de son tort* could discharge himself by delivering over the goods after the action was brought. And that the cases cited on the second point were not applicable, because they only prove that the executor *de son tort* may purge his own wrong by procuring letters of administration to himself; and that even in those cases the writ does not abate, but the plaintiff may have judgment of assets *quando acciderent*: whereas here, if the plaintiff do now succeed, there must be judgment against him. Those cases were determined on the ground of the necessity of the administrator's interfering in many instances with the intestate's goods before letters of administration are granted;

but that reasoning does not apply to a case where the executor is a wrong-doer throughout.

The Court took time to consider of this question; and the next day

Lord KENYON, C. J., said: They had looked into the authorities which were cited on the part of the defendant, but that they did not establish the propositions for which they were adduced. The case in 1 Sid. 76, is reported in a confused manner;[1] but * it concludes with saying, "that an executor *de son tort* [* 590] cannot pay himself." Now that goes the length of deciding the present case. And indeed the cases cited from Freem., Yelv., Moor., Mod., and Strange, all prove the same point, that an executor *de son tort* cannot retain for his own debt. They also take the distinction between such an executor, and an executor *de son tort* afterwards legalising his own wrong by taking out letters of administration. The case in Strange shows this matter very clearly; where a person said it would be extremely hard that, if a person, entitled to administration, is opposed in the Ecclesiastical Court, and does any acts *pendente lite* to make himself executor *de son tort*, those acts should not be purged by his afterwards obtaining letters of administration. And they added that the granting administration legalises those acts which were tortious at the time. With respect to the first point in this case, the opinion of Lord Ch. J. HOLT in Salk. 313, is decisive; where he says, "If H. get the goods of an intestate into his hands, and administration be granted afterwards, yet he remains chargeable as a wrongful executor, unless he deliver the goods over to the administrator before the action is brought, and then he may plead *plenè administravit*." From all the authorities it is clear, first, that an executor *de son tort* must deliver over the goods of the intestate to the rightful administrator before an action is brought against him; and 2dly, that, though he be a creditor of a superior nature, he cannot retain in satisfaction of his own debt. Therefore we are of opinion that both these pleas are bad; and consequently there must be

Judgment for the plaintiffs.

[1] This case is reported in 1 Keb. 285; and it explains some parts of the case as reported in 1 Sid.

Vernon v. Curtis.

2 H. Bl. 18–26. In the Exchequer Chamber in Error, Feb. 10, 1792.

A writ of error was brought and the assignment of errors was "That in the record and proceedings aforesaid, as also in the rendering of the judgment aforesaid, there is manifest error in this, because by the record aforesaid it appears that the [21] judgment aforesaid was given for the said Timothy and William Curtis against him the said William Vernon, when by the law of the land that judgment ought to have been given for the said William Vernon against the said Timothy and William Curtis. There is also error in this, that it appears by the record aforesaid that judgment was given for the said Timothy and William Curtis against the said William Vernon, upon demurrer to the third plea of the said William Vernon to the declaration of the said Timothy and William Curtis, whereas that judgment ought to have been given for the said William Vernon against the said Timothy and William Curtis, because the said plea and the matters therein contained are sufficient in law to bar and preclude the said Timothy and William Curtis from further maintaining their aforesaid action against the said William Vernon, the said several matters therein alleged having occurred previous to the time of such plea being pleaded, as appears by the record of such plea; and such plea being pleaded in bar of further maintaining such action, therefore in that there is manifest error. There is also error in this, that it appears by the record aforesaid, that judgment was given for the said Timothy and William Curtis against him the said William Vernon upon demurrer to the fourth plea of the said William Vernon to the declaration of the said Timothy and William Curtis, whereas that judgment, by the law of the land, ought to have been given for the said William Vernon against the said Timothy and William, because the said plea and the matters therein contained are sufficient in law to bar and preclude the said Timothy and William Curtis from further maintaining their said action against the said William Vernon, the several matters therein alleged having occurred previous to the time of such plea being pleaded, as appears by the record of such plea, and such plea being pleaded in bar of further maintaining such action; therefore in that there is manifest error. There is error also in this, that

judgment was given upon the said third plea for the said Timothy and William Curtis against the said William Vernon as executor of his own wrong, although it appears that before such plea pleaded he delivered over all the assets of John Palmer which had ever come to his hands, to the rightful administratrix of the said John Palmer, and that as soon as administration was granted to her; therefore in that there is manifest error. There is also error in this, that judgment was given upon the said fourth plea for the said Timothy and William Curtis against the said William [22] Vernon, as executor of his own wrong, to recover a simple contract debt of the said John Palmer, although it appears that the rightful administratrix of John Palmer had before plea pleaded, and as soon as administration was granted to her, assented to the said William Vernon's retaining assets in respect whereof the action was brought, towards satisfaction of a debt of a superior nature, to wit, a debt on a judgment recovered in His Majesty's Court of King's Bench, by the said William Vernon against the said John Palmer, and although by the law of the land a rightful administratrix is bound to apply the assets of an intestate in discharge of debts of a superior nature before debts of an inferior nature; therefore in that there is manifest error," &c.

This was twice argued in the Exchequer Chamber, and on a subsequent day, after consideration, Lord LOUGHBOROUGH declared [26] the unanimous opinion of the Court, that whatever hardship or inconvenience there might be in the decision, yet as the law was settled, the Court ought not to overturn it. That on both the points rested upon in the argument, the law was established by a series of authorities from *Coulter's Case* to that in Salk. 313, that an executor *de son tort* could not retain for his own debt, though of a superior nature, nor could he avail himself of a delivery over of the effects to the rightful administrator, after action brought, nor of the assent of the administrator to his retainer, so as to defeat the action of the creditor.

Judgment affirmed.[1]

[1] At the close of the first argument, a doubt was suggested by Mr. Justice GOULD, whether the Stat. 43 Eliz., c. 8, s. 2, had not given an executor *de son tort* a general right to retain for his own debt, and the counsel for the defendants in error were desired to advert to that statute, previous to the second argument.

Afterwards Bower said, that, according to the desire of the Court, he had looked into the statute, but that it appeared to him clearly to relate only to the case of fraudulent administrations, which it was designed to prevent. To which opinion the Court seemed to assent.

Hooper v. Summersett.

Wightwick, 16–21 (12 R. R. 708).

Executor de son Tort. — Intermeddling.

[16] Living in the house, and carrying on the trade of deceased (a victualler), is sufficient intermeddling to make defendant executor *de son tort*, and as such liable *de bonis propriis*, notwithstanding his wife proved the will after the action was commenced.

This was an action of assumpsit for spirituous liquors, delivered to Jane Thornton, deceased, who had kept the Pig and Beehive public house, Honey Lane, Cheapside, and who died in the [*17] month of February, 1809. In the * month of June following, her will, appointing her daughter (the wife of the defendant) executrix, was proved; and the defendant and his wife had in the meantime carried on the trade. This action (which was commenced before the probate of the will) was brought against William Summersett, as executor of the said Jane Thornton, who pleaded *ne unques executor;* and the cause coming on to be tried at the sittings after last Michaelmas term, before Macdonald, C. B., he was of opinion, that the action ought to have been brought against the husband and wife; and the plaintiff was nonsuited, with liberty to move to enter a verdict, if the Court should think the intermeddling sufficient to entitle him to his demand.

Abbott this day showed cause against a rule, obtained by Dauncey in the course of last term, to set aside the nonsuit, and enter a verdict for the plaintiff, for his whole demand. To make the defendant liable for the whole debt, there ought to be proof of conversion to that amount; for although from the cases of *Padget and another* v. *Priest and Porter*, 2 T. R. 97 (1 R. R. 440), and *Erring and others* v. *Peters*, 3 T. R. 687 (9 R. C. 330), it would appear that formerly any assets would render an executor liable to all demands; yet that rule was broken through by Lord Mansfield in the case of *Harrison* v. *Beecles*, per Lord Kenyon in *Erring* v. *Peters* (9 R. C. 333), where he held that the executor was liable only to the amount of the assets in his hands; and what reason or justice is there, that a person should be answerable for more than he has received? upon principle, it ought to be the same, on a plea of *ne unques executor*, as on a plea of *plene administravit*, as

the plaintiff seeks by this action to recover the damage which has been done him, and which cannot exceed the extent of the assets which the defendant may have wrongfully administered.

* Then as to the point, whether there was any intermed- [* 18] dling sufficient to constitute the defendant an executor *de son tort;* the defendant has done none of those acts which are said in Toller's " Law of Executors " to constitute an executor *de son tort*, sect. 2, p. 17; it appears from the evidence in this case, that the daughter of the deceased, and her husband (the defendant), remained on the premises, doing nothing more than was absolutely necessary to carry on the trade; there was no proof of the sale of furniture, or any act, further than was necessary for continuing the business; had they been strangers, it is doubtful whether the defendant would have been liable under these circumstances, having done nothing but what was requisite for the benefit of the estate of the deceased. What makes a man an executor *de son tort* is matter of law; the Court is to give a character to the defendant's actions; they are to say whether he interfered officiously or not; and they will not presume that a man does wrong till it is clearly so proved: the question is, whether the defendant acted officiously for his own benefit, or *bonâ fide* for the benefit of the testator's estate; and the Court will not decide that he has acted wrongfully, when all that he has done may have been done rightfully; the defendant having in this case acted in aid and assistance, and as the servant of his wife, and for the benefit of all the creditors. Executors cannot always prove a will immediately upon the testator's decease; they must be allowed time to ascertain the assets; and, if poor, to collect sufficient money to pay the duties attendant upon the probate; this will was proved within five months, and it was absolutely necessary for the good of the estate, that the victualling business should be carried on in the meantime for the purpose of keeping alive the good-will of the house.

* Had not this action been commenced before the probate, [* 19] there can be no question, but it ought to have been brought against both the husband and his wife. The effect of the probate is to show, that from the death of the testator there was a rightful executor; and as all actions, done before the probate, are made good by relation, the present action ought to have been brought against both. In the case of *Kenrick* v. *Burges*, Moor. 126, the

Court agreed, that if a man enter as executor *de son tort*, and sell goods, and afterwards take out administration, the sale is good by relation. It is true that the taking out administration *pendente lite* will not abate the writ, but it will nevertheless purge the wrong which the defendant has done as executor *de son tort*. This distinction is laid down in *Williamson* v. *Norwich*, Styles, 337, where a plea of retainer, under an administration taken out after the action was commenced, was held good upon demurrer.

Thomson, B. — Were not these cases under consideration in the case of *Curtis* v. *Vernon*, 3 T. R. 587, 2 H. Bl. 18 (p. 64, *ante*)?

The law in these cases was not denied in *Curtis* v. *Vernon;* that was determined upon other grounds.

Dauncey and Littledale for the plaintiff. — As to the amount to which the defendant is liable, the cases completely set that point at rest: 1 Rol. Abr. 930, pl. 2, 8, 993, pl. 15; and in Wentw. Off. of Ex. p. 184, it is laid down, that if upon a plea of *ne unques executor*, a verdict be found for the plaintiff, the judgment shall be to recover the debt and damages out of the proper goods of the executor, if none of the testator's can be found.

Thomson, B. — In Coke's Entries you find the judgment in *Reid's Case* was *de bonis testatoris, et si non, de bonis propriis.*

In the case of *Harrison* v. *Beccles*, the defendant had pleaded *de bene administravit;* but it is quite clear, that if [* 20] * an executor lets judgment go by default, or if judgment be given against him upon demurrer, it amounts to a confession of assets; and also if he pleads *ne unques executor*, or a release to himself, which is found against him, the judgment must be *de bonis propriis.*[1] *Shelton* v. *Hawling*, 1 Wils. 258; *Rock* v. *Leighton*, 1 Salk. 310, 1 Ld. Raym. 389, 3 T. R. 689; *Stubbs* v. *Rightwise*, Cro. Eliz. 102; *Bull* v. *Wheeler*, Cro. Jac. 684; *Bridgman* v. *Lightfoot*, Cro. Jac. 672.

Per Curiam. — The cases seem to be quite decisive on this point.

With regard to the intermeddling, it appears from the books, that any act not authorized constitutes a person an executor *de*

[1] And if an executor pleads *non assumpsit*, or other general issues, and the verdict is found against him, though the judgment would be as to the debts *de bonis testatoris*, and as to the damages *de bonis testatoris et si non de bonis propriis;* yet he would not be allowed to plead *plene administravit* in a *scire facias*, or in any other action founded upon the original action. *Erring* v. *Peters*, 3 T. R. 685 (9 R. C. 330); *Ramsden* v. *Jackson*, 1 Atk. 292.

son tort; the old law was very strict with regard to intermeddling, and there is no hardship, for the defendant might have pleaded *plene administravit,* and he would then have been liable only *de bonis testatoris.*

Wood, B. — I remember a case of both pleas, and *plene administravit* found for the defendant.

The sale of perishable goods, though under a writ *ad colligend'* granted by the ordinary, has been held sufficient to make the vendor an executor *de son sort,* Dyer, 256; and in *Gerret* v. *Carpenter,* Dyer, 166 b, note (11), a wife for milking the cows of the deceased husband was also adjudged to be an executrix *de son tort.* In the present case the defendant sold goods, and again laid out the money made by the sale of them in the purchase of other goods; it is impossible to consider him as the servant of his wife; he was in fact living in the house, and using the goods exactly as his own, and * if that does not constitute him an [* 21] executor *de son tort,* nothing will.

Then as to the effect of the probate, the language of the books is, that it shall not abate the suit. *Pyle* v. *Woolland,* 2 Vent. 180, and *Williamson* v. *Norwich,* Styles, 337. The cases only establish this, that the party may retain by proper pleading; but as the defendant in the present case has chosen to rely on a plea which he could not support, he must take the consequences.

Thomson, B. — Administration taken out, or probate, may be pleaded *puis darrein continuance* to enable him to retain. *Andrews* v. *Brown,* 2 Str. 1106, Andr. 328.

Per Curiam. — There is no case exactly like this, the man and wife were acting together and were in the house before the death of the testator; we must take time to look into the cases.

Macdonald, C. B., this day (May 30) gave the judgment of the Court. The defendant living in the house, and carrying on the business in the same manner as in the lifetime of the deceased, we are of opinion, constitutes a sufficient intermeddling to charge him as executor *de son tort;* as to any hardship, if he had pleaded *plene administravit,* he would not have been liable for more than the assets, which he had received, which would have been no hardship. The authorities to show that this is a sufficient intermeddling, are too strong to be got over. With regard to the probate, the only way that the creditors have of knowing who is the executor, is from the probate; and if they find the defendant

acting as executor before the probate, and bring their action against him, the probate will not relate back so as to abate the suit. *The rule absolute.*

ENGLISH NOTES.

The rule is in effect stated, and the authority of *Vernon* v. *Curtis* acknowledged by Wood, V. C., in *Hill* v. *Curtis* (1866), L. R. 1 Eq. 90, 35 L. J. Ch. 133, where it was also held sufficient for the person charged as executor *de son tort* to show that before action brought he had accounted for and handed over the assets to the rightful executor. The previous authorities are fully reviewed in this judgment.

Executor *de son tort* is defined in Williams on Executors, c. 5, as follows: "One who takes upon himself the office by intrusion, not being so constituted by the deceased, nor for want of such constitution substituted by the Court to administer."

In *Webster* v. *Webster* (1804), 10 Ves. 93, 7 R. R. 351, the question arose as to the effect of the Statute of Limitations in a suit for an account against an executor who had possessed himself of the estate at a period beyond the time of limitation, though he had not proved until a date within the period. The Lord Chancellor (Eldon) held that he might be charged as executor *de son tort*, if it was proved that he had done any act; and accordingly allowed the plea. The authority of Lord Eldon in this case was followed and applied by Vice Chancellor Malins in *Re Lovett, Ambler* v. *Lindsay* (1876), 3 Ch. D. 198, 45 L. J. Ch. 768, 35 L. T. 93, 24 W. R. 982.

Where an executor has intermeddled with the estate, the Court will not allow him to renounce, but will compel him to take probate. *In the Goods of Fell* (1861), 2 Sw. & T. 126 (Pritchard *arguendo*), 127; *Mordaunt* v. *Clarke* (1868), L. R. 1 P. & D. 592, 38 L. J. P. D. & A. 65. And where an executor, after intermeddling renounces on the statement that he has not intermeddled, the act is altogether invalid, and he may (and *semble* must if required) still take probate of the will. *In the Goods of Badenach* (1864), 3 Sw. & T. 465, 32 L. J. P. D. & A. 179. An application by an executor for payment of a debt, though unsuccessful, has been held a sufficient act of intermeddling to prevent his afterwards renouncing. *In re Stevens, Cooke* v. *Stevens* (North, J., 26 Jan., 1897), 1897, 1 Ch. 422, 66 L. J. Ch. 155.

But a widow having intermeddled by mistake on the faith of a testamentary paper, appointing her executrix, which turned out not to be well executed, was allowed to renounce without making the statement (according to the usual form) that she had not intermeddled. *In the Goods of Fell* (1861), 2 Sw. & T. 126.

A person who deals with the goods of a testator as agent of the executors cannot be treated as executor *de son tort*, although the executors have not proved the will. *Sykes* v. *Sykes* (1879), L. R. 5 C. P. 113, 39 L. J. C. P. 179, 22 L. T. 236, 18 W. R. 551. The case was distinguished from *Sharland* v. *Mildon* (V. C. Wigram, 1846), 5 Hare, 469, 15 L. J. Ch. 434, 10 Jur. 771, where the agent of an executor *de son tort* who knew that his principal had no proper authority, was treated as himself being a wrong-doer.

In the above case of *Sykes* v. *Sykes*, the executors, after proving the will, sued the sheriff who had seized the goods of E. S. (the testator) under a writ of execution against the goods of E. S. "in the hands of W. S. (the agent) to be administered." The only way in which the goods could be said to be in the hands of W. S. to be administered was by treating him as executor *de son tort*. And it was argued on behalf of the plaintiff that W. S. might be treated as a wrong-doer by reason that he acted as the agent of persons (the same persons who as executors were plaintiffs) who were executors *de son tort*. Upon this Bovill, C. J., observes (L. R. 5 C. P. 117): "It is true that executors may be sued as executors by reason of their intermeddling with the goods of their testator before probate, and an executor so circumstanced appears in the case of *Webster* v. *Webster* (*supra*) to have been called an executor *de son tort*; but this cannot have been intended to imply that he was a wrong-doer." It should be remembered that Lord Eldon does not appear to have said that the executor so circumstanced was an executor *de son tort*, but that he *may be charged* as (*i. e.*, as if he were) an executor *de son tort*. It would not follow from Lord Eldon's language that such an executor was a wrong-doer so that his agent could not plead a lawful authority.

The executor of an executrix *de son tort* has been held not liable for a breach of contract committed by the person with whose property the executrix *de son tort* has intermeddled, there being no devastavit to bring the case within 30 Car. II., c. 7. *Wilson* v. *Hodgson* (1872), L. R. 7 Ex. 84, 41 L. J. Ex. 49, 20 W. R. 438.

As to the acts which constitute a sufficient intermeddling to charge a person as executor *de son tort*, the case of *Peters* v. *Leeder*, *Peters* v. *Bouquet* (1878), 47 L. J. Q. B. 573, contains an important judgment. The intestate was manager of iron-works, and shortly after his death and before administration could be taken out the widow was required to remove from the house. It became therefore necessary to remove the furniture, and the widow had an inventory made of the whole of the furniture, had part of it removed to an auction room where it was to be sold, and took part to a smaller house, having it valued and intending to buy it for her own use. An action being brought before ad-

ministration against the widow and auctioneer respectively, the question was whether these acts of the defendants constituted them (or either of them) executors *de son tort*. Judgment was delivered by Lush, L. J., in favour of the defendants in each action. After citing from Williams on Executors (cap. 5) the definition given in the commencement of this note, he proceeded as follows (47 L. J. Q. B. 574): "The definition implies a wrongful intermeddling with the assets, a dealing with them in such a way as denotes an usurpation of the functions of an executor, an assumption of authority which none but an executor or administrator can lawfully exercise. It is obvious that it is not every intermeddling with the goods of the deceased which is wrongful. Acts which are not destructive of the property, and which do not otherwise amount to a conversion of goods, are wrongful or not according to the intent. Milking the cows, feeding the horses, locking up the goods, doing repairs, and such like acts, if done as an assertion of dominion and act of ownership, would be wrongful; if as an act of necessity or an office of kindness and charity, would be meritorious. So the removing and holding possession of the goods, if done for the purpose of keeping them in safe custody till a lawful representative should appear, is rightful; if for the purpose of making away with them, is wrongful. (See Godolphin, part 2, c. 8, ss. 3, 6.) And in case of necessity, a stranger may even sell part of the goods or collect sufficient of the debts for the purpose of burying the deceased, without being chargeable as executor *de son tort*. (See the authorities 1 Williams on Executors, c. 5.) In the present case, the removal of the furniture from the residence of the deceased to some place of deposit was a necessity. If that necessity had not existed, the widow would have been guilty of no wrong by remaining there, and using the furniture as before, until an administrator should be appointed; nor would the quality of her acts have been altered if, being obliged to remove, she had taken all the furniture to another house and used it there. As her house would not contain the whole, it was necessary to place a portion of it somewhere else, and as it was known that everything would have to be sold, the most reasonable course was to take it direct to a sale-room. If the defendant Leeder had acted upon the advertisement, and sold the goods in his possession at the time advertised, that would have been a tortuous act, which would have made him liable as executor *de son tort*. But he did not sell, or attempt to sell. When it appeared no administration could be taken out by the 19th, the day fixed for the sale, he postponed the sale and did not hold the auction till he was lawfully authorised to do so. I am satisfied upon the evidence that his intention throughout was to hold the goods at the disposal of the person who should become administrator, and that his making a valuation and advertising the goods for sale,

although it afforded evidence which if unexplained might have made him liable, was nothing more than a preparation for a contemplated legal sale — a sale which it was known must take place as soon as administration should have been granted.

"I am equally satisfied that the widow never intended to claim as her own the furniture which she took, but that her intention was to purchase and pay for it as soon as there was a representative capable of selling.

"The acts done by the defendants with such an intention do not in my opinion render either of them liable as an executor *de son tort*."

AMERICAN NOTES.

Both principal cases are cited in Schouler on Executors and Administrators, sect. 187.

In many of the United States an executor *de son tort* is unknown; and in others his liability is regulated by statute. See note by Randolph and Talcott to 3 Williams on Executors (7th Am. ed.), p. 298.

A fraudulent donee, who has become liable to creditors as executor *de son tort* of the donor, cannot discharge himself by delivery of the thing given to one who afterwards obtains letters of administration. *Morrison* v. *Smith*, Busbee Law (Nor. Car.), 399.

EXTRADITION.

In re BELLENCONTRE.

(Q. B. D. 1891.)

RULE.

In order to justify the extradition of the subject of a foreign state, there must be evidence of an act committed by him in the foreign country, amounting to an offence against the law of that country, and which, if committed in England, would amount to an offence against English law.

In re Bellencontre.

1891, 2 Q. B. 122–144 (s. c. 60 L. J. M. C. 83; 64 L. T. 461; 39 W. R. 381).

Extradition. — Embezzlement. — Treaty with France. — French Penal Code.

In order to justify the extradition of the subject of a foreign state, there [122] must be evidence of an act committed by him in the foreign country, amount-

ing to an offence against the law of such country, and which if committed in England, would amount to an offence against English law.

A warrant was issued in France for the arrest of a French subject, accused of having embezzled or misappropriated money delivered to him in his capacity of notary. He escaped from France, and was arrested in English territory, and his extradition was demanded by the French authorities. A magistrate committed him for extradition on a warrant describing him as accused of the crime of fraud by a bailee and fraud as an agent. The French warrant specified nineteen separate charges. On an application for a *habeas corpus*, the Court came to the conclusion that as to fifteen of the charges, the evidence disclosed no crime punishable by English law. With regard to the other four charges, there was evidence that in each case money was intrusted, without any direction in writing, to the prisoner as a notary, with a view to re-investment as soon as either he or his customer should have found a suitable investment, and that he had misappropriated such money:

Held, that the offences charged were sufficiently described, both in the French and in the English warrant, and that the warrants were consistent with each other; that the fact that, as to some of the charges in the French warrant, the evidence did not disclose any crime against English law, was no answer to the claim for extradition; that as to the four charges last above-mentioned, there was evidence of offences within the meaning of article 408 of the French
[* 123] * Penal Code, and article 3, clause 18, of the Extradition Treaty, and evidence that the prisoner had been intrusted as an attorney or agent with money for safe custody within the meaning of 24 & 25 Vict., c. 96, s. 76, and therefore there was evidence of offences against English law, and extradition ought to be granted:

Held, that there was no evidence of offences against 24 & 25 Vict., c. 96, s. 75, because the first part of that section requires that the money should have been intrusted with a direction in writing, and the second part does not apply to money.

A rule *nisi* had been obtained on behalf of David Henri Bellencontre, a French subject, for a *habeas corpus* to bring up his body in order that he might be discharged from custody.

The prisoner had been committed for extradition, by Sir John Bridge, the chief magistrate at Bow Street Police Court, under a warrant, a copy of which is set out below. His extradition was demanded by the French authorities on nineteen separate and distinct charges, but as the Court, after considering the whole of the evidence, arrived at the conclusion that as to four only of the charges specified in the French warrant of arrest, numbers 3, 4, 17, and 18, the evidence set out disclosed crimes punishable by English law, with regard to which extradition could be granted, the portions of the French warrant, and the depositions relating to the remaining fifteen charges, are omitted.

The following is a translation of the French warrant of arrest, so far as it relates to the charges as to which the Court decided that extradition could rightly be demanded.

"In the Name of the Law.

"*Warrant of Arrest.*

"The Juge d'Instruction of the Civil Tribunal at Bayeux, has issued the Warrant which follows: —

"We Duc Michel Arthur, Juge d'Instruction of the district of Bayeux, require and order the apprehension and conveyance to the House of Arrest, of one David Henri Bellencontre . . . Notary . . . Accused of having at Tour, Calvados . . .

"(3.) Since 7th October, 1889, and 13th June, 1890, embezzled or misapropriated, to the injury of one M. Malassis, certain sums of money which had been delivered to him in his capacity of Notary.

"(4.) Since January, 1890, embezzled or misappropriated to *the injury of one M. Lefortier, a certain sum of [*124] money which had been delivered to him in his capacity of Notary . . .

"(17.) Since 25th June, 1890, embezzled or misappropriated to the injury of Madame Verdelet Lamare a certain sum of money which had been delivered to him in his capacity of Notary.

"(18.) Since 25th June, 1890, embezzled or misappropriated to the injury of Madame Brunet née Guilbert, a certain sum of money which had been delivered to him in his capacity of Notary . . ."

Crimes provided for and punished by Article 408 of the Penal Code, which is thus conceived: —

"Whoever shall have embezzled or misappropriated to the injury of the owners, possessors, or holders any effects, moneys, goods, bills, receipts, or other writings containing or operating in obligation or discharge, which shall have been delivered to him only by right of hire of deposit, under writ, security, loan at interest, or for a work salaried or not salaried, upon the condition to return them or to employ them for a specific purpose, will be punished with the penalty prescribed in art. 406.

"If the fraud provided against and punished by the preceding paragraph has been committed by an officer, public or ministerial, or by a servant, or man employed in service at wages, pupil, clerk,

traveller, workman, companion, or apprentice, to the injury of his master, the penalty will be that of reclusion. . . .

"We require and order all officers to whom the present warrant may be exhibited to lend main force if necessary towards its execution.

"And the Keeper of the House of Arrest at Bayeux to receive the prisoner conformably to law.

"In witness, &c. Done at Bayeux, December 11, 1890.

"(Signed) A. Duc."

By the extradition treaty with France, art. 3, clause 18, one of the crimes for which extradition is to be granted is defined thus: "Abus de confiance, ou détournement par un banquier, commissionnaire, administrateur, tuteur, curateur, liquidateur, syndic, officier ministériel, directeur, membre ou employé d'une société, ou par toute autre personne." [1]

[*125] * The following is the requisition signed by the Home Secretary: —

"To the Chief Magistrate of the Metropolitan Police Courts, or other magistrate of the Metropolitan Police Court at Bow Street.

"Whereas in pursuance of the Extradition Acts of 1870 [*126] and * 1873 a requisition has been made to me the Right Honourable Henry Matthews, one of Her Majesty's Principal Secretaries of State, by M. Waddington, the Diplomatic Representative of the French Republic, for the surrender of David Henri Bellencontre accused of the commission of the crime of fraud by a bailee within the jurisdiction of the French Republic.

"Now I hereby by this my order under my hand and seal signify to you that such requisition has been made, and require you to proceed in conformity with the provisions of the said Acts.

"Given under the hand and seal of the undersigned, one of Her Majesty's Principal Secretaries of State, the 22nd of December, 1890.

[Seal, Home Office.]

"(Signed) Henry Matthews."

[1] See "London Gazette," May 21, 1878, p. 3163. The enactments of the English criminal law which deal with offences of this nature are sections 75 and 76 of the Larceny Act, 1861 (24 & 25 Vict., c. 96), which are commented on in the judgments.

In re Bellencontre, 1891, 2 Q. B. 126, 127.

The following is a copy of the warrant of arrest signed by Sir John Bridge: —

Police Court, Bow Street.

"*Metropolitan Police District to wit.*" To all and every the constables of the Metropolitan Police Force, and to the Keeper of Her Majesty's Prison at Holloway, in the County of London, and within the Metropolitan Police District.

"Be it remembered that on this 22nd January, A.D. 1891, David Henri Bellencontre (hereinafter called the defendant) is brought before me the Chief Magistrate of the Metropolitan Police Courts, sitting at the Police Court in Bow Street, within the Metropolitan Police District to show cause why he should * not [* 127] be surrendered in pursuance of the Extradition Act on the ground of his being accused of the commission of the crimes of fraud by a bailee and frauds as an agent within the jurisdiction of the French Republic, and for as much as no sufficient cause has been shown to me why he should not be surrendered in pursuance of the said Act.

'This is therefore to command you the said constable in Her Majesty's name forthwith to convey and deliver the body of the said defendant into the custody of the said Keeper of Her Majesty's Prison at Holloway, and you the said keeper to receive the said defendant into your custody, and him there safely to keep until he is thence delivered pursuant to the provisions of the said Extradition Act, for which this shall be your warrant."

The evidence on the 3rd charge in the French warrant was as follows: —

Jacques Cyrus Malassis deposed: "I had confidence in M. Bellencontre, and I left with him on deposit on the 7th October, 1889, a sum of 6000 fr. In the course of the year 1890, M. Bellencontre told me that one M. Hue, farmer at Aiquerville, had begged him to find a sum of 15,000 fr.

"He asked me if I could furnish him with a like sum to make an investment. I told him that I would endeavour to contrive to raise the necessary funds.

"On 6th June, 1890, I paid into the hands of M. Bellencontre a sum of 5000 fr. at Trevières at the Hotel Leneveu. The notary

delivered to me the receipt which you have in your hands. On the 13th June following I went again to Trevières, and paid into the hands of M. Bellencontre at the Hotel Leneven, a sum of 3000 fr. for which he gave me a receipt. In order to complete the sum of 15,000 fr. M. Bellencontre was to take 1000 fr. on the interest which he had to receive from several of my debtors in his office. No deed of bond has been signed by me, and in spite of my reiterated demands, M. Bellencontre has never told me the use which he has made of my 15,000 fr.

"I have learnt since that M. Bellencontre has fled, and that M. Hue was not my debtor. I fear indeed that the notary has not got my 15,000 fr."

[* 128] * The receipts signed by Bellencontre were as follows: —

"M. Malassis pays me this day 3000 fr. for Hue investment. I will advance 1000 fr. to be received from his debtors, and with 6000 fr. deposited the 7th October last, he will have an investment of 15,000 fr.

"Trevières, June 13, 1890."

"Received of M. Malassis the sum of 5000 fr. to be invested with M. Hue.

"Trevières, June 6, 1890."

On June 8, 1890, Bellencontre wrote to Malassis as follows: —

"Sir, — In reply to your letter received this morning, please call on me at Trevières on Friday, and bring me your disposable funds, and we shall easily come to an understanding as to the surplus."

Evidence on the 4th Charge.

Gustave Bassourdy, living at 35, Rue Hallé, Paris, deposed: "I had in the month of April last given power to M. Bellencontre, notary at Tour, to contract a loan amounting to the sum of 1000 fr. for me. Bellencontre remitted this power to M. Bourdon, formerly notary at Caen Place, St. Martin.

"The latter received the money from a lady client whose name I do not know. This sum has been paid me by successive fractions. This affair has been entirely liquidated. I have always on this subject manifested to M. Bellencontre my discontent as to the fees which he has believed he should retain as to the entire sum, fees amounting to an exorbitant sum. I have not contracted any loan. I do not know M. Lefortier, at Etreham, and I do not know if the latter has deposited the money in the office of M. Bellencontre.

"I am not his debtor for whatever this may be.

"If, as seems to result from the communications you make to me, a deed has been passed by M. Bellencontre, agreeing to a loan to me from M. Lefortier, it is simply a forgery."

Pierre François Lefortier, residing at Etreham, deposed: —

"In the month of January, 1890, M. Bellencontre asked me if I could dispose of a sum of 2500 fr., for which he had an investment.

* "I answered him affirmatively, and paid him the funds. [*129] On February 3, 1890, a deed of bond was drawn by which one M. Elie acknowledged himself our debtor in 2500 fr. This loan was agreed for five years. The repayment was to take place on January 12, 1895.

"In the course of the month of July, 1890, I reclaimed my title from Bellencontre. He replied that Elie had repaid, and that he would find me another borrower. I returned many times afterwards to Bellencontre to know if my money was invested. Things went on thus up to the end of the month of August, at which time Bellencontre told me that he had indeed found a borrower, but that, information showing that this borrower did not offer sufficient security, it was in our interest that he was seeking another.

"At length on September 2, 1890, I went to M. Bellencontre and demanded of him either my title or my money.

"He answered me as previously that my title was not returned from the Registry, and delivered to me a receipt for 2500 fr., adding that one borrower was a M. Bassourdy, living at Paris.

"Since that period we have heard nothing more said about it. Bellencontre has fled.

"I know not if he has remitted the funds to Bassourdy. We have not a title (deed), and I have not signed any.

"Happily for me, I made him give me a receipt for 2500 fr. on September 2 last.

"Bellencontre paid us the interest on this sum of 2500 fr. in the middle of September last.

"He owes me only the interest *pro ratâ* since that time."

Desiré Charles Victor Halley, formerly clerk to Bellencontre, deposed: —

"About two months ago Pierre François Lefortier, property holder, living at Etreham, came to the office of M. Bellencontre to reclaim the deeds concerning an investment made by him in the office. This investment was of 2500 fr.

In re Bellencontre, 1891, 2 Q. B. 129, 130.

"The borrower was one M. Bassourdy, living at Paris, 35 Rue Hallé. This investment I believe has not been made. I am certain that the 2500 fr. were paid into the hands of M. Bel-
[* 130] lencontre, * for I heard M. Bellencontre several times tell M. Lefortier that he would give him his deeds.

"Bassourdy came to Tour, to the office of M. Bellencontre, about three weeks ago. He was accompanied by a M. Albert Piquerel, property holder at Crounay, purchaser of the estates of M. Bassourdy. At this time M. Bellencontre had already gone, and we had not seen him for three days."

Evidence on Charge 17.

Arthur Jules Guilbert, farmer, living at Mosles, deposed: —

"At the death of my mother all the estates which she possessed were sold. M. Dupard, innkeeper at Port-en-Bessin, bought on June 3, 1888, divers estates situated at Crounay, for the price of 23,400 fr. The succession of my parents was represented by Mesdames Verdelet Lamare and Brunet and by me. I was to receive for my share 11,700 fr., the half. On October 1, 1888, M. Dupard made a first payment in the office of Bellencontre. The ladies, Verdelet Lamare and Brunet, and I, were present at the payment made by M. Dupard, who gave me 7700 fr. and kept a capital sum of 4000 fr. for the purpose of a 'Rente' of 200 fr. to the Carel couple, hatters at Bayeux. This Rente had been imposed on it as a charge. M. Carel is dead, and when Madame Carel shall be deceased M. Dupard will pay me this capital sum of 4000 fr., and will be completely unencumbered for me.

"A notarial receipt was made on June 3, 1888, by M. Bellencontre, who signed it as well as I. I have received the 7700 fr. paid by M. Dupard, so that Bellencontre has not kept anything in his hands.

"On June 25, 1890, M. Dupard paid the balance of his price, viz., 11,700 fr. to M. Bellencontre. I was present at the payment as well as Mesdames Verdelet Lamare and Brunet. M. Dupard paid further 585 fr. for interest, which brought up his payment to 12,285 fr.

"In consequence of an arrangement made between my sister and me on the subject of a piece of land which had been sold me by my brother for 2000 fr., and which, in error, had been included in the properties brought by M. Dupard, I received of

* the sum paid on June 25, 1890, by M. Dupard a sum [*131] of 1000 fr., my sisters having no right to this sum. It resulted that my sisters received only 10,700 fr., plus interest.

"A notarial receipt was drawn up the same day by Bellencontre, who signed it as well as my sisters and I. M. Dupard was then discharged as regards us.

"The 10,700 fr. accruing to my sisters half for each, was to be re-invested on account of their position as 'dotal' wives. M. Bellencontre kept the funds in order to make the re-investment. I know not if the re-investment was made."

Madeline Anne Guilbert, wife of Jean Baptiste Verdelet Lamare, deposed: —

"On the death of my mother we were to sell all the properties which she left, in order to proceed to share the succession. On June 3, 1888, M. Dupard, innkeeper at Port-en-Bessin, bought divers estates situated at Crounay for the price of 23,400 fr. The succession was represented by Madame Brunet my sister, Arthur Guilbert my brother, and me.

"Arthur Guilbert was to receive 11,700 fr., my sister and I 11,700.

"On October 1, 1888, M. Dupard made a first payment in the office of Bellencontre, my sister, my brother and I being present. Arthur Guilbert my brother received 7700 fr., for which he gave receipt. M. Dupard kept a sum of 4000 fr. in order to provide an annuity of 200 fr. to the Carel couple, hatters at Bayeaux, in execution of a clause in the list of charges.

"On June 23, 1890, M. Dupard paid in my presence, and that of my brother and sister, a sum of 11,700 fr. balance of his purchase price into the hands of M. Bellencontre. He paid besides a sum of 585 fr. for interest due, for which my sister and I gave receipt.

"In consequence of an error committed in the sale, my sister and I were obliged to restore 1000 fr. to our brother Arthur Guilbert, who received the 1000 fr. and gave a receipt for it to M. Dupard.

"The 10,700 fr. capital which remained belonged to us, my sister and me, one half each. As this capital was to be * employed again on account of our position as 'dotal' [*132] wives, the money was deposited with M. Bellencontre.

"We were present when the money was deposited in his hands, who drew up a receipt which my sister and I signed. Bellen-

contre told us when receiving the money, that he would reply [1] as to the investment.

"We have indeed found a re-investment for those moneys in the office of M. Lebire, but M. Bellencontre, who was to pay the funds on the morrow of Christmas day, 1890, has taken flight eight hours after I had given him notice of the re-investment."

Victor Honoré Dupard, innkeeper, living at Port-en-Bessin, deposed: —

"On June 3, 1888, I purchased before M. Bellencontre, notary at Tour, divers estates situated at Crounay, proceeding from the Guilbert succession, represented by Mesdames Verdelet Lamare and Brunet, and by M. Arthur Guilbert.

"On October 1, 1888, I paid at Tour in the office of M. Bellencontre, notary, a sum of 7700 fr. in the presence of M. Arthur Guilbert and of Mesdames Verdelet Lamare and Brunet. A receipt was delivered to me by M. Bellencontre, notary, and the 7700 fr. which I came to pay was given to M. Arthur Guilbert. I kept a sum of 4000 fr. to provide for an annuity of 200 fr. to the Carel couple, hatters at Bayeaux. The husband died about two years ago. I kept this sum of 4000 fr. to provide for an annuity of 200 fr. to the said Carel couple, as that had been imposed by the list of charges.

"As my price of purchase was 23,400 fr., I was then discharged from half my debt. This half appertained to the share of Arthur Guilbert. A notarial deed had been drawn up by M. Bellencontre, and the receipt was signed by M. Bellencontre and M. Guilbert.

"On June 25, 1890, I paid to Bellencontre the 11,700 fr. balance of my purchase money, plus 585 fr. interest. The 12,285 fr. was the share going to Mesdames Verdelet [*133] Lamare *and Brunet. All my creditors were present. A notarial receipt was made out by Bellencontre, and signed by him and my creditors. I am, therefore, completely discharged in respect of every one."

Evidence on Charge 18.

Aline Marie Guilbert, wife of Jean Baptiste Brunet, deposed: —

[1] So translated in the English translation of the original French depositions used in Court. The true meaning, however, appears to be that he was confident he should be able to find an investment, as explained by Wills, J., *post*, p. 97.

"When my mother died we had to sell all her property in order to be able to share the succession. On June 3, 1888, M. Dupard, innkeeper at Port-en-Bessin, became purchaser of several estates situated at Crounay. His price of purchase was 23,400 fr.

"The heirs were my sister, Madame Verdelet Lamare, our brother Arthur Guilbert, and I. Arthur Guilbert, who had bought the share of our brother Francis, was to receive 11,700 fr. There came therefore to my sister and me an equal sum of 11,700 fr.

"On October 1, 1888, M. Dupard made a first payment in the office of Bellencontre. I attended there as well as my sister and my brother Arthur. Dupard paid 7700 fr., which my brother Arthur received, for which he gave a receipt. Dupard retained a sum of 4000 fr., conformably to a claim on the schedule of charges to provide for an annuity of 200 fr. to the Carel couple, hatters at Bayeux.

"On June 25, 1890, M. Dupard made a second payment in my presence, and that of my sister and of our brother Arthur. Dupard paid 11,700 fr. capital balance of the purchase money, and 585 fr. for interest due. We received the 585 fr. interest, and gave a receipt to M. Dupard. In consequence of an error committed in the adjudication, we paid to our brother Arthur a sum of 1000 fr., and he also gave a receipt for that to Dupard.

"The 10,700 fr. capital remained to be divided between my sister and me in halves. It was paid by Dupard to Bellencontre, who retained it because it was to be reinvested on account of our position as 'dotal' wives. We were all present when the capital was paid into the hands of Bellencontre. The notary drew up a receipt, and made my sister and me sign it. On *receiving the money, Bellencontre told me that he [*134] would answer[1] as to the reinvestment. The reinvestment of my capital was to be made in a first mortgage. I have not yet found a mode of reinvestment, but I do not know what has become of my capital, Bellencontre having taken flight. I have not seen Bellencontre again since the day when the funds were paid by Dupard."

[1] See note 1, *ante*, p. 86.

Evidence on Charges 17 *and* 18.

Antoine Edmond René Lefèvre, notary, living at Bayeux, deposed: —

"On September 26 last (1890), accompanied by M. Herbert, notary at Isigny, on the summons of the president of our chamber, we repaired to the office of Bellencontre, notary at Tour, to verify certain facts that had been notified to us in our capacity of delegates.

"We required him to exhibit to us his cash book, which we balanced, and we affixed thereto our *visa*. We ascertained a deficit of 7271 fr. 53 cent. under the heading, funds of clients.

"We also demanded of Bellencontre to exhibit to us a sum of 10,700 fr. which he had received about the month of June last on account of Mesdames Verdelet Lamare and Brunet, nées Guilbert, and destined for a dotal reinvestment. This he has not been able to do, nor to justify that a reinvestment was made.

"We repaired on November 4 and 5 to the office of the said notary, and in view of his absence have not been able to proceed to any verification."

Feb. 23, 24. Sir Edward Clarke, Q. C., S.-G., and Henry Sutton (Sir Richard Webster, Q. C., A.-G., with them), showed cause. The objection that the French warrant does not specify offences for which extradition can be granted is disposed of by article 408 of the French Penal Code, and by the cases of *Reg.* v. *Jacobi*, 46 L. T. 595, n., and *Ex parte Piot*, 48 L. T. 120. The English warrant is good. It substantially agrees with the French warrant, [*135] and specifies crimes *according to both French and English law. It is not required, and it would be impossible, that the English warrant should be a literal translation of the French warrant. *Ex parte Terraz*, 4 Ex. D. 63, 48 L. J. Ex. 214; *Reg.* v. *Ganz*, 9 Q. B. D. 93, 51 L. J. Q. B. 419; *Reg.* v. *Weil*, 9 Q. B. D. 701, 53 L. J. M. C. 74. There is sufficient evidence to justify the committal and extradition of the prisoner on several of the offences specified in the French warrant. The evidence brings the case within Article 3, clause 18, of the Treaty, within Article 408 of the French Penal Code, and within 24 & 25 Vict., c. 96, s. 75 or s. 76, or perhaps within both those sections. *Reg.* v. *Tatlock*, 2 Q. B. D. 157, 46 L. J. M. C. 7; *Reg.* v. *Fullagar*,

41 L. T. 448. [They also referred to *Reg.* v. *Maurer*, 10 Q. B. D. 513, 52 L. J. M. C. 104; *In re Castioni* [1891], 1 Q. B. 149.]

[WILLS, J., referred to *Ex parte Lamirande*, 10 Lower Canada Jurist, 280; Clarke on Extradition, 3rd ed. p. 113, and Appendix, celii.]

J. P. Grain and Eldridge in support of the rule. — The warrants are insufficient, and the evidence does not show any offence which comes within the Treaty of Extradition. *Reg* v. *Cooper*, L. R. 2 C. C. 123, 43 L. J. M. C. 89; *Reg.* v. *Newman*, 8 Q. B. D. 706, 51 L. J. M. C. 87; *In re Windsor*, 6 B. & S. 522.

There is no evidence to bring the case within either s. 75 or s. 76 of 24 & 25 Vict., c. 96, nor is anything shown in the nature of larceny by a bailee or larceny by a trick, and it cannot be said that there has been embezzlement, for the prisoner was not in the position of a clerk or servant. Some of the charges specified in the French warrant must fail, and, as the committal appears to be on all, the failure of one will vitiate the whole warrant. [They also referred to *Reg.* v. *Hassall*, L. & C. 58; 30 L. J. M. C. 175; *Reg.* v. *Oxenham*, 46 L. J. M. C. 125.]

Cur. adv. vult.

Feb. 26. The following judgments were delivered: —

CAVE, J. — In this case the Solicitor-General and Mr. Sutton showed cause against a rule *nisi* for a *habeas corpus* which had been obtained on behalf of David Henri Bellencontre on the * ground that he had not committed any extradition [* 136] crime for which he could be delivered over for trial to the authorities in France. Substantially two points were made on his behalf; the one technical, the other substantial. The first or technical point had reference to the form of the French warrant, the warrant of the Secretary of State, and the warrant of Sir John Bridge; and it was contended that they or some of them were not in the proper form. I am of opinion that there is nothing in that ground of objection. When one comes to look at the French warrant it appears to me to state an offence within No. 18 of the crimes for which extradition is to be granted. It states in effect that the prisoner was in nineteen cases guilty of an abuse of confidence and of fraudulent misappropriation of the property which had been deposited with him in his character of a notary. That seems to me a sufficient statement of an offence

under No. 18 of the Extradition Treaty. The warrant of the Secretary of State only translates that into the corresponding English provision of the same article, and describes the charge as one of fraud by a bailee. That no doubt is somewhat wider than the statement in the French warrant, which specifies fraudulent misappropriation by a notary who has been intrusted with the property, but I see no objection to it on the ground of its being wider. The duty of the Secretary of State is to call the attention of the police magistrate to what he is required to do under the Extradition Treaty, and it is enough if he draws attention to the particular crime under the 3rd article of the Extradition Treaty, and that is fraud by a bailee, which expresses in general terms what is expressed rather more specifically in the French warrant. The warrant of Sir John Bridge seems to me also perfectly good. "Fraud by a bailee" is a term used in No. 18, and it is for the magistrate to inquire whether the evidence laid before him shows an offence of "fraud by a bailee" of such a nature as would be cognisable in an English Court of justice. Now, in order to do that, he has to consider the law in respect of frauds by bailees and the evidence which is produced before him, and he arrives at the conclusion that there is evidence of a fraud by a bailee who is an agent of the party. Although it might not be sufficient to convict any bailee in an [* 137] English * Court of justice, it is sufficient for the purpose when the bailee who is charged is an agent. It seems to me that is a very proper mode of expressing the result of the inquiry, and that there is no ground for saying that there is any technical informality in any of these warrants which would justify us in discharging the prisoner.

Then we come to the substantial point, which is that the evidence which was laid before Sir John Bridge was not sufficient to have satisfied him that a crime punishable by English law had been committed by Bellencontre. Now, when one comes to deal with that point, one is at once struck with the superiority of the French criminal law over our own. We find there a perfectly clear and comprehensive definition of the offence which is made punishable. It is abuse of confidence or fraudulent misappropriation by any person who has been intrusted with property, a wide and general definition which embraces undoubtedly a good deal more than is expressed by our law on the same

subject. Our law, unfortunately, instead of being in the form of a code, or even of a well-drawn Consolidation Act, is a thing of shreds and patches, and one has to look to different portions of the statute law in order to see to what extent a person who has been intrusted with property is made responsible for the fraudulent misappropriation of it.

Now, we find that law, as I have said, in different parts of our statute law. In the case of a bailee — in the case, that is to say, of all bailees — they are made responsible where the article which they have been intrusted with is one which they are to return or to deliver to somebody else in specie, but they are not made responsible where they are at liberty, or are bound, to convert the particular article delivered to them into something else before they return it or deliver it to the other persons to whom they are instructed to deliver it. Now that being the case, the charge against Bellencontre did not prove an offence of that nature. Therefore that particular provision of our law is out of the question.

Then there are two sections in the Act of 1861 which deals with crimes against property (24 & 25 Vict., c. 96), namely, ss. 75 and 76, which also contain provisions for the punishment of * fraudulent bailees in certain cases and of fraudulent bailees [* 138] of particular kinds. Where a man is a bailee of a particular kind — a banker, a merchant, an agent, or a factor — and receives property with written instructions how he is to dispose of it, and he misappropriates that property, then under s. 75 he is punishable; but our law requires, what the French law does not require, written instructions, and therefore the first part of that section is not applicable to the present case. There is the second part of the section which is also not applicable, because it excludes money which was the subject-matter of the offences committed by Bellencontre in this case. That brings us to s. 76, which is the last provision of the statute law having any application to a case of that kind, and by that section bailees of a certain specified description, bankers, agents, and other people are made punishable when they receive property for safe custody and misapply it. That, again, is obviously very much narrower than the French offence, because, in the first place, it applies, not to all bailees, but only to bailees of the kind there specified, and whether the specification is sufficiently wide to include all bailees I should

prefer not to say, because it is impossible to know what circumstances may subsequently arise which may turn out, although they are cases of bailees, not to be included in the specified kinds of bailees here referred to. Not only in that respect may there be a difference, but there obviously is another very important difference between the French law and the English law in this respect, that by our law the property must have been intrusted to the particular bailee for safe custody. If it is intrusted to him for any purpose other than that special purpose, then the selling or parting with the goods or transferring the property is no longer an offence within s. 76. Therefore, as I have said, it follows that our criminal law is very much narrower on those points, and far less clear, than the law of France is. It is fenced round with exceptions, which make it somewhat difficult at times to apply it. We have, therefore, to see whether the facts laid before the magistrate justified him in coming to the conclusion that there was a *primâ facie* case made out of an offence against the English law. Now, for that reason I have gone, with the assistance of my learned brother, carefully through the nineteen different cases which [* 139] have * been made against Bellencontre, and I find that with regard to the third, the fourth, the seventeenth and eighteenth cases, there is *primâ facie* evidence of the commission of a crime against the English law, or what would be a crime by English law. Of course, it does not follow that because there is *primâ facie* evidence to that effect the prisoner will necessarily be convicted of it. That will be a question for the tribunal by which he will have to be tried; but all that is necessary for the magistrate here to be satisfied of is that there is such evidence as would warrant him in committing the prisoner for trial in an English Court of justice, if what he did had been done in this country. It appears to me, having regard to those four cases, that there is the necessary amount of evidence, and, consequently, as to those four, he would be rightly extradited for the purpose of being tried in France. That being so, it follows to my mind that the warrant is good, and that, consequently, the writ of *habeas corpus* ought not to go. Two objections have been raised by Mr. Grain, about which I should like to say a word, and one is that the term made use of in the French warrant is embezzlement. Now, in the first place, that is not the term used in the French warrant: that is the term made use of to translate it. It might with equal

propriety be translated as fraudulent misappropriation, and then the point made by Mr. Grain would not arise. That point was that embezzlement in our law means misappropriation of money by a clerk or servant. Embezzlement does not mean that misappropriation by a clerk or servant is the only species of embezzlement to which the law actually gives that name, and so it is to be regarded as if that were the only subject-matter to which the term embezzlement could be applied; but in my judgment that is not so; embezzlement means nothing more nor less than a fraudulent misappropriation, and although it is called embezzlement where it is committed by a clerk or servant, because it is only in that case that it is made punishable under that name, yet the thing actually exists in other cases than those of a clerk and servant, and is made punishable in the case of a banker, merchant, factor, or agent by those sections of the Act of 1861, to which I have referred. Another point which was taken was that, inasmuch as Sir John Bridge has committed the * prisoner upon all of these charges, therefore, the war- [* 140] rant not being good as to all of them, it is bad as to all. That is a point which I am unable to understand. There is a committal of the prisoner upon a warrant which describes him as having been guilty of frauds as a bailee and of frauds as an agent. It does not specify upon which of those offences the evidence had satisfied Sir John Bridge. I think it is fair to assume, in the absence of anything to the contrary, that it may have satisfied him upon all. If it did satisfy him upon all, then to that extent it seems to me that he was wrong, that there was no evidence that should have satisfied him except in the four cases that I have named. But the only object of specifying those cases is in order to give the prisoner the right, if he wishes to make use of it, to object to being tried in France for those other offences — for the other fifteen — on the ground that those are not in themselves crimes for which he could have been extradited. That objection he will have the opportunity of taking; but I do not see that there is any reason why the warrant, which is in perfectly general terms, is not to be held by us to be good in respect of those cases as to which there is sufficient *primâ facie* evidence to go upon. For that reason it seems to me that this technical objection, like the others, fails, and that consequently the rule ought to be discharged.

WILLS, J. — I am of the same opinion. As to the technical objections which have been referred to, there seems to be really nothing in them, and I do not think they are worth serious discussion. The substance of the Extradition Act, 33 & 34 Vict., c. 52, seems to me to require that the person whose extradition is sought should have been accused in a foreign country of something which is a crime by English law, and that there should be a *primâ facie* case made out that he is guilty of a crime under the foreign law, and also of a crime under English law. If those conditions are satisfied, the extradition ought to be granted. We cannot expect that the definitions or descriptions of the crime when translated into the language of the two countries respectively, should exactly correspond. The definitions may have grown up under widely different circumstances [* 141] *in the two countries; and if an exact correspondence were required in mere matter of definition, probably there would be great difficulty in laying down what crimes could be made the subjects of extradition. Now this difficulty has been met, as it seems to me, by the first schedule to the Extradition Act, 1870 (33 & 34 Vict., c. 52), which describes what are the various extradition crimes. In this case, the man has been accused of a number of things which clearly fall within article 408 of the French Code, and therefore are crimes in France, and crimes which clearly fall under number 18 in the French part of the Treaty of Extradition. One looks, then, to see whether in the corresponding English section, No. 18 of article 3, there is a crime described by English law which crime has been made out by the evidence. It seems to me that there is no difficulty in saying which of the definitions it falls under. It is either fraud by a bailee or an agent, made criminal by an Act in force in England. I cannot help saying that I share a certain feeling of humiliation which my learned brother has expressed, when one is obliged to confess formally to a neighbouring country that a great part of the atrocious things which have been done by this man, if the evidence is to be relied upon, are not punishable by English law. It does seem an extraordinary thing that a man being intrusted with money by other people for investment should be able to put it into his own pocket fraudulently and dishonestly, and yet commit no crime punishable by English law. I am reminded of a circumstance that was mentioned to

me some time ago by a friend very greatly versed in the English criminal law. In the course of his studies he made out a list of the iniquitous things which could be done by the English law, without bringing the man under any provision of the common or statute law, and he had had it in his mind at one time to publish it, to show how defective the law was, but he forbore on grounds of public policy to call attention to what people might do without rendering themselves liable to punishment. Certainly we have a very signal illustration of it with regard to the particular classes of fraud established in this case. But fortunately we have s. 76 of the Act, 24 & 25 Vict., c. 96, which provides that whoever being, amongst other
* things, an attorney or agent, and intrusted with the prop- [* 142]
erty of any other person for safe custody, shall commit certain frauds in respect of it shall be punishable. There is no doubt that Bellencontre answered this description of an attorney or agent as nearly as a person carrying on business in France could. There is no doubt also that he was intrusted with property within the meaning of that section, because he was intrusted with money, and the definition clause (24 & 25 Vict., c. 96, s. 1) makes money a portion of the articles which are comprehended under property. There is no doubt also that there is evidence that with intent to defraud he appropriated that money to his own use.

Then one question remains, was he intrusted with the money for safe custody? This section deals with property of every description, and money is probably the most important and the most common subject in respect of which frauds of this kind are carried out, so I cannot for a moment doubt that the section was meant to have a real and substantial operation with regard to money, and with regard to money that was intrusted to, amongst other people, merchants, brokers, attorneys, or agents. Now, to hold, as has been suggested, that the section applies only to money which is put into a bag and given to a man to keep in a drawer would be, to my mind, simply a *reductio ad absurdum*, because in the business of this and every other civilised country no such process as that ever takes place; and the probability is that if a man did keep money intrusted to him for safe custody in that way it would be said, if he lost the money, that he had not taken reasonable means to secure its custody. I cannot doubt that it is fully within the meaning of the Act, if the

money is intrusted to him under circumstances which would make it his duty to pay it to a special account with a bank, or to keep it in any other reasonable way in which men of business ordinarily keep their money, so as to have, not the specific coins, but the equivalents, at call when demanded. It seems to me that *Reg.* v. *Fullagar*, 41 L. T. 448, is absolutely on all-fours with some portion of the present case in that respect, because there the money which was held to be the subject of safe custody in the hands of the solicitor who received it, was paid over to him [* 143] on * behalf of a client to whom he wrote announcing that he had it, and asking for instructions for investment. He received answers which clearly contemplated future investment, but which also contemplated that the client could interfere further by giving directions as to investment on being consulted before the investment was actually made. Under those circumstances the Court held, without any hesitation, that it had been intrusted to him for safe custody. In the present instance, in numbers 3 and 4, which my learned Brother has dealt with, my opinion, and I believe his, is that with regard to the sums of 6000 fr. and 2500 fr. respectively, there is evidence (we do not say conclusive evidence, but there is evidence) that the 6000 fr. was originally, and the 2500 fr. after repayment by Elie, intrusted, not for investment, but for safe custody, and that there had been no change of the circumstances under which either sum was so held; therefore they seem to us to fall within the principle of *Reg.* v. *Fullagar*, 41 L. T. 448. With regard to the other two charges (numbers 17 and 18), the case of the Guilberts, the two sisters for whom this man had received a sum of money of about 11,000 fr., which belonged in moieties to each of them, but as to which, inasmuch as the moneys were subject to dotal rights, so that there might be persons in succession to them who would be entitled to the capital, they could not themselves receive the capital and divide it, there is, I do not say conclusive evidence, but there is evidence that he held that sum for investment in this sense, and in this qualified sense only, that he, like themselves, was to look out for an investment, and, if he found an investment, to communicate with them and ascertain whether it was satisfactory, they in the meantime looking out for investments themselves. The fact that one of them found an investment, and the other had been looking out for it, seems to my mind to be evidence that there was no

definite trust to the agent to invest without further consultation with them, and that, therefore, until any further directions should be given, which would be necessary before investment took place, it was held for safe custody and nothing else. A good deal of stress was laid upon an expression in which it was said that he had made himself answerable for the investment. I *have already pointed out that I do not think that is at all [* 144] the meaning of the French term, and that "*J'en réponds*," in my opinion means, "I will answer for it," in this sense, that "I am perfectly confident I shall be able to find an investment," not that "I make myself responsible to invest it without anything further." It seems to me, with regard to those four offences, that there is distinct evidence to go to a jury, and, therefore, evidence sufficient to justify the committal by the magistrate for extradition. I think, also, that the objection that because some of the charges are not within the Extradition Treaty, therefore the warrant is bad, and the man is to be set at liberty, cannot be maintained. It seems to me that the warrant is general. It speaks of committal for crimes of a certain specified kind, which are described in number 18 of article 3 of the treaty, and it is sufficient, if there are facts which are evidence that such crimes have been committed. The warrant is statutory in its form, and is not to be construed as an ordinary English common-law document, and it is not at all necessary, in my judgment, that there should be anything like the same particularity that there would be in respect of the warrant of committal to the gaols of this country under ordinary circumstances. For these reasons, I am of opinion that this *habeas corpus* ought not to issue.

Rule discharged.

ENGLISH NOTES.

By the definition clause of the Extradition Act, 1870 (33 & 34 Vict., c. 52), s. 26 (*inter alia*), the term "extradition crime" means a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the First Schedule to the Act.

The first schedule gives a list of crimes, and provides that they are to be construed according to the law existing in England, or in a British possession, (as the case may be,) at the date of the alleged crime, whether by common law or by statute made before or after the passing of the Act. These include Murder; Manslaughter; Counterfeiting money; Forgery; Embezzlement and larceny; Obtaining money

on goods by false pretences; Crimes by bankrupts against bankruptcy law; Fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company made criminal by any Act for the time being in force: Rape; Abduction; Child stealing; Burglary and housebreaking; Arson; Robbery with violence; Threats with intent to extort; Piracy by law of nations; Sinking or destroying a vessel at sea; Assaults on board ship with intent to kill or do grievous bodily harm; Mutiny, or conspiracy to revolt on board ship.

The Extradition Act, 1870, is an enabling Act empowering the Government by the joint effect of an arrangement with the foreign State and an Order in Council to give facilities for extradition under the conditions laid down by the Act. Some of the most important of these conditions are briefly as follows: —

By section 3 — A fugitive criminal shall not be surrendered (1) if the offence in respect of which his surrender is demanded is one of a political character, or if he prove that the demand is made with a view to punish him for an offence of a political character; or (2) unless provision is made by the law of the foreign State or by the extradition treaty that the fugitive criminal shall not be tried for an offence committed prior to his surrender, other than the extradition crime on which the surrender is grounded.

By section 10 — If the foreign warrant authorising the arrest is duly authenticated and such evidence is produced as (subject to the provisions of the Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime had been committed in England, the police magistrate shall commit him to prison (to await the warrant of a Secretary of State for his surrender), but otherwise shall order him to be discharged.

Where a prisoner has been committed for extradition in respect of crimes *primâ facie* divested of any political character, and there is no evidence that they are of a political character, or that his extradition is demanded in order to punish him for an offence of a political character, the Court will not on a mere suggestion to that effect grant a *habeas corpus*. In the absence of evidence, it is for the Government to deal with any question as to the good faith of the demand. *In re Arton* (21 Dec., 1895), 1896, 1 Q. B. 108, 65 L. J. M. C. 23.

In the sequel, *In re Arton*, No. 2, 1896, 1 Q. B. 509, 65 L. J. M. C. 50, 74 L. T. 249, 44 W. R. 351, the Court held that fraudulent falsification of accounts as director or officer of a public company and constituting the crime of "faux en écritures de commerce" within the 147th article of the Code Pénal is an extradition crime within the treaty with France, and within the Extradition Acts, 1870 and 1873.

It has been held that, under the existing treaty with Belgium, as construed along with the Act, it is discretionary with the Government whether they will surrender their own subjects. *In re Galway, Ex parte Galway* (1896), 1896, 1 Q. B. 230, 65 L. J. M. C. 38, 73 L. T. 756, 44 W. R. 313.

AMERICAN NOTES.

Dr. Spear, in his work on Extradition (p. 40), states that "The general rule of evidence adopted in the extradition treaties of the United States is, that the charge of criminality on which the demand for delivery is based must be supported by such evidence as would justify the apprehension and commitment for trial of the person accused, if the alleged offence had been committed in the country on which the demand is made. The laws of that country, and not those of the one making the demand, furnish this rule; and in this respect each government administers its own laws without reference to those of the others."

FAMILY ARRANGEMENT.

No. 1. — STAPILTON *v.* STAPILTON.

(CH. 1739.)

No. 2. — GORDON *v.* GORDON.

(CH. 1821.)

RULE.

A COURT of equity will support an agreement entered into between members of the same family for the settlement of doubtful rights, although founded on a mistake.

Where, however, a material fact is known to one of the parties to a family arrangement, and concealed by him from a party ignorant of that fact, the agreement will not be specifically enforced.

Stapilton v. Stapilton.

1 Atk. 2–11 (Wh. & Tud. L. C. Eq.).

Family Arrangement. — Specific Performance.

[2] Philip Stapilton, tenant of the premises in question for ninety-nine years, if he so long lived, remainder to his first and other sons in tail, remainder to his right heirs, having two sons, Henry and Philip, they by lease and release of the 9th and 10th September, 1724, in order to settle and perpetuate the manors, &c., in the name and blood of the Stapiltons, and for making provision for his sons, and for preventing disputes that might possibly arise between them or any other person claiming an interest in the estates, and for barring all estates tail, release and confirm to two trustees all those manors, &c., to hold to them and their heirs (as to part), to the use of Philip the father, his heirs and assigns for ever, and (as to another part) to the use of the father for life, to Henry the son for life, remainder to trustees for preserving, &c., remainder to his first and every other son in tail male, remainder to Philip the son for life, with like remainders to his sons, remainder to the daughters of Henry in tail, remainder to the daughters of Philip the son in tail, remainder to the right heirs of Philip the father. And as to the other part, to the use of Philip the father for life, remainder to Philip the son for life, &c.

Henry having died before a recovery to carry out the purposes of the above deed could be effected, and a recovery having afterwards been carried out, which, according to its strict legal effect, would have ousted the heir of Henry, a suit was brought by the heir of Henry to have the estate conveyed according to the intention of the deeds of 9th and 10th September, 1724. In this suit Philip insisted that Henry was a bastard, and that his heir had no right in the estate. The Court however decreed that the family arrangement expressed in the deeds of 9th and 10th September, 1724, should be carried out, and the property assured according to the intention of those deeds.

By a deed dated on the 21st of August, 1661, Philip Stapilton was tenant of the premises in question for ninety-nine years, if he so long live, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to his right heirs.

[*3] * Philip having two sons, Henry and Philip, they by deeds of lease and release the 9th and 10th of September, 1724, reciting, that for settling and perpetuating all manors, &c., in the name and blood of the Stapiltons, and for making provision for his two sons, &c., for preventing disputes and controversies that might possibly arise between the said two sons, or any other person claiming an interest in all or any of the estates therein after mentioned, and for barring all estates tail, and for answering all and every the purpose and purposes of the parties thereto, and for and in con-

sideration of the sum of 5*s.* release and confirm to Thompson and Fairfax all those manors, &c. To have and to hold to them, their heirs and assigns, to the use (as to part) of Philip the father, his heirs and assigns for ever, and as to another part, to the use of Philip the father for life, remainder to Henry the son for life, remainder to trustees to preserve contingent remainders, remainder to his first and every other son in tail male, remainder to Philip the son for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to the daughters of Henry in tail, remainder to the daughters of Philip the son in tail, remainder to the right heirs of Philip the father. And as to the remaining part, to the use of Philip the father for life, with like limitations in the first place to Philip the son and his issue, and then to Henry and his issue, remainder in fee to the father.

There were covenants to suffer a recovery within 12 months, and likewise for further assurances. — *N. B.* To this deed the heir of the surviving trustee in the deed in 1661 was not a party.

But by deeds of lease and release dated the 28th and 29th of September, 1724, to which the heir of the surviving trustee of the deed of 1661 was a party, the father and two sons make Thompson and Fairfax tenants to the præcipe, in order to suffer a recovery for the purposes mentioned in the former deeds of the 9th and 10th of September.

Before any recovery suffered Henry died, leaving issue the plaintiff.

Afterwards, by lease and release the 12th and 13th of April, 1725, to which the heir of the surviving trustee of the deed of 1661 was a party, Philip the father and Philip the son covenant to suffer a recovery, in which Thompson and Fairfax were to be tenants to the præcipe, to the use, as to part, of Philip the father, his heirs and assigns; and as to the other part, to the use of Philip the father for life, remainder to Philip the son in fee.

*In Trinity Term, 1725, a recovery was suffered, in which [*4] were the same tenant to the præcipe, the same demandant, and the same vouchees (except Henry, who was dead), as were covenanted to be by the first deed; it was likewise suffered within twelve months after the first deed.

The father Philip Stapilton being dead, the plaintiff, as son and heir of Henry, brought his bill to establish his title to the prem-

ises in question, and for the whole estate as tenant in tail under the old settlement, and to be let into possession, and for an account of rents received by Philip Stapilton the son, due since the death of the plaintiff's grandfather, and to have the same applied for the plaintiff's benefit during his infancy, and for an injunction to restrain the defendants from receiving any more rents.

The defendant, Philip the son, by his answer confesses the several deeds before mentioned, but says, Henry was a bastard, and that by virtue of the deed of 1725, and of the recovery, he was entitled to the whole estate in question.

Upon an issue directed, Henry was found illegitimate, and the cause was now heard upon the equity reserved, when the counsel for the plaintiff, waiving the claim to the whole estate, insisted upon these two points:

1st, That the recovery suffered in Trinity Term, 1725, should enure to the use of the deeds of the 9th and 10th of September, 1724, and not to the uses of the deed in 1725.

2dly, Supposing it did not, yet that the deed of 1724 was such an agreement as this Court will carry into execution.

As to the first point; it was said that the uses when once declared cannot be altered, unless all the parties entitled to the uses join in the new declaration, and Henry did not join in the deed of 1725. Tenant in tail may part with his estate, and it shall be good against him, though not against his issue. For tenant in tail is not aided by the Statute of Westminster the 2d, but only his issue, therefore by the deed of 1724, the uses being executed by the statute of Hen. VIII., Henry gained a base fee which is not avoidable by Philip during his life, and as his issue are barred by the subsequent recovery, they will not be able to avoid it, and consequently Henry's estate which was before defeasible is made indefeasible by the recovery.

[*5] *If tenant in tail confesses a judgment, or mortgages the lands, and afterwards suffers a recovery to a collateral purpose, that recovery shall enure to make good all his precedent acts and incumbrances. 1 Ch. Cas. 119. (Lord Chancellor mentioned a case in Lord King's time, where father tenant in tail, remainder to himself in fee, contracting debts on specialty, his son after his death levying a fine let in his father's creditors.) And if a recovery suffered for another purpose will substantiate any prior act of the tenant in tail, much more, in this case, this

No. 1. — Stapilton v. Stapilton, 1 Atk. 5.

recovery will substantiate the first deed, where there are all the parties who covenanted by that deed.

As to the second point; this cannot be considered as a voluntary agreement, for Henry's legitimacy was then doubtful, and if he had proved legitimate, Philip would have come into this Court to have the agreement executed, and Henry would have been bound by it. This Court has decreed the performance of agreements like this founded upon mistakes; as in the cases of *Frank* v. *Frank*, 1 Ch. Cas. 84, and *Cann* v. *Cann*, 1 P. Wms. 723.

For the defendant it was argued, as to the first point, that Henry being dead before the recovery was suffered, the intent of the parties, in the first deed, could not be pursued; for the plaintiff (supposing him legitimate) claims paramount his father, and the deed of 1661, therefore as the recovery could not substantiate the first deed, supposing him legitimate, it shall not substantiate it, now he is found illegitimate.

The plaintiff upon the death of his father had not any use vested in him, for the intent of the parties was, that the uses should arise out of the recovery; the ends recited could not be come at without a recovery, and where the intent of the parties is, that the uses should pass by fine or recovery, nothing will pass by the deed, that is intended only to declare the uses; the fine and recovery all make but one conveyance. Cro. Jac. 643; 2 Co. Rep. 68; 2 Lev. 306; 1 Vent. 279; 2 Lev. 54; *Cromwell's Case*, 2 Co. Rep. 69 b, Cro. Jac. 320.

As to the second point; take it as an agreement, this Court will not decree a performance of it, for supposing Henry had been found legitimate, this Court would not have decreed a performance of it against the plaintiff; so that, in regard to the defendant, it must be considered as a voluntary agreement, into which he was drawn without any valuable consideration, and the covenant for further assurance will be void as the deed itself to which it is annexed is void; and so it was determined in the case of *Furzaker* v. *Robinson*, Prec. in Chan. 475.

Lord Chancellor (Lord Hardwicke). — The plaintiff in this case is entitled to have a decree; there was a sufficient foundation for Philip the father, and Henry and Philip his two sons, to execute the lease and release of the 9th and 10th of September, 1724. It was to save the honour of the father and his family, and was a reasonable agreement, and therefore if it is possible for a Court of equity to decree a performance of it, it ought to be done.

[* 6] * It would be very hard for the defendant on his side to endeavour to set aside this agreement, and the effect of this deed. Consider the state and situation of the family at the time of making the agreement: Philip had these children grown up, had a very considerable real estate, both his sons then owned as legitimate, their father and mother had lived together as husband and wife for many years, and at the time of this agreement were so; there was a foresight in the father and mother, that such a dispute between their two sons might hereafter arise, to their dishonour and likewise that of the family.

The foundation of this agreement, the illegitimacy of the eldest son Henry, has now been determined by trial, and it is found that Henry was a bastard, yet both the sons are of the same blood of the father equally, though not so in the notion of the law.

If the eldest son should be found illegitimate (as he now is), the father knew he would be left without any provision if no such agreement was made; and on the other hand, if his legitimacy should be established, then Philip the younger son would have nothing: to prevent these disputes, and ill consequences, the father brings both his sons into an agreement to make a division of his real estate. It is very plain the parties did not know who was the heir of the surviving trustee, in the settlement of 1661, at the time of the lease and release the 9th and 10th of September, 1724; because they covenant a writ of entry should be sued out within twelve months, which is a very unusual time to limit to suffer a recovery, and done in order to give time to find out the heir of the surviving trustee, if they could find him out; but he was afterwards found and made a party to the deeds of the 28th and 29th of September, 1724.

The bill is brought by the eldest son and heir of Henry, to have the benefit and possession of the whole estate, and to have an account of the rents and profits, and to be quieted in the possession, and for general relief. Upon the first hearing an issue was directed to try whether Henry the father was legitimate, and found he was not, and now the plaintiff insists upon having the benefit of this agreement, whereby he is only entitled to a part: this being the bill of an infant, he may have a decree upon any matter arising upon the state of his case, though he has not particularly mentioned and insisted upon it, and prayed it by his bill; but it might be otherwise in the case of an adult person.

No. 1. — Stapilton v. Stapilton, 1 Atk. 6, 7.

Upon this case there arise two general questions.

First, Whether the plaintiff has any estate in law by virtue of any of the conveyances, or by the recovery?

Secondly, If he has no estate at law, or only a defeasible one, whether he is entitled to have the benefit of this agreement, and to have it carried into execution here?

The first question consists of two branches.

First, Whether the lease and release of the 9th and 10th of [7] September, 1724, will amount to a good declaration of the uses of the recovery, notwithstanding the subsequent deed of April, 1725?

Secondly, If not, whether the recovery of Trinity Term, 1725, having barred the estate tail, will make good any estate which passed by the lease and release of the 9th and 10th of September, 1724?

As to the first; whether the lease and release is a good declaration of the uses of the recovery, I am strongly inclined to think it will amount to a good declaration: this question depends on the construction of law, and the authority of cases upon the declaration of uses. It is true, where there is an agreement to suffer a recovery, and uses are declared, if the recovery is after suffered, though it varies in point of time from the recovery covenanted to be suffered, yet if there is no subsequent declaration of uses, the recovery will enure to the uses so declared.

And before the Statute of Frauds, if the deeds declaring the uses had not been pursued, a parol declaration of uses would have been let in; but if there is a deed declaring the uses, and the common recovery is suffered accordingly, that would, before the statute, exclude a parol declaration of new uses.

But even now there may be a subsequent declaration of uses, but that declaration must be in writing, and such a new declaration of uses depends upon the agreement of the parties; therefore, though it is said at the bar that the declaration of uses is in the power of the tenant in tail, and that he may declare new uses, I take that not to be law, for such subsequent declaration must be by all the parties concerned in interest; and in the *Case of the Countess of Rutland*, 5 Co. Rep. 25, it is not laid down there, that the tenant in tail might declare new uses, but said, whilst it is directory only, new uses may be declared; and the meaning of that is, that as the uses must arise out of the agreement of the parties, the parties may change the uses, but that must be done

by the mutual consent of all the parties concerned in interest, and in that case it was a mutual agreement of all parties.

And in the case of *Jones* v. *Merley*, 2 Salk. 677, there was a variance as to the time of suffering the recovery, from the deed declaring the uses, and there held that a declaration of uses was equally good, whether by deed or not, if in writing.

But in the present case, the second agreement not being between all the parties concerned in interest, ought not to control the first declaration, and especially as this recovery was suffered within the time prescribed by the first deed, and between the same demandant and tenant.

[8] The consideration for suffering the recovery was good both in law and equity, and there is no case to warrant me to say, the first agreement is not good and binding, or that the tenant in tail could by his own agreement afterwards change the uses.

But if it was doubtful whether the recovery suffered in 1725 should enure to the uses declared by the deed of 1724, I am of opinion the recovery will operate to make good those estates which passed by the deed of 1724.

But to this two objections have been made.

First, That the uses must be governed by, and operate according to the intention of the parties, therefore the subsequent recovery being suffered to other uses, those uses will take place.

Secondly, If any uses did pass by the deed in 1724, yet this recovery will not make those uses good, because the subsequent recovery was suffered to particular uses declared by the deed of 1725.

As to the first objection. I am of opinion that a use did pass by the deed of 1724, and according to the intention of the parties. It is certainly true, that, according to the Statute of Uses, the general doctrine is, that the uses shall be executed according to the intention of the parties, but both the Courts of law and equity consider what was the general and final intent of the parties. In this case, their intention was, that the estate should pass, and wherever a Court of law or equity find that the general and substantial intent of the parties was that the estate should pass, they will construe deeds in support of that intention, different from the formal nature of those deeds themselves; as a feoffment, to serve the intention of the parties, shall operate as a covenant to stand seised. The intent here was, that the estate in point of law should

pass by the deed of 1724, and that the uses declared by that deed should vest in the mean time till the recovery suffered.

This is an answer to the objection arising from the Statute of Uses; but there is another question, What estate passed by the deed of 1724?

It was a defeasible estate to serve the uses of that deed, and so is the resolution in *Machell* v. *Clark*, in Farr. 18, Salk. 619, Com. 119. That tenant in tail may convey a base fee and estate defeasible by the entry of the issue.

The next question is, Whether the recovery suffered in 1725 did enure to make good and render indefeasible those base estates created by the deed of 1724?

And I am of opinion they are made good.

The objection to this is, that the recovery was suffered in pursuance of the deed in 1725, wherein there were new uses limited, but the only uses which make any difference in that deed are to Philip the son and his heirs, so there is nobody concerned in the question but Philip and his heirs.

It has been argued by defendant's counsel, that, if the first declaration of uses is in general to prevail, purchasers of [9] estates, though they have a recovery for strengthening their title, with a declaration of the uses of the recovery to themselves and their heirs, cannot be safe, for the vendor may defeat such declaration by a precedent one to different uses; but in such cases I think a recovery would not enure to make good such former declaration of uses, but only the uses of the purchase.

It is admitted, that if tenant in tail confesses a judgment, or a statute, or enters into a bond, and afterwards suffers a recovery to bar the estate tail, it lets in the precedent judgment, &c. And it is as clear, if a tenant in tail makes a lease not warranted by the statute of the 32 Hen. VIII., if he suffers a recovery, that lets in the lease and makes it good. There are so many cases of this kind, that it is not necessary for me to mention them.

This case is different from those that turn only upon the point of the effect of a mere declaration of uses; for a mere declaration of uses subsists only upon the agreement of the parties, and in such cases, where the agreement has been changed by mutual assent of all parties, there a recovery shall enure to make good such last agreement or declaration.

But if the estate was vested, notwithstanding such declaration

of uses, yet the recovery has always been held to make good such defeasible estate; for the prior lease, charge, or estate made by tenant in tail is only defeasible by the issue, by virtue of the statute *de donis*, which was made to protect the issue against the alienation of the tenant in tail; therefore the issue would avoid such lease, &c., but not the tenant in tail himself; but when by the recovery he has gained to himself a fee, all the reasoning for avoiding an estate made by tenant in tail is gone, for the issue is barred by the recovery. The reason why the issue may avoid a charge made by tenant in tail, is upon account of the protection of the issue and his estate under the statute *de donis*, and of the privity of the estate tail; but when the privity is gone, the reason ceases, and to this purpose is the case of *Croker* v. *Kelsey*, Sir W. Jones, 60.

In the *Case of Lord Derwentwater*, Mod. Cases in Law and Equity, 172, 2nd part, the question was, Whether a papist, tenant in tail, suffering a recovery and declaring the uses to himself in fee, gained a new estate within the 11th and 12th of Will. III., or was in of the old use? And it was held the 5th of Geo. I., by four judges out of five, appointed delegates to determine appeals from the commissioners of forfeited estates, that he was in of the old use; and I take it for law, that a tenant in tail suffering a recovery is in of the old use, and that the estate is discharged of the statute *de donis*, and therefore I am of opinion that the recovery has made good this defeasible estate created by the deed of 1724.

It has been objected, that if the plaintiff has any title, his [10] remedy is at law, but I think it is more properly here; he is an infant, and has come recently into this Court, nor do I think this case depends entirely upon the point of law; for I am of opinion that the plaintiff is entitled to have an execution of the agreement, as a good and binding agreement in this Court.

The question is, Whether there was any valuable consideration on all sides for entering into this agreement? If so, then there is a sufficient ground for coming here; but a mere volunteer is not entitled to come here for an execution of an agreement; but here is a proper consideration as appears in the recital of the deed of 1724; neither is it the common case of a bastard, for the law of England does allow of some privileges to a bastard *eigne*, and their parents are not punishable by the canon law for antenuptial fornication.

In the case of *Cann* v. *Cann*, 1 P. Wms. 727, it was laid down by Lord Macclesfield, that an agreement entered into upon a supposition of a right, or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties, for the right must always be on one side or the other; and therefore the compromise of a doubtful right is a sufficient foundation of an agreement.

Another objection has been made to this agreement, that the benefit on Henry and Philip's side was not mutual and equal.

During both their lives the benefit and obligation were mutual, and Henry would have been equally compellable to suffer a recovery with Philip.

But it is said, that an alteration as to their mutual benefit has happened by the death of Henry, and it is said, that if Henry had been legitimate the plaintiff would not have been compellable to suffer a recovery, because the issue in tail is not compellable to perform the covenants of his ancestor the tenant in tail.

But here the chance was at first equal, and it is hard to say that the act of God should hinder the agreement from being carried into execution; the chance was equal, who died first, Henry or Philip: if Henry had been legitimate, and Philip had died in Henry's life, leaving children, I am of opinion Philip's son would have been entitled to have come against Henry for an execution of the agreement; and therefore the chance was at first equal on both sides, and we are not to consider how the event has happened.

Another objection has been taken, that the father made use of his coercive power over Philip to force him into this agreement, and it is said equity does not favour agreements made by compulsion.

But this Court always considers the reasonableness of the agreement: besides here is no proof of compulsion by the father; if there was any compulsion, it seems rather to have been made use of against Henry, who was then esteemed his eldest son, [11] and considering the consequence of setting aside this agreement, a Court of equity will be glad to lay hold of any just ground to carry it into execution, and to establish the peace of a family.

His Lordship therefore declared, that the plaintiff is entitled to the lands and premises limited in remainder, to the first son of Henry Stapilton, his father, by the deeds of the 9th and 10th of

September, 1724, according to the uses therein, and to the benefit of the covenants in those deeds, and decreed the defendant Philip to come to an account for the rents of the said premises, and declared that Philip was entitled to hold the lands limited by the deeds of the 9th and 10th of September, 1724, to Philip the elder for life, with a remainder to the defendant for life, against the plaintiff and his heirs, and that the defendant should make further assurance to the plaintiff of his part, and the plaintiff the like assurance to the defendant of his part, and no costs on either side. Reg. Lib. B, 1738, fol. 446.

Gordon v. Gordon.

3 Swanst. 400–482 (19 R. R. 230).

Family Arrangement. — Concealment of Facts.

[400] An agreement between two brothers, the younger of whom disputed the legitimacy of the elder, for a division of the family estates, rescinded after a lapse of nineteen years; the legitimacy of the elder being established on the trial of an issue directed, and the younger brother having been apprised at the time of the agreement of a private ceremony of marriage which had passed between their parents, and not having communicated that fact to the elder, and not possessing a legal power, on the supposition of the elder brother's illegitimacy, to secure to him the benefits stipulated in the agreement.

The bill, filed on the 28th of April, 1809, stated that Colonel Harry Gordon, late of the island of Grenada, being seized of some plantations in that island, and in America, some of which were charged with a mortgage for £5550 and interest, by his will, dated the 1st of April, 1776, devised all his said plantations to his son Peter Gordon, since deceased, and his heirs male, and gave to each of his three sons, namely, the plaintiff Harry Gordon, his second son Adam Gordon, the defendant James Gordon, and his daughter Hannah, certain pecuniary legacies; and if Peter Gordon [* 401] should * die without heirs male, he gave his estates, so charged, to his younger sons and their heirs male successively, the elder claiming before the younger, with ulterior [* 402] * remainders; and charged his estates with an annuity of £300 to his wife Hannah, and appointed her, and his [* 403] nephew James Gordon, since deceased, executrix and * executor. By a codicil dated the 7th of December, 1782, reciting that he had two children by Margaret O'Hara, and

No. 2. — Gordon v. Gordon, 3 Swanst. 404–416.

that she was then pregnant, and expressing his * desire [*404]
that his two natural children should be provided for, the testator bequeathed his whole estates, both real and personal, to six persons (including Margaret O'Hara), * named [*405]
as executors of his codicil, for the purpose of paying the legacies and annuities given by the will and codicil.

* The bill further stated, that the testator died on the [*406]
7th of August, 1787, leaving his widow, and his children named in his will surviving, and that his widow and * Mar- [*407]
garet O'Hara proved his will and codicil; that some time after his death it was discovered that the testator had made another will, bearing date on board the *Grenada [*408]
packet, on her passage from Grenada to London, the 5th of August, 1787, and thereby declared that his son Peter Gordon should be his sole heir, and appointed * him, to- [*409]
gether with Benjamin Boddington and Thos. Boddington, of London, his nephew James Gordon, and James Gordon the son of his nephew, executors; and * bequeathed £2000 to [*410]
the plaintiff, and to each of his children, James, Adam, and Hannah, to be paid by Peter Gordon within two years after the testator's death, with interest; and declared Peter Gordon his residuary legatee.

* The bill then stated, that Peter Gordon died in October, [*411]
1787, without issue and intestate, and upon his death the plaintiff, who was thereby become heir-at-law of his * father, [*412]
proved his father's will in America, and began to receive the rents of his estates; but very shortly afterwards the defendant James Gordon claimed the * estates, alleging [*413]
that he was the real heir-at-law of the testator, by reason that both Peter Gordon and the plaintiff were illegitimate, and not born after the * testator and his wife were mar- [*414]
ried; and he represented to the plaintiff that he was provided with evidence to prove the plaintiff's illegitimacy; and the * plaintiff, in consequence of such assertions, and [*415]
having seen a certificate of a public solemnization of a marriage between his father and mother subsequent to his birth, * and previous to that of the defendant, James [*416]
Gordon, was induced to believe his alleged illegitimacy; and under that impression, and in order to end the differences subsisting between him and James Gordon, who threatened legally to

assert his claim, and solely under that persuasion, and without any consideration, articles of agreement were executed by
[* 417] the plaintiff and the * defendant, James Gordon, dated the 31st of March, 1790, whereby, after reciting a mortgage of the estates of the testator to Boddington and Bettes-
[* 418] worth for £5559 and * the wills and codicil of the testator, and the death of him and of Peter Gordon, it was agreed that the plaintiff should continue in possession of the
[* 419] estates in Grenada, * and should, in consideration thereof, pay out of the profits the cultivation and management thereof, and the interest of the £5559, and should also
[* 420] pay to * Messrs. Boddington and Bettesworth £1040, then due from the defendant, James Gordon, to them, and to James Gordon or his assigns an annuity of £400 for five
[* 421] * years, and in case James Gordon should be living at the end of five years, an annuity of £300 during James Gordon's life; and it was also agreed that at the
[* 422] * expiration of ten years the plaintiff should pay to the defendant James Gordon £4500, and in the mean time secure the same in manner therein mentioned.

[* 423] * The bill further stated that, in pursuance of the agreement, the plaintiff paid to James Gordon the annuity until January, 1808, and £500 part of the £4500, and
[* 424] * interest on the remainder; and also paid the debt of £1040 to Boddington and Bettesworth; that the mortgage debt of £5559 was afterwards paid by Messrs.
[* 425] * Lang, Turin, and Co., of London, who had in consequence a considerable claim on the estates, for securing
[* 426] the amount of which the plaintiff conveyed * them to Messrs. Arnold and Co., of Grenada, in trust for sale, if the plaintiff should make default in reducing the mortgage
[* 427] debt; and that the produce of the * estates becoming insufficient to discharge the mortgage debt, the mortgagees, in March, 1808, entered into possession of the estates.

[* 428] * The bill proceeded to state, that upon the death of the plaintiff's father, the plaintiff became entitled to certain estates in America, to which the defendant James
[* 429] * Gordon also laid claim on the ground of the plaintiff's illegitimacy, and the plaintiff under that impression was prevailed upon to enter into another agreement; and

No. 2. — Gordon v. Gordon, 3 Swanst. 430–442.

*articles for that purpose were executed between the [*430]
plaintiff and the defendant James Gordon, dated the 10th
of February, 1805, whereby, after reciting that the *tes- [*431]
tator was possessed of or entitled to certain lands and
tenements in Pennsylvania, and also to about 5000 acres of
land in Vermont, it was agreed that if the plaintiff
*should recover possession of the estates, he should sell [*432]
them, and give notice thereof to James Gordon, and pay
to him one-fourth of the money produced by the sale;
*and also, within twenty-four months after the same [*433]
should be recovered, the further sum of £63.

*The bill then stated that the plaintiff had recently [*434]
discovered that a private marriage between his father and
mother took place in America, long previous *to the birth [*435]
of Peter Gordon; and charging that the defendants, James
Gordon and R. B. Fisher, and S. Bourke, (to whom James
Gordon had assigned some *portion of his interest under [*436]
the agreements with the plaintiff,) had lately commenced an
action in the Court of Session in Scotland against the plaintiff,
for the remainder of the sum of £4500; that the plaintiff's father
and mother were privately married in America, by a chaplain of
the army, and that it was merely in consequence of a wish
expressed by the friends of the plaintiff's mother that they
were afterwards publicly married; *and that in the register [*437]
of the church of Christ Church and St. Peter's in Philadel-
phia the plaintiff's baptism is registered thus, "Harry
Gordon, son of Captain *Harry Gordon and Hannah his [*438]
wife, born the 4th of October, 1761;" prayed that the agree-
ments might be declared void, and be delivered up to be
cancelled; an *account, and repayment by James Gordon, [*439]
of the sums paid by the plaintiff under the agreement; and
an injunction.

*The defendant James Gordon by his answer, claiming [*440]
to be the eldest legitimate son of Colonel Gordon, stated
that in 1785, Colonel Gordon, when at *Portsmouth, pre- [*441]
vious to a voyage to Grenada, wrote, with his own hand,
an instrument, being a will or draft of a will, containing,
among others, the following clauses: "First, *to my children [*442]
by my wife Hannah, whom I married before the birth of
my third son called James;" and, "seeing by the marriage of

No. 2. — Gordon v. Gordon. 3 Swanst. 443–450.

[* 443] my said wife Hannah she * becomes entitled to a third interest of the value and price of the money arising from the sale of my estates above mentioned, my will is, that the [* 444] said third be * applied in the purchase of stock in the 3 per cents as above ordered, and the interest and yearly profits accruing from the said stock to be paid to my said trustees [* 445] * for the behoof of my said wife Hannah during her life; and my will is, that the said principal money of a third part of the price of the sale of my said estates be divided [* 446] * at the death of my said wife among all my children, by her my said wife, legitimate and illegitimate, according to the above-described proportions."

[* 447] * The defendant also stated, that he understood and believed, and had no doubt to be able to prove, that Colonel [* 448] Gordon and his wife had been married at * Wilmington in America, in May, 1763, which was after the birth of the plaintiff, and before the birth of the defendant; and that [* 449] the defendant did not know or believe * it to be true, though lately asserted by the plaintiff; that a private marriage was celebrated between Colonel Gordon and his wife, in America, some time before the birth of Peter Gordon and the plaintiff, that is to say, so long ago as the year 1755.

[* 450] * On the part of the plaintiff, Benjamin West, Esquire, deposed, that while he lived in America he knew Hannah Gordon, then Hannah Meredith, for many years; that in or about 1760, being about to depart from America for Italy, he went to the house of his father for the purpose of taking leave of his family and friends, and on that occasion he inquired of his brother, who was much attached to Hannah Meredith, where she then was, and was informed by him that she was then in Philadelphia, and married or about to be married to a Mr. Gordon; and the deponent was inclined to think, as far as his recollection assisted him, that his brother then told him that Hannah Meredith was married to a British officer of the name of Gordon; that about eighteen or twenty years after the deponent left America, Colonel Gordon and Hannah his wife were introduced to him in London, where they had lately arrived, as man and wife, and remained in habits of intimacy with the deponent until they left London; that they had several children with them, one of which, he believed, was the plaintiff; and the deponent and his wife, and a respectable Quaker,

No. 2. — Gordon v. Gordon, 3 Swanst. 450–452.

received Colonel and Hannah Gordon as man and wife, and their children as legitimate children. . . .

Other witnesses testified the reception of Colonel and * Hannah Gordon as husband and wife, and of all their [* 451] children as legitimate.

The Reverend Dr. Hogg deposed, that he became preceptor to Colonel Gordon's family in 1773 or 1774, and was confidentially acquainted with Colonel Gordon from that time; and after stating his means of information and his belief that Colonel Gordon had been privately married to his wife, before the birth of any of their offspring, stated that he was present when James Gordon, after the death of Colonel Gordon, opened his trunks; that James Gordon took out, among other papers, and showed to the deponent, a paper appearing * to have been a will of Colonel [* 452] Gordon (but the subscription was torn off), dated in 1776, and containing a general destination of his property, first to his eldest son Peter Gordon, and then to his other sons in succession, burdened with bequests to his wife Hannah Gordon and to their younger children; that James Gordon then, for the first time, mentioned that his brothers Peter and Harry were illegitimate, that he had a title to his father's West India property, and was determined to take possession of it; that the deponent, then for the first time, mentioned to James Gordon the circumstance of his father's private marriage, which the deponent told him would be a bar to his claim, to which James Gordon replied the private marriage was of no consequence, as the succession would be regulated by the public declaration of marriage; that as the deponent never entered into private matters with his pupils, he had never before thought it proper to mention the private marriage to James Gordon, nor did he mention it at all to the plaintiff, conceiving that the agreement made in 1790 had ended all disputes between them; that the plaintiff at the time of his father's death was in the East Indies, where he had been about twelve years, and he returned to this country only in 1789.

Miss Gordon, the sister of the plaintiff, and of James Gordon, deposed, that she had been told by her mother that her parents began to live together as husband and wife just after the defeat of General Braddock, in 1755 or 1756; and that she never entertained any doubt of the legitimacy of all her brothers, or heard her father mention any private or public marriage between him and

his wife, or any discussion on the subject; that on the return of James Gordon to Scotland (where his mother and the deponent then resided), about three weeks after his father's death, [* 453] he asked his mother for * leave to see her papers, and having obtained access to them, destroyed several, much against her will, and took others away with him; and the deponent saw him burn several: that in 1808, James Gordon threatening to take out a warrant against the plaintiff, the deponent asked her mother how she could have had children before marriage? To which her mother answered, that she had not had children before marriage, for that she had been privately married before she had any, but that James Gordon had told her that the private marriage was of no avail; that her mother also on this occasion told her that she had been privately married by a military chaplain; that there were present Dr. Adair, an army physician, Mr. Edwards, her brother-in-law, and Miss Peake, and that she was so married in her own house in Third Street, in Philadelphia; that at the time of this communication her mother did not know of any difference between the plaintiff and James Gordon, it having been purposely kept secret from her; that her mother told her that the marriage was private lest it might displease Judge Gordon, the brother of her husband; and that she had informed James Gordon of her private marriage after his return from London, and that he had desired her, and made her promise, not to mention it to any one, as it was not a legal marriage; that after learning the present dispute, and that the marriage was legal, she frequently said that had she known it to be legal she would have disclosed it long before, and on her death-bed, in 1811, she declared the plaintiff to be her eldest lawful son.

General Adam Gordon, brother of the plaintiff and James Gordon, deposed, that the first intimation he had of any doubt or question on the legitimacy of the plaintiff, was in 1788, when the deponent was with his regiment in Grenada, and James [* 454] Gordon arrived there to * possess himself of his father's estate, of which the deponent was in possession, on behalf of the plaintiff; that James Gordon then claimed the estate as lawful heir, insisting that the plaintiff was illegitimate; but the deponent refused to part with the estate until the plaintiff should come from the East Indies, and told James Gordon that he knew their father and mother were privately married before the public

marriage, and that such marriage was good in the eyes of God and man; that James Gordon made a proposal to the deponent that they should sell the property under his management, and divide the proceeds between them, as the plaintiff had the estate in Scotland, and must have made money in the East Indies; but the deponent rejected the proposal with indignation; that James Gordon shortly after returned to England, and the deponent continued in the management of the estate until 1791, when the plaintiff arrived in Grenada; that the deponent then saw the plaintiff for the first time during eighteen years, and never informed him of the private marriage of their father and mother, understanding that matters had been amicably settled between him and James Gordon; that the plaintiff's mother told the deponent that after the death of Colonel Gordon, James Gordon had taken from her several papers which she considered of consequence, and she complained much of his having done so, and said she was sure he meant to make some bad use of them. . . .

* At the hearing of the cause before Sir WILLIAM GRANT, [*456] MASTER OF THE ROLLS, on the 17th of December, 1816, his Honour observed, that in the agreement between the plaintiff and defendant it was stated, that the plaintiff was born before the actual marriage of his father with his mother, and that he entered into the agreement with the belief of his illegitimacy; but that it appeared, by the testimony of General Gordon and Dr. Hogg, that the defendant was acquainted with a private marriage of his father and mother before the birth of the plaintiff, and there was no proof that the defendant, at the time of making the agreement, communicated that circumstance to the plaintiff; the defendant thus taking advantage of his own knowledge of it, and of the plaintiff's ignorance. His Honour accordingly directed an issue at law as to the plaintiff's legitimacy.

On the 27th February, 1818, the issue was tried, and [457] the jury returned a verdict in favour of the plaintiff's legitimacy.

The case having come on for further directions, was argued on the 9th, 10th, and 13th of November, and consideration reserved.

Jan. 18, 1819. The LORD CHANCELLOR (Lord ELDON).

During my long indisposition I have considered this case with much attention, and I have informed myself fully of the view which the late MASTER OF THE ROLLS took when he directed that

it should be sent to an issue. Unquestionably he looked [*458] no further than this, I speak *from his own authority, that if the jury upon the issue found for the illegitimacy of the plaintiff, there was an end of the case; but he had not considered what was to be the effect of a verdict of legitimacy.

It appears that Colonel Harry Gordon died in the year 1787, seized of an estate in the island of Grenada, and having a claim also upon certain property situated in the United States of America, but which claim had not at that time been matured into a title. On his death a dispute arose in his family, which of his sons was the eldest legitimate son; the present plaintiff, Mr. Harry Gordon, was his second son, legitimate or illegitimate; and he had an elder son of the name of Peter. The deceased Colonel Harry Gordon had made several wills, but by his last will he left the whole of his property, real and personal, subject to certain legacies, to his son Peter, constituting him generally his heir and executor. It is insisted by Mr. James Gordon, the present defendant and third son of Colonel Harry Gordon, that his father and mother were not married at the time when Peter Gordon was born, or at the time when Harry Gordon, the present plaintiff, was born; and that, consequently, James was the eldest legitimate son. If such was the case, Peter, who became entitled to the property under the will of his father, being on that supposition illegitimate, and having died intestate, and without children, neither of his brothers could be his heir, but the title to the estates would become vested in the Crown. It happened, however, that at the time of Peter's death, some gentlemen well known in the city, of the name of Boddington, had a mortgage upon the Grenada estate; and a question therefore would arise whether the legal estate being in the mortgagees, the equity of redemption of which Peter Gordon died seized would escheat to the Crown, or whether the mort- [*459] gagees *would be entitled to hold the property against the Crown, the family of the Gordons, and all the rest of the world? It appears that, under the circumstances, the mortgagees very liberally agreed not to take advantage of their legal right, in case they had a legal right against the family; but that if the claim of the Crown should not prevail, they would hold the property for those who were entitled to redeem it.

The first agreement could not have taken place without great investigation of the state of the family and the situation of the

property. It happens, however, that the persons engaged in preparing that agreement, and who must have been instructed on all these facts, have not been examined.

It is represented, that on that occasion, James Gordon, the third son, assuming to be the eldest legitimate son, insisted that the marriage between his father and mother took place after the birth of Harry and Peter, whom, consequently, he stated to be illegitimate; and that he was the representative of the family. Now, even on that statement, James Gordon could have only a claim of favour upon either the Crown or the mortgagees of the Grenada estate, to be preferred to an illegitimate son; although as this was a Scottish family, domiciled in America, the law of Scotland, by which children born before marriage become legitimate when marriage afterwards takes place between their parents, may, perhaps, have produced some question. If Peter was the heir of the family, the plaintiff was entitled to the Grenada estate, and if he gives up that estate, it must be for some valuable consideration; but if it is supposed that Peter was illegitimate, the title to the Grenada estate, after the death of Peter, was not in James *Gordon, but in the Crown, or in the mortgagees; it did [*460] not depend on James to give Harry a title to that estate, but on the mortgagees or the Crown. I am at a loss, therefore, to conceive what consideration passed from James Gordon at the time of the agreement respecting that estate.

It appears that about the year 1788, General Adam Gordon was in possession of the Grenada estate, as the agent of Peter; and he states in his evidence, which I have examined with great attention, that James, in the year 1788, came to the island of Grenada previously to the agreement of 1790, and insisted that James was entitled to the possession of the estate, and desired that General Gordon would give it up to him. This request on the part of James, grounded upon his assertion of the illegitimacy of Peter and Harry, was received with great indignation by General Gordon, who expressed his opinion of that request, and of the individual who made it, in terms which there is no occasion to repeat; and General Gordon then told James Gordon, that there had been a private marriage between his father and mother previous to the birth of Peter, and consequently, previous to the birth of Harry, and that such private marriage was a good marriage, notwithstanding there had been a subsequent public marriage; the first

marriage ceremony having been privately performed in order to keep the circumstance a secret from Judge Gordon, who had other views for Mr. Harry Gordon's establishment. In conclusion, General Gordon declared that he held the estate in trust for Harry, and that he would not give up the possession.

I advert particularly to this conversation in the year 1788, on account of the subsequent agreement with respect to the
[*461] American property, which did not take * place until the year 1805, seventeen years after the period at which, as General Gordon states in his deposition, he being in possession of the Grenada estate as agent of Peter, treated the younger brother in the manner that has been described; and yet General Gordon states that he never informed his principal of the transaction, nor ever mentioned this conversation, which occurred in the year 1788, until the other agreement with respect to the American property had taken place in the year 1805. This is certainly a very extraordinary circumstance; it amounts almost to an improbability. There is, besides, among the papers in this case, a deed executed in 1788, to which General Gordon is himself a party, and in which he mortgages thirteen negroes to Messrs. Boddington, and the equity of redemption is expressly reserved to the legitimate or illegitimate children of Colonel Gordon; an acknowledgment, as it seems, by General Gordon, that there were children of both classes, legitimate and illegitimate.

The present bill is filed in the year 1809, four years after the agreement relative to the American property, and twenty-one years after the agreement relative to the Grenada estate; and the whole effect of the bill, as I collect, is this: after adverting to the mortgage on the Grenada estate, the bill states in *ipsissimis verbis*, the register of the birth of Harry Gordon, in which he is called the son of Captain Harry Gordon, and of Hannah Gordon, described as his wife; and not containing one word of spoliation of papers, it proceeds to state, that the plaintiff being led to believe, but without saying by whom, that he was not the legitimate son of his father, and being confirmed in that belief by the assertion of James Gordon, executed the deed of the year 1790; and that he had no knowledge of the private marriage until after the agreement in 1805.

[*462] * In the course of this case the publication of the depositions *de bene esse* of the mother, Mrs. Gordon, who was

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still alive, was at first refused, and that question coming again before the MASTER OF THE ROLLS, his Honour permitted the publication; and on appeal I approved that decision; and I then expressed my opinion that if the plaintiff chose to have the examination read, in other words, if he chose to have his mother examined as a witness, it would be extremely difficult both on the trial of the issue, and at the hearing of the cause, to receive the evidence of witnesses who spoke to the declarations made by the mother: for although it is clear that on questions of pedigree, if a parent is dead, evidence may be given of his declarations on the subject of the pedigree, and witnesses may be called to prove these declarations, yet it would be difficult to find any case in which witnesses were permitted to prove such declarations when the parent in question was living, and was personally examined. I therefore wish to know how far those witnesses were heard upon the trial of the issue, as to the declaration of a woman who was herself a witness.

In the view of the case which I now take, much of that evidence which went before the jury must necessarily be considered upon the hearing for further directions; and it must be considered with strict attention to the law of the Court, which says, that a man shall not be at liberty to prove upon a trial any thing he may think fit; that he is at liberty to prove only that which is put in issue. Now here is a great deal said about spoliation of papers, of which not a word is to be found in the bill or in the answer.

Supposing the question cleared from the difficulty about evidence, I have Sir William Grant's authority to say, * that [* 463] his view of the case in directing the issue, went no further than this, that if the illegitimacy was found, there was an end of the matter; but he had not considered what was to happen in the other event, if the legitimacy was found. The case will now come to be discussed on two points: first, supposing all imposition out of the question, whether it is a case in which, upon the principles that guide the conduct of a Court of equity, relief can be granted? and, secondly, whether, if there are any passages in the several depositions imputing imposition, there are in the bill any allegations, or in the answer any admissions, of imposition as a ground for relief?

Of the cases which have been quoted, *Stapilton* v. *Stapilton* (p. 100, *ante*), and *Cann* v. *Cann*, 1 P. Wms. 723, there is no necessity for

me to say more, than that they fully establish a principle of which I can have no doubt, that where family agreements have been fairly entered into, without concealment or imposition upon either side, with no suppression of what is true, or suggestion of what is false, then, although the parties may have greatly misunderstood their situation, and mistaken their rights, a Court of equity will not disturb the quiet, which is the consequence of that agreement; but when the transaction has been unfair, and founded upon falsehood and misrepresentation, a Court of equity would have a very great difficulty in permitting such a contract to bind the parties.

In the present case it is for the Court to consider, first, whether the pleadings have sufficiently put in issue the fact of imposition? and, secondly, if they have, in what the imposition consists? I suppose the most prominent mode of putting the fact of [*464] imposition is this: *that James Gordon knew that there had been a marriage *de facto*: not that he knew the marriage was a legal marriage, but that a ceremony of marriage, whether valid or not, had been performed previous to the public marriage, and previous to the birth of Harry; that James Gordon was aware of this fact, and knew that Harry was not aware of it, and kept from him the knowledge of that fact. It was his duty to communicate the fact of the private marriage; and if Harry knowing it, had decided for himself that the ceremony was not valid, and treating it as not a marriage *de jure*, had chosen to enter into the contract, there would have been no ground for the suggestion of imposition, unless on evidence of spoliation of papers, of which I find no allegation.

When this case came before me at Westminster the point of spoliation of papers was adverted to; and it was said, that the evidence produced upon the issue afforded strong grounds for an inference contrary to the verdict on the question of the legitimacy. I lay all this entirely out of the question; but still I cannot think that the case has been argued to the bottom. I am clearly of opinion, that Mr. James Gordon has no right, at the present time, to argue from circumstances that Harry Gordon is illegitimate; on that subject he is concluded by the verdict: but he has certainly a right to say, of any particular circumstances, that they, at the time of the contract, induced him to believe that Harry was not legitimate; and the question would then be, whether this is not a case of mistake into which all parties might honestly fall? Before the

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Court declares a contract like this void, it ought to be fully satisfied that the contract was entered into under circumstances of wilful concealment.

I have thus explained my view of the case; and *before [*465] I pronounce a final decision I should wish to have it argued again by one counsel on each side.

The cause was again argued (June 29).

Mr. Heald for the plaintiff.

In all the cases of family agreement which have been the subject of judicial decision except one, the contracting parties had among them a good title; if the claim of *one was [*466] bad, by necessary consequence the claim of the other was good. Here, if Peter and Harry Gordon were illegitimate, the estate was the property of the mortgagees or of the Crown, not of James Gordon. The agreement, therefore, which the plaintiff now impeaches was without consideration. Harry Gordon sacrificed a part of his rights, in consideration of the title which James represented himself to have and to give; but it is clear that he had no title. He cannot be permitted to allege, that the agreement was founded on the probability that he might become the grantee of the Crown.

The Lord Chancellor.

Before the Act of Parliament introduced by Lord Redesdale, 39 & 40 Geo. III., c. 88, s. 12, the Crown could make no grants of estates escheated beyond leases for short terms of years or during lives, 1 Anne, st. 1, c. 7; 34 Geo. III., c. 75; that Act has enabled the Crown to be more liberal. It may, however, be found, on examination, that the statute of Anne is not applicable to lands out of the kingdom.[1]

Argument for the plaintiff resumed.

The conclusion is, that the agreement was voluntary, and this case is within the principle of those decisions in which agreements founded in misrepresentation, whether wilful or innocent, have been rescinded.

The Lord Chancellor.

If the defendant James Gordon, when he entered into the agreement knew that there had been a private *legal [*467] marriage between his father and mother, it would require little time to dispose of this case; if he knew that there had been

[1] The words are "manors, &c., within Wales, or town of Berwick-upon-Tweed, or the kingdom of England, dominion of any of them."

a ceremony of marriage, without knowing whether it amounted to a legal marriage, and omitted to communicate that fact to his brother, and enable him to decide for himself the effect of the ceremony in law, the consequence to James Gordon might be serious; but does the bill contain any charge even that James Gordon knew the fact of marriage? If not, a question will arise, whether evidence to that effect can be admitted at all; and if admitted, whether James Gordon is to be concluded by evidence which he has had no opportunity of answering.

My opinion is, that if James Gordon, prior to the agreement, knew that there had been a private ceremony of marriage, and conscientiously believing that it was not a legal marriage, omitted to communicate the fact to his brother, the plaintiff would be entitled to relief; on the principle that, though family agreements are to be supported, where there is no fraud or mistake on either side, or none to which the other party is accessary, yet where there is mistake, though innocent, and the other party is accessary to it, this Court will interpose.

Argument for the plaintiff resumed.

The bill contains no distinct allegation that the defendant was apprised of the ceremony, but the statement in the answer, that the defendant had been informed that neither Peter nor Harry were legitimate, is sufficient to introduce the evidence. But the objection is too late; the evidence was received on the original hearing, and cannot now be rejected, when the cause is heard for further directions.

[* 468] * Mr. Hart for the defendant.

The fact that the deed was voluntary, affords no reason for rescinding it. The evidence manifests the existence of mutual doubts of the plaintiff's legitimacy; and a compromise of rights originating in such doubts, is the very transaction which Courts of equity support, in order to preserve the peace of families. On the supposed right of the Crown it may be sufficient to refer to *Burgess* v. *Wheate*, 1 Black. 123, 1 Eden, 177.

In the course of the argument the following cases were cited: *Stockley* v. *Stockley*, 1 Ves. & B. 23 (12 R. R. 184); *Stapilton* v. *Stapilton*, 1 Atk. 2 (p. 100, *ante*); *Cann* v. *Cann*, 1 P. Wms. 723; *Pullen* v. *Ready*, 2 Atk. 587; *Cory* v. *Cory*, 1 Ves. 19; *Lansdown* v. *Lansdown*, Mos. 364; *Bingham* v. *Bingham*, 1 Ves. 126; *Dunnage* v. *White*, 1 Sw. 137 (18 R. R. 33).

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The Lord Chancellor.

I have never known a case in which it was more the duty of the Judge to make a covenant with himself not to suffer his feelings to influence his judgment.

It is obvious that the plaintiff, if not legitimate, has no title to relief; the trial of the issue has decided, and I think properly, that the plaintiff is legitimate; unfortunately it seems to have been taken for granted, when the issue was directed, that after a verdict of legitimacy no dispute could arise touching the relief to be decreed; but, in fact, the question still remains, whether, admitting the plaintiff to be legitimate, the agreement was concluded under circumstances which entitle him to * relief? [*469] I cannot avoid thinking that it would have been more prudent first to consider the effect of a verdict of legitimacy, lest the expense and time of the trial should be wasted. The case, however, has taken another course, and I am now to decide whether, after this verdict, and on these pleadings and this evidence, the plaintiff is entitled to relief.

Withholding my judgment on the effect of the evidence which has been read for the first time on this hearing for further directions — I mean the mortgage deed, reserving the equity of redemption to Colonel Gordon and his children, legitimate and illegitimate, and some letters, I will proceed to observe on the rest of the evidence, and to point out in some degree what, as I conceive, must be the principles of decision.

The bill is filed by Harry Gordon, who must now be taken to be the eldest living legitimate son of Colonel Gordon, stating that his father died in 1787, seized of estates in Grenada, and claiming estates in America, having by his will devised his real estates to his son Peter and his heirs for ever. Peter was the elder brother, legitimate or illegitimate, of Harry Gordon; and Harry being found legitimate, Peter must be taken to be legitimate also; but while it could be asserted that Harry was illegitimate, it followed of necessity that Peter was illegitimate; and on the defendant's showing, therefore, this must be taken to be a case in which the father of several children, some legitimate and some illegitimate, has given an estate in fee to one of the latter class, who died intestate; and in which, by reason of his death, estates in the island of Grenada, subject to a mortgage in fee, are so circumstanced, if the law there is, as I believe it to be, the same as the

law in England, that neither the plaintiff nor the defend-
[* 470] ant, James Gordon, * have any title to them; because if the doctrine of escheat applied to those estates, the title was in the Crown; if on the principles adopted in *Burgess* v. *Wheate*, the mortgagee might refuse to be redeemed by any one, neither the plaintiff nor James Gordon could disturb his enjoyment; the right being on one supposition in the Crown, and on the other in the mortgagee. The Crown was dealt with as is usual in these cases; that is, considerable care was taken that its officers should know nothing on the subject; the mortgagees appear to have acted in a manner highly creditable to them, and having a probable title themselves, consented to dispose of the estate according to the agreement entered into by the members of the family.

It has been contended, on the behalf of the plaintiff, that this case is distinguishable from *Cann* v. *Cann*, and other authorities of that class; and in general certainly the circumstances are such as have been represented; namely, a dispute about the title to an estate, which clearly belongs to one of the disputants, unless it belongs to the other: as where between two brothers, supposed to be both legitimate, or one legitimate and the other illegitimate, a compromise is effected, on the supposition of the illegitimacy of one who was found afterwards to be legitimate, the Court holding this to be a family agreement, would not disturb it, provided that there was honest dealing on both sides, and each withheld the communication of no circumstance proper for the consideration of the other; though one had been dealing for his birth-right under an erroneous notion that he was illegitimate, he would be bound. But in every case it has been said, and it would be monstrous to hold otherwise, that if what one knows has been concealed from the other, who has been misled by that concealment, the Court would not sanction the agreement.

[* 471] * It is said that this case differs from those to which I have alluded in this respect, that here, on the hypothesis of illegitimacy, which was the foundation of the agreement, neither party was entitled. I doubt much whether that distinction is material, and I think the fair way of putting the case on that point is this: both parties had agreed to set out of question the title of the Crown, the adverse title of the mortgagees was waived in favour of both, and both consented that, for the purpose

No. 2. — Gordon v. Gordon, 3 Swanst. 471, 472.

of the arrangement, the estate should be considered as belonging to them; and I am of opinion, therefore, that if the dealing is honest, this case is within the principle of those decisions. But a difficulty arises here, partly from the manner in which the case is necessarily and properly pleaded, partly from the nature of the case as collected from what appears on the pleadings, contrasted with what in every way of estimating the due weight of the observations made, might have appeared there, if the parties thought proper.

The plaintiff represents that in 1788 he returned from the East Indies, in consequence of his father's death; that on his arrival here he was taught to believe that his father had been only once legally married, subsequently to the plaintiff's birth, and must be understood to state that he was not apprised of the fact of that private marriage, which is now to be considered as valid. The case on this point has more of complexity, because it appears that the parties looked to the law of Scotland, and may have confounded the law arising from Scottish and English domicil. In this state of ignorance, the plaintiff concludes an agreement with James Gordon, in 1790, and afterwards in 1805. The bill also contains an allegation, in singular terms, that the defendant now knows the private marriage; not that he knew it at the time of the contract.

* The answer of James Gordon may be read in two [*472] ways; he denies his belief that there was a private marriage, and if he honestly believed, when he swore to his answer, supposing him to have known the private ceremony, that that ceremony did not constitute a marriage, his answer is strictly true; but then it is no answer to the case on which the plaintiff insists; and if it is a fair observation on the one hand, that the plaintiff might have charged much more in his bill, on the other hand it is obvious that James Gordon might have made an answer, which, if it truly stated all the circumstances of the case as he knew them, might have put an end to the suit.

Of the evidence, I lay out of the question the circumstances to which more witnesses than one speak, I mean the conduct of James Gordon with regard to family papers, on the news of his father's death arriving in Scotland; the pleadings contain no allegation on the subject, and I must therefore know nothing of it. But supposing James Gordon to know, that though there had been

a ceremony of marriage, the marriage was not valid, if he knew the fact of the ceremony and took on himself to determine its validity, and dealt with his elder legitimate brother without disclosing that fact, knowing that he was not otherwise apprised of it, he was wrong; when he entered into a contract with his elder brother as the heir-at-law of their father, while if that ceremony constituted a valid marriage he could not be heir, it was his duty, as an honest man, to state the fact of that ceremony, and his opinion that it was not valid. If the plaintiff so informed had thought proper to enter for himself into the consideration whether that ceremony did or not constitute a legal marriage, and had then dealt with James Gordon, this case would have been brought precisely within those decisions, in which the Court has [* 473] refused * to disturb family agreements. But here occurs a painful part of the case. Dr. Hogg positively swears, under circumstances indeed difficult to be accounted for, but which can never justify me in saying that he is perjured, that he communicated to James Gordon the fact which he had learned from his father, the private ceremony of marriage. The defendant requires me to believe that this clergyman, the tutor of the family, has solemnly deposed to a falsehood, so infamous as this statement, if false, must be. But the deposition is supported by the evidence of General Adam Gordon. It is difficult, indeed, to understand, why neither Dr. Hogg nor General Gordon communicated these declarations to the plaintiff; but that difficulty will not authorise me in discrediting testimony, than which, if false, more profligate was never given.

It must be considered, therefore, as established, that before the agreement of 1790, James Gordon knew that there was a rumour at least of a private marriage; and I have no hesitation in saying, that whether there had been a private marriage or not, yet if James Gordon withheld from the plaintiff the information which he had received from Dr. Hogg and General Gordon, this bargain, if speedily questioned, could not have stood in this Court. In contracts of this sort, full and complete communication of all material circumstances is what the Court must insist on.

The fact of a private marriage is further established by the evidence of Mrs. Gordon and her daughter; and the difficulty of understanding the delay of a Dr. Hogg and General Gordon, in communicating to the plaintiff circumstances so material, is not

No. 2.— Gordon v. Gordon, 3 Swanst. 473–475.

sufficient to discredit their testimony. The reason which they assign is, that the brothers having settled their differences by the *agreement of 1790, the witnesses were anxious [*474] not to disturb the harmony of the family. It is remarkable also that General Gordon is party to the deed of mortgage, reserving the equity of redemption to the children legitimate or illegitimate of Colonel Gordon; he was aware, therefore, that some difficulty attended the question of legitimacy; the mortgagees reasonably required the deed to be so framed, that the question should not embarrass them. But much more is necessary before this evidence can be rejected.

The pleadings on the part of the plaintiff seem not so ample as they might have been, with reference to so singular a case; but it must be considered, whether the allegations of the defence have not opened a case within the statement of the bill, however general; and it must be recollected, that it was competent to the defendant, by a cross bill to obtain from the plaintiff an answer supplying all the defects of the record.

The case will finally turn on this point: at the time of the agreement, did James Gordon know that there had been a private ceremony of marriage, whether he thought it valid or not? If he did not know that there had been a private ceremony, had such a statement been made to him? Although he might not believe that statement, still he was bound to communicate it to his brother. If it can be shown that the plaintiff had the same knowledge, the case will take another turn; but regard being had to the nature of the answer, and the fact that no cross bill has been filed, the probability is, that James Gordon knew, or had reason to believe, that there had been a private marriage, and that the plaintiff possessed no such knowledge; and then the parties did not meet on equal terms. In that view, taking the case, as I wish to take it, as a case of mere non-disclosure, *the [*475] Court, even at this late hour, will give relief. But if the plaintiff had a knowledge of the fact, and exercised his own judgment on the legal effect of it, this case will be one of that class in which the Court, seeing that there has been full disclosure on all sides, and that the parties have thought proper by agreement and compromise to settle what each shall hereafter claim, supports the contract, though proceeding on mistake. If in this case, therefore, the Court refuses relief, the refusal will be

grounded on the fact, that all parties acted in knowledge; if it grants relief, its interposition will suppose proof, that some material circumstance known to one party was not communicated to the other.

The following cases were cited on the admissibility of depositions beyond the allegations in the bill: *Ward* v. *The Duke of Buckingham*, 3 Bro. P. C., ed. Toml. 581; *Tennant* v. *Stebbing*, 3 Anstr. 640, 644; *Clarke* v. *Turton*, 11 Ves. 240.

The Lord Chancellor.

The agreements which the bill in this case seeks to rescind were entered into, it must be admitted, after considerable deliberation on the subject. The chief difficulties of the case arise, unless I mistake its nature, from the infirmity of the pleadings on each side.

At the date of the agreement of 1790, recollecting that if Harry Gordon was illegitimate, Peter Gordon, as the elder brother, [* 476] was necessarily illegitimate also, and * that by reason of his illegitimacy and intestacy, James Gordon could have no title to the estates, it is not easy, from any allegation in the bill or answer, to understand the views of the parties; but the arrangement seems to be explained by the conduct of the mortgagees, who kindly agreed to consider themselves as trustees for the family; and it is evident that the parties dealt with a knowledge that the Crown might have a claim in the property, for the contract provides for the event of the Crown establishing its claim.

This was originally opened at the bar as a case in which the plaintiff having, by the event of the issue, established his legitimacy, nothing remained but to decree the relief which the bill prays; but in my opinion, although it is impossible that the plaintiff should succeed if illegitimate, his mere legitimacy will not entitle him to success, and for this reason: I apprehend that if on the death of an individual seized in fee of an estate, a dispute arises who is his heir, and there is room for rational doubt as to that fact, and the parties deal with each other openly and fairly, investigating the subject for themselves, and each communicating to the other all that he knows, and all the information which he has received on the question, and at length adopt a resolution to distribute the property, under the notion that the eldest claimant is illegitimate, although it afterwards appears that he is legitimate, the Court will not disturb a family arrangement of that kind, merely because the fact is eventually found different from the

supposition on which it was founded. I put the case of full and free disclosure, and where the transaction proceeds on a compromise, with reference to which no want of good faith on either side can be suggested.

* On the question of legitimacy the verdict is decisive, [* 477] and I am bound to consider the plaintiff as the legitimate son of Colonel Gordon ; and the question now is, whether attending to the *allegata & probata* in this case, these agreements are to be impeached, and to what extent, and on what terms ?

I lay out of the case the question of consideration ; and I think myself justified by the authority of *Cann* v. *Cann* and other decisions, in holding, that if a dispute arises relative to the legitimacy of children, and the members of the family, to maintain their character in the world, arrange their rights among themselves, if the matter is fully before them, their agreement will not be disturbed, because it is founded on a supposition, which imputes the character of legitimacy to the illegitimate, or illegitimacy to the legitimate ; but then there must not only be good faith and honest intention, but full disclosure ; and without full disclosure honest intention is not sufficient.

My view of this case, and I have not arrived at it without reluctance, is, that James Gordon knew that there had been some ceremony, which is called a private marriage. I cannot doubt that fact without imputing to several witnesses the most infamous perjury. I find no evidence that, at the time when the plaintiff entered into the agreement of 1790, he was apprised of that ceremony ; and I say that if James Gordon, knowing that fact, of which the plaintiff was ignorant, dealt with him without disclosing it, whether the omission of disclosure originated in design, or in honest opinion of the invalidity of the ceremony, and of a want of obligation on his part to make the communication, the agreement cannot be sanctioned by the Court.

* If James Gordon had informed the plaintiff of the fact [* 478] of the private ceremony, and afforded him the opportunity of deciding, by his own judgment, whether that ceremony constituted a marriage, and the plaintiff had consented to impute to himself the character of illegitimacy, when by the verdict it appears that the character of legitimacy belonged to him, I think, omitting at present the question of consideration, that the Court could not have interfered with the agreement.

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It is not uninstructive to observe the different effect of the same evidence on different minds; the letters which have been read in proof that the plaintiff acted with great deliberation, and knew the fact of the private ceremony, appear to me strong evidence that he never had that knowledge.

Many views of this case it is difficult to reach, considering the penury of allegation in the bill; but, after an attentive consideration of the bill, the answer, and the evidence, it appears to me that these agreements must be rescinded; on what terms is another question. If the deeds are declared void, the other parts of the arrangement must also be set aside.

I think that the defendant is entitled to have a declaration inserted in the decree of the ground on which I proceed in holding the deeds void. Such declarations on the record are always useful, enabling the parties to deal with them as they think right.

The decree, stating that the cause now stood for judgment, and reciting the pleadings, and that the parties proceeded to a trial of the issue on the 27th February, 1818, when the jury found [* 479] that the * plaintiff was and is the legitimate son of Colonel Harry Gordon, proceeds thus: "His Lordship doth declare that it is established by the verdict found in this matter that the plaintiff is the legitimate son of his father; and his Lordship doth declare that Peter Gordon, his elder brother, must also have been legitimate, and, consequently, that the defendant James Gordon was not the heir-at-law of Harry Gordon the elder, nor of the said Peter Gordon; and further, that it appears that if Peter Gordon was not legitimate, yet if having survived Harry Gordon the elder, he became entitled in fee, in law or equity, to the estates in question, by virtue of his father's will, mentioned, in the agreement of 1790, to bear date the 5th day of August, 1787, the defendant James Gordon could not be entitled at his father's death, or at the death of Peter Gordon, to the estates of Harry Gordon the father, as his heir-at-law, or have any well-founded claims to the said estates, as such heir-at-law; that nevertheless the agreement of 1790 purports to be made between the plaintiff Harry Gordon and the defendant James Gordon, claiming to be the heir-at-law of the testator Harry Gordon the elder, and as such making certain claims upon the estates therein mentioned, over and besides the provisions made for him by the will and codicil of 1776, 1782, and 1787, recited in the said agreement of 1790, and which

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will and codicil are thereby by the said plaintiff and defendant admitted to have been made by the said Harry Gordon the elder; that it further appears, from the recitals of the said agreement of 1790, that if Peter Gordon had been illegitimate, and Harry Gordon the younger also illegitimate, and if the estates were vested in Peter Gordon by virtue of the said will of 1787, the said James Gordon could not, as heir-at-law of his father, or otherwise, by his contract, or by any other his act, authorise or give title to Harry the younger to enter upon the said estates, or empower him effectually * to require the mortgagees mentioned in the [*480] said agreement, to reconvey to him the said Harry Gordon the younger, upon payment of what was due to them, or vest in the said Harry Gordon the younger any interest in the said estates, save the said James Gordon's interest as a legatee; that it also appears that the other agreement of the 4th day of February, 1805, as well as the said agreement of 1790, was made between the parties thereto in consequence of the supposed illegitimacy of the plaintiff, negatived by the before-mentioned verdict; and that the defendant, if the plaintiff was illegitimate, had no title to the lands in America, nor any right, for his own behoof, to hinder the plaintiff from obtaining possession thereof, subject to the charges thereon, in case such lands, under the grant thereof, were vested in his father, and passed by his father's will to Peter Gordon; and his Lordship doth declare, that if the plaintiff could not be relieved against the said agreements on the mere ground of mistake respecting his legitimacy, on the ground that the said agreements were entered into in consequence of mistake and misapprehension respecting such legitimacy, yet that the plaintiff is entitled to be relieved against the same, as having been also entered into under a misapprehension and misunderstanding that the said James Gordon the defendant had such right and interest in the said estate, as would enable him effectually to give and assure to the plaintiff those benefits and interests which, for the considerations mentioned in the said agreements, are contracted or agreed to be given and assured to him by the said James Gordon; and inasmuch also as it is established, by the evidence in the cause, that, prior to the entering into the said agreement, the defendant James Gordon had been informed and knew, that a ceremony of marriage had previously taken place between his father and mother before the birth of the plaintiff, (being the marriage which, by the

[* 481] * aforesaid verdict, has been established as a valid marriage,) and the said agreement having been entered into with such previous information on his part, and without such information being imparted to the plaintiff, who might, if the said James Gordon had communicated to him that information, have been able by due inquiry to prove his legitimacy, as he has since proved the same, after he had discovered that such ceremony had previously taken place; his Lordship doth therefore declare the agreements in the pleadings mentioned, bearing date the 31st day of March, 1790, and the 4th day of February, 1805, to be void, and doth order and direct that the same be delivered up to be cancelled; and it is further ordered that it be referred to Mr. Dowdeswell, to whom this cause stands referred, to take an account of all sums of money paid by the plaintiff to the said defendant James Gordon, or to any other person or persons by his order or for his use, in respect of the annuity mentioned in the agreement bearing date the 31st day of March, 1790, and of the sums of £4600 and interest, and £1040 in the said agreement also mentioned; and it is ordered that the said Master do compute interest on the respective sums paid by the plaintiff to the defendant James Gordon, from the respective times of paying the same: and for the better taking the said account, &c.; and it is ordered, that what the said Master shall find to be the amount of such sums and interest be paid into the bank with the privity of the Accountant-General of this Court, on the credit of this cause, subject to the further order of this Court; and his Lordship doth reserve the consideration of costs, &c.; and this is to be without prejudice to any claims which the defendant James Gordon may have or can establish against the plaintiff, in respect of the estate or effects of Harry Gordon the elder, deceased, or Peter Gordon, deceased, or either of them, in any suit or proceedings which he

[* 482] * may be advised to institute against him, and other proper and necessary parties." Reg. Lib. A, 1820, fol. 1984.

ENGLISH NOTES.

The principle upon which the rule is founded is well stated by Lord STAIR in his Institutions of the Law of Scotland (I. 7. 9). In treating of natural obligations, amongst which he reckons the duty of "Restitution" of (*inter alia*) what has been paid by mistake, he proceeds: "Positive law, for utility and quietness' sake, excepteth transactions,

which are properly such; and which are of two sorts. The one extra-judicial, when, in any matter doubtful and debateable, either party, to shun the hazard and trouble of a legal decision, is willing to transact and agree, so as thereby they quit or abate part of what they claim as their right, and so they tacitly renounce all future question upon any appearing of right either judicially or extrajudicially. And therefore, what either quitteth to other of their rights, is done for the same cause; and hath in it, either expressly or implicitly, that the transaction shall not be retracted upon any thing that shall accidentally appear thereafter, fraud and force only (as the common exception in all human actions) being excepted: and therefore such things, though they appear not to be the haver's, are not to be restored. The other transaction is judicial by *litis contestatio*." This latter gives rise to the plea of *res judicata*, and is usually considered in English law under the head of Estoppel. See 11 R. C. 1–47.

Again Lord Stair (1. 17. 1) says: "Transaction may be interposed in the matter of all contracts, and it is a most important contract, whereby all pleas and controversies may be prevented or terminated; for thereby all parties transacting, quit some part of what they claim, to redeem the vexation and uncertain event of pleas. It is therefore the common interest, that transactions should be firmly and inviolably observed, which both by the Roman law and our customs, hath been held as sacred and necessary for men's quiet and peace. It must therefore be accurately considered what a transaction is, and what are the necessary requisites thereto. The word *transaction* is variously taken; so the administration of any affair is commonly called *a transaction*, and particularly the public transactions; and in other cases, even where the name of *transaction* is used, there is no transaction in the sense here proposed; for it is very ordinary in any contract to say, 'it is transacted, agreed, and finally contracted;' but a proper transaction must imply the doubtful event of a plea: and therefore, when parties commune, and come to an agreement, by clearing the point of right in their claims on either side, though either party pass from much they claimed, there is no transaction, albeit thereby the vexation of a plea be shunned; for it is more the uncertain event, than the trouble, of legal process that makes a transaction; and therefore when a real transaction is meant, it is fittest to express it in clear terms, that in the differences among parties in such points that are, or may be controverted, both parties acknowledge that the matter is dubious, and the event is uncertain; and therefore either party remits their claims, and comes to a middle agreement, wherein it is not necessary that either party remit equally, nor will an inconsiderable abatement infer transaction, or the quitting of penalties though considerable; yet though the express terms of trans-

action be not used, or the descending from mutual claims, there may be a true transaction; as when parties, during the dependence of processes come to agree, giving and taking less than they pleaded, otherwise such an agreement is no transaction."

The English cases have perhaps extended the principle in the case of agreements between members of a family; so that it is not essential that the matter conceded should be one of doubtful right, so long as it is calculated or intended to put an end to family differences or to be for the honour of the family. In this sense the principle of Lord HARDWICKE's judgment in *Stapilton* v. *Stapilton* is reinforced by the judgment of Lord ELDON in *Stockley* v. *Stockley* (1812), 1 Ves. & B. 23, 12 R. R. 184, and that of Lord Chancellor SUGDEN in *Westby* v. *Westby* (1842), 2 Dr. & War. 502, 525.

The Courts of equity in England have regarded with favour arrangements between father and son for the resettlement of a family estate. In *Cory* v. *Cory* (1777), 1 Ves. Sen. 19, Lord HARDWICKE observed that if a son tenant in tail, and a father tenant for life, agree on something for the benefit of the younger children, and afterwards the son complains of paternal authority being exerted: though there might be something of that sort, yet, if the agreement be reasonable, the Court will not set it aside. Instances of such cases will be found in *Bellamy* v. *Sabine* (1835), 2 Ph. 425; *Dimsdale* v. *Dimsdale* (1856), 3 Drewry, 556; *Jenner* v. *Jenner* (1860), 2 Giff. 232, 2 De G., F. & J. 359. If the father receives direct benefits from the resettlement that affords an inference that the transaction is not fair, *Hoghton* v. *Hoghton* (1852), 15 Beav. 278. But the Court may rectify the settlement so far as relates to such provisions without setting it aside altogether. *Hoblyn* v. *Hoblyn* (1889), 41 Ch. D. 200, 60 L. T. 499, 38 W. R. 12.

In order that a family arrangement may be supported as such, there must be full and fair communication of all material circumstances affecting the subject matter which are within the knowledge of the parties. See besides the principal case of *Gordon* v. *Gordon*, p. 110, *supra*; *Smith* v. *Pincombe* (1851), 3 Mac. & G. 653; *Greenwood* v. *Greenwood* (1863), 2 De G., J. & S. 28. There must be, on all sides, *uberrima fides*: per Lord WESTBURY in *Tennent* v. *Tennents* (1870), L. R. 2 H. L. Sc. 6, 10. And even an innocent misrepresentation by one of the parties to a resettlement by way of family arrangement, where the other party has entered into it on the faith of the representation, has been held sufficient ground for setting aside the resettlement. *Fane* v. *Fane* (1875), L. R. 20 Eq. 698.

To support a compromise, whether between members of a family or strangers, it may be stated generally that where there is a *bonâ fide*

claim, the giving up of the claim is a sufficient consideration; and the Court will not inquire as to the adequacy of the consideration, or whether the claim could have been made good. Nor does it make any difference if both parties were in ignorance of the true state of rights, whether that ignorance was of fact or of law. *Pullen* v. *Ready* (Lord HARDWICKE, 1743), 2 Atk. 587, 591; *Naylor* v. *Winch* (1824), 1 Sim. & St. 555, 24 R. R. 227; *Neale* v. *Neale* (1837), 1 Keen, 672; *Stewart* v. *Stewart* (H. L. 1838), 6 Cl. & Fin. 911.

In *Cook* v. *Wright* (1861), 1 B. & S. 559, the question was as to whether there was a good consideration for a compromise. It was argued that the existence of disputes, where no litigation had commenced, did not furnish the ground of a good consideration. In the judgment of the Court, delivered by BLACKBURN, J., the law is stated as follows: "We agree that unless there was a reasonable claim on the one side, which it was *bonâ fide* intended to pursue, there would be no ground for a compromise; but we cannot agree that (except as a test of the reality of the claim in fact) the issuing of a writ is essential to the validity of a compromise. . . . The real consideration depends, not on the actual commencement of a suit, but on the reality of a claim made and the *bona fides* of the compromise." This principle was followed in *Callisher* v. *Bischoffsheim* (1870), L. R. 5 Q. B. 449, 39 L. J. Q. B. 181, 18 W. R. 1127. The law, as laid down in these cases, is confirmed by opinions delivered in the Court of Appeal in *Miles* v. *New Zealand Alford Estate Co.* (C. A. 1886), 32 Ch. D. 266, 55 L. J. Ch. 801, 54 L. T. 582, 34 W. R. 669. The Lords Justices, while agreeing upon the principle of law, differed upon the presumption of fact arising on the evidence in that case: Lords Justices COTTON and FRY being of opinion that there was no serious claim given up; and Lord Justice BOWEN (agreeing in opinion with NORTH, J., who was the Judge of first instance) being of opinion that there was a serious claim given up, or at least forborne to be pressed at a critical moment, and that such forbearance at the request of the other party was a sufficient consideration.

AMERICAN NOTES.

Mr. Pomeroy recognizes the exception of family compromises from the general rule as to relief in cases of mistake. (2 Eq. Jur., sec. 846.) He cites both principal cases repeatedly, on the general subject, but they have little particular application in this country, because family arrangements or compromises are uncommon.

The doctrine of the Rule was held in *Trigg* v. *Read*, 5 Humphreys (Tennessee), 529; 42 Am. Dec. 447, where the Court said: "The cases of compromises of doubtful rights and contracts, settling family disputes . . . appear to be somewhat more favored (especially the latter) than ordinary contracts of pur-

chase." "In the cases of family compromises, all that need be said here is that agreements affecting them are upheld with a strong hand, and an equity has been administered in regard to them which has not been applied to agreements generally, upon the ground that the honor and peace of families make it just and proper so to do." They will be enforced when resting on grounds which would not have been satisfactory if the transaction had been between strangers. *Smith* v. *Smith*, 36 Georgia, 184; 91 Am. Dec. 761, citing the *Stapilton Case* as "certainly the leading case," and Lord SUGDEN's remarks in *Westby* v. *Westby*, 2 Drury & W. 503. Both these American cases treat this subject very learnedly.

FERRY.

No. 1. — HUZZEY *v.* FIELD.

(EX. 1835).

No. 2. — HOPKINS *v.* GREAT NORTHERN RAILWAY COMPANY.

(C. A. 1877.)

RULE.

A FERRY is a franchise by grant from the Crown, in consideration of the obligation of the grantee to convey passengers over. If another, without legal authority, interrupts the grantee in his right, by withdrawing the profits of passengers, the disturber is liable to an action for the injury.

But it is not a disturbance of the ferry to use the river as a public highway, or to cross to or from a point at a distance from the terminus of the ferry, unless it be shown that the object is to evade the ferry.

Nor is it an actionable disturbance of the ferry to build a bridge across the river to meet a growing public need, although the traffic on the ferry is thereby destroyed.

No. 1. — Huzzey v. Field, 2 Cr., M. & R. 432.

Huzzey v. Field.

2 Crompton, Meeson & Roscoe, 432–446 (s. c. 4 L. J. Ex. 239; 1 Gale, 166; 5 Tyr. 855).

Ferry. — Infringement of Right.

Where there is an ancient ferry from A to B, which leads to a public [432] highway, and another constructs a landing-place at C, a short distance from B, and carries passengers over from A to C, from whence they pass to the same highway upon which the ancient ferry is established, before it reaches any town or village, it is an injury to the ancient ferry, for which an action will lie.

But where there is a river passing by several towns or places, the existence of an ancient ferry over such river from a particular point on one side to a particular point on the other does not preclude persons from using the river as a public highway from or to all the towns or places on its banks which are not in the line leading from one *terminus* of the ferry to the other.

Where the owner of a boat, which was accustomed to ply for hire, and to carry passengers across a haven, employed a servant for that purpose, and the servant on one occasion received a passenger on board, and carried him across the haven near the line of an ancient ferry, and paid the fare over to his master: *Held*, that the servant was acting at the time in the course of his master's service and for his master's benefit, and that the master was answerable for his act, and would have been liable in an action on the case for such act, if it had been distinctly proved to have amounted to an invasion of the ferry.

Action upon the case for the infringement of a ferry. The first count of the declaration stated that the plaintiff was possessed of a certain ancient ferry, called Burton Ferry, otherwise Pembroke Ferry, across and over a certain branch of a certain haven, called Milford Haven, for the conveying and ferrying over and across the said branch of the said haven, backwards and forwards within the said ferry, all persons, &c., in boats kept for that purpose by the plaintiff; he, the said plaintiff, taking and receiving reasonable freights and ferriages to him of right payable therefor. It then averred that the defendant, intending to deprive him of the profits of his ferry, wrongfully carried and conveyed and ferried for hire, in certain boats, divers persons, &c., over and across the said branch of the said haven, at and within the said ferry, whereby the plaintiff had been and was greatly injured in the enjoyment of his said ferry. The second count was similar to the first, but calling the ferry an ancient ferry (without giving any name to it) across Milford Haven, and stated as a breach that the defendant had ferried over, &c., at or near to the said last-

mentioned ferry. The third was similar to the second, omitting the keeping of boats by the plaintiff. The fourth count stated that the plaintiff was possessed of a certain ancient ferry, called Nayland Ferry, across and over Milford Haven; and alleged that the defendant carried and conveyed passengers over and across the haven, and upon the part of the said haven where the said [*433] plaintiff had such ferry, over, upon, within, * and across the same. The fifth count called the ferry Pembroke Ferry, and the sixth Burton Ferry. The defendant pleaded not guilty.

The cause was tried before PARKE, B., at the last Summer Assizes for the county of Pembroke, when it appeared that the plaintiff was the lessee, under Sir John Owen, Bart., of a horse and foot ferry, called Pembroke Ferry, across Milford Haven, from a place called Burton, to a point on the opposite shore where the road from Pembroke town terminated, and also of another ferry from a place called Nayland to the same point. The town of Pembroke is at the distance of two miles from the shore. In consequence of an extensive dockyard having been constructed lower down the haven, called Pater Dock, a new road had been made from Pembroke town to Pater Dock, and which road passed by or near a place called Hobbes's Point, where a hard or pier had been constructed, and which was about half a mile lower down on the haven than the Pembroke Ferry-house. It appeared that the defendant had for some time kept a boat on the haven, and had frequently carried passengers from Nayland to Pater Dock; but on one occasion, when the defendant's boy was plying at Nayland, a person named Llewelyn got into the defendant's boat, and, after the boy had pushed off from the shore, desired to be taken to Hobbes's Point, saying he was going to Pembroke. Since the new road had been made, it was nearer to go from Nayland by Hobbes's Point to Pembroke than from Nayland by the Pembroke Ferry-house. One question in the cause was, whether the plaintiff's ferry extended from Nayland to Pater Dock, on the Pembroke side; but this the jury negatived. The plaintiff, however, contended that the defendant, by carrying a passenger from Nayland to Hobbes's Point to go to Pembroke, had, in point of law, infringed his ferry, and that he was entitled to a verdict. For the [*434] * defendant it was contended that there was nothing to show either that this was intended as an infringement of

the plaintiff's ferry, or that it was done in fraud of it; and even if it were, yet that it was an act done by the defendant's servant without authority, for which the defendant could not be made responsible. The learned Judge left it to the jury to say whether the act had been done fraudulently, which they negatived. He then directed them to find for the defendant, but gave the plaintiff leave to move to enter a verdict for him, if the Court should be of opinion that these facts amounted, in point of law, to an infringement of the plaintiff's right. The Attorney-General having obtained a rule accordingly, cause was shown in Hilary Term last by

John Evans for the defendant. — There are two points for the opinion of the Court in the present case. 1st, Whether the defendant was liable for the act of his servant in carrying a passenger from Nayland to Hobbes's Point. 2dly, Whether that was, in point of law, an infringement of the plaintiff's ferry from Nayland to the Pembroke Ferry-house. First, the defendant was not liable for the act of his boy. The boy was not authorised by his master to carry persons to Pembroke town by way of Hobbes's Point, but his employment was only to carry passengers to Pater Dock. He was, therefore, not acting within the scope of his general authority, and his master cannot be responsible for his act. Secondly, the act itself was not an infringement of the plaintiff's ferry, it not having been done fraudulently, or with an intention to infringe it. The question cannot depend upon the circumstance of this being a nearer route to Pembroke than by the plaintiff's ferry; for, suppose a new road were made, and Pembroke was so situated that it should become nearer to go by Pater Dock to Pembroke, is it to be said that it would be an infringement of the plaintiff's ferry to convey passengers from Nayland to Pater Dock? That * certainly [*435] is not the law; and it would be very inconvenient to the public if it were so. The case of *Tripp* v. *Frank*, 4 T. R. 666 (2 R. R. 495), is decisive of the present case. There Lord Kenyon said, " If certain persons, wishing to go to Barton, had applied to the defendant, and he had carried them at a little distance above or below the ferry, it would have been a fraud on the plaintiff's right, and would be the ground of an action. But here these persons were substantially, and not colourably merely, carried over to a different place; and it is absurd to say that no persons shall be

permitted to go to any other place on the Humber than that to which the plaintiff chooses to carry them." In the present case the jury have negatived any fraudulent intention. According to that decision, also, it appears that the plaintiff cannot be compelled to carry passengers to Hobbes's Point, for Lord KENYON adds: "It is now admitted that the ferryman cannot be compelled to carry passengers to any other place than Barton: then his right must be commensurate with his duty." That, as was said by ASHHURST, J., in the same case, is decisive against the plaintiff.

Sir J. Campbell, Sir W. Owen, Chilton, and E. V. Williams, *contra*. — First, the master was liable for the act of his servant, as it was clearly within the scope of his authority. The master kept a boat, which he used by his servant, and received the money which he earned; and when the boy received a passenger on board, and rowed him to Hobbes's Point to go to Pembroke, he committed an act for which his master was liable. It was not a wilful act done by him contrary to his master's directions, but it was an act done by him in the course of his ordinary employment. The master was therefore responsible. *Turberville* v. *Stampe*, 1 Lord Raym. 264; *Bush* v. *Steinman*, 1 Bos. & P. 404. It is not necessary to show express orders given to the servant to do the particular act, to render the master liable. *Rex* v. *Almon*,
[*436] 5 Burr. 2686. *Secondly, this amounted to an infringement of the plaintiff's ferry. The plaintiff was bound to keep a boat to convey all passengers going from Nayland to Pembroke; and the right of ferry is coextensive with such obligation. This passenger was going from Nayland to Pembroke, and the defendant, by carrying him to Hobbes's Point, to enable him to get to Pembroke, committed an injury to the plaintiff's right of ferry. The case of *Tripp* v. *Frank* is in reality an authority for the plaintiff, as it shows that a person who carries passengers near to an ancient ferry, either at a short distance above or below it, subjects himself to an action. This was not only near the line of the plaintiff's ferry, but may be said to have been on it, for a ferry is not a mathematical line from point A to point B, but must have some considerable extent on each side, otherwise it would be of no avail. The line, therefore, from Nayland to Hobbes's Point may be considered as the Pembroke Ferry. [Lord ABINGER, C. B. — That might be true if going to Pembroke Ferry meant Pembroke town. PARKE, B. — This might

have been an infringement if the plaintiff was obliged to carry all persons going to Pembroke town.] If there had been a town on the south side of the haven, it would have been an infringement to have carried and landed persons a little lower down on the shore for the purpose of going there, according to the case of *Tripp* v. *Frank;* and this, it is submitted, was substantially the same. In *Tripp* v. *Frank*, the passengers were not going to Barton; but here this passenger was going to Pembroke, the place to which the plaintiff's ferry leads. The authorities on this subject are very few. In 2 Rolle's Abr. 140, tit. Nusans (G), pl. 4, there is the following passage, for which the Year Book, 22 Hen. VI., c. 14, is cited as an authority: "If I have a ferry by prescription, and another erects another ferry on the same river near to it, by which my ferry is injured (*empaire*), that is a nuisance to me, for I am bound to sustain and repair the ferry for the ease of the lieges, otherwise I * shall be grievously amerced;" and [*437] that passage is also referred to in Com. Dig., Action on the Case for a Nuisance. The next case is that of *Churchman* v. *Tunstall*, Hardres, 162, which appears, according to the report, to be against the proposition here contended for, because there a bill had been filed for an injunction by the farmer of a ferry against a person who had carried passengers over the river three-quarters of a mile below the ferry, and it was held no infringement: but the reporter adds a query. [PARKE, B. — That case is no authority, as there was afterwards a decree in that case by Lord HALE that the new ferry should be put down.] The case of *Blissett* v. *Hart*, Willes, 508, is an authority to show that where another person sets up a new ferry near an ancient ferry the owner of the ancient ferry has his remedy by action. [PARKE, B. — The case of *Tripp* v. *Frank* certainly does appear somewhat contradictory to *Blissett* v. *Hart* and the older authorities.] *Tripp* v. *Frank* seems to have been somewhat of a hasty decision; and it is to be observed that no authorities appear to have been cited. The proposition laid down in Com. Dig. as to ferries, immediately precedes the propositions as to markets, to which they are analogous. It is laid down, that, if a new market be set up within seven miles of an ancient market, on the same day, the law will intend it to be a nuisance, but if it be on a different day it is a question for the jury whether it is a nuisance or not. It is held reasonable that every man should have a market within seven miles; that is,

about one-third of a day's journey, computed at twenty miles. If it be true with respect to markets, that a person shall not be allowed to set up a new market within seven miles of an ancient market, the same principle is applicable to the case of ferries; and the principle as to the former is, that a new one shall not [*438] be set up where * there is an ancient one, which is available within a reasonable distance. In this case, the plaintiff's ferry was equally available for the purpose for which the other was used, and if this were allowed, it would be a manifest injury to the plaintiff's ferry. It is laid down in Blackstone's Commentaries, vol. iii., p. 219, that, "If a ferry is erected on a river so near another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For, where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness for the ease of all the King's subjects; otherwise he may be grievously amerced. It would therefore be extremely hard if a new ferry were suffered to share his profits, which does not also share his burden." In this case the plaintiff is bound to keep boats at Nayland Ferry, and he is therefore entitled to the corresponding advantages resulting from the exclusive right of ferry. *Cur. adv. vult.*

The judgment of the Court was now delivered by

Lord ABINGER, C. B. — This was an action on the case for the disturbance of the plaintiff's ferry over Milford Haven, tried before my Brother PARKE, at Haverfordwest. It was claimed in the declaration in different ways; but the question reserved for the consideration of the Court arises on the count which complains of a disturbance of Nayland Ferry.

The plaintiff was the lessee, under Sir John Owen, of a ferry, called the Pembroke or Burton Ferry, across Milford Haven, which was the ordinary communication between Pembroke and Haverfordwest. He was also lessee, under the same gentleman, of another ferry from the same point, on the Pembroke side, to Nayland and back; there was no question as to the right [*439] of the plaintiff to * both these ferries. He claimed also a much more extensive right, that of ferrying all persons backwards and forwards over Milford Haven, within no very narrow limits; but this right was negatived by the jury on the trial.

No. 1. — Huzzey v. Field, 2 Cr., M. & R. 439, 440.

It appeared, however, that the defendant had, before the commencement of this suit, set up a boat to carry passengers from Nayland to the opposite side, and, amongst other places, to Hobbes's Point, more than half a mile from the Pembroke Ferry-house. At this place a hard or pier had been built, to improve the communication between England and Ireland, and a road made from thence to Pembroke, which communicated with the turnpike road from Pembroke Ferry to Pembroke, at a distance of more than half a mile from the ferry; and the way from Nayland to Pembroke, by Hobbes's Point, was shorter than by Pembroke Ferry. There was no town or vill between Hobbes's Point or Pembroke Ferry, and the junction of the new with the old road; and, I rather believe, none between that point and Pembroke, although that circumstance was not inquired into on the trial.

On one occasion, a boy in the service of the defendant, and in his boat, received a passenger on board at Nayland, who, after the boat had been shoved off the shore, informed him he was going to Pembroke, and desired to be put on shore at Hobbes's Point; and this was done.

The jury having found for the defendant on the other questions in the cause, these points were reserved for the consideration of the Court: 1st, whether the defendant was responsible for this act of his servant; and, 2dly, whether, if he was, the facts proved amounted to a disturbance of the plaintiff's right of ferry, the jury having negatived any fraud in fact on the part of the defendant or his servant.

A rule *nisi* having been granted for a new trial, the case was argued before my Brothers PARKE, BOLLAND, GURNEY, and myself.

* Upon the first point there is no difficulty. The ser- [* 440] vant was acting at the time in the course of his master's service, and for his master's benefit; and his act was that of the defendant, although no express command or privity of his master was proved. *Turberville* v. *Stampe*, 1 Ld. Raym. 265.

The second point is one of a more doubtful nature, and has called for much consideration. It is quite clear that a ferry is a franchise which none can set up without a licence from the Crown; and in the case of a ferry by prescription, a grant or licence is presumed. As early as in the Year Book, 22 Hen. VI., 146, it is thus laid down by Paston, "If I have of ancient time

a ferry in a town, and another sets up a ferry upon the same river near to my ferry, so that the profits of my ferry are impaired, I shall have against him an action on the case;" and Newton says, "The case of a ferry differs from that of a mill, for you are bound to sustain the ferry, to serve and repair it, in ease of the common people, and it is inquirable before the sheriff in his tourn, and justices in Eyre." This proposition is quoted in 2 Roll. 140 (G), pl. 4, Com. Dig. Piscarry, B., and Action on the Case for a Nuisance, and in most of the cases in which the rights of ferry have come in question.

In the case of *Churchman* v. *Tunstall*, Hardres, 162, in the Exchequer, in the time of the Commonwealth, 1659, the plaintiff, the farmer of a ferry at Brentford, as it would seem, under the Crown, filed a bill for an injunction to restrain the defendant, who had lands on both sides of the Thames, three-quarters of a mile off, and who was in the habit of ferrying passengers across, from continuing to do so. The bill was dismissed without costs; but the reporter adds a query as to the propriety of the decision; and even if it was right, it is no authority against the maintenance of an action on the case. The decision, however, appears [*441] to have been wrong; for, upon another * bill filed in 1663, after the Restoration, a decree was made by Lord Hale, on the 18th of June, 14 Car. II., in favour of the same plaintiff, that the new ferry should be put down.

In *Blissett* v. *Hart*, Willes, 508, the plaintiff recovered in an action on the case, against the defendant, for setting up another ferry over the same river, near the plaintiff's ferry, and ferrying over persons and horses over the same river, near the plaintiff's ferry, by which she was obliged to let it for less rent than before, and had been deprived of great part of the profit of it. On motion in arrest of judgment, the Court held the declaration to be good, and they said, that "a ferry is a franchise that no one can erect without a licence from the Crown; and when one is erected, another cannot be erected without an *ad quod damnum*. If a second is erected without a licence, the Crown has a remedy by *quo warranto*, and the former grantee has a remedy by action. The franchise is the ground of the action." Willes, 512, n.

So far the authorities appear to be clear, that, if a new ferry be set up without the King's licence, to the prejudice of an old one, an action will lie; and there is no case which has the appear

ance of being to the contrary, except that of *Tripp* v. *Frank*, hereafter mentioned. These old authorities proceed upon the ground, first, that the grant of the franchise is good in law, being for a sufficient consideration to the subject, who, as he receives a benefit, may have, by the grant of the Crown, a corresponding obligation imposed upon him in return for the benefit received; and secondly, that, if another, without legal authority, interrupts the grantee in the exercise of his franchise, by withdrawing the profit of passengers, which he would otherwise have had, and which he has, in a manner, purchased from the public at the price of his corresponding liability, the disturber is subject to an action for the injury; and the case is, in this respect, analogous
* to the grant of a fair or market, which is also a priv- [* 442]
ilege of the nature of a monopoly.

A public ferry, then, is a public highway, of a special description, and its *termini* must be in places where the public have rights, as towns or vills, or highways leading to towns or vills. The right of the grantee is, in the one case, an exclusive right of carrying from town to town, in the other, of carrying from one point to the other, all who are going to use the highway to the nearest town or vill to which the highway leads on the other side. Any new ferry, therefore, which has the effect of taking away such passengers, must be injurious.

For instance, if any one should construct a new landing-place at a short distance from one terminus of the ferry, and make a practice of carrying passengers over from the other terminus, and there landing them at that place, from which they pass to the same public highway upon which the ferry is established, before it reaches any town or vill, and by which the passengers go immediately to the first, and all the vills and towns to which that highway leads; there could not be any doubt that such an act would be an infringement of the right of ferry, whether the person so acting intended to defraud the grantee of the ferry or not.

If such new ferry be nearer, or the boats used more commodious, or the fare less, it is obvious that all the custom must inevitably be withdrawn from the old ferry; and thus the grantee would be deprived of all benefit of the franchise, whilst he continued liable to all the burden imposed upon him.

It does not follow from this doctrine that, if there be a river passing by several towns or places, the existence of a franchise of

a ferry over it, from a certain point on one side to a point on the other, precludes the King's subjects from the use of the river, as a public highway from or to all the towns or places on [*443] its banks, and obliges them, *upon all occasions, to their own inconvenience, to pass from one terminus of the ferry to the other. The case of *Tripp* v. *Frank*, 4 T. R. 666 (2 R. R. 495) decided otherwise; and it is not intended to question that decision. It was there held that the plaintiff, who had a right of ferry from Hull to the town of Barton, had no right of action against a person who carried passengers from Hull to Barrow, a place on the banks of the river, at some distance from Barton. But, suppose he had known that the passengers were going by that route to Barton, and that their sole object was to go there; or suppose that Barton, instead of being within a few hundred yards from the Humber, was a mile distant, and was the first town with which either ferry communicated, it would not follow, from that decision, that in such a case passengers might be landed at Barrow, for the sole purpose of going to Barton.

We have thought it right, in consequence of the course taken by the counsel in argument, to enter thus far into the general question, and to lay down these principles, that it may not be supposed that the decision to which we find ourselves obliged to come, can in any manner affect the plaintiff's right to the exclusive privilege of ferrying passengers who leave Nayland, with no other object than that of going to Pembroke.

But, fully admitting his right, we are of opinion, after much deliberation, and I may add, not without some hesitation, that there is no sufficient ground for making the rule absolute.

It is to be observed that, between Hobbes's Point and the junction of the two roads that lead from that place and from Pembroke Ferry respectively to the town of Pembroke, there are intermediate points to which the passenger Llewelyn might be going; though Pembroke was his ultimate object, it might [*444] not be his only object; and, if he *had any particular view of convenience in making Hobbes's Point the place of his landing, which could not have been accomplished as well by landing at Pembroke Ferry, then, according to the principles laid down in the case of *Tripp* v. *Frank*, there would have been no evasion of the plaintiff's ferry. It is true, that the intentions of Llewelyn are left very uncertain upon the evidence; and it does

not appear from the report that the counsel on either side thought proper to elicit them by any inquiry. And if this had been the real question which the parties intended to try, the Court might have been disposed to direct a new trial. But one cannot fail to observe that the main questions of fact in difference were fully tried and disposed of by the jury, and that the point stated upon Llewelyn's evidence was laid hold of for no other purpose than that of recovering a verdict for the plaintiff at all events, after all the matters really in difference had been decided against him. The Court, therefore, is bound to look with strictness to the evidence, and not to allow the plaintiff any advantage from an uncertainty that he ought to have removed. It was incumbent on him to offer satisfactory proof that Llewelyn had no other object than to evade his ferry, and that the defendants were aware, and must have understood, that he had no other object. Now, the communication made by Llewelyn to the defendant's servant, after the boat had commenced her passage, is not inconsistent with his having some legitimate object in going to Hobbes's Point, besides that of going to Pembroke. The uncertainty, therefore, in which this point has been left by the evidence makes it impossible to say that the facts proved amounted to a disturbance of the plaintiff's ferry; therefore the rule cannot be made absolute, to enter a verdict for the plaintiff. And we think that the plaintiff, in a case of this sort, is not entitled to a new trial, that he may amend his evidence upon an incidental point, upon which he left it too doubtful to be *properly submitted to the [*445] jury. The rule, therefore, must be discharged.

Rule discharged.

Hopkins v. Great Northern Railway Company.

2 Q. B. D. 224–238 (s. c. 46 L. J. Q. B. 265; 36 L. T. 898).

Ferry — Disturbance — Bridge — Railway Company — Compensation. [224]

The owner of a ferry cannot maintain an action for loss of traffic caused by a new highway by bridge or ferry made to provide for a new traffic.

Quære, whether the exclusive right of the owner of a ferry extends beyond the carriage of passengers by boat.

A railway company, under the authority of their Act, constructed across a river, half a mile above an ancient ferry, a railway bridge and a foot-bridge, the foot-bridge being used by persons going to the railway station and also to other places. The traffic across the ferry fell off, and the ferry was given up. The

No. 2. — Hopkins v. Great Northern Railway Company, 2 Q. B. D. 224, 225.

owners of the ferry claimed compensation under the Lands and Railway Clauses Acts.

Held, reversing the decision of the Queen's Bench Division, that no [225] compensation could be recovered: First, on the ground that an action could not have been maintained for disturbance of the ferry in respect of the traffic either by the railway or by the foot-bridge, if they had been erected without the authority of an Act. Secondly, on the ground that, the injury to the ferry being occasioned, not by the construction but by the working of the railway, the ferry had not been injuriously affected within the Lands Clauses Act or the Railway Clauses Act.

Action by the plaintiffs, as owners of a ferry, against the defendants, for the recovery of £300, the amount of an award, made between the parties in a question of disputed compensation, by an umpire appointed in accordance with the provisions of the Lands Clauses Consolidation Act, 1845.

A case was stated for the opinion of the Court as follows: —

1 and 2. Statement that the plaintiffs, as trustees of the will of Charles Boucher, were owners in fee of a certain ancient and exclusive ferry over the navigable river Nene.

3. Before and until the construction of the bridge by the defendants, as hereinafter mentioned, the ferry was extensively used for the conveyance across the river by the plaintiffs and their predecessors, owners of the said ferry, or their under-tenants, of passengers by horse and foot, goods, horses, sheep, cattle, and carriages, and was, down to the said time, the only public means of communication within about six miles between the north and south sides of the river, which is at this spot navigable and about 100 feet in breadth. It increases in width towards its mouth, and for some miles upwards is of considerable breadth, and navigable for barges. It connects two high roads, the one to the north leading from the ferry to Wisbeach and Peterborough, and the other to the south from the ferry to March, Chatteris, and so to Ely and Cambridge.

4. By the Great Northern Railway (Spalding to March) Act, 1863, the defendants were authorised to make a railway from Spalding to March, and to make a bridge, footway, and works across the river in connection therewith.

5. The defendants, in pursuance of and in exercise of the powers contained in the said Act, constructed a bridge and footway attached to it across the River Nene, which bridge and footway are on the west side of or above the said ferry, and

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are distant from the landing-places of the said ferry about half a mile.

*5A. The said bridge and footway are physically inde- [*226]
pendent of and unconnected with the said ferry, and in no way physically obstruct the same or the approaches thereof.

6. The bridge and footway are and have been, since they were opened by the defendants in or about the year 1867, used for the railway traffic of the defendants, and also for the passage of passengers on foot across the Nene to and from the station called "Guyhirn," situated on the south side of the said river. The said foot-bridge has not been dedicated to the public. The passage of stock, and sheep, and of barrows across the said foot-bridge is prevented by stiles placed for the purpose at either end. Notices are put up near the bridge as follows (on the north side): "Great Northern Railway. Notice. Any person found trespassing on the railway will be prosecuted. By order. Alexander Forbes, secretary. November 4th, 1870." At the south end of the bridge a notice is fixed: "To the station only." There are no steps beyond these taken to prevent persons not intending to use the bridge as an access to the station from using it, and persons do, in fact, use it occasionally simply for the purpose of crossing the river.

7. The transit of goods, horses, sheep, cattle, and carriages is carried on by means of the defendants' trains, and such goods, horses, sheep, cattle, and carriages must be put upon their railway at some or one of their stations, the nearest of which on the north side is about two and a half miles, and on the south side is the Guyhirn station adjoining the bridge and footway. In connection with the last-mentioned station there is also accommodation for loading trains at the north end of the bridge and footway.

8. Neither the said bridge and footway, nor any of the said works, communicate with the said ferry, inasmuch as it is half a mile distant, but persons travel by the trains on the said railway across the said bridge who otherwise would have used the said ferry as a means of transit. Stock, cattle, and sheep are also carried by the said railway over the said bridge which otherwise would have crossed the ferry.

9. Since the erection and opening of the bridge, foot- [*227]
way, and *works, the traffic over the ferry of all descriptions, including foot-passengers, fell off, and the franchise

of the ferry, and the plaintiffs' interest therein, became less valuable, and they were compelled to reduce the rents received by them from the tenants of the ferry, and ultimately the ferry was given up.

10. In consequence of this prejudicial effect on the plaintiffs' ferry, the plaintiffs, on the 24th of February, 1872, caused to be served on the defendants a notice in writing stating therein the nature of their interest, their claim for compensation in respect of the injury thereto, and their desire to have the said question of disputed compensation settled by arbitration in accordance with the provisions of the statutes in that behalf.

The case then stated the proceedings under the arbitration, and the appearance of defendants under protest before the umpire, who made his award in favour of the plaintiffs for £300.

A plan was annexed to the case, showing a road on one side of the river leading from Peterborough to Wisbeach, and an approximately parallel road on the other side leading from March to Wisbeach, with the ferry affording means of passing from one of the roads to the other. The Lands Clauses Consolidation Acts and the Railways Clauses Consolidation Act were incorporated in the Great Northern Railway (Spalding to March) Act, 1863.

The question for the opinion of the Court was, Are the plaintiffs entitled to recover the sum so awarded?

May 9, 1876. The case came before the Queen's Bench Division (Blackburn and Quain, JJ.), who, being of opinion that it was governed by *Reg.* v. *Cambrian Ry. Co.*, L. R. 6 Q. B. 422, 40 L. J. Q. B. 169, gave judgment for the plaintiffs.

The defendants appealed.

Nov. 10, 21, 1876. Mellor, Q. C., and Monckton, for the defendants. — There is this distinction between this case and *Reg.* v. *Cambrian Ry. Co.*, that there the company took toll for the use of their bridge; here the company only use the bridge for the purposes of their station. What they have done has been [*228] done under the *authority of their Act, and the injury, if any, to the ferry is by the working, not by the construction, of the railway, and is, therefore, not a subject for compensation under the Acts: *Brand* v. *Hammersmith Ry. Co.*, L. R. 4 H. L. 171, 38 L. J. Q. B. 265. *M'Carthy* v. *Metropolitan Board of Works*, L. R. 7 H. L. 243, 43 L. J. C. P. 385. But the plaintiffs also complain of injury by reason of the traffic in carriages

and animals being taken away. That, however, is no subject for compensation: *Newton* v. *Cubitt*, 12 C. B. (N. S.) 32, 31 L. J. C. P. 246. The Legislature has thought fit to leave such cases unprovided for. If the railway had interfered physically with the ferry the damage would have been the subject of compensation under the Acts, but that is not the case here. A ferry owner cannot stop all improvement by setting up an exclusive right to take people across a river for an indefinite distance.

F. M. White and Silvester for the plaintiffs. — There has been no change of circumstances, nor is this ferry in a populous place, as in *Newton* v. *Cubitt*. The ferry is from one high road to the other, and was granted for the convenience of the district, and is now given up. The owner of the ferry is bound to maintain the ferry, and has a right to the traffic. Even he could not put up a bridge. *Payne* v. *Partridge*, 1 Salk. 12. The plaintiffs do not want to stop any improvement, and want merely £300 to compensate them for the loss of their undoubted property, just as a landowner would be compensated. The injury is directly traceable to the execution of the powers given by the Act. In *Brand* v. *Hammersmith Ry. Co.* the damage was remote; here it is direct, for every passenger who crosses the bridge would have crossed by the ferry. *Cory* v. *Yarmouth and Norwich Ry. Co.*, 3 Hare, 593. A bridge could not be built to the injury of the ferry. *Letton* v. *Goodden*, L. R. 2 Eq. 123. In *Churchman* v. *Tunstal*, Hardr. 162, it was held that a waterman could not carry passengers across a river three-quarters of a mile from a ferry. See also *Attorney-General* v. *Richards*, 2 Anstr. 603 (3 R. R. 632); *Huzzey* v. *Field*, 2 Cr., M. & R. 432 (p. 139, *ante*). At all events, the plaintiffs have been injuriously affected within the Lands Clauses Consolidation Act (8 Vict., c. 18), *s. 68, [*229] and the Railway Clauses Consolidation Act (8 Vict., c. 20), ss. 6, 16, and are entitled to compensation.

Mellor, Q. C., in reply. *Cur. adv. vult.*

Jan. 22, 1877. The judgment of the Court (Lord Coleridge, C. J., Mellish, L. J., and Brett and Amphlett, JJ. A.) was delivered by

Mellish, L. J. — This was an appeal from a judgment of the Queen's Bench Division on a special case. [The Lord Justice read the material facts from the special case.] The Queen's

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Bench Division gave judgment in favour of the plaintiffs upon the authority of the case of *Reg.* v. *Cambrian Railway Company*, L. R. 6 Q. B. 422, 40 L. J. Q. B. 169, and we agree that the present case, except in one point, which will be hereafter referred to, cannot be distinguished from that of *Reg.* v. *Cambrian Railway Company*, and that we have to consider whether that case was rightly decided.

There are two questions to be considered: First, could an action have been maintained by the plaintiffs against the defendants, if the defendants' railway bridge and foot-bridge had been erected without the authority of an Act of Parliament? And, secondly, if such an action could have been maintained, are the plaintiffs nevertheless prevented from recovering compensation, upon the ground that they have not suffered damage from the construction of the railway, but only from the user of the railway after it was constructed, and that the case is therefore governed by *Brand* v. *Hammersmith Ry. Co.*, L. R. 4 H. L. 171, 38 L. J. Q. B. 265?

With respect to the first question, in *Reg.* v. *Cambrian Ry. Co.*, it appears to have been admitted by the counsel for the company, that the owner of a ferry could have maintained an action against the owner of a railway not constructed under the authority of an Act of Parliament in respect to the diversion of traffic from his ferry by the opening of the railway; and therefore the question, whether such an action could be maintained, was very little considered; but Mr. Justice BLACKBURN says: "The prosecutor's right is to a ferry or franchise by which he had the exclusive right of carrying passengers across the river. It is well established that if that right is interfered with, without the authority [*230] * of an Act of Parliament, by something which carries passengers across so close to it as to disturb the right, an action would lie for that disturbance. The cases, so far as I remember them, in which actions have lain for the interference with or disturbance of the right of ferry, have been where there has been a carrying across by boats. But I cannot bring my mind to doubt the principle, that if a bridge were to be erected across a ferry, and people were to go across the bridge, and consequently the bridge would have the effect of disturbing the owner of the ferry in his right, he would be entitled to bring an action on the case and recover damages. It follows, I think, that what the railway company have here done, not only in making a bridge for

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carrying railway traffic across, but actually a footway, and taking toll from foot-passengers for passing from one side to the other, if that had not been authorised by Act of Parliament, would have been a disturbance of the ferry, for which the owner of the ferry could have brought an action on the case." (L. R. 6 Q. B., at p. 430.) In the present case, the railway company have erected and opened both a bridge to carry the railway traffic, and a foot-bridge, but the facts as to the user of the foot-bridge are different from what they were in *Reg.* v. *Cambrian Ry. Co.*; and it seems desirable to consider separately, whether an action could have been maintained in respect of the diversion of traffic by means of the railway bridge, and whether an action could have been maintained in respect of the diversion of traffic by means of the foot-bridge.

We will first consider that which is by far the most important, whether an action could have been maintained in respect of the diversion of traffic caused by the railway bridge. Now, in order that such an action may be maintained, it is clearly not sufficient for the owner of the ferry to prove that something has been done by which traffic has been diverted from his ferry. He must prove that his right has been violated. He is the owner of a particular description of monopoly, which the law allows to be created from its being presumed to be for the public advantage, and to maintain an action he must prove that the defendants have in substance done that which he has the sole right to do. Now we apprehend that the owner of a ferry has not a grant of an exclusive right of *carrying passengers and goods across the stream [*231] by any means whatever, but only a grant of an exclusive right to carry them across by means of a ferry. In *Payne* v. *Partridge*, 1 Salk. 12, it was laid down, that the owner of a ferry could not himself build a bridge in substitution for the ferry; which seems a clear decision that he has not a grant of every mode of carrying goods and passengers across; for if he had he would surely be entitled, if not bound, to provide the best means of crossing. The first grantee of the ferry is supposed to have represented to the Crown that it would be for the public advantage that a ferry should be established in the particular locality, and then, in consideration of the grantee undertaking perpetually to keep up the ferry, the Crown has granted to him the exclusive right of ferrying within certain limits. There is nothing in the

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nature of this transaction which would lead me to believe that the Crown intended to guarantee, or had power to guarantee, the grantee of the ferry against changes of circumstances and future discoveries of an entirely different description of transit by which ferrying might be superseded. The Crown professes to protect the grantee against the competition of other persons who are in the same line of business and do the same thing that he does; but he appears to run the risk of any change of circumstances which may render ferrying at that place useless.

There is no doubt, however, that the right of the owner of a ferry does extend somewhat beyond a mere right to bring an action against persons who have carried goods or passengers for hire by boat from one terminus of his ferry to the other, and it is necessary to examine the authorities for the purpose of seeing what the true limit of the right is. We have not been able to discover that any action has ever been brought by the owner of a ferry against any person for violating his right otherwise than by means of boats. The authorities, both old and new, are all collected in *Huzzey* v. *Field*, 2 Cr., M. & R. 432 (p. 139, *ante*), and *Newton* v. *Cubitt*, 12 C. B. (N. S.) 32, 31 L. J. C. P. 246; but they all relate to alleged infringements of the rights of the owner of a ferry by means of boats. They establish that although it is laid down in a very early case (2 Roll. Abr. 140): "If I have a ferry by [*232] prescription, and another erects * another ferry on the same river near to it by which my ferry is injured, that is a nuisance to me, for I am bound to sustain and repair the ferry for the ease of the lieges, otherwise I shall be grievously amerced;" and there are other authorities to the same effect; yet it does not conclusively follow, as a matter of law, that because a new ferry diverts some of the traffic from an old ferry it is actionable; and it may be that no action can be maintained in respect of the new ferry, if it has been set up *bonâ fide* for the purpose of accommodating a new and different traffic from that which was accommodated by the old ferry. In *Newton* v. *Cubitt*, 12 C. B. (N. S.) 32, 31 L. J. C. P. 246, there were two counts, the first complaining that the defendants had carried passengers in the line of the plaintiff's ferry, the second that they had so done near the said ferry for the purpose of evading it; and Mr. Justice Willes, after showing that the defendants had not carried passengers in the line of the plaintiff's ferry, says: "The second count, charging

that the defendants carried near the line of ferry for the purpose of evading it, raises another question. The owner of the ferry has a cause of action for carrying in the line of the ferry, whether it be done directly or indirectly. He has a right to the transport of the passengers using the way; and if the alleged wrong-doer makes a landing-place near to the ferry landing-place, so as to be in substance the same, making no material difference to travellers, such a wrong-doer would be guilty of the wrong complained of in the second count; he would indirectly carry in the line of the plaintiff's ferry " (12 C. B. (N. S.), at p. 59; 31 L. J. 3 C. P., at p. 253). Further on he says: " The principle by which to decide whether the proximity of a new passage across the water to an ancient ferry is actionable has not been clearly laid down. It seems reasonable to infer that if the franchise of a ferry is established for facility of passage, and if the monopoly is given to secure convenient accommodation, a change of circumstances creating new highways on land would carry with it a right to continue the line of those ways across a water highway; and it is obvious that the single landing-place which sufficed for an uninhabited marsh would be utterly inadequate for several towns thronged with industrial mechanics." Now this being the result
* of the authorities, it seems to us by no means clear that [*233]
a person building a bridge over a stream, even in the line of a ferry, would be liable to an action by the owner of a ferry. It is true that the opening a new bridge might be as prejudicial, or, indeed, much more prejudicial to the property of the owner of the ferry than the setting up of a rival ferry; but the one does, and the other does not involve the direct doing of the very thing the exclusive right to do which has been granted to the owner of the ferry; and it seems to be extending the principle of liability for an indirect violation of the rights of the owner of a ferry to an unreasonable extent, to hold that it extends to make a person liable to an action, who has not ferried or carried passengers by boat at all.

This, however, is not the point which we have to decide. It may be that if a person built and opened a bridge in the line of a ferry, so as to enable persons and goods to be conveyed from the highway on which one terminus of the ferry was situate to the highway on which the other terminus was situate, he ought to be held to have indirectly violated the rights of the owner of the

ferry: but that is not what the defendants have done. The railway bridge does not join the highway on which one terminus of the ferry is situate to the highway on which the other terminus is situate. The passengers and goods which are conveyed over the railway bridge do not use the highway on each side of the river adjoining the ferry at all. They use the railway as a substitute for those highways as well as a substitute for the ferry. How can it be said that the defendants, by opening an entirely new highway of a different description from the old highways and the ferry for the general accommodation of the public, have either directly or indirectly violated the plaintiffs' right, their right being to have the exclusive ferrying of goods and passengers from the one side of the river to the other in that locality? Then the passages we have cited from Mr. Justice Willes's judgment in *Newton* v. *Cubitt* (12 C. B. (N. S.), at p. 59; 31 L. J. C. P., at p. 253) seem strongly in the defendants' favour. From what is there said it would follow, that even if the railway bridge had never been made, but the railway company had established a new ferry for the purpose of conveying goods and passengers from their railway on one side of the river to their railway on the other [*234] side, * it would not have been actionable, for the railway would have been a new highway on land, which a change of circumstances had rendered necessary, and it would be reasonable that the new highway should be allowed to be continued over the water highway. It is true that there was not in this case, as in *Newton* v. *Cubitt*, a change of circumstances in the immediate neighbourhood of the ferry, which rendered the new highway necessary, but there was a general change of circumstances in the country at large which rendered this new highway necessary, not only or principally for the accommodation of the persons who formerly used the ferry, but for the accommodation of a much larger portion of the public; and we cannot think that it would have been illegal or a violation of the rights of the owner of the ferry to have given the public that accommodation, even if the railway had been made without the authority of an Act of Parliament.

There is another consideration, which seems to us to be in favour of the defendants. If owners of ferries are held entitled to compensation, they will certainly form a singular exception to all other persons who were the owners of highways, or had a legal interest in the profits to be derived from the use of highways

before railways were invented. It can hardly be necessary to enumerate the different classes of persons who had a legal interest in the old highways, and who have suffered loss from the diversion of traffic from those highways to railways; proprietors of canals, turnpike trustees, holders of turnpike bonds, trustees of river navigations, and holders of bonds secured on their tolls, have all suffered great losses from the diversion of traffic to railways and have received no compensation. No doubt their rights have not been infringed, though their property has been affected. They were all in substance the owners of particular kinds of highway. If any person used their highway without their permission and without paying their toll, the law gave them a remedy, but they had no remedy for a diversion of traffic caused by the invention of a better kind of highway. Is the owner of a ferry in a different position? We think he is not. We think he also is the owner of a particular description of highway, who is entitled to his legal remedy if anybody infringes upon his right, or uses his highway *without paying his toll, but that he, like the [*235] others, must bear the loss occasioned by the diversion of traffic caused by the introduction of railways. Another class of persons interested in highways may be referred to, more analogous to the owners of ferries. The Crown had exactly the same prerogative respecting bridges that it had respecting ferries. Suppose that the Crown had, in consideration of a person undertaking to keep perpetually in repair a bridge over a stream carrying a highway, granted to such person and his heirs a reasonable toll in respect of all persons and goods passing over the bridge; or, in other words, assume the existence of a good toll thorough in respect of a bridge. The owner of the toll would be possessed of a franchise exactly similar to that of the owner of a ferry, and would be liable to be indicted if he did not keep the bridge in repair; but would he be entitled to compensation on account of traffic having been diverted from his bridge by a new railway? It is difficult to suppose that he would, for his right to receive toll in respect of all persons and goods passing over his bridge has not been violated in the least. On the whole, we are of opinion that no action could have been maintained by the plaintiffs in respect of the railway bridge if it had been opened without the authority of an Act of Parliament.

We have next to consider whether the plaintiffs would have had

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a good cause of action in respect of the foot-bridge. Now the case finds that the company had charged no toll in respect of the foot-bridge, and only used it to enable passengers to get to and from their station; and assuming that an action might, under some circumstances, be maintained by an owner of a ferry for the disturbance of his ferry by the opening of a bridge, and that the indirect profit obtained by the company from the use of the bridge has the same effect as the charging of a toll, still we think that the case of *Newton* v. *Cubitt* is an authority that no action could have been maintained by the plaintiffs in respect of the foot-bridge. The foot-bridge was made expressly to provide for a new traffic in which the defendants had an interest, and was rendered necessary by a change of circumstances, and it seems to us that we should be overruling *Newton* v. *Cubitt*, if we held that the defendants were obliged to compel all persons who wished
[* 236] * to cross the river to or from the defendants' station to go round by the plaintiffs' ferry. The case, indeed, finds that some persons who were not going to the station used the foot-bridge to cross the river. We do not see how the defendants can be liable for the acts of trespassers, and if they were liable for the acts of trespassers, they would be liable to an action for not having prevented those persons from crossing the bridge, and not liable on account of their acts to pay compensation to be assessed under the Lands Clauses Consolidation Act. For these reasons, we are of opinion that the plaintiffs could not have maintained any action against the defendants, either in respect of the railway bridge or in respect of the foot-bridge, if they had been erected without the authority of an Act of Parliament, and that consequently they are not entitled to maintain this action.

Having come to this conclusion, it is, strictly speaking, unnecessary for us to give any opinion on the second point; but as the second point is the one on which the judgment of the Court below, both in the present case and in that of *Reg.* v. *Cambrian Ry. Co.*, L. R. 6 Q. B. 422, 40 L. J. Q. B. 169, mainly proceeded, we have thought it right to consider it and give our opinion upon it. For that purpose we must consider what was the rule of law established by the case of *Brand* v. *Hammersmith Ry. Co.*, L. R. 4 H. L. 171, 38 L. J. Q. B. 265, and determine whether the present case comes within the rule. Now, what was decided in *Brand* v. *Hammersmith Ry. Co.* was that the owner and occupier of a

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house was not entitled to recover compensation from a railway company, in respect of the nuisance and actual structural damage to his house caused by vibration arising from the running of trains after the line was opened; and the ground of the decision appears to us to have been that a railway company is not bound to pay compensation for damage necessarily caused by the running of their trains in the way authorised by their Act of Parliament after the line is opened to the public. The two learned Lords who formed the majority of the House of Lords on that occasion carefully examined the different sections of the Lands Clauses Consolidation Act and the Railway Clauses Consolidation Act bearing on the subject, and from that examination came to the conclusion that compensation is only given for damage caused by the construction * of the railway and works, and is not given [*237] for damage caused by the user of the railway after it has been constructed and opened to the public. Now, that being the rule so established, we are of opinion that the present case comes within the rule. It seems clear to us that the damage for which compensation is claimed in the present case has arisen solely from the user of the railway and works after they had been constructed and opened to the public, and has not arisen from the construction of the railway and works. In the case of *Reg.* v. *Cambrian Ry. Co.* the Judges rely on the clause in the Lands Clauses Consolidation Act by which the word " land " includes " franchises." This, no doubt, proves that if franchises are injured by the construction of the railway or works — which they may be — compensation may be obtained, but surely does not prove that compensation ought to be given for damage caused to a franchise by the user of a railway after it has been constructed, contrary to the rule in other cases. The Court also relied upon this, that in *Brand* v. *Hammersmith Ry. Co.* the company had no intention to cause damage to Mr. Brand's house, though damage was occasioned by their acts, but that in *Reg.* v. *Cambrian Ry. Co.* it was the object of the company to divert the traffic from the plaintiff's ferry. We cannot see why this should make any difference. It is impossible to deny that structural damage to a house was the proper subject of compensation, if the damage was caused by the construction of the railway; but compensation is not given because the damage is caused by the user of the railway, and not by its construction. If that be good law, why is there not to be some

rule respecting franchises? If damage is caused to a franchise by the construction of a railway, as, for instance, if the approach to a ferry is blocked up by a railway embankment, compensation would be given, but we can see no reason why the owner of a franchise should have a greater right to compensation for damage caused by the user of a railway, as distinguished from its construction, than any one else. Then Mr. Justice BLACKBURN expresses an opinion that the construction of the railway may be treated as the proximate cause of the damage to the owner of the ferry, because the railway was constructed for the pur-
[*238] pose of diverting the traffic * from the ferry. It seems to us that the construction of the railway, as distinguished from the user of the railway after it was constructed, was not the proximate cause of the damage suffered by the owner of the ferry, for this simple reason, that if the railway and foot-bridge had only been constructed and never opened to the public or used, it is plain the owner of the ferry would have suffered no damage whatever. We are therefore of opinion that, in accordance with the judgment of the House of Lords in the case of *Brand* v. *Hammersmith Ry. Co.*, the appellants are entitled to succeed.

The judgment for the plaintiffs must be reversed, and judgment entered for the defendants, with costs both in the Court below and here.

Judgment reversed, and entered for the defendants

ENGLISH NOTES.

The owner of a ferry must, as incident to the ferry, have such right to use the land on both sides as to enable him to embark and disembark his passengers; but he need not for that purpose have any property in the soil. *Peter* v. *Kendal* (1827), 6 B. & C. 703.

To maintain an action on the case for a disturbance of a ferry, it is sufficient that the plaintiff is in possession of the ferry at the time the cause of action arose. *Trotter* v. *Harris* (1828), 2 Y. & J. 285. It was held in the same case that from a user of 35 years the jury may presume a legal origin for the right of ferry; and that an increase of the toll from a halfpenny to a penny within the time of living memory did not avoid the presumption. It was however suggested by HULLOCK, B., that a frequent variation in the sum charged might have been regarded as strong evidence of voluntary payment.

In the case of *Newton* v. *Cubitt* (1862), 12 C. B. (N. S.) 32, 31 L. J. C. P. 246, 6 L. T. 860, on which the judgment in the latter prin-

cipal case is to some extent founded, an ancient ferry existed from the Isle of Dogs on the northern bank of the River Thames to the town of Greenwich; and, according to the evidence of user, the ferry was always exercised from a landing-place called Potter's Ferry stairs to the town of Greenwich. The proprietors of the ferry brought an action for infringement against the defendants, who carried persons by steamboat from a new pier, 1,282 yards distant by road from Potter's stairs, to the town of Greenwich. It was held that the limits of the ferry must be ascertained from user, and that by user the ferry was limited to the line from Potter's Ferry stairs to the town of Greenwich; and that the acts of the defendants were not an infringement. For they had not carried the traffic in the line of the defendants' ferry; and upon the question whether they had carried in a line near the ferry for the purpose of evading it, the change of circumstances and the opening up of access to a new landing-place on the river must be taken into consideration, and the fact negatived the purpose of evading the ferry. That the right of ferry was determined by the line of user had already been decided in a case in the Queen's Bench (*Matthews* v. *Peache*, or *Reg.* v. *Matthews*, 1855, 5 El. & Bl. 540, 25 L. J. M. C. 7), upon the same ferry. There the owners of the ferry had employed a person to carry passengers across from a point 800 yards below Potter's stairs. The person so employed was not a licensed waterman, and on being convicted for plying without a license he appealed on the ground that he was plying in exercise of a right of ferry. The Court held that this was a good ground of objection to the conviction; but that the facts did not support it, because the ancient ferry was from the stairs, and plying across from a point 800 yards further down could not be an exercise of the right.

AMERICAN NOTES.

A ferry is an incorporeal hereditament acquired from the State, either by special Act of the Legislature, or by some other competent authority under the provisions of a general law: *Patrick* v. *Ruffners*, 2 Robinson (Virginia), 209; 40 Am. Dec. 740; is dependent upon governmental permission or grant: *McGowen* v. *Stark*, 1 Nott & McCord (So. Car.), 387; 9 Am. Dec. 712; *Binghamton Bridge Case*, 3 Wallace (U. S. Sup. Ct.), 81; or by uninterrupted, exclusive, and notorious enjoyment for twenty years conclusively presuming a grant: *Smith* v. *Harkins*, 3 Iredell, Equity (No. Car.), 613; 44 Am. Dec. 83; *Milton* v. *Haden*, 32 Alabama, 30; 70 Am. Dec. 523; and the franchise may be taken away by statute: *Hudson* v. *Cuero, &c. Co.*, 47 Texas, 56; 26 Am. Rep. 289 (but see *Dufour* v. *Stacey*, 90 Kentucky, 288; 29 Am. St. Rep. 374); or another may be granted: *Charles River Bridge* v. *Warren Bridge*, 11 Peters (U. S. Sup. Ct.), 420.

These cases also establish the right to an action for disturbance of such

franchise. Equity will prohibit the invasion of such franchise. *Newburgh T. R.* v. *Miller*, 5 Johnson, Chancery (New York), 101; 9 Am. Dec. 274.

An exclusive franchise to maintain a ferry across a river does not prevent the public use of the river as a highway between points above and below. *Broadnax* v. *Baker*, 94 North Carolina, 675; 55 Am. Rep. 633, citing *Huzzey* v. *Field*: *Conway* v. *Taylor's Execr.*, 1 Black (U. S. Sup. Ct.), 603.

One may habitually transport his own goods in his own boat where another has an exclusive right of ferry. *Alexandria, &c. Co.* v. *Wisch*, 73 Missouri, 655; 39 Am. Rep. 535; *Hunter* v. *Moore*, 44 Arkansas, 184; 51 Am. Rep. 589.

At common law no bridge or ferry could be erected so near another as to draw away its profits: *Norris* v. *Farmers', &c. Co.*, 6 California, 590; 65 Am. Dec. 535; *Gates* v. *McDaniel*, 2 Stewart (New Jersey Equity), 211; 19 Am. Dec. 49; even though the second be free: *Long* v. *Beard*, 3 Murphy (Nor. Car.), 57.

A railroad company, owning lands on both sides of a navigable stream, may not construct a bridge or ferry over the same, to the detriment of one whom the State has specially licensed for such purpose, although such bridge or ferry is used only for the passage of its own trains, and the detriment is slight, and although when the former grant was made railways were unknown. *Enfield T. B. Co.* v. *Hartford R. Co.*, 17 Connecticut, 40; 42 Am. Dec. 716, citing *Ogden* v. *Gibbons*, 4 Johnson, Chancery (New York), 150; *Charles River Bridge* v. *Warren Bridge*, 7 Pickering (Mass.), 515. But a grant to a toll-bridge company, with a prohibition of any other bridge within a mile, is not infringed by a subsequent grant for a bridge within that distance to be used exclusively for railroad purposes. *Lake* v. *Virginia & T. R. Co.*, 7 Nevada, 294; *Bridge Co.* v. *Hoboken L. & I. Co.*, 13 New Jersey Equity, 81; affirmed 1 Wallace (U. S. Sup. Ct.), 116. Nor is a ferry franchise infringed by a subsequent bridge franchise. *Piatt* v. *Covington & C. B. Co.*, 8 Bush (Kentucky), 31. The Court said: "In the case of the *Richmond & Lexington Turnpike Road Company* v. *Rogers* (1 Duvall, 135), this Court held, in substantial conformity with the controlling principle decided in the case of the *Charles River Bridge* v. *The Warren Bridge et al.* (11 Peters, 420), that where the construction of a bridge will interpose no physical obstruction to the enjoyment of a ferry franchise across the same river, the owners of the ferry are not entitled to compensation for any incidental impairment of the profits of their ferry resulting merely from the use of the bridge instead of the ferry by the public.

"It cannot be pretended that the laws of this State for establishing and regulating ferries contain any express provision prohibiting the erection of bridges across our rivers, however near may be the site of a bridge to the landings of a ferry; and for obvious reasons of policy and necessity no such prohibition should be raised by implication. In the case of the *Charles River Bridge* v. *Warren Bridge et al.*, *supra*, it was truly said by the Supreme Court of the United States that 'the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its

power for accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience, and prosperity of the people. A State ought never to be presumed to surrender this power, because like the taxing power, the whole community have an interest in preserving it undiminished.'

"It is a familiar principle, alike applicable to the establishment of ferries and bridges under legislative sanction, that they are not authorized for remunerative purposes to the owners only, but for the benefit of the public whose interest is their first and paramount object; and in the absence of express law the Legislature should not be presumed to have intended to deprive itself of the power of promoting that object.

"The importance of this doctrine is fully illustrated by various systems of internal improvements in this State, such as turnpikes and railroads, which have successively superseded each other as objects of value to their owners. If in such cases the principle were established that corporations or individuals who may incidentally impair the value of public roads and other conveniences owned by others for the use of the community incurred responsibility to them by more efficiently subserving the convenience and welfare of the public, it would, for obvious reasons, tend to impede the progress of the State, and prove to be most disastrous to its prosperity."

FISHERY.

No. 1. — CARTER *v.* MURCOT.

(K. B. 1768.)

No. 2. — MALCOMSON *v.* O'DEA.

(1862.)

No. 3. — DUKE OF NORTHUMBERLAND *v.* HOUGHTON.

(EX. 1870.)

RULE.

Primâ facie, the right of fishing in navigable and tidal waters is vested in the Crown and may be exercised by the public generally.

No. 1. — Carter v. Murcot, 4 Burr. 2162, 2163.

A subject may claim a several fishery in navigable and tidal waters by grant from the Crown.

A grant from the Crown must have been made prior to Magna Charta. But a legal origin may be presumed upon evidence of immemorial user, unless the non-existence of the right at some time subsequent to Magna Charta is proved.

Carter v. Murcot.

4 Burr. 2162–2165.

Fishery. — Navigable River. — Presumption.

[2162] In navigable rivers, or arms of the sea, fishery is common and public; in private rivers, not navigable, it belongs to the lords of the soil on each side.

This was an action of trespass for breaking and entering the plaintiff's close called The River, or The River Severn. The defendant pleaded that it is a navigable river; and also, that it is an arm of the sea, wherein every subject has a right to fish. The plaintiff (without traversing these allegations) replied, that this was part of the manor of Arlingham; that Mrs. Yates was seised of that manor; and prescribes for a several [*2163] *fishery there. Issue being joined thereon, a verdict was found for the plaintiff.

On Monday, 9th November last, Mr. Ashhurst, on behalf of the defendant, moved in arrest of judgment, and had a rule to show cause.

He objected that though the fact was so found, yet the law is otherwise; viz., that every one has a right to fish in a navigable river or in an arm of the sea. He cited *Anonymous*, 1 Mod. 105; *Warren* v. *Matthews*, 6 Mod. 73; s. c. 1 Salk. 357; and *Ward* v. *Creswell*, C. B., 14 & 15 Geo. II., which recognises 1 Mod. 105.

Mr. Serjeant Nares, for the plaintiff, now showed cause.

It is not an arm of the sea where the sea flows and reflows, but a part of a manor.

It is found to be in the manor of Arlingham, in the county of Gloucester. And a place may be parcel of a manor, if between the high and low water marks, though the sea flows and reflows

No. 1. — Carter v. Murcot, 4 Burr. 2163, 2164.

upon it. So is *Sir Henry Constable's Case*, 5 Co. Rep. 107 a; Bracton, lib. 2, c. 12.

Mr. Ashhurst, *contra*, for the rule.

An exclusive right cannot be maintained by the subject in a river that is an arm of the sea: the general right of fishing in an arm of the sea is common to all.

The replication ought to have shown that this was a separate pool; but the plaintiff cannot maintain a general right in the river, in exclusion of all other the King's subjects.

In *Sir Henry Constable's Case* the admiral had jurisdiction between the high and the low water mark. When the tide is in, the water cannot belong to a manor; and a fishing can only be exercised when the tide is in — when there is water.

In Sir John Davys's Reports, p. 55, — the case of the fishery in the river Banne in Ireland, — it is said that the King has a right as high as the sea flows and reflows. And an arm of the sea, where the tide flows and reflows, is the same as the sea itself. Justinian Inst., lib. 1, c. 1, tit. 1.

* *Warren* v. *Matthews*, 6 Mod. 73. Every subject, of [*2164] common right, may fish with lawful nets, &c., in a navigable river, as well as in the sea; and the King's grant cannot bar them thereof. 1 Salk. 357, s. c. Per Holt, Chief Justice: "The subject has a right to fish in all navigable rivers, as he has to fish in the sea."

Anon., 1 Mod. 105. In case of a river that flows and reflows, and is an arm of the sea, Hale says, "The right of fishing is *primâ facie* common to all."

Lord Mansfield. — The rule of law is uniform.

In rivers not navigable, the proprietors of the land have the right of fishery on their respective sides, and it generally extends *ad filum medium aquæ*.

But in navigable rivers the proprietors of the land on each side have it not; the fishery is common; it is, *primâ facie*, in the King, and is public.

If any one claims it exclusively, he must show a right. If he can show a right by prescription, he may then exercise an exclusive right; though the presumption is against him, unless he can prove such a prescriptive right.

Here it is claimed and found. It is therefore consistent with all the cases "that he may have an exclusive privilege of fishing,

although it be an arm of the sea." Such a right shall not be presumed; but the contrary, *primâ facie:* but it is capable of being proved; and must have been so in the present case.

Mr. Justice YATES. — I was concerned in a case of this kind. Such a claim was made: but the claim failed, because it there happened that such a right could not be proved: therefore it was in that case determined that the right of fishing was common. But such a right may be proved. By the law of England, what is otherwise common may, by prescription, be appropriated. Grotius owns that navigable rivers may be appropriated.

The cited cases prove only this distinction, "that navigable rivers or arms of the sea belong to the Crown, and not (like private rivers) to the land-owners on each side;" and therefore the presumption lies the contrary way in the one case from what it does in the other. Here, indeed, it lies, *primâ facie*, on the side of the King and the public; but it may nevertheless be appropriated by prescription.

[*2165] *The case of the royal salmon fishery in the river Banne, in Sir John Davys's Reports, is agreeable to this, and it is a very good case. It appears by it that the Crown may grant a several fishery in a navigable river where the sea flows and reflows, or in an arm of the sea; and in the case of Abbotsbury there mentioned (p. 57 a) the Court said, "It must be intended that the abbey had originally had a grant from the Crown." And in the case in 1 Mod. 105, HALE says truly, "If any one will appropriate a privilege to himself, the proof lieth on his side." Now if it may be granted, it may be prescribed for; a prescription implies a grant. But it can't be presumed; it must be proved.

Why, then, may not this plaintiff prescribe for an exclusive right of fishing in an arm of the sea, and prove this appropriation, though the *primâ facie* presumption is contrary?

Mr. Justice ASTON concurred. This is the true distinction, and 1 Mod. 105 is in point.

PER CURIAM.[1] *Rule discharged*

[1] Mr. J. WILLES was gone out of Court.

No. 2. — Malcomson v. O'Dea, 10 H. L. Cas. 593, 594.

Malcomson v. O'Dea and others.

10 H. L. Cas. 593–624 (s. c. 9 Jur. (N. S.) 1135; 9 L. T. 93; 12 W. R. 178).

Several Fishery. — Crown Grant. — Payment of Rent.

The soil of navigable tidal rivers, so far as the tide flows and reflows, [593] is *primâ facie* in the Crown, and the right of fishery therein is *primâ facie* in the public. But the right to exclude the public therefrom, and to create a several fishery, existed in the Crown, and might, lawfully, have been exercised by the Crown before Magna Charta, and the several fishery could, lawfully, be afterwards made the subject of grant by the Crown to a private individual.

Where a grant of a several fishery had been made by the Crown to a corporation, and rent received by the Crown in respect thereof for a long period of time, the earliest grants describing it as "an ancient inheritance of the Crown," it was held that the lawfulness of the origin of the several fishery might be presumed.

William Malcomson claimed to be entitled, under a lease from the Mayor and Corporation of Limerick, to a several fishery in the river Shannon, called the Fisher's Stent, extending from a place called the Lax Wear in the *east, to the river [*594] Meelick in the west,[1] and he complained that the defendants had entered his said several fishery and taken away his fish. The defendants pleaded several pleas, which in substance alleged that the Shannon was a public navigable river, and that the *locus in quo* was part of the same. The plaintiff put on the record several replications to the defendants' pleas, the most material of which were to the tenth and eleventh defences, and alleged that the *locus in quo* was a several fishery, and an ancient possession of the Crown, which became vested in the Mayor and Corporation of Limerick, and that they, by lease of January 31, 1834, demised the same to Poole Gabbett for ninety-nine years, through whom the plaintiff derived title. Fifteen issues were framed: 1. Whether

[1] The river Shannon, for the purposes of this case, may be described as flowing (within the county of Limerick) in a southerly course from St. Thomas's Island, which is above the city of Limerick, where the "Lax Weir" is situated, passing by Island Point to Thomond's Bridge (between which two places the alleged trespass was committed by these defendants) to the city of Limerick, where it begins to take a westerly course for some distance, and then turns northerly to a part where the river Meelick (which divides the county of Limerick from the county of Clare) falls into it. Some small distance beyond this, and within the county of Clare, is situated Castle Donnell, often referred to in this case, and described by some of the witnesses as popularly known by the name of Cromwell's Castle. It there widens and falls into the sea some distance further on.

the defendants had entered the plaintiff's close; 2. Whether the close was the close of the plaintiff, or the fish caught therein were the fish of the plaintiff; 3. Whether the *locus in quo* was a several fishery; 4. Whether it was the several fishery of the plaintiff; 5. Whether the plaintiff had a several fishery within the limits alleged; 6. Whether the *locus in quo* was outside the limits of the alleged fishery; 7. Whether the fish were the fish of the [* 595] plaintiff; 8. Whether the * *locus in quo* was a common public fishery; 9. Whether the public had a common prescriptive right of fishing therein; 10. Whether the defendants at the time, &c., had a prescriptive right of fishing therein; 11. Whether the replication to the tenth defence was true in substance and in fact; 12. The same as to the replication to the eleventh defence; 13. Whether the defendants took away the fish, and converted the same to their own use; 14. Whether the fish mentioned in the ninth paragraph of the declaration were the plaintiff's fish; and 15. Whether the defendants were entitled to take the fish on any of the grounds relied on in the first eight defences.

The cause came on for trial at Dublin, in February, 1858, before the Lord Chief Justice of the Court of Queen's Bench and a special jury.

There was ample proof that the plaintiff had title under the Corporation of Limerick, and that the defendants had committed the alleged acts of trespass. The real questions were, whether the Crown had, in fact, granted within the *locus in quo* a several fishery to the Mayor and Corporation of Limerick, and whether the Crown had, in law, power to make such a grant.

The evidence was in substance as follows: —

An Inspeximus Charter, dated in 1414, by Henry V., referring to and confirming previous charters of Edward and John, and granting, among many other things, "the profits of a certain fishery which is called 'Lax Wear,' with its appurtenances, to the same mayor and commonalty [of Limerick], and their successors for ever." That was confirmed in 1423 by Henry VI. In 1576 Queen Elizabeth directed letters patent to issue, called a *Fiant*, by which she commissioned certain persons therein named on her behalf, to demise for twenty-one years to one [* 596] Edward Molyneux, at a rent of 53*s.* 4*d.*, "the * Wears, commonly called the Fisher's Stent, near the city of

Limerick, which do lie from the Lax Wear, or common wear, in the east part, until the river nigh to Castle Donnell in the west part, with all the customs, duties, profits, &c., to them and every of them appertaining and belonging, parcel of Her Majesty's ancient inheritance, and of long time concealed." It was much observed upon that the Crown did not here demise Lax Wear, which it was contended arose from the fact that that had long before been the subject of grant to the corporation. The demise contained a clause requiring the tenant to maintain and repair the wears during the term, and another to the effect that if the rent should be in arrear for twelve weeks after any of the days for payment, Molyneux might be made to pay double value, or might be evicted at the pleasure of the Crown. There was an entry of this lease of the Fisher's Stent in the books of the Auditor General, which also contained entries of the payment of the rent. Molyneux was afterwards evicted, and the mayor and bailiffs made the tenants in his stead. The entry in the books of the Auditor General after this change of tenancy, called Molyneux, "the late farmer of the wears called the Fisher's Tente, at 53*s.* 4*d.* per annum," and it went on with these words of description, "The Mayor and Bailiffs of the City of Limerick, tenants of the aforesaid wears." In 1582 the Queen granted them a Charter which contained an inspeximus and confirmation of that of Henry V. in the very words of Henry's Charter, as to the wear and its appurtenances. This was declared to be done in respect of the services of the citizens "in that most wicked rebellion, by Gerald, Earl of Desmond." There was a special grant to the mayor, bailiffs, and citizens for ever, "of all these wears and pools in the water of Shannon, within the liberties of * the said city, [* 597] called the Lex Werres and Fisher's Stent, with all and singular their profits, &c., and to have, hold and enjoy all and singular franchises, jurisdictions, privileges, perambulations, grounds, and waste pieces of land called the New Stent, or New Extent, the wears called Lex Weers, gurgites, Fisher's Stent, ingate and outgate customes," &c. Then came the provision for the rent, which was fixed at 6*s.* 8*d.* a year. There was also a Charter of James I. to the City of Limerick, confirming all the wears and fisheries "granted by us or our progenitors, Kings or Queens" of England.

The rent-roll of James I. described the rent payable under the

grant of Elizabeth at 6*s.* 8*d.*, and the "increased rent, 8*s.* 10¾*d.* in respect of the weares, near the City of Limerick, called the Fisherstente, lying from the Lex Weare on the east, as far as the river called Castle Connell on the west." [1] In 1643 a rent-roll of Charles I. described the mayor and sheriffs as "tenants of the weirs called the Fisherstent," for which they paid 6*s.* 8*d.* a year. In the time of the Commonwealth a commission was issued to examine into these matters, and the commissioners set the rent of "the Limerick salmon weare and nett fishing" at £165 a year, and three persons, named Playstead, Bennett, and Pawsey, became tenants at that rent. After the Restoration, Sir George Preston obtained a grant of several fishings in Ireland. The grant recited that they had fallen to the Crown by forfeiture for rebellion; and in consideration of the eminent services of Sir George Preston, the Crown granted to him, amongst other things, "all that the fishing of pike, and salmon, and other sea fish, and eels, in the great salmon wear, called the Lax Wear, in the river [* 598] Shannon," then describing their * boundaries, "formerly belonging to our Crown, but enjoyed by the Corporation of Limerick, paying a rent;" and after describing the boundary lands with great minuteness, there were these general words, "and also all and singular other fishings of salmon, and pike, and other fish in the river Shannon." The rent was fixed at £5 a year. The mayor and bailiffs complained of this grant as in derogation of their own rights, but as it appeared to have been confirmed by an Act of the Irish Parliament, they compromised the matter by purchase. In the Communia Roll of 1665 there was a recital of the Commonwealth lease; the names of the tenants and the amount of the rent were given, and it was alleged that one-half year's rent was in arrear, and process was ordered to issue. The mayor and sheriffs pleaded in answer that they were not liable to make this payment to the Crown, and they set forth the Charters of Elizabeth and James, to which the Attorney-General replied, and admitted these Charters; but there the roll became imperfect, and no conclusion appeared upon it. But to make up for this deficiency, there was produced a roll of the Equity Exchequer, which stated these proceedings, recorded the Attorney-General's confession of the truth of the plea, and the order by the court to

[1] This was in fact the river Meelick, which ran into the Shannon near to Castle Connell.

discharge the mayor and sheriffs from the claim. In the receipt-book of the Exchequer in 1665 there was an entry of the payment by the corporation of 6*s.* 8*d.* by the year in respect of "the wears called the Fisher's Stent, in the county of the City of Limerick." In that same year Sir George Preston obtained another grant of letters patent, which recited the former grant, or what "we did intend to grant," the Act of the Irish Parliament, and the fact that Sir George Preston had been, by a decree of the Court of Claims, disappointed in obtaining what he expected; and
* then there was a grant of the "weare, called the Lax [* 599]
Weare, in the river Shannon," bounded on the north by the lands of Bancke, on the east by Thomas' Island, on the south by the lands of Corbally, and on the west with the Shannon, "and all fishings in the said weare;" but nothing was said of the Fisher's Stent. In 1669 the corporation granted a lease for one year to Robert Pasey of the "nett fishings, fishing stentes, and fishing courses," in the Shannon, "excepting the Lax Weare," and this lease contained a covenant of indemnity against molestation. In 1670 a similar lease was granted to Josiah Lynch. In 1674 Sir George Preston filed a bill in Chancery against the Mayor and Sheriffs of Limerick, setting forth the grant to himself, complaining that the defendants had possessed themselves of his fishings, and praying for an account and for restoration to his fishings in the said river. The mayor and sheriffs put in an answer, and in the present appeal one question raised on the exceptions was whether the bill and answer were admissible in evidence, the answer being a statement by the mayor and corporation of their own title. A similar objection was raised to the admissibility of the "Assembly Book" of the corporation for 1676, which recited that "the nett fishing and Fisher's Stent belonging to the corporation" had that day been let for one year to Edmund Carroll for £60 for the year. In 1677 Sir George Preston got a third grant by letters patent, which recited the first grant, but in fact granted no more than he had obtained before, namely, the Lax Wear. Negotiations followed between the mayor and sheriffs of Limerick and Sir George Preston, and in 1678 there was a letter of license from the King giving power to Sir George Preston to alienate. This letter recited the grant to Preston, and described it
as a grant "of the fishing of * pike, salmon, and other sea [* 600]
fish, and eeles, in the great salmon weare, called the Lax

Weare, in the county of the City of Limerick, and the fishing in the river Shannon westward of the said weare," at a rent of £5 a year, and the mortgage by him of the grant, and a treaty between the mayor and sheriffs of the one part, and Sir George and his mortgagees of the other part, for the purchase of the rights of the latter; whereupon this letter of license to alienate was granted. A conveyance was afterwards made to the mayor and sheriffs of the fishing in "the Lax Weare, mearing on the north side with the land of Bank, on the east with Thomas his Island; on the south with the lands of Corbally, and on the west with the said river of Shannon." Then came a lease, dated in 1685, for twenty-one years, from the mayor and sheriffs to one John Leonard, of "the Lax Wear, in the river Shannon, near, &c., together with the fishings in the said river of Shannon, commonly called the net fishings, or Fisher's Stent, extending from the New Stent, or New Extent, near the said Lax Wear, westward in the said river." The considerations for this lease were a fine of £300, and a rent of £200 a year. In 1719 the corporation granted a lease for ninety-nine years, commencing from 1726, to Roche and others, of the same fishings, which were described in the same terms; the fine was £1200, and the rent £352 a year. The accounts of the corporation showed that these rents had been paid. In 1834 a lease was granted by the corporation to Poole Gabbett, of Corbally, for ninety-nine years, at a rent of £300 a year, and in this lease there was a covenant that no disturbance in Gabbett's enjoyment of the fishing should be a ground for withholding of the rent unless such disturbance proceeded from eviction on a superior title. In 1857 the sons and administrators of Mr. Poole Gabbett granted a [* 601] lease of the fishings to the * plaintiff for seventy-five years, upon a fine of £9250, and at an annual rent of £301. The description in this lease was the same as in those formerly granted. In 1840, while Mr. Gabbett was in possession, he brought an action against one Clancy for trespassing on the fishings, and recovered judgment. The damages, it being made a question of right (for the defendant pleaded that it was a public fishery in a public river), were assessed at 6*d.*, but with full costs of suit.

[1] 8 Ir. C. L. Rep. 299. In the course of giving judgment, Mr. Justice Burton remarked that at the trial the jurors had been called on "to find the limits of the fishery called the Fisher's Stent, and their finding was that the said fishery extended from the Lax Wear on the east to the river Meelick on the west."

The defendants' counsel took eighteen exceptions, to some of which alone is it necessary to refer.

The ninth exception was as to the admissibility of the bill and answer of 1674.

The tenth exception was as to the admissibility of the entries in the assembly book of the corporation for 1676.

The sixteenth, seventeenth, and eighteenth exceptions were as to the sufficiency of the evidence, the defendant contending that the LORD CHIEF JUSTICE was bound to direct the jury that the plaintiff was not entitled to a several fishery in the tidal part of the river Shannon, the said river being a navigable river, there being no evidence to rebut the public right of fishing therein; and that the LORD CHIEF JUSTICE ought to have directed the jury to find for the defendant on all the issues but the tenth issue.[1] And that his Lordship ought to have directed the jury that there was no evidence of the plaintiff's right to an exclusive or several fishery in the part of the river in which the fishing by the defendant took place.

* The jury returned a verdict for the plaintiff. The ex- [* 602] ceptions were afterwards argued before the Court of Queen's Bench,[2] and that Court gave judgment for the plaintiff, overruling all the exceptions. The case was taken on error to the Exchequer Chamber, and on the 21st November, 1860, that Court reversed the judgment given below, and gave judgment for the defendants on the ninth, tenth, sixteenth, seventeenth, and eighteenth exceptions, and directed a *venire de novo*. Mr. Baron FITZGERALD, *diss.*, except as to the tenth exception. The plaintiff thereon brought error in this House.

The Judges were summoned, and Lord Chief Baron POLLOCK, Mr. Justice WILLIAMS, Mr. Justice WILLES, Mr. Justice CROMPTON, Mr. Baron BRAMWELL, and Mr. Justice BLACKBURN, attended.

Sir H. Cairns and Mr. Mellish (Mr. T. H. Baylis was with them) for the plaintiff in error.

One objection made in the Court below was, that the Crown could not, after Magna Charta, grant a several fishery in a public navigable river. Perhaps so; but the Crown might grant such a fishery if it had been in existence previous to Magna Charta.[3] It

[1] In which the defendant claimed a prescriptive right, as part of the public, to fish in a public navigable river.

[2] According to the provisions of the 38 Geo. III. c. 31, s. 1 (Ir.).

[3] As to when Magna Charta and Eng-

had been so here. That is shown by the language of all the Charters, for all of them speak of the fishery as a well-known thing, and in the Charter of Queen Elizabeth the description is that of "the ancient inheritance" of the Crown. During all the time in which it is thus shown to have been in existence the Crown received rent for it.

It may be true that the mayor and sheriffs are not [* 603] * entitled to the soil of this public navigable river; but according to Lord COKE a man may have a several fishery, though the property in the soil is not in him (Co. Litt. 122 b, and Hargr. note 7). The word "gurgites" in the charter describes a place of deep water: Du Cange (Gloss. Voc. Gurges); and a lax wear is a salmon wear, the word "lacks" being the Saxon for salmon (Bailey's Dict.). It is admitted that in John's Magna Charta it is said, "Omnes Kidelli de caetero deponantur penitus per Thamisiam et per Medwayam, et per totam Angliam, nisi per costeram maris;" but that does not prevent the Crown from having a several fishery in a navigable river, but only requires that obstructions to the free navigation of such a river shall be removed; and such is the construction put by Lord HALE (De Jure Maris, Harg. Tracts, ch. v. 22) on similar words in the Charter of Henry III.; and in commenting on it, Lord COKE (2 Inst. Mag. Ch. c. 16), first translating it thus, "No owner of the banks of river shall so appropriate or keep the rivers several to him, to defend or bar others either to have passage or fish there, otherwise than they were used in the reign of Henry II.," adds, "this statute, saith the Mirror, is out of use, 'Car plusors rivers sont ore appropries et engarnies, et mises in defence, que soilount estre commons a pisher et user en temps le Roy Henry II.'" [1] [* 604] That would show that the creation of wears by * act of the Crown might be valid even after Magna Charta; but there is no doubt that if in existence before that time, they might afterwards be lawfully granted by the Crown to a subject. *Williams* v. *Wilcox*, 8 A. & E. 314. And in such a several fishery granted by the Crown has been held to be an incorporeal hereditament,

lish laws were first introduced into Ireland, reference was made to the "Argument," by Prynne in *Lord Macquire's Case*, 4 How. St. Tr. 690.

[1] "Roi Henri le premer" is the reading of the passage according to Mr. Maitland's edition, Selden Society, vol. 7, p. 178. This, no doubt, makes the passage inconsequential. But the worthlessness of any such quotation may now be appreciated in the light of Mr. Maitland's introduction. — R. C.

and a term of years could not be created in it without deed. *The Duke of Somerset* v. *Fogwell*, 5 B. & C. 875 (29 R. R. 449). In *The Duke of Devonshire* v. *Hodnett*, 1 Huds. & Brooke, 322, the grant by patent of the soil and bottom of a river in Ireland was held to be evidence that the Crown was seised in fee of the soil and bottom, and the several fishery at the time of making the grant. . . .

Mr. Manisty and Mr. Barry (of the Irish Bar) for the [606] defendants in error. . . .

The grants did not establish the plaintiffs' claim. In [610] the grant of 1576, to Molyneux, upon which, in part, the plaintiffs' claim is founded, the thing granted is described as "the weirs, called the Fisher's Stent," &c. Now there is no weir at what is now called the Fisher's Stent, and consequently that which is now claimed cannot be the subject of the grant, and not even by that act of the Crown, supposing it to be legally valid, can the public in any way be interfered with in the enjoyment of fishing in this open navigable river. Suppose the rent reserved on these weirs had fallen into arrears, the distress must have been on the weir, the subject-matter of the grant and of the rent, not on the open river four or five miles away.

The *Lord Fitzwalter's Case*, 3 Keb. 242, s. c. *Anon.*, 1 Mod. 106, shows that a right such as is now claimed must be strictly proved, for that the right to fish in navigable rivers "is common to all the subjects." In that case Lord HALE speaks of "gurgites" in a way to show that they are obstructions in a river, and that word, therefore, cannot be used, as it is now sought to be used, to describe an open part of the river. If, therefore, these grants conveyed any exclusive right of fishing, that right was confined to those places where weirs existed, and consequently the open part of the river, where the alleged acts of trespass were committed, is not affected by them.

The claim here was made as one of prescription, to support which, in such a case, the possession must have been undisputed and undisturbed. *Benest* v. *Pipon*, 1 Knapp, 60. The evidence shows it was not so here. So that even if the Crown had the power to create and make a grant of * a several [*611] fishery in a public navigable river, which, since Magna Charta, it could not do, or if the several fishery had existed before that time, and was only granted afterwards, the possession here

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having been many times the subject of dispute and contention, cannot now be insisted on as lawful. There is no evidence [the learned counsel examined the evidence most minutely] sufficient to support this claim.

Sir Hugh Cairns replied.

The Lord Chancellor (Lord Westbury) said the case had been elaborately argued. He proposed the following questions for the consideration of the Judges: —

1. Ought the Ninth Exception to have been allowed or disallowed?

2. Ought the Tenth Exception to have been allowed or disallowed?

3. Ought the Sixteenth, Seventeenth, and Eighteenth Exceptions to have been allowed or disallowed?

Mr. Justice Willes delivered the unanimous opinion of the Judges (Feb. 24th, 1863).

My Lords, in answer to the first question, we are of opinion that the Ninth Exception ought not to have been allowed. . . .

[613] Your Lordships' next question to the Judges is, Whether the Tenth Exception ought to have been allowed? That exception was to the admission in evidence of "a certain book purporting to be the assembly book of the Corporation of Limerick, in the year of our Lord, 1676," to wit, an entry of the 16th of October, 1676, and also another entry of an account of rents in arrear. We cannot pass by this exception without noting that it treats the two entries as either both admissible or both inadmissible; and it might be a question, whether it could be sustained, supposing either of the documents mentioned therein to be admissible. We need not, however, farther criticise its

[* 614] language, * because, construing it not as one exception to the book, but as two distinct and separate exceptions, one to the entry of the 16th of October, 1676, and another to the account of arrears, we are of opinion that each of such exceptions ought to have been overruled. . . .

[615] We know of no case in which an ancient document, coming from a proper custody, and purporting to be an act of ownership, by way of lease or license over the prop-

[* 616] erty, in company * with other evidence showing enjoyment consistent with such ownership, has been rejected upon the ground that the enjoyment could not be referred to the particular document in question. . . .

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The only remaining question is, whether the Sixteenth, [617] Seventeenth, and Eighteenth Exceptions ought to have been allowed? We think all those exceptions ought to have been disallowed. The Sixteenth Exception is in substance that there was no evidence of a several fishery in the tidal part of the river Shannon, a navigable river, to take away or rebut the public right of fishing there. The Seventeenth and Eighteenth Exceptions are in substance that there was no evidence of an exclusive or several right of fishery in the place where the defendant fished between the weir and Thomond Bridge.

Upon this record, no question properly arises with respect to the bed and soil of the river. If the finding as to that was entered by mistake (which, considering that a several fishery may include the soil, we do not say it was), it could have been amended by Lord Chief Justice LEFROY, and by him only, at chambers, from his notes. It is now quite immaterial as between these parties. No exception is founded upon it; and the * argu- [* 618] ment of the learned counsel as to that extraneous matter cannot affect our opinion upon the true question raised by these three exceptions, which is, whether there be evidence of a fishery as found by the jury from the lax wear on the east, to the river Meelick on the west, that being the extreme limit of the county of the city.

That such a right may lawfully exist is clear. The soil of "navigable tidal rivers," like the Shannon, so far as the tide flows and reflows, is *primâ facie* in the Crown, and the right of fishery *primâ facie* in the public. But for Magna Charta, the Crown could, by its prerogative, exclude the public from such *primâ facie* right, and grant the exclusive right of fishery to a private individual, either together with or distinct from the soil. And the great charter left untouched all fisheries which were made several, to the exclusion of the public, by Act of the Crown not later than the reign of Henry II.

If evidence be given of long enjoyment of a fishery, to the exclusion of others, of such a character as to establish that it has been dealt with as of right as a distinct and separate property, and there is nothing to show that its origin was modern, the result is, not that you say, this is a usurpation, for it is not traced back to the time of Henry II., but that you presume that the fishery being reasonably shown to have been dealt with as property, must

have become such in due course of law, and therefore must have been created before legal memory.

Some discussion took place during the argument as to the proper name of such a fishery, whether it ought not to have been called in the pleadings (following Blackstone) a " free " instead of a " several " fishery. This is more of the confusion which the ambiguous use of the word " free " has occasioned from a period as early as that of the Year Book of 7 Hen. VII., P. fo. 13, [* 619] down to the * case of *Holford* v. *Bailey*, 13 Q. B. 426, where it was clearly shown that the only substantial distinction is between an exclusive right of fishery usually called " several," sometimes " free " (used as in free warren), and a right in common with others, usually called " common of fishery," sometimes " free " (used as in free port). The fishery in this case is sufficiently described as a " several " fishery, which means an exclusive right to fish in a given place, either with or without the property in the soil.

Much argument also took place with respect to the meaning of the words " gurgites," " gors," and " wears." They appear all to be words of more ample meaning than was allowed to them in the argument against the right. Of course we are principally concerned with the mediæval use of the word " gurges; " though, inasmuch as the use of Latin in legal documents has been justified by its unchangeableness, we are at liberty to observe, that classic authors applied the word " gurges " to the open sea, to a lake, and to the course of a river, instances of which are collected in the dictionary of Facciolati (1 Fac. Lond. ed. 850, 851). As to the use of the word in later times, Lord Coke says (Co. Litt. 5 *b*) " gurges, a deep pit of water, a gore, or gulph, consisteth of water and land, and therefore by the grant thereof by that name the soil doth passe, and a *praecipe* doth lie thereof, and shall lay his esplees in taking of fishes, as breames and roaches. In Domesday it is called guort, gort, and gors, plurally, as, for example, *de 3 Gorz Mille Anguillae.*" To the same effect is the argument in *Throckmorton* v. *Tracy*, 1 Plow. 154, which shows that " gurges " may stand for pool, and is of wider significance than " wear." Cowell, under the word " gort," finds fault with Lord Coke's statement, that " gurges " and " gort " correspond, and he [* 620] says that " gort " * is old French for " wear." Cowell's criticism, however, is proved too narrow by reference to

Kelham's Norman-French Dictionary, page 116, where "gor," "gorse," or "gorts" is translated "a stream or pool, a watery place, a weir, a fish-pond, a ditch, a dam, a gorse;" and with respect to the word "wear" itself, although its etymology be different, we find in the Anglo-Saxon Dictionary that it had anciently a more extensive application than now. At page 243 of Bosworth, the word "wær," or "wér," answering to our "wear," is translated, "1, an enclosure, a place enclosed; 2, a fish pond, a place or engine for catching and keeping fish, a wear; 3, the sea, a wave." The only reference which we have met in the old books to the use of the word "wear," is the *dictum* in the Year Book (14 Hen. VIII., M. fo. 2), from which it seems that a grant or exception of a wear includes the fishery there. Therefore, especially when we bear in mind the conciseness of language used in ancient times, we cannot doubt that any criticism founded upon a narrow construction of these words is deceptive. The word "gurgites," used in addition to "lax wears," instead of being restricted to imaginary or possible scattered wears, the existence of which is unproved, and the nature of which is unknown, appears to us more properly to apply to all the streams, pools, and reaches of the river, so far as the fishing extends. Probably it ought to be thus translated, and not as "wears," in the earlier documents.

There is no improbability in the early appropriation of this always valuable property, or even a more extensive fishery, either in the time of the Irish Princes, or in that of the Ostmen, who in this and other ports displaced the ancient inhabitants, and who no doubt gave the name of * Lax Wear (Leax Wær, [*621] or Lachs Wehr) to the chief accessory of the fishery, or by Henry II., in his grant to the companion of Strongbow. There is nothing improbable in its having been granted over in later times to the ancient and loyal city of Limerick.

It appears by the earlier documents, construed by the light of subsequent user, that the fisheries of the waters of Limerick, which means at least the fishery within the city bounds, were a distinct and separate property from before the time of legal memory, and that they included the Lax Wear and the Shannon, so far as the city boundary extended. All that fishery appears to have been granted to the corporation at latest by the Charter of 25th Elizabeth, under which rent has ever since been paid, and which granted the "les werres," called "lex werres, gurgites,

Fisher's Stent," and reserved a rent "de pro predictis gurgitibus in predictâ aquâ de Shenyn vocatis Fissher's Stent," and no rent out of Lax Wear, whereof the corporation had had undisputed possession, showing as distinctly as language can, that the Fissher's Stent was something over and above the mere wear; and at least so early as that reign the fishing appears in terms by the Crown rent rolls and otherwise, A. D. 1577, "The said Wear commonly called the Fisher's Stent, near the City of Limerick, from the wear called the Lax Were on the east to the river near Castle Donel on the west," to have been substantially the same as it is now claimed by the plaintiff. The subsequent dealings with the property do not show that the corporation ever lost any part of the right acquired under the charter to the whole fishery, but, on the contrary, they show a long enjoyment of it to as great an extent as the mayor and sheriffs and their lessees seem to have thought it worth their while to enforce their rights, which [* 622] were no doubt considerably * interfered with from time to time by reason of the neighbourhood of a large city, and the great extent of the property, making it difficult to watch, especially at night, and by reason of the ample rights which the public are, notwithstanding the several fishery, entitled to exercise upon the river as a public highway and port, making it impossible to warn people off, unless detected in the very act of salmon fishing; but without, so far as we can see, any such acquiescence of the proprietors as to constitute an admission on their part that the property has by surrender or otherwise been diminished since the reign of Elizabeth.

In our opinion the evidence strongly preponderated in favour of the plaintiff.

We spare your Lordships any discussion of the evidence in detail, because, having examined it for ourselves, we may, upon this principal part of the case, express our concurrence in the masterly judgment of Mr. Baron FITZGERALD, a performance which we cannot hope to improve upon.

We are thus of opinion that none of the exceptions to which the questions relate ought to have been allowed.

July 28. The LORD CHANCELLOR (Lord WESTBURY):

My Lords, Mr. Malcomson, the plaintiff in error, was also the plaintiff in the Court below in an action brought by him against the defendants to recover damages for having fished, and having

No. 2. — Malcomson v. O'Dea, 10 H. L. Cas. 622–624.

carried away the fish from a fishery in the river Shannon, claimed by him as lessee of the Mayor and Sheriffs of Limerick, who claimed to be owners of that fishery.

At the trial of the action, a bill of exception was tendered to the admissibility of documents in evidence, and
* the bill of exceptions was duly received by the learned [* 623]
Judge. On the question coming to be argued in the Court of Queen's Bench in Ireland, the Court disallowed all these exceptions. From that judgment there was an appeal to the Court of Exchequer Chamber in Ireland, and the Court of Exchequer Chamber differing from the Court of Queen's Bench, allowed the Ninth, Tenth, Sixteenth, Seventeenth, and Eighteenth of these Exceptions. From that judgment of the Court of Exchequer Chamber the present appeal is brought.

My Lords, the learned Judges who attended your Lordships' House on the occasion of the argument of this case have delivered an unanimous and very elaborate and learned opinion by the mouth of Mr. Justice WILLES. The conclusion at which the learned Judges arrived was, in truth, if I divined rightly, anticipated by your Lordships at the end of the argument. Being therefore prepared for their conclusion, your Lordships will agree with them.

My Lords, I cannot forbear from expressing the feeling of admiration with which I have read that opinion, and also the masterly judgment given by Mr. Baron FITZGERALD, in the Court below. I entirely concur with the reasons of the learned Judges, and therefore think it unnecessary to repeat them now to your Lordships, but shall move your Lordships that the judgment of the Court of Exchequer Chamber in Ireland be reversed, and that the judgment of the Court of Queen's Bench be affirmed.

Lord CRANWORTH and Lord CHELMSFORD entirely concurred.

The Order entered on the Journals directed that the
* judgment of the Court of Exchequer Chamber in Ireland [* 624]
be reversed; and judgment of the Court of Queen's Bench in Ireland affirmed; and that the record be remitted to the said Court of Exchequer Chamber.

Lords' Journal, 28 July, 1863.

No. 3. — Duke of Northumberland v. Houghton, 39 L. J. Ex. 66.

Duke of Northumberland v. Houghton and others.

39 L. J. Ex. 66-69 (s. c. L. R. 5 Ex. 127; 22 L. T. 491; 18 W. R. 495).

[66] *Fishery. — Several Salmon Fishery. — Tidal River. — Merger.*

A several salmon fishery in a tidal river, granted by the Crown to a subject before Magna Charta, does not, if it reverts to the Crown, merge in the prerogative of the Crown, but may be re-granted by the Crown to a subject. *So held* per MARTIN, B. Per KELLY, C. B., and PIGOTT, B., that it was unnecessary for the purposes of the case so to hold; but, *semble*, such a decision would be correct.

Trespass for breaking and entering the plaintiff's several salmon fishery in the river Tyne. The following facts were stated in a special case without pleadings.

The priory of Tynemouth, which had been in existence in the time of the Saxons, was endowed by Robert de Mowbray, Earl of Northumberland, in the time of William Rufus. It was confirmed in its possessions by charters of Henry II., Richard I., John, and Henry III.

In the reign of Edward I. the burgesses of Newcastle instituted a suit by the King's Attorney in the King's Court against the Prior of Tynemouth, complaining that he had made a port and forestalled merchandise at Sheeles, and taken wreck which belonged to the King, and frisages and customs from vessels of wine and sea fish. The prior, in his answer, claimed the soil and freehold and free fishery from the land of the monastery to the middle of the river. The judgment was given for the Crown, but it did not affect the fishery.

In the twenty-seventh year of his reign the same King by charter, after reciting that certain liberties and free usages, claimed by the Prior of Tynemouth and his predecessors by virtue of their charter, had been adjudged by the King's Court to have been forfeited, and were seized into the King's hands, did for himself and his heirs restore and yield up all the aforesaid liberties and free usages so adjudged to the King and seized into his hands, unto the said abbot, prior, and monks, to have and to hold to them and their successors.

In the thirtieth year of Henry VIII. the priory, which had previously been given, granted, and confirmed to the King, his heirs and successors, was dissolved, and all the possessions, estates, and rights became and were vested in the Crown. Accounts of

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the fishery were from time to time rendered by the bailiff into the Exchequer. James I. granted part of the lands and possessions of the late monastery to Henry, Earl of Northumberland, an ancestor of the present plaintiff, without any express mention of any fishery, but with general words including fisheries. Charles I. granted a salmon fishery in the Tyne, parcel of the lands and premises *of the priory, to Edward and Robert Ramsay, [*67] and this, with the manor of Tynemouth, ultimately came to the ancestors of the plaintiff. [It is unnecessary for the purposes of this report to particularize the steps of transmission.] The plaintiff and his predecessors had occupied and enjoyed the fishery for one hundred and ten years before the commencement of this action.

Mellish (Manisty and Pinder with him) for the plaintiff. — Upon the question of merger, in the first place as to the supposed forfeiture in the time of Edward I., there is no sufficient evidence of it. The free fishery does not come within the description of "liberties and usages" which are found to have been forfeited. In the next place, both as to the supposed forfeiture in the time of Edward I. and that on the dissolution of the monasteries, a free fishery does not necessarily merge on reverting to the Crown. It is analogous to free warren and market, which do not merge. *Case of the Abbot of Strata Mercella*, 9 Co. Rep. 24;[1] Com. Dig. tit. Franchises, G. 1. Again, as to the supposed merger in the time of Henry VIII., the statute of 32 Hen. VIII., c. 20, passed to revive in the Crown all the privileges, liberties, and franchises of the late owners of the abbeys, &c., prevented any such merger. [Upon this last point no further argument took place.]

Pickering (Gainsford Bruce with him) for the defendant. — The free fishery reverted to the Crown in the time of Edward I., and therefore, being subsequent to Magna Charta, could not be regranted. *The Case of the Abbot of Strata Mercella* is not applicable to this case, for a fishery is not like free warren. *Rogers* v. *Allen*, 1 Camp. 310 (10 R. R. 689).

Mellish, in reply, referred to the *Case of the Bann Fishery*, Davis, 55 a, *The Duke of Somerset* v. *Fogwell*, 5 B. & C. 875 (29 R. R. 449), and *Heddy* v. *Wheelhouse*, Cro. Eliz. 591.

The judgments, so far as they bear upon the question of merger, were as follows: —

[1] The passages cited will be found at length in the judgment of MARTIN, B.

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KELLY, C. B. — I am of opinion that the plaintiff in this case is entitled to the judgment of the Court. The plaintiff claims a several fishery in the tidal waters of the river Tyne. He has clearly proved that he and his ancestors have been in the actual possession, so far as the term can be applied to an incorporeal hereditament of the fishery from the year 1759 until the present day. This is evidence upon which a jury, if not absolutely called upon to presume, would be amply justified in presuming that the right to the fishery has existed from time immemorial, and consequently that there must have been some valid grant of this fishery by the Crown anterior to Magna Charta. It lies upon the defendant, who questions the right of the plaintiff to this fishery, to establish one of two propositions: either that this fishery (though upon the evidence it may be presumed to have existed before the time of memory) was, in fact, created since the time of memory, and since Magna Charta, and therefore could not be lawfully created, of which fact, however, there is no evidence; or that at some period subsequent to Magna Charta no such fishery was in existence, in which case it could have come into existence at a subsequent period only by a grant of the Crown to the subject, contrary to Magna Charta and void in law. But it is not proved that at any period of time between Magna Charta and the present time the fishery did not *de facto* exist or was not *de facto* enjoyed.

With reference to the question of merger, it is contended that by law a several fishery is parcel of the prerogative of the Crown, and though it might have been lawfully granted away to a subject before Magna Charta, if, after that Act of Parliament, the fishery reverted to the Crown, whether by forfeiture or any other means of legal transmission, then it became merged in the Royal prerogative and extinguished. Before we could accede to that doctrine and admit it to be a sound and true proposition of law, I certainly, speaking for myself, should pause and consider the effect which such a decision would have upon a great number of titles to valuable fisheries in a great many parts of the kingdom. But, in the first place, I do not see any satisfactory
[*68] *evidence at all that this fishery ever did revert to the Crown. It is stated that King Edward I., by his charter (of the twenty-seventh year of his reign), recites that certain liberties and free usages claimed by the Prior of Tynemouth and

his predecessors by virtue of their charter had been adjudged by the King's Court to have been forfeited; but I do not think that a several fishery would, in common parlance, be included within the term "liberties and free usages." I am clearly of opinion, therefore, that there is no evidence that this fishery ever did revert to the Crown until the reign of Henry VIII.

As our attention has been called to the authorities upon which it was contended that a free fishery on reverting to the Crown merges in the prerogative, I may observe that, looking to the rights and franchises which have been decided to be extinguished by merger in the prerogative, if they come back from a subject into the possession of the Crown, and without intending to pronounce any final and decisive opinion upon the subject, it appears to me that a several fishery does not range itself within them. Those rights or properties, which have been held not to be merged in the Crown, are free warren, markets with toll, fairs, "et similia." Those which have been held to merge are waifs, estrays, wrecks, felons' goods, &c. Certainly, if I were called upon to declare what was the first impression upon my mind, I should be inclined to hold that a several fishery, granted by the Crown to a subject before Magna Charta, would rather range itself with free warren and markets with toll, than with the other franchises to which I have alluded. But it is unnecessary to decide that question. The right of the plaintiff to the fishery being established by the evidence to which I have already referred, of long user and enjoyment, and not being met by any evidence on the part of the defendant, to the effect that the fishery was originally granted by the Crown to a subject subsequently to Magna Charta, or that there was any period of time between Magna Charta and the dissolution of the monasteries, in which it was proved not to exist, I am of opinion that the right is clearly established, that the objection on the ground of merger in the prerogative cannot prevail, and that the plaintiff is entitled to the judgment of the Court.

MARTIN, B. — I am of the same opinion. This is an action of trespass which is brought by the Duke of Northumberland against the defendants for breaking and entering his several fishery in the river Tyne, and catching and disturbing the fish there. [After reviewing the facts, and stating that the plaintiff's title by prescription seemed conclusively made out, his Lordship said:] With respect to the merger, it seems to me that this is directly within

the judgment of the *Case of the Abbot of Strata Mercella* and the judgment in *Heddy* v. *Wheelhouse*. The question in the *Case of the Abbot of Strata Mercella* was very much the same question as is raised here. The King had seized that with other monasteries, and Lord COKE says that it being a question whether the intention of the Act of the 32 Hen. VIII., c. 20, was "to advance these possessions," that is, the possessions which the Crown had got hold of, "as well in valuation as estimation, to revive actually and really such privileges, liberties, franchises, and temporal jurisdictions which the late owners of the abbeys had, &c.; then it is to be considered what privileges, liberties, franchises, and jurisdictions were in the Crown by the accession of the said possessions to it." Therefore Lord COKE is dealing with this very subject, the franchises, liberties, and privileges belonging to the Abbot which were merged. Then he proceeds, "And as to that it is to be known that when the King grants any privileges, liberties, franchises, &c., which were privileges, liberties, or franchises in his own hands as parcel of the flowers of his Crown, as 'bona et catalla felonum, fugitivorum, utlagatorum, &c., bona et catalla, waviata, extrahur', deodanda wreccum maris,' &c., within such possessions, there if they come again to the King they are merged in the Crown, and he has them again *in jure coronæ;* and if the wreck or goods, waifs, estrays, &c., were appendant before to possessions, now the appendancy is extinct, and the King is seized of them *in jure coronæ*. But when a privilege, liberty, [*69] franchise, or jurisdiction, was at the beginning * erected and created by the King, and was not any such flower before in the garland of the Crown, there by the accession of them again to the Crown they are not extinct, nor the appendancy of them severed from the possessions; as if a fair, market, hundred, leet, park, warren, *et similia*, are appendants to manors, or in gross, and afterwards they come back to the King, they remain as they were before *in esse*, not merged in the Crown, for they were at first created and newly erected by the King, and were not *in esse* before, and time and usage has made them appendant." I cannot conceive anything more similar to a warren than the right to a several fishery. The one is an exclusive right to take two descriptions of animals upon the land, and the other is a right to take fish in the sea. It seems to me that this case falls directly within the judgment in the *Case of the Abbot of Strata Mercella.*

Pigott, B. — I am of the same opinion. The long user which has been shown raises the presumption of a legal origin prior to Magna Charta. I do not find anything in the documents to rebut the presumption that we are bound to make of a legal origin from the long enjoyment. Then I come to the question whether there is any evidence of merger in this case, and if so, what the law is upon that subject. I think it is not proved that there was a merger in point of fact. If it were necessary to decide the point, I should not think it difficult to determine that the merger of a several fishery, such as is contended for by Mr. Pickering, would not destroy the existence of the right so that it could not exist in the King as a distinct property, and be capable of being granted by the King to a subject. It seems to me to be a mistake to say that a free or several fishery merges in the prerogative of the Crown. I cannot see how the right to grant a several fishery ever grew out of the prerogative of the Crown, simply and strictly as existing in the prerogative of the Crown. I take it that the origin of such a right was that the King was formerly considered the universal lord and original proprietor of all the lands in this kingdom, and that thence arose his right to grant property such as this. The King might have parted with the land out of which this franchise was granted, and if this franchise afterwards came back to him, it would not merge in the land, for he would no longer possess the land, nor in the prerogative of the Crown, because it did not grow out of the prerogative of the Crown. It is not a flower of the Crown like a wreck, estray, or waif. It grew out of the property supposed to exist in the King in old times. That seems to me to have been the origin of such a right as this; and being a valuable property in the subject it might have come back to the King, and been available property in the King capable of being granted by him just as much as by any subject. It is not necessary, however, to decide this. I am of opinion, with the rest of the Court, that the plaintiff in this case is entitled to our judgment. *Judgment for the plaintiff.*

ENGLISH NOTES.

The effect of a general custom in the whale fishery is described in *Fennings* v. *Grenville*, cited in the notes to No. 3 of "Animal," 3 R. C. 106–108. And as to a local custom, see the principal case there referred to, 3 R. C. 92–105.

The *primâ facie* right of the public and the limitations to which such right may be subject are also illustrated by the cases of *Mayor of Orford* v. *Richardson* (1791), 4 T. R. 437, reversed upon a question of pleading (*s. n. Richardson* v. *Orford*), 2 H. Bl. 182, 1 Anstr. 231, 3 R. R. 579; *Rogers* v. *Allen* (1808), 1 Camp. 309, 10 R. R. 689.

Primâ facie every subject has a right to take fish found upon the seashore between high and low water mark. But such general right may be abridged by the existence of an exclusive right in some individual. *Bagott* v. *Orr* (1801), 2 Bos. & P. 472, 5 R. R. 668.

A right of several fishery in tidal waters is presumed to have been granted subject to the public right of navigation; and the right of navigation consists not only of the right to float in the tide-way but of the right to take the ground when the state of the tide is such that the vessel could not float. So that where a ship properly navigating the tide-way was, owing to the state of the tide, unavoidably grounded upon oyster beds in which a right of property was claimed, no action could lie against the shipowner for the injury to the oyster beds. *Mayor of Colchester* v. *Brooks* (1845), 7 Q. B. 339, 15 L. J. Q. B. 59, 9 Jur. 1090.

An incorporated borough had enjoyed immemorially a several oyster fishery in a navigable tidal river, qualified by a usage, also immemorial, for free inhabitants of ancient tenements in the borough to dredge for oysters without stint from Candlemas to Easter Eve in each year. The corporation claimed a several fishery discharged from the usage in favour of the inhabitants: *Held* (*dissentiente* Lord Blackburn), first, that, inasmuch as the claim of the corporation rested on prescriptive enjoyment, the whole user ought to be taken into account, and that the right to a several fishery could not be maintained, unless it were consistent with the user by the free inhabitants. Secondly, that the claim of the free inhabitants was not to a *profit à prendre in alieno solo*, but was a claim to which the law could and would give effect by presuming a grant to the corporation, subject to a condition or charitable trust in favour of the free inhabitants. *Goodman* v. *Mayor, &c. of Saltash* (H. L. 1882), 7 App. Cas. 633, 52 L. J. Q. B. 193, 48 L. T. 239, 31 W. R. 293, cited also 10 R. C. 250.

The *primâ facie* right of the public to fish in tidal waters does not extend to a place which was beyond the flow of ordinary spring tides, although at very high tides the fresh water is dammed back so as to rise to some extent. *Reece* v. *Miller* (1882), 8 Q. B. D. 626, 51 L. J. M. C. 64. And (as to the Norfolk Broads) see *Blower* v. *Ellis* (1886), 50 Justice of the Peace, 326; *Mickleth wait* v. *Vincent* (Romer, J., 1892), 67 L. T. 225.

In the case of *Neill* v. *Duke of Devonshire* (H. L. 1882), 8 App.

Cas. 135, 31 W. R. 622, the right to a several fishery in a navigable river was established by documents affording a presumption that the fishery had been put in defence before Magna Charta, and by decree in a possessory suit in which the predecessor of the defendant obtained an injunction to quiet his possession of his fishing as he had it at the time of the commencement of the suit and for three years previously, to continue until evicted by due course of law — the presumption of exclusive possession arising upon this decree not being met by counter-evidence applicable to the same period.

As to the rights of fishing in non-tidal waters, which are *privati juris*, it is to be observed that such a right if detached from the ownership of the soil is a *profit à prendre* out of the soil of another, and cannot be established by custom. See *Gateward's Case*, and notes, 10 R. C. 245–252. In such waters there is no *primâ facie* right of the public to fish.

Nor does such *primâ facie* right exist in fresh non-tidal waters, although they have been made navigable. *Murphy* v. *Ryan* (1867), 2 Ir. R. C. L. 143, 16 W. R. 678; *Johnson* v. *Blomfield* (1868), 8 Ir. R. C. L. 68; *Hargreaves* v. *Diddams* (1875), L. R. 10 Q. B. 582, 44 L. J. M. C. 178, 32 L. T. 600, 23 W. R. 828; *Mussett* v. *Burch* (1878), 35 L. T. 486; *Pearce* v. *Scotcher* (1882), 9 Q. B. D. 162, 46 L. T. 342; *Smith* v. *Andrews* (1891), 1891, 2 Ch. 678, 65 L. T. 175.

A grant by the Crown of a several fishery in an inland non-tidal lake is not, without more, sufficient to establish the title thereto — there being no *de jure* right in the Crown to grant or exercise such a franchise. *Bristow* v. *Cormican* (1878), 3 App. Cas. 641.

By an inquisition held upon the death of G. de N. in the time of Edward I. it was found that he died seized as of fee of the Manor of Hornby and also of (*inter alia*) "*piscarium omnium aquarum de* Hornby." The title to this estate devolved by various conveyances and successions upon C., who in 1711 enfranchised certain lands of the manor, but reserving (*inter alia*) the free liberty of fishing and fowling in and upon the premises or any part thereof. The title to the lands so enfranchised devolved upon the defendant, and the title to remaining lands and rights upon the plaintiff. The river Lune, which before the enfranchisement flowed entirely within the lands of the manor other than the defendant's land, gradually changed its course, until a part of its bed which could still be identified flowed over the defendant's lands. It was held on a principle analogous to that of *Rex* v. *Yarborough*, 1 R. C. 458, that the plaintiff's right of fishery still held good over the whole of the river; and it appears to have been considered that this would have been the case even apart from any question

as to the effect of the reservation in the enfranchisement. *Foster* v. *Wright* (1878), 4 C. P. D. 438, 49 L. J. Q. B. 97.

Whether the principle of accretion applies in a case where the ancient line of demarcation between the land of the riparian proprietor and the river still remains distinct, was a question which came before the Court of Appeal, but was not decided by them, in *Hindson* v. *Ashby* (1896), 1896, 2 Ch. 1, 65 L. J. Ch. 515, 74 L. T. 327, a case which furnishes a clue to most of the case law upon the nature of a private fishery.

The question in the last-mentioned case relates to a spot by the river Thames which is here navigable, although not tidal. The plaintiff was proprietor of the land on the Bucks side. The defendant was proprietor of a several fishery in the river and of the soil of an eyot in the river. The question arose upon the proprietorship of the bed of the river between the eyot and the Bucks side. It appeared that this channel had become, by a gradual process, silted up, although the original bed was still distinguishable. The Court of Appeal held that the defendant being owner of the several fishery was presumably the owner of the whole bed of the river whether wet or dry; and, as the *locus in quo* still answered the description of "bed of the river," the question as to the effect of accretion did not arise.

AMERICAN NOTES.

The right of several fishery in navigable waters depends on ownership of the soil, or grant or prescription. *Collins* v. *Benbury*, 5 Iredell Law (Nor. Car.), 118; 42 Am. Dec. 155; *Rogers* v. *Jones*, 1 Wendell (New York), 237; 19 Am. Dec. 493, citing *Carter* v. *Murcot*.

A several fishery cannot be acquired by prescription in Pennsylvania. *Tinicum Fishing Co.* v. *Carter*, 61 Penn. State, 21; 100 Am. Dec. 597.

But to support a prescriptive claim the use must have been exclusive. *Collins* v. *Benbury*, *supra*: *Delaware & M. R. Co.* v. *Stump*, 8 Gill & Johnson (Maryland), 479; 29 Am. Dec. 561; *Chalker* v. *Dickinson*, 1 Connecticut, 382; 6 Am. Dec. 250.

FIXTURES.

No. 1. — ELWES *v.* MAW.

(K. B. 1802.)

No. 2. — HOBSON *v.* GORRINGE.

(C. A. 1896.)

RULE.

WHATEVER is affixed to the freehold, and cannot be removed without injury to the freehold, is in law a fixture, and regarded as a part of the freehold itself.

Elwes v. Maw.

3 East, 38-57 (6 R. R. 523).

Fixtures. — Landlord and Tenant.

A tenant in agriculture, who erected at his own expense, and for the [38] mere necessary and convenient occupation of his farm, a beast-house, carpenter's shop, fuel-house, cart-house, pump-house, and fold-yard wall, which buildings were of brick and mortar, and tiled, and let into the ground, cannot remove the same; though during his term, and though he thereby left the premises in the same state as when he entered. There appears to be a distinction between annexations to the freehold of that nature for the purposes of trade, and those made for the purposes of agriculture and better enjoying the immediate profits of the land, in favour of the tenant's right to remove the former; that is, where the superincumbent building is erected as a mere accessary to a personal chattel, as an engine; but where it is accessary to the realty, it can in no case be removed.

The declaration stated that the plaintiff was seized in fee of a certain messuage, with the out-houses, &c., and certain land, &c., in the parish of Bigby, in the county of Lincoln, which premises were in the tenure and occupation of the defendant as tenant thereof to the plaintiff, at a certain yearly rent, the reversion belonging to the plaintiff; and that the defendant wrongfully,

&c., intending to injure the plaintiff in his hereditary estate in the premises, whilst the defendant was possessed thereof, wrongfully and injuriously, and without the licence and against the will of the plaintiff, pulled down divers buildings, parcel of the said premises, in his, the defendant's, tenure and occupation, viz., a beast-house, a carpenter's shop, a waggon-house, a fuel-house, and a pigeon-house, and a brick wall, inclosing the fold-yard, and took and carried away the materials, which were the property of the plaintiff, as landlord, and converted them to his, the defendant's, own use; by reason whereof the reversionary estate of the plaintiff in the premises was greatly injured, &c. The defendant pleaded the general issue. And at the trial at the last
[* 39] Lincoln * assizes a verdict was found for the plaintiff, with £60 damages, subject to the opinion of the Court on the following case: —

The defendant occupied a farm, consisting of a messuage, cottages, barn, stables, outhouses, and lands, at Bigby, in the county of Lincoln, under a lease from the plaintiff for twenty-one years, commencing on the 12th day of May, 1779; which lease contained a covenant on the part of the tenant to keep and deliver up in repair the said messuage, barn, stables, and outhouses, and other buildings belonging to the said demised premises. About fifteen years before the expiration of the lease the defendant erected upon the said farm at his own expense a substantial beast-house, a carpenter's shop, a fuel-house, a cart-house, and pump-house, and fold-yard. The buildings were of brick and mortar, and tiled, and the foundation of them were about one foot and a half deep in the ground. The carpenter's shop was closed in, and the other buildings were open to the front, and supported by brick pillars. The fold-yard wall was of brick and mortar, and its foundation was in the ground. The defendant, previous to the expiration of his lease, pulled down the erections, dug up the foundations, and carried away the materials, leaving the premises in the same state as when he entered upon them. These erections were necessary and convenient for the occupation of the farm, which could not be well managed without them. The question for the opinion of the Court was, Whether the defendant had a right to take away these erections? If he had, then a verdict to be entered for the defendant; if not, the verdict for the plaintiff to stand.

[40] This case was first argued in Easter Term last, by Torking-

ton for the plaintiff, and Clarke for the defendant; and again in this term by Vaughan, Serjt., for the plaintiff, and Balguy for the defendant.

For the plaintiff it was argued that the removing the buildings in question was waste at common law, and that this case did not fall within any of the exceptions which had been introduced solely for the benefit of trade in relaxation of the old rule. That rule was, that whatever was once annexed to the freehold could never be severed again without the consent of the owner of the inheritance. Accordingly, glass windows, wainscot, benches, doors, furnaces, &c., though annexed by tenant for years for his own accommodation, could not be removed by him again. Co. Lit. 53 *a*. The principle on which this was founded was the injury which would thereby arise to the inheritance from disfiguring the walls of the mansion; though some of these things were in their nature personal chattels, supplying the place of mere movable utensils and furniture. But it never was questioned but that buildings let into the soil became part of the freehold from the very nature of the thing. This was decided so long ago as Hil. 17 Ed. II. 518, in a writ of waste against a lessee, who had built a house and pulled it down during his term. And Co. Lit. 53 *a*, which is to the same purpose, goes further and says, that even the building of such new house by the tenant is waste; but that is denied in *Lord Darcy* v. *Askwith*, Hob. 234; though that also agrees that the letting down of such new house built by the tenant himself would be waste. So taking down a stone wall, or a partition between two chambers, is waste. 10 Hen. VII. 2, pl. 3. It does not indeed appear by that * book whether those erections had been before [*41] made by the tenant himself; but they were so taken to be by Meade, J., in *Cooke* v. *Humphrey*, Moor, 177. All this is confirmed by Lord Coke at the end of *Herlakenden's Case*, 4 Co. Rep. 63, 4, where it is said to have been adjudged in C. B. that glass fastened to the windows, or wainscot to the house, by the lessee, cannot be removed by him; and that it makes no difference in law whether the fastening of the latter be by great or little nails, screws, or irons put through the posts or walls (as had been then of late invented), or in whatever other manner it was fastened to the posts or walls of the house. In all these cases, the rule as between landlord and tenant seems to have followed that between heir and executor, founded upon the reason first mentioned;

and no innovation upon the strict rule seems ever to have been admitted, except in the case before Lord Ch. B. Comyns, cited in *Lawton* v. *Lawton*, 3 Atk. 13, 16, at Nisi Prius, of the cider mill, which he held should go to the executor, and not to the heir; but upon what particular grounds does not appear: and the case of *Culling* v. *Tuffnell*, Bull. N. P. 34, before Lord Ch. J. Treby at Hereford, in 1694, where a barn erected by a tenant upon pattens and blocks of timber, lying on, but not let into, the ground was holden to be removable by the tenant; but even there he relied on the custom of the country in favour of the tenant, with reference to which it might be presumed that he and his landlord had contracted. The only established exception (which the plaintiff's counsel admitted was as old as the rule itself) is in favour of trade, with respect to articles annexed to the freehold for the purpose of carrying on trade and manufactures. In 20 Hen. VII., fo. 13, pl. 24, an heir brought trespass against executors for [* 42] taking * away a furnace fixed to the freehold with mortar, and the taking was holden tortious. But it was there said, "that if a lessee for years set up such a furnace for his own advantage, or a dyer his vats and vessels to carry on his business,[1] during the term he may remove them; but if he suffer them to be fixed to the land after the end of the term, then they belong to the lessor; and so of a baker." Then follows, "it is no waste to remove such things within the term by any." But this is said to have been against the opinions before mentioned, and to have been doubted in the 42 Ed. III. (p. 6, pl. 19), whether it were waste or not. It is clear, therefore, from the whole of the passage, that the only generally admitted exception was in favour of traders, which is shown by the examples of the dyer and baker affixing vessels *pur occupier son occupations:* and that at least it was doubtful whether the same privilege extended to others affixing to the freehold similar articles. And the exception is the more remarkable because at that early period agriculture must have been of much greater importance to the State than trade. This distinction was continued in later times. In *Poole's Case*, Salk. 368, M. 2 Ann., in an action on the case by a lessee against the sheriff of Middlesex, who had taken in execution the vats, coppers, tables, partitions, and pavement, &c., of an under lessee, a soap-boiler, which he had put up as fixtures for the convenience of

[1] The words in the original are *pur occupier son occupation.*

No. 1. — Elwes v. Maw. 3 East, 42–44.

his trade, Lord Ch. J. Holt held that during the term the soap-boiler might well remove the vats set up in relation to trade, by the common law; but that there was a difference between what he did to carry on his trade, and what he did to complete the house, as hearths and chimney pieces, which he held not removable. *The next case was *Cave* v. *Cave*, 2 Vern. 508, [*43] in 1705, where the Lord Keeper held that not only wainscot, but pictures and glasses put up in the place of wainscot, should go to the heir and not to the executor, to prevent the house being disfigured. Then followed *Lawton* v. *Lawton*, 3 Atk. 13, where it was decreed by Lord Hardwicke, C., that a fire-engine erected for the benefit of a colliery by the tenant for life should be considered as personal estate, and go to his executor, and not to the remainder-man, in favour of creditors. But there it was proved to be customary to remove such an engine; that in building the shed for its security holes were left for the ends of the timber to make it more commodious for removal, and that it was very capable of being removed. The evidence relied on by the other side was that it could not be removed without tearing up the soil and destroying the brickwork. But Lord Hardwicke considered the brickwork there as a mere accessory to the engine, which in its own nature was a mere personal movable chattel. One reason, he said, which weighed with him was, that it was a mixed case, between enjoying the profits of the land and carrying on a species of trade; and considering it in that light, it came near the instances of furnaces and coppers in brew-houses. That decision was in 1743. In *Ex parte Quincey*, 1 Atk. 477, in 1750, where the principal question was, whether the utensils of a brew-house passed by a mortgage of the brew-house with the appurtenances, it is said that a tenant may, during the term, take away chimney pieces, and even wainscot; but the latter is observed to be a very strong case. The same was before said in *Lawton* v. *Lawton*, with this difference, that it was there said of wainscot fixed only by screws, and of marble chimney-pieces. This opinion may *have proceeded as it did in *Beck* v. *Rebow*, 1 P. Wms. 94, [*44] upon the consideration that matters of this sort were merely ornamental furniture, and not necessary to the enjoyment of the freehold. The case of *Lord Dudley* v. *Lord Ward*, Ambl. 113, and Bull. N. P. 34, in 1750, was like that of *Lawton* v. *Lawton*, on the authority of which it was decided. There Lord Hardwicke recog-

nised the general rule, with the single exception as between landlord and tenant, that fixtures annexed by the latter for the sake of trade might be removed. There too the fire-engine was considered as the principal, and the building erected over to preserve it, as the mere accessory; and the colliery itself as in part the carrying on of a trade. In *Lawton* v. *Salmon*, E. 22 Geo. III. B. R.,[1] salt-pans were holden to go to the heir and not to the executor; and though Lord MANSFIELD said that the rule had been relaxed as between landlord and tenant, tenant for life and remainder-man, in respect of things put up by the tenant in possession, still he confined the relaxation to things so affixed for the benefit of trade. And he there alluded to the case of the cider-mill (doubtingly) as standing alone, and not printed at large. Then the case of *Dean* v. *Allalley*, 3 Esp. N. P. 11, sittings after Easter, 39 Geo. III., was a case where two sheds, called Dutch barns, which had been erected by the tenant during his term, were removed by him; and being sued on his covenant, by which he undertook to leave all buildings which then were or should be erected on the premises during the term in repair, Lord KENYON, at Nisi Prius, held that buildings of that description were not included, and said that the [* 45] law would make the * most favourable construction for the tenant where he had made necessary and useful erections for the benefit of his trade or manufacture. Of what precise description the buildings there were does not appear; possibly not affixed to the ground,[2] at least not such parts as were removed. If not, the case amounts to no more than that of *Penton* v. *Robart*, 2 East, 88 (6 R. R. 379), where a varnish-house of wood which had been erected on a brick foundation by the tenant, for the purpose of carrying on his trade, was removed by him. But it did not appear there that the foundation was removed, but only the superstructure of wood, which had been brought by the tenant from another place, where he had before carried on his business. Lord KENYON indeed there laid stress on the instances of gardeners and nurserymen in the neighbourhood of the metropolis erecting greenhouses, &c., which he considered that they would be at liberty to remove. Whether that be done under particular agreements or not does not appear; but supposing the law would imply an exception

[1] Cited in a note to *Fitzherbert* v. *Shaw*, 1 H. Black. 259 (2 R. R. 764). The principal case turned on a particular agreement.

[2] Vide *post*, what account was given of this case in the arguments of the defendant's counsel.

in favour of tenants of that description, it would only be upon the ground of considering them as carrying on a species of trade; the very nature of their occupation and of the letting being to enable them to disannex even trees from the land.[1] But none of the cases have gone the length now contended for; and the very grounds on which exceptions have been made from the general rule * preclude the present case. Erections of this sort [* 46] are not in their nature temporary nor moveable, but are calculated solely for the enjoyment of the land: the expense of erecting them is great, and their value is great on the spot, but of trifling consideration when removed: the injury of their removal therefore is much greater to the landlord than the benefit of the materials when removed are to the tenant. If the exception were extended to buildings erected for the purposes of agriculture, it would be as extensive as the rule itself, and would therefore destroy it. The sole object of such erections is for the purpose of enjoying the produce of the land; the land therefore is the principal, and the buildings the accessory to the land. This distinguishes it essentially from buildings erected for engines or machinery used in trade, where the personal chattel is the principal. No other line than this can be drawn without overthrowing all the authorities.

For the defendant it was contended that the old rule of law had been gradually relaxed between landlord and tenant, though not so much between tenant for life and remainder-man, or between heir and executor. The object has been to encourage tenants to lay out their money in the improvement of the premises, and in making their industry as productive as possible, which is for the benefit of the State as well as the individuals, and applies at least as strongly to tenants in husbandry as in trade. Agriculture in the improved state in which it is now carried on is in itself a trade; it requires a much larger capital than formerly, and the use of more expensive implements and machinery. Without the aid of modern improvements, the land cannot be made so productive as it otherwise may be, nor the produce so well preserved and brought to * market. But unless the tenant is [* 47]

[1] Lawrence, J., on the first argument intimated, that if ground were let expressly for nursery ground, it might be considered as implied in the terms of the contract that it was to be used for taking up young trees, &c., as is usual in such cases. But he expressed a wish to be informed of the usual terms of the leases under which such grounds were holden in the neighbourhood of the metropolis.

entitled to take away with him at the end of his term, or have a compensation in value for buildings like these in question erected in such a manner as to be capable of being removed at pleasure and set up on any other farm, he will not be at the expense of erecting them at all; and therefore though he, and through him the public, will suffer, yet the landlord will not be the better for the right which he now claims. This is no question whether permanent additions or improvements made by a tenant to the old dwelling-house or out-buildings, or even new ones of that sort erected by him for his personal accommodation, are to be removed at the end of the term; for not even persons renting premises for the purpose of carrying on trades have any such privilege: but whether buildings so erected for the sole purpose and convenience of carrying on the farm, that is, of turning to the best account the capital and industry of the farmer in his trade or business, may not be removed by him. The materials of which the buildings are composed cannot vary the law, but the objects and interests of the persons concerned. If in the case of *Dean* v. *Allalley*, 3 Esp. N. P. 11, and MS., the tenant was entitled to remove the buildings called Dutch barns, the same rule will apply to the buildings in question, which are as much calculated for removal. For in that case (as appears from the MS. note of one of the counsel in the cause) the sheds erected "had a foundation of brick in the ground, and uprights fixed in and rising from the brickwork, and supporting the roof, which was composed of tiles, and the sides open," as in the present case. If the exception be confined to erections for the benefit of trade, Lord Kenyon in that case considered the Dutch barns as coming [* 48] within that description. * This is consonant to the opinion delivered by the same learned Judge in *Penton* v. *Robart*, 2 East, 88 (6 R. R. 379). It is true that was the case of a varnish-house; but it is clear that his Lordship's opinion was founded on the extension of the exception in the case of landlord and tenant generally; for the instances put by him in illustration of his opinion are cases of gardeners and nurserymen whose profits are derived out of the immediate produce of the land; and the buildings now in question are no more annexed to the soil than the varnish-house there was, which was on a foundation of brick, or than the hot-houses and green-houses of the persons alluded to. But the argument does not rest alone on very modern cases, but

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is strongly supported by the decisions of Lord HARDWICKE in the cases of *Lawton* v. *Lawton*, 3 Atk. 13, and *Lord Dudley* v. *Lord Ward*, Ambl. 113. There, even as between tenants for life or in tail and the remainder-men, the executors of the former were holden entitled to the fire-engines of collieries; buildings which must in their very nature be annexed to the soil, and without which the profits of the land, viz., the coal, could not be taken. Those were indeed said to be mixed cases between taking the profit of land and carrying on a trade, but wherefore mixed does not so plainly appear. So the case of the cider-mill is directly in point: that is as essential to the enjoyment of the land in that particular species of produce out of which the cider is to be made, as barns and other buildings are to the enjoyment of arable, or beast-houses of pasture land. That case was much stronger than what is now contended for; the question arising there between the heir and executor, where it may be admitted that the old rule has prevailed much stricter. All the cases therefore
* in the books between persons standing in that relation [*49]
may well be laid out of the question, as they turn upon the presumed intention of the ancestor or testator in favour of the heir, that the inheritance should descend to him entire and undefaced. But the case of *Culling* v. *Tuffnell*, Bull. N. P. 34, before Lord Ch. J. TREBY, which is in point, was between landlord and tenant. That was the case of a barn removed by the tenant; and though the foundations were not dug into the ground, yet its very weight must have sunk it in some measure below the surface of the soil. It is true that case was put by him on the ground of the custom of the country; but BULLER, J., in citing it, observes that now, without any custom, it would be determined in favour of the tenant without any difficulty; for that the old rule had been relaxed as between landlord and tenant, &c., though still preserved as between heir and executor. No distinction is there hinted at between trade and agriculture. In *Fitzherbert* v. *Shaw*, 1 H. Bl. 258, the question, it is true, turned at last on the agreement; but GOULD, J., was decidedly of opinion at the trial, that if the tenant had removed the buildings during the term he would have been justified in so doing; and there some of the things removed were a shed built on brickwork, and some posts and rails erected by the tenant, all which must have been let into the ground, and were adapted to purposes of agriculture. Upon the whole, they

contended that the only line to be drawn from all the books was, that whatever buildings were erected by a tenant (be the materials what they may, or however placed in or upon the ground), for the immediate purposes of his trade, or for the more advantageous taking or improving the profits of his farm, he may remove [* 50] them again, provided he leave * the premises on his quitting as he found them. According to this rule, no injury could ensue to the landlord, whose property would, on the contrary, be eventually benefited by the better cultivation of it, while the public would derive an immediate advantage from the encouragement afforded to the capital and industry of the tenant.

Cur. adv. vult.

Lord Ellenborough, C. J., now delivered the opinion of the Court. This was an action upon the case in the nature of waste by a landlord, the reversioner in fee, against his late tenant, who had held under a term for twenty-one years a farm consisting of a messuage, and lands, out-houses, and barns, &c., thereto belonging, and who, as the case reserved stated, during the term and about fifteen years before its expiration, erected at his own expense a beast-house, carpenter's shop, a fuel-house, a cart-house, a pump-house, and fold-yard. The buildings were of brick and mortar, and tiled, and the foundations of them were about a foot and a half deep in the ground. The carpenter's shop was closed in, and the other buildings were open to the front and supported by brick pillars. The fold-yard wall was of brick and mortar, and its foundation was in the ground. The defendant, previous to the expiration of his lease, pulled down the erections, dug up the foundations, and carried away the materials, leaving the premises in the same state as when he entered upon them. The case further stated, that these erections were necessary and convenient for the occupation of the farm, which could not be well managed without them. And the question for the opinion of the Court was, Whether the defendant had a right to take away these [* 51] erections? Upon a full consideration of all the * cases cited upon this and the former argument, which are indeed nearly all that the books afford materially relative to the subject, we are all of opinion that the defendant had not a right to take away these erections.

Questions respecting the right to what are ordinarily called

fixtures, principally arise between three classes of persons: 1st, Between different descriptions of representatives of the same owner of the inheritance; viz., between his heir and executor. In this first case, *i.e.*, as between heir and executor, the rule obtains with the most rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel anything which has been affixed thereto. 2dly, Between the executors of tenant for life or in tail, and the remainder-man or reversioner; in which case the right to fixtures is considered more favourably for executors than in the preceding case between heir and executor. The third case, and that in which the greatest latitude and indulgence has always been allowed in favour of the claim to having any particular articles considered as personal chattels as against the claim in respect of freehold or inheritance, is the case between landlord and tenant.

But the general rule on this subject is that which obtains in the first-mentioned case, *i.e.*, between heir and executor; and that rule (as found in the Year Book, 17 E. II., p. 518, and laid down at the close of *Herlakenden's Case*, 4 Co. Rep. 64, in Co. Litt. 53, in *Cooke* v. *Humphrey*, Moore, 177, and in *Lord Darcy* v. *Asquith*, Hob. 234, in the part cited by my Brother VAUGHAN, and in other cases) is that where a lessee, having annexed anything to the freehold during his term, afterward takes it away, it is waste. But this rule at a very early period had several exceptions attempted to be engrafted upon it, and which * were at last [* 52] effectually engrafted upon it, in favour of trade and of those vessels and utensils which are immediately subservient to the purposes of trade. In the Year Book, 42 Ed. III. 6, the right of the tenant to remove a furnace erected by him during his term is doubted and adjourned. In the Year Book of the 20 Hen. VII., 13 a and b, which was the case of trespass against executors for removing a furnace fixed with mortar by their testator and annexed to the freehold, and which was holden to be wrongfully done, it is laid down that "if a lessee for years make a furnace for his advantage, or a dyer make his vats or vessels to occupy his occupation during his term, he may remove them; but if he suffer them to be fixed to the earth after the term, then they belong to the lessor. And so of a baker. And it is not waste to remove such things within the term by some: and this shall be against the opinions aforesaid." But the rule in this extent in favour of

tenants is doubted afterwards in 21 Hen. VII. 27, and narrowed there, by allowing that the lessee for years could only remove, within the term, things fixed to the ground, and not to the walls, of the principal building. However, in process of time the rule in favour of the right in the tenant to remove utensils set up in relation to trade became fully established; and, accordingly, we find Lord Holt, in *Poole's Case*, Salk. 368, laying down (in the instance of a soap-boiler, an under-tenant, whose vats, coppers, &c., fixed had been taken in execution, and on which account the first lessee had brought an action against the sheriff) that during the term the soap-boiler might well remove the vats he set up in relation to trade; and that he might do it by the common law, and not by virtue of any special custom, in favour of trade, and to encourage industry; but that after the term they became [* 53] a gift in law to him in reversion, * and were not removable. He adds that there was a difference between what the soap-boiler did to carry on his trade, and what he did to complete his house, as hearths and chimney-pieces, which he held not removable. The indulgence in favour of the tenant for years during the term has been since carried still further, and he has been allowed to carry away matters of ornament, as ornamental marble chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, and the like. *Beck* v. *Rebow*, 1 P. Wms. 94, *Ex parte Quincey*, 1 Atk. 477, and *Lawton* v. *Lawton*, 3 Atk. 13. But no adjudged case has yet gone the length of establishing that buildings subservient to purposes of agriculture, as distinguished from those of trade, have been removable by an executor of tenant for life, nor by the tenant himself who built them during his term.

In deciding whether a particular fixed instrument, machine, or even building should be considered as removable by the executor, as between him and the heir, the Court, in the three principal cases on this subject (viz., *Lawton* v. *Lawton*, 3 Atk. 13, which was the case of a fire-engine to work a colliery erected by tenant for life; *Lord Dudley and Lord Ward*, Ambler, 113, which was also the case of a fire-engine to work a colliery, erected by tenant for life (these two cases before Lord Hardwicke); and *Lawton, executor*, v. *Salmon*, E. 22 Geo. III., 1 H. Bl. 259, *in notis* (2 R. R. 764), before Lord Mansfield, which was the case of salt-pans, and which came on in the shape of an action of trover brought for the

salt-pans by the executor against the tenant of the heir-at-law), the Court may be considered as having decided mainly on this ground, that where the fixed instrument, engine, or utensil (and the building covering the same falls within the same principle) was an * accessory to a matter of a personal nature, that it should [* 54] be itself considered as personalty. The fire-engine, in the cases in 3 Atk. and Ambler, was an accessory to the carrying on the trade of getting and vending coals, a matter of a personal nature. Lord HARDWICKE says, in the case in Ambler, "A colliery is not only an enjoyment of the estate, but in part carrying on a trade." And in the case in 3 Atk. he says, "One reason that weighs with me is its being a mixed case, between enjoying the profits of the lands, and carrying on a species of trade; and considering it in this light, it comes very near the instances in brew-houses, &c., of furnaces and coppers." Upon the same principle, Lord Ch. B. COMYNS may be considered as having decided the case of the cider-mill; *i.e.*, as a mixed case between enjoying the profits of the land and carrying on a species of trade; and as considering the cider-mill as properly an accessory to the trade of making cider.

In the case of the salt-pans, Lord MANSFIELD does not seem to have considered them as accessory to the carrying on a trade; but as merely the means of enjoying the benefit of the inheritance. He says, "The salt spring is a valuable inheritance, but no profit arises from it unless there be a salt-work, which consists of a building, &c., for the purpose of containing the pans, &c., which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment of the principal. The owner erected them for the benefit of the inheritance." Upon this principle he considered them as belonging to the heir, as parcel of the inheritance, for the enjoyment of which they were made, and not as belonging to the executor, as the means or instrument of carrying on a trade. If, however, he had even considered them as belonging to the executor, as * utensils of trade, or as being removable by the tenant, [* 55] on the ground of their being such utensils of trade; still it would not have affected the question now before the Court, which is the right of a tenant for mere agricultural purposes to remove buildings fixed to the freehold, which were constructed by him for the ordinary purposes of husbandry, and connected with no

description of trade whatsoever: and to which description of buildings no case (except the Nisi Prius case of *Dean* v. *Allalley*, before Lord KENYON, and which did not undergo the subsequent review of himself and the rest of the Court) has yet extended the indulgence allowed to tenants in respect to buildings for the purposes of trade. In the case in Buller's Nisi Prius, 34, of *Culling* v. *Tuffnell*, before Ch. J. TREBY, at Nisi Prius, he is stated to have holden that the tenant who had erected a barn upon the premises, and put it upon pattens and blocks of timber lying upon the ground, but not fixed in or to the ground, might by the custom of the country take them away at the end of his term. To be sure he might, and that without any custom; for the terms of the statement exclude them from being considered as fixtures; "they were not fixed in or to the ground." In the case of *Fitzherbert* v. *Shaw*, 1 H. Bl. 258, we have only the opinion of a very learned Judge indeed, Mr. Justice GOULD, of what would have been the right of the tenant as to the taking away a shed built on brickwork, and some posts and rails which he had erected, if the tenant had done so during the term; but as the term was put an end to by a new contract, the question what the tenant could have done in virtue of his right under the old term, if it had continued, could never have come judicially before him at Nisi Prius; and when that question was offered to be argued in the Court [* 56] above, the counsel * were stopped, as the question was excluded by the new agreement. As to the case of *Penton* v. *Robart*, 2 East, 88 (6 R. R. 379), it was the case of a varnish-house, with a brick foundation let into the ground, of which the woodwork had been removed from another place, where the defendant had carried on his trade with it. It was a building for the purpose of trade, and the tenant was entitled to the same indulgence in that case, which, in the cases already considered, had been allowed to other buildings for the purposes of trade; as furnaces, vats, coppers, engines, and the like. And though Lord KENYON, after putting the case upon the ground of the leaning which obtains in modern times in favour of the interests of trade, upon which ground it might be properly supported, goes further, and extends the indulgence of the law to the erection of greenhouses and hot-houses by nurserymen, and, indeed, by implication to buildings by all other tenants of land; there certainly exists no decided case, and, I believe, no recognised opinion or practice on

either side of Westminster Hall, to warrant such an extension. The Nisi Prius case of *Dean* v. *Allalley* (reported in Mr. Woodfall's book, p. 207, and Mr. Espinasse's, vol. iii. 11) is a case of the erection and removal by the tenant of two sheds, called Dutch barns, which were, I will assume, unquestionably fixtures. Lord KENYON says: "The law will make the most favourable construction for the tenant, where he has made necessary and useful erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage. It has been so holden in the case of cider-mills and other cases; and I shall not narrow the law, but hold erections of this sort made for the benefit of trade, or constructed as the present, to be removable at the end of the term." Lord KENYON here uniformly mentions the benefit * of trade, as if it were a building subservient to [* 57] some purposes of trade, and never mentions agriculture, for the purposes of which it was erected. He certainly seems, however, to have thought that buildings erected by tenants for the purposes of farming were, or rather ought to be, governed by the same rules which had been so long judicially holden to apply in the case of buildings for the purposes of trade. But the case of buildings for trade has been always put and recognised as a known, allowed exception from the general rule, which obtains as to other buildings; and the circumstance of its being so treated and considered establishes the existence of the general rule to which it is considered as an exception. To hold otherwise, and to extend the rule in favour of tenants in the latitude contended for by the defendant, would be, as appears to me, to introduce a dangerous innovation into the relative state of rights and interests holden to subsist between landlords and tenants. But its danger or probable mischief is not so properly a consideration for a Court of law, as whether the adoption of such a doctrine would be an innovation at all; and, being of opinion that it would be so, and contrary to the uniform current of legal authorities on the subject, we feel ourselves, in conformity to and in support of those authorities, obliged to pronounce that the defendant had no right to take away the erections stated and described in this case.

Postea to the plaintiff.

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[114] *Fixtures. — Mortgagor and Mortgagee.*

An engine affixed by means of screws and bolts to a concrete bed in freehold land, for the purpose of driving a saw-mill on the land, will, in the absence of special circumstances, cease to be a chattel, and become part of the freehold.

Where the owner of a chattel lets the chattel to the owner of land for the purpose of being fixed on the land and used thereon, reserving to himself the right to unfix and take possession of it in certain events, and it is in fact annexed to the land, it will become a fixture — that is, part of the soil — subject to the right of the owner to retake possession of it in the events specified; but such right, if it is not an easement created by deed, nor is conferred by a covenant running with the land, cannot be enforced against a purchaser of the land without notice of it.

Consequently, a mortgagee in fee of land on which is affixed a chattel belonging to a third person, placed there under a hiring agreement not under seal, of which the mortgagee has no notice, can take possession of the fixture under his mortgage with the land, and hold it as against the original owner.

Appeal from an order of KEKEWICH, J.

The question was whether the defendant, the mortgagee in fee of a certain saw-mill and premises, who had entered into possession of the mortgaged property, was entitled to the possession of an engine which was attached to the soil of the property by means of bolts and screws, though the engine was not and [* 115] * never had been the property of the mortgagor, but belonged to the plaintiff, who had let it on hire to the mortgagor under a hire-purchase agreement, for the purpose of being fixed on the premises in question.

On January 7, 1895, an agreement in writing, not under seal, was entered into between the plaintiff (therein called the owner) and J. G. King (therein called the hirer) for the letting by the owner to the hirer of a Stockport gas-engine complete. The engine was to take the place of another engine belonging to King then on the premises, which was, as part consideration for the agreement, to become the property of the plaintiff. The terms of the agreement were, so far as material, as follows: —

1. The owner agrees to deliver the said gas-engine, &c., at . . . for the purpose of being fixed at Southcourt Road, Worthing (the hirer's premises).

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2. The hirer agrees to use the said gas-engine, &c., in a skilful and proper manner, and to keep the same in proper repair and condition, and in good working order (fair wear excepted); and in case of damage by fire, accident, or otherwise to the said gas-engine, &c., the hirer agrees to bear the loss or risk occasioned thereby; and agrees not to dispose of or create any charge on the said gas-engine, or to remove the same from the Southcourt Road premises aforesaid to any other premises without the consent in writing of the owner, who shall be at liberty at all times to inspect the said gas-engine, &c., either personally, or by his agents or servants duly authorised.

3. The hirer agrees to pay the owner for the hire and use of the said gas-engine the sum of £18 before the said gas-engine, &c., is delivered, and the sum of £3 10s. per month after delivery thereof, the first payment to be made on the 15th day of February next, and each subsequent payment to be made on the 15th day of each succeeding calendar month.

4. If, during the continuance of the hiring, the hirer fail to pay the said hire or any part thereof as it becomes due, or convene any meeting of or compound with his creditors, or if a petition for a receiving order shall be presented by or against him, or if he shall abscond or commit any act of bankruptcy, or be about so to do, or shall do or omit anything whereby the said gas-engine may become liable to be taken in execution, or under a distress for rent, rates, or taxes, or shall not duly observe and perform this agreement on his part, this agreement shall forthwith determine, and the owner shall be at liberty (without prejudice, nevertheless, to any claim or right of action he may have) to repossess himself of and to remove the said gas-engine, &c., by force or otherwise, wherever they may be; and the hirer shall have no claim whatever against the owner, either for money he has paid for the use of the said gas-engine, &c., or for any damage sustained by reason of the retaking thereof.

5. The hirer agrees that any relaxation or indulgence on the part of the owner in respect of any of the provisions of this agreement shall not prejudice the rights of the owner hereunder.

6. The owner agrees that at the expiration of ten months' hiring from the said 15th day of February, 1895, of the said gas-engine, &c., if the hirer shall in all things have performed his part of this agreement, the rent or hire named in clause 3 shall cease and the

said gas-engine, &c., shall become the absolute and sole property of the hirer on the further payment of the sum of £3.

7. This agreement shall not be construed to operate in any way as a contract for the sale of the said gas-engine, but only as an arrangement for the hire thereof, and unless and until the hiring terminates under the provisions of clause 6, the hirer shall have no right or property in the said gas-engine at law or in equity, save and except as bailee thereof for hire.

The engine was, as the plaintiff was aware, required by King to drive a saw-mill which he had on his premises. The engine sent had on it when delivered a "hire plate," with the words on it, "This engine is the property of Wilfred Hobson, of ——."

The engine was erected by King in his saw-mill. A concrete foundation had been prepared, which was flush with the floor of the mill, in which were embedded two iron plates. At [* 116] each of the four * outside corners of this foundation there was fixed a bolt projecting upwards in a vertical position, with a screw at its uppermost end. The engine had a cast-iron hollow base-plate, like a dish cover, with a hole at each of the four outside corners of the bottom rim. The bottom rim of the base-plate rested on the concrete foundation, and the upright bolts fixed in the corners of the foundation projected through the holes in the base-plate, nuts being screwed tightly down upon the tops of the bolts so as to keep the engine in position and steady.

An exhaust pipe and exhaust boxes and a pulsometer were also let on hire to King by the plaintiff with the engine, and were more or less affixed to the building in which the engine was placed. It appeared that when the engine was fixed, the "hire plate" was between the engine and the wall, in a position where it might not be seen unless attention were called to it. King made some of the monthly payments due under the agreement, but then they fell into arrear, and he had never made sufficient payments to become the owner of the engine as a chattel.

King had, on March 26, 1894, executed a mortgage in fee of the premises in Southcourt Road, and on July 24, 1895, he, by an indenture of transfer and further charge, mortgaged the premises, together with the saw-mill, engine-house, and buildings on the property, and the fixed machinery and fixtures, to the defendant. On January 17, 1896, King was adjudicated bankrupt. The defendant, in March, 1896, took possession of the mortgaged property

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and the engine which was then on it. It did not appear that he was ever made aware of the "hire plate" which was on the engine when delivered.

On June 10, 1896, the plaintiff commenced this action, claiming a declaration that the engine had not become part of the property comprised in the mortgage, but remained the sole property of the plaintiff; that the defendant might be ordered to deliver up the engine to the plaintiff; an injunction to restrain the defendant from selling or disposing of or creating any charge on the engine, or delivering possession thereof to any person except the plaintiff, and damages for the detention of the engine.

In order to leave the defendant free to proceed with the realisation of his security, the sum of £55, the agreed value of the engine, had been deposited by him in a bank in the joint names of the solicitors of the plaintiff and defendant to abide the result of the trial.

On July 7, 1896, the case came before KEKEWICH, J., upon a motion for an injunction, which the parties agreed to treat as the trial of the action. He was of opinion that the engine passed by the mortgage to the mortgagee; and that, upon the principle laid down in *Sanders* v. *Davis* [1885], 54 L. J. Q. B. 576; 15 Q. B. D. 218; and *Gough* v. *Wood* [1894], 63 L. J. Q. B. 564; [1894] 1 Q. B. 713; as explained by the Court of Appeal in *Huddersfield Banking Co.* v. *Henry Lister & Son* [1895], 64 L. J. Ch. 523, 527, 529; [1895] 2 Ch. 273, 282, 286, though the mortgagor might, so long as he remained in possession of the mortgaged premises, have had an implied power to remove fixtures, when the mortgagee had entered into possession, and his rights had so become crystallised, the mortgagor could no longer have such power. He declared the defendant entitled to the £55.

The plaintiff appealed.

J. Walton, Q. C., and Curtis Price, for the appeal. — The engine was no doubt to a certain extent fixed to the freehold — it could not otherwise have been worked; but it was not so attached as to become a fixture and pass with the freehold, not even as between mortgagor and mortgagee. It remained a chattel. The question is not merely how it was attached — that is only one of the tests, for a thing may become a fixture which is not fastened to the soil, but merely rests on it by its own weight, such as a stone wall. To make a thing pass with the land it must have been put on the land with the

intention that it should become attached to it. *Hellawell* v. *Eastwood* [1850], 20 L. J. Ex. 154; 6 Ex. 295; and *Holland* v. *Hodgson* [1872], 41 L. J. C. P. 146; L. R. 7 C. P. 328.

[A. L. Smith, L. J., referred to *Longbottom* v. *Berry* [1869], 39 L. J. Q. B. 37; L. R. 5 Q. B. 123.]

The presumption is that that which is annexed to the [* 117] soil becomes part of the * soil, but that presumption may be rebutted by showing the intention of the parties to the contrary. *Lancaster* v. *Eve* [1859], 28 L. J. C. P. 235; 5 C. B. (N. S.) 717; *Wood* v. *Hewett* [1846], 15 L. J. Q. B. 247; 8 Q. B. 913; and *Wake* v. *Hall* [1883], 52 L. J. Q. B. 494; 8 App. Cas. 195, 203.

As between mortgagor and mortgagee, perhaps, the fact of an article being fixed to the soil may lead to the inference that it was to be part of the mortgagee's security; but as between the mortgagee and third parties the circumstances under which it was placed there must be taken into consideration. It would not be part of the land unless the intention was to make it so. The onus would be on the person who says it was not part of the land to show that it was not. In the present case there was no intention that the engine should become part of the land. It was not the property of King. The agreement between the plaintiff and him was an agreement for hiring only, not for sale. No doubt King could at a future date, on payment of a certain sum, become the purchaser; but the only binding contract was one for hire, and the engine could have been returned by King or removed by the plaintiff to save it from distress or execution. It was clearly intended that it should remain a chattel. The case comes within *Helby* v. *Matthews* [1895], 64 L. J. Q. B. 465; [1895] A. C. 471; and not within *Lee* v. *Butler* [1893], 62 L. J. Q. B. 591; [1893] 2 Q. B. 318, where there was a binding contract by the hirer to pay the full purchase-money. As against the plaintiff, the engine would not pass to the mortgagee unless the plaintiff has acted in such a way as to allow King to treat it and deal with it as his own. It is so notorious a custom to let gas-engines out on hire-purchase agreements that it may be taken to be a matter of common knowledge that they are so let out. The defendant was aware that the engine was on the premises, and he left King in possession of it without inquiring as to the ownership. The "hire plate" would have shown him who it belonged to. *Peel, In re; Crossley*

Brothers, Ex parte [1893], [1894] 1 Ir. Rep. 235. See s. c. in H. L. *sub nom. McEntire* v. *Crossley Brothers*, 64 L. J. P. C. 129; [1895] A. C. 457.

[Lord Russell of Killowen, C. J. — That was a case of reputed ownership in bankruptcy.]

Supposing that the engine was a fixture, the mortgagee, by leaving the mortgagor in possession of the premises, must be taken to have impliedly given him licence to fix things for the purposes of his trade, and also to unfix and remove fixtures; and he would obtain no greater right to the fixtures than the mortgagor himself had. *Sanders* v. *Davies*; *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.* [1891], 61 L. J. Ch. 227; [1892] 1 Ch. 415; *Gough* v. *Wood* and *Huddersfield Banking Co.* v. *Henry Lister & Son*. The case should be decided upon the principles applicable as between landlord and tenant, and not upon those applicable as between mortgagor and mortgagee. The plaintiff practically has a right equivalent to an easement to have his engine on the premises, and it remains his engine.

Warrington, Q. C., and Willoughby Williams, for the defendant. — The effect of affixing an article to land cannot depend upon any undisclosed intention which a man may have in his mind. The intention is to be inferred from the circumstances, and, in particular, from the degree and object of the annexation, — that is, the purpose of the annexation, — having regard to the nature of the chattel itself, and the land upon which it is to be used. That is what was decided in *Holland* v. *Hodgson*. *Gough* v. *Wood* was decided on the ground of there being an implied consent by the mortgagee to the removal of fixtures by the mortgagor; but it was distinctly said by Kay, L. J., that articles affixed to the land could not be removed under a hire-purchase agreement as against a subsequent purchaser or mortgagee, without his consent. That shows that the intention as to affixing must be gathered from the mode and object of the annexation. *Wood* v. *Hewett*, *Lancaster* v. *Eve*, and *Wake* v. *Hall* were all cited in *Gough* v. *Wood*; but the cases relied on by the appellants are all capable of this explanation — that, as between a person who puts an article on to land and the owner of the land on which it is put, the Court may infer that the circumstances were such that it was intended that the *article should remain a chattel. What [*118] might be a reasonable inference as between landlord and

tenant would not be reasonable as against a mortgagee or purchaser of the land.

There seems to be some discrepancy between *Hellawell* v. *Eastwood* and *Walmsley* v. *Milne* [1859], 29 L. J. C. P. 97; 7 C. B. (N. S.) 115; but there is no authority for the contention that as against third parties the intention of the parties to an agreement can be taken into account except so far as it is evidenced by external facts.

The engine was really the property of King. He could not, under the agreement, have returned it; and the case comes within the principle of *Lee* v. *Butler*.

[Their Lordships intimated that they did not wish to hear any argument upon the other questions raised.]

J. Walton, Q. C., in reply. — It is not contended that the question whether an article has become fixed to the land depends upon the intention in a man's mind. The whole of the circumstances must be looked at, and it must be seen what was the bargain between the owner of the land and the owner of the chattel. The mortgagee can only take what is, in fact, part of the freehold, not chattels which, though they may be physically on the land, are not the property of the mortgagor, but of some other person.

Cur. adv. vult.

Dec. 19. — A. L. Smith, L. J., delivered the judgment of the Court. He referred to the facts, observing that they showed what was the actual and ostensible annexation of the engine to the soil of King's land, and the object for which it was so annexed; also that their Lordships did not consider that the exhaust pipe, exhaust boxes, and pulsometer had any material bearing upon the case, for if the affixing of the engine in the manner described did not convert it into a fixture and thus part of the freehold, they did not think that the other attachments, upon the conflicting evidence relating thereto, should be held to do so; also that they did not refer to the mortgage of March 26, 1894, as they did not consider it relevant to the question to be dealt with. He continued: The question is whether Mr. Gorringe is entitled, having entered under his mortgage, to the gas-engine as part of the land. It is not disputed that he is entitled to the land, but the plaintiff denies that he is entitled to the gas-engine upon the ground that it had never become King's property, and had always remained a chattel belonging to the plaintiff. There can be no doubt that

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upon a mortgage in fee of land, as between the mortgagor and mortgagee, the mortgagee is entitled to all fixtures which may be upon the land, whether placed there before or after the mortgage. If Mr. Justice NORTH in the passage in his judgment which has been referred to in *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.* meant to hold otherwise, in our opinion he was in error, but we doubt if he did intend so to hold.

The case of *Gough* v. *Wood*, decided in this Court, in no way assists the plaintiff in this case, and has no application to the present case. That case was decided solely upon the ground that the mortgagee had acquiesced in the removal by the mortgagor during his tenancy of trade fixtures. For additional confirmation of the *ratio decidendi* of this case, what was said by Lord Justice LINDLEY and by Lord Justice KAY in *Huddersfield Banking Co.* v. *Lister & Son, Lim.*, may be referred to. Even if in the present case a licence had been granted by Gorringe to King to remove the gas-engine during the continuance of a term, Gorringe, by entering and taking possession of the land and engine, would have determined such licence.

We now come to the real point made on behalf of the plaintiff. It is this: It is said that this gas-engine never was a fixture, but always remained a chattel, and consequently never passed to Gorringe as mortgagee of the land. It obviously did not pass to him as a chattel under the mortgage to him of "fixed machinery," for, if a chattel, it ever remained Hobson's and never was the property of King; and unless Gorringe takes the engine as being part of the land mortgaged to him, he does not take it at all. Now, leaving out of consideration for the present the hire-and-purchase * agreement of January 7, 1895, there is a [* 119] sequence of authorities which establish that the gas-engine, affixed as it was, and for the purpose for which it was, to King's freehold, ceased to be a chattel and became part of the freehold. Take first of all the case of *Wiltshear* v. *Cottrell* [1853], 22 L. J. Q. B. 177; 1 E. & B. 674. There the Court of Queen's Bench held that a threshing-machine fixed by bolts and screws to posts which were let into the ground, and which machine could not be got out without disturbing some of the soil, would clearly pass under a conveyance of the land and all fixtures. In the case of *Mather* v. *Fraser* [1856], 25 L. J. Ch. 361; 2 K. & J. 536, which was a case between the assignees of a mortgagor and mortgagees, Vice-Chancellor PAGE-WOOD held that the machinery fixed to the

land, whether by screws, solder, or other permanent means, passed to the mortgagees. Again, in *Walmsley* v. *Milne*, which was a case between a mortgagor and mortgagee in fee, the Court of Common Pleas held that a steam engine and boiler and other implements secured by bolts and nuts to the walls, though they were all capable of being removed without injury either to the machinery or to the premises, were fixtures, and passed to the mortgagee as part of the freehold. In *Climie* v. *Wood* [1868 and 1869], 37 L. J. Ex. 158; 38 ibid. 223; L. R. 3 Ex. 257; L. R. 4 Ex. 328, which was a case between mortgagor and mortgagee in fee, the jury found that an engine and boiler which were used for sawing purposes (the engine being screwed down to planks upon the ground and the boiler being fixed in the brickwork) were trade fixtures, and had been so fixed for their better use and not to improve the inheritance, and that they were removable without any appreciable damage to the freehold. The Court of Exchequer, nevertheless, held that the engine and boiler passed to the mortgagee, and this judgment was affirmed by the Court of Exchequer Chamber. Mr. Justice Willes, who delivered the judgment of the Court, stated that the reasons for a tenant with a limited interest being allowed to remove trade fixtures were not applicable in the case of the owner of the fee. In *Longbottom* v. *Berry*, which was a case between assignees of a mortgagor and mortgagees, it was also held that machinery annexed to the floor of a building in a "*quasi*-permanent manner" by means of bolts and screws passed to the mortgagees; and the Exchequer Chamber in *Holland* v. *Hodgson* affirmed *Mather* v. *Fraser* and *Longbottom* v. *Berry*, and held that looms attached by means of nails driven through holes in the feet of the looms into the floors — which attachment was necessary to keep the looms steady when at work, and which nails could be drawn easily and without any serious damage to the flooring — formed part of the realty, and passed to the mortgagee in fee.

If there had been in this case nothing but the existing visible degree of annexation of the gas-engine of King's freehold, and the known object for which such annexation had taken place, then, according to the authorities, it would be conclusively established that the gas-engine had ceased to be a chattel, and had become part of the freehold. But it was argued that the terms of the hire-and-purchase agreement caused this engine to remain a chattel,

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notwithstanding its annexation to the soil, for it was said that the intention of the parties who placed it where it was must be considered, and if this consideration showed that the intention was that the chattel was not to be a fixture, though actually fixed to the freehold, it still remained a chattel. In support of this argument a passage in the judgment of Lord BLACKBURN (then Mr. Justice BLACKBURN), when delivering the judgment of the Exchequer Chamber in *Holland* v. *Hodgson*, was cited. That learned Judge, when dealing with what were or were not fixtures, says: "Perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they are so intended lying on those who assert that they have ceased to be chattels; and that on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel." The question in each
* case is whether the circumstances are sufficient to satisfy [* 120]
the onus. It is said on behalf of the plaintiff that the hire-and-purchase agreement shows an intention on his part, as also on King's part, that the gas-engine should remain a chattel until King had paid the contracted instalments, which he never did. Now, if the engine had been a trade fixture, erected by King as tenant, with a limited interest, we apprehend that when affixed to the soil, as it was, it would have become a fixture — that is, part of the soil — and would immediately have vested in the owner of the soil, subject to the right of King to remove it during his term. "Such," says Lord CHELMSFORD, in *Bain* v. *Brand* [1876], 1 App. Cas. 762, "is the general law. But an exception has been long established in favour of a tenant erecting fixtures for the purposes of trade, allowing him the privilege of removing them during the continuance of the term. When he brings any chattel to be used in his trade and annexes it to the ground it becomes a part of the freehold, but with a power as between himself and his landlord of bringing it back to the state of a chattel again by severing it from the soil. As the personal character of the chattel ceases when it is fixed to the freehold, it can never be revived as long as it continues so annexed."

No. 2. — Hobson v. Gorringe, 66 L. J. Ch. 120.

It seems to us that the true view of the hire-and-purchase agreement, coupled with the annexation of the engine to the soil, which took place in this case, is that the engine became a fixture — that is, part of the soil — when it was annexed to the soil by screws and bolts, subject as between Hobson and King to this — that Hobson had the right by contract to unfix it and take possession of it if King failed to pay him the contracted monthly instalments. In our opinion, the engine became a fixture — that is, part of the soil — subject to this right of Hobson, which was given him by contract. But this right was not an easement created by deed, nor was it conferred by a covenant running with the land. The right, therefore, to remove the fixture imposed no legal obligation on any grantee from King of the land. Neither could the right be enforced in equity against any purchaser of the land without notice of the right; and the defendant Gorringe is such a purchaser. The plaintiff's right to remove the chattel if not paid for cannot be enforced against the defendant, who is not bound either at law or in equity by King's contract. The plaintiff's remedy for the price, or for damages for the loss of the chattel, is by action against King, or, he being bankrupt, by proof against his estate.

This, in our judgment, is sufficient to determine this case in favour of the defendant; but as another point has been stoutly argued on behalf of the plaintiff we will deal with it. It is said that the intention that the gas-engine was not to become a fixture might be got out of the hire-and-purchase agreement, and, if so, it never became a fixture and part of the soil; and it was said that the case of *Holland* v. *Hodgson* had so decided. For this point it must be assumed that such intention is manifested by the hire-and-purchase agreement, though, as before stated, we think it is not. In *Holland* v. *Hodgson* Lord BLACKBURN, when dealing with the "circumstances to show intention," was contemplating and referring to circumstances which showed the degree of annexation, and the object of such annexation, which were patent for all to see, and not to the circumstance of a chance agreement that might or might not exist between an owner of a chattel and a hirer thereof. This is made clear by the examples to which he alludes to show his meaning. He takes as instances — (*a*) blocks of stone placed in position as a dry stone wall, or stacked in a builder's yard; (*b*) a ship's anchor affixed to the soil, whether to hold a ship riding thereto or to hold a suspension bridge. In each of these instances it will be seen

that the circumstances to show intention were the degree and object of the annexation, which were in themselves apparent, and thus manifested the intention. Lord BLACKBURN in his proposed rule was not contemplating a hire-and-purchase agreement between the owner of a chattel and a hirer, or any agreement unknown to either a vendee or mortgagee in fee of land, and the argument that such a consideration was to be entertained is in our judgment not well founded. It was further argued on behalf of the plaintiff that the cases of *Wood* v. *Hewett* and of **Lancaster* v. *Ere* showed that the intention of the parties affixing a chattel to the soil must be ascertained when considering whether a chattel is or is not a fixture and part of the soil. In our opinion these cases do not show this; and, indeed, if they did, as before stated, if the hire-and-purchase agreement is considered it does not show what the plaintiff says it does. In the first case, *Wood* v. *Hewett*, the plaintiff, a miller, had put up a movable hatch, which worked up and down a groove in some immovable masonry and brickwork upon the defendant's land, and he had so used it for years, the complaint against the defendant being that he had pulled up and taken away the hatch. The question was whether this movable hatch remained the plaintiff's, or had become the property of the defendant. The jury found that this hatch remained the property of the plaintiff, and the Court *in banco* held, as we read the case, that the jury were well warranted in finding that, between the plaintiff and the defendant, the former had become entitled to have the hatch, which was his own property, standing in the soil of the defendant; in other words, that it might be inferred that the plaintiff had acquired an easement of having his hatch on the defendant's land, and could therefore sue for interference therewith. There was no question in this case between a mortgagee and a third party. In the second case, *Lancaster* v. *Ere*, the plaintiff, who was a wharfinger, many years before the action was brought, had driven a pile into the bed of the Thames, which was the property of the Crown, for the purpose of carrying on the necessary business of his wharf, and for years and years had used this pile without interruption by any one, until the defendant's barge, by reason of the negligence of the defendant's servant, ran against it and carried it away. The point taken by the defendant was, that the pile had been affixed to and formed part of the bed of the river, which was not the property of the

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plaintiff, and that therefore he could maintain no action for injury thereto; but the Court held that, as between the plaintiff and the Crown, it ought to be inferred that, although the pile had been affixed in the soil of the river, yet it was so affixed by agreement between the plaintiff and the Crown that the former should have an easement over the Crown's property so as to be able to use the pile, which was necessary for carrying on the business of the plaintiff's wharf. That is the point decided, though there are, as has been pointed out, some isolated passages as to the intention of persons when affixing a chattel to the soil. That the plaintiff had a cause of action in some form or other against the defendant cannot be denied; but if the case decided, as it is argued it did, that the pile remained a chattel, we do not agree with it.

That a person can agree to affix a chattel to the soil of another so that it becomes part of that other's freehold, upon the terms that the one shall be at liberty in certain events to retake possession, we do not doubt; but how a *de facto* fixture becomes not a fixture or is not a fixture as regards a purchaser of land for value and without notice, by reason of some bargain between the affixers, we do not understand, nor has any authority to support this contention been adduced.

The point as to the effect of the plate on the gas-engine when delivered comes to nothing, for the plate was no more than an indication of what the agreement was between the plaintiff and King; and as there is no evidence whatever that the defendant was ever made aware of it, it cannot affect his right as mortgagee in fee of King's land.

For the reasons above given, we think that the gas-engine became affixed to and was part of King's freehold, and thus passed to Mr. Gorringe as mortgagee in fee of King's land. In our judgment, Mr. Justice KEKEWICH was right when he gave judgment for the defendant, and this appeal must be dismissed with costs.

ENGLISH NOTES.

The conditions under which a chattel becomes in law part of the land appear to be capable of being classified (see Campbell on Sale, 2d ed., p. 5 *et seq.*) as follows: —

(*a*) Things fixed to the land in a permanent manner: *Cave* v. *Wood*, 2 Vern. 508; *D'Eyncourt* v. *Gregory* (1866), L. R. 3 Eq. 282, 36 L. J. Ch. 107, 15 W. R. 186; *Climie* v. *Wood* (1869), L. R.

3 Ex. 257, 4 Ex. 328, 38 L. J. Ex. 223, 20 L. T. 1012; *Ex parte Ashbury, &c.* (1868), L. R. 4 Ch. 630, 38 L. J. Bk. 9, 20 L. T. 997, 17 W. R. 997; *Longbottom* v. *Berry* (1869), L. R. 5 Q. B. 123, 39 L. J. Q. B. 37, 22 L. T. 385; *Holland* v. *Hodgson* (1872), L. R. 7 C. P. 328, 41 L. J. C. P. 146, 26 L. T. 709, 20 W. R. 990; *Sheffield & S. Yorkshire, &c. Society* v. *Harrison* (1884), 15 Q. B. D. 358, 54 L. J. Q. B. 15, 51 L. T. 649, 33 W. R. 144; *Tottenham* v. *Swansea Zinc Ore Co.* (1885), 52 L. T. 738.

(*b*) Things fixed in what has been called a *quasi*-permanent manner (by means of bolts or screws): *Longbottom* v. *Berry* (1869), L. R. 5 Q. B. 123, 39 L. J. Q. B. 37, 22 L. T. 385; *Hobson* v. *Gorringe* (No. 2, p. 208, *supra*).

(*c*) Things forming (although not physically attached to the land) an essential part of a machine or thing fixed in a permanent or *quasi*-permanent manner to land, *e. g.* an upper millstone: *Walmsley* v. *Milne* (1859), 7 C. B. (N. S.) 115, 29 L. J. C. P. 97, 6 Jur. (N. S.) 125, 1 L. T. 62; *Wystow's Case*, cited in *Liford's Case*, 11 Co. Rep. 50. The removable part of a machine having one part fixed. *Longbottom* v. *Berry* (*supra*); *Ex parte Ashbury, &c.* (*supra*). Compare *Tripp* v. *Armitage* (1839), 4 M. & W. 657, 1 Horn. & H. 442, where sash frames intended for a building, but which had not been fitted, were held not to be parts of the building.

(*d*) Things set in a fixed place for permanent use and enjoyment in connection with the land; *e. g.* a floating landing-stage permanently moored in a fixed site: *Forrest* v. *Overseers of Greenwich* (1858), 8 El. & Bl. 890, 27 L. J. M. C. 96, 4 Jur. (N. S.) 480. This may be used as a fair illustration, although the question was one of rating, which may turn on other considerations. See *Tyne Boiler Works Co.* v. *Overseers of Longbenton* (C. A. 1886), 18 Q. B. D. 81, 56 L. J. M. C. 8, 55 L. T. 825, 35 W. R. 110. Another example may be taken from the sculptured marbles resting by their own weight, but forming part of the architectural design, in *D'Eyncourt* v. *Gregory* (*supra*).

The case of *Hellawell* v. *Eastwood* (1850), 6 Ex. 295, 20 L. J. Ex. 154, where certain cotton-spinning machines called "mules" were held not to be fixtures, has been cited in numerous cases — always by the unsuccessful party. It has been frequently commented on, and attempted to be distinguished in the judgments. It may be observed that it is again cited unsuccessfully in the argument in *Hobson* v. *Gorringe* (No. 2, *supra*), but apparently not thought worth mentioning in the judgments. It may be safely treated as overruled in principle.

Things coming within any of the categories above mentioned come

within what may be called the strict rule as to fixtures: *Quod plantatur solo, solo cedit.*

The strict rule applies as between a mortgagee of the freehold on the one part and the mortgagor and those claiming under him on the other part. *Walmsley* v. *Milne* (*supra*); *Climie* v. *Wood* (*supra*); *Ex parte Ashbury, &c.* (*supra*); *Tottenham* v. *Swansea Zinc Ore Co.* (*supra*). See also *Cullwick* v. *Swindell* (1866), L. R. 3 Eq. 249, 36 L. J. Ch. 173, 15 W. R. 216. It also holds good in favour of a mortgagee or purchaser for value against the claim of a third party of which he had no notice. *Hobson* v. *Gorringe* (No. 2, *supra*).

The strict rule also applies between a person claiming under a specific bequest of leasehold estate and the residuary legatee: *In re Sharman's Estate*, *Sharman* v. *Rose* (2 May, 1873), W. N. p. 99; and in a question whether a thing is "goods" within the reputed ownership clause of the Bankruptcy Acts: *Horn* v. *Baker* (1808), 9 East, 215, 9 R. R. 541; *Ex parte Lloyd*, *In the Matter of Ogden* (1834), 1 Mont. & Ayr. 494; *Ex parte Brown*, *In re Reed* (1878), 9 Ch. D. 389, 48 L. J. Bk. 10, 39 L. T. 338, 27 W. R. 219.

The strict rule applies generally in questions between heir or devisee and executor. *Elwes* v. *Maw* (No. 1, *supra*); *Lee* v. *Risdon* (1816), per GIBBS, C. J., 7 Taunt. 190, 17 R. R. 486; *Fisher* v. *Dixon* (1845), 12 Cl. & Fin. 312; *Norton* v. *Dashwood* (CHITTY, J., 1896), 1896, 2 Ch. 497, 65 L. J. Ch. 737, 75 L. T. 205, 44 W. R. 680. But this is subject to the exception of emblements. See 10 R. C. 392. The same rule applies generally in a question whether a thing which is the property of a freeholder in the land is liable to be seized under a writ directing seizure of his goods and chattels. *Winn* v. *Ingilby* (1822), 5 B. & Ald. 625, 24 R. R. 503. And see *Farrant* v. *Thompson*, No. 5 of "Execution," 11 R. C. 647, 658. This is also subject to the exception of emblements. See 10 R. C. 392. The same rule applies generally in a question whether a thing is a chattel and as such liable to be distrained. *Turner* v. *Cameron* (1870), L. R. 5 Q. B. 306, 39 L. J. Q. B. 125, 22 L. T. 525, 18 W. R. 544. This is also subject by statute to the exception of emblements. See 10 R. C. 392.

The strict rule is relaxed to some extent in questions between executors of tenant for life and remainder-man in a settled estate. *Lawton* v. *Lawton*, 3 Atk. 16; *Elwes* v. *Maw* (No. 1, *supra*); *Wiltshear* v. *Cottrell* (1853), 1 El. & Bl. 674, 22 L. J. Q. B. 177, 17 Jur. 758; *D'Eyncourt* v. *Gregory* (1866), L. R. 3 Eq. 382, 36 L. J. Ch. 107, 15 W. R. 186.

The strict rule is relaxed to a greater extent between landlord and tenant. As to the things which may be treated as tenants' fixtures, no general rule can be laid down, much depending on the nature and

object of the tenancy. The tenant is entitled during his tenancy to remove such fixtures, reinstating the premises. *Elwes* v. *Maw* (No. 1, *supra*); *Pugh* v. *Arton* (1869), L. R. 8 Eq. 626, 38 L. J. Ch. 619, 20 L. T. 865; *Wake* v. *Hall* (H. L. 1883), 8 App. Cas. 195; *Cosby* v. *Shaw* (1888), 19 L. R. Ir. 307; *Barff* v. *Probyn* (1895), 64 L. J. Q. B. 557, 73 L. T. 118; *Thomas* v. *Jennings* (1896), 66 L. J. Q. B. 5, 75 L. T. 274, 45 W. R. 93. The tenant's right has been allowed between a mortgagee of the landlord and a tenant of the mortgagor, who, without interference by the mortgagee, has entered and put up fixtures. *Sanders* v. *Davies* (1885), 15 Q. B. D. 218, 54 L. J. Q. B. 576, 33 W. R. 665. The distinction is obvious between this case and the above case of *Hobson* v. *Gorringe* (No. 2, *supra*), where at the time of the mortgage there are fixtures on the premises which a third party, by an agreement with the mortgagor of which the mortgagee has no notice, is entitled to remove. *Sanders* v. *Davis* was followed in *Cumberland Union Banking Co.* v. *Maryport Hematite Iron Co.* (1892), 1892, 1 Ch. 415, 61 L. J. Ch. 227, 66 L. T. 108, 40 W. R. 280; and in *Gough* v. *Wood* (C. A. 1894), 1894, 1 Q. B. 713, 63 L. J. Q. B. 564, 70 L. T. 297, 42 W. R. 469.

As to the questions whether the thing is within the term "personal chattels" or "trade machinery" so as to be within the operation of the Bills of Sale Acts, see 5 R. C. 32, 34, 73. And observe that these Acts do not apply to trade machinery, which is attached to the freehold and passes to the mortgagee by virtue of the mere conveyance of the fee. *In re Yates, Batcheldor* v. *Yates* (C. A. 1888), 38 Ch. D. 112, 57 L. J. Ch. 697, 59 L. T. 47, 36 W. R. 563.

AMERICAN NOTES.

The two principal cases are repeatedly cited by Mr. Elwell in his treatise on Fixtures. This writer, quoting Lord Kenyon's *dictum* as to the right of gardeners to remove buildings and trees erected and planted to carry on the nursery business, says that although it was disapproved by Lord Ellenborough in *Elwes* v. *Maw*, "it is believed to be a correct statement of the law."

A learned writer in 3 Albany Law Journal, 108, after citing the case in the Year Book, ii. 518, referred to in Co. Litt. 53 *a*, observes: "This decision, which is the first of the reported decisions upon the matter, probably checked for a time the enterprise of the villein improver; but that enterprise soon discovered other contrivances whereby to elude or to defeat the landlord's right. These contrivances we shall consider hereafter; for the present we must follow up the effect of the decision itself. It appears, then, that the decision was thoroughly effective, and even final, upon the particular state of matters in respect of which it was pronounced; for although we do indeed find a considerable number of cases, both early and recent (being the cases hereinafter in that relation mentioned), upon matters more or less resembling

this particular state of matters, yet we do not find any other instance of a dispute regarding the identical state of matters, until so recent a date as the beginning of the present century, when the same question was again raised, and apparently in a wilful or intentional manner, in the great case of *Elwes* v. *Maw* (3 East, 38), decided by Lord Ellenborough in 1803. The inducement for bringing this case forward at all at the time appears, as well from the arguments of counsel as from the judgment delivered in it, to have been the hope of being able, upon the strength of the (as we shall see) admitted liberality of the law of fixtures in matters other than the strictly agricultural, to extend the like liberality to the strictly agricultural fixtures also, and thereby to dissipate and to dispel by one decision, conceived in the modern spirit, the rigor of law which had descended without mitigation from the olden times. But the endeavor failed of its object, and the old rigor of the law of agricultural fixtures — where those fixtures were buildings let into the ground — survived then, as it still survives, the noble and learned judge having decided, after an examination of all the cases, that no adjudged case had yet gone the length of establishing that buildings subservient to the purpose of agriculture, as distinguished from those of trade, were removable by the tenant himself who built them during his term."

The law of this country is very lenient toward the tenant in respect to fixtures put on the demised premises by him for the purposes of trade. In *Coombs* v. *Jordan*, 3 Bland Chancery (Maryland), 284; 22 Am. Dec. 236, the court, citing *Elwes* v. *Maw*, said: "A tenant who is a nurseryman and gardener may remove trees, shrubs, &c." Such is the doctrine of *King* v. *Wilcomb*, 7 Barbour (N. Y. Sup. Ct.), 266; *Miller* v. *Baker*, 1 Metcalf (Mass.), 27 (citing *Penton* v. *Robart*); and (*obiter*) *Maples* v. *Millon*, 31 Connecticut, 598.

But nursery trees pass by mortgage. *Adams* v. *Beadle*, 47 Iowa, 439; 29 Am. Rep. 487.

A very strong case, fairly illustrating the prevalent doctrine, is *Conrad* v. *Saginaw M. Co.*, 54 Michigan, 249; 52 Am. Rep. 817, where engines and boilers erected by the tenant on brick and stone foundations, bolted down solidly to the ground, and walled in with brick arches, and dwellings erected by him for his employees, standing on posts or dry stone walls piled together, all intended to be merely accessory to the tenancy, and without intention to make them permanent, and capable of removal without material disturbance to the land, were held to be trade fixtures, removable at or before the termination of the lease. The Court cited no authorities. So in *White's Appeal*, 10 Penn. State, 252, of an engine-house built of stone and wood, with a stone foundation. So in *Brown* v. *Reno E. L. & P. Co.*, 55 Federal Reporter, 229, of a building erected on a solid foundation of masonry, with machinery for carrying on the business of producing electricity. So in *Bliss* v. *Whitney*, 9 Allen (Mass.), 114, of platform scales set in an excavation in a highway, and extending under a building on adjoining land, and up into a room to which that part of the scales by which the weight is ascertained is firmly attached as a fixture. So of a dwelling-house, erected on a foundation of masonry, for carrying on the dairy business as well as for dwelling. *Van Ness* v. *Pacard*, 2 Peters (U. S. Sup. Ct.), 137. Story, J., said (*obiter*): "But between land-

lord and tenant it is not so clear that the rigid rule of the common law, at least as it is expounded in 3 East, 38, was so applicable to their [our ancestors'] situation as to give rise to necessary presumptions in its favor. This country was a wilderness, and its universal policy was to procure its cultivation and improvement. The owner of the soil, as well as the public, had every motive to encourage the tenant to devote himself to agriculture, and to favor any erections which should aid this result; yet in the comparative poverty of the country, what tenant could afford to erect fixtures of much expense or value, if he was to lose his whole interest therein by the very act of erection? His cabin or log hut, however necessary for any improvement of the soil, would cease to be his the moment it was finished." Citing *Penton* v. *Robart*, 2 East, 88 (cited p. 198, *ante*), approved in *Searl* v. *School District*, 133 United States, 561.

In *Wiggins Ferry Co.* v. *O. & M. Railway Co.*, 142 United States, 396, 415, it was held that rails laid by a tenant on leased land for railway purposes were removable. The Court said: "As between landlord and tenant, or one in temporary possession of lands under any agreement whatever for the use of the same, the law is extremely indulgent to the latter with respect to the fixtures for a purpose connected with such temporary possession. [Citing and approving *Van Ness* v. *Pacard*.] Indeed, it is difficult to conceive that any fixture, however solid, permanent, and closely attached to the realty, placed there for the mere purposes of trade, may not be removed at the end of the term. In the case of *Wagner* v. *Cleveland and Toledo Railroad*, 22 Ohio State, 563, it was held that stone piers, built by a railroad company as part of its road on lands over which it had acquired the right of way, did not, though firmly imbedded in the earth, become the property of the owner of the land, and that upon the abandonment of the road the company might remove such structures as personal property." Citing also *Northern Cent. R.* v. *Canton Co.*, 30 Maryland, 347, to the same effect.

In *Ombony* v. *Jones*, 19 New York, 234, a large ball-room, erected on stone piers sunk in the ground by the lessee of an inn used as a summer resort, was held to be a removable trade fixture, citing *Penton* v. *Robart*. This was put on the rather ingenious ground that the innkeeper was exercising a trade. But unless the erection is for a trade purpose, and when it is exclusively for a dwelling, the contrary rule prevails; as in the case of the "summer house" erected on blocks or pillars. *Reid* v. *Kirk*, 12 Richardson Law (So. Car.), 54.

In *Holmes* v. *Tremper*, 20 Johnson, 29; 11 Am. Dec. 238, the tenant was allowed to remove a cider mill and press, the Court saying of *Elwes* v. *Maw*: "This case does not call for any expression of our opinion on the correctness of that decision, nor do we intend to approve or disapprove of it. It is very materially different from the present case." (This case was cited by Story, J., in *Van Ness* v. *Pacard*, *supra*, observing: "It is quite certain that the Supreme Court of New York were not prepared at that time to adopt the doctrine of *Elwes* v. *Maw*, in respect to erections for agricultural purposes.") The same remark would apply to *Whiting* v. *Brastow*, 4 Pickering (Mass.), 310, which related to a padlock and boards forming a bin, the Court observing: "There seems to be no doubt that, according to the later decisions in England, and

several cases in our books, a tenant for life, years, or for will, may, at the expiration of his estate, remove from the freehold all such improvements as were erected or placed there by him, the removal of which will not injure the premises, or put them in a worse plight than they were in when he took possession." Citing *Elwes* v. *Maw*. The last two cases were clearly cases of mere chattels. The language last quoted must be qualified by the condition, that as to real fixtures, the right of removal by a tenant does not exist unless they were affixed with the intention of removal, and were designed for and used in trade. To this effect is *Friedlander* v. *Hewitt*, 30 Nebraska, 783; 9 Lawyers' Rep. Annotated, 700, the case of an annexation to a building of a wooden addition of considerable size, set on wooden posts, but connected with the original structure. So of *Winship* v. *Pitts*, 3 Paige (N. Y. Chan.), 259. *Van Ness* v. *Pacard*, *supra*, recognizes the limitation that a building erected chiefly as a dwelling, and independently of carrying on a trade, would not be removable.

In *Fisher* v. *Dixon*, 12 Cl. & F. 312, Lord CAMPBELL, speaking of the famous cider-mill case, decided by COMYNS, C. B., and cited in *Lawton* v. *Lawton*, says: "We know that a cider-mill is not necessarily affixed to the freehold, a familiar instance of which is given in the Vicar of Wakefield, where when a match was proposed between one of the Misses Primrose and young farmer Flamstead, Moses said, 'I hope that if my sister marries young farmer Flamstead, he will lend us his cider-mill.'" One can hardly regard the simple Moses of that romance as so good legal authority as the Hebrew law-giver.

If however the trade fixture cannot be removed without manifest injury to the soil or building in its original condition, it may may not be removed. So held of a baker's oven, in *Callamore* v. *Gillis*, 149 Massachusetts, 578; 14 Am. St. Rep. 460; 5 Lawyers' Rep. Annotated, 150, distinguishing *Penton* v. *Robart*.

In *McCullough* v. *Irvine's Ex'rs*, 13 Penn. State, 438, the Court observed: "A two-story brick house and a large brick barn — the buildings in controversy — are not instruments or implements of any trade. They are great conveniences, which enable men of all sorts to enjoy the fruits of their labor or trade. If you make these an exception, nothing is essentially of the realty, except the earth itself, and that which is in its bowels. The exceptions have been carried very far by some decisions of the Eastern States, particularly in *Whiting* v. *Brastow*, 4 Pick. 310; *Holmes* v. *Tremper*, 20 Johns. 29; 11 Am. Dec. 238; and *Van Ness* v. *Pacard*, 2 Pet. 143. It is, however, in somewhat loose expressions of the Court in these cases, and not from the cases themselves, that the principle asserted derives some countenance. The first, where the *dicta* are the most latitudinarian, was merely the removal of a padlock and some loose boards, about which there never could have been any reasonable doubt. The second was the removal of a cider-press by the tenant, and there, no reasonable doubt of its being an implement for the manufacture of cider could be entertained. The last case runs to a little more magnitude, for it was removing a sort of a house, but a house erected for the manufacturing of a commodity; and the decision goes expressly upon the ground of its not being a dwelling-house. None of these cases, either expressly or by implica-

tion, overrule *Elwes* v. *Maw*, 3 East, in which it was held that an agricultural tenant could not remove, during the continuance of the lease, a beast-house, carpenter-shop, and fuel-house erected for the use of the farm, even though he left the premises as he found them."

The subject is very learnedly discussed in *Cannon* v. *Hare*, 1 Tennessee Chancery, 22, a case of tenancy for life, citing *Elwes* v. *Maw*, examining the chief authorities on the point in question under this Rule.

It is very generally held that such fixtures must be removed during the term. *Morey* v. *Hoyt*, 62 Connecticut, 542; 19 Lawyers' Rep. Annotated, 611, and cases cited; *Bliss* v. *Whitney*, 9 Allen (Mass.), 114.

FOREIGN ENLISTMENT.

REG. *v.* JAMESON.

(Q. B. D. 1896.)

RULE.

An offence against the Foreign Enlistment Act, 1870 (33 & 34 Vict., c. 90), is committed by a British subject who, although resident outside the dominions of the Crown, takes part in the fitting out within those dominions of a hostile expedition having as its objective a State in friendship with Her Majesty.

Reg. v. Jameson and others.

1896, 2 Q. B. 425–431 (s. c. 65 L. J. M. C. 218; 75 L. T. 77).

Foreign Enlistment Act, 1870 (33 & 34 *Vict.*, *c.* 90). [425]

By s. 14 of the Foreign Enlistment Act, 1870, "If any person within the limits of Her Majesty's dominions, and without the licence of Her Majesty, prepares or fits out any naval or military expedition to proceed against the dominions of any friendly State, the following consequences shall ensue: (1.) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence": —

Held, that, if there be an unlawful preparation of an expedition by some person within Her Majesty's dominions, any British subject who assists in such preparation will be guilty of an offence even though he renders the assistance from a place outside Her Majesty's dominions.

By s. 2 of the said Act, "This Act shall extend to all the dominions of Her

Majesty." And by s. 3, "This Act shall come into operation in the United Kingdom immediately on the passing thereof, and shall be proclaimed in every British possession by the governor thereof as soon as may be after he receives notice of this Act, and shall come into operation in that British possession on the day of such proclamation."

An indictment alleged that "within the limits of Her Majesty's dominions and after the coming into operation therein of the Act called 'The Foreign Enlistment Act, 1870.'" certain offences against the said Act were committed: —

Held, that the indictment sufficiently alleged the Act to have been in operation in that part of Her Majesty's dominions in which the alleged offences were committed.

Motion to quash an indictment.

An indictment framed under s. 11 of the Foreign Enlistment Act, 1870, alleged in the first count that the defendants "within the limits of Her Majesty's dominions and after the coming into operation therein of the Act called 'The Foreign Enlistment Act, 1870,' and without the licence of Her Majesty, were unlawfully engaged in the preparation of a military expedition to proceed against the dominions of a certain friendly State — to wit, the South African Republic." The remaining counts alleged a variety of offences against the said section, in each case alleging that the preparation or fitting out of the expedition was "within [*426] the limits of Her Majesty's dominions and * after the coming into operation therein of the Act." The ninth count alleged that "within the limits of Her Majesty's dominions and after the coming into operation therein of the Act called 'The Foreign Enlistment Act, 1870,' and without the licence of Her Majesty, a military expedition was prepared to proceed against the dominions of a certain friendly State — to wit, the South African Republic; and that (the defendants), after the coming into operation of the said Act, and without the licence of Her Majesty, unlawfully did assist in the preparation of such military expedition." The subsequent counts were variations of the ninth count.

Sir Edward Clarke, Q. C. (Sir Frank Lockwood, Q. C., Carson, Q. C., C. F. Gill, Alfred Lyttelton, J. P. Wallis, Roskill, and H. Spensley with him) for the defendants. — The indictment is bad, for none of the counts contain any allegation that the Foreign Enlistment Act was in force in that part of the Queen's dominions in which the illegal expedition was prepared. The word "therein" is ambiguous, and might mean that the Act was in force in some

other part of the dominions. Further, if the Crown intends to rely on a preparation in a British possession, there is no averment that the Act was duly proclaimed in such possession. But it is a rule of criminal procedure that every fact which constitutes the offence shall be stated in the indictment. The pleading must aver facts, not conclusions of law. In Hawkins' Pleas of the Crown, Bk. II., c. xxv., s. 60, it is laid down that "in an indictment nothing material shall be taken by intendment or implication." In *Rex* v. *Woolcock*, 5 C. & P. 516, on an indictment under the Riot Act for a felony in remaining together one hour after the making of proclamation, it appeared that the words of the proclamation as contained in the book from which it was read differed from the statement of the proclamation in a certain count of the indictment by containing the additional words, "of the reign of." It was held to be a variance. In *Rex* v. *Everett*, 8 B. & C. 114, an information for unlawfully soliciting a custom-house officer to neglect his duty stated that dutiable goods were about to be *imported, that the person solicited was a [*427] custom-house officer, and that it was his duty as such officer to seize and detain all such goods as on importation would be forfeited to the King. The information was held bad on the ground that it was not the duty of every custom-house officer to seize smuggled goods, and that the averment that it was the particular officer's duty was insufficient without showing the special facts from which that duty arose. Here the proclamation of the Act is a material part of the offence. *Reg.* v. *Otway*, 1 Ir. C. L. R. 69; *Walsh* v. *Reg.*, 22 L. R. Ir. 314. But even if the indictment is not bad as a whole, the ninth and subsequent counts are bad, inasmuch as they do not allege that the assistance rendered by the defendants to the other persons engaged in preparing the expedition was rendered within the limits of the Queen's dominions. The Act does not apply s. 11, under which the indictment is framed, outside the dominions, even to British subjects. Every Act is *primâ facie* to be read as only applying within the dominions. *Rosseter* v. *Cahlman*, 22 L. J. Ex. 128. Even if there were no sections in the Act applying in terms to British subjects outside the dominions, s. 11, being silent on the subject, ought to be read as not so applying. But the presumption that it was not intended to apply outside the dominions is strengthened by the fact that there are other sections — *e. g.*, ss. 4, 5 — which expressly

provide that the Act shall apply to certain specified acts done by British subjects outside. Further, if the Act is to be applied to British subjects outside the dominions, there is no averment that the defendants are British subjects.

Sir R. Webster, A.-G., and Sir R. B. Finlay, S.-G. (H. Sutton, C. Mathews, Avory, and J. F. Rawlinson with them), for the Crown. — The indictment sufficiently avers that the Act came into force within the limits of Her Majesty's dominions so far as is material for the purposes of the indictment — that is to say, within the place where the Acts complained of were committed. A distinction is to be drawn between matters of inducement and matters which are the gist of the offence. The former [* 428] (under which head comes the fact of the statute being * in operation in the particular place) may be stated generally. *Reg.* v. *Bidwell*, 1 Den. C. C. 222. The case of *Rex* v. *Everett*, 8 B. & C. 114, belongs to the latter class. There the duty alleged was a special duty lying on the particular custom-house officer, and it was necessary to show how it arose. Here the duty, the breach of which is complained of, is a duty resting on all persons alike. The objections to the ninth and subsequent counts are equally untenable. If there has been an illegal preparation of an expedition within the dominions, the offence of assisting may be committed outside the dominions, at all events by British subjects. Sub-s. 1 of s. 11 purposely omits the words "within the limits of Her Majesty's dominions," for to have inserted them would have tended to defeat the object of the Act. The omission to aver that the defendants are British subjects is not an objection that can be taken to the indictment.

Sir Edward Clarke, Q. C., in reply.

Lord Russell of Killowen, C. J. — This is an application made on behalf of the defendants to quash the indictment, or in the alternative to quash certain counts of the indictment. Such an application is one the granting of which is within certain limits in the discretion of the Court. If the Court should be of opinion that the indictment is clearly bad, or that any counts in it are clearly bad, it would be the duty of the Court to quash the one or the other, as the case might be. If the matter were one of doubt, and if the language of the indictment, or of certain counts in it, were such as to cause embarrassment to the defendants in their defence and to prejudice the fair trial of the case, then the

Court would have discretion to quash the indictment, or such counts of it as might be necessary. We have, however, come to the conclusion that none of the objections which have been raised in this case, either to the indictment as a whole or to any of the counts in it, are sufficient to justify us in quashing either the one or the other.

The first objection which was taken was one which went to the whole indictment — that is to say, if it were a good objection to the first count, with reference to which it was argued, it *would equally be a good objection to the remaining [*429] counts. The count in question is, so far as is material, in the following terms: it charges that the defendants "within the limits of Her Majesty's dominions and after the coming into operation therein of the Act called 'The Foreign Enlistment Act, 1870,' and without the licence of Her Majesty, were unlawfully engaged in the preparation of a military expedition to proceed against the dominions of a certain friendly State." By s. 2 of that Act it is provided that the Act shall extend to all the dominions of Her Majesty; and by s. 3 it is provided that the Act shall come into operation in the United Kingdom immediately on the passing thereof, and in the several British possessions outside the United Kingdom on proclamation thereof in such possessions in the manner provided by that section. And it was argued that the words "after the coming into operation therein" were ambiguous, and that the count was bad as not containing a distinct averment that the Act was in force in that part of Her Majesty's dominions in which the unlawful preparation of the expedition was alleged to have been made. But even in considering the question of the validity of a criminal pleading one must have some regard to the ordinary interpretation of language, and apply some measure of common sense to its construction; and applying that test I cannot doubt that the count states reasonably and intelligibly that the defendants, in a place within Her Majesty's dominions and in which the Act of 1870 was in operation, were engaged in the preparation of an expedition which would be an offence against the Act. That is what the prosecution must prove in fact. They must prove, not that the Act was in force in some part of the dominions of the Crown, but that it was in force in the part in which the illegal preparation took place. Then it was further argued that if the prosecution intend

to rely on a preparation of the expedition in a British possession outside the United Kingdom, inasmuch as s. 3 says that the Act shall not come into force in such British possession until after it has been duly proclaimed there, the count ought to have averred that the Act had been duly proclaimed in the place where the illegal preparation was made, and for want of such [*430] *averment is bad. But that objection is not, in my opinion, one that can be taken to the count. If in the result it be necessary, in order to show that the Act was in operation in the place where the expedition was prepared, to prove that the Act was duly proclaimed there, failure on the part of the Crown to prove such proclamation will be fatal. But it is not a matter that need be averred in the indictment. It is enough for the purposes of the indictment to allege that the Act was in fact in operation in the place in question. I pass on to the objections taken to the ninth and subsequent counts, which I may deal with briefly. But first I should like to make some observations with regard to the rules of construction applicable to statutes such as this. It may be said generally that the area within which a statute is to operate, and the persons against whom it is to operate, are to be gathered from the language and purview of the particular statute. But there may be suggested some general rules — for instance, if there be nothing which points to a contrary intention, the statute will be taken to apply only to the United Kingdom. But whether it be confined in its operation to the United Kingdom, or whether, as is the case here, it be applied to the whole of the Queen's dominions, it will be taken to apply to all the persons in the United Kingdom or in the Queen's dominions, as the case may be, including foreigners who during their residence there owe temporary allegiance to Her Majesty. And, according to its context, it may be taken to apply to the Queen's subjects everywhere, whether within the Queen's dominions or without. One other general canon of construction is this — that if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory. Now apply those considerations to the present case. Sect. 2 provides that " This Act shall

extend to all the dominions of Her Majesty." Therefore the preparations mentioned in s. 11, under which this indictment is framed, are preparations made either by subjects of the Queen or by foreigners in any * part of the Queen's [*431] dominions. And it also seems clear that the provisions of that section were intended to apply to subjects of the Queen wherever they might be, for we must consider the mischief that was aimed at by the Act. I think the objections raised to the ninth and subsequent counts were based on a construction of the statute, both as to the area of its operation and as to the class of persons to whom it is applied, with which I cannot agree. It is no doubt clear that in order to bring a case within s. 11 there must have been a preparation in the Queen's dominions; but I think that, when you have got that fact established, there may be an assistance in such preparation, or an employment of the kind mentioned in the section, outside the Queen's dominions, which will amount to an offence against the Act, if the person rendering such assistance or accepting such employment be a subject of Her Majesty. But then it was argued that these counts contain no averment that the defendants are British subjects. In my judgment that averment is not necessary. If in the course of the trial it turns out that any of the defendants are foreigners, every opportunity will be given to their counsel to take that objection, and to give legal effect to any defence attributable to that fact.

We have not thought it necessary to go through, though we have considered the various cases that have been cited. Many of them belong to a time when the right and justice and substance of the thing were sacrificed to the science of artificial statement. By some of the cases that have been cited we should not consider ourselves bound, but we arrive at the conclusion that none of them throw any real light on the question we have here to consider. None of them lay down any canon applicable to the present case. The result, therefore, will be that the application to quash the indictment as a whole or to quash certain counts in it will be refused.

POLLOCK, B., and HAWKINS, J., concurred.[1]

Application refused.

[1] The defendants were tried at Bar.

ENGLISH NOTES.

The cases that have come up for decision under the Foreign Enlistment Act, 1870, have not been many.

It has been held to be a breach of the Act by dispatching a ship, &c., under section 8, for the owners of an English steam-tug to engage her in the service of towing a prize taken by the French in the war with Germany, from the Downs to Dunkirk. *The Gauntlet, Dyke* v. *Elliott* (Privy Council appeal from Admiralty, 1872), L. R. 4 P. C. 184, 41 L. J. Adm. 65, 26 L. T. 45, 20 W. R. 497: — reversing the decision of the Court of Admiralty (L. R. 3 Adm. 381, 40 L. J. Adm. 34, 25 L. T. 69). On the other hand, it was held by the Court of Admiralty (under the same section) that a vessel dispatched to furnish and lay a submarine telegraph cable between Cherbourg and Verdun, upon a contract made with the French Government in November, 1870, was not a breach of the Act. This judgment appears not to have been appealed. *The International* (1871), L. R. 3 Adm. 321, 40 L. J. Adm. 1, 23 L. T. 787.

It has been held that the offence of "fitting out and preparing an expedition" under section 11 of the Act is sufficiently constituted by the purchase of guns and ammunition in this country and their shipment in order to be put on board a ship in a foreign port, for the purpose of a hostile demonstration against a friendly State, although the shipper takes no part in the overt act of war. *Reg.* v. *Sandoval* (1887), 56 L. T. 526, 35 W. R. 500, 16 Cox C. C. 206.

A case which was in part argued and decided on the ground of the prohibitions of the Foreign Enlistment Act, 1870, was *O'Neill* v. *Armstrong Mitchell & Co.* (C. A. 1895), 1895, 2 Q. B. 418, 65 L. J. Q. B. 7, 73 L. T. 178. The defendants had agreed with the Japanese Government to build for that government and deliver in Japanese waters a vessel of war. The plaintiff was engaged as a seaman on board the ship from this country to Japan. On arrival at Aden, the plaintiff was informed of the breaking out of the war between Japan and China, and heard Her Majesty's Proclamation of Neutrality, which was read to the crew. He accordingly refused to continue to serve on board. It was held that he was justified in so refusing, and was entitled to recover his wages for the whole voyage. There was evidence that the captain of the ship (who was treated as the agent of the defendants) was really acting in the service of the Japanese Government; and that by the act of the Japanese Government in declaring war, an ordinary contract was changed into a contract of a different character, subject to the double risk of capture by the Chinese and of penalties incurred under the Foreign Enlistment Act.

No. 1. — Pasley v. Freeman, 3 T. R. 51. — Rule.

FRAUD.

See also Nos. 76 and 77 of "Contract," 6 R. C. 834 *et seq.*

No. 1. — PASLEY *v.* FREEMAN.

(K. B. 1789.)

No. 2. — DERRY *v.* PEEK.

(H. L. 1889.)

RULE.

When a person, with a view to influence the conduct of another, wilfully leads him into a false belief, and this other person acts accordingly to his hurt, the act is said to have been induced by fraud; and the former is liable to the latter in damages in an action for deceit.

To constitute the fraud, it is not essential that the defendant was, or expected to be, benefited by the deceit; but it is essential that he should have been guilty of wilful falsehood (or at least reckless disregard of truth) in the representation made.

Pasley and another v. Freeman.

3 T. R. 51-65 (1 R. R. 634).

Fraud. — Action for Deceit. — Benefit immaterial.

A false affirmation made by the defendant with intent to defraud the [51] plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit. In such an action, it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is.

This was an action in the nature of a writ of deceit; to which the defendant pleaded the general issue. And after a verdict for the plaintiffs on the third count a motion was made in arrest of judgment.

The third count was as follows: "And whereas also the said Joseph Freeman afterwards, to wit, on the 21st day of February,

in the year of our Lord 1787, at London aforesaid, in the parish and ward aforesaid, further intending to deceive and defraud the said John Pasley and Edward, did wrongfully and deceitfully encourage and persuade the said John Pasley and Edward to sell and deliver to the said John Christopher Falch divers other goods, wares, and merchandises, to wit, sixteen other bags of cochineal of great value, to wit, of the value of £2634 16*s.* 1*d.*, upon trust and credit; and did for that purpose then and there falsely, deceitfully, and fraudulently assert and affirm to the said John Pasley and Edward that the said John Christopher then and there was a person safely to be trusted and given credit to in that respect; and did thereby falsely, fraudulently, and deceitfully cause and procure the said John Pasley and Edward to sell and deliver the said last-mentioned goods, wares, and merchandises, upon trust and credit, to the said John Christopher; and in fact they the said John Pasley and Edward, confiding in and giving credit to the said last-mentioned assertion and affirmation of the said Joseph, and believing the same to be true, and not knowing the contrary thereof, did afterwards, to wit, on the 28th day of February, in the year of our Lord 1787, at London aforesaid, in the parish and ward aforesaid, sell and deliver the said last-mentioned goods, wares, and merchandises, upon trust and credit, to the said John Christopher; whereas in truth and in fact, at the time of the said Joseph's making his said last-mentioned assertion and affirmation, the said John Christopher was not then and there a person safely to be trusted and given credit to in that respect, and the said Joseph well knew the same, to wit, at London aforesaid, in the parish and ward aforesaid. And the said John Pasley and Edward further say, that the said John Christopher hath not, nor hath any other person on his behalf, paid to the said John Pasley and Edward, or either of them, the said sum of £2634 [* 52] 16*s.* 1*d.*, last mentioned, * or any part thereof, for the said last-mentioned goods, wares, and merchandises; but, on the contrary, the said John Christopher then was, and still is, wholly unable to pay the said sum of money last mentioned, or any part thereof, to the said John Pasley and Edward, to wit, at London aforesaid, in the parish and ward aforesaid; and the said John Pasley and Edward aver that the said Joseph falsely and fraudulently deceived them in this, that at the time of his making his said last-mentioned assertion and affirmation, the said John

Christopher was not a person safely to be trusted or given credit to in that respect as aforesaid, and the said Joseph then well knew the same, to wit, at London aforesaid, in the parish and ward aforesaid; by reason of which said last-mentioned false, fraudulent, and deceitful assertion and affirmation of the said Joseph, the said John Pasley and Edward have been deceived and imposed upon, and have wholly lost the said last-mentioned goods, wares, and merchandises, and the value thereof, to wit, at London aforesaid, in the parish and ward aforesaid; to the damage," &c.

Application was first made for a new trial, which, after argument, was refused; and then this motion in arrest of judgment. Wood argued for the plaintiffs, and Russell for the defendant, in the last term; but as the Court went so fully into this subject in giving their opinions, it is unnecessary to give the arguments at the bar.

The Court took time to consider of this matter, and now delivered their opinions *seriatim*.

Grose, J. — Upon the face of this count in the declaration, no privity of contract is stated between the parties. No consideration arises to the defendant; and he is in no situation in which the law considers him in any trust, or in which it demands from him any account of the credit of Falch. He appears not to be interested in any transaction between the plaintiffs and Falch, nor to have colluded with them; but he knowingly asserted a falsehood, by saying that Falch might be safely entrusted with the goods, and given credit to, for the purpose of inducing the plaintiffs to trust him with them, by which the plaintiffs lost the value of the goods. Then this is an action against the defendant for making a false affirmation, or telling a lie, respecting the credit of a third person, with intent to deceive, by which the third person was damnified; and for the damages * suffered, the [* 53] plaintiffs contend that the defendant is answerable in an action upon the case. It is admitted that the action is new in point of precedent; but it is insisted that the law recognises principles on which it may be supported. The principle on which it is contended to lie is, that wherever deceit or falsehood is practised to the detriment of another, the law will give redress. This proposition I controvert; and shall endeavour to show, that in every case where deceit or falsehood is practised to the detriment of another, the law will not give redress; and I say that by the

law, as it now stands, no action lies against any person standing in the predicament of this defendant for the false affirmation stated in the declaration. If the action can be supported it must be upon the ground that there exists in this case what the law deems *damnum cum injuria*. If it does, I admit that the action lies; and I admit that upon the verdict found the plaintiffs appear to have been damnified. But whether there has been *injuria*, a wrong, a tort, for which an action lies, is matter of law. The tort complained of is the false affirmation made with intent to deceive; and it is said to be an action upon the case analogous to the old writ of deceit. When this was first argued at the bar, on the motion for a new trial, I confess I thought it reasonable that the action should lie; but, on looking into the old books for cases in which the old action of deceit has been maintained upon the false affirmation of the defendant, I have changed my opinion. The cases on this head are brought together in Bro., Tit. Deceit, pl. 29, and in Fitz. Abr. I have likewise looked into Danvers, Kitchins, and Comyns, and I have not met with any case of an action upon a false affirmation except against a party to a contract, and where there is a promise, either express or implied, that the fact is true, which is misrepresented; and no other case has been cited at the bar. Then if no such case has ever existed, it furnishes a strong objection against the action, which is brought for the first time for a supposed injury, which has been daily committed for centuries past; for I believe there has been no time when men have not been constantly damnified by the fraudulent misrepresentations of others: and if such an action would have lain, there certainly has been, and will be, a plentiful source of litigation, of which the public are not hitherto aware. A variety of cases may be put: suppose a man recommends an estate [* 54] * to another, as knowing it to be of greater value than it is; when the purchaser has bought it, he discovers the defect, and sells the estate for less than he gave; why may not an action be brought for the loss upon any principle that will support this action? And yet such an action has never been attempted. Or, suppose a person present at the sale of a horse asserts that he was his horse, and that he knows him to be sound and sure-footed, when in fact the horse is neither the one or the other; according to the principle contended for by the plaintiffs, an action lies against the person present as well as the seller; and the purchaser

has two securities. And even in this very case, if the action lies, the plaintiffs will stand in a peculiarly fortunate predicament, for then they will have the responsibility both of Falch and the defendant. And they will be in a better situation than they would have been if, in the conversation that passed between them and the defendant, instead of asserting that Falch might safely be trusted, the defendant had said, "If he do not pay for the goods, I will;" for then, undoubtedly, an action would not have lain against the defendant. Other and stronger cases may be put of actions that must necessarily spring out of any principle upon which this can be supported, and yet which were never thought of till the present action was brought. Upon what principle is this act said to be an injury? The plaintiffs say, on the ground that when the question was asked the defendant was bound to tell the truth. There are cases, I admit, where a man is bound not to misrepresent, but to tell the truth; but no such case has been cited, except in the case of contracts; and all the cases of deceit for misinformation may, it seems to me, be turned into actions of assumpsit. And so far from a person being bound in a case like the present to tell the truth, the books supply me with a variety of cases in which even the contracting party is not liable for a misrepresentation. There are cases of two sorts, in which, though a man is deceived, he can maintain no action. The first class of cases (though not analogous to the present) is, where the affirmation is that the thing sold has not a defect which is a visible one; there the imposition, the fraudulent intent, is admitted, but it is no tort. The second head of cases is, where the affirmation is (what is called in some of the books) a nude assertion; such as the party deceived may exercise his own *judg- [*55] ment upon; as where it is matter of opinion, where he may make inquiries into the truth of the assertion, and it becomes his own fault from laches that he is deceived. 1 Ro. Abr. 101; Yelv. 20; 1 Sid. 146; Cro. Jac. 386, *Bayly* v. *Merrel*. In *Harrey* v. *Young*, Yelv. 20, J. S., who had a term for years, affirmed to J. D. that the term was worth £150 to be sold, upon which J. D. gave £150, and afterwards could not get more than £100 for it, and then brought his action; and it was alleged that this matter did not prove any fraud, for it was only a naked assertion that the term was worth so much, and it was the plaintiff's folly to give credit to such assertion. But if the defendant had warranted the

term to be of such a value to be sold, and upon that the plaintiff had bought it, it would have been otherwise; for the warranty given by the defendant is a matter to induce confidence and trust in the plaintiff. This case, and the passage in 1 Ro. Abr. 101, are recognised in 1 Sid. 146. How, then, are the cases? None exist, in which such an action as the present has been brought; none, in which any principle applicable to the present case has been laid down to prove that it will lie; not even a *dictum*. But from the cases cited, some principles may be extracted to show that it cannot be sustained: 1st, That what is fraud, which will support an action, is matter of law. 2dly, That in every case of a fraudulent misrepresentation attended with damage, an action will not lie even between contracting parties. 3dly, That if the assertion be a nude assertion, it is that sort of misrepresentation the truth of which does not lie merely in the knowledge of the defendant, but may be inquired into, and the plaintiff is bound so to do; and he cannot recover a damage which he has suffered by his laches. Then let us consider how far the facts of the case come within the last of these principles. The misrepresentation stated in the declaration is respecting the credit of Falch; the defendant asserted that the plaintiffs might safely give him credit: but credit to which a man is entitled is matter of judgment and opinion, on which different men might form different opinions, and upon which the plaintiffs might form their own: to mislead which no fact to prove the good credit of Falch is falsely asserted. It seems to me, therefore, that any assertion relative to credit, especially where the party making it has no interest, nor is in any collusion with the person respecting whose credit the [* 56] assertion is made, is like the case in * Yelverton respecting the value of the term. But at any rate it is not an assertion of a fact peculiarly in the knowledge of the defendant. Whether Falch deserved credit depended on the opinion of many; for credit exists on the good opinion of many. Respecting this, the plaintiffs might have inquired of others, who knew as much as the defendant; it was their fault that they did not, and they have suffered damage by their own laches. It was owing to their own gross negligence that they gave credence to the assertion of the defendant, without taking pains to satisfy themselves that that assertion was founded in fact, as in the case of *Bayly* v. *Merrel*. I am therefore of opinion that this action is as novel in

principle as it is in precedent, that it is against the principles to be collected from analogous cases, and consequently that it cannot be maintained.

Buller, J. — The foundation of this action is fraud and deceit in the defendant, and damage to the plaintiffs. And the question is, Whether an action thus founded can be sustained in a Court of law? Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies. Per Croke, J., 3 Bulst. 95. But it is contended that this was a bare naked lie; that, as no collusion with Falch is charged, it does not amount to a fraud: and, if there were any fraud, the nature of it is not stated. And it was supposed by the counsel who originally made the motion, that no action could be maintained, unless the defendant, who made this false assertion, had an interest in so doing. I agree that an action cannot be supported for telling a bare naked lie; but that I define to be, saying a thing which is false, knowing or not knowing it to be so, and without any design to injure, cheat, or deceive another person. Every deceit comprehends a lie; but a deceit is more than a lie on account of the view with which it is practised, it's being coupled with some dealing, and the injury which it is calculated to occasion, and does occasion, to another person. Deceit is a very extensive head in the law; and it will be proper to take a short view of some of the cases which have existed on the subject, to see how far the Courts have gone, and what are the principles upon which they have decided. I lay out of the question the case in 2 Cro. 196, and all other cases which relate to freehold interests in lands; for they go on the special reason that the seller cannot have them without title, and the buyer is at his peril to see it. But the cases cited on the part * of the defendant, deserving notice, are [* 57] Yelv. 20, Carth. 90, Salk. 210. The first of these has been fully stated by my Brother Grose; but it is to be observed that the book does not affect to give the reasons on which the Court delivered their judgment; but it is a case quoted by counsel at the bar, who mentions what was alleged by counsel in the other case. If the Court went on a distinction between the words "warranty" and "affirmation," the case is not law, for it was rightly held by Holt, C. J., in the subsequent cases, and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appear on evidence to have been so intended.

But the true ground of that determination was, that the assertion was of mere matter of judgment and opinion; of a matter of which the defendant had no particular knowledge, but of which many men will be of many minds, and which is often governed by whim and caprice. Judgment or opinion, in such case, implies no knowledge. And here this case differs materially from that in Yelverton; my Brother Grose considers this assertion as mere matter of opinion only; but I differ from him in that respect. For it is stated on this record that the defendant knew that the fact was false. The case in Yelv. admits that if there had been fraud it would have been otherwise. The case of *Crosse* v. *Gardner*, Carth. 90, was upon an affirmation that oxen, which the defendant had in his possession and sold to the plaintiff, were his, when in truth they belonged to another person. The objection against the action was that the declaration neither stated that the defendant deceitfully sold them, or that he knew them to be the property of another person; and a man may be mistaken in his property and right to a thing without any fraud or ill intent. *Ex concessis*, therefore, if there were fraud or deceit the action would lie; and knowledge of the falsehood of the thing asserted is fraud and deceit. But notwithstanding these objections, the Court held that the action lay, because the plaintiff had no means of knowing to whom the property belonged but only by the possession. And in Cro. Jac. 474, it was held, that, affirming them to be his, knowing them to be a stranger's, is the offence and cause of action. The case of *Medina* v. *Stoughton*, Salk. 210, in the point of decision, is the same as *Crosse* v. *Gardner;* but there is an *obiter dictum* of Holt, C. J., that where the seller of a personal thing is out of possession, it is otherwise, for there [* 58] * may be room to question the seller's title, and *caveat emptor* in such case to have an express warranty or a good title. This distinction by Holt is not mentioned by Lord Raym. 593, who reports the same case; and if an affirmation at the time of sale be a warranty, I cannot feel a distinction between the vendor's being in or out of possession. The thing is bought of him, and in consequence of his assertion; and if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on. These cases then are so far from being authorities against the present action, that they show that if there

be fraud or deceit the action will lie; and that knowledge of the falsehood of the thing asserted is fraud and deceit. Collusion then is not necessary to constitute fraud. In the case of a conspiracy, there must be a collusion between two or more to support an indictment; but if one man alone be guilty of an offence, which, if practised by two, would be the subject of an indictment for a conspiracy, he is civilly liable in an action for reparation of damages at the suit of the person injured. That knowledge of the falsehood of the thing asserted constitutes fraud, though there be no collusion, is further proved by the case of *Risney* v. *Selby*, Salk. 211, where, upon a treaty for the purchase of a house, the defendant fraudulently affirmed that the rent was £30 per annum, when it was only £20 per annum, and the plaintiff had his judgment; for the value of the rent is a matter which lies in the private knowledge of the landlord and tenant, and if they affirm the rent to be more than it is, the purchaser is cheated, and ought to have a remedy for it. No collusion was there stated, nor does it appear that the tenant was ever asked a question about the rent, and yet the purchaser might have applied to him for information; but the judgment proceeded wholly upon the ground that the defendant knew that what he asserted was false. And by the words of the book it seems that if the tenant had said the same thing he also would have been liable to an action. If so, that would be an answer to the objection, that the defendant in this case had no interest in the assertion which he made. But I shall not leave this point on the *dictum* or inference which may be collected from that case. If A by fraud and deceit cheat B out of £1000, it makes no difference to B whether A or any other person pockets that £1000. He has lost his money, * and [* 59] if he can fix fraud upon A, reason seems to say that he has a right to seek satisfaction against him. Authorities are not wanting on this point. 1 Ro. Abr. 91, pl. 7. If the vendor affirm that the goods are the goods of a stranger, his friend, and that he had authority from him to sell them, and upon that B buy them, when in truth they are the goods of another, yet if he sell them fraudulently and falsely on this pretence of authority, though he do not warrant them, and though it be not averred that he sold them knowing them to be the goods of the stranger, yet B shall have an action for this deceit. It is not clear from this case whether the fraud consisted in having no authority from his friend,

or in knowing that the goods belonged to another person; what is said at the end of the case only proves that "falsely" and "fraudulently" are equivalent to "knowingly." If the first were the fact in the case, namely, that he had no authority, the case does not apply to this point; but if he had an authority from his friend, whatever the goods were sold for his friend was entitled to, and he had no interest in them. But however that might be, the next case admits of no doubt. For in 1 Ro. Abr. 100, pl. 1, it was held that if a man acknowledge a fine in my name, or acknowledge a judgment in an action in my name of my land, this shall bind me for ever; and therefore I may have a writ of deceit against him who acknowledged it. So if a man acknowledge a recognisance, statute merchant, or staple, there is no foundation for supposing that in that case the person acknowledging the fine or judgment was the same person to whom it was so acknowledged. If that had been necessary, it would have been so stated; but if it were not so, he who acknowledged the fine had no interest in it. Again, in 1 Ro. Abr. 95, l. 25, it is said, if my servant lease my land to another for years, reserving a rent to me, and to persuade the lessee to accept it, he promise that he shall enjoy the land without incumbrances; if the land be incumbered, &c., the lessee may have an action on the case against my servant, because he made an express warranty. Here, then, is a case in which the party had no interest whatever. The same case is reported in Cro. Jac. 425, but no notice is taken of this point; probably because the reporter thought it immaterial whether the warranty be by the master or servant. And if the warranty be made at the time of the sale, or before the sale, and the sale is upon the faith of the warranty, I can see no distinction between [*60] * the cases. The gift of the action is fraud and deceit, and if that fraud and deceit can be fixed by evidence on one who had no interest in his iniquity, it proves his malice to be the greater. But it was objected to this declaration, that if there were any fraud, the nature of it is not stated; to this the declaration itself is so direct an answer that the case admits of no other. The fraud is that the defendant procured the plaintiffs to sell goods on credit to one whom they would not otherwise have trusted, by asserting that which he knew to be false. Here then is the fraud, and the means by which it was committed; and it was done with a view to enrich Falch by empoverishing the plain-

tiffs, or, in other words, by cheating the plaintiffs out of their goods. The cases which I have stated, and Sid. 146, and 1 Keb. 522, prove that the declaration states more than is necessary; for *fraudulenter* without *sciens*, or *sciens* without *fraudulenter*, would be sufficient to support the action. But, as Mr. JUSTICE TWISDEN said in that case, the fraud must be proved. The assertion alone will not maintain the action; but the plaintiff must go on to prove that it was false, and that the defendant knew it to be so: by what means that proof is to be made out in evidence need not be stated in the declaration. Some general arguments were urged at the bar to show that mischiefs and inconveniences would arise if this action were sustained; for if a man, who is asked a question respecting another's responsibility, hesitate, or is silent, he blasts the character of the tradesman; and if he say that he is insolvent he may not be able to prove it. But let us see what is contended for: it is nothing less than that a man may assert that which he knows to be false, and thereby do an everlasting injury to his neighbour, and yet not be answerable for it. This is as repugnant to law as it is to morality. Then it is said that the plaintiffs had no right to ask the question of the defendant. But I do not agree in that: for the plaintiffs had an interest in knowing what the credit of Falch was. It was not the inquiry of idle curiosity, but it was to govern a very extensive concern. The defendant undoubtedly had his option to give an answer to the question, or not; but if he gave none, or said he did not know, it is impossible for any Court of justice to adopt the possible inferences of a suspicious mind as a ground for grave judgment. All that is required of a person in the defendant's situation is, that he shall give no answer, or that if he do, he shall answer according to the truth as * far as he knows. The reasoning [*61] in the case of *Coggs* v. *Bernard* (Ld. Raym. 909), which was cited by the plaintiff's counsel, is, I think, very applicable to this part of the case. If the answer import insolvency, it is not necessary that the defendant should be able to prove that insolvency to a jury; for the law protects a man in giving that answer, if he does it in confidence and without malice. No action can be maintained against him for giving such an answer unless express malice can be proved. From the circumstance of the law giving that protection, it seems to follow, as a necessary consequence, that the law not only gives sanction to the question, but requires that, if it be

answered at all, it shall be answered honestly. There is a case in the books which, though not much to be relied on, yet serves to show that this kind of conduct has never been thought innocent in Westminster Hall. In *R.* v. *Gunston*, 1 Str. 583, the defendant was indicted for pretending that a person of no reputation was Sir J. Thornycraft, whereby the prosecutor was induced to trust him; and the Court refused to grant a *certiorari*, unless a special ground were laid for it. If the assertion in that case had been wholly innocent the Court would not have hesitated a moment. How, indeed, an indictment could be maintained for that I do not well understand; nor have I learned what became of it. The objection to the indictment is, that it was merely a private injury; but that is no answer to an action. And if a man will wickedly assert that which he knows to be false, and thereby draws his neighbour into a heavy loss, even though it be under the specious pretence of serving his friend, I say, "ausis talibus istis non jura subserviunt."

Ashhurst, J. — The objection in this case, which is to the third count in the declaration, is, that it contains only a bare assertion, and does not state that the defendant had any interest, or that he colluded with the other party who had. But I am of opinion that the action lies, notwithstanding this objection. It seems to me that the rule laid down by Croke, J., in *Bayly* v. *Merrell*, 3 Bulst. 95, is a sound and solid principle, — namely, that fraud without damage, or damage without fraud, will not found an action; but where both concur, an action will lie. The principle is not denied by the other Judges, but only the application of it, because the party injured there, who was the carrier, had [*62] *the means of attaining certain knowledge in his own power, namely, by weighing the goods; and therefore it was a foolish credulity against which the law will not relieve. But that is not the case here, for it is expressly charged that the defendant knew the falsity of the allegation, and which the jury have found to be true; but *non constat* that the plaintiffs knew it, or had any means of knowing it, but trusted to the veracity of the defendant. And many reasons may occur why the defendant might know that fact better than the plaintiffs; as if there had before this event subsisted a partnership between him and Falch, which had been dissolved; but, at any rate, it is stated as a fact that he knew it. It is admitted that a fraudulent affirmation, when the party mak-

ing it has an interest, is a ground of action; as in *Risney* v. *Selby*, Salk. 211, which was a false affirmation made to a purchaser as to the rent of a farm which the defendant was in treaty to sell to him. But it was argued that the action lies not unless where the party making it has an interest, or colludes with one who has. I do not recollect that any case was cited which proves such a position; but if there were any such to be found, I should not hesitate to say that it could not be law; for I have so great a veneration for the law as to suppose that nothing can be law which is not founded in common sense or common honesty. For the gist of the action is the injury done to the plaintiff, and not whether the defendant meant to be a gainer by it: what is it to the plaintiff whether the defendant was or was not to gain by it; the injury to him is the same. And it should seem that it ought more emphatically to lie against him, as the malice is more diabolical, if he had not the temptation of gain. For the same reason, it cannot be necessary that the defendant should collude with one who has an interest. But if collusion were necessary, there seems all the reason in the world to suppose both interest and collusion from the nature of the act; for it is to be hoped that there is not to be found a disposition so diabolical as to prompt any man to injure another without benefiting himself. But it is said that if this be determined to be law, any man may have an action brought against him for telling a lie, by the crediting of which another happens eventually to be injured. But this consequence by no means follows; for in order to make it actionable, it must be accompanied with the circumstances averred in this count, namely, that the defendant, "intending *to deceive and defraud [*63] the plaintiffs, did deceitfully encourage and persuade them to do the act, and for that purpose made the false affirmation, in consequence of which they did the act." Any lie accompanied with those circumstances I should clearly hold to be the subject of an action; but not a mere lie thrown out at random without any intention of hurting anybody, but which some person was foolish enough to act upon; for the *quo animo* is a great part of the gist of the action. Another argument which has been made use of is, that this is a new case, and that there is no precedent of such an action. Where cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is

only new in the instance, and the only question is upon the application of a principle recognised in the law to such new case, it will be just as competent to Courts of justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago. If it were not, we ought to blot out of our law books one-fourth part of the cases that are to be found in them. The same objection might, in my opinion, have been made with much greater reason in the case of *Coggs* v. *Bernard*, for there the defendant, so far from meaning an injury, meant a kindness, though he was not so careful as he should have been in the execution of what he undertook. And, indeed, the principle of the case does not, in my opinion, seem so clear as that of the case now before us, and yet that case has always been received as law. Indeed one great reason, perhaps, why this action has never occurred, may be that it is not likely that such a species of fraud should be practised unless the party is in some way interested. Therefore I think the rule for arresting the judgment ought to be discharged.

Lord Kenyon, C. J. — I am not desirous of entering very fully into the discussion of this subject, as the argument comes to me quite exhausted by what has been said by my brothers. But still I will say a few words as to the grounds upon which my opinion is formed. All laws stand on the best and broadest basis which go to enforce moral and social duties. Though, indeed, it is not every moral and social duty the neglect of which is the ground of an action. For there are which are called in the civil law duties of imperfect obligation, for the enforcing of which no [* 64] action lies. There are many cases where * the pure effusion of a good mind may induce the performance of particular duties, which yet cannot be enforced by municipal laws. But there are certain duties, the non-performance of which the jurisprudence of this country has made the subject of a civil action. And I find it laid down by the Lord Ch. B. Comyns, Com. Dig. Tit. ("Action upon the case for a deceit") A. 1, that "an action upon the case for a deceit lies when a man does any deceit to the damage of another." He has not, indeed, cited any authority for this opinion; but his opinion alone is of great authority, since he was considered by his contemporaries as the most able lawyer in Westminster Hall. Let us, however, consider whether that proposition is not supported by the invariable principle in all the cases

on this subject. In 3 Bulstr. 95, it was held by CROKE, J., that "fraud without damage, or damage without fraud, gives no cause of action; but where these two do concur, there an action lieth." It is true, as has been already observed, that the judges were of opinion in that case that the action did not lie on other grounds. But consider what those grounds were. DODDERIDGE, J., said, "If we shall give way to this, then every carrier would have an action upon the case; but he shall not have any action for this, because it is merely his own default that he did not weigh it." Undoubtedly, where the common prudence and caution of man are sufficient to guard him, the law will not protect him in his negligence. And in that case, as reported in Cro. Jac. 386, the negligence of the plaintiff himself was the cause for which the Court held that the action was not maintainable. Then how does the principle of that case apply to the present? There are many situations in life, and particularly in the commercial world, where a man cannot by any diligence inform himself of the degree of credit which ought to be given to the persons with whom he deals; in which cases he must apply to those whose sources of intelligence enable them to give that information. The law of prudence leads him to apply to them, and the law of morality ought to induce them to give the information required. In the case of Bulstrode the carrier might have weighed the goods himself; but in this case the plaintiffs had no means of knowing the state of Falch's credit but by an application to his neighbours. The same observation may be made to the cases cited by the defendant's counsel respecting titles to real property. For a person does not have recourse to common conversations to know * the title [* 65] of an estate which he is about to purchase; but he may inspect the title-deeds; and he does not use common prudence if he rely on any other security. In the case in Bulstrode, the Court seemed to consider that *damnum* and *injuria* are the grounds of this action; and they all admitted that, if they had existed in that case, the action would have lain there; for the rest of the Judges did not controvert the opinion of CROKE, J., but denied the application of it to that particular case. Then it was contended here that the action cannot be maintained for telling a naked lie; but that proposition is to be taken *sub modo*. If, indeed, no injury is occasioned by the lie, it is not actionable; but if it be attended with a damage it then becomes the subject of

an action. As calling a woman a whore, if she sustain no damage by it, is not actionable; but if she loses her marriage by it, then she may recover satisfaction in damages. But in this case the two grounds of the action concur; here are both the *damnum et injuria*. The plaintiffs applied to the defendant, telling him that they were going to deal with Falch, and desiring to be informed of his credit, when the defendant fraudulently, and knowing it to be otherwise, and with a design to deceive the plaintiffs, made the false affirmation which is stated on the record, by which they sustained a considerable damage. Then can a doubt be entertained for a moment but that this is injurious to the plaintiffs? If this be not an injury, I do not know how to define the word. Then as to the loss, this is stated in the declaration, and found by the verdict. Several of the words stated in this declaration, and particularly "*fraudulenter*," did not occur in several of the cases cited. It is admitted that the defendant's conduct was highly immoral and detrimental to society. And I am of opinion that the action is maintainable on the grounds of deceit in the defendant, and injury and loss to the plaintiffs.

Rule for arresting the judgment discharged.

Derry and others, appellants, v. Sir Henry William Peek, Baronet, respondent.

14 App. Cas. 337-380 (s. c. 58 L. J. Ch. 864; 61 L. T. 265; 38 W. R. 33).

[337] *Fraud. — Action of Deceit. — Misrepresentation in Prospectus.*

In an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shown that a false representation has been made knowingly or without belief in its truth, or recklessly, without caring whether it be true or false.

A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud, but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent, and does not render the person making it liable to an action of deceit.

A special Act incorporating a tramway company provided that the carriages might be moved by animal power, and, with the consent of the Board of Trade, by steam power. The directors issued a prospectus containing a statement that by their special Act the company had the right to use steam power instead of horses. The plaintiff took shares on the faith of this statement. The Board of Trade afterwards refused their consent to the use of steam power and the company was wound up. The plaintiff having brought an action of deceit against the directors founded upon the false statement: —

No. 2. — Derry v. Peek, 14 App. Cas. 337, 338.

Held, reversing the decision of the Court of Appeal and restoring the decision of STIRLING, J. (37 Ch. D. 541), that the defendants were not liable, the statement as to steam power having been made by them in the honest belief that it was true.

Appeal from a decision of the Court of Appeal. The following is a brief summary of the facts: —

By a special Act (45 & 46 Vict., c. clix.) the Plymouth, Devonport, and District Tramways Company was authorised to make certain tramways.

* By sect. 35 the carriages used on the tramways might [* 338] be moved by animal power and, with the consent of the Board of Trade, by steam or any mechanical power for fixed periods and subject to the regulations of the Board.

By sect. 34 of the Tramways Act, 1870 (33 & 34 Vict., c. 78), which section was incorporated in the special Act, "all carriages used on any tramway shall be moved by the power prescribed by the special Act, and where no such power is prescribed, by animal power only."

In February, 1883, the appellants, as directors of the company, issued a prospectus containing the following paragraph: —

"One great feature of this undertaking, to which considerable importance should be attached, is, that by the special Act of Parliament obtained, the company has the right to use steam or mechanical motive power, instead of horses, and it is fully expected that by means of this a considerable saving will result in the working expenses of the line as compared with other tramways worked by horses."

Soon after the issue of the prospectus the respondent relying, as he alleged, upon the representations in this paragraph, and believing that the company had an absolute right to use steam and other mechanical power, applied for and obtained shares in the company.

The company proceeded to make tramways, but the Board of Trade refused to consent to the use of steam or mechanical power except on certain portions of the tramways.

In the result the company was wound up, and the respondent, in 1885, brought an action of deceit against the appellants, claiming damages for the fraudulent misrepresentations of the defendants, whereby the plaintiff was induced to take shares in the company.

No. 2. — Derry v. Peek, 14 App. Cas. 338, 339.

At the trial before STIRLING, J., the plaintiff and defendants were called as witnesses. The effect given to their evidence in this House will appear from the judgments of noble and learned Lords.

STIRLING, J., dismissed the action; but that decision was reversed by the Court of Appeal (COTTON, L. J., Sir J. HANNEN, and LOPES, L. J.), who held that the defendants were liable to make good to the plaintiff the loss sustained by his taking [* 339] the shares, * and ordered an inquiry (37 Ch. D. 541, 591). Against this decision the defendants appealed.

March 28, 29; April 5, 9, 11. Sir Horace Davey, Q. C., and Moulton, Q. C. (M. Muir Mackenzie with them), for the appellants: —

The law as laid down by the Court of Appeal goes much further than any previous decision, and is unsound. To support an action of deceit it always was necessary at common law, and still is both there and in Chancery to prove fraud, *i.e.*, that the thing was done fraudulently. Fraud never has been and never will be exhaustively defined, the forms which deceit may take being so many and various. There is a negative characteristic: it must be something which an honest man would not do; not merely what a logical or clear-headed man would not do. However unbusinesslike a man may be, he is not fraudulent if he acts honestly. The natural consequences of words or acts must be taken to have been intended, but not so as to impute fraud to honesty. No honest mistake, no misake not prompted by a dishonest intention, is fraud. The shape of the mistake does not make it more or less a fraud if it is a mistake. Once establish that a man honestly intended to do his duty, the consequences cannot turn his words or acts into a fraud. There may be an obligation to see that no untrue statement is made, but the failure to meet that obligation is not fraud, if there is no dishonest intention. The statement may be inaccurate, yet if the defendants honestly — though mistakenly — believed that it substantially represented the truth, there is no fraud, and an action of deceit will not lie. The decision of the Court of Appeal is that to such a statement the law attaches a meaning which makes it fraudulent. A material misstatement may be a ground for rescinding the contract, but the consequences of fraud and of breach of contract are widely different. In an action for breach of contract the defendant must

make good his words. In an action founded on fraud he must bear the whole of the consequences which have been induced by the fraudulent statement, which may be very extensive. The essence of fraud is the tricking a person into the bargain. If the fact that the consent of the Board of Trade * was [* 340] necessary was suppressed by these defendants in order to make the bait more alluring there was fraud. The issue then is one of fact, Was there an intention to make the bait more alluring? It is not the carelessness leading to an untrue statement which makes fraud: it is the carelessness whether the statement is untrue or not. It is in this sense that the authorities have held defendants liable for fraud when they have made untrue statements "recklessly." The above propositions are the result of the authorities. The law laid down in the earlier cases is well exemplified by *Taylor* v. *Ashton*, 11 M. & W. 401, where, however, the headnote does not truly represent the effect of the decision, and *Joliffe* v. *Baker*, 11 Q. B. D. 255. In *Polhill* v. *Walter*, 3 B. & Ad. 114, which may be relied on by the respondent, the Court considered that the misrepresentation was made by the defendant, knowing it to be untrue. The idea that something less than fraud was necessary to found an action of deceit crept in first in Lord CHELMSFORD'S observations in *Western Bank of Scotland* v. *Addie*, L. Rep. 1 H. L. (Sc.) 145, 162, and was extended by COTTON, L. J., in *Weir* v. *Bell*, 3 Ex. D., at p. 242, where he treats "recklessly" as if it meant "negligently," whereas it means "indifferent whether the statement be true or false." This confusion has arisen mainly since the Judicature Act, actions of deceit being tried in Chancery by Judges who, sitting without juries, have confounded issues of fact with issues of law. Here the Court of Appeal held that an action of deceit lies if the defendant makes an untrue statement, without reasonable ground for believing it to be true, though he did, in fact, honestly believe it to be true. If that be the law a negligent, improvident, or wrong-headed man is a fraudulent man. A want of reasonable ground may be evidence of fraud, but it is not the same thing as fraud.

As to the facts, STIRLING, J., found that the defendants believed the misstatement to be true, and that finding ought to be conclusive. The Court of Appeal do not contradict that finding.

The misstatement complained of really meant that the company

had obtained the necessary statutory authority to use steam power, without which authority no consents could have given [*341] *authority, because by the Tramways Act, 1870 (33 & 34 Vict., c. 78, s. 34), steam power is prohibited except where the special Act authorises steam power. It may be that the defendants knew the statement was not strictly accurate; but if so, they honestly thought that the statement conveyed a substantially accurate representation of the fact, either because they thought it not worth while to encumber the prospectus with the qualifications, or because those qualifications were not present to their minds when they made the statement. In the prospectus reference is made to the special Act, so that any one who consulted the Act could see for himself what the authority was.

Lastly, the plaintiff was no doubt in some degree influenced by the misstatement, but there was no evidence that he would not have taken the shares if the statement had contained the full truth as to the necessary consents being obtained.

Bompas, Q. C., and Byrne, Q. C. (Patullo with them), for the respondent: —

The decision of the Court of Appeal is right, and for the reasons there given. Directors are liable not only for a false statement, which they know to be false, but for a false statement which they ought to have known to be false. This proposition is supported by the *obiter dictum* of Lord WESTBURY in *New Brunswick, &c. Co.* v. *Conybeare*, 9 H. L. C. 725, 726, and by the *obiter dicta* of the Lords in *Peek* v. *Gurney*, L. R. 6 H. L. 377, as to what the liability of the defendants would have been to original shareholders, and by the judgment of JESSEL, M. R., in *Smith* v. *Chadwick*, 20 Ch. D. 44.

It is not necessary that there should be carelessness whether the statement is true or not: it is enough if there be carelessness or negligence in making the statement. Making an untrue statement without reasonable ground is negligence which will support an action of deceit. In support of the respondent's contention, the following authorities are relied on: *Slim* v. *Croucher*, 1 D., F. & J. 518, 523; *Evans* v. *Bicknell*, 6 Ves., at p. 183; *Brownlie* v. *Campbell*, 5 App. Cas. 925, 935, 950; *Polhill* v. *Walter*, 3 B. & Ad. 114; *Milne* v. *Marwood*, 15 C. B. 778, 781; *Denton* [*342] v. *Great* *Northern Railway Company*, 25 L. J. Q. B. 129; *Thorn* v. *Bigland*, 8 Ex. 725; *Smout* v. *Ilbery*, 10

M. & W. 1, 10; *Rawlins* v. *Wickham*, 3 D. & J. 304, 312; *Hallows* v. *Fernie*, L. R. 3 Ch. 467; *Mathias* v. *Yetts*, 46 L. T. (N. S.) 497, 502; *Smith* v. *Chadwick*, 20 Ch. D. 27, 44; *Pasley* v. *Freeman*, 2 Sm. L. C., 9th ed., p. 74; *Chandelor* v. *Lopus*, 1 Sm. L. C., 9th ed., p. 186. [Lord HALSBURY, L. C., referred to *Haycraft* v. *Creasy*, 2 East, 92 (6 R. R. 380.)]

But it is not necessary to go the full length of the propositions contended for. Even if the fourth proposition of LOPES, L. J., is not law, the appellants are nevertheless liable; for the evidence shows that the statements were made either with the knowledge that they were untrue or with no belief on the subject.

It was stated that it was fully expected that a considerable saving would be effected by the use of steam. In fact, the directors had not considered the matter, and when they did so afterwards, there was a majority of one only in favour of steam. The effect of the evidence is not the same as to all the directors. As to Derry, the inference is that he never took the trouble to consider whether the statement was true or false. Wakefield and Wilde had complete knowledge, but made statements which they knew not to be true at the time, thinking the requisite consents would be given. Pethick's evidence is inconsistent with itself. At one moment he says that he thought the Board of Trade had no right to refuse consent if its reasonable requirements were met; at another, that he thought they had an absolute right to refuse. Moore, it must be admitted, stands in a different position, and can only be held liable under the fourth proposition of LOPES, L. J.

The respondents are entitled to judgment on the grounds accepted by Lord CRANWORTH in *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. (Sc.) 145, 164, and by the EARL OF SELBORNE in *Smith* v. *Chadwick*, 9 App. Cas. 187, 190. The belief which would justify the appellants must be one founded on an exercise of judgment. Grounds which would be sufficient in some cases would not be so in others, where *uberrima fides* is required, *e.g.*, in statements made to an intending partner. As * to the [*343] duty of a director to persons about to take shares in a company, see *New Brunswick and Canada Railway Company* v. *Muggeridge*, 1 Dr. & S. 363, 381, and *Henderson* v. *Lacon*, L. R. 5 Eq. 249.

The House took time for consideration, Lord HALSBURY, L. C., saying that notice would be given to the appellants if their Lordships desired to hear a reply.

July 1. Lord HALSBURY, L. C. : —

My Lords, I have so recently expressed an opinion in the Court of Appeal on the subject of actions of this character that I do not think it necessary to do more than say that I adhere to what I there said (*Arnison* v. *Smith*, 41 Ch. D. 348, 367). To quote the language, now some centuries old, in dealing with actions of this character, " fraud without damage or damage without fraud " does not give rise to such actions. I have had, also, the opportunity of reading the judgment of my noble and learned friend Lord HERSCHELL, and I could desire to add nothing to his exhaustive and lucid treatment of the authorities.

My Lords, when I turn to the question of fact I confess I am not altogether satisfied. In the first place, I think the statement in the prospectus was untrue, — untrue in fact, and to the minds of such persons as were likely to take shares I think well calculated to mislead. I think such persons would have no idea of the technical division between tramways that had rights to use mechanical means and tramways that had not. What I think they would understand would be that this particular tramway was in an exceptionably advantageous position, — that the statement was of a present existing fact, that it had at the time of the invited subscription for shares the right to use steam. And I think such a statement, if wilfully made, with the consciousness of its inaccuracy, would give rise to an action for deceit, provided that damage had been sustained if a person had acted upon a belief induced by such a prospectus.

But upon the question whether these statements were made with a consciousness of their misleading character, I cannot but [* 344] * be influenced by the opinions entertained by so many of your Lordships that they are consistent with the directors' innocence of any intention to deceive.

The learned Judge who saw and heard the witnesses acquitted the defendants of intentional deceit, and although the Court of Appeal held them liable, overruling the decision of the learned Judge below, they appear to me to have justified their decision upon grounds which I do not think tenable; namely, that they, the directors, were liable because they had no reasonable ground for the belief which, nevertheless, it is assumed they sincerely entertained.

My Lords, I think it would have been satisfactory to have had

a more minute and exact account of how this prospectus was framed, the actual evidence of the draftsman of it, and the discussions which took place upon the alteration in form; which alteration gave such marked and peculiar prominence to the special feature of this particular tramway, in respect of the possession of power to use steam. Nevertheless, if, as I have said, the facts are reconcilable with the innocence of the directors, and with the absence of the *mens rea*, which I consider an essential condition of an action for deceit, the mere fact of the inaccuracy of the statement ought not to be pressed into constituting a liability which appears to me not to exist according to the law of England.

As to the question whether Sir Henry Peek was induced to take his shares by reliance on the misleading statement, I admit that I have very considerable doubt. On the one hand, I do not believe that any one can so far analyze his mental impressions as to be able to say what particular fact in a prospectus induced him to subscribe. On the other hand, the description of Sir Henry Peek, even now that the question has been pointedly raised and brought to his mind, of what did or did not induce him to take his shares, is hardly reconcilable with his having been substantially induced by the statement in question to take them.

On the whole, I acquiesce in the judgment which one of your Lordships is about to move, namely, that the judgment appealed from be reversed.

* Lord WATSON: — [* 345]

My Lords, I agree with STIRLING, J., that, as matter of fact, the appellants did honestly believe in the truth of the representation upon which this action of deceit is based. It is by no means clear that the learned Judges of the Court of Appeal meant to differ from that conclusion; but they seem to have held that a man who makes a representation with the view of its being acted upon, in the honest belief that it is true, commits a fraud in the eye of the law, if the Court or a jury shall be of opinion that he had not reasonable grounds for his belief. I have no hesitation in rejecting that doctrine, for which I can find no warrant in the law of England. But I shall not trouble your Lordships with any observations of mine, because I accept without reserve the opinion about to be delivered by my noble and learned friend upon my left (Lord HERSCHELL).

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Lord Bramwell: —

My Lords, I am of opinion that this judgment should be reversed. I am glad to come to this conclusion; for, as far as my judgment goes, it exonerates five men of good character and conduct from a charge of fraud, which, with all submission, I think wholly unfounded, — a charge supported on such materials as to make all character precarious. I hope this will not be misunderstood; that promoters of companies will not suppose that they can safely make inaccurate statements with no responsibility. I should much regret any such notion; for the general public is so at the mercy of company promoters, sometimes dishonest, sometimes over-sanguine, that it requires all the protection that the law can give it. Particularly should I regret if it was supposed that I did not entirely disapprove of the conduct of those directors who accepted their qualification from the contractor or intended contractor. It is wonderful to me that honest men of ordinary intelligence cannot see the impropriety of this. It is obvious that the contractor can only give this qualification because he means to get it back in the price given for the work he is to do. That price is to be fixed by the directors who have taken his money. They are paid by him to give
[* 346] * him a good price, as high a price as they can, while their duty to their shareholders is to give him one as low as they can.

But there is another thing. The public, seeing these names, may well say, "These are respectable and intelligent men who think well enough of this scheme to adventure their money in it; we will do the same," little knowing that those thus trusted had made themselves safe against loss if the thing turned out ill, while they might gain if it was successful. I am glad to think that Mr. Wilde, a member of my old profession, was not one of those so bribed. The only shade of doubt I have in the case is, that this safety from loss in the directors may have made them less careful in judging of the truth of any statements they have made.

There is another matter I wish to dispose of before going into the particular facts of the case. I think we need not trouble ourselves about "legal fraud," nor whether it is a good or bad expression; because I hold that actual fraud must be proved in this case to make the defendants liable, and, as I understand, there is never any occasion to use the phrase "legal fraud" except when actual

fraud cannot be established. "Legal fraud" is only used when some vague ground of action is to be resorted to, or, generally speaking, when the person using it will not take the trouble to find, or cannot find, what duty has been violated or right infringed, but thinks a claim is somehow made out. With the most sincere respect for Sir J. HANNEN, I cannot think the expression "convenient." I do not think it is "an explanation which very clearly conveys an idea;" at least, I am certain it does not to my mind. I think it a mischievous phrase, and one which has contributed to what I must consider the erroneous decision in this case. But, with these remarks, I have done with it, and will proceed to consider whether the law is not that actual fraud must be proved, and whether that has been done.

Now, I really am reluctant to cite authorities to show that actual fraud must be established in such a case as this. It is one of the first things one learned, and one has never heard it doubted until recently. I am very glad to think that my noble and learned friend (Lord HERSCHELL) has taken the trouble to go into the authorities fully; but to some extent I deprecate it, * because it seems to me somewhat to come within the [* 347] principle *Qui s'excuse s'accuse*. When a man makes a contract with another he is bound by it; and in making it he is bound not to bring it about by fraud. *Warrantizando vendidit* gives a cause of action if the warranty is broken. Knowingly and fraudulently stating a material untruth which brings about, wholly or partly, the contract, also gives a cause of action. To this may now be added the equitable rule, which is not in question here, that a material misrepresentation, though not fraudulent, may give a right to avoid or rescind a contract where capable of such rescission. To found an action for damages there must be a contract and breach, or fraud. The statement of claim in this case states fraud. Of course that need not be proved merely because it is stated. But no one ever heard of or saw a statement of claim or declaration for deceit without it. There is not an authority at common law, or by a common-law lawyer, to the contrary; none has been cited, though there may be some incautious, hesitating expressions which point that way. Every case from the earliest in Comyns' Digest to the present day alleges it. Further, the learned Judges of the Court of Appeal hardly deny it. There is, indeed, an opinion to the contrary, of the late MASTER

of the Rolls, but it must be remembered that his knowledge of actions of deceit was small, if any. I did not think, then, that it was necessary to cite cases to show that to maintain this action fraud in the defendant must be shown, though I am glad it has been done.

Now, as to the evidence. The plaintiff's case is that the defendants made an untrue statement, which they knew to be untrue, and likely to influence persons reading it; therefore they were fraudulent. It is not necessary to consider whether a *primâ facie* case was made out by the plaintiff. We have all the evidence before us, and must judge on the whole. The alleged untrue statement is that, "The company has the right to use steam or mechanical power instead of horses, and that a saving would be thereby effected." Now, this is certainly untrue, because it is stated as an absolute right, when, in truth, it was conditional on the approval of the Board of Trade, and the sanction or consent of two local boards; and a conditional right is * not the same as an absolute right. It is also certain that the defendants knew what the truth was, and therefore knew that what they said was untrue. But it does not follow that the statement was fraudulently made. There are various kinds of untruth. There is an absolute untruth, an untruth in itself, that no addition or qualification can make true; as, if a man says a thing he saw was black, when it was white, as he remembers and knows. So, as to knowing the truth. A man may know it, and yet it may not be present to his mind at the moment of speaking; or, if the fact is present to his mind, it may not occur to him to be of any use to mention it. For example, suppose a man was asked whether a writing was necessary in a contract for the making and purchase of goods, he might well say, "Yes," without adding that payment on receipt of the goods, or part, would suffice. He might well think that the question he was asked was whether a contract for goods to be made required a writing like a contract for goods in existence. If he was writing on the subject he would, of course, state the exception or qualification.

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Now, consider the case here. These directors naturally trust to their solicitors to prepare their prospectus. It is prepared and laid before them. They find the statement of their power to use steam without qualification. It does not occur to them to alter it. They swear they had no fraudulent intention. At the very

last they cannot see the fraud. There is their oath, their previous character unimpeached, and there is to my mind this further consideration: the truth would have served their purpose as well. "We have power to use steam, &c., of course, with the usual conditions of the approval of the Board of Trade and the consent of the local authorities, but we may make sure of these being granted, as the Board of Trade has already allowed the power to be inserted in the Act, and the local authorities have expressed their approbation of the scheme." (See plaintiff's answer, 313,[1] which shows that he would have been content with that statement.)

During the argument I said I am not sure that I should not have passed the prospectus. I will not say so now, because * certainly I would not pass it now after knowing [*349] the unfortunate use made of the statement, and no one can tell what would have been the state of his mind if one of the factors influencing it was wanting. But I firmly believe it might have been, and was, honestly done by these defendants. STIRLING, J., saw and heard them, and was of that opinion. It is difficult to say that the plaintiff was not. The report of the 6th of November, 1884, showed that the consent of the Board of Trade was necessary, showed also that the corporation of Devonport would not consent, showed, therefore, the "untruth" and the defendants' knowledge of it, and yet the plaintiff "had every confidence in the directors;" and see his answers to questions 53 and 365.

I now proceed to consider the judgments that have been delivered. It is not necessary to declare my great respect for those who have delivered them. STIRLING, J., refuses to say whether actual fraud must be shown, and deals with the case on the footing that the question is whether the defendants had reasonable grounds for making the statement they did. He holds, as I do, that they thought the company had the right, as put in the prospectus, to use steam. Then he says he must "come to the conclusion that they had reasonable grounds for their belief; at all events, that their grounds were not so unreasonable as to justify me in charging them with being guilty of fraud." It is singular that the learned Judge seems to consider that unreasonableness must be proved to such an extent as to show fraud. He

[1] The references are to the Appendix printed for the House.

then proceeds, for what seem to me unanswerable reasons, to show that they did every one believe that they had the right stated in the prospectus. He refers to what he saw of them in the box. He says he cannot come to the conclusion that their belief was so unreasonable and so unfounded, and their proceedings so reckless or careless, that they ought to be fixed with the consequences of deceit. He makes an excellent remark, that "mercantile men dealing with matters of business would be the first to cry out if I extended the notion of deceit into what is honestly done in the belief that these things would come about, and when they did not come about, make them liable in an action of fraud." My only variation of this would be that it may be that the objection did not, and naturally did not, occur to them. It has [*350] * not been argued, and I will say no more on the question, whether, had the plaintiff known the contents of the Act, he would or would not have applied for the shares, than that I agree with STIRLING, J.

COTTON, L. J., says the law is "that where a man makes a statement to be acted on by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false, that is, without any reasonable ground for believing it to be true," he is liable to an action for deceit. Well, I agree to all before the "that is," and I agree to what comes after if it is taken as equivalent to what goes before, viz., "recklessly or without care whether it is true or false," understanding "recklessly" as explained by "without care whether it is true or false." For a man who makes a statement without care and regard for its truth or falsity commits a fraud. He is a rogue. For every man who makes a testament says "the truth is so and so, and I know it or believe it." I say I agree to this as I understand it.

It seems to me, with great respect, that the learned LORD JUSTICE lost sight of his own definition, and glided into a different opinion. He says (p. 451 F.): "There is a duty cast upon a director who makes that statement to take care that there are no statements in it which, in fact, are false; to take care that he has reasonable ground for the material statements which are contained in that document (prospectus), which he intends to be acted on by others. And although in my opinion it is not necessary there should be what I should call fraud, there must be a departure from

duty, . . . and he has violated the right which those who receive the statement have, to have true statements only made to them." This seems to be a most formidable matter. I agree there is some such duty. I agree that not only directors in prospectuses, but all persons in all dealings, should tell the truth. If they do not they furnish evidence of fraud; they subject themselves to have the contract rescinded. But to say that there is "a right to have true statements only made," I cannot agree, and I think it would be much to be regretted if there was any such right. Mercantile men, as STIRLING, J., says, would indeed cry out. No qualification is stated.

* If this is law the statement may be reasonably believed [* 351] to be true by him who makes it, but if untrue there is to be a cause of action; and that although he may have refused a warranty. I hope not. There is a duty to tell the truth, or, rather, what is believed to be the truth. At page 452 B., his Lordship says: "Where a man makes a false statement without reasonable ground to suppose it to be true, and without taking care to ascertain if it is true, he is liable civilly as much as a person who commits what is usually called fraud." I say I agree if that means making a statement of which he knows or believes not the truth. His Lordship proceeds to examine whether the defendants had reasonable ground for believing what they said, and comes to the conclusion that they had not, and so holds them liable, not because they were dishonest, but because they were unreasonable. I say they never undertook to be otherwise. He says (461 G.): "It is not that I attribute to them any intention to commit fraud, but they have made a statement without any sufficient reason for believing it to be true."

Sir JAMES HANNEN says that he agrees with COTTON, L. J.'s statement of the law, and adds: "If a man takes upon himself to assert a thing to be true, which he does not know to be true, and has no reasonable ground to believe to be true," it is sufficient in an action of deceit. I agree, if he knows he has no such reasonable ground and the knowledge is present to his mind; otherwise, with great respect, I differ. He cites Lord CAIRNS (465 F.), that, "if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must in a civil point of view be held as responsible as if they had asserted that which they

knew to be untrue." So say I, but this does not support Sir James's proposition. Nor does he deal with what he quotes from Lord Cranworth. But further (466), he speaks of legal fraud as meaning "that degree of moral culpability in the statement of an untruth to induce another to alter his position, to which the law attaches responsibility." But if there is moral culpability, I agree there is responsibility. But to believe without reasonable grounds is not moral culpability, but (if there is such a thing) mental culpability. He says, "The word 'fraud' is in common parlance reserved for actions of great turpitude, [* 352] but * the law applies it to lesser breaches of moral duty."

I agree the law applies it to all breaches of the moral duty to tell the truth in dealing with others; but that duty cannot be honestly broken. To be actionable, a breach of that duty must be dishonest. Nay, it is a man's duty sometimes to tell an untruth. For instance, when asked as to a servant's character, he must say what he believes is the truth, however he may have formed his opinion, and however wrong it may be. His Lordship says he cannot think the directors had any reasonable ground for believing the prospectus to be true. But had they the matter present to their minds? Even if this were the question, I should decide in their favour.

As to the judgment of Lopes, L. J., I quite agree with what he says: "I know of no fraud which will support an action of deceit to which some moral delinquency does not belong." I think that shows the meaning of what he says "fourthly," though that is made doubtful by what he says at 472 D.

I think, with all respect, that in all the judgments there is, I must say it, a confusion of unreasonableness of belief as evidence of dishonesty, and unreasonableness of belief as of itself a ground of action.

I have examined these judgments at this length owing to my sense of their importance and the importance of the question they deal with. I think it is most undesirable that actions should be maintainable in respect of statements, made unreasonably perhaps, but honestly. I think it would be disastrous if there was "a right to have true statements only made." This case is an example. I think that in this kind of case, as in some others, Courts of equity have made the mistake of disregarding a valuable general principle in their desire to effect what is, or is thought to

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be, justice in a particular instance. It might, perhaps, be well to enact that in prospectuses of public companies there should be a warranty of the truth of all statements except where it was expressly said there was no warranty. The objection is to exceptional legislation, and to the danger of driving respectable and responsible men from being promoters, and of substituting for them those who are neither.

In this particular case I hold that unless fraud in the defendants could be shown, the action is not maintainable. I am * satisfied there was no fraud. Further, if an unreasonable misstatement were enough, I hold there was none. [*353] Still further, I do not believe that the plaintiff was influenced by the misstatement, though I am entirely satisfied that he was an honest witness.

Lord FITZGERALD: —

My Lords, the pleadings and the facts have been already referred to by the noble Lords who have addressed the House. The action is for deceit. The writ was sued out in February, 1885, and originally claimed rescission of the contract with the company. It was subsequently amended by striking out the company as defendants, and also the prayer for rescission, and it assumed the character of an action for deceit against the present appellants (five of the directors), and claimed "damages for the fraudulent misrepresentations of the defendants."

The statement of claim, which is sufficient in form to raise the real question, alleged the misrepresentation to exist in the prospectus issued in February, 1883, and to consist of the paragraph so often read, that the company had a right to use steam or other mechanical motive power; and it was further alleged "that the defendants intended thereby to represent that the company had an absolute right to use steam and other mechanical power," and that such representation was made fraudulently, and with the view to induce the plaintiff to take shares in the company.

So far, my Lords, the real issue seems to have been raised fairly and clearly, and to depend on matters of fact. There were circumstances connected with the promotion of the company, and the procuring of four of the defendants to act as directors, which tended to create suspicion as to their statements and their *bona fides*, and attracted, directly, the attention of the learned Judge before whom the case was tried. The defendants, who were

severally produced as witnesses at the trial, were exposed to a very lengthened and searching cross-examination by counsel for the plaintiff, and were also carefully examined by the Judge as to these transactions, with the result apparently of freeing them from any imputation therein of moral misconduct.

[* 354] The question which I am about to examine in the first instance, * and excluding for the present the element of fraud, is, whether the impugned statement in the prospectus was a false statement in the sense of being untrue. That it was inaccurate so far as it purported to give the legal effect of the special Act I do not doubt, but was it untrue as representing the position of the company in a popular and business sense? The General Tramways Act (33 & 34 Vict., c. 78), which regulates tramways generally, but subject to the provisions of the special Act, if any, of each company, places them under the supervision of the Board of Trade with a view to public safety, and for public protection generally, and by its 34th section it provides "that all carriages used on tramways shall be moved by the power prescribed by the special Act."

The special Act of this company became law on the 24th of July, 1882, and by ss. 4 and 5 the company incorporated by the Act is empowered to make the seven tramways in question in all respects in accordance with the plans and sections. Sect. 15 provides minutely for their formation, subject to the orders of the Board of Trade, and by sect. 16 the tramway is not to be opened for public traffic until it shall have been inspected and certified by the Board of Trade to be fit for such traffic.

Before referring to the 35th section of the special Act we may glance at sect. 37 of that Act, which empowers the Board of Trade to make by-laws as to any of the tramways on which steam may be used under the authority of the Act, and sect. 44, which provides that where the company intends to use steam they shall give two months' notice.

There are several other sections providing for the use of steam power if the company should elect to use it as the motor.

In the light of those sections of the special Act, and of sect. 34 of the general Act, let us now look at the particular paragraph of the prospectus, and sect. 35 of the special Act. By that section Parliament has done that which Parliament could do, and which the Board of Trade could not do. It has conferred on the com-

pany authority to use steam as its motive power. It has not imposed on the company the use of steam power, but it says that they may use it if they elect to do so. Before dealing with the consent of the Board of Trade I desire to call attention
* to the proviso in the 35th section, "that the exercise of [* 355]
the powers hereby conferred with respect to the use of steam
shall be subject to the regulations in Schedule 'A,' and to any regulations which may be added thereto or substituted therefor by the Board of Trade for securing to the public all reasonable protection against danger in the exercise of the powers by this Act conferred with respect to the use of steam."

Schedule A, referred to in sect. 35, contains no less than ten regulations for the direction of the company in the exercise of the right so conferred to use steam power.

Now, turning back to the words "with the consent of the Board of Trade," in sect. 35 of the special Act, that consent could not confer, nor would its absence take away, the right conferred by the Legislature to use steam as a motor. Its true character is that of a precaution imposed by the Legislature to defer the actual exercise of the right conferred until the supervision of the Board of Trade secures to the public all reasonable protections against danger. To attain these objects the Legislature provides that the powers it has conferred should not be actually exercised without the consent of the Board of Trade.

My Lords, I have, though with difficulty, arrived at the conclusion that the statement in the prospectus, that by the special Act the company had the right to use steam power, was not untrue in a popular or business sense.

Let us see for a moment in what way and with what meaning General Hutchinson used similar expressions. In his report of the 12th of July, 1884, he says: "The Act of 1882 gives, however, the company authority to use mechanical power over all their system, and I think it would be most objectionable that this power should be exercised on parts of Tramway No. 1 on account of the narrowness of three of the roads."

The remainder of the incriminated paragraph of the prospectus is, "and it is fully expected that by means of this (*i.e.*, the use of steam) a considerable saving will result in the working expenses of the line as compared with other tramways worked by horses." This was not untrue: there had been a division of opinion in the

directory on the subject, which was finally and before the issue of the prospectus resolved in favour of steam.

[* 356] * The conclusion I have arrived at, my Lords, is that this paragraph of the prospectus, though inaccurate in point of law in one particular, seems on the whole to have been morally true.

If this view is correct it is an answer to the action, but assuming that it is not correct, or that your Lordships are not prepared to adopt it, I proceed to express my opinion on the remaining substance of the action. Cotton, L. J., describes the action as "an action of deceit, a mere common-law action." The description is accurate, and I proceed to deal with it as a mere common-law action. It has not been in the least altered in its characteristics by having been instituted in the Chancery Division, or tried by a Judge without the aid of a jury, nor are your Lordships necessarily driven to consider on the present appeal some of the subtle and refined distinctions which have been engrafted on the clear and simple principles of the common law. The action for deceit at common law is founded on fraud. It is essential to the action that moral fraud should be established, and since the case of *Collins* v. *Evans*, 5 Q. B. 804, 820, in the Exchequer Chamber, it has never been doubted that fraud must concur with the false statement to maintain the action. It would not be sufficient to show that a false representation had been made. It must further be established that the defendant knew at the time of making it that the representation was untrue, or, to adopt the language of the learned editors of the Leading Cases, that "the defendant must be shown to have been actually and fraudulently cognisant of the falsehood of his representation or to have made it fraudulently without belief that it was true." The leading counsel for the respondent met the argument fairly on the allegations of fact. He alleged "that the defendants were not honest; that they stated in the prospectus a definite lie, and knew that it was a lie." That is the very issue, in fact, in the case.

The whole law and all the cases on the subject will be found in the notes to *Chandelor* v. *Lopus*, 1 Smith's L. C., 9th ed., p. 186, and *Pasley* v. *Freeman*, 2 Smith's L. C., 9th ed., p. 74. There is also a clear and able summary of the decisions, both in law and in equity, brought down to the present time in the recent edition of Benjamin on Sales, by Pearson-Gee and Boyd.

No. 2. — Derry v. Peek, 14 App. Cas. 357, 358.

* I desire to make an observation on *Chandelor* v. *Lopus*, [* 357] 1 Smith's L. C., 9th ed., p. 186. The report in Cro. Jac. 4 would seem to have but little direct bearing on the present case were it not for the opinion attributed to ANDERSON, J.; but there is a valuable note in 1 Dyer by Vaillant (75 a) which is as follows: Lopus brought an action upon the case against Chandelor, and showed that, whereas the defendant was a goldsmith, and skilled in the nature of precious stones, and being possessed of a stone which the defendant asserted and assured the said plaintiff to be a true and perfect stone called a bezoar stone, &c., upon which the plaintiff bought it, &c. There the opinion of POPHAM, C. J., was "that if I have any commodities which are damaged (whether victuals or otherwise), and I, knowing them to be so, sell them for good, and affirm them to be so, an action upon the case lies for the deceit; but although they be damaged, if I, knowing not that, affirm them to be good, still no action lies, without I warrant them to be good." The action seems originally to have been on a warranty which failed in fact, as there had been no warranty, and it was then sought to support it as an action for deceit; but it was not alleged in the count that the defendant knew the representation to be untrue. It was in reference to that that the observation of POPHAM, C. J., was made. He had the reputation of being a consummate lawyer.

The note in 1 Dyer (75 a) was probably by Mr. Treby, afterwards Chief Justice TREBY. He edited an edition of Dyer published in 1688. I have not had an opportunity of referring to it, but it is said that he gave the public some highly authoritative notes in that edition. I have quoted from Mr. Vaillant's edition, published in 1794.

The whole evidence given on this apppeal has been laid before your Lordships, and we have to deal with it as a whole. That evidence has been already so fully stated and criticised that it is not necessary for me to do more than to state the conclusions of fact which in my opinion are reasonably to be deduced from it, viz., that the several defendants did not know that the incriminated statement in the prospectus was untrue, and that, on the contrary, they severally and in good faith believed it to be * true. The conclusions, in fact, at which I have [* 358] arrived, render it unnecessary for me to consider the long and rather bewildering list of authorities to which your Lordships

were referred, or to criticise the reasons given in the Court of Appeal for their decision in the present case. I desire, however, to make a single observation.

There is one characteristic which, as it seems to me, pervades each of the several judgments in the Court of Appeal, viz., that the *bonâ fide* belief of the defendants in the truth of the representation was unavailing unless it was a reasonable belief resting on reasonable grounds. If this is correct, it seems to me that in an action for "deceit" it would be necessary to submit to the jury (if tried before that tribunal) not only the existence of that belief *bonâ fide*, but also the grounds on which it was arrived at, and their reasonableness.

I am by no means satisfied that such is the law, and if now driven to express an opinion on it, I would prefer following the opinion of Lord Cranworth in *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 145, 168, in which he said: "I confess that my opinion was that in what his Lordship (the Lord President) thus stated, he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs, which they *bonâ fide* believe to be true, I cannot think they can be guilty of fraud, because other persons think, or the Court thinks, or your Lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence, not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true."

A director is bound in all particulars to be careful and circumspect, and not, either in his statements to the public or in the performance of the duties he has undertaken, to be careless * or negligent, or rash. Want of care or circumspection, as well as recklessness, may in such a case as the present be taken into consideration in determining at every stage the question of *bona fides*.

[* 359]

My Lords, I am of opinion that the decision of the Court of Appeal should be reversed.

No. 2. — Derry v. Peek, 14 App. Cas. 359, 360.

Lord HERSCHELL: —

My Lords, in the statement of claim in this action the respondent, who is the plaintiff, alleges that the appellants made in a prospectus issued by them certain statements which were untrue, that they well knew that the facts were not as stated in the prospectus, and made the representations fraudulently, and with the view to induce the plaintiff to take shares in the company.

"This action is one which is commonly called an action of deceit, a mere common-law action." This is the description of it given by COTTON, L. J., in delivering judgment. I think it important that it should be borne in mind that such an action differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite. I lay stress upon this because observations made by learned Judges in actions for rescission have been cited and much relied upon at the bar by counsel for the respondent. Care must obviously be observed in applying the language used in relation to such actions to an action of deceit. Even if the scope of the language used extend beyond the particular action which was being dealt with, it must be remembered that the learned Judges were not engaged in determining * what is necessary to support an action of deceit, or in [*360] discriminating with nicety the elements which enter into it.

There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact, has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given. *Burrowes* v. *Lock*, 10 Ves. 470, may be cited as an example, where a trustee had been asked

by an intended lender, upon the security of a trust fund, whether notice of any prior incumbrance upon the fund had been given to him. In cases like this it has been said that the circumstance that the answer was honestly made in the belief that it was true affords no defence to the action. Lord SELBORNE pointed out in *Brownlie* v. *Campbell*, 5 App. Cas., at p. 935, that these cases were in an altogether different category from actions to recover damages for false representation, such as we are now dealing with.

One other observation I have to make before proceeding to consider the law which has been laid down by the learned Judges in the Court of Appeal in the case before your Lordships. "An action of deceit is a common-law action, and must be decided on the same principles, whether it be brought in the Chancery Division or any of the Common Law Divisions, there being, in my opinion, no such thing as an equitable action for deceit." This was the language of COTTON, L. J., in *Arkwright* v. *Newbould*, 17 Ch. D. 320. It was adopted by Lord BLACKBURN in *Smith* v. *Chadwick*, 9 App. Cas. 193, and is not, I think, open to dispute.

In the Court below COTTON, L. J., said: "What in my opinion is a correct statement of the law is this, that where a man makes a statement to be acted upon by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false, that is, without any reasonable ground for believing it to be true, he is liable in an action of deceit at the suit of any one to whom it was addressed or any one of the class to whom it was addressed, and who [*361] was * materially induced by the misstatement to do an act to his prejudice." About much that is here stated there cannot, I think, be two opinions. But when the learned LORD JUSTICE speaks of a statement made recklessly or without care whether it is true or false, that is without any reasonable ground for believing it to be true, I find myself, with all respect, unable to agree that these are convertible expressions. To make a statement careless whether it be true or false, and therefore without any real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is, nevertheless, honestly believed to be true. And it is surely conceivable that a man may believe that what he states is the fact, though he has been so wanting in care that the Court may think that there were no sufficient grounds to warrant

his belief. I shall have to consider, hereafter, whether the want of reasonable ground for believing the statement made is sufficient to support an action of deceit. I am only concerned for the moment to point out that it does not follow that it is so, because there is authority for saying that a statement made recklessly, without caring whether it be true or false, affords sufficient foundation for such an action.

That the learned LORD JUSTICE thought that if a false statement were made without reasonable ground for believing it to be true an action of deceit would lie, is clear from a subsequent passage in his judgment. He says that when statements are made in a prospectus like the present, to be circulated amongst persons in order to induce them to take shares, "there is a duty cast upon the director or other person who makes those statements to take care that there are no expressions in them which, in fact, are false; to take care that he has reasonable ground for the material statements which are contained in that document which he prepares and circulates for the very purpose of its being acted upon by others."

The learned Judge proceeds to say: "Although in my opinion it is not necessary that there should be what I should call fraud, yet in these actions, according to my view of the law, there must be a departure from duty, that is to say, an untrue statement made without any reasonable ground for believing that statement * to be true; and in my opinion, when a man makes [* 362] an untrue statement with an intention that it shall be acted upon without any reasonable ground for believing that statement to be true, he makes a default in a duty which was thrown upon him from the position he has taken upon himself, and he violates the right which those to whom he makes the statement have to have true statements only made to them."

Now I have first to remark on these observations that the alleged "right" must surely be here stated too widely, if it is intended to refer to a legal right, the violation of which may give rise to an action for damages. For if there be a right to have true statements only made, this will render liable to an action those who make untrue statements, however innocently. This cannot have been meant. I think it must have been intended to make the statement of the right correspond with that of the alleged duty, the departure from which is said to be making an untrue

statement without any reasonable ground for believing it to be true. I have further to observe that the LORD JUSTICE distinctly says that if there be such a departure from duty an action of deceit can be maintained, though there be not what he should call fraud. I shall have, by and by, to consider the discussions which have arisen as to the difference between the popular understanding of the word "fraud" and the interpretation given to it by lawyers, which have led to the use of such expressions as "legal fraud," or "fraud in law;" but I may state at once that, in my opinion, without proof of fraud no action of deceit is maintainable. When I examine the cases which have been decided upon this branch of the law, I shall endeavour to show that there is abundant authority to warrant this proposition.

I return now to the judgments delivered in the Court of Appeal. Sir JAMES HANNEN says: "I take the law to be that if a man takes upon himself to assert a thing to be true which he does not know to be true, and has no reasonable ground to believe to be true, in order to induce another to act upon the assertion, who does so act and is thereby damnified, the person so damnified is entitled to maintain an action for deceit." Again, LOPES, L.J., states [* 363] what, in his opinion, is the result of the * cases. I will not trouble your Lordships with quoting the first three propositions which he lays down, although I do not feel sure that the third is distinct from, and not rather an instance of, the case dealt with by the second proposition. But he says that a person making a false statement, intended to be and in fact relied on by the person to whom it is made, may be sued by the person damaged thereby: "Fourthly, if it is untrue in fact, but believed to be true, but without any reasonable grounds for such belief."

It will thus be seen that all the learned Judges concurred in thinking that it was sufficient to prove that the representations made were not in accordance with fact, and that the person making them had no reasonable ground for believing them. They did not treat the absence of such reasonable ground as evidence merely that the statements were made recklessly, careless whether they were true or false, and without belief that they were true, but they adopted as the test of liability, not the existence of belief in the truth of the assertions made, but whether the belief in them was founded upon any reasonable grounds. It will be seen, further, that the Court did not purport to be establishing any new

doctrine. They deemed that they were only following the cases already decided, and that the proposition which they concurred in laying down was established by prior authorities. Indeed, LOPES, L. J., expressly states the law in this respect to be well settled. This renders a close and critical examination of the earlier authorities necessary.

I need go no further back than the leading case of *Pasley* v. *Freeman*, 2 Smith's L. C. 74. If it was not there for the first time held that an action of deceit would lie in respect of fraudulent representations against a person not a party to a contract induced by them, the law was, at all events, not so well settled but that a distinguished Judge, GROSE, J., differing from his brethren on the Bench, held that such an action was not maintainable. BULLER, J., who held that the action lay, adopted in relation to it the language of CROKE, J., in 3 Bulstrode, 95, who said: "Fraud without damage, or damage without fraud, gives no cause of action, but where these two concur an action lies." In reviewing the case * of *Crosse* v. *Gardner*, [* 364] Carth. 90, he says: "Knowledge of the falsehood of the thing asserted is fraud and deceit;" and further, after pointing out that in *Risney* v. *Selby*, 1 Salk. 211, the judgment proceeded wholly on the ground that the defendant knew what he asserted to be false, he adds: "The assertion alone will not maintain the action, but the plaintiff must go on to prove that it was false, and that the defendant knew it to be so," the latter words being specially emphasised. KENYON, C. J., said: "The plaintiffs applied to the defendant, telling him that they were going to deal with Falch, and desired to be informed of his credit, when the defendant fraudulently, and knowing it to be otherwise, and with a design to deceive the plaintiffs, made the false affirmation stated on the record, by which they sustained damage. Can a doubt be entertained for a moment but that this is injurious to the plaintiffs?" In this case it was evidently considered that fraud was the basis of the action, and that such fraud might consist in making a statement known to be false.

Haycraft v. *Creasy*, 2 East, 92 (6 R. R. 380), was again an action in respect of a false affirmation made by the defendant to the plaintiff about the credit of a third party whom the plaintiff was about to trust. The words complained of were, "I can assure you of my own knowledge that you may credit Miss R. to any

amount with perfect safety." All the Judges were agreed that fraud was of the essence of the action, but they differed in their view of the conclusion to be drawn from the facts. Lord KENYON thought that fraud had been proved, because the defendant stated that to be true within his own knowledge which he did not know to be true. The other Judges thinking that the defendant's words vouching his own knowledge were no more than a strong expression of opinion, inasmuch as a statement concerning the credit of another can be no more than a matter of opinion, and that he did believe the lady's credit to be what he represented, held that the action would not lie. It is beside the present purpose to inquire which view of the facts was the more sound. Upon the law there was no difference of opinion. It is a distinct decision that knowledge of the falsity of the affirmation made is essential to
[* 365] the * maintenance of the action, and that belief in its truth affords a defence.

I may pass now to *Foster* v. *Charles*, 7 Bing. 105. It was there contended that the defendant was not liable, even though the representation he had made was false to his knowledge, because he had no intention of defrauding or injuring the plaintiff. This contention was not upheld by the Court, TINDAL, C. J., saying: "It is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motives from which the representations proceeded may not have been bad." This is the first of the cases in which I have met with the expression "fraud in law." It was manifestly used in relation to the argument that the defendant was not actuated by a desire to defraud or injure the person to whom the representation was made. The popular use of the word "fraud" perhaps involves generally the conception of such a motive as one of its elements. But I do not think the CHIEF JUSTICE intended to indicate any doubt that the act which he characterised as a fraud in law was in truth fraudulent as a matter of fact also. Wilfully to tell a falsehood, intending that another shall be led to act upon it as if it were the truth, may well be termed fraudulent, whatever the motive which induces it, though it be neither gain to the person making the assertion nor injury to the person to whom it is made.

Foster v. *Charles*, 7 Bing. 105, was followed in *Corbett* v. *Brown*, 8 Bing. 33, and shortly afterwards in *Polhill* v. *Walter*, 3 B. & Ad. 114. The learned counsel for the respondent placed great

reliance on this case, because although the jury had negatived the existence of fraud in fact the defendant was, nevertheless, held liable. It is plain, however, that all that was meant by this finding of the jury was, that the defendant was not actuated by any corrupt or improper motive, for Lord TENTERDEN says: "It was contended that . . . in order to maintain this species of action it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant or a wicked motive of injury to the plaintiff; it was said to be enough if a representation is made which the party
* making it knows to be untrue, and which is intended [* 366]
by him, or which from the mode in which it is made is
calculated, to induce another to act on the faith of it in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature was contended to be in the legal sense of the word a fraud, and for this position was cited *Foster* v. *Charles*, 7 Bing. 105, to which may be added the recent case of *Corbett* v. *Brown*, 8 Bing. 33. The principle of these cases appears to us to be well founded, and to apply to the present."

In a later case of *Crawshay* v. *Thompson*, 4 M. & Gr. 357, MAULE, J., explains *Polhill* v. *Walter*, 3 B. & Ad. 114, thus: "If a wrong be done by a false representation of a party who knows such representation to be false, the law will infer an intention to injure. That is the effect of *Polhill* v. *Walter*." In the same case CRESSWELL, J., defines "fraud in law" in terms which have been often quoted. "The cases," he says, "may be considered to establish the principle that fraud in law consists in knowingly asserting that which is false in fact to the injury of another."

In *Moens* v. *Heyworth*, 10 M. & W., at p. 157, which was decided in the same year as *Crawshay* v. *Thompson*, Lord ABINGER having suggested that an action of fraud might be maintained where no moral blame was to be imputed, PARKE, B., said: "To support that count (viz., a count for fraudulent representation), it was essential to prove that the defendants knowingly" (and I observe that this word is emphasised), "by words or acts, made such a representation as is stated in the third count, relative to the invoice of these goods, as they knew to be untrue."

The next case in the series, *Taylor* v. *Ashton*, 11 M. & W. 401, is one which strikes me as being of great importance. It was an

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action brought against directors of a bank for fraudulent representations as to its affairs, whereby the plaintiff was induced to take shares. The jury found the defendants not guilty of fraud, but expressed the opinion that they had been guilty of gross negligence. Exception was taken to the mode in which the case was left to the jury, and it was contended that their verdict was [* 367] sufficient * to render the defendants liable; Parke, B., however, in delivering the opinion of the Court said: "It is insisted that even that (viz., the gross negligence which the jury had found), accompanied with a damage to the plaintiff in consequence of that gross negligence, would be sufficient to give him a right of action. From this proposition we entirely dissent, because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind unless it be fraudulently made. . . . But then it was said that in order to constitute that fraud, it was not necessary to show that the defendants knew the fact they stated to be untrue, that it was enough that the fact was untrue if they communicated that fact for a deceitful purpose, and to that proposition the Court is prepared to assent. It is not necessary to show that the defendants knew the facts to be untrue; if they stated a fact which was untrue for a fraudulent purpose, they at the same time not believing that fact to be true, in that case it would be both a legal and moral fraud."

Now it is impossible to conceive a more emphatic declaration than this, that to support an action of deceit fraud must be proved, and that nothing less than fraud will do. I can find no trace of the idea that it would suffice if it were shown that the defendants had not reasonable grounds for believing the statements they made. It is difficult to understand how the defendants could, in the case on which I am commenting, have been guilty of gross negligence in making the statements they did, if they had reasonable grounds for believing them to be true, or if they had taken care that they had reasonable grounds for making them.

All the cases I have hitherto referred to were in courts of first instance. But in *Collins* v. *Evans*, 5 Q. B. 804, 820, they were reviewed by the Exchequer Chamber. The judgment of the Court was delivered by Tindal, C. J. After stating the question at issue to be "whether a statement or representation which is false in fact, but not known to be so by the party making it, but, on the

contrary, made honestly, and in the full belief that it is true, affords a ground of action," he proceeds to say: "The current of * the authorities, from *Pasley* v. *Freeman*, 2 Smith's [* 368] L. C. 74, downwards, has laid down the general rule of law to be, that fraud must concur with the false statement in order to give a ground of action." Is it not clear that the Court considered that fraud was absent if the statement was "made honestly, and in the full belief that it was true"?

In *Evans* v. *Edmonds*, 13 C. B. 777, MAULE, J., expressed an important opinion, often quoted, which has been thought to carry the law further than the previous authorities, though I do not think it really does so. He said: "If a man having no knowledge whatever on the subject takes upon himself to represent a certain state of facts to exist he does so at his peril, and if it be done either with a view to secure some benefit to himself or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood the representation may still have been fraudulently made." The foundation of this proposition manifestly is, that a person making any statement which he intends another to act upon must be taken to warrant his belief in its truth. Any person making such a statement must always be aware that the person to whom it is made will understand, if not that he who makes it knows, yet at least that he believes it to be true. And if he has no such belief he is as much guilty of fraud as if he had made any other representation which he knew to be false, or did not believe to be true.

I now arrive at the earliest case in which I find the suggestion that an untrue statement made without reasonable ground for believing it will support an action for deceit. In *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 145, 162, the LORD PRESIDENT told the jury "that if a case should occur of directors taking upon themselves to put forth in their report statements of importance in regard to the affairs of the bank false in themselves and which they did not believe, or had no reasonable ground to believe to be true, that would be a misrepresentation and deceit." Exception having been taken to this direction without avail in the Court of Session, Lord CHELMSFORD in this House said: "I agree in the propriety of this * interlocutor. [* 369]

In the argument upon this exception the case was put of an honest belief being entertained by the directors, of the reasonableness of which it was said the jury, upon this direction, would have to judge. But supposing a person makes an untrue statement which he asserts to be the result of a *bonâ fide* belief in its truth, how can the *bona fides* be tested except by considering the grounds of such belief? And if an untrue statement is made founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterised as misrepresentation and deceit."

I think there is here some confusion between that which is evidence of fraud and that which constitutes it. A consideration of the grounds of belief is, no doubt, an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so. There may be such an absence of reasonable ground for his belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief which he alleges. If the learned Lord intended to go further, as apparently he did, and to say that though the belief was really entertained, yet if there were no reasonable grounds for it, the person making the statement was guilty of fraud in the same way as if he had known what he stated to be false, I say, with all respect, that the previous authorities afford no warrant for the view that an action of deceit would lie under such circumstances. A man who forms his belief carelessly, or is unreasonably credulous, may be blameworthy when he makes a representation on which another is to act, but he is not, in my opinion, fraudulent in the sense in which that word was used in all the cases from *Pasley* v. *Freeman*, 2 Smith's L. C. 74, down to that with which I am now dealing. Even when the expression "fraud in law" has been employed, there has always been present, and regarded as an essential element, that the deception was wilful either because the untrue statement was known to be untrue, or because belief in it was asserted without such belief existing.

[*370] * I have made these remarks with the more confidence because they appear to me to have the high sanction of Lord Cranworth. In delivering his opinion in the same case he said: "I confess that my opinion was that in what his Lordship

(the Lord President) thus stated, he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs which they *bonâ fide* believe to be true, I cannot think they can be guilty of fraud because other persons think, or the Court thinks, or your Lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true."

Sir James Hannen, in his judgment below, seeks to limit the application of what Lord Cranworth says to cases where the statement made is a matter of opinion only. With all deference I do not think it was intended to be or can be so limited. The direction which he was considering, and which he thought went beyond what true principle warranted, had relation to making false statements of importance in regard to the affairs of the bank. When this is borne in mind, and the words which follow those quoted by Sir James Hannen are looked at, it becomes, to my mind, obvious that Lord Cranworth did not use the words "the opinion which they had formed" as meaning anything different from "the belief which they entertained."

The opinions expressed by Lord Cairns in two well-known cases have been cited as though they supported the view that an action of deceit might be maintained without any fraud on the part of the person sued. I do not think they bear any such construction. In the case of *Reese Silver Mining Co.* v. *Smith*, L. R. 4 H. L. 64, 79, he said: "If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, * they must, in a civil point of view, be [*371] held as responsible as if they had asserted that which they knew to be untrue." This must mean that the persons referred to were conscious when making the assertion that they were ignorant whether it was true or untrue. For if not it might be said of any one who innocently makes a false statement. He must be ignorant that it is untrue, for otherwise he would not

make it innocently; he must be ignorant that it is true, for by the hypothesis it is false. Construing the language of Lord CAIRNS in the sense I have indicated, it is no more than an adoption of the opinion expressed by MAULE, J., in *Evans* v. *Edmonds*, 13 C. B. 777. It is a case of the representation of a person's belief in a fact when he is conscious that he knows not whether it be true or false, and when he has therefore no such belief. When Lord CAIRNS speaks of it as not being fraud in the more invidious sense, he refers, I think, only to the fact that there was no intention to cheat or injure.

In *Peek* v. *Gurney*, L. R. 6 H. L. 377, 409, the same learned Lord, after alluding to the circumstance that the defendants had been acquitted of fraud upon a criminal charge, and that there was a great deal to show that they were labouring under the impression that the concern had in it the elements of a profitable commercial undertaking, proceeds to say: "They may be absolved from any charge of a wilful design or motive to mislead or defraud the public. But in a civil proceeding of this kind all that your Lordships have to examine is the question, Was there, or was there not, misrepresentation in point of fact? If there was, however innocent the motive may have been, your Lordships will be obliged to arrive at the consequences which properly would result from what was done." In the case then under consideration it was clear that if there had been a false statement of fact it had been knowingly made. Lord CAIRNS certainly could not have meant that in an action of deceit the only question to be considered was whether or not there was misrepresentation in point of fact. All that he there pointed out was that in such a case motive was immaterial: that it mattered not that there was no design to mislead or defraud the public if a false representation were knowingly made. It was therefore but an affirma-
[* 372] tion of the law laid down in *Foster* * v. *Charles*, 7 Bing. 105, *Polhill* v. *Walter*, 3 B. & Ad. 114, and other cases I have already referred to.

I come now to very recent cases. In *Weir* v. *Bell*, 3 Ex. D. 238, Lord BRAMWELL vigorously criticised the expression "legal fraud," and indicated a very decided opinion that an action founded on fraud could not be sustained except by the proof of fraud in fact. I have already given my reasons for thinking that, until recent times, at all events, the Judges who spoke of fraud in law

did not mean to exclude the existence of fraud in fact, but only of an intention to defraud or injure.

In the same case COTTON, L. J., stated the law in much the same way as he did in the present case, treating "recklessly" as equivalent to "without any reasonable ground for believing" the statements made. But the same learned Judge in *Arkwright* v. *Newbold*, 17 Ch. D. 301, laid down the law somewhat differently, for he said: "In an action of deceit the representation to found the action must not be innocent, that is to say, it must be made either with knowledge of its being false, or with a reckless disregard as to whether it is or is not true." And his exposition of the law was substantially the same in *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459. In this latter case BOWEN, L. J., defined what the plaintiff must prove in addition to the falsity of the statement, as "secondly, that it was false to the knowledge of the defendants, or that they made it not caring whether it was true or false."

It only remains to notice the case of *Smith* v. *Chadwick*, 20 Ch. D. 27, 44, 67. The late MASTER OF THE ROLLS there said: "A man may issue a prospectus or make any other statement to induce another to enter into a contract, believing that his statement is true, and not intending to deceive; but he may through carelessness have made statements which are not true, and which he ought to have known were not true, and if he does so he is liable in an action for deceit; he cannot be allowed to escape merely because he had good intentions, and did not intend to defraud." This, like everything else that fell from that learned Judge, is worthy of respectful consideration. With the last sentence I quite agree, * but I cannot assent to the [*373] doctrine that a false statement made through carelessness, and which ought to have been known to be untrue, of itself renders the person who makes it liable to an action for deceit. This does not seem to me by any means necessarily to amount to fraud, without which the action will not, in my opinion, lie.

It must be remembered that it was not requisite for Sir GEORGE JESSEL in *Smith* v. *Chadwick*, 20 Ch. D. 27, 44, 67, to form an opinion whether a statement carelessly made, but honestly believed, could be the foundation of an action of deceit. The decision did not turn on any such point. The conclusion at which he arrived is expressed in these terms: "On the whole, I have come to the conclusion that this, although in some respects

inaccurate, and in some respects not altogether free from imputation of carelessness, was a fair, honest, and *bonâ fide* statement on the part of the defendants, and by no means exposes them to an action for deceit."

I may further note that in the same case LINDLEY, L. J., said: "The plaintiff has to prove, first, that the misrepresentation was made to him; secondly, he must prove that it was false; thirdly, that it was false to the knowledge of the defendants, or, at all events, that they did not believe the truth of it." This appears to be a different statement of the law to that which I have just criticised, and one much more in accord with the prior decisions.

The case of *Smith* v. *Chadwick* was carried to your Lordships' House (9 App. Cas. 187, 190). Lord SELBORNE thus laid down the law: "I conceive that in an action of deceit it is the duty of the plaintiff to establish two things: first, actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts; and secondly, he must establish that this fraud was an inducing cause to the contract." It will be noticed that the noble and learned Lord regards the proof of actual fraud as essential; all the other matters to which he refers are elements to be considered in determining whether such fraud has been [*374] * established. Lord BLACKBURN indicated that although he nearly agreed with the MASTER OF THE ROLLS, that learned Judge had not quite stated what he conceived to be the law. He did not point out precisely how far he differed, but it is impossible to read his judgment in this case, or in that of *Brownlie* v. *Campbell*, 5 App. Cas. 925, without seeing that in his opinion proof of actual fraud or of a wilful deception was requisite.

Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made

(1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

I think these propositions embrace all that can be supported by decided cases from the time of *Pasley* v. *Freeman*, 2 Smith's L. C. 74, down to *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 145, in 1867, when the first suggestion is to be found that belief in the truth of what he has stated will not suffice to absolve the defendant if his belief be based on no reasonable grounds. I have shown that this view was at once dissented from by Lord CRANWORTH, so that there was at the outset as much authority against it as for it. And I have met with no further assertion of Lord CHELMSFORD's view until * the [* 375] case of *Weir* v. *Bell*, 3 Ex. D. 238, where it seems to be involved in Lord Justice COTTON's enunciation of the law of deceit. But no reason is there given in support of the view: it is treated as established law. The *dictum* of the late MASTER OF THE ROLLS, that a false statement made through carelessness, which the person making it ought to have known to be untrue, would sustain an action of deceit, carried the matter still further. But that such an action could be maintained, notwithstanding an honest belief that the statement made was true, if there were no reasonable grounds for the belief, was, I think, for the first time decided in the case now under appeal.

In my opinion, making a false statement through want of care falls far short of, and is a very different thing from fraud, and the same may be said of a false representation honestly believed, though on insufficient grounds. Indeed, COTTON, L. J., himself indicated, in the words I have already quoted, that he should not call it fraud. But the whole current of authorities, with which I have so long detained your Lordships, shows to my mind, con-

elusively, that fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed. And the case of *Taylor* v. *Ashton*, 11 M. & W. 401, appears to me to be in direct conflict with the *dictum* of Sir GEORGE JESSEL, and inconsistent with the view taken by the learned Judges in the Court below. I observe that Sir Frederick Pollock, in his able work on Torts (p. 243, note), referring, I presume, to the *dicta* of COTTON, L. J., and Sir GEORGE JESSEL, M. R., says that the actual decision in *Taylor* v. *Ashton* is not consistent with the modern cases on the duty of directors of companies. I think he is right. But for the reasons I have given I am unable to hold that anything less than fraud will render directors or any other persons liable to an action of deceit.

At the same time, I desire to say distinctly that when a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief [* 376] was * destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by Lord BLACKBURN in *Brownlie* v. *Campbell*, 5 App. Cas., at p. 952, a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.

I have arrived with some reluctance at the conclusion to which I have felt myself compelled, for I think those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea. I think there is much to be said for the view that this moral duty ought, to some extent, to be converted into a legal obligation, and that the want of reasonable care to see that statements, made under such circumstances, are true, should be

made an actionable wrong. But this is not a matter fit for discussion on the present occasion. If it is to be done the Legislature must intervene and expressly give a right of action in respect of such a departure from duty. It ought not, I think, to be done by straining the law, and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent whether his acts can or cannot be justly so designated.

It now remains for me to apply what I believe to be the law to the facts of the present case. The charge against the defendants is that they fraudulently represented that by the special Act of Parliament which the company had obtained they had a right to use steam or other mechanical power instead of horses. The test which I purpose employing is to inquire whether the defendants knowingly made a false statement in this respect, or whether, on the contrary, they honestly believed what they stated to be a true and fair representation of the facts. Before considering whether the charge of fraud is proved, I may say that I
* approach the case of all the defendants, except Wilde, [* 377]
with the inclination to scrutinise their conduct with severity. They most improperly received sums of money from the promoters, and this unquestionably lays them open to the suspicion of being ready to put before the public whatever was desired by those who were promoting the undertaking. But I think this must not be unduly pressed, and when I find that the statement impeached was concurred in by one whose conduct in the respect I have mentioned was free from blame, and who was under no similar pressure, the case assumes, I think, a different complexion.

I must further remark that the learned Judge who tried the cause, and who tells us that he carefully watched the demeanour of the witnesses and scanned their evidence, came, without hesitation, to the conclusion that they were witnesses of truth, and that their evidence, whatever may be its effect, might safely be relied on. An opinion so formed ought not to be differed from except on very clear grounds, and after carefully considering the evidence, I see no reason to dissent from STIRLING, J.'s conclusion. I shall therefore assume the truth of their testimony.

I agree with the Court below that the statement made did not accurately convey to the mind of a person reading it what the

rights of the company were, but to judge whether it may nevertheless have been put forward without subjecting the defendants to the imputation of fraud, your Lordships must consider what were the circumstances. By the General Tramways Act of 1870 it is provided that all carriages used on any tramway shall be moved by the power prescribed by the special Act, and where no such power is prescribed, by animal power only. (33 & 34 Vict., c. 78, s. 34.) In order, therefore, to enable the company to use steam power, an Act of Parliament had to be obtained empowering its use. This had been done, but the power was clogged with the condition that it was only to be used with the consent of the Board of Trade. It was therefore incorrect to say that the company had the right to use steam; they would only have that right if they obtained the consent of the Board of Trade. But it is impossible not to see that the fact which would impress itself upon the minds of those connected with the company was that they had, [* 378] after submitting * the plans to the Board of Trade, obtained a special Act empowering the use of steam. It might well be that the fact that the consent of the Board of Trade was necessary would not dwell in the same way upon their minds, if they thought that the consent of the Board would be obtained as a matter of course if its requirements were complied with, and that it was therefore a mere question of expenditure and care. The provision might seem to them analogous to that contained in the General Tramways Act, and I believe in the Railways Act also, prohibiting the line being opened until it had been inspected by the Board of Trade and certified fit for traffic, which no one would regard as a condition practically limiting the right to use the line for the purpose of a tramway or railway. I do not say that the two cases are strictly analogous in point of law, but they may well have been thought so by business men.

I turn now to the evidence of the defendants. I will take first that of Mr. Wilde, whose conduct in relation to the promotion of the company is free from suspicion. He is a member of the Bar and a director of one of the London tramway companies. He states that he was aware that the consent of the Board of Trade was necessary, but that he thought that such consent had been practically given, inasmuch as, pursuant to the Standing Orders, the plans had been laid before the Board of Trade with the statement that it was intended to use mechanical as well as horse

power, and no objection having been raised by the Board of Trade, and the Bill obtained, he took it for granted that no objection would be raised afterwards, provided the works were properly carried out. He considered, therefore, that, practically and substantially, they had the right to use steam, and that the statement was perfectly true.

Mr. Pethick's evidence is to much the same effect. He thought the Board of Trade had no more right to refuse their consent than they would in the case of a railway; that they might have required additions or alterations, but that on any reasonable requirements being complied with they could not refuse their consent. It never entered his thoughts that after the Board had passed their plans, with the knowledge that it was proposed to use steam, they would refuse their consent.

* Mr. Moore states that he was under the impression [* 379] that the passage in the prospectus represented the effect of sect. 35 of the Act, inasmuch as he understood that the consent was obtained. He so understood from the statements made at the board by the solicitors to the company, to the general effect that everything was in order for the use of steam, that the Act had been obtained subject to the usual restrictions, and that they were starting as a tramway company, with full power to use steam as other companies were doing.

Mr. Wakefield, according to his evidence, believed that the statement in the prospectus was fair; he never had a doubt about it. It never occurred to him to say anything about the consent of the Board of Trade, because as they had got the Act of Parliament for steam he presumed at once that they would get it.

Mr. Derry's evidence is somewhat confused, but I think the fair effect of it is that though he was aware that under the Act the consent of the Board of Trade was necessary, he thought that the company having obtained their Act the Board's consent would follow as a matter of course, and that the question of such consent being necessary never crossed his mind at the time the prospectus was issued. He believed at that time that it was correct to say they had the right to use steam.

As I have said, STIRLING, J., gave credit to these witnesses, and I see no reason to differ from him. What conclusion ought to be drawn from their evidence? I think they were mistaken in supposing that the consent of the Board of Trade would follow as a

matter of course because they had obtained their Act. It was absolutely in the discretion of the Board whether such consent should be given. The prospectus was therefore inaccurate. But that is not the question. If they believed that the consent of the Board of Trade was practically concluded by the passing of the Act, has the plaintiff made out, which it was for him to do, that they have been guilty of a fraudulent misrepresentation? I think not. I cannot hold it proved as to any one of them that he knowingly made a false statement, or one which he did not believe to be true, or was careless whether what he stated was true or false. In short, I think they honestly believed that what they asserted was true, and I am of opinion that the charge of fraud made against them has not been established.

[* 380] * It is not unworthy of note that in his report to the Board of Trade, General Hutchinson, who was obviously aware of the provisions of the special Act, falls into the very same inaccuracy of language as is complained of in the defendants, for he says: "The Act of 1882 gives the company authority to use mechanical power over all their system."

I quite admit that the statements of witnesses as to their belief are by no means to be accepted blindfold. The probabilities must be considered. Whenever it is necessary to arrive at a conclusion as to the state of mind of another person, and to determine whether his belief under given circumstances was such as he alleges, we can only do so by applying the standard of conduct which our own experience of the ways of men has enabled us to form; by asking ourselves whether a reasonable man would be likely, under the circumstances, so to believe. I have applied this test, with the result that I have a strong conviction that a reasonable man, situated as the defendants were, with their knowledge and means of knowledge, might well believe what they state they did believe, and consider that the representation made was substantially true.

Adopting the language of JESSEL, M. R., in *Smith* v. *Chadwick* (20 Ch. D., at p. 67), I conclude by saying that on the whole I have come to the conclusion that the statement, "though in some respects inaccurate and not altogether free from imputation of carelessness, was a fair, honest, and *bonâ fide* statement on the part of the defendants, and by no means exposes them to an action for deceit."

I think the judgment of the Court of Appeal should be reversed.

Order of the Court of Appeal reversed; order of Stirling, J., restored; the respondent to pay to the appellants their costs below and in this House; cause remitted to the Chancery Division.

Lords' Journals, 1st July, 1889.

ENGLISH NOTES.

The former of the principal cases is selected as the leading authority for a principle of law which has never been questioned since; but the particular application of the principle in that case has been modified by statute. That a verbal statement as to the credit of another might involve the person making it in a liability to make that credit good, was a circumstance to create alarm in the commercial world; and, some thirty years later, a clause was inserted in Lord TENTERDEN's Act (9 Geo. IV., c. 14) enacting (s. 6) that no action should be brought to charge any person upon a representation or assurance given concerning the credit of another, unless the representation or assurance was in writing and signed by the party to be charged. In effect, the principle of the Statute of Frauds relating to mercantile guaranties was applied to the liability for a representation having indirectly the effect of a guarantee.

The case of *Polhill* v. *Walter*, referred to in the judgment of Lord HERSCHELL in *Derry* v. *Peek* (p. 276, *et seq.*, *ante*), was decided in 1832, by a strong Court in the King's Bench, and furnishes an instructive example of the principle decided in *Pasley* v. *Freeman*. The case was this. A bill of exchange was accepted under the hand of W. purporting to be *per procurationem* for H. The holder (P.), an indorsee for value, presented the bill for payment in due course to H., who refused payment on the ground that his acceptance was without authority. Having, on the same ground, been non-suited in an action against H., P. brought an action against W., laying his action (in one Court) on the ground of deceit; namely, that he had been induced to give value for the bill on the false representation by H. that he had authority to accept. The facts proved at the trial were that the defendant was a former partner of H., and carried on business on premises where H. had his counting-house. The bill had been presented for acceptance on these premises, by the payee accompanied by a banker's clerk. The defendant, who was on the premises, stated that H. was out of town; but on the assurance of the payee that it was all correct, signed the acceptance *per proc.* for H. At the trial, Lord TENTERDEN, being of opinion that if there was

no fraudulent or deceitful intention on the part of the defendant, he was not answerable, left it to the jury to determine whether there was such fraudulent intent or not. The jury found that there was no such fraudulent intent; and the verdict was entered for the defendant, giving the plaintiff leave to move to enter a verdict for a stated sum if the Court should be of opinion that he was entitled to it. The case was argued by Campbell (afterwards Lord CAMPBELL) for the defendant and Scarlett (afterwards Lord ABINGER) for the plaintiff.

The judgment of the Court was delivered by Lord TENTERDEN, who, it is to be observed, had been obliged by the force of Scarlett's argument to alter the view which he had taken at Nisi Prius. He first dealt with and dismissed the argument, founded upon another count of the declaration, by which it was attempted to make the defendant liable as acceptor of the bill, which he clearly could not be. The learned CHIEF JUSTICE further expressed a doubt whether the defendant by writing the acceptance entered into any contract or warranty at all. That is a question on which a different light would now be thrown after the decision in *Collen* v. *Wright*, No. 19 of "Agency," 2 R. C. 484; and see *West London Commercial Bank* v. *Kitson* (C. A. 1884), 13 Q. B. D. 360, 53 L. J. Q. B. 345, 50 L. T. 656, 32 W. R. 757: but this does not affect the gist of Lord TENTERDEN's judgment. The learned CHIEF JUSTICE then proceeded as follows (3 Barn. & Adol. 123): "It was in the next place contended that the allegation of falsehood and fraud in the first count was supported by the evidence; and that, in order to maintain this species of action, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff: it was said to be enough if a representation is made which the party making it knows to be untrue, and which is intended by him, or which, from the mode in which it is made, is calculated, to induce another to act on the faith of it, in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature was contended to be, in the legal sense of the word, a fraud: and for this position was cited the case of *Foster* v. *Charles*, 6 Bing. 396, 7 Bing. 105, which was twice under the consideration of the Court of Common Pleas, and to which may be added the recent case of *Corbet* v. *Brown*, 8 Bing. 33. The principle of these cases appears to us to be well founded, and to apply to the present. It is true that there the representation was made immediately to the plaintiff, and was intended by the defendant to induce the plaintiff to do the act which caused him damage. Here, the representation is made to all to whom the bill may be offered in the course of circulation, and is, in fact, intended to be made to all, and the plaintiff is one of these; and the defendant must be taken to have intended that all

such persons should give credit to the acceptance, and thereby act upon the faith of that representation, because that, in the ordinary course of business, is its natural and necessary result. If then the defendant, when he wrote the acceptance, and thereby in substance represented that he had authority from the drawee to make it, knew that he had no such authority (and upon the evidence there can be no doubt that he did), the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence. If the defendant had had good reason to believe his representation to be true, as, for instance, if he had acted upon a power of attorney which he supposed to be genuine, but which was, in fact, a forgery, he would have incurred no liability, for he would have made no statement which he knew to be false: a case very different from the present, in which it is clear that he stated what he knew to be untrue, though with no corrupt motive." The rule was accordingly made absolute to enter the verdict for the plaintiff.

The effect of the judgments in the latter principal case (*Derry* v. *Peek*) may be shortly summarised by saying that they sweep away any supposed distinction between fraud as understood in a Court of Equity and in Courts of Common Law. It is essential that the statement acted upon is wilfully false — the word "wilfully" including "recklessly." In effect the principle is contained in what has been stated by a great authority (the late Lord Justice Bowen) to be the proper direction to a jury in such a case: — "Whether the defendant made the statement knowing it to be untrue, or not knowing whether it was true or false, and not caring."

It is clear, therefore, that fraud, as the ground of an action of damages for the deceit, is broadly distinguishable from the misrepresentation or concealment which may afford ground for the rescission of a contract. This last-mentioned topic has been fully dealt with under Nos. 72–74 of "Contract," 6 R. C. 746–816; and it is unnecessary further to refer to it, except by the remark that where fraud is shown such as would support an action for damages, the same facts would also support a claim for rescission of a contract, unless circumstances have intervened to make the *restitutio in integrum* impracticable.

By the Directors Liability Act 1890 (53 & 54 Vict., c. 64) an important change was made in the law as to the liability of directors and others who issue a prospectus.

The substantial enactment is contained in section 3, which enacts as follows: "Where after the passing of this Act a prospectus or notice invites persons to subscribe for shares in or debentures or debenture stock of a company, every person who is a director of the company at the time of the issue of the prospectus or notice, and every person who

having authorised such naming of him is named in the prospectus or notice as a director of the company or as having agreed to become a director of the company either immediately or after an interval of time, and every promoter of the company, and every person who has authorised the issue of the prospectus or notice, shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures, or debenture stock on the faith of such prospectus or notice for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved" (in effect) (*a*) That there was reasonable ground for belief of the statement not made on the authority of an expert, and (*b*) and (*c*) that the reports of experts and official persons are fairly represented; or unless the director or promoter publicly dissociated himself from the issue of the prospectus as soon as he became aware of it.

It is to be noted that *primâ facie* a prospectus is addressed to persons who are invited to subscribe for shares, and that on the shares being subscribed for and allotted, its object is fulfilled. And where a prospectus is issued with this genuine object, even if there are statements in it which are wilfully or recklessly false, an action for deceit does not lie at the instance of a third person who has bought shares in the market and had them transferred to him. This is made clear by the judgment delivered by the Lords (particularly that of Lord CAIRNS) in *Peek* v. *Gurney* (H. L. 1874), L. R. 6 H. L. 377, 43 L. J. Ch. 19, 43 *et seq.* And it does not appear that on this point the liability is in any way extended by the Act of 1890. But where it is proved (as unfortunately is sometimes the case) that a prospectus is concocted and circulated as part of a fraudulent conspiracy to deceive the public — not (or not only) to obtain the original subscription, but to keep up the deception until the public come in as purchasers of the shares — the case is altered: and a member of the public who is the victim of the conspiracy by purchasing shares in the market may bring an action for deceit against the promoters. *Andrews* v. *Mockford* (C. A. 1896), 1896, 1 Q. B. 372, 65 L. J. Q. B. 302, 73 L. T. 726.

AMERICAN NOTES.

Pasley v. *Freeman* is cited in 1 Bigelow on Fraud, p. 466, with the remark: "This has been the law in actions for damages for a hundred years." "It dates from *Pasley* v. *Freeman*." *Ibid.*, p. 536.

"It is not necessary that the misrepresentation complained of should have been made with a corrupt motive of personal gain on the part of the person making the representation." 1 Bigelow on Fraud, p. 536, citing *Pasley* v. *Freeman*; *Hubbell* v. *Meigs*, 50 New York, 480; *Cowley* v. *Smyth*, 46 New

Jersey Law, 380 ; 50 Am. Rep. 432 ; *Fitzsimmons* v. *Joslin*, 21 Vermont, 129 ; 52 Am. Dec. 46. In the last case the Court disapprove *Langridge* v. *Levy* and *Cornfoot* v. *Fowke*, observing that they "seem to be wholly at variance with the general current of authorities upon that subject, since the case of *Pasley* v. *Freeman*, 3 T. R. 51. The principle there deduced, and sustained by the majority of the Judges with great learning and clearness, and which has formed the basis of all subsequent determinations upon the subject, is that 'a false affirmation, made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action.' 'It is not necessary that the plaintiff should be benefited by the deceit, or that he should collude with the person who is.'"

The misrepresentation must have been acted upon by the party to his hurt. *Wells* v. *Waterhouse*, 22 Maine, 131 ; *Branham* v. *Record*, 42 Indiana, 181 ; *Howe Machine Co.* v. *Brown*, 78 *ibid.* 209 ; *Rogers* v. *Higgins*, 57 Illinois, 244 ; *Lindsey* v. *Lindsey*, 34 Mississippi, 132 ; *Taylor* v. *Guest*, 58 New York, 262 ; *Parker* v. *Moulton*, 14 Massachusetts, 99 ; 19 Am. Rep. 315 ; *Converse* v. *Hood*, 149 Massachusetts, 471 ; 4 Lawyers' Rep. Annotated, 521 ; *First N. Bank* v. *North*, 2 South Dakota, 180 ; *Pearce* v. *Buell*, 22 Oregon, 29 ; *Lorenzen* v. *Kansas City I. Co.*, 44 Nebraska, 99.

The other party must be ignorant and destitute of means of information, and rely entirely on the representation, or be prevented from inquiry and knowledge by the other's artifice. *Chrysler* v. *Canaday*, 90 New York, 272 ; 43 Am. Rep. 166 ; *Champion* v. *Woods*, 79 California, 17 ; 12 Am. St. Rep. 126 ; *Finlayson* v. *Finlayson*, 17 Oregon, 347 ; 3 Lawyers' Rep. Annotated, 801 ; *Griel* v. *Lomax*, 94 Alabama, 641.

The complainant must not be guilty of *laches*. *Mamlock* v. *Fairbanks*, 46 Wisconsin, 415 ; 32 Am. Rep. 716 ; *Poland* v. *Brownell*, 131 Massachusetts, 138 ; 41 Am. Rep. 215 ; *Farnsworth* v. *Duffner*, 142 United States, 43.

The positive assertion as a fact of what is untrue, though believed by the party asserting it to be true, by which another is induced to contract to his damage, is fraudulent. *Snyder* v. *Findley*, Coxe (New Jersey), 78 ; 1 Am. Dec. 193 (citing *Sir Crisp Gascoigne's Case*) ; *Tyson* v. *Passmore*, 2 Penn. State, 122 ; 44 Am. Dec. 181 ; *Converse* v. *Blumrich*, 14 Michigan, 109 ; 90 Am. Dec. 231 ; *Smith* v. *Richards*, 13 Peters (U. S. Sup. Ct.), 26 ; *East* v. *Matheny*, 1 A. K. Marshall (Kentucky), 192 ; 10 Am. Dec. 721 ; *Joice* v. *Taylor*, 6 Gill & Johnson, 54 ; 25 Am. Dec. 325 ; *Gould* v. *York, &c. Co.*, 47 Maine, 403 ; 74 Am. Dec. 491 ; *Woodruff* v. *Garner*, 27 Indiana, 4 ; 89 Am. Dec. 477 ; *Monroe* v. *Pritchett*, 16 Alabama, 785 ; 50 Am. Dec. 203 ; *Frenzel* v. *Miller*, 37 Indiana, 1 ; 10 Am. Rep. 62 ; *Cabot* v. *Christie*, 42 Vermont, 121 ; 1 Am. Rep. 313 ; *Bullitt* v. *Farrar*, 42 Minnesota, 8 ; 18 Am. St. Rep. 485 ; 6 Lawyers' Rep. Annotated, 149 ; *McKinnon* v. *Vollmar*, 75 Wisconsin, 82 ; 6 Lawyers' Rep. Annotated, 121 ; *Cameron* v. *Mount*, 86 Wisconsin, 177 ; 22 Lawyers' Rep. Annotated, 512.

Some cases are more lenient. "Fraud cannot exist without an intent to deceive :" *Miller* v. *Howell*, 1 Scammon (Illinois), 499 ; 32 Am. Dec. 36 ; "it is not only necessary that the representation should be untrue, but that the party making it should know it to be so at the time it was made :" *Campbell* v. *Hillman*, 15 B. Monroe (Kentucky), 508 ; 61 Am. Dec. 195. So of mere

mistaken information by one not acting under contract: *Smith* v. *Mariner*, 5 Wisconsin, 551; 68 Am. Dec. 73, distinguishing *Pasley* v. *Freeman*. See also *Griswold* v. *Sabin*, 51 New Hampshire, 167; 12 Am. Rep. 76; *Nash* v. *Minnesota, &c. Co.*, 163 Massachusetts, 574; 28 Lawyers' Rep. Annotated, 753. Representations by a director of the solvency of a bank must be untrue and fraudulent to warrant action against him. *Cowley* v. *Smyth*, 46 New Jersey Law, 380; 50 Am. Rep. 432 (citing *Pasley* v. *Freeman*); *Westervelt* v. *Demarest*, 46 New Jersey Law, 37; 50 Am. Rep. 400; *Cole* v. *Cassidy*, 138 Massachusetts, 437; 52 Am. Rep. 284; *Lewark* v. *Carter*, 117 Indiana, 206; 10 Am. St. Rep. 40. In *Cowley* v. *Smyth*, *supra*, the cases are learnedly reviewed, and the conclusion of the Court is that in an action of deceit to recover damages for a false representation, "there must be moral fraud in the misrepresentations to support the action." The Court admit that the American cases "are not altogether harmonious;" and quote Mr. Pomeroy, who, speaking of cases in the Queen's Bench, said: "This theory admitted the possibility of fraud at law where there was no moral delinquency. It denied that moral wrong was an essential element in the legal conception of fraud. The same view was for a time accepted and adopted by a considerable number of decisions in different American States. These cases have however been overruled, and the theory itself abandoned in England, and generally, if not universally, throughout the States of our own country. It is now a settled doctrine of the law that there can be no fraud, misrepresentation, or concealment without some moral delinquency. There is no actual legal fraud which is not also a moral fraud." (2 Pomeroy's Eq. Jur., sect. 884.) The Court continue: the English and American cases "have placed the law on this subject where it was put by *Pasley* v. *Freeman* and *Haycraft* v. *Creasy*, and have, I think, upon principle, as well as by the great weight of authority, established the law upon the rational basis, that in the action for deceit, moral fraud is essential to furnish a ground of action." This is one of the most valuable of the American cases on this subject.

It must appear that the party knew or ought to have known that the representation was untrue. *Hexter* v. *Bast*, 125 Penn. State, 52; 11 Am. St. Rep. 874; *People* v. *Healy*, 128 Illinois, 9; 15 Am. St. Rep. 90; *Prewitt* v. *Trimble*, 92 Kentucky, 176; 36 Am. St. Rep. 586; *Pryor* v. *Foster*, 130 New York, 171; *High* v. *Berret*, 148 Penn. St. 261; *Lewark* v. *Carter*, 117 Indiana, 206; 10 Am. St. Rep. 40; *Campbell* v. *Hillman*, 15 B. Monroe (Kentucky), 508; 61 Am. Dec. 195; *Farmers' S. B. Ass'n* v. *Scott*, 53 Kansas, 534.

The representation must be made with knowledge that it was false, or recklessly, not knowing or caring whether it was true or false. *Kountze* v. *Kennedy*, 147 New York, 124; 29 Lawyers' Rep. Annotated, 360; *Montreal R. L. Co.* v. *Mihills*, 80 Wisconsin, 540.

The honest statement of a mere opinion is immaterial if the other party had equal opportunity and means to verify it. *Mamlock* v. *Fairbanks*, 46 Wisconsin, 415; 32 Am. Rep. 716.

The statement of a mere opinion generally does not constitute legal representation, although known to be untrue. *Barnard* v. *Coffin*, 141 Massachusetts, 37; 55 Am. Rep. 443; *Ellis* v. *Andrews*, 56 New York, 83; 15 Am. Rep. 379; *Holbrook* v. *Connor*, 60 Maine, 578; 11 Am. Rep. 212; *Parker* v. *Moulton*, 11 Massachusetts, 99; 19 Am. Rep. 315. The general rule undoubtedly

is expressed in *Slaughter's Adm'r* v. *Gerson*, 13 Wallace (U. S. Sup. Ct.), 379, that where the means of knowledge are at hand and equally available to both parties, or the subject of contract is open to their inspection alike, the false expression of an opinion in respect to it is not actionable. See *Homer* v. *Perkins*, 124 Massachusetts, 431; 26 Am. Rep. 677; *Neidefer* v. *Chastain*, 71 Indiana, 363; 36 Am. Rep. 198; *Graffenstein* v. *Epstein*, 23 Kansas, 443; 33 Am. Rep. 171; *Poland* v. *Brownell*, 131 Massachusetts, 138; 41 Am. Rep. 215; *Lake* v. *Tyree*, 90 Virginia, 719.

But the false statement of an opinion as of one's own knowledge is actionable, when relied upon. *Cabot* v. *Christie*, 42 Vermont, 121; 1 Am. Rep. 313. "Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual engagement; and he is under no obligation to investigate and verify statements as to which the other party to the contract, with full means of knowledge, has deliberately pledged his faith." *Mead* v. *Bunn*, 32 New York, 275. So of statements that cattle will average a certain weight: *Birdsey* v. *Butterfield*, 34 Wisconsin, 52; or that a railway would be constructed and laid by a certain route: *Kent R. Co.* v. *Wilson*, 5 Houston (Delaware), 49.

And so where the statement was made to induce the party to forbear inquiry, and resulted in such forbearance. *Simar* v. *Canaday*, 53 New York, 298; 13 Am. Rep. 523; *Birdsey* v. *Butterfield*, 34 Wisconsin, 52; *Chrysler* v. *Canaday*, 90 New York, 272; 43 Am. Rep. 166; *Hickey* v. *Morrell*, 102 New York, 454; 55 Am. Rep. 824; *Commonwealth* v. *Mech. Ins. Co.*, 120 Massachusetts, 495; *Grim* v. *Byrd*, 32 Grattan (Virginia), 293; *Montgomery Southern R. Co.* v. *Matthews*, 77 Alabama, 357; *Gaty* v. *Holcomb*, 41 Arkansas, 216; *Buschman* v. *Codd*, 52 Maryland, 202. Miller, J., says, in *Simar* v. *Canaday*, *supra*: "When known to the utterer to be untrue, if made with the intention of misleading the vendee, if he does rely upon them, and is misled to his injury, they avoid the contract. *Stebbins* v. *Eddy*, 1 Mason, 414–423. And where they are fraudulently made of particulars in relation to the estate, which the vendee has not equal means of knowing, and where he is induced to forbear inquiries which he would otherwise have made, and damage ensues, the party guilty of the fraud will be liable for the damages sustained." Of this Dr. Bigelow says (1 Fraud, p. 475): "This language is somewhat open to criticism, but it indicates, it is believed, the true doctrine."

The distinction between mere opinion and statement of fact is illustrated in the following recent cases: *Dawe* v. *Morris*, 149 Massachusetts, 188; 4 Lawyers' Rep. Annotated, 158; *Nounnan* v. *Sutter County Land Co.*, 81 California, 1; 6 Lawyers' Rep. Annotated, 219; *Teachout* v. *Van Hoesen*, 76 Iowa, 113; 1 Lawyers' Rep. Annotated, 664; *Deming* v. *Darling*, 148 Massachusetts, 504; 2 Lawyers' Rep. Annotated, 743; *Crane* v. *Elder*, 48 Kansas, 259; 15 Lawyers' Rep. Annotated, 795; *Barndt* v. *Frederick*, 78 Wisconsin, 1; 11 Lawyers' Rep. Annotated, 199. Some of these cases disclose a wide difference of judicial opinion; for example, the false and fraudulent statement that a railroad bond is "A No. 1," and "the railroad was good security," was held not actionable, in *Deming* v. *Darling*, *supra*; while a similar statement that a promissory

note is "perfectly good" was held actionable in *Crane* v. *Elder*, *supra*. Possibly these may be distinguishable on the ground that the purchaser had equal means of ascertaining the truth in the former, and not in the latter case.

Representations by an agent to procure subscriptions to stock are not fraudulent unless made by him with fraudulent knowledge and intent. *Montgomery S. Ry. Co.* v. *Matthews*, 77 Alabama, 357; 54 Am. Rep. 60. In such cases proof of bad faith or absence of reasonable belief is essential. *Erie City Iron Works* v. *Barber*, 106 Penn. State, 125; 51 Am. Rep. 508. So a director of a company is not liable for representations, false in fact, but not known by him to be so, made in published circulars of the company, in which his name appears only as one of the list of directors. *Wakeman* v. *Dalley*, 51 New York, 27; 10 Am. Rep. 551. But a director knowing and misrepresenting the character of bonds is liable to a relying purchaser. *Clark* v. *Edgar*, 84 Missouri, 106; 54 Am. Rep. 84. And a director who falsely represents the company's condition to a stockholder, knowing that he seeks information to guide his decision as to selling his stock, is liable for injury, although he did not make the misrepresentation with a view to induce the sale. *Rothmiller* v. *Stein*, 143 New York, 581; 26 Lawyers' Rep. Annotated, 148. The publication by bank directors that directors and stockholders are personally liable for its debts, if intentionally false, is actionable. *Westerrelt* v. *Demarest*, 46 New Jersey Law, 37; 50 Am. Rep. 400.

No. 3. — BARWICK *v.* ENGLISH JOINT STOCK BANK.

(Ex. Ch. 1867.)

RULE.

The fraud of a servant or agent may be imputed to the master or principal, if the fraudulent act was done by the servant in the course of the master's business, or by the agent within the scope of the principal's authority, and for the benefit of the master or principal.

Barwick v. English Joint Stock Bank.

L. R. 2 Ex. 259–267 (s. c. 36 L. J. Ex. 147).

[259] *Principal and Agent. — Representation. — Money had and received.*

A principal is liable to an action for the fraudulent misrepresentation of his agent, acting within the scope of his authority, and for the benefit of the principal.

The plaintiff having for some time, on a guarantee of the defendants, supplied J. D., a customer of theirs, with oats on credit, for carrying out a government contract, refused to continue to do so unless he had a better guarantee.

No. 3. — Barwick v. English Joint Stock Bank. L. R. 2 Ex. 259. 260.

The defendants' manager thereupon gave him a written guarantee to the effect that the customer's cheque on the bank in plaintiff's favour, in payment for the oats supplied, should be paid, on receipt of the government money, in priority to any other payment, "except to this bank." J. D. was then indebted to the bank to the amount of £12,000, but this fact was not known to the plaintiff, nor was it communicated to him by the manager. The plaintiff thereupon supplied the oats to the value of £1227; the government money, amounting to £2676, was received by J. D., and paid into the bank; but J. D.'s cheque for the price of oats drawn on the bank in favour of the plaintiff was dishonoured by the defendants, who claimed to retain the whole sum of £2676 in payment of J. D.'s debt to them. The plaintiff having brought an action for false representation, and for money had and received: —

Held, first, that there was evidence to go to the jury that the manager knew and intended that the guarantee should be unavailing, and fraudulently concealed from the plaintiff the fact which would make it so.

Secondly, that the defendants would be liable for such fraud in their agent.

Thirdly, that the fraud was properly charged in the declaration as the fraud of the defendants.

Quære, whether the plaintiff could have recovered under the count for money had and received.

Declaration, 1st count, that, in consideration that the plaintiff would sell to or purchase for J. Davis & Son not exceeding one thousand quarters of oats for the use of their contract, the defendants promised * the plaintiff that they would honour the [* 260] cheque of J. D. & Son in the plaintiff's favour in payment of the said goods, on receipt of the money from the commissariat in payment of the forage supplied for the then present month, in priority to any other payment except to the defendants' bank, provided that J. D. & Son were able to continue the contract, and were not made bankrupts; that the plaintiff, relying on the defendants' promise, and within a reasonable time, sold to and purchased for J. D. & Son one thousand quarters of oats, to the amount of £1227, under and according to the guarantee; that J. D. & Son made their cheque on the defendants in favour of the plaintiff in payment of the goods, and delivered it to the plaintiff; that the plaintiff did all things necessary to entitle him to have the cheque honoured; that the defendants received from the commissariat money in payment for the forage supplied by J. D. & Son for the said month, more than sufficient to pay the cheque, and out of which they could and ought to have honoured it; that all necessary conditions, &c., yet the defendants did not honour the cheque, nor have the said J. D. & Son nor the defendants paid the

plaintiff the price of the said goods, or any part thereof, and the same remains due and unpaid to the plaintiff.

2nd count, for money had and received, and on accounts stated.

3rd count, that the defendants, by falsely and fraudulently representing to the plaintiff that J. D. & Son were not then indebted to them, induced the plaintiff to accept the guarantee in the first count mentioned, and to sell to and purchase for J. D. & Son one thousand quarters of oats on the faith of the said guarantee, and to take the cheque of J. D. & Son on the defendants in payment of the oats; averring that J. D. & Son were then, as the defendants well knew, indebted to the defendants in an amount greatly exceeding the cheque and any moneys then coming to the defendants on account of J. D. & Son, and out of which the cheque would otherwise have been payable: that by means of the premises the plaintiff was then deceived by defendants, and, believing their representations to be true, gave J. D. & Son credit for the said one thousand quarters of oats on the faith of the guarantee, and wholly lost the amount for which he so gave credit and the interest, and was otherwise injured.

Pleas — 1, to the first count, denial of the promise; 2, [* 261] to the * same, that the money received from the commissariat was not more than sufficient to pay what was due from J. D. & Son to the defendants' bank, wherefore, etc.; 3, to the second count, never indebted; 4, to the last count, not guilty.

Replication, joining issue on all the pleas, and to the second plea, on equitable grounds, that the money due to the defendants' bank was due before, and at the time of making the guarantee, whereof the defendants had notice, but the plaintiff had no notice, either at the time of accepting the guarantee or of selling the oats, and that the defendants fraudulently concealed from the plaintiff the existence of the debt of J. D. & Son to the defendants until after the selling of the oats, and represented to the plaintiff, and caused him to believe, that the only payments to be made to the defendants' bank out of the money to be received from the commissariat would be payments of advances to be made by them after the guarantee, on account of the forage supply for the month; and that the sale and purchase by the plaintiff to and for J. D. & Son was the means of enabling the defendants to receive the money from the commissariat, and but for that they would not have

received the money, or any part thereof, as they at the time of making the guarantee well knew.

Rejoinder, joining issue on the second replication.

The cause was tried before MARTIN, B., at Westminster, on the 15th of June, 1866; and on the evidence given for the plaintiff, the substance of which is fully stated in the judgment of the Court, the learned Baron ruled that there was no evidence to go to the jury in support of the plaintiff's case, and accordingly directed a nonsuit, but signed a bill of exceptions setting out the evidence.

Feb. 8. Brown, Q. C. (Huddleston, Q. C., and Griffits, with him), for the plaintiff, contended that his case rested on the ground on which in equity a second mortgagee has priority over a first mortgagee, whose negligence has enabled and induced him to advance money without knowledge of the first incumbrance. Story on Equity, s. 384 *et seq.*; *Mocatta* v. *Murgatroyd*, 1 P. Wms. 393; *Berrisford* v. *Milward*, 2 Atk. 49; a doctrine applied to the case of a guarantee in *Lee* * v. *Jones*, 17 C. B. (N. S.) [* 262] 482; 34 L. J. C. P. 131, and open here to the plaintiff under his equitable replication; that as to the existence of an intention in the manager that the plaintiff should be induced by his representation to advance the money, which must be admitted to be an essential circumstance under the last count, there was ample evidence on which the jury might find it: *Swan* v. *North British Australasian Company*, 2 H. & C. 175; 32 L. J. Ex. 273; see per COCKBURN, C. J., and BLACKBURN, J. (2 H. & C., at pp. 182, 188).

He was stopped.

Mellish, Q. C. (Watkin Williams with him), for the defendants, contended that they clearly could not be liable on the guarantee declared upon the first count, since they had satisfied its terms; that, further, there was no evidence of fraud, for that the transaction itself was abundant notice of the indebtedness of Davis; and it might be inferred from the guarantee itself, which was the termination and embodiment of the conversation, that there was knowledge or the means of knowledge in the plaintiff; that at least the want of knowledge in the plaintiff was owing to his negligence, since it was his business to inquire, and not the manager's voluntarily to disclose: *Humilton* v. *Watson*, 12 Cl. & F. 109; that even supposing there was a false representation by the agent, still the principal was not liable to an action: *Cornfoot* v. *Fowke*, 6 M.

& W. 358; *Udell* v. *Atherton*, 7 H. & N. 172; 30 L. J. Ex. 337; see the judgments of Martin and Bramwell, BB. (7 H. & N., at pp. 187, 193); *Wilde* v. *Gibson*, 1 H. L. C. 605; and that at least the fraud could not be stated as the fraud of the bank.

[Willes, J. — I should be sorry to have it supposed that *Cornfoot* v. *Fowke* turned upon anything but a point of pleading. The learned judge referred to Com. Dig., Action on the Case for Deceit, B.]

Brown, Q. C., in reply, contended that in *Udell* v. *Atherton* the general question of the liability of a principal for the acts of his agent, acting in the course of his agency, did not arise, but the decision turned on the facts of the case; and that *Hamilton* v. *Watson* was no authority against the plaintiff when taken [* 263] as * explained by Blackburn, J., in *Lee* v. *Jones*, 17 C. B. (N. S.), at pp. 503, 504; 34 L. J. C. P. 131; the defendants were therefore liable on all the counts, and in particular as to the first, upon the ground that they were bound by way of estoppel by their agent's representation. *Cur. adv. vult.*

May 18. The judgment of the Court (Willes, Blackburn, Keating, Mellor, Montague, Smith, and Lush, JJ.) was delivered by Willes, J. This case, in which the Court took time to consider their judgment, arose on a bill of exceptions to the ruling of my Brother Martin at the trial that there was no evidence to go to the jury.

It was an action brought for an alleged fraud, which was described in the pleadings as being the fraud of the bank, but which the plaintiff alleged to have been committed by the manager of the bank in the course of conducting their business. At the trial, two witnesses were called, first, Barwick, the plaintiff, who proved that he had been in the habit of supplying oats to a customer of the bank of the name of Davis; and that he had done so upon a guarantee given to him by the bank, through their manager, the effect of which probably was, that the drafts of the plaintiff upon Davis were to be paid, subject to the debt of the bank. What were the precise terms of the guarantee did not appear, but it seems that the plaintiff became dissatisfied with it, and refused to supply more oats without getting a more satisfactory one; that he applied to the manager of the bank, and that after some conversation between them, a guarantee was given, which was in this form: —

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"Dear Sir, — Referring to our conversation of this morning, I beg to repeat that if you sell to, or purchase for, J. Davis and Son not exceeding one thousand quarters of oats for the use of their contract, I will honour the cheque of Messrs. J. Davis and Son in your favour in payment of the same, on receipt of the money from the commissariat in payment of forage supplied for the present month, in priority to any other payment, except to this bank; and provided, as I explained to you, that they, J. Davis and Son, are able to continue their contract, and are not made bankrupts.

(Signed) "Don. M. Dewar, *Manager*."

*The plaintiff stated that in the course of conversation [*264] as to the guarantee, the manager told him that whatever time he received the government cheque, the plaintiff should receive the money.

Now, that being the state of things upon the evidence of the plaintiff, it is obvious that there was a case on which the jury might conclude, if they thought proper, that the guarantee given by the manager was represented by him to be a guarantee which would probably, or might probably, be paid, and that the plaintiff took the guarantee, supposing that it was of some value, and that the cheque would probably, or might probably, be paid. But if the manager at the time, from his knowledge of the accounts, knew that it was improbable in a very high degree that it would be paid, and knew and intended that it should not be paid, and kept back from the plaintiff the fact which made the payment of it improbable to the extent of being as a matter of business impossible, the jury might well have thought (and it was a matter within their province to decide upon) that he had been guilty of a fraud upon the plaintiff.

Now, was there evidence that such knowledge was in the mind of the manager? The plaintiff had no knowledge of the state of the accounts, and the manager made no communication to him with respect to it. But the evidence of Davis was given for the purpose of supplying that part of the case; and he stated that, immediately before the guarantee had been given, he went to the manager, and told him it was impossible for him to go on unless he got further supplies, and that the government were buying in against him; to which the manager replied, that Davis must go and try his friends; on which Davis informed the manager that

the plaintiff would go no further unless he had a further guarantee. Upon that the manager acted; and Davis added, "I owed the bank above £12,000." The result was that oats were supplied by the plaintiff to Davis to the amount of £1227, that Davis carried out his contract with the government, and that the commissariat paid him the sum of £2676, which was paid by him into the bank. He thereupon handed a cheque to the plaintiff, who presented it to the bank, and without further explanation the cheque was refused.

This is the plain state of the facts; and it was contended on behalf of the bank that, inasmuch as the guarantee con-
[*265] tains a *stipulation that the plaintiff's debt should be paid subsequent to the debt of the bank, which was to have priority, there was no fraud. We are unable to adopt that conclusion. I speak sparingly, because we desire not to anticipate the judgment which the constitutional tribunal, the jury, may pass. But they might, upon these facts, justly come to the conclusion that the manager knew and intended that the guarantee should be unavailing; that he procured for his employers, the bank, the government cheque, by keeping back from the plaintiff the state of Davis's account, and that he intended to do so. If the jury took that view of the facts, they would conclude that there was such a fraud in the manager as the plaintiff complained of.

If there be fraud in the manager, then arises the question, whether it was such a fraud as the bank, his employers, would be answerable for. With respect to that, we conceive we are in no respect overruling the opinions of my Brothers Martin and Bramwell in *Udell* v. *Atherton*, 7 H. & N. 172; 30 L. J. Ex. 337; the case most relied upon for the purpose of establishing the proposition that the principal is not answerable for the fraud of his agent. Upon looking at that case, it seems pretty clear that the division of opinion which took place in the Court of Exchequer arose, not so much upon the question whether the principal is answerable for the act of an agent in the course of his business — a question which was settled as early as Lord Holt's time (*Hern* v. *Nichols*, 1 Salk. 289) — but in applying that principle to the peculiar facts of the case; the act which was relied upon there as constituting a liability in the sellers having been an act adopted by them under peculiar circumstances, and the author of that act not being their general agent in business, as the manager of a bank is. But with respect to the question, whether a principal is answerable for the

act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. (*Laugher* v. *Pointer*, 5 B. & C. 547, at p. 554.) That principle is acted upon every day in *running down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad, improperly selling the cargo. *Ewbank* v. *Nutting*, 7 C. B. 797. It has been held applicable to actions of false imprisonment, in cases where officers of railway companies, intrusted with the execution of by-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the by-laws. *Goff* v. *Great Northern Railway Company*, 3 E. & E. 672; 30 L. J. Q. B. 148, explaining (at 3 E. & E. p. 683) *Roe* v. *Birkenhead Railway Company*, 7 Ex. 36; and see *Barry* v. *Midland Railway Company*, Ir. L. Rep. 1 C. L. 130. It has been acted upon where persons employed by the owners of boats to navigate them and to take fares, have committed an infringement of a ferry, or such like wrong. *Huzzey* v. *Field*, 2 C., M. & R. 432, at p. 440 (p. 145 *ante*). In all these cases it may be said, as it was said here, that the master has not authorised the act. It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in. [*266]

The only other point which was made, and it had at first a somewhat plausible aspect, was this: It is said, if it be established that the bank are answerable for this fraud, it is the fraud of the manager, and ought not to have been described, as here, as the fraud of the bank. I need not go into the question whether it be necessary to resort to the count in case for fraud, or whether, under the circumstances, money having been actually procured for and paid into the bank, which ought to have got into the plaintiff's hands, the count for money had and received is not applicable to the case. I do not discuss that question, because in common-law pleading no such difficulty as is here suggested is recognised. If

a man is answerable for the wrong of another, whether it be fraud or other wrong, it may be described in pleading as the wrong of the person who is sought to be made answerable in the action. That was the decision in the case of *Raphael* v. *Goodman*, 8 A. & E. 565. The sheriff sued upon a bond; plea, that the [* 267] bond was obtained * by the sheriff and others by fraud; proof, that it was obtained by the fraud of the officer; held, the plea was sufficiently proved.

Under these circumstances, without expressing any opinion as to what verdict ought to be arrived at by the jury, especially considering that the whole case may not have been before them, we think this is a matter proper for their determination, and there ought therefore to be a *venire de novo*. *Venire de novo.*

ENGLISH NOTES.

To supplement the statement of the rule, the fraud of the servant cannot be imputed to the master, where the servant, although acting in the course of his master's business, is acting not for the master's benefit, but in pursuit of his own private ends. This is shown by *British Mutual Banking Association* v. *Charnwood Forest Railway Co.* (C. A. 1887), 18 Q. B. D. 714, 56 L. J. Q. B. 449, 57 L. T. 833, 35 W. R. 590.

The judgment of Bowen, L. J., citing the decision of the Exchequer Chamber in *Limpus* v. *General Omnibus Co.* (1862), 1 Hurl. & Colt. 526, 32 L. J. Ex. 34, shows, in accordance with the judgment in the principal case, that this is only the application of a general principle of the law of torts.

AMERICAN NOTES.

The principal case is cited as the leading one by Dr. Bigelow (1 Fraud, p. 226), and the subject is discussed in Mechem on Agency, section 743.

Some of the American cases seem to take the view that the innocent principal is liable only to the extent of the benefit received by him. *Krumm* v. *Beach*, 96 New York, 398; *Bennett* v. *Judson*, 21 ibid. 238; *Kennedy* v. *McKay*, 43 New Jersey Law, 288; 39 Am. Rep. 581, following *Western Bank of Scotland* v. *Addie*, and restricting the remedy to rescission and recovery of the money paid. In *Freyer* v. *McCord*, 165 Penn. State, 539, it was said, without discussion or citations, that there "should be some evidence of participation or knowledge on the part of the principal, or circumstances which should have put him on inquiry."

But generally the principal is held to the extent of the damage where the act was in the course of the agent's employment and in the scope of the business. *Allerton* v. *Allerton*, 50 New York, 670; *Durst* v. *Burton*, 47 ibid. 167;

No. 3. — Barwick v. English Joint Stock Bank. — Notes.

7 Am. Rep. 428; *White* v. *Sawyer*, 16 Gray (Mass.), 586; *Fitzsimmons* v. *Joslin*, 21 Vermont, 129; 52 Am Dec. 46; *Presby* v. *Parker*, 56 New Hampshire, 409; *Lee* v. *Pearce*, 68 North Carolina, 76; *Hopkins* v. *Snedaker*, 71 Illinois, 449; *Brown* v. *Bonner*, 8 Leigh (Virginia), 1; 31 Am. Dec. 637; *Locke* v. *Stearns*, 1 Metcalf (Mass.), 560; 35 Am. Dec. 382; *Jeffrey* v. *Bigelow*, 13 Wendell (New York), 518; 28 Am. Dec. 476. In *Fitzsimmons* v. *Joslin*, *supra*, the Court, by Redfield, J., say: "The case of *Cornfoot* v. *Fowke* is certainly a most remarkable instance of self-delusion, brought about by the severity of one's own discriminations. Lord Abinger, who dissented from the opinion of the majority of the Judges, seems to have readily comprehended the delusion under which his brethren were laboring, as indeed he did all intricacies of thought or language. But when the majority of a Court of law gravely tell us that, in a case where the defendant has been most grossly deceived and cheated by the false representations of the plaintiff's agent, which the plaintiff himself knew to be false, but did not expect the agent would make, but which became essential to induce the defendant to make the contract, and were consequently made by the agent at a venture, and the plaintiff, after knowing the facts, still persists in enforcing the contract, it should be said the defendant is liable, because there is no fraud on the part of the plaintiff, — none on his own part, because he made no representations, and none on the part of the agent, because he did not know them to be false, — it is certainly not a little calculated to shake our reliance upon human judgment and discrimination. One is almost compelled to doubt if indeed these men can be serious. It almost strikes the mind as a matter of mere badinage. It is scarcely surpassed, in its ethical or metaphysical acumen, by the sophistry of the ancient schoolmen, by which it was attempted to be proved, by syllogistic reasoning, that in a foot race Hercules could never overtake the lobster. This whole subject is placed in the clearest possible light by Lord Denman, in *Wilson* v. *Fuller*, 43 Eng. Com. L. 634, in these lines: 'We think the principal and his agent are, for this purpose, completely identified; and that the question is not what was passing in the mind of either, but whether the purchaser was in fact deceived by them, or either of them.'"

The rule is also sustained by *Rhoda* v. *Annis*, 75 Maine, 17; 46 Am. Rep. 354; *Wolf* v. *Pugh*, 101 Indiana, 293; *Lynch* v. *Mercantile Trust Co.*, 18 Federal Reporter, 486; *Law* v. *Grant*, 37 Wisconsin, 548; *Lamm* v. *Port Deposit Homestead Ass'n*, 49 Maryland, 233; 33 Am. Rep. 246; *Ellenberger* v. *Protective M. F. Ins. Co.*, 89 Penn. St. 461; *Tagg* v. *Tennessee Nat. Bank*, 9 Heiskell (Tennessee), 479; *Reynolds* v. *Witte*, 13 South Carolina, 5; 36 Am. Rep. 678; *McCord* v. *Western Union Tel. Co.*, 39 Minnesota, 189; 1 Lawyers' Rep. Annotated, 143; *Johnson* v. *Barber*, 5 Gilman (Illinois), 425; 50 Am. Dec. 416; *Henderson* v. *San Antonio, &c. R. Co.*, 17 Texas, 560; 67 Am. Dec. 675; *Maple* v. *Railroad Co.*, 40 Ohio State, 313; 48 Am. Rep. 685; *Sidney School F. Co.* v. *Warsaw School District*, 122 Penn. State, 491; 9 Am. St. Rep. 121; *Haskell* v. *Starbird*, 152 Mass. 117; 23 Am. St. Rep. 809; *Fairchild* v. *McMahon*, 139 New York, 290; 36 Am. St. Rep. 701; *Wheeler* v. *Baars*, 33 Florida, 696; *Mitchell* v. *Finnell*, 101 California, 614. "Nothing is better settled," said the Texas Court, citing *Doe* v. *Martin*, 4 T. R. 39, and *Cornfoot* v. *Fowke*, 6 M. &

W. 358. "That a principal is liable for the false representation of his agent, although personally innocent of the fraud," said the Massachusetts Court, "is said by Mr. Justice Hoar, in *White* v. *Sawyer*, 16 Gray, 586, 589, to be settled by the clear weight of authority." "The principal holds out his agent as competent," said the New York Court (*Fifth Avenue Bank* v. *Railway Co.*, 137 New York, 231; 33 Am. St. Rep. 712), quoting from Story on Agency, "and thereby in effect he warrants his fidelity and good conduct in all matters within the scope of the agency." "In such case," said the California Court, "the principal is bound even though the agent disobeyed his positive instructions," citing *Garretzen* v. *Duenckel*, 50 Missouri, 104; 11 Am. Rep. 405. This last principle is recognized in many of the other cases cited above.

It is held in *Kennedy* v. *McKay*, 43 New Jersey Law, 288; 39 Am. Rep. 581, contrary to other decisions, that the only remedy in such a case is to rescind the transaction and sue for the money paid, and that an action for the fraud will not lie against the innocent vendor. The Court said: "To support this suit against McKay fraud must be imputable to him, and the case is entirely destitute of all testimony tending to show that he authorized or was privy to the utterance of the false representations in question. On the ground thus assumed, then the case would be that of a sale made by fraud-doing agents in behalf of an innocent vendor. Whatever uncertainty may at one time have prevailed in regard to the legal incidents of such a position, such uncertainty no longer exists, and the rights, under the given circumstances, of both vendor and vendee, have been plainly defined, and, as I think, firmly settled by recent judicial decisions. In the light of such authorities it is clear that an innocent vendor cannot be sued in tort for the fraud of his agent in effecting a sale. In such a juncture the aggrieved vendee has at law two, and only two, remedies; the first being a rescission of the contract of sale and a reclamation of the money paid by him from the vendors, or a suit against the agent founded on the deceit. But in such a posture of affairs, a suit based on the fraud will not lie against the innocent vendor, on account of the deceit practised, without his authority or knowledge, by his agent. If the situation is such that the vendee can make complete restitution, so as to put the vendor in the condition with respect to the property sold that he was in at the time of the sale, he has the right to rescind such contract of sale, and if the vendor, on a tender to that effect, refuses to return the money received in the transaction, a suit will lie for such money; but such refusal on the part of the vendor will not make him a party to the original wrong, so that he can be sued for the deceit. This is the doctrine declared with much clearness and force by Barons Bramwell and Martin, in the case of *Udell* v. *Atherton*, 7 H. & N. 172; and their views on this subject were concurred in, and the principle propounded by them adopted and enforced by the House of Lords in *Western Bank of Scotland* v. *Addie*, L. R. 1 Sc. App. 146."

No. 4. — SAVAGE *v.* FOSTER.

(CH. 1723.)

RULE.

If A, being entitled to property, and privy to a transaction by which B acquires an apparent title, lies by while a third party (C) purchases the property on the strength of that apparent title, A cannot avail himself of his own title against C.

Savage v. Foster.

9 Modern, 35–38.

Fraud. — Public Purchase. — Owner lying by without disclosing Title.

Where a person knowing his own title, and not giving notice of it to a [35] purchaser, shall never set it up against the purchaser.

Margaret Smith being seized of the lands in question upon her marriage with Peter Flavill settled the same upon trustees and their heirs, to the use of the said Peter Flavill for life, then upon Margaret his intended wife for life; remainder, after the death of the said Peter and Margaret, to the heirs of the said Peter, on the body of the said Margaret to be begotten; remainder to the right heirs of the said Margaret for ever. The said Peter and Margaret had issue only one daughter, the now defendant, who was married to one Foster. Peter Flavill died, and then his widow married one Brown, by whom she had issue one other daughter, and no more; which daughter being courted by one Williams, but he refusing to marry her without such a fortune, which Margaret her mother was not able to give without breaking through this settlement, conveyed the said lands to the aforesaid Williams, &c.; and the defendant Mrs. Foster, and her husband, who knew that the lands were settled on her in tail as aforesaid, solicited her mother Margaret Brown to make a conveyance in favour of the said Williams, and were assisting in carrying on the marriage between him and her half-sister Brown. * Whereupon the [* 36] said Margaret conveyed these lands, &c., to the use of herself for life, remainder to Williams and his heirs; then the marriage took effect: and afterwards Williams sold these lands to the plaintiff Savage, who entered and built a house thereon.

No. 4. — Savage v. Foster. 9 Modern. 36, 37.

And now Mrs. Foster, who was the issue in tail by virtue of the said settlement, and endeavouring to set it up against the title of the plaintiff, who was the purchaser, he exhibited a bill against her to have his title established against that settlement; for that she having full notice of the purchase, and of her own title, she gave no notice thereof to the plaintiff, and therefore ought not to be at liberty now to impeach it, though she was a *feme covert*, but that she should be concluded by this fact as well as if she was an infant.

It was argued for the defendant Mrs. Foster that two things are necessary to bind the right in cases of this nature: the one is, that the party must know his own title to the lands; and the other is, that he must be instrumental in promoting the purchase thereof by the vendee, without giving him notice of such title; for it would be dangerous consequence if the bare permission of him to proceed in the purchase should be a foundation to bind his right in this Court on the foot of fraud. It is true the defendant knew she had a title under this settlement, but she apprehended she was not to take till after her mother's death; she knew likewise that her sister was about to marry with Williams, but did not know upon what terms; but if she had known the terms of that marriage, she was then a *feme covert*, and her husband ought to have given the plaintiff notice of her title; therefore his negligence shall not prejudice her, who had done nothing to lose her inheritance and the entire benefit of this settlement for ever.

On the other side it was first denied that the two things before mentioned by the plaintiff's counsel are necessary to have relief in cases of this nature: the one, that the party should know his own title; and the other, that he should be instrumental in carrying on the purchase by another, without giving him notice of such title. It is true he ought to know his own title, and that must necessarily be intended in this case, because the defendant had the custody of this deed of settlement; but it is not necessary that the person interested should be active or instrumental in carrying [*37] on the agreement in order to a purchase; for *if the party knew his own title, there can be no danger that his right should be bound by the purchase, because it was in his power to help himself, by giving the purchaser notice of such right; and though this defendant was a *feme covert*, yet it was a fraud in her not to give the purchaser notice of her right; and therefore it shall

No. 4. — Savage v. Foster, 9 Modern, 37, 38.

be bound for ever; and the rather, because the defendant solicited her mother to make this conveyance in favour of Williams, upon the marriage of her sister, and for that the plaintiff hath entered and built on the lands.

The Court. —Where there is a parol agreement made for a lease, and the lessee, by virtue of such agreement, enters and builds, this Court will establish it on the foot of fraud in the lessor, notwithstanding the Statute of Frauds, &c.; because contracts executed in part are not always within the statute, though executory contracts are.

Now this bill is brought to be relieved against a fraud in the defendant, who would avoid the plaintiff's title by an elder settlement, though she was privy to, and assisting in, carrying on the marriage of him under whom the plaintiff claims, and never gave any notice of her title to the purchaser.

Now when anything in order to a purchase is publicly transacted, and a third person knowing thereof, and of his own right to the lands intended to be purchased, and doth not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase; for it was an apparent fraud in him not to give notice of his title to the intended purchaser, and in such case infancy or coverture shall be no excuse; for though the law prescribes formal conveyances and assurances for the sales and contracts of infants and *feme covert*, which every person who contracts with them is presumed to know; and if they do not take such conveyances as are necessary, they are to be blamed for their own carelessness, when they act with their eyes open; yet when their right is secret, and not known to the purchaser, but to themselves, or to such others who will not give the purchaser notice of such right, so that there is no laches in him, this Court will relieve against that right, if the person interested will not give the purchaser notice of it, knowing he is about to make the purchase; neither is it necessary that such infant or *feme covert* should be active in promoting the purchase, if it appears that they were so privy to it that it could not be done without their knowledge.

*Therefore it was decreed that the defendant should [*38] levy a fine to the plaintiff to extinguish her right to the lands in this settlement, and that the plaintiff should have a perpetual injunction to quiet his possession; and that if the defendant shall levy the fine quietly, and without delay, then the

plaintiff shall have no costs, otherwise he shall pay costs. And the case of *Watts* v. *Cresswell*, 9 Viner Abr. 415, was now remembered, where tenant for life borrowed money, and his son, who was the next in remainder, and an infant, was a witness to the deed of mortgage; this Court gave relief on the foot of fraud, because the infant did not give the mortgagee notice of his title. So in the case of one Clere (*Clere* v. *Earl of Bedford*, 13 Viner Abr. 536), who was an infant, and clerk to an attorney, and had a mortgage on his master's estate, and engrossed a subsequent mortgage thereof to another, without giving notice that the estate was mortgaged before to him; and for that reason his mortgage was postponed on the foot of fraud.

Nota. In the next Session of Parliament the defendant petitioned to appeal, or to have a rehearing at the peril of costs, and offered to levy a fine on that condition; but it was rejected for not coming in time.

ENGLISH NOTES.

The above case might perhaps, more scientifically, have been ranged with the cases under the title of "Estoppel" (as estoppel by conduct). But since the Court gave active assistance to the plaintiff, and since the conduct of the defendant is labelled by the judgment with the word "fraud," it seems convenient to range the case under this title.

In Sugden's Vendors and Purchasers, ch. 23, s. 1, § 17, a principle is stated as follows: "If a person having a right to an estate permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right, although covert or under age." And he cites amongst others the principal case and *Hobbs* v. *Norton*, *infra*.

It may indeed be questioned whether mere silence on the part of the owner would under any circumstances be now recognised as a ground for interference by the Court; but it seems necessary to select some of the decisions on which the doctrine appears to be founded.

The case of *Hobbs* v. *Norton* (in 1682), 1 Vern. 135, was perhaps an extreme application of the supposed principle. A younger brother having under his father's will an annuity of £100 charged on land, contracts with H. for selling him the annuity. H. goes to the elder brother (who appears to have been the devisee of the lands charged with the annuity) and asked whether the younger brother had a good title to the annuity and whether the father was seized in fee at the time of making the will. The elder brother told him that he believed his brother had a good

title, and that he had paid him his annuity these twenty years, but at the same time told him that he heard there was a settlement made of his father's lands before the will, and that this settlement was in the possession of another person, and that he had never seen it, and could not tell what the contents of it were, but encouraged him to proceed in his purchase. Afterwards the elder brother got the settlement into his hands, which entailed the lands upon himself. H. filed his bill against both brothers to have the annuity decreed.

The Lord Keeper, Sir F. North (afterwards Lord Guildford), decreed the elder brother to confirm the annuity "purely on the encouragement he gave H. to proceed with his purchase, and that it was a negligent thing in him not to inform himself of his own title, that thereby he might have informed the purchaser of it, when he came to inquire of him." It does not appear clear by the report what was proved to have been said by way of "encouragement;" but it seems hardly possible that negligence to inform himself of his own title could be treated as a ground of relief at the present day.

In *Berrisford* v. *Milward* (18 July, 1740), 2 Atk. 49, a mortgagee being present when the mortgagor was in treaty for the marriage of his son with the father of the son's intended wife, fraudulently concealed his mortgage and at the same time privately assured the father that he would trust to his personal security. The mortgaged property having accordingly been put into settlement as unincumbered, a decree was made restraining the mortgagee from setting up his title against the settlement, and directing him to make a conveyance to trustees in order to protect the title of the beneficiaries under the settlement. In this case it seems not too much to say that the mortgagee, to use the language employed in an analogous class of cases in *Northern Counties of England Fire Ins. Co.* v. *Whipp*, 10 R. C. 527, "assisted in or connived at the fraud which led to the creation of the subsequent estate."

A class of cases which may fairly be considered under this rule are those relating to the duty, or supposed duty, of trustees of whom inquiries are made as to the title of the beneficiaries under them. Of this class is the case of *Burrowes* v. *Lock*, which was long regarded as a terror to trustees; but, so far — if at all — as the case has now any authority, it is only a warning to them not to make rash assertions.

Burrowes v. *Lock* (1805) is reported in 10 Ves. 470, and with the aid of the extract from the Register Book, which was examined in the case of *Low* v. *Bouverie*, *infra*, is more fully set forth in The Revised Reports, vol. 8, pp. 33, 856. The case was that of a bill filed against a trustee, who, in answer to an inquiry by the intending purchaser of a share of the trust estate, expressly stated that the intending vendor was entitled to his share, "which he can dispose of to any one." The plain-

tiff upon this statement had purchased the share, and now filed his bill against both the vendor and the trustee to have the purchase made good. The trustee was held liable jointly with the vendor (who of course was primarily liable) to make good to the plaintiff a certain deduction out of the share which was claimed by a prior incumbrancer who had given the trustee due notice of his incumbrance. The answer of the trustee had stated that he did not recollect the notice. Sir William Grant, M. R., said that this was no excuse; at least it was gross negligence to take upon him to aver positively and distinctly that the vendor was entitled to the whole fund "without giving himself the trouble to recollect whether the fact was so or not, without thinking upon the subject."

It will be observed that *Burrowes* v. *Lock* is commented on in the judgments in *Derry* v. *Peek* (p. 271, *supra*). It was further very fully considered, and the application of any principle which may have been supposed to rest on it is very much narrowed by the decision of the Court of Appeal in *Low* v. *Bouverie* (C. A. 1891), 1891, 3 Ch. 82, 60 L. J. Ch. 594, 65 L. T. 533, 40 W. R. 50, a case in which a trustee, in answer to an inquiry by a person who had been applied to for a loan on a life interest, replied that the life interest was subject to several incumbrances, which he mentioned. The plaintiff having advanced money on a mortgage of the life interest, subsequently discovered that there were other incumbrances, and brought an action against the trustee to make him liable. There were in fact several prior mortgages of which the defendant had received formal notice; but it appeared that he had forgotten them. The Court held that he was not liable. The effect of the decision will be best shown by briefly stating the judgment of the late Lord Justice Bowen. "*Derry* v. *Peek*," he in effect says, "decides two things: first, that an action of deceit would only lie for a representation in the truth of which the person making it had no honest belief; secondly, that in the class of cases of which *Derry* v. *Peek* is an instance, there is no duty enforceable by action to be careful in the representation which is made. Negligent misrepresentation," he continues, "does not certainly amount to deceit, and negligent misrepresentation can only amount to a cause of action if there exists a duty to be careful — to give information after careful inquiry. In *Derry* v. *Peek* the House of Lords considered that the circumstances raised no such duty. It is hardly necessary to point out that, if the duty is assumed to exist, there must be a remedy for its non-performance; and that consequently the doctrine that negligent misrepresentation affords no cause of action is confined to cases in which there is no duty, which the law recognises under the circumstances, to be careful. But *Derry* v. *Peek*, as Lord Justice Lindley has said, leaves altogether untouched,

first of all, cases of warranty, which we need not consider; and, secondly, cases of estoppel. Estoppel is only a rule of evidence; you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief when you can see that, on the hypothesis that the defendant is estopped from denying the truth of something which he has said, a cause of action would exist. An illustration of a case of that kind of estoppel is to be found in the case of *Bahia* v. *The San Francisco Railway Company*, L. R. 3 Q. B. 584, 37 L. J. Q. B. 176. I think that *Burrowes* v. *Lock* was a case of estoppel. As soon as we looked at the record, it so appeared; it was a case where there was a right to relief on the hypothesis that the defendant was precluded from denying the truth of a particular fact. . . . Now, after considering and reconsidering, and reading and re-reading, these letters over and over again, I have come to the conclusion myself that the trustee here did not make any clear statement of the character which the plaintiff alleges. I think that his language would be reasonably understood as conveying an intimation of the state of his belief in a particular fact without an assertion that the fact was so, apart from the limitation of his own knowledge; and therefore that no relief here can be granted."

Low v. *Bouverie* is followed by STIRLING, J., in *Re Wyatt, White* v. *Ellis* (1891), 65 L. T. 214. He held that there is no obligation on a trustee to answer questions as to incumbrances by an intending mortgagee; but that, whether there was or not, a mortgagee who lent his money without having obtained an answer did so at his peril, and could acquire no better title than the mortgagor could confer. This judgment was affirmed by the Court of Appeal, who held that the latter proposition laid down by STIRLING, J., was established by cases which the Court was not at liberty to review. (C. A. 8 Dec., 1891), 1892, 1 Ch. 188, 61 L. J. Ch. 178.

The principal case itself when examined really resolves itself into conduct intended to deceive the purchaser, that is to say, fraud pure and simple. And of course fraud is an estoppel. The later cases appear to show that mere silence or an omission to give information is in no case an estoppel unless it is part of a line of conduct equivalent to an express statement of a fact.

That an infant or married woman who has been a party to a fraud is bound by the estoppel which the fraud would create against such party if *sui juris*, is a proposition involved in the principal case and confirmed by numerous cases, of which it may be here sufficient to cite *Sharpe* v. *Foy* (1868), L. R. 4 Ch. 35; *Re Lush's Trusts* (1869), L. R. 4 Ch. 596.

AMERICAN NOTES.

This point is somewhat touched upon under Estoppel, *ante*, vol. xi., p. 78, (*Pickard* v. *Sears*).

There is no doubt of the acceptance of the principle in this country. In *Crosby* v. *Buchanan*, 23 Wallace (United States Sup. Ct.), 420, one to whom lands had been conveyed, being bound to make a reconveyance to the grantor's children, "slept upon his rights for a quarter of a century; he waited for every actor in the premises except himself to die; in all the litigation affecting his interests he never appeared so long as there was any one alive who could speak against him from actual knowledge of the facts, and during all that time he permitted his adversaries to assume and represent his title." "When therefore he came into Court and asserted his absolute title as against the ignorant heirs of the deceased contracting parties, and wilfully concealed his contract for a reconveyance, and the receipt which belonged to it, he came with unclean hands, and must suffer the consequences."

The rule is sustained by *Engle* v. *Burns*, 5 Call (Virginia), 463; 2 Am. Dec. 593 (citing the principal case); *Henderson* v. *Overton*, 2 Yerger (Tennessee), 394; 24 Am. Dec. 492; *Blanchard* v. *Allain*, 5 Louisiana Annual, 367; 52 Am. Dec. 594; *Godeffroy* v. *Caldwell*, 2 California, 489; 56 Am. Dec. 360; *Bryan* v. *Ramirez*, 8 California, 461; 68 Am. Dec. 340; *Workman* v. *Guthrie*, 29 Penn. State, 495; 72 Am. Dec. 654; *Storrs* v. *Barker*, 6 Johnson Chancery (New York), 166; 10 Am. Dec. 316; *Rice* v. *Bunce*, 49 Missouri, 231; 8 Am. Rep. 129; *Markham* v. *O'Connor*, 52 Georgia, 183; 21 Am. Rep. 249; *Guffey* v. *O'Reilly*, 88 Missouri, 418; 57 Am. Rep. 424, and note by the present writer, 429; *Danley* v. *Rector*, 10 Arkansas, 211; 50 Am. Dec. 242 ("it is very questionable, however, whether this rule applies to common-law proceedings"). "There is no principle better established in this Court, nor one founded on more solid considerations of public utility, than that which declares that if one man knowingly, does it passively by looking on, suffers another to purchase and expend money on land, under an erroneous impression of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person." *Wendell* v. *Van Rensselaer*, 1 Johnson Chancery (New York), 354, by KENT, Chancellor. See *Alabama, &c. R. Co.* v. *S. & N. A. R. Co.*, 84 Alabama, 570; 5 Am. St. Rep. 401; *Peters Box & L. Co.* v. *Lesh*, 119 Indiana, 98; 12 Am. St. Rep. 367; *Marines* v. *Goblet*, 31 South Carolina, 153; 17 Am. St. Rep. 22; *O'Connor* v. *Clark*, 170 Penn. State, 318; 29 Lawyers' Rep. Annotated, 607; *Anderson* v. *Hubble*, 93 Indiana, 570; 47 Am. Rep. 394; *Rice* v. *Bunce*, 49 Missouri, 231; 8 Am. Rep. 129; *Pool* v. *Lewis*, 41 Georgia, 162; 5 Am. Rep. 526.

But knowledge that another is about to buy one's own land from a third does not impose the duty of seeking him out and informing him of his title. *Bramble* v. *Kingsbury*, 39 Arkansas, 131. So one is not estopped, by the circulation of a map of his land unauthorized by him, to deny the validity of the subdivisions. *Sullivan* v. *Davis*, 29 Kansas, 28.

Mr. Pomeroy cites the principal case (2 Eq. Jur., p. 1086) with approval of the doctrine.

No. 5. — COCKSHOTT *v.* BENNETT.

(K. B. 1788.)

No. 6. — JACKMAN *v.* MITCHELL.

(CH. 1807.)

RULE.

A BARGAIN made by a creditor on a composition by his debtor with his creditors generally, whereby he is to obtain a larger payment than the other creditors, is a fraud on those creditors and void.

Cockshott and another v. Bennett and another.

2 T. R. 763–766 (1 R. R. 617).

Fraud. — Composition Deed. — Inequality.

If all the creditors of an insolvent consent to accept a composition for [763] their respective demands upon an assignment of his effects by a deed of trust, to which they are all parties, and one of them, before he executes, obtain from the insolvent a promissory note for the residue of his demand, by refusing to execute till such note be made, the note is void in law, as a fraud on the rest of the creditors; and a subsequent promise to pay it is a promise without consideration, which will not maintain an action.

This was an action of assumpsit on a promissory note given by the defendants to the plaintiffs, tried at the last Lancaster Assizes, before THOMPSON, B., when a verdict was found for the defendants. The circumstances of the case were these: the defendants being considerably indebted to the plaintiffs, and to several other creditors, and being insolvent, assigned over all their effects in trust to pay 11*s.* in the pound to their creditors, to which they all consented and signed the deed, except the plaintiffs, who, as their demand accrued just before the failure, refused to sign the deed, and to take any composition unless the defendants would give them a note for the remaining 9*s.* in the pound: they accordingly gave them the note in question to that amount, on which the plaintiffs signed the deed, and the defendants made a subsequent promise to pay it. It also appeared that the rest of the creditors would not have signed the deed, unless the plaintiffs did so likewise.

No. 5. — Cockshott v. Bennett, 2 T. R. 763, 764.

A rule having been obtained to show cause why a new trial should not be granted,

The Solicitor-General was now proceeding to show cause; but the Court desired the counsel in support of the rule to begin.

Law, in support of the rule for a new trial. — First, supposing the rule now settled in a Court of equity, that creditors signing a composition deed with the rest of the creditors shall be restrained by injunction from suing at law upon securities obtained from the bankrupt for the unsatisfied surplus of their debts, it does not follow that such a debt is not recoverable in a Court of law. 2dly, Subsequent acts of confirmation have been held, both at law and equity, sufficient to entitle a party to sue without any new consideration. As to the first, although it has been the practice of late years in a Court of equity to grant injunctions to stay suits brought in the Courts of law on securities given by insolvent persons, to secure to particular creditors a payment beyond the common dividend, yet all the authorities previous to the statute 5 Geo. II., c. 30, s. 22, show that in such cases a Court of equity would not interfere. *Small* v. *Brackley*, 2 Vern. 602.

[* 764] * In *Lewis* v. *Chase*, 1 P. Wms. 620, on the defendant's petitioning against the allowance of the plaintiff's certificate (who had become a bankrupt) the plaintiff gave him a bond for payment of his whole debt, in consideration of withdrawing his petition; and on the defendant's obtaining a verdict at law on the bond, the plaintiff brought a bill in Chancery to be relieved against it, which was dismissed by Lord Chancellor Macclesfield. The next case on this subject is that of *Spurret* v. *Spiller*, 1 Atk. 105, which is the first case after the statute where an injunction was granted, the Lord Chancellor being of opinion that it was a very proper case to be considered. But the ground on which a Court of equity interferes in these cases is decisive to show that a Court of law cannot vacate the contract; for a Court of equity interferes upon terms, and may give a partial relief; but a Court of law cannot try all the equitable circumstances of the case. The Court of Chancery also has a jurisdiction from the bankrupt laws; but there is no analogy between cases on the bankrupt laws and the present. A security given by a bankrupt to obtain his certificate is vacated by the statute 5 Geo. II. The bankrupt laws are compulsory, and the object of them is an equal distribution among the creditors, and the discharge of the bankrupt on giving

up all his effects. But a composition agreement with creditors has for its object only an equal partition of all the insolvent's effects among the creditors; but the future liberty of the person of the insolvent is no part of the object of their agreement. And this case is different from that of *Spurret* v. *Spiller*, and the case put by Lord HARDWICKE in *Lord Chesterfield* v. *Janssen*, 1 Atk. 352; for in those cases a precise dividend was to be made; and the Court of Chancery interfered on the ground that it was a fraud on the other creditors, who might otherwise have obtained a larger dividend; but in this case, inasmuch as the whole fund was assigned, the creditors could not possibly be prejudiced by the security given to the plaintiffs. But, secondly, even if this were fraudulent as against the rest of the creditors, yet it was not so as against the defendants; for there was a good consideration for the promise in law. There was a preceding debt, which was revived by the subsequent promise. In *Trueman* v. *Fenton*, Cowp. 544, it was held that a note given by a bankrupt after his bankruptcy for a debt due before was valid. That was determined on the ground that the old debt due in conscience, though not in law, * was a good consideration for a promise. Then [* 765] as the Court in that case gave effect to the promise, there is no reason why the former debt should not be a valid consideration for the subsequent promise which was made in this case.

Lord KENYON, Ch. J. — In determining this case, I wish to disclaim founding my opinion upon grounds of equity as contradistinguished from grounds of law. The foundation of my opinion is, that the temptation to give this note was a fraud on the creditors who were parties to the contract, on which their debts were to be cancelled in consideration of receiving a composition. The note preceded the execution of the deed; all the creditors being assembled for the purpose of arranging the defendant's affairs, they all undertook and mutually contracted with each other that the defendants should be discharged from their debts after the execution of the deed. Then these plaintiffs, in fraud of that engagement, entered into a contract with the defendants, which prevented their being put in that situation which was the inducement to the other creditors to sign the deed, and to relinquish a part of their demands. If a bankrupt or an insolvent, after becoming free from his engagements, having no restraint on his

mind, voluntarily give security for a former demand, which is only due in conscience, such a security may be enforced in a Court of law. But the contract in the present case affected all the other creditors, by rendering abortive all that they had intended to do for the bankrupt, in compounding for their debts. It has been said that the Court of Chancery has interfered in these cases on equitable principles, and that some of the cases are one way and some another. But I do not know that Lord HARDWICKE (in *Lord Chesterfield* v. *Janssen*) would have been of a different opinion in a Court of law. And during the time that I was in a Court of equity the decisions on this subject were uniform; and in these sort of cases the Court ordered the securities to be delivered up. Then as to the revival of this debt by a subsequent promise, contracts not founded on immoral considerations may be revived, though before there was no legal remedy. But this transaction is bottomed in fraud, which is a species of immorality; and, not being available as such, cannot be revived by a subsequent promise.

ASHHURST, J. — If this security be fraudulent, a Court of law may avoid it as well as a Court of equity; and in my apprehension, it is a fraud on the rest of the creditors. For they [* 766] were * induced to enter into this agreement on principles of humanity, in order to discharge the defendants from their incumbrances; and if they had not thought that such would have been the effect, they would not probably have agreed to sign the deed, but each would have endeavoured to obtain payment of his whole debt. Therefore I think that this security is not merely voidable, but absolutely void. If it had been only voidable, the subsequent promise might have revived it; but if void in its creation, no promise could set it up again. But here the note was void on the ground of fraud, and any subsequent promise must be a *nudum pactum*; for the debt was annihilated by the deed of composition, and the plaintiffs had consented to take a smaller sum than their original debt. This is not like a security given by an infant, which is only voidable; for that may be revived by a promise after he comes of age. In such case he is bound in equity and in conscience to discharge the debt, though the law would not compel him to do so; but he may waive the privilege of infancy, which the law gives him for the purpose of securing him against the impositions of designing persons. And if he

choose to waive his privilege, the subsequent promise will operate upon the preceding consideration.

BULLER, J. —The case of *Smith* v. *Bromley*, Dougl., 2d ed., 671, n., in which that of *Lewis* v. *Chase* is shaken, goes the full length of deciding this question. Here the defendants were absolutely in the power of the plaintiffs at the time when this note was given; they took an undue advantage of the distressed situation of the defendants. If this note had been obtained by actual compulsion, there is no doubt but that it would be void; now this is equivalent to it. Then if the security were void at its creation, no subsequent promise can set it up; for it must be recollected that the promise, which is relied on, is to revive the note. This is not like the case of *Trueman* v. *Fenton*, where the party was a free man, and acted without compulsion, after his bankruptcy.

GROSE, J., of the same opinion. *Rule discharged.*

Jackman v. Mitchell.

Mitchell v. Jackman.

13 Ves. 581–587 (9 R. R. 229).

Fraud. — Composition Deed.

Bond, to secure to one creditor the deficiency of a composition, not [581] communicated to the other creditors, decreed to be delivered up, with costs, though to *particeps criminis:* in these cases, proceeding upon public policy, the relief being given on account, not of the individual, but of the public.

The first of these causes was instituted upon a bill, representing that in June, 1785, Isaac Jackman of Dublin, the plaintiff's father, proposed to his creditors a deed of composition. The defendant, claiming a debt of £4043 3*s.*, refused to come in, unless the plaintiff, Isaac Jackman the younger, would give him a * bond for securing the deficiency of the debt [* 582] and interest beyond the composition; and that, for the purpose of inducing the defendant, who was the largest creditor, to execute the deed, and thereby to get the other creditors to follow his example, to extricate his father from his difficulties, the plaintiff was prevailed upon to execute such bond; and in consideration of that bond the defendant executed the deed, in consequence of which some of the other creditors also executed it.

No. 6. — Jackman v. Mitchell, 13 Ves. 582, 583.

The bill stated that the bond, given by the plaintiff to the defendant, was dated the 3rd of June, 1785, in the penalty of £8086 6*s.*, defeasible on payment by the plaintiff to the defendant of £4043 3*s.* on the 3rd of June, 1786; and a memorandum of defeasance of equal date was indorsed, signed by the defendant and plaintiff, reciting the debt, &c.; that the plaintiff had applied to the defendant not to take any steps for the recovery of his debt from the plaintiff's father, but to come in and accept such composition, as the other creditors might agree to take, or as the estate might produce under any commission of bankrupt, or otherwise; and in consideration thereof had executed the said bond; which, it was thereby declared, should stand as a security to the defendant for payment of any deficiency of his said debt, with interest; but in case the plaintiff's father, after obtaining such release from his creditors, or his certificate under any commission of bankrupt, and on or before the 3rd day of June, 1786, should duly execute to the defendant a security for the deficiency of his said debt and interest; that then and in either of the said cases the said bond was to be delivered up and cancelled. The deed of composition, having been executed by the defendant and some other creditors, was never acted upon.

[* 583] * The bill, charging that no consideration was received by the plaintiff for this bond, that other creditors, naming one, were thus induced to come in, that the fact was never communicated to them, and that the defendant, from consciousness that he could not recover upon the bond, had never attempted to enforce it, prayed that the bond, as having been obtained for such fraudulent purpose, be delivered up and cancelled.

The case, represented by the cross bill, against both the Jackmans was, that Jackman the elder having given his bond to Mitchell to secure a debt of £4000, Jackman the younger, in June, 1785, proposed a composition, to which Mitchell refused to accede. Jackman the younger then proposed that Mitchell should deliver up Jackman the elder's bond, and grant him a letter of licence for one year, and execute to Jackman the younger and William Bulmer a power of attorney to enable them to recover or compound such debt, and to recover such composition or dividend as should be paid in respect of Mitchell's debt, in case Jackman the elder should compound with his creditors, or become a bankrupt; and in consideration thereof Jackman the younger pro-

posed to become bound to Mitchell, not only to covenant for the composition or dividend he might receive from the estate of his father, but to pay Mitchell the residue of such debt; and, in order to induce him to agree to such proposal, assured him the estate of Jackman the elder should be divided within a year. Mitchell agreeing to that proposal, the account was settled, and the bond given by Jackman the son; and in consideration of such bond Mitchell executed the letter of licence and power of attorney, and delivered up the bond of Jackman the elder; and Mitchell stated that he never executed any deed of composition, though he had by mistake, from the length of * time, by [* 584] his answer stated the instrument to be a deed of composition.

This bill, charging that the plaintiff was induced by the representations of Jackman the younger to give up the bond of his father, who was then in good circumstances, prayed an account of what was due upon the bond of the elder Jackman, and an inquiry what loss had been sustained by the plaintiff's having delivered up the bond, to be answered by Jackman the younger, or that he may be decreed to deliver up that security.

Bulmer, being examined by the plaintiff Jackman, spoke generally of some instrument, deed, or power of attorney, to enable Jackman the younger and the deponent to act for the creditors of Jackman the elder, in the event of a composition or a commission of bankruptcy; such power, &c., to be limited to twelve months: representing that Mitchell refused to execute such instrument or power of attorney unless Jackman the younger would give his bond for the residue of the debt to Mitchell, to which Jackman at length agreed; in consideration whereof Mitchell executed the aforesaid instrument or power of attorney, enabling the deponent and Jackman the younger, or one of them, to act for the creditors, and take such sums in lieu of their respective debts as might be produced by means of either a deed of composition or under a commission of bankruptcy, should either the one or the other take place within twelve months; and that none of the other creditors had any knowledge of Mitchell's motive for signing, and some of them (naming one) signed in consequence of his signing.

Mr. Richards and Mr. Hall for the plaintiff, Jackman, [585] insisted that the bond given by him was void as against

the policy of the law, a fraud upon all the creditors of Jackman the elder, an attempt by one creditor to get a preference, holding out, at the same time, that they were all participating in equal proportions; which cannot stand, according to *Cockshott* v. *Bennett*, 2 T. R. 763 (p. 317, *ante*); *Cecil* v. *Plaistow*, 1 Anstr. 202; *Jackson* v. *Lomas*, 4 T. R. 166; *Estabrook* v. *Scott*, 3 Ves. 456; and many other cases.

Sir Samuel Romilly and Mr. Bell for the defendant, Mitchell.

The only question is as to the jurisdiction. If an instrument is void upon the face of it, this Court will not assume jurisdiction upon a bill to have that instrument delivered up, as, the fact being established, it is void equally at law as in equity. The defendant cannot possibly recover upon this bond, and cannot, therefore, want the assistance of a Court of equity. In *Ryan* v. *M'Math*, 3 Bro. C. C. 15, Lord Thurlow held that where it is perfectly clear that a promissory note is void, this Court will not entertain a bill to have it delivered up and cancelled. That decision was disapproved at the time, the instrument appearing to be void, not upon the face of it, but from collateral circumstances. But there is no instance of a decree for delivering up a bond appearing upon the face of it to be void. This transaction, though certainly not to be supported, appears very different, according to the cross bill, from the representation by the original bill. At least Mitchell ought to be placed in the same situation, by having the bond of Jackman the elder restored to him.

[586] Mr. Richards in reply.

There are many instances in which this Court acts, though the party against whom it acts cannot succeed at law; as upon a marriage brocage bond relief is given here, though the defect appears upon the instrument; so upon annuity deeds. *Bromley* v. *Holland*, 5 Ves. 610, 7 Ves. 3 (6 R. R. 58); *Underhill* v. *Horwood*, 10 Ves. 209. But here no preference, concealed from the other creditors, appears upon this bond. It must therefore be pleaded.

The Lord Chancellor (Lord Eldon).

The date of this bond, in 1785, is material. It is admitted at the bar that if this bond was given to secure to one creditor the deficiency of a composition, and was given without communication of that fact to the other creditors, it is bad in equity; and certainly it is now well understood that it is bad at law also. But I remember when such a bond was not considered bad at law

by any person attending this Hall. It must, however, now be taken to be bad at law, declarations of Courts of law upon that point having been very uniform of late. But it is also well settled that the jurisdiction of Courts of equity is not gone by the resolution of Courts of law to adopt the principle of equity.

As to the question of jurisdiction, it is not necessary now to say anything upon that, this case not calling for my opinion upon that point. It is not true that every instrument creating an obligation to pay the deficiency of a composition, though by the debtor himself, is bad. I remember the case of a person named Hebblethwaite, who had made a composition with his * creditors, and secured the deficiency to one creditor by [* 587] a bond; and that was held good in this Court by Lord THURLOW; and it was part of the transaction that that dealing should not be kept secret, but should be communicated to the other creditors; and, as they did not object, Lord THURLOW held it good. It is not made out that the ground of the distinction taken by Sir SAMUEL ROMILLY exists here; for this bond, notwithstanding the indorsement, might be good; and it is bad, only as it is proved *aliunde*, that it was intended to be kept secret; and there is no doubt of that upon the letter. The decree in the first cause must therefore be, without doubt, that this bond shall be delivered up.

It is contended for Mitchell that this distinction must be made in his favour; that he has been by the act of the plaintiff, Jackman, placed in circumstances that make it unfit to give him this equitable relief; unless he is replaced in the situation in which he stood before this vicious transaction took place; that Jackman the younger is bound in conscience to replace the bond of Jackman the elder, which was given up by Mitchell, in his hands, before any relief can be given against the other bond. The circumstances attending that bond from Jackman the elder to Mitchell are very suspicious; and the proof fails in fixing Jackman the younger with the duty of restoring that bond.

The decree in the first cause must therefore be that this bond shall be delivered up to be cancelled. The other bill must be dismissed, and the decree must be made with costs in both causes, though Jackman was a party; as in these cases, which proceed upon grounds of public policy, the relief is given on account, not of the individual, but of the public.

ENGLISH NOTES.

The principle of the rule is supported by numerous cases, of which it may suffice to mention *Wood* v. *Barker* (1865), L. R. 1 Eq. 139, 35 L. J. Ch. 276; *Daughlish* v. *Tennent* (1866), L. R. 2 Q. B. 49, 36 L. J. Q. B. 10; *McKeuran* v. *Sanderson* (1875), L. R. 20 Eq. 72, 44 L. J. Ch. 447, 32 L. T. 385; *Ex parte Milner*, *In re Milner* (1885), 15 Q. B. D. 605, 54 L. J. Q. B. 425, 53 L. T. 652.

On the other side of this line will be found the case of *In re McHenry*, *McDermott* v. *Boyd*, *Levita's Claim* (C. A. 1894), 1894, 3 Ch. 365, 64 L. J. Ch. 13, 71 L. T. 502. The question there was as to the validity of an agreement made by McHenry, deceased, to Levita. The circumstances under which the agreement had been made were as follows: In 1886 McHenry had been adjudicated a bankrupt. In the bankruptcy Levita proved a debt for £25,000. Arrangements were made for the annulment of the bankruptcy by means of money placed by a third person in the hands of trustees, who applied the money in buying up the claims of the various creditors separately. The trustees bought up Levita's claim nominally for £2,000, but there was a verbal agreement between Levita and McHenry that in consideration of Levita assigning his debt to the trustees for this sum he (McHenry) would pay him £6,000 at a future time. The bankruptcy was subsequently annulled with the assent of the assignees of the creditors (being the trustees who had bought up the debts as above mentioned). On the claim being made by Levita for the £6,000 in the administration of McHenry's estate after his death, it was held by the Court of Appeal, reversing the judgment of North, J., that the claim was good. The agreement was not a fraud on the Court who annulled the bankruptcy, for there was no necessity of bringing before the Court more than the assent of the original creditors or their assignees. Nor was it a fraud as regards the other creditors. For the transaction was not one — like the case of a composition deed — in which the creditors were dealing, or were understood to be dealing, on a common basis.

AMERICAN NOTES.

Dr. Bigelow cites both these cases (1 Fraud, 203, 204, 205). *Jackman* v. *Mitchell* is cited in 2 Pomeroy, Eq. Jur. p. 1406.

The principle that a secret preference exacted to induce an assent to a composition is not enforceable, is familiar in American jurisprudence. *Willis* v. *Morris*, 63 Texas, 458; 51 Am. Rep. 655; *Fay* v. *Fay*, 121 Massachusetts, 561; *Bank of Commerce* v. *Hoeber*, 88 Missouri, 37; 57 Am. Rep. 359, and extended notes by the present writer, pp. 363–374 (citing *Cockshott* v. *Bennett*); *Solinger* v. *Earle*, 82 New York, 393 (citing *Cockshott* v. *Bennett*); *Kullman* v. *Greenebaum*,

92 California, 403; 27 Am. St. Rep. 150; *Doughty* v. *Savage*, 28 Connecticut, 146; *Feldman* v. *Gamble*, 26 New Jersey Equity, 494; *Loucheim Bros.' Appeal*, 67 Penn. State, 49; *Clarke* v. *White*, 12 Peters (U. S. Sup. Ct.), 178; *Goodwin* v. *Blake*, 3 T. B. Monroe (Kentucky), 106; 16 Am. Dec. 87; *Newell* v. *Higgins*, 55 Minnesota, 82.

But the fraudulent preference does not avoid the creditor's right to recover his lawful proportion under the composition. *Hanover Nat. Bank* v. *Blake*, 142 New York, 404; 40 Am. St. Rep. 607; 27 Lawyers' Rep. Annotated, 33 (accompanied by a very careful note).

The weight of authority is that an innocent creditor may ignore a general composition, and recover on his original demand, where another creditor has secretly obtained an undue advantage and a fraudulent preference in the composition. *Cobb* v. *Tirrell*, 137 Massachusetts, 143; *Kahn* v. *Gumberts*, 9 Indiana, 430, counsel citing *Cockshott* v. *Bennett*: *Hefter* v. *Cahn*, 73 Illinois, 296; *Saul* v. *Buck*, 72 Georgia, 254: *Kullman* v. *Greenebaum*, 92 California, 403; 27 Am. St. Rep. 150; *Zell Guano Co.* v. *Emry*, 113 North Carolina, 85; *Crandall* v. *Cochran*, 3 Thompson & Cook (N. Y. Sup. Ct.) 203; *Crossley* v. *Moore*, 40 New Jersey Law, 27; *Bank of Commerce* v. *Hoeber*, 88 Missouri, 37; 57 Am. Rep. 359; *O'Shea* v. *Collier*, &c. *Co.*, 42 Missouri, 397; 97 Am. Dec. 332, citing *Cockshott* v. *Bennett*; *Doughty* v. *Savage*, 28 Connecticut, 146; *White* v. *Kuntz*, 107 New York, 518; 1 Am. St. Rep. 886; *Lanes* v. *Squyres*, 45 Texas, 382; 2 Pomeroy's Eq. Jur., p. 1407; *Musgat* v. *Wybro*, 33 Wisconsin, 515; Story's Eq. Jur., sect. 379. And these cases unanimously hold that the result is the same even if the debtor was ignorant of the preference, and it was the work of his attorney or near relatives.

But in *Page* v. *Carter*, 16 New Hampshire, 254; 41 Am. Dec. 726, it was held that although a note given to induce consent was void, yet in an action on the original debt the composition would not be held void, and a recovery on the original claim was denied where a note had thus been given but held void. *Bartlett* v. *Blaine*, 83 Illinois, 25; 25 Am. Rep. 346: *Babcock* v. *Dill*, 43 Barbour (N. Y. Sup. Ct.), 577. The debtor's mere intention to pay a particular creditor in full out of his future earnings is not fraudulent. *Argall* v. *Cook*, 43 Connecticut, 160. But his subsequent engagement to pay the balance is not enforceable. *Stafford* v. *Bacon*, 1 Hill (N. Y.), 532: 37 Am. Dec. 366.

In *Page* v. *Carter*, *supra*, after citing *Cockshott* v. *Bennett*, the Court observe: "But none of these cases, nor the reasons upon which they are based, go to the extent of avoiding the composition, by reason of any such unfair preference obtained by a creditor through a secret agreement with the debtor. The rule appears to have been made for his benefit and protection, rather than for the sake of any advantage to the creditors at large; their only interest in the faithful execution of the agreement being that which they justly have in the absolute and full achievement of their purpose in his behalf. To hold therefore that the debtor should be charged with complicity in a fraudulent transaction designed to defeat the measures which have been instituted for his relief, would be to engraft upon that rule of law an alien branch that would conflict with its beneficial purposes.

"The case of *Howden* v. *Haigh*, 11 Ad. & El. 1033, which has been cited as tending to favor the proposition that such a fraudulent act would defeat, by reason of the debtor's concurrence in it, the benefits to which he would otherwise be entitled under the composition, does not appear to sustain it. The point which is there decided, and to which it is there cited by the writers, is that the fraud destroys the security which the creditor takes for the sum to which he is fairly entitled and the excess also. Chit. on Con. 460. These cases of composition between a debtor and his creditor must not be confounded with those which have arisen under the English bankrupt laws, in which it has been held that money paid or secured to a creditor to induce him to sign the bankrupt's certificate would have the effect of avoiding the certificate, even if such payment or security was made by a stranger, and without the privity of the bankrupt. These cases proceed upon the ground that the policy of the statute, which in terms vacated certificates procured through such influences, required that the creditors should act without such a bias. 'The test which the Legislature requires is the unbiased approbation of the creditors.' 'Although a third person shall not be punished for the fraud of another, he shall not avail himself of it.' *Robson* v. *Calze*, Doug. 227. Between these two classes of cases there is obviously no analogy."

In *Chevcront* v. *Textor*, 53 Maryland, 295, the Court "find a great many cases," including *Cockshott* v. *Bennett*, in which a recovery has been denied to the creditor who seeks to enforce his fraudulent preference, and such securities have been decreed to be given up; but they continue: "In none of these cases does the composition agreement appear to have been disturbed. On the contrary the decisions proceed on the hypothesis that the composition stands. On a case made, a Court of *equity*, with all the parties before it, would set aside an agreement thus secured to the injury of the parties compounding; but we have found no case where at law *one* creditor has been permitted to abandon the agreement, and *recover* notwithstanding it, on showing that one creditor has thus been dealt with by the debtor.". This however seems to be *obiter* (see p. 306), and must be construed to have been intended to apply only to the decisions of Maryland.

The theory on which the majority of our Courts proceed is thus stated, in *Partridge* v. *Messer*, 14 Gray (Mass.), 180: "All the creditors, who execute a deed of composition by which they agree to discharge their debtor on receiving a ratable proportion of their dues, are presumed to do it upon the understanding that they are all to receive the same proportion; and any private agreement for securing to one or more of those creditors a greater proportion than the others are to receive is a fraud on the others." Citing *Leicester* v. *Rose*, 4 East, 380; *Knight* v. *Hunt*, 5 Bing. 433; *Howden* v. *Haigh*, 11 Ad. & El. 1033; *Malludieu* v. *Hodgson*, 16 Ad. & El. 689. And the leading New York case (*Breck* v. *Cole*, 4 Sandford (N. Y. Superior), 83) thus states the reason: "It is in all cases the concealment of a fact which it was material for them to know, and the knowledge of which might have prevented them from assenting to the proposition. Every composition deed is in its spirit an agreement between the creditors themselves, as well as between them and the debtor. It is an agreement that each shall receive the sum or the security which the

deed stipulates to be paid or given, and nothing more, and that upon this consideration the debtor shall be wholly discharged from all the debts then owing to the creditors who then signed the deed." (Citing *Cockshott* v. *Bennett*.) "The beneficial consideration to each creditor is the engagement of the rest to forbear." *Williams* v. *Carrington*, 1 Hilton (New York City Com. Pl.), 519.

A creditor who has exacted a secret preference is estopped from claiming that the composition is void by reason of similar preferences to others. *Baldwin* v. *Rosenman*, 49 Connecticut, 105; *O'Brien* v. *Greenebaum*, 92 California, 104; *Blair* v. *Wait*, 69 New York, 113; *White* v. *Kuntz*, 107 ibid. 518. *Contra*: *Stuart* v. *Blum*, 28 Penn. State, 225; *Elfelt* v. *Snow*, 2 Sawyer (U. S. Circ. Ct.), 94.

The doctrine in question has no application where the creditors do not join in a composition deed, but "each acts not only for himself, but in opposition to every other creditor, all equally relying upon their vigilance to gain a priority." *Clarke* v. *White*, 12 Peters (U. S. Sup. Ct.), 200.

The line of English cases which hold that even where the secret agreement has been fully performed, the debtor may recover back the money or property thus paid or transferred, on the theory of coercion exercised over him by the creditor, is disapproved and distinguished in *Solinger* v. *Earle*, 82 New York, 393, which was the case of a secret preference given by the brother-in-law of the debtor, as a mere volunteer. The Court said: "It is somewhat difficult to understand how a debtor, who simply pays his debt in full, can be considered the victim of oppression or extortion, because such payment is exacted by the creditor as a condition of his signing a compromise, or to see how both the debtor and creditor are not *in pari delicto*. (See remark of Parke, B., in *Higgins* v. *Pitt*, 4 Exch. 312.) But the cases go no further than to hold that the debtor himself, or a near relative who out of compassion for him pays money upon the exaction of the creditor, as a condition of his signing the composition, may be regarded as having paid under duress, and as not equally criminal with the creditor. These decisions cannot be upheld on the ground simply that such payment is against public policy. Doubtless the rule declared in these cases tends to discourage fraudulent transactions of this kind, but this is no legal ground for allowing one wrong-doer to recover back money paid to another in pursuance of an agreement illegal as against public policy." "And in respect to the claim of duress, upon which *Smith* v. *Bromley* (2 Doug. 696) was decided, we are of opinion that the doctrine of that and the subsequent cases referred to (*Smith* v. *Cuff*, 6 M. & S. 160; *Atkinson* v. *Denby*, 7 H. & N. 934) can only be asserted in behalf of the debtor himself, or of a wife or husband, or near relative of the blood of the debtor, who intervenes in his behalf." This seems practically to overrule *Gilmour* v. *Thompson*, 49 Howard Practice (N. Y.), 198.

FRAUDULENT CONVEYANCE.

No. 1. — MATHEWS *v.* FEAVER.

(CH. 1786.)

No. 2. — SIMS *v.* THOMAS.

(K. B. 1840.)

RULE.

In order that a settlement may be impeached under 13 Eliz., c. 5, the property settled must be liable to be taken in execution.

Mathews v. Feaver.

1 Cox, 278–280 (1 R. R. 39).

Fraud. — Statute of 13 Eliz. — Copyholds.

[278] An assignment of personal property for a consideration clearly inadequate is fraudulent as against creditors under 13th Eliz. But copyholds not being naturally subject to the debts, a conveyance of them cannot be fraudulent against creditors.

The plaintiffs in this cause were assignees of a bond, which was entered into by Robert Feaver (the defendant's father) for securing a sum of £300, being the marriage portion given by the said Robert Feaver on the marriage of his daughter with the defendant, James Mathews; and the said James Mathews having assigned the same as a security for two sums of £200 and £100, in which he was indebted to the two plaintiffs respectively; and the said Robert Feaver, the father, being dead, and leaving the defendant,
[*279] * Robert Feaver, the son, his personal representative, the present bill was brought against Robert Feaver, the son, for a discovery of his father's assets, and for payment of the said bond.

The defendant, Robert Feaver, the son, by his answer to the original bill, denied that he possessed assets of his father to any greater amount than £40, but insisted on the benefit of an assignment made by the father to him some short time before the father's

death, whereby, in consideration of an annuity of £30 to be paid by the son to the father during the father's life, and of natural love and affection, the father assigned over to the son certain copyhold and leasehold premises, and his stock in trade, and several other articles of property therein enumerated.

The amended bill impeached the assignment as being fraudulent against creditors, and prayed that the personal property might be taken as part of the father's assets.

The facts (either admitted by the defendant's answer or in proof in the cause) were, that at the time of the assignment the defendant, Robert Feaver, the son, had notice of the plaintiff's claim in respect of the said bond; that the father was about seventy-seven years of age, in an infirm state, and not likely to live; that the property assigned was, in fact, the whole of the father's property, and the value of the whole was about £800 (though some of the witnesses called it near £1000), and, exclusive of the copyhold, was worth at least £600.

On the part of the plaintiffs, it was said this assignment was clearly fraudulent under the statute 13th Eliz.; it was an assignment of the whole property; and he being at the time a trader, it was, in fact, an act of bankruptcy; that the consideration of natural love and affection was of no avail as against creditors, and this transaction, upon the whole, seemed directly calculated to defraud the father's creditors.

For the defendant it was said this was merely the case of an old man wishing to retire from business, and surrendering up his property to his son, upon having an annuity secured to him for his life, and that in transactions * of this nature [* 280] the inadequacy of the transaction was not to be rigidly examined, according to *Jones* v. *Marsh*, Ca. Temp. Talb. 64.

Master of the Rolls (Sir Lloyd Kenyon). — If the facts in this cause were all fully established in evidence, I should have no difficulty in determining it. I do not know how this case differs from a case of bankruptcy; though, to be sure, if the bankrupt laws are to be argued from, it is begging the question. If the conveyance had been made without any consideration, it would certainly have been void under the statute; and I am of the same opinion, where the consideration is entirely inadequate. It is true as between vendor and vendee the Court will not weigh the consideration in golden scales; but this is a transaction between the

father and the son, and natural love and affection is mentioned as part of the consideration, upon which, as against creditors, I cannot rest at all. It is true it is a consideration which, though not valuable, is yet called meritorious, and which in many instances the Court will maintain, but not against creditors.

But I am not satisfied as to the nature or the value of the copyhold premises, which, generally speaking, are not subject to debts, and therefore the assignment of them can never be fraudulent against creditors.

There may be copyholds which, from their particular tenure, or from the custom of the manor, may be liable to debts, but in this cause I have nothing from which I can judge of the nature of the copyholds in question. I at first thought this case proper to be determined by a jury, but, upon reconsidering, I cannot frame an issue which will answer the purpose. I shall therefore direct the Master to inquire what was the value of the property comprehended in the assignment, exclusive of the copyhold; what was the nature of the interest of Robert Feaver, the father, in the said copyhold premises, and by what tenure the same were holden; and what was the custom of the manor acting upon the same, and what was the value of such copyhold premises; and reserve all further directions and costs. Reg. Lib. B., 1786, fol. 734.

Sims v. Thomas.

9 L. J. Q. B. 399–405 (s. c. 12 Ad. & El. 536; 4 P. & D. 233).

Fraud. — Statute of 13 Eliz. — Goods and Chattels. — Bond.

[399] A bond for securing an annuity is not "goods and chattels" within 13 Eliz., c. 5.

J. S. assigned an annuity bond to trustees, in trust for his wife and family, and in the event of the decease of his child and grandchildren without issue, in trust for himself, his executors, administrators, and assigns; J. S. afterwards became insolvent, and his estate and effects were assigned under the insolvent Act (the 1 Geo. IV., c. 119, which was then in force): — *Held*, that the right of action on the bond did not pass to the assignee, the contingency in question not having happened.

Debt on a bond, given by way of security for an annuity of £150 per annum, by the defendant, together with three others, to the intestate. Breaches, non-payment of £262, 10*s.*, due in the lifetime of the intestate, and £2025 due since his death.

No. 2. — Sims v. Thomas, 9 L. J. Q. B. 399, 400.

Pleas. — First, that the intestate, James Sims, on the 24th of May, 1823, petitioned for his discharge as an insolvent debtor, and obtained his discharge on the 1st of September; and an assignment of his real and personal estate to Robert Strachan as assignee, on the 22d of September, under 1 Geo. IV., c. 119; and thereupon, by virtue of the same indenture and the said statute, the said cause of action, in the declaration mentioned, and all the right, title, and interest of the said J. Sims, of, in, and to the same, did then become, and were and still are, vested in the said R. Strachan, as such assignee as aforesaid. Second, payment.

Replication to the first plea, that before the making of the said writing obligatory, and before any part of the said arrears of the said annuity became due and payable, and before the said James Sims applied by petition for his discharge, to wit, on the 30th of June, 1820, the said J. S., by indenture then made, granted, bargained, sold, assigned, and set over all that the said annuity, and also the said bond, and all benefit and advantage of the same, respectively, to Richard Johnson and George * Whitfield, their executors, administrators, and assigns, [*400] to hold on the trusts expressed in the said indenture.

The rejoinder set forth the indenture, by which it appeared that the bond was assigned to the trustees, in trust for the wife, child, and grandchildren of Sims, and in case all the children should die under the age of twenty-one, without leaving issue, then in trust for him, the said J. Sims, his executors, administrators, and assigns. It then proceeded to aver, that long before the making of the said indenture the said J. Sims was indebted to divers persons in divers large sums of money, amounting in the whole to a large sum, to wit, the sum of £3000, which remained due and unpaid from thenceforth until and at the time of the discharge of the said J. Sims, as in the first plea mentioned; and which remains still unpaid. And the said defendant further says, that the said indenture was made and executed without consideration in that behalf, and to the end, intent, and purpose to delay, hinder, and defraud the said creditors of the said J. Sims of their just and lawful debts, whereupon the said indenture, as against the said R. Strachan, in the said plea mentioned, was and is void, frustrate, and of none effect. Issue joined.

At the trial, before Lord Denman, Ch. J., at the Middlesex Sittings after Michaelmas Term, 1838, the jury found for the defend-

ant on the first issue, viz., whether J. Sims was indebted, as in the rejoinder averred, at the time of the assignment, and for the plaintiff on the second (that of payment).

In the following term: —

Erle obtained a rule for judgment *non obstante veredicto*, on the ground that the indenture was not void as against R. Strachan, the assignee of the insolvent; or, if it were, that the defendant could not aver it to be so, without showing also that the creditor had elected to treat it as void.

The case was argued in Trinity Term (by consent) by —

Merivale, for the defendant. — A conveyance of property, made by one in insolvent circumstances, which would be void as against creditors, by 13 Eliz., c. 5, is also void as against his assignee, under the insolvent act. It is void, in the first place, because the property actually passes to the assignee (by the assignment under the old insolvent acts, by his appointment under the recent one), notwithstanding such prior conveyance. It is true that the assignment by an insolvent debtor passed only such property as the insolvent had at the time of the assignment; but there was an exception to that rule, namely, where fraud had been committed. *Sims* v. *Simpson*, 1 Bing. N. C. 306; 4 L. J. (N. S.) C. P. 35. The insolvency in the present case was in 1823, and consequently under the provisions of the 1 Geo. IV., c. 119. That act contains no provision similar to section 32 of 7 Geo. IV., c. 57, and analogous sections of subsequent acts, for making voluntary transfers of property within three months of imprisonment, or with a view of petitioning the Court, void as against the assignee. And it was contended, when this rule was moved for, that the insertion of such provision in the later acts showed that such conveyances were not void under 13 Eliz.; but the truth is, that the provision in question was made *alio intuitu*, and relates to a different class of conveyances; namely, those made "in trust to or for the use of creditors." Now, such conveyances would not be void under 13 Eliz. 1 Smith's Leading Cases, 12; Com. Dig. 'Covin,' B, 2; *Pickstock* v. *Lyster*, 3 M. & S. 371 (16 R. R. 300); *Goss* v. *Neale*, 5 Moore, 19; *Holbird* v. *Anderson*, 5 T. R. 235; *Meux* v. *Howell*, 4 East, 1. Again, conveyances may be fraudulent, and yet not voluntary: *Twyne's Case*, 3 Co. Rep. 80; *Cadogan* v. *Kennett*, Cowp. 432; and such would not be within the provision in question. That provision, therefore, leaves the law exactly where it

was, as regards fraudulent transfers under the 13 Eliz.; and it must be contended, on the other side, that while a special provision has been made to render a class of conveyances, which are not fraudulent, and would not be void under that statute, void as against the assignee, fraudulent conveyances are left in full force as against him. Next, it is void as against him as the agent of the creditors. By 1 Geo. IV., c. 119, s. 7, he is empowered to receive and get in * the estate of the prisoner; [*401] to sue from time to time, as there may be occasion, in his name, for the recovery, obtaining, and enforcing any estate or rights. Wherever a man makes a gift of goods which is fraudulent and void as against creditors, he is considered to have died in full possession with respect to the claim of the creditors: *Shears* v. *Rogers*, 3 B. & Ad. 369; 1 L. J. (N. S.) K. B. 89; the assignee has therefore to enforce that claim; if so, he is one "whose actions, suits, debts, accounts, &c., by such guileful, covinous, or fraudulent devices, are disturbed, hindered, delayed, or defrauded," 13 Eliz., c. 5, s. 2; and consequently they are void as against him. This was the ground of the decision in *Butcher* v. *Harrison*, 4 B. & Ad. 129; 2 L. J. (N. S.) K. B. 189, where it was held that the assignees of an insolvent are "parties grieved," within section 3 of the same statute, "being the persons who, but for the fraudulent conveyance, would have been entitled to seize the lands by due process of law." Again, the assignee is himself a creditor; and, as such, the conveyance is void as against him. By 1 Geo. IV., c. 119, s. 7, the provisional assignee is to assign to him "in trust for the benefit of such assignee or assignees, and the rest of the creditors." He is treated throughout as one of the creditors. It is true he may have become so since the fraudulent transfer; but when a transfer is made by a party actually indebted at the time, it is void against subsequent as well as prior creditors. *Hungerford* v. *Earle*, 2 Vern. 261; *Turback* v. *Marbury*, 2 Vern. 510; Com. Dig. 'Covin,' B, 2; *Russell* v. *Hammond*, 1 Atk. 13; *Richardson* v. *Smallwood*, Jac. 552. But independent of the act of 13 Eliz., the insolvent assignee is entitled to recover the property which it is attempted to pass by this settlement. A contingent beneficial interest is limited by it to Sims, the assignor, viz., if the children should die under twenty-one, without having attained a vested interest. It falls, therefore, within the words of Lord ALVANLEY, in *Carpenter* v. *Marnell*, 3 Bos. & P. 41: "If,

indeed, the assignees had possessed the remotest possibility of interest, or if they could show anything from which a benefit to the creditors would result, I should hold that the action might be maintained." The same is the principle in *Carvalho* v. *Burn*, 4 B. & Ad. 393; *Burn* v. *Carvalho*, 1 Ad. & El. 883; *Best* v. *Argles*, 2 Cr. & M. 394; 3 L. J. (N. S.) Ex. 117. In these cases the only question was whether the transfer left anything like a substantial interest in the other, whether valid or contingent; if it did, no doubt seems to have been entertained that the assignees might recover the property. If, then, the assignee has a right to recover, it is plain that this furnishes the obligee of the bond with a defence to the action, namely, that another party may recover the amount from him. By his plea, he avers that the right of action has passed to the assignees; that is denied by the replication, setting up this settlement; and is reaffirmed by the rejoinder showing the settlement to be void. The plea being good, the rejoinder is equally so. But it is said that the rejoinder ought to have averred that the creditor elected to treat the settlement as void. In what mode could they so treat it? only by entering on the lands, if lands were settled; or bringing their action by their assignee, if it were of personal property. Then the averment would amount to this — the right of action has passed to the assignee, because he has brought his action. It might be as well contended that the ordinary plea of a plaintiff's bankruptcy or insolvency ought to contain an averment that the creditors have elected to claim the property. There are some contracts by a bankrupt, which his assignees may elect either to affirm or disaffirm; but it cannot be contended that a party, sued by a bankrupt on such a contract, would be bound to aver that his assignee had made such election. Lastly, bonds are within the general words "goods and chattels," in the statute 13 Eliz., c. 5; 1 Selw. N. P. 206. The nearest analogy is to be found in the decisions on the statutes of bankruptcy, which are much *in* [*402] **pari materiâ* with the present; and the earliest of which, the statute of James, is an enactment of nearly the same period. As to the meaning of the words, "goods and chattels in the order and disposition of a bankrupt," they have been held to comprehend, not only movable goods, but debts and choses in action; also bills of exchange. *Hornblower* v. *Proud*, 2 B. & Ald. 327 (20 R. R. 456), where BEST, J., says, that goods

and chattels, within that statute, mean "all personal property the right to which is evidenced by possession." *Ex parte Vallance*, 3 Mont. & Ayr. 224; 6 L. J. (N. S.) Bk. 52; *Ex parte Burbridge*, 1 Dea. 131; *Ex parte Ord*, 1 Dea. 166; 4 L. J. (N. S.) Bk. 84, which are commented on in *Humble* v. *Mitchell*, 9 L. J. Q. B. 29.

W. H. Watson, *contra*. — Choses in action are not within 13 Eliz., c. 5. In *Mathews* v. *Feaver*, 1 Cox, 278 (p. 330, *ante*), it was held that the assignment of copyhold premises is not fraudulent within it, because, generally speaking, they are not subject to debts. In *Doe d. Tunstill* v. *Bottriell*, 5 B. & Ad. 137; 2 L. J. (N. S.) K. B. 158, it was held that they are within the 27 Eliz., c. 4; but the judgment in the former case was there noticed and upheld. In *Dundas* v. *Dutens*, 1 Ves. Jr. 198 (1 R. R. 112), Lord THURLOW held that stock was not within 13 Eliz., as being a chose in action, which could not be taken by the creditor upon a *levari facias*; and the same doctrine was entertained by Lord ELDON in *Rider* v. *Kidder*, 10 Ves. 360. No process could reach a chose in action until 1 & 2 Vict., c. 110. The purpose of section 72 of the Bankrupt Act, and 13 Eliz., c. 5, are entirely different. In the next place, assuming that goods and chattels are within the statute, *Hawes* v. *Leader*, Cro. Jac. 270, shows that a transfer of them, which would be fraudulent as against creditors, is good as against the executor of the assignor. And the assignee of an insolvent merely comes into the property under him and by his title. *Hopper* v. *Marshall*, 2 Bing. 372; 3 L. J. (N. S.) C. P. 45. If he could not avoid his own conveyance, neither can his assignee. The statute 1 Geo. IV., c. 119, nowhere makes such conveyances void as against the latter. By section 17 a punishment of three years' imprisonment is awarded for fraudulent conduct; but it is not said that such conduct avoids any acts of the insolvent. The assignee is not necessarily a creditor; he is not averred to be so in the rejoinder, nor need he be so in fact. By section 7 the Court is to appoint "proper persons" to that office; it is not said they are to be creditors. Next, it is true that there is a contingency limited in the settlement, in the event of which the trustees will hold the bond in trust for the settlor. But that does not give to the assignee the property in the whole bond. It might pass to him whenever that contingency arose, but not before. The *dictum* in *Carpenter* v. *Marnell* has no application; it merely shows that

a right of action may remain in the bankrupt under certain circumstances. In *Burn* v. *Carvalho* the bankrupt had assigned certain documents, but the whole interest in the property remained in him. Lastly, supposing that this conveyance is void as against the assignee, under 13 Eliz., c. 5, still it should have been averred that the creditors had made some claim of the property. For all that appears, they may have assented to the settlement. A deed of this kind, when avoided by a Court of equity, is only avoided to the extent claimed by those who make the application. Void "as against creditors" may mean as against creditors who impeach the settlement. And a creditor, to impeach a settlement for fraud, must state that he is defrauded of it. *Colman* v. *Croker*, 1 Ves. Jr. 160. In *Shears* v. *Rogers*, LITTLEDALE, J., says, "The assignment was void as soon as the creditors claimed to treat it as such, though not until then." The case of property acquired by an uncertificated bankrupt is analogous. He cannot retain it as against his assignees. They may claim it, but he has it as against all the rest of the world. *Ashley* v. *Kell*, 2 Stra. [*403] 1207; *Webb* * v. *Fox*, 7 T. R. 391 (4 R. R. 472). Consequently, in order to defend an action for the recovery of such property, it is necessary to aver that the assignees have claimed. *Drayton* v. *Dale*, 2 B. & C. 293; 2 L. J. K. B. 20 (26 R. R. 356).

Merivale, in reply. — The expressions of LITTLEDALE, J., in *Shears* v. *Rogers*, are to be understood with reference to the facts of that case. It was an action by a creditor against the executor of the debtor; and the question between them was whether a lease was assets or not. The executor set up an assignment of that lease by his testator; and the creditor contended that it was fraudulent. The words of the learned Judge, therefore, only mean, that though the executor could not himself impeach the assignment, he could not set it up on an issue of assets or no assets against a creditor claiming it. The case of property acquired by an uncertificated bankrupt differs from the present, because that is property which the assignees may either claim or not at their pleasure; consequently it is necessary to aver that they have claimed it; but the assignee of an insolvent is bound, by the act, to recover all the property of an insolvent for the benefit of the creditors. therefore, in setting up his right of action as a defence, it cannot be requisite to make any similar averment. *Cur. adv. vult.*

No. 2. — Sims v. Thomas, 9 L. J. Q. B. 403.

Lord DENMAN, Ch. J., now delivered the judgment of the Court. After stating the pleadings, his Lordship continued: Before we consider the effect of the rejoinder, it will be necessary to see whether there be any defect on either side in the previous pleadings. The plea states that the plaintiff was discharged under the Insolvent Act, and that all his real and personal estate, and the cause of action mentioned in the declaration, and the right and interest of Sims under the same, became vested in Robert Strachan, his assignee. The plea is a sufficient answer to the declaration. The 4th section of the Act directs the insolvent to make conveyance of all his real and personal estate to the provisional assignee, so as to vest all such real and personal estate in such assignee, subject to the proviso, which does not apply to this question; and then the 7th section directs the provisional assignee to assign the real and personal property, so vested in him, to the full assignee, if we may use the term; and such assignee is, by the same section, empowered to sue in his own name for the recovery, obtaining, and enforcing any estate and effects or rights of the insolvent. The replication to this shows, by the indenture above stated, that Sims had, before his discharge under the Act, assigned his interest in this bond to the trustees therein named, for the benefit of his wife and family; and that, therefore, he had no longer any beneficial interest in it; and as the Insolvent Act above stated directs that the estate and effects of the insolvent shall be assigned to the assignee, in trust for the benefit of the assignee and other creditors, if no benefit could arise to the creditors from the bond in question, on account of all the beneficial interest having already been disposed of in it, that bond could not be the subject of assignment under the Insolvent Act, and therefore the assignee could not sue in his own name for the recovery of money under the bond. This replication, therefore, we are of opinion, contained a sufficient answer to the plea. The rejoinder then claims oyer of the deed stated in the replication, and that deed is set out; and by that it appears that the bond was assigned to the trustees to make a provision for the wife and family of Sims, and that the interest in the bond was wholly taken out of Sims at the time of the assignment, except that, in the contingency of the death of his wife, child, and grandchild, there was a resulting trust to Sims himself. The rejoinder then states that before the making of the indenture of assignment Sims

was indebted to divers persons in divers large sums of money, to wit, amounting to £3000, which remained due to them until and at the time of his discharge, and then remained still unpaid; and then the rejoinder further states that the indenture of assignment was made and executed without consideration, and to the end, intent, and purpose to delay, hinder, and defraud the said creditors of Sims of their just and lawful debts. Wherefore the indenture of assignment, as against Robert Strachan, the [* 404] assignee * of the insolvent, was and is void, frustrate, and of none effect. Now, if this indenture of assignment be void and of none effect as against Strachan, the assignee, the replication falls to the ground, and the plea is therefore set up, and the defendant would be entitled to the judgment. The surrejoinder alleges that the indenture of assignment was executed for consideration, and without the end, intent, and purpose to delay, hinder, or defraud any creditors of Sims of their just and lawful debts. The issue is joined on that surrejoinder; and that issue is found for the defendant, thereby affirming the rejoinder, as far as the issue of fact of fraud is concerned.

Several objections were made to the rejoinder; we do not consider it necessary to consider the whole of them, as there is one question which will decide the validity of it; that is, whether the bond and grant of an annuity, stated in the pleadings, are goods and chattels within the meaning of the statute of the 13 Elizabeth. If they are not goods and chattels within that Act, this indenture of assignment cannot be void as against creditors by the operation of that Act; and if it be not void under the Act, there is nothing else to make it void against them. It is not void against Sims himself, and there is no provision in the Act of 1 Geo. IV., c. 119, which was the Insolvent Act in question at the time of the assignment, to make it void as against the creditors. Any provision made under the subsequent Insolvent Acts, even if they apply to a case similarly circumstanced, could not affect this case; and it is not a question whether it would not be void under the bankrupt laws, but only whether it be void against the assignee and creditors under this Insolvent Act. There are a great many cases as to what the words "goods and chattels" extend to; some of them turn on some very fine distinctions; but it is only now necessary to consider whether those words, without further explanation of the circumstances attending them, would pass bonds

or not. The question is, whether they are "goods and chattels" within the meaning of the 13 Eliz. Now, in *Mathews* v. *Feaver*, where a question arose as to the assignment of copyhold premises, the MASTER OF THE ROLLS, Lord KENYON, says, "I am not satisfied as to the nature and value of the copyhold premises, which, generally speaking, are not subject to debts; and therefore the assignment of them could never be fraudulent against creditors." In *Dundas* v. *Dutens*, which arose upon an assignment of stock, Lord THURLOW says, "Is there any case in which a man having stock in his own name was sued for the purpose of having it applied to satisfy creditors? These things, such as stock, debts, &c., being choses in action, are not liable; they could not be taken on a *fieri facias*." In *Rider* v. *Kidder*, which was a case of transfer of stock, Lord ELDON appears to have been of opinion that stock was not within the statute of Elizabeth; and assents to the opinion of Lord THURLOW, although, under the circumstances of the cases, he afterwards appears to have allowed the transfer to be made. We therefore think it is only such things as may be taken in execution that are affected by the statute of Elizabeth. Bonds, indeed, are now liable to be taken in execution; but they were not so at the time of making the indenture of assignment. Since, then, we are of opinion that the statute of Elizabeth only extends to the assignment of such effects as are liable to be taken in execution, the greater part of the foundation of the argument, taken on the part of the defendant, fails; and it is only material to consider one of the points, namely, that it is argued that inasmuch as it appears on the face of the indenture of assignment that there was a contingent interest in Sims in the bond and the grant of the annuity, and that it would revert and become vested in him on the death of his wife, child, and grandchildren, therefore the assignee of Sims, the insolvent, takes something, and in that respect the assignee has some beneficial interest. The assignee has certainly a contingent beneficial interest; and when that comes to be vested he will be the proper person to sue; but he has no beneficial interest until that event arises. And as we have none in the meantime, nothing passes to the assignee. Unless he has a beneficial interest, he has no right of action, and cannot sue for the arrears of that annuity, while his interest is merely contingent. This interest is very remote; but that makes no difference; it must be judged of * in the [*405]

same way as if the interest of Sims had depended on a single life, or had even been certain, as depending on a term for years. On the whole of this case we are of opinion that the rule must be made absolute to enter a judgment for the plaintiff, notwithstanding the verdict found for the defendant.

Judgment accordingly.

ENGLISH NOTES.

The precise points covered by the above cases are of no importance in England since the Judgments Act, 1838 (1 and 2 Vict., c. 110), which by ss. 11 and 12 extended the description of property which may be taken in execution to copyhold lands, and to such things as money, bank notes, bills of exchange, and bonds, and other securities for money. So that there is apparently no description of property which is now beyond the reach of the statute. But the principle may still be important in any country where the law is based upon English law without this or a similar extension of the powers of execution.

It is also to be observed that under the present English Bankruptcy Law, as well as by the former Bankruptcy Act of 1869, the effect intended by the statute of Elizabeth is carried out so far as relates to the trustee in bankruptcy, as to property of every description which may become vested in the trustee. The clause of the Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), is contained in s. 4 (1) (*b*), whereby a debtor commits an act of bankruptcy if . . . he makes a fraudulent conveyance, gift, or transfer of his property or of any part thereof.

AMERICAN NOTES.

These cases are cited in 2 Bigelow on Fraud, pp. 69, 72, 73, 75, and in Bump on Fraudulent Conveyances, sect. 216.

In this country *choses in action* are almost everywhere subject to claims of creditors, either by decision or by statute. *Bayard* v. *Hoffman*, 4 Johnson Chancery (New York), 452; *Hadden* v. *Spader*, 20 Johnson (New York), 554; *Drake* v. *Rice*, 130 Massachusetts, 110; *Catchings* v. *Manlove*, 39 Mississippi, 655; *Elliott's Appeal*, 50 Penn. State, 75; *Burton* v. *Farinholt*, 86 North Carolina, 260, *Abbott* v. *Tenney*, 18 New Hampshire, 109; *Hamilton* v. *Russell*, 1 Cranch (United States Sup. Ct.), 316; *Doughten* v. *Gray*, 10 New Jersey Equity, 323; *Law* v. *Payson*, 32 Maine, 521; *Planters' Bank* v. *Henderson*, 4 Humphreys (Tennessee), 75; *Green* v. *Tantum*, 19 New Jersey Equity, 105; 21 ibid. 364; *Greer* v. *Wright*, 6 Grattan (Virginia), 154.

In Indiana the courts follow Lord Thurlow's rule. *Keightley* v. *Walls*, 27 Indiana, 384; *Scott* v. *Indianapolis Wagon Co.*, 18 ibid. 75. And see *Cosby* v. *Ross's Adm'r*, 3 J. J. Marshall (Kentucky), 290; *Buford* v. *Buford*, 1 Bibb (Kentucky), 305.

Mr. Bump says (*supra*): "But as stock, *choses in action*, and money, could not be taken on execution at common law, it has been doubted whether a

transfer of such property could be fraudulent. The question is one that relates merely to the remedy as affected by the character of the property, and whenever a statute enables a creditor to reach such property either by attachment or execution, a transfer of it becomes liable to investigation on the ground of fraud. Even independently of such statutory provisions, the better doctrine is that a Court of equity, in aid of an execution at law, may, for the purpose of suppressing fraud and enforcing justice, reach property which is not liable to legal process at law. Equity follows out the law in this respect by adopting its maxims and carrying them out according to the principles of justice and right. Where the law fails, equity therefore affords relief for the purpose of enforcing the payment of just debts."

Dr. Bigelow, after examining *Taylor* v. *Jones*, *King* v. *Dupine*, and *Partridge* v. *Goff*, observes: "In the face of such cases one may well marvel to hear Lord THURLOW ask, 'Is there any case where a man having stock in his own name has been sued for the purpose of having it applied to satisfy creditors?'" (*Dundas* v. *Dutens*, 1 Ves. Jr. 196.) "But the result has generally been reached on the one hand without straining the rule of construction, and on the other without legislative enlargement of the statutes against fraudulent conveyances. Those Courts which have followed Chancellor KENT" (in *Bayard* v. *Hoffman*, *supra*), "have held, with Lord HARDWICKE and his contemporaries, that equity could subject *choses in action*, though it could not reach them by execution; the Courts of States in which the subjects of execution have been enlarged by statute have held, as in England, that this was enough to open the statute of Elizabeth."

In *Hadden* v. *Spader*, *supra*, the question was examined with abundant research and ability by the New York Court of Errors, after elaborate arguments (well reported) by Isaac Hamilton and Thomas Addis Emmet. The Court stood by the older English decisions, made before our Revolution, the period when "we adopted the common law," and said: "Although it may appear that the doctrine has been questioned in some modern decisions, they cannot be regarded as authority."

No. 3. — PRICE *v.* JENKINS.

(C. A. 1877.)

RULE.

A CONSIDERATION, however insignificant, is sufficient to support a settlement as against a subsequent purchaser for value.

Price v. Jenkins.

5 Ch. D. 619–622 (s. c. 46 L. J. Ch. 805; 37 L. T. 31).

Voluntary Settlement. — Consideration. — 27 *Eliz.*, *c.* 4. [619]

A widower, on his second marriage, made a settlement, in which he assigned some leasehold property to trustees, one of whom was his son by a former

No. 3. — Price v. Jenkins, 5 Ch. D. 619, 620.

marriage, upon trust for himself for life, and after his death for his said son. He afterwards contracted to sell the leasehold property to the plaintiff: —

Held, that the settlement of the leasehold property on the son was not a voluntary conveyance under the 27 Eliz., c. 4, on the ground that the assignment of leasehold property to which liability is attached is, in itself, a conveyance for valuable consideration.

This was an appeal from a decision of Vice-Chancellor HALL (4 Ch. D. 483).

The action was brought by Margaret Price for specific performance of a contract, dated the 16th of November, 1874, by which Thomas Jenkins the elder agreed to sell a leasehold house called the Bruce Hotel, at Pant, near Merthyr Tydvil, to the plaintiff, for £200.

In the first instance, Thomas Jenkins the elder was the only defendant, but it appeared that his son, Thomas Jenkins the younger, claimed an interest adversely to his father, and he was accordingly, by the direction of the Court, made a defendant.

[* 620] * Thomas Jenkins the younger was a son of the original defendant by his first marriage. The property, the subject of the contract, belonged to Thomas Jenkins the elder for a term of years at the time of his second marriage, which took place in May, 1864; and by a settlement dated the 17th of May, 1864, and made in contemplation of the second marriage, it was assigned to two trustees, of whom Thomas Jenkins the younger was one, in trust, after paying all outgoings, for Thomas Jenkins the elder, during his life, and after his death for his son Thomas Jenkins the younger, absolutely. The intended wife's property was also settled by the same deed upon her and her children. The settlement contained no covenant by the trustees to pay the rent or perform the covenants of the lease under which the premises were held.

The plaintiff contended that the settlement made on the second marriage of Thomas Jenkins the elder was voluntary, so far as related to his son by his former marriage, and was void against the plaintiff under the 27 Eliz., c. 4.

The VICE-CHANCELLOR was of opinion that Thomas Jenkins the younger was a volunteer under the settlement on the second marriage of his father, and that the settlement was void as against the plaintiff, and accordingly granted specific performance of the agreement.

From this decision the defendants appealed.

Morgan, Q. C., and Maclean, for the appellant: —

The consideration for the settlement on the second marriage extended to the son by the former marriage. It was a bargain between all parties which was cemented by the marriage.

[JAMES, L. J. — Can an assignment of leasehold property ever be, strictly speaking, voluntary? I remember a case in my own practice at the bar, which is not reported, in which the owner of three leasehold houses made a promise on his deathbed to give one of them to his widow; and the executor accordingly signed a written agreement to assign one of the houses to the widow, she undertaking to pay an apportioned rent of one guinea to the ground * landlord and performing the covenants of the [* 621] lease. I advised that this was a *nudum pactum*, but it was held by Vice-Chancellor SHADWELL to be an agreement for valuable consideration.]

Dickinson, Q. C., and Freeling, for the plaintiff, were called on upon this particular point: —

Each assignment of leaseholds must depend on its own circumstances. In the case referred to by the LORD JUSTICE there was a valuable consideration in the payment of the apportioned rent; but in the present case no such consideration is alleged, nor is it shown that any liability attached to the trustees under the assignment. On the contrary, the first trust is to satisfy all outgoings before the trustees paid anything to the *cestuis que trust*. There must have been many cases of assignments of leaseholds which have been called in question under the statute of Elizabeth, but there is no reported case in which this point has been decided or taken.

JAMES, L.J.: —

It appears to me impossible to hold that this settlement was voluntary as regarded Thomas Jenkins the younger, who was himself one of the assignees of the leaseholds. The trustees came under a responsibility for payment of rent and performance of the covenants of the lease. It might be such a responsibility that a lessee might be actually willing to pay money to get rid of. If there is any valuable consideration for a settlement, the quantum of such a consideration is of no consequence under the statute of Elizabeth. I think that here there was a valuable consideration sufficient to support the settlement against a subsequent purchaser.

It appears to me impossible to distinguish it from such a case as that to which I referred during the argument. The purchaser's title cannot prevail against the trustees of the settlement. On that ground alone, therefore, I think the bill must be dismissed.

Mellish, L. J., and Baggallay, J. A., concurred.

[622] James, L. J., added: We desire it to be understood that we have expressed no opinion as to the point on which the Vice-Chancellor founded his judgment. That point has not been argued before us, and we give no opinion upon it.

ENGLISH NOTES.

It will be observed that the decision of the Court of Appeal in the principal case does not deal with the question whether the step-son would have been treated as a volunteer if there had been no liability in respect of the property settled. That point will be dealt with in connection with *Newstead* v. *Searles* and the cases following on it cited in a later part of this note. But before further considering the question of voluntary settlements under the statute 27 Eliz., it may be useful here to note some of the cases upon what constitutes fraud against creditors under the statute 13 Eliz., c. 5. The same facts, generally speaking, would constitute a fraudulent conveyance under the clause of the Bankruptcy Act mentioned on p. 342, *supra*.

A settlement, although there is consideration for it, — even the consideration of marriage, — may come under the statute if actual fraud is proved, or if the settlement is made in pursuance of a scheme for defeating creditors. *Columbine* v. *Penhall* (1853), 1 Sm. & Giff. 228; *Holmes* v. *Penney* (1856), 3 K. & J. 90, 26 L. J. Ch. 79; *Bulmer* v. *Hunter* (1869), L. R. 8 Eq. 46, 38 L. J. Ch. 543, 20 L. T. 942; *Ex parte Cooper, In re Pennington* (1888), 59 L. T. 774.

Where the settlement is voluntary, the intent to defraud may be inferred if the circumstances are such that it would necessarily defeat creditors. *Adames* v. *Hallett* (1868), L. R. 6 Eq. 468; *Ware* v. *Gardner* (1869), L. R. 7 Eq. 317, 38 L. J. Ch. 348, 20 L. T. 71, 17 W. R. 439; *Freeman* v. *Pope* (1870), L. R. 5 Ch. 538, 39 L. J. Ch. 689, 21 L. T. 816, 18 W. R. 906; *Spencer* v. *Slater* (1878), 4 Q. B. D. 13, 48 L. J. Q. B. 204, 39 L. T. 424, 27 W. R. 134; *Ex parte Chaplin, In re Sinclair* (C. A. 1884), 26 Ch. D. 319, 53 L. J. Ch. 732, 51 L. T. 345. So where a person about to engage in large liabilities makes a voluntary settlement of the bulk of his property, it has been held to be a fraud on creditors. *Mackay* v. *Douglas* (1872), L. R. 14 Eq. 106, 41 L. J. Ch. 539, 26 L. T. 721, 20 W. R. 652. And the same principle is applied where the settlor's liabilities already exceed the value of his property

other than that which he settles. *In re Ridler, Ridler* v. *Ridler* (C. A. 1882), 22 Ch. D. 74, 52 L. J. Ch. 343, 48 L. T. 396, 31 W. R. 93.

But the inference has been held to be rebutted by a laudable motive not necessarily tending to defeat creditors. So where a person in insolvent circumstances transferred his property to trustees for the purpose primarily of selling his business as a going concern, and incidentally of carrying it on. *Bolders* v. *London & Westminster Discount Co.* (1879), 5 Ex. D. 47, 42 L. T. 56, 28 W. R. 154. And where a person against whom an action for breach of promise had been commenced, and who subsequently ascertained that he was entitled to a legacy, made a settlement of the legacy upon his wife and children of his marriage, — the Judge being of opinion on the evidence that he acted *bonâ fide* and had not the intention of defeating or delaying his creditors, — the settlement was upheld. *Ex parte Mercer, In re Wise* (1886), 17 Q. B. D. 290, 55 L. J. Q. B. 558, 54 L. T. 720.

Where a widow, engaged in a farming business upon a farm of her own, granted the farm and premises (which constituted her whole property) to her two daughters in consideration of their covenant to pay the debts incurred by her in connection with the working of the farm and to maintain the grantor, this was upheld by Mr. Justice Fry (whose judgment was affirmed by the Court of Appeal) as an honest family arrangement upon valuable consideration, and that it was not a sufficient badge of fraud to show that the value of the consideration was inadequate, or that there were outstanding debts not within the scope of the covenant — there being nothing to show that any such debts were present to the settlor's mind in making the arrangement. *In re Johnson, Golden* v. *Gillam* (1881), 20 Ch. D. 389, 51 L. J. Ch. 154, 46 L. T. 222, affirmed (C. A. 1882) 51 L. J. Ch. 503. The waiver by a wife of her equity to a settlement has been held a good consideration for the settlement of property to which the husband was entitled in right of his wife — the marriage having been before the operation of the Married Women's Property Act, 1882. *Re Home, Ex parte Home* (1886), 54 L. T. 301.

It has been held to be no ground for inferring fraud in a settlement made in consideration of marriage that the husband was in insolvent circumstances at the time, and that a false recital was introduced into the settlement that the intended husband was indebted to the intended wife in the amount of the sum settled by way of security on the husband's property — it appearing that the wife had at the time no knowledge of the insolvency. *Kevan* v. *Crawford* (C. A. 1877), 6 Ch. D. 29, 46 L. J. Ch. 729, 37 L. T. 322, 25 W. R. 49.

And, where there is no bankruptcy so as to bring in the provisions of the Bankruptcy Acts relating to fraudulent preference (see 4 R. C.

73 *et seq.*), there is no fraud in a transaction which gives security to certain favoured creditors, and is not a contrivance for the personal benefit of the grantor. *Alton* v. *Harrison* (L. J. Giffard, 1869), L. R. 4 Ch. 622, 626, 38 L. J. Ch. 669, 21 L. T. 282, 17 W. R. 1034; *Middleton* v. *Pollock, Ex parte Elliott* (1876), 2 Ch. D. 104, 45 L. J. Ch. 293.

Other cases in which the fraudulent intent has been held not proved are *Kent* v. *Riley* (1872), L. R. 14 Eq. 190, 41 L. J. Ch. 569, 27 L. T. 263, 20 W. R. 852; *White* v. *Witt* (1876), 24 W. R. 727.

Where a person settles his own property upon trust for himself until bankruptcy, and then upon trust for members of his family, the fraudulent intent as against creditors generally may be presumed if creditors are in fact defeated. *In re Pearson, Ex parte Stephens* (1876), 3 Ch. D. 807, 35 L. T. 68, 25 W. R. 126; *Learmouth* v. *Miller* (1875), L. R. 2 H. L. (Sc.) 438. It has indeed been held by North, J., in *Re Detmold, Detmold* v. *Detmold* (1889), 40 Ch. D. 585, 58 L. J. Ch. 495, 61 L. T. 21, 37 W. R. 442, that the objection to such a settlement is not available to a particular execution creditor. But it may be questioned whether the more general principle acted on in *Learmouth* v. *Miller* (which was not cited) would not apply equally to a particular creditor as to the trustee in bankruptcy. It was expressly stated by Lord O'Hagan (L. R. 2 H. L. Sc. 444) to be adopted equally by Scotch and English jurisprudence.

Another circumstance out of which a presumption of fraud has been considered to arise, namely, the sale of goods without parting with the possession, has been covered and extended by the Bills of Sale Acts (see 5 R. C. p. 21), and is fully considered under the head of "Bill of Sale" (5 R. C. 1–139).

The right to set aside a settlement under the Act 13 Eliz., c. 5, being a legal right, a person claiming it is not barred by such delay as would merely raise a ground of defence by delay in enforcing an equitable claim. *In re Maddever, Three Towns Banking Co.* v. *Maddever* (C. A. 1884), 27 Ch. D. 523, 53 L. J. Ch. 998, 52 L. T. 35, 33 W. R. 286.

To avoid a settlement against a purchaser under the 27 Eliz., c. 4, the fraudulent intent is presumed from the absence of consideration, and this presumption cannot be rebutted. Nor is it material whether the purchaser has at the time of making or completing his purchase notice of the settlement. The former of these propositions is expressly stated, and the latter implied and acted on, by Lord Ellenborough in *Doe d. Otley* v. *Manning* (1807), 9 East, 59, 9 R. R. 503; and both propositions are in all modern cases regarded as settled law.

As to whether a good consideration can arise under an ante-nuptial

settlement made in consideration of marriage so as to support the settlement in favour of objects not within the consideration of the marriage, there has been much controversy, turning chiefly upon the judgment of Lord HARDWICKE in *Newstead* v. *Searles* (1737), 1 Atk. 264. To understand the effect of this judgment, it is necessary to state the case somewhat fully. Elizabeth Searles, a widow, having two children by a former husband (each of whom has one child), and being in possession in her own right of freehold and other estates, conveys these estates with the concurrence of her husband and pursuant to articles made before her second marriage to trustees in trust (after the death of the survivor of the spouses), if there should be no issue of the marriage to be divided between her two grandchildren (children of the children by the former husband) in fee; provided that if there should be any children of the second marriage each such child should have an equal share with the two grandchildren. The question was between the grandchildren under the trusts of this deed, and a subsequent mortgagee (one Pindar) of the estate who had notice of the deed. Lord HARDWICKE decreed in favour of the rights of the grandchildren. "If," he said, "I was to lay down a rule that such articles as these are not binding, it would become impossible for a widow on her second marriage to make any certain provision for the issue of a former, and the second husband might then contrive to defeat the provision made for those children. . . . The children of the first marriage stand in the very same plight and condition as the issue would have done, if there had been any, of the second marriage, and even are provided for before them. Supposing there had been issue of the second marriage, and they had brought their bill to carry these articles into execution, upon a decree in their favour, would not the children by the first marriage have been equally entitled to a benefit from the decree? Taking the case with all its circumstances, I think the settlement no voluntary agreement, but a binding one; the statutes of the 13 and 27 Eliz., that make conveyances fraudulent, are voluntary conveyances, made against purchasers upon a valuable consideration, or *bonâ fide* creditors: but it would be difficult to show that such a limitation, as in the present case, has been held fraudulent and void against subsequent purchasers or creditors. The present is a stronger case, for here are reciprocal considerations both on the part of the husband and wife, by the provisions under the articles for the children of the second marriage."

Of course no judge in modern times has ventured to question the decision of Lord HARDWICKE; but it will be easily seen that various reasons are suggested by the judgment which may not be sufficient if they stood alone. One appears to be that the intended husband gave up certain rights to which he would have been otherwise entitled, and

that the widow may thus be presumed to have purchased the rights for her children. At the same time it is to be observed that the settlement itself was ingeniously framed, so that the rights given to the children of the second marriage were made conditional on the equal rights stipulated for in favour of the children of the first. And although the judgment is not emphatically rested on this ground, it is clear that this was kept in view as an important circumstance.

In *Clayton* v. *Wilton* (1817), 6 M. & S. 67, *n.*, 18 R. R. 307, Lord Ellenborough and his colleagues in the King's Bench held that a limitation in a marriage settlement, in favour of the issue of a second marriage by the settlor, was good against a subsequent purchaser for valuable consideration.

Clarke v. *Wright* (1861), 6 H. & N. 849, 30 L. J. Ex. 113, 7 Jur. (N. S.) 1032, 9 W. R. 571, s. c. *nom. Wright* v. *Dickinson*, 4 L. T. 21, was a decision in the Exchequer Chamber affirming the judgment of the Queen's Bench. A widow by settlement made in contemplation of a second marriage, and in accordance with the agreement with her intended husband, conveyed real estate to trustees in trust for herself for life, with remainder in part to the husband for life, remainder to the use of her illegitimate son, the plaintiff, in fee, and as to the remainder to the plaintiff in fee if he should attain the age of twenty-one. The Court of Queen's Bench on the authority of *Newstead* v. *Searles* decided that the settlement was good against a subsequent mortgagee. In the Exchequer Chamber the question was considered in more elaborately reasoned judgments. The decision was affirmed by a majority: by Cockburn, C. J., and Wightman, J., on the ground that although the illegitimate son was not within the marriage consideration, and the settlement was therefore voluntary as to him, yet the case came within the principle of the exception engrafted on the rule by *Newstead* v. *Searles* and *Clayton* v. *Wilton* : by Blackburn, J., because the limitations so interfered with those which would naturally be made in favour of the husband and wife and issue of the marriage, that it must be presumed to have been agreed upon as part of the marriage-contract bargain. Willes, J., gave his judgment with the majority without stating his reasons at large. Williams, J., dissented, considering that *Newstead* v. *Searles* had been decided at a time when it was thought, contrary to the view which had since prevailed, that some settlements might be supported as not fraudulent against purchasers, although voluntary.

In the case of *Mackie* v. *Herbertson* (a Scotch appeal to the House of Lords in 1884), 9 App. Cas. 303, Lord Selborne found occasion to discuss the case of *Newstead* v. *Searles* in relation to the principle of the question — what persons came within the marriage consideration. His comment on the judgment is as follows (9 App. Cas. 336): "Lord

Hardwicke entertained no doubt that the considerations of the contract included the earlier children, because their interests and those of the children of the marriage which afterwards took place were so dealt with, that the stipulations for those children who were within the marriage consideration were made dependent upon the agreement that the other children should take as they did. The children within the consideration were to take upon certain terms; and without giving them either more or less than that which the contract gave them it was impossible to disappoint the others. Exactly the same was the principle of the case of *Clayton* v. *Lord Wilton*, though the form in which the question was raised was different, because it was a limitation by way of remainder occurring after a gift to male issue who were within the consideration of marriage, and before another gift to female issue in the like situation."

In the case of *De Mestre* v. *West* (an appeal from New South Wales to the Privy Council, 1891), 1891, A. C. 264, 60 L. J. P. C. 66, 64 L. T. 375, the above cases and some others bearing on the subject were discussed, and the judgment of the Committee (Lord Selborne, Lord Watson, Lord Hobhouse, and Lord Field) adopted the view of Lord Selborne above mentioned, and applied it to the case in point by deciding that a limitation in a marriage settlement in favour of the settlor's illegitimate child and his issue may be defeated by a subsequent conveyance by the settlor to a purchaser for value, unless such result would involve the defeat of other limitations within the marriage consideration.

The same view has been again adopted by the Court of Appeal (Lindley, L. J., Lopes, L. J., and Kay, L. J.) in *Attorney-General* v. *Jacobs-Smith* (C. A. 1895), 1895, 2 Q. B. 341, 64 L. J. Q. B. 605, 72 L. T. 714, 43 W. R. 657, where the question was as to the construction of the words "voluntary settlement" and trust "in favour of a volunteer" in the Customs and Inland Revenue Acts, 1881 and 1889 (44 & 45 Vict., c. 12, s. 38, and 52 & 53 Vict., c. 7, s. 11).

If the decision in the Exchequer Chamber in *Clarke* v. *Wright* (*supra*) had been unanimously founded upon a clear ground, it would be difficult to say that it is finally overruled even by the opinion of Lord Selborne and the judgments of the Judicial Committee and the Lords Justices in the Court of Appeal. But having regard to the dissentient judgment of Williams, J., and the fact that two of the judges went upon the ground that *Newstead* v. *Searles* (*supra*) furnished an exception to the general rule, it is difficult to regard the decision of the Exchequer Chamber as carrying the exception further than the actual decision in the circumstances of *Newstead* v. *Searles* would warrant. The result is that the decision in *Clarke* v. *Wright* cannot now be regarded as an authority.

Instances of cases where the undertaking of a not very onerous liability has been held a sufficient consideration are *Townend* v. *Toker* (1866), L. R. 1 Ch. 446, 35 L. J. Ch. 608, 14 L. T. 531, 14 W. R. 806; *Bagspoole* v. *Collins* (1871), L. R. 6 Ch. 228, 40 L. J. Ch. 289, 25 L. T. 282, 19 W. R. 363.

Between husband and wife there may be good consideration even for a post-nuptial settlement, if the rights which each has in the absence of a settlement are modified in favour of each other. For instance, where freehold and copyhold estate stood limited to A. for life, remainder to C., the wife of B., in fee, and (in 1848) by post-nuptial settlement B. and C., by deed duly acknowledged by the latter, conveyed the estate to trustees upon trust for C. for her separate use for life, remainder to B. for life, remainder to the use of such person as C. should appoint. The tenant for life having died, B. and C., by deed duly acknowledged, made a mortgage of the property. Sir J. Romilly, M. R., held that there was sufficient consideration on both sides for the settlement. *Hewison* v. *Negus* (1853), 16 Beav. 594. This decision was followed by the Court of Appeal, in *Teasdale* v. *Braithwaite* (24 April, 1877), 5 Ch. D. 630, 46 L. J. Ch. 725, 36 L. T. 601, 25 W. R. 546 (affirming the decision of Bacon, V. C.), where James, L. J., in a judgment concurred in by Mellish, L. J., and Baggallay, L. J., says, "The Vice-Chancellor correctly puts it thus: 'It is settled that if husband and wife, each of them having interests, no matter how much or in what degree, or of what quality, come to an agreement which is afterwards embodied in a settlement, that is a bargain between husband and wife which is not a transaction without valuable consideration.'" The same principle is maintained by the judgment of the Master of the Rolls, *In re Foster and Lister* (21 April, 1877), 6 Ch. D. 87, 46 L. J. Ch. 480, 36 L. T. 582, 25 W. R. 553, delivered a few days before the judgment of the Court of Appeal in *Teasdale* v. *Braithwaite*.

A married woman entitled under a will to freehold and leasehold property for her separate use joined her husband in making a settlement, whereby the husband and wife conveyed the freeholds, and the husband alone demised the leaseholds (for the nominal payment of 1*s.* if demanded) to trustees upon trust for the wife for her separate use for life, remainder to the husband for life, remainder for the children (if any), with ultimate remainder to the wife absolutely. Afterwards the husband and wife joined in a mortgage of the property. It was held that the settlement was voluntary and voidable under the statute 27 Eliz. There was no consideration moving from the husband, for any estate which he might have by the curtesy could only take effect in default of the wife disposing of the property. And there was no

consideration moving from the trustees to whom the leaseholds were demised for the nominal payment (if demanded). *Shurmur* v. *Sedgwick* (1883), 24 Ch. D. 597, 49 L. T. 156, 31 W. R. 884.

A mortgage executed without pressure for an antecedent debt for which there has been no agreement to execute a mortgage, has been held to be a voluntary and fraudulent conveyance as against a subsequent mortgagee for value. *Cracknall* v. *Janson* (C. A. 1879), 11 Ch. D. 1, 48 L. J. Ch. 168, 40 L. T. 640, 27 W. R. 851.

A judgment creditor is not a purchaser for value within the meaning of 27 Eliz., c. 4. *Dolphin* v. *Aylward* (H. L. 1879), L. R. 4 H. L. 486, 23 L. T. 636.

A voluntary gift for charitable purposes is not to be treated as covinous within the meaning of 27 Eliz., c. 4, and is not avoided by a subsequent conveyance for value. *Ramsay* v. *Gilchrist* (Judicial Committee appeal from N. S. Wales, 1892), 1892, A. C. 412, 61 L. J. P. C. 72, 66 L. T. 806.

Much of the law considered in the latter part of this note is rendered obsolete for England by the Voluntary Conveyances Act, 1893 (56 & 57 Vict., c. 21), which, in effect, enacts that a person who, on or after the 29th June, 1893, becomes a purchaser for value of land, is not entitled to avoid (as "fraudulent" or "covinous" within the meaning of 27 Eliz., c. 4) a previous voluntary settlement made *bonâ fide* and without fraudulent intent.

AMERICAN NOTES.

Dr. Bigelow cites this case (2 Fraud, p. 446), with the remark that it "has attracted much attention, and has almost always been treated as a case peculiar to the Statute of 27th Elizabeth." This excellent writer correctly states the American law as follows: "If the purpose of the transaction is to confer a benefit or an advantage, as *e. g.* out of affection, generosity, or the like, it matters not the transaction takes the form of an agreement, and that the party to receive the advantage promises, or takes upon himself a duty, to do something involving time, labor, or expense, or all three, in the way of carrying out the purpose; so long as nothing is done by the recipient except to make good the terms of the benefit as a gratuity, the transaction still is voluntary on the part of the one conferring the benefit. . . . Indeed the question in such cases appears to come to this, whether the transaction amounted to a bargain or was only a gift; if it was intended as a gift, the fact that the donee was put to inconvenience, trouble, and expense in accepting it does not make him a purchaser for value under the Statute of Elizabeth, — the conveyance still is voluntary; if the conveyance, on all the facts, is to be treated as an intended bargain and sale, the very same circumstances of inconvenience, trouble, and expense, or any of them, would make a case of purchase for value under the statute."

Thus in *Bibb* v. *Freeman*, 59 Alabama, 612, a brother-in-law wrote to the

widow of his brother, living sixty miles distant, offering to give her a place to bring up her family if she would come to see him. She broke up her old residence and removed to that of her brother-in-law. He furnished her a comfortable house for two years, and then required her to give it up. *Held*, a gratuitous promise. *Forward* v. *Armstead*, 12 Alabama, 124; 46 Am. Dec. 246, was quite similar. A similar holding was made in *Van Wyck* v. *Seward*, 18 Wendell (New York), 386, where a father conveyed land to his son, requiring him to pay to his sisters such sums as the father should decide to be their portion of his estate. So in *McCutcheon's Appeal*, 99 Penn. State, 133, the payment of premiums by the gratuitous assignee of a life-insurance policy was held not to constitute him a purchaser for value.

This doctrine is also supported by *Randall* v. *Vroom*, 30 New Jersey Equity, 353; *Nichols* v. *McCarthy*, 53 Connecticut, 299; 55 Am. Rep. 105; *Lyon* v. *Haddock*, 59 Iowa, 682; *Tyler* v. *Tyler*, 126 Illinois, 525; *Park* v. *Battey*, 80 Georgia, 353; *Lewis* v. *Linscott*, 37 Kansas, 379; *Benson* v. *Benson*, 70 Maryland, 253. The last two cases hold that the assumption of some of the grantor's debts makes the grant valuable only to the extent of such payment.

But in *Dozier* v. *Matson*, 94 Missouri, 328, where a solvent father made an oral gift of land to his son, who entered and made valuable improvements, the latter was held to be a purchaser, and to have a valid title as against creditors.

In *Burkholder* v. *Ludlam*, 30 Grattan (Virginia), 255; 32 Am. Rep. 668, A offered his son-in-law B, who was living and in successful business in another town, that if he would remove to A's place of residence, he would give B's wife a lot and an unfurnished house thereon. B accordingly removed at expense, furnished the house with his own and his wife's earnings, and occupied it twelve years, but no conveyance was made as promised. A then became insolvent, and then, in consideration of five dollars and love and affection conveyed the house and lot to a trustee for B's wife. *Held*, that the conveyance was not subject to the lien of judgments rendered after B's possession.

A conveyance on condition that the grantee shall support certain members of the grantor's family is not voluntary. *Worthy* v. *Brady*, 91 North Carolina, 265; *Barnes* v. *Foxen*, 53 Michigan, 475; *Hoisington* v. *Ostrom*, 27 Kansas, 110. Compare *Stanley* v. *Robbins*, 36 Vermont, 422.

Even a moral obligation will support a conveyance as against a subsequent judgment-creditor. *Cottrell* v. *Smith*, 63 Iowa, 181.

FRAUDULENT PREFERENCE.

See Nos. 7–9 of "Bankruptcy," 4 R. C. 73 *et seq.*

It is to be observed that the principle of "Fraudulent Preference" is applied to insolvent companies by s. 164 of the Companies Act, 1862.

FREIGHT.

See also "Dead Freight," 8 R. C. 479 *et seq.*

No. 1. — LUKE *v.* LYDE.

(1759.)

RULE.

If a freighted ship becomes accidentally disabled on its voyage, without the fault of the master, the master has the option of two things, — either to refit the ship, if that can be done within a convenient time; or to hire another ship to convey the goods to the port of delivery. If the merchant (owner of the goods) disagrees to this, and will not let him do so, the shipowner is entitled to the whole freight for the full voyage.

But if, while the election is still open to both parties, the owner of the goods accepts, and the master delivers, them at the place where they are, without an offer by the master to carry them on, or a requirement by the owner that he should do so, a new contract may be implied whereby the owner in consideration of the delivery of the goods promises to pay freight *pro ratâ parte itineris.*

No. 1. — Luke v. Lyde, 2 Burr. 882, 883.

Luke v. Lyde.

2 Burr. 882–890 (s. c. 1 Bl. Rep. 90).

Freight. — Accident to Ship. — Option of the Master. — Acceptance at Intermediate Stage of Voyage. — Freight pro rata.

[882] In case of an accident at sea, where the owner of the goods does not require them to be carried on, freight must be paid only in proportion to the goods saved, and the part of the voyage which was performed.

A special case from the last Devonshire Assizes; reserved by Lord MANSFIELD, who went that circuit last summer.

The defendant Lyde shipped a cargo of 1501 quintals of fish, at the port of St. John in Newfoundland, on board the ship *Sarah*, belonging to the plaintiffs, to be carried to Lisbon. The plaintiffs were to be paid freight at the rate of two shillings per quintal. The original price of the said cargo was, at Newfoundland, ten shillings and sixpence sterling per quintal.

The plaintiffs had also on board the said *Sarah* a cargo of 945 quintals of fish, which was their own property.

The ship sailed from the port of St. John on 27th November, 1756, and had proceeded seventeen days on her voyage; and was taken on the 14th of December following, within four days' [* 883] sail of * Lisbon, by a French ship. And the captain, the other officers, and all the crew (except one man and a boy) were taken out of the *Sarah*, and put on board the French ship. The ship *Sarah* was retaken on the 17th of the same December, 1756, by an English privateer; and on the 29th of December, 1756, brought into the port of Biddeford in Devonshire.

The plaintiffs, having insured the ship and their part of the cargo, abandoned the same to the insurers. But the freight, which the owners were entitled to, was not insured.

The defendant had his goods of the recaptors, and paid them 5*s.* per quintal salvage, at the rate of 10*s.* per quintal value.

The fish could not be sold at all at Biddeford, nor at any other port in England, for more than 10*s.* per quintal, clear of all charges and expenses in bringing them to such port. And the most beneficial market (in the apprehension of every person) for disposing of the said cargo of fish was at Bilboa, in Spain, to which place the defendant sent it in the March following; and there was no delay in the defendant in sending the said cargo

No. 1. — Luke v. Lyde, 2 Burr. 883, 884.

thither. And it was sold there for 5*s.* 6*d.* per quintal, clear of the freight thither, and of all expenses attending the sale there.

The freight from Biddeford to Lisbon is higher than from Newfoundland to Lisbon.

From the time of the capture, the whole way that the ship was afterwards carried was out of the course of her voyage to Lisbon.

The question was, " Whether the plaintiffs are entitled to any, and what freight, and at what rate, and subject to what deduction ? "

Mr. Hussey, for the plaintiffs, observed (by way of preface), that the right of the owners of the ship was not so divested by the capture as to preclude them from bringing their action for the freight.

If the capture made any alteration, the recapture put everything *in statu quo.*

When the ship came into Biddeford there was a total incapacity and inability in the ship to proceed on the voyage. And there was an abandoning by the owners, and acceptance * by the insurers. This inability to proceed was invol- [* 884] untary and accidental, without any fault of the owners, masters, or mariners.

There was no intention to carry the goods to Lisbon; the defendant, the owner of the fish, considered Bilboa as the better market for them, and accordingly sent them thither, and sold them there.

After premising this, he made two questions: —

1st question. Whether any freight at all is due to the plaintiffs ?

2d question. If any, then what freight is due ?

First. He alleged it to be the rule of the maritime law " that freight is due, unless there be some fault in the owners or master. " If there be no fault in the owners or master, the freight must be paid, either *in toto* or *pro ratâ.*

Molloy, 263, lays down the rule, that where the disability of the ship is inevitable or accidental, without fault of the owners or master, freight is due, if the master will either mend his ship, or freight another. But if the merchant will not agree to that, then freight is due for so much as the ship hath earned. Lib. 2, c. 4, § 4.

The shipwreck of the ship does not dissolve the contract, where any goods are saved; the owners are entitled to their freight. It

is so far from dissolving the contract that it gives the master his election whether to provide another ship or not.

In the present case there is nothing to prevent freight being due. Freight became due from and upon the freighters taking the goods into their possession, and continued due by the defendants not totally abandoning them.

Second question. What freight is due to the plaintiffs?

He insisted on the whole. All the goods were delivered. The money paid for salvage will not lessen it, for they must have paid that otherwise. The deviation will not lessen it, for that was not voluntary.

The privateer who retook this ship was entitled only to one-third part for salvage, for it was not ninety-six hours under detention. Therefore, if more was paid, it was too much.

[* 885] * Lord MANSFIELD. — It was compounded at half, and upon this case we must take that proportion to be right.

Mr. Hussey cited, as a foundation of his argument, the case of *Lutwidge and How* v. *Grey et al.*, heard on the 22d of February, 1738, in the House of Lords.

Lord MANSFIELD. — The House of Lords determined upon these reasons (delivered by the Lord Chancellor TALBOT) "that the whole freight was due upon the goods sent to Bristol, because the master offered a ship to carry the goods to Glasgow, which was the port of delivery; but as the master declined carrying the other goods to Glasgow (the port of their delivery), they determined that as to them he ought to be paid only *pro ratâ*; viz., as much as was proportionable to his carrying them to Youghall, the place where the accident happened." And this was all agreeable to the maritime law.

Mr. Hussey. — It appears by that case that the contract is not dissolved by the involuntary accident; that the master had his election to carry them to the port of delivery in another ship; and that if he did not, he shall yet be paid *pro ratâ itineris* to the place where the accident happened.

But at least something is due, especially as the goods were carried to a beneficial market.

Mr. Gould for the defendant, Mr. Lyde.

Upon computing the account of the prime cost and produce of these goods, as stated in this case, it appears that Mr. Lyde has not saved a farthing.

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As to the property not being divested. The plaintiffs have abandoned the ship, and given it up absolutely to their insurers, and never provided any other to carry the fish to Lisbon. He mentioned the case of *Goss* v. *Withers*, 5 Burr. 683 [1 R. C. 1], to show that they were not obliged to abandon the ship.

The plaintiffs have no pretence of satisfaction. Though the mariners of this ship were taken out by the enemy, yet other mariners might have been procured. Therefore there was not a total inability to proceed.

The plaintiffs received their whole insurance upon the ship, and upon their part of the goods. And they never offered
* nor meant to furnish another ship to carry the fish to [*886] Lisbon; they had even given up their own cargo.

The value of the fish depended upon its being carried to Lisbon, to be there against the Lent season.

Malines Lex Mercatoria, fo. 98 & 21, par. 5 (transcribed by Molloy, V. lib. 2, c. 4, §§ 4, 5, pp. 254, 255, 6th ed.), says, "If the master of the ship, after his ship is become disabled (without his fault), will either mend it, or freight another, to carry the goods to the destined port." And in this case he will be entitled to freight *in toto*. "But if the freighter disagrees to the master's carrying them in another ship, the master shall receive his freight in proportion to what he has already carried." This relates to accidents inevitable, and without any fault of the master.

Molloy, 259, 7th ed., 1722, puts the same case, of a ship taken by the enemy, and retaken, and not otherwise incapacitated; and says that after restitution she may proceed; and the entire freight will become due. V. lib. 2, c. 4, § 13, p. 259 of 6th ed.

And the case of *Lutwidge and How* v. *Grey et al.* falls in with this rule, and goes upon the same principles.

It may perhaps be said that the freighter has not an absolute right to demand his goods, and carry them himself to the destined port of delivery, and abate a ratable proportion of freight. But the master has his option, to provide another ship, and carry the goods in it, and receive the whole freight, if he chooses to do so.

But here it is the same thing as if the goods had been sunk in the bottom of the sea; the freighter has totally lost his whole risk. It would be hard, therefore, if he were liable to pay freight for it.

Mr. Hussey in reply. — Lyde was not a third person, but the contractor to pay the freight.

No. 1. — Luke v. Lyde, 2 Burr. 886, 887.

The plaintiffs abandoning the ship to their insurers could not destroy their right to the freight, for the freight was neither insured nor abandoned.

Mr. Gould says, "The freight must be paid, and the agreement performed, if the master provides another ship to carry the goods to the destined port; but not if he does not do so, but the freighter agrees to carry them himself."

[* 887] * But the master, though he may provide another ship, is not, at all events, absolutely obliged to it; he has his option. And the case of *Lutwidge et al.* v. *Grey et al.* shows that the master is entitled *pro ratâ itineris*, though he does not proceed on his voyage; and there he had an allowance *pro ratâ*, though he refuse to carry the goods any further.

Lord MANSFIELD said, that though he was of the same opinion at the assizes as he was now, yet he was desirous to have a case made of it, in order to settle the point more deliberately, solemnly, and notoriously, as it was of so extensive a nature, and especially as the maritime law is not the law of a particular country, but the general law of nations: "non erit alia lex Romæ, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes et omni tempore, una eademque lex obtinebit."

He said he always leaned (even where he had himself no doubt) to make cases for the opinion of the Court; not only for the greater satisfaction of the parties in the particular cause, but to prevent other disputes, by making the rules of law and the ground upon which they are established certain and notorious; but he took particular care that this should not create delay or expense to the parties; and therefore he always dictated the case in Court, and saw it signed by counsel, before another cause was called; and always made it a condition in the rule, "that it should be set down to be argued within the first four days of the term." Upon the same principle the motion "to put off the argument of this case to the next term" was refused, and the plaintiff will now have his judgment within a few days as soon as he could have entered it up if no case had been reserved, at the expense of a single argument only, and some rules of the maritime law applicable to a variety of cases will be better known. He said, before he entered into it particularly, he would lay down a few principles, viz.:

If a freighted ship becomes accidentally disabled on its voyage

No. 1. — Luke v. Lyde, 2 Burr. 887, 888.

(without the fault of the master), the master has his option of two things: either to refit it (if that can be done with convenient time), or to hire another ship to carry the goods to the port of delivery. If the merchant disagrees to this, and will not let him do so, the master will be entitled to the whole freight of the full voyage. And so it was determined in the House of Lords, in that case of *Lutwidge and How* v. *Grey et al.*

As to the value of the goods. It is nothing to the master of the ship "whether the goods are spoiled or not." Provided the freighter takes them, it is enough if the master
* has carried them, for by doing so he has earned his [* 888] freight. And the merchant shall be obliged to take all that are saved, or none; he shall not take some and abandon the rest, and so pick and choose what he likes, taking that which is not damaged, and leaving that which is spoiled or damaged. If he abandons all, he is excused freight; and he may abandon all, though they are not all lost. (I call the freighter the merchant; and the other the master, for the clearer distinction.)

Now here is a capture without any fault of the master, and then a recapture. The merchant does not abandon, but takes the goods, and does not require the master to carry them to Lisbon, the port of delivery. Indeed, the master could not carry them in the same ship, for it was disabled, and was itself abandoned to the insurers of it; and he would not desire to find another, because the freight was higher from Biddeford to Lisbon, than from Newfoundland to Lisbon.

There can be no doubt but that some freight is due; for the goods were not abandoned by the freighter, but received by him of the recaptor.

The question will be "What freight?"

The answer is, "A ratable freight," *i.e.*, *pro ratâ itineris.*

If the master has his election to provide another ship to carry the goods to the port of delivery, and the merchant does not even desire him to do so, the master is still entitled to a proportion, *pro ratâ*, of the former part of the voyage.

I take the proportion of the salvage here to be half of the whole cargo, upon the state of the case as here agreed upon. And it is reasonable that the half here paid to the recaptor should be considered as lost. For the recaptor was not obliged to agree to a valuation, but he might have had the goods actually sold, if

he had so pleased, and taken half the produce; and therefore the half of them are as much lost as if they remained in the enemy's hands. So that half the goods must be considered as lost, and half as saved.

Here the master had come seventeen days of his voyage, and was within four days of the destined port when the accident happened. Therefore he ought to be paid his freight for $\frac{17}{21}$ parts of the full voyage for that half of the cargo which was saved.

[* 889] * I find by the ancientest laws in the world (the Rhodian laws), that the master shall have a ratable proportion, where he is in no fault. V. art. 27, 32, 42. And "Consolato del Mere," a Spanish book, is also agreeable thereto. Ever since the Laws of Oleron it has been settled thus. In the "Usages and Customs of the Sea" (a French book), with observations thereon, the 4th article of the Laws of Oleron is, "That if a vessel be rendered unfit to proceed in her voyage, and the mariners save as much of the lading as possibly they can, if the merchants require their goods of the master, he may deliver them, if he pleases, they paying the freight in proportion to the part of the voyage that is performed, and the costs of the salvage; but if the master can readily repair his ship, he may do it; or if he pleases, he may freight another ship to perform his voyage." Amongst the observations thereon, the first is "that this law does not relate to a total and entire loss, but only to salvage; or rather, not to the shipwreck, but to the disabling of a ship, so that she cannot proceed in her voyage without refitting; in which case the merchants may have their goods again, paying the freight, in proportion to the way the ship made. Wisbury, art. 33, The Emperor Charles V., Ord. art. 40.

The observation adds, further, "That if the master can, in a little time, refit his vessel, and render her fit to continue her voyage (that is, if he can do it in three days' time at the most, according to the Hanse-Town laws), or if he will himself take freight for the merchandise aboard another ship, bound for the same port to which he was bound, he may do it; and, if the accident did not happen him by any fault of his, then the freight shall be paid him." The 37th article of the Laws of Wisbury is to the very same purport.

Roccius de Navibus et Naulo, in note 81st, says: "Declara hoc dictum. Ubi nauta munere vehendi *in parte* sit functus, quia

tunc *pro parte itineris* quo merces inventæ sint, vecturam deberi æquitas suadet; et pro eâ rata mercedis solutio fieri debet. Ita Paul de Castro, &c." (Then a string of authorities follows): "Et probat Joannes de Evia, &c.; qui hoc extendit in casu quo merces fuerint *deperditæ* (totally lost) unâ cum navi, et certa pars ipsarum mercium postea fuerit salvata et recuperata; tunc naulum deberi pro rata mercium recuperatarum, *et pro rata itineris usque ad locum in quo casus adversus acciderat*, fundat, &c." (And then he goes on with authorities.) "Item declara, quòd si dominus seu magister navis solverit mercatori pretium mercium deperditarum, tunc tenetur mercator ad solutionem nauli; quia merces habentur ac si salvatæ fuissent."

* In another book, entitled "The Ordinance of Lewis [*890] XIV.," established in 1681 (collected and compiled under the authority of M. Colbert), the same rules are laid down, particularly in the 18th, 19th, 21st, and 22d articles. Art. 18th directs that no freight shall be due for goods lost by shipwreck, or taken by pirates or enemies. Art. 19th is, that if the ship and goods be ransomed, the master shall be paid his freight to the place where they were taken; and he shall be paid his whole freight, if he conduct them to the place agreed on, he contributing towards the ransom. (Art. 20th settles the rate of contribution.) Art. 21st, The master shall likewise be paid the freight of goods saved from shipwreck, he conducting them to the place appointed. Art. 22nd, If he cannot find a ship to carry thither the goods preserved, he shall only be paid his freight in proportion to what he has performed of the voyage.

And the case in the House of Lords between *Lutwidge and How* v. *Grey et al.* is also in point, and was well considered there. And Lord TALBOT gave the reasons of the judgment of the House at length.

Therefore, in the present case, a ratable proportion of freight ought to be paid for half the goods.

It is quite immaterial what the merchant made of the goods afterwards, for the master hath nothing at all to do with the goodness or badness of the market; nor, indeed, can that be properly known till after the freight is paid, for the master is not bound to deliver the goods till after he is paid his freight. No sort of notice was taken of that matter, in the case of *Lutwidge and How* v. *Grey*, in the House of Lords, and yet there the

tobacco was damaged very greatly, even so much that a great part of it was burned at the scales at Glasgow.

Therefore the verdict must be for £60 14*s.*, which, upon computation, amounts to the ratable proportion of the freight, being $\frac{17}{21}$ of £75, the half of £150.

Consequently the verdict, which was for £70, must be set right, and made £60 14*s.*

PER CURIAM. *Let the postea be delivered to the plaintiff.*

ENGLISH NOTES.

As between shipowner and freighter (though the case may be different as between freighter and insurer of the freight) the inception of the freight is breaking ground; and so where a ship bound for London, after taking in her cargo, but before breaking ground, was cut out of her port of lading in Jamaica by a French privateer, but was afterwards recaptured and carried into another port in the same island, where the cargo was sold by order of the Court of Admiralty for the benefit of the freighters, it was held that the owners of the ship were not entitled to any part of the freight. *Curling* v. *Long* (1797), 1 Bos. & P. 634, 4 R. R. 747.

In *Mullog* v. *Bucker* (1804), 5 East, 316, 7 R. R. 704, the ship (a Dutchman bound from Demerara to Flushing) had been taken by an English ship, and libelled for prize in the Court of Admiralty. The defendant and his family had been landed in England with their luggage. An action by the shipowners for passage-money was held premature; for *non constat* that in the proceedings in the prize Court any freight or passage-money might not be decreed to the captors. The case, however, contains some useful comments upon *Luke* v. *Lyde*. Lord ELLENBOROUGH, C. J., observed: "The case of *Luke* v. *Lyde* seems to have proceeded upon an implied contract arising out of the marine law. . . . There it seems an implied contract was raised, if not on the ground of beneficial service performed for the defendant, at least on the ground of labour performed in his service by the plaintiff, for which none other but he was entitled to recover. But this is a very different case; for here, by the capture, other rights have intervened, and interfere with those of the master; and pending the discussion of those rights in a Court which has not only competent but exclusive jurisdiction over the question of prize, and which has power to deal with the freight as it thinks proper, this action was brought, which assumes the right to the freight to be in the plaintiff." LE BLANC, J., said: "The plaintiff contends that he is entitled to recover *pro ratâ* for the freight, not on the ground of the original contract, but by

reference to the marine law, on which the Courts have shaped a course to recover for a benefit to the defendant which made part of the original contract. That was the footing on which the case of *Luke* v. *Lyde* was put; that though the master could not recover on the original contract which was not performed, yet that he might recover upon an implied assumpsit for a benefit already conferred on the defendant; which in that case was implied from the acceptance of the goods by the defendant at the port into which they were carried."

The same principle is illustrated by *Christy* v. *Row* (1808), 1 Taunt. 300, 9 R. R. 776.

On the other hand there is no implied promise to pay a compensation for carrying goods a part of a voyage, unless the goods are accepted at a port short of the destination. *Osgood* v. *Groning* (1810), 2 Camp. 446, 11 R. R. 765. But it seems from the observations of the Lord Chancellor (Lord Eldon), reported at the end of the case, that if the shipowner could not reasonably have been required to proceed on the voyage, and the goods have been in fact delivered at an intermediate port without prejudice to the claim for freight, they should be considered as having been accepted. *Ibid.*

The Teutonia, *Duncan* v. *Koster* (P. C. App. from Adm. 1872), L. R. 4 P. C. 171, 41 L. J. Adm. 57, 26 L. T. 48, 20 W. R. 421, was a case in which the shipowner recovered full freight under exceptional circumstances. A Prussian ship was chartered by English merchants at Valparaiso to sail from Pisagua and deliver cargo at a safe port, to be named by the charterers, in Great Britain, or on the Continent, between Havre and Hamburgh. The charterer named Dunkirk. On the arrival of the ship off Dunkirk at midnight of 16 July, 1870, the master was informed by a pilot that war had been declared between France and Germany. The master proceeded with the vessel to the Downs to make enquiry, and on the 19th July, in accordance with his owner's instructions, took the vessel into Dover as the nearest safe port. He was there told by the German Consul, as the fact was, that war had been declared. The charterers did not order the ship to proceed to any other port than Dunkirk, nor did they tender the freight. In an action against the shipowners for not delivering the cargo, the question was argued whether they were entitled either to freight according to the charter-party, or to freight *pro ratâ* or compensation for the voyage from Pisagua to Dover. The Judicial Committee considered that they were entitled to the full freight according to the charter-party; since Dover was a port which might have been named by the charterers as the destination, and as they claimed the cargo there without naming any other safe port, the shipowners were still entitled to their lien for the full freight under the charter-party. The judgment concluded by saying

that it was unnecessary to consider whether, if Dunkirk had been the only port of discharge, the shipowner would have been entitled either to freight *pro ratâ parte itineris*, or to a sum by way of compensation for the carriage of the goods from Pisagua to Dover, — questions which they observed were of great difficulty and importance.

If the goods are converted by the tortious act of the master, he cannot recover freight *pro ratâ parte itineris*. And a waiver of the tort or acceptance of the goods cannot be inferred from the circumstance that the owner of the goods brings his action in the form of an action for money had and received instead of an action for wrongful conversion. *Hunter* v. *Prinsep* (1808), 10 East, 378, 10 R. R. 328. And even if the master, under the stress of accident in the course of the voyage, is justified by necessity in selling, and does sell part of the goods, there is no implied contract in respect of the goods so sold, entitling him to freight *pro ratâ parte itineris*. His remedy against such an accident would have been by insurance of the freight. *Vlierboom* v. *Chapman* (1844), 13 M. & W. 230, 13 L. J. Ex. 384, 8 Jur. 811; *Hopper* v. *Burness* (1876), 1 C. P. D. 137, 45 L. J. C. P. 377, 34 L. T. 528, 24 W. R. 612.

A ship bound under charter-party for Taganrog in the Sea of Azof, "or so near thereto as she may safely get," arrived at Kertch (three hundred miles short of the destination); and the navigation was there blocked by ice, so that it would be impossible to proceed further for four months. Contrary to express notice from the charterers, the master discharged the cargo at Kertch and placed it in the hands of the Custom authorities there, by whom it was delivered to the agents of the consignees, notwithstanding the protest of the master not to deliver it without satisfying his lien for freight. The master having sailed away without the intention of returning to complete the voyage, it was held that the shipowner had no right to payment of freight *pro ratâ*. *Metcalfe* v. *Britannia Ironworks Co.* (C. A. 1877), 2 Q. B. D. 423, 46 L. J. Q. B. 443, 36 L. T. 451, 25 W. R. 720.

In the last-mentioned case it appears that the captain had put an end to the contract by refusing to carry the goods further, which he might easily have done in the following spring. The difficulty still remains, what are the presumptions where the further performance of that contract has become impossible without default on either part, and the goods have been so far carried as to give the consignee or charterer some benefit? Upon this the cases throw little light. But perhaps the judgment of Parke, B., in *Vlierboom* v. *Chapman* (*supra*), and that of the Common Pleas in *Hopper* v. *Burness* (*supra*), are authorities against any right to freight having accrued.

No. 1. — Luke v. Lyde. — Notes.

AMERICAN NOTES.

This case is cited in 1 Parsons on Shipping and Admiralty, p. 234, with the observation: "In this country the rule seems to be well settled in accordance with the doctrine of the text," — which is in accordance with the Rule. Citing *Saltus* v. *Ocean Ins. Co.*, 12 Johnson (New York), 107; *Schieffelin* v. *New York Ins. Co.*, 9 Johnson (New York), 21; *Searle* v. *Scovell*, 4 Johnson Chancery (New York), 215, 222; *Treadwell* v. *Union Ins. Co.*, 6 Cowen (New York), 270; *Bryant* v. *Com. Ins. Co.*, 6 Pickering (Mass.), 130; *Hugg* v. *Augusta Ins. Co.*, 7 Howard (U. S. Sup. Ct.), 595, 609; *Adams* v. *Haught*, 14 Texas, 243; *Lemont* v. *Lord*, 52 Maine, 365. See also *Tio* v. *Vance*, 11 Louisiana, 199; 30 Am. Dec. 715; *Welch* v. *Hicks*, 6 Cowen (New York), 504; 16 Am. Dec. 443. In the last case the Court said: "This Court has repeatedly held that freight *pro ratâ itineris* is due where a ship, in consequence of the perils of the sea, without any fault of the master, goes into a port short of her destination, and is unable to prosecute the voyage, and the goods are received by the owner at such intermediate port. 2 Caines, 21; 1 Johns. 27; 2 id. 323, 336; 9 id. 19, 20, 186. This principle has been adopted from the decisions of the English Courts, commencing with *Luke* v. *Lyde*, 2 Burr. 882, and continued without any essential conflict or contrariety down to the present time. 7 T. R. 381; 5 East, 316; 10 id. 393, 526; 2 Campb. 466; 3 Binn. 448; 5 id. 525; 7 Cranch, 358; 1 Marsh. 281, note."

In *Western Trans. Co.* v. *Hoyt*, 69 New York, 230; 25 Am. Rep. 175, the Court said: "As the plaintiff cannot recover under the contract, if he has any claim for freight, it is only for *pro ratâ* freight, which is sometimes allowed, when the transportation has been interrupted or prevented by stress of weather or other cause. In such a case, if the freighter or his consignee is willing to dispense with the performance of the whole voyage, and voluntarily accept the goods before the complete service is rendered, a proportionate amount of freight will be due as 'freight *pro ratâ itineris*.' This principle was derived from the marine law, and it is said that the common law presumes a promise to that effect as being made by the party who consents to accept his goods at a place short of the port of destination, for he obtains his property, with the advantage of the carriage thus far. The principle is based upon the idea of a new contract, and not upon the right to recover upon the original contract. The application of this principle has been considerably modified by the Courts. In the early case of *Luke* v. *Lyde*, 2 Burr. 889, a contract was inferred from the fact of acceptance, and the rule was enunciated, without qualification, that from such fact, without regard to the circumstances, and whether the acceptance was voluntary or from necessity, a new contract to pay *pro ratâ* freight might be inferred. Some later English cases, and the earlier American cases, apparently followed this rule; but the rule has been in both countries materially modified, and it is now held that taking possession from necessity to save the property from destruction, or in consequence of the wrongful act of the freighter, as in *Hunter* v. *Prinsep*, 10 East, 394, and in 13 M. & W. 229, where the master caused the goods to be sold, or when the carrier refuses to complete the performance of his contract, the carrier is not entitled to any freight."

No. 1. — Luke v. Lyde.— Notes.

"The general principle is not disputed by the defendant's counsel. On the other hand, it is conceded that where the master refuses to repair his ship, and send on the goods, or to procure other vessels for the purpose, and the owner of the goods then receives them, that this is not such an acceptance of the goods as will entitle the shipowner to a *pro ratâ* freight. It is not a voluntary acceptance. He does not elect to receive his goods at the intermediate port, and sell them there, or become his own carrier to the port of destination. He does not assent to the termination of the voyage at the intermediate port; but it having been terminated there against his will, by the refusal of the master to send on his goods to the port of destination, he does not, he receiving them under such circumstances in judgment of law, promise to pay the freight to the intermediate port."

Freight *pro ratâ itineris* is due only when the owner of the goods voluntarily receives them at an intermediate port. *Gray* v. *Waln*, 2 Sergeant & Rawle (Penn.), 229; 7 Am. Dec. 642, "where the consent of the merchant, either by words or by actions, has been expressly given or may be fairly inferred." *Propeller Mohawk*, 8 Wallace (U. S. Sup. Ct.), 153; *Lorent* v. *Kentring*, 1 Nott & McCord (So. Car.), 132. See note, 60 Am. Dec. 153, citing the principal case and many others. See *Hunt* v. *Haskell*, 24 Maine, 339; 41 Am. Dec. 387.

Master may save freight where vessel is wrecked or disabled in the course of the voyage, and cannot be repaired without great delay and expense, by forwarding the cargo by another competent vessel. *Crawford* v. *Williams*, 1 Sneed (Tennessee), 205; 60 Am. Dec. 146.

If the owner demands and receives the goods at an intermediate port, the master being willing to repair and continue the voyage, or to transship the goods, full freight is demandable. *Jordan* v. *Warren Ins. Co.*, 1 Story (U. S. Circ. Ct.), 342; *Merchants' Mut. Ins. Co.* v. *Butler*, 20 Maryland, 41; *Ellis* v. *Willard*, 9 New York, 529; *Ship Hooper*, 3 Sumner (U. S. Circ. Ct.), 542.

The amount of freight recoverable is to be determined by the actual benefit to the charterer. *Coffin* v. *Storer*, 5 Massachusetts, 252; 4 Am. Dec. 54: "The demand for a *pro ratâ* freight adjusted on these principles is a reasonable one; but the rule adopted in the case of *Luke* v. *Lyde* is manifestly unjust; for it is in that case admitted that the expense of freight to the destined port from the port where the freighter received the goods was as great as from the shipping port; so that he received no benefit from the proportion of transportation for which freight was demanded of him." To the same effect, *Crawford* v. *Williams*, *supra*.

No. 2. — ANDREW *v.* MOORHOUSE.

(C. P. 1814.)

RULE.

THE term "freight" is ambiguous, and may by context be construed to mean a payment which is not strictly *freight*, but a sum of money to be paid at all events in consideration of the master receiving the goods on board and undertaking to carry them.

Andrew and another v. Moorhouse.

5 Taunt. 435–439 (s. c. 1 Marshall, 122; 15 R. R. 544).

Freight. — Contract for Freight payable in Advance.

The term "freight" in common parlance is ambiguous, and may be so [435] applied as to mean a sum of money to be paid at all events upon the taking of goods on board to be carried on a voyage, in lieu of the expectation of earning freight upon the contingency of the ship's arrival.

The plaintiffs declared on a contract that in consideration that the plaintiffs would receive on board their ship the *Queen Charlotte*, then in the port of London, and bound on a voyage to the Cape of Good Hope, forty-two casks of wine to be carried from London to the Cape, the defendant undertook to pay them after the rate of £5 per ton for the casks, on delivery to the defendant of proper bills of lading of the casks on board the ship, and averred the receiving of the casks on board, to the admeasurement of twenty tons, and the delivery by the plaintiffs of proper bills of lading, and that the vessel with the goods sailed on the voyage. The second count averred the consideration to be taking the goods on board in the port of London, and a promise to pay on request; the third count stated the consideration to be the taking on board and delivery of a bill of lading. There were also counts for work and labour and the money counts. The cause was tried at Guildhall at the sittings after Hilary Term, 1814, before GIBBS, Ch. J.
The bill of lading * contained the words, "freight for the [*436] said goods being paid." The broker who freighted the ship stated that the contract for the conveyance of the goods was verbal; the broker told the defendant that the price of the freight of goods upon a voyage from London to the Cape was £5

No. 2. — Andrew v. Moorhouse, 5 Taunt. 436, 437.

paid in London, or £7 paid at the Cape; the plaintiff preferred the contract at £5 per ton. Soon after the vessel had sailed the broker called on the defendant for payment; the defendant said it would not yet be due for some months, for that a certain period of credit was to be given. The broker replied that that credit was given only in the case of large sums, and this was a small sum; upon which the defendant answered that he would call and pay it on the following Monday. The vessel being lost before she arrived at the Cape, Best, Serjt., for the defendant, contended that freight had never been earned, and that the plaintiff could not recover. That the meaning of the contract was, that the lesser sum was to be paid in London, instead of the greater sum being paid at the Cape, only on account of the difference in the exchange at the two places; but that whether any money was to be paid at all, or whether, if paid, the shipowner should be entitled to retain it, depended on the contingency whether the ship should arrive at the Cape, and make delivery of the goods; for that if she did not, no freight was due. The plaintiffs contended that the meaning of the contract was that if the defendant elected to pay the lesser sum, the money was to be paid at all events, whether the ship arrived or not, and became due on the taking of the goods on board, which was the full consideration for the money. Gibbs, Ch. J., left it to the jury to decide, whether of the two was the meaning of the contract; and the jury found a verdict for the plaintiffs, his Lordship granting permission to the defendant to move to enter a nonsuit.

[*437] * Best in this term moved for a rule, upon the authority of *Mashiter* v. *Buller and another*, 1 Camp. 84. If this money had been actually paid, it could now be recovered back again, because freight had never been earned. There was no evidence here that the money was to be paid and finally retained, whether the owner of the goods should obtain any reciprocal advantage or not: it is only said the money was to be paid in advance. The £5 paid in London was worth as much or more than the £7 paid at the Cape: the difference of exchange was as much, and no man would be so unjust to himself as to pay his money with the chance of obtaining nothing for it. Every principle of policy and justice which guided the old law of freight ought to prevent the contract from being stretched beyond its fair meaning.

No. 2. — Andrew v. Moorhouse, 5 Taunt. 437, 438.

GIBBS, Ch. J. Nothing turned on the bill of lading, the terms of which would equally apply to either construction. The case was this: that which was called the freight was to be paid before the ship set out; but the party was not by using that word precluded from getting at the true meaning of his contract. The ship was lost, and, consequently, freight was never earned; the question was, whether, the goods being laden, the money was to be paid in London absolutely, or whether it was to be paid only in case the goods arrived at the Cape of Good Hope. The counsel for the defendant does not take a correct view of the facts; he supposes them not to be in any respect distinguishable from *Mashiter* v. *Buller*. If it were so we certainly should not dispose of the case without further consideration; but it is distinguishable in a most material point. *Mashiter* v. *Buller* turned wholly on the bill of lading. In Lord ELLENBOROUGH'S view of the case of *Mashiter* v. *Buller*, the money did not become a debt unless the goods were delivered; it would be too absurd to put on that contract the construction * that the money might be [* 438] paid this day in London, and that afterwards, if the goods did not arrive, the plaintiff might recover it back again. I should have doubted on those words, "the shippers paying freight for the said goods in London;" but Lord ELLENBOROUGH thought that on the words of that contract the stipulation only changed the place of payment; that the meaning was, that freight should be paid, strictly so called, which could not be due till the delivery of the goods at the port of discharge. There was no indication there of an intent that if the freight were not earned the money might not be recovered back. Here is an indication not only of the place where it was to be paid, but also of the time when it was to become due, which was not the case there. The broker calls for the money; the defendant says, you call on me very quickly; it will not yet be due for some months. No, says the broker, that credit is only given with large sums. Then, says the defendant, I will pay it on Monday. I left it to the jury to consider whether the agreement intended merely to change the place where the freight should be payable, in case any freight should be earned, or whether in lieu of a contract for freight it was intended that this sum should be payable in all events after shipping the goods; and the jury found that the meaning of the agreement was, that the money should be paid at all events upon the delivery of the

goods on board the ship here. I believe they were very much guided by the construction which the parties themselves had put on the agreement when the defendant was called on for the payment of the freight; for he did not then dispute that the money was due as a debt, but only the length of credit. In *Blakey* v. *Dixon*, 2 Bos. & P. 321, Lord Eldon, on demurrer, held that, because the ship had not arrived, freight could not be recovered on a declaration for "money due for freight," but said he [*439] *should have had no difficulty in framing a declaration that would enable him to recover on a contract to pay the freight when the goods were put on board. It signifies not what name is given to the money; the defendant is misled by the ambiguity of the phrase "freight;" there is no doubt but that a man may agree to pay money on the delivery of the goods on board the ship, call it what you will. The question is, what was the contract in this case. The jury have decided it, and I cannot quarrel with their verdict.

Heath, J. — I cannot quarrel with the verdict; it was a question for the jury, and I think the verdict is perfectly right.

Chambre, J. — The general law respecting freight is such as it has been stated; but it is competent for the parties to make their own contracts for themselves; it was in this case peculiarly the province of the jury to say what the agreement was; the case was very properly left to them; and I think they have found a right verdict.

Dallas, J., concurred. *Rule refused.*

ENGLISH NOTES.

"Freight is the reward payable to the carrier for the safe carriage and delivery of goods; it is payable only on the safe carriage and delivery. . . . But a sum of money payable before the arrival of the ship at her port of discharge, and payable by the shippers of the goods at the port of shipment, does not acquire the legal character of freight, because it is described under that name in a bill of lading, nor does it acquire the legal incidents of freight. It is, in effect, money to be paid for taking the goods on board and undertaking to carry, and not for carrying them." Judgment of The Judicial Committee delivered by Lord Kingsdown in *Kirchner* v. *Venus* (1859), 12 Moore P. C. 361, 390, 5 Jur. (N. S.) 395, 7 W. R. 455 (citing *Blakey* v. *Dixon*, 2 Bos. & P. 321, and *Andrew* v. *Moorhouse*).

The meaning of the word "freight" in an instrument which stipulates

for its being payable in advance is further elucidated by the opinions delivered by the House of Lords in *Allison* v. *Bristol Marine Insurance Co.* (H. L. 1875), 1 App. Cas. 209, 34 L. T. 809, 24 W. R. 1039, upon an insurance on freight effected by the shipowner valued at a certain sum. By the charter-party the freight was to be paid one-half in cash on signing bills of lading less certain percentages for interest and insurance, and the remainder on right delivery of the cargo. The construction and effect of such a charter-party is, according to the judgments, that the half of the freight was payable in advance, and therefore, according to long-settled law, could not be recovered back from the shipowners. And although it had not all the legal incidents of freight, such as lien (which was the consequence particularly adverted to in Lord KINGSDOWN'S judgment above cited), it was still freight so as to be properly the subject of insurance. But as the effect of the contract is to transfer the risk from the shipowner to the charterer, the insurable interest is in the latter and not in the former, and that is the reason of the stipulation as to a deduction for insurance. The facts of the case were that half of the cargo was lost on the voyage, so that no freight became payable to the shipowner on arrival. It was held that there was a total loss of the freight insured, since the whole of the freight in which the shipowner had any insurable interest was lost.

A stipulation in the charter-party was "one-third freight, if required, to be advanced, less three per cent, for interest and insurance." The ship was lost before any requirement was made. It was held in effect that a requirement made after the loss was too late. For then the purpose of the deduction for insurance would have been inapplicable. *Smith* v. *Pyman* (C. A. 1891), 1891, 1 Q. B. 742, 60 L. J. Q. B. 621, 64 L. T. 436, 39 W. R. 466.

By a clause in a charter-party, "The freight to be advanced as follows: One-third on signing bills of lading, less three per cent for interest, insurance, &c., and the remainder, on unloading, in cash;" and bills of lading were to be signed within twenty-four hours after the cargo was on board. The vessel sunk and the cargo was lost within the time for presenting the bills of lading; and the charterer refused to present them. It was held by the Court of Appeal that he was bound to present the bills of lading, and was liable accordingly to pay the sum named as advanced freight. *Oriental Steamship Co.* v. *Tylor* (C. A. 1893), 1893, 2 Q. B. 518, 63 L. J. Q. B. 128, 69 L. T. 577, 42 W. R. 89.

Where the clause was "Cash for steamer's ordinary disbursements at port or ports of loading, not exceeding £150, in all, to be advanced at exchange of 50*d.* to the dollar, on account of freight, subject to three per cent to cover cost of insurance, &c., . . . and balance of freight on right and true delivery of the cargo in cash:" — at the end of the voyage the

charterer claimed to deduct the benefit he would have obtained from the exchange if the whole sum of £150 had been advanced, although a smaller sum had been applied for and actually advanced. It was held that the clause was introduced for the benefit of the shipowner, and that it was optional to him to take advantage of it, so that the whole freight was due less the amount of the actual advance at the stipulated exchange and subject to the three per cent as stipulated. *The Primula* (1894), 1894, P. 128, 63 L. J. P. 118, 70 L. T. 253, 42 W. R. 527.

Mention may be here made of the construction which has been adopted in recent cases of what is called the "cesser clause" relating to the liability of the charterer. The clause has been construed so as to apply only to the liability in respect of which the shipowner has no other remedy. *Clink* v. *Radford* (C. A. 1891), 1891, 1 Q. B. 625, 60 L. J. Q. B. 388, 64 L. T. 491, 39 W. R. 355. So where the charter-party provided in the usual form, "The liabilities of the charterers to cease on the vessel being loaded, the master and owners having a lien on all cargo for all freight and demurrage under this charter-party;" the charterers having re-chartered the ship and the captain signed a bill of lading for the cargo by which freight was to be paid at a certain rate per ton on the weight of cargo delivered, and the freight on weight actually delivered having become through loss of weight on the voyage less than the agreed freight under the charter-party, it was held (following *Clink* v. *Radford*, *supra*), that the cesser clause discharged the charterers from liability under the charter-party only to the extent to which the lien obtained by the shipowner was an equivalent, and that the charterers were still liable under the charter-party for the difference. *Hansen* v. *Harrold* (C. A. 1894), 1894, 1 Q. B. 612, 63 L. J. Q. B. 744, 70 L. T. 475.

Where money is advanced by the freighter for the use of the ship, it depends on the terms of the contract whether the money is to be considered as in advance of the freight (in which case it is not repayable in case of freight, properly so called, not being earned), or whether it is advanced as a loan, in which case the freighter has no insurable interest in it. If the intention is that the money is to be in advance of freight, it must be expressed in clear and explicit words. *Mansfield* v. *Maitland* (1821), 4 B. & Ald. 582, 23 R. R. 402.

AMERICAN NOTES.

In *Watson* v. *Duykinck* (N. D. 1806), 3 Johnson (New York), 335, it was held (KENT, C. J.), that where the agreement was that the master should suffer the plaintiff to proceed in the vessel as a passenger, and to load on board goods for carriage to the value of $600, this did not imply a contract to deliver the goods, but only to make all due and *bonâ fide* efforts to do so, and where the voyage was broken up, the master was entitled to retain the

freight. "The English books are almost silent on the subject," said Kent. In *Griggs* v. *Austin*, 3 Pickering (Mass.), 20; 15 Am. Dec. 175, that case and the principal case were cited, and the Court said: "In the English cases cited a very nice discrimination has been adopted between a contract for freight, which includes an obligation to transport and deliver, and a contract to receive the goods on board the vessel. That a contract of the latter nature may be made, so that it will be considered as executed by the mere lading of the goods, we do not doubt; but we cannot think that such a contract can be implied from the mere fact of the freights being paid down; because reasons may, and often do, exist for exacting this, without any intention to vary the legal liabilities of the parties. If persons apply for a passage in a vessel, as is often the case between this country and Great Britain, whose responsibility may be doubtful, and they are received on board at the customary price on condition of advancing the passage-money, and the vessel should be wrecked immediately on commencement of the voyage, so that the passengers would have to seek another vessel, and pay their passage-money again, we cannot think that the master or shipowner would have a right to retain the money, unless there were an express agreement to that effect. The case of *Watson* v. *Duykinck*, above cited, is somewhat of this nature. In that case, the voyage was broken up two days after its commencement, and the passenger, instead of being carried to the island of St. Thomas, was landed in Connecticut. He, however, was not allowed to recover back the passage-money which had been paid in advance, on the ground that the consideration was an agreement on the part of the master to suffer him to proceed in the sloop, &c., and that the master had suffered him to come on board, which was an execution of the contract. I confess this does not seem to me to be the most obvious effect of the contract; but it was by this construction only that the defendant prevailed, the Court being clear that, were it a common case of passage-money paid in advance by the principles of the marine law engrafted into the common law, it must have been recovered back. The same principle applies with equal force to money paid in advance for the freight of goods. Such payment does not import a relinquishment of any right, for it may have been exacted, because the goods themselves might not be a sufficient security for the freight, and the owner of the goods might not be responsible."

"But one of the counsel for the defendant has put the case on ground which admits the general principle that freight may be recovered back when the goods are not delivered, unless there be an agreement to the contrary, but he insists that such an agreement does not appear from the evidence, — that is, from the bill of lading and the receipt on the account. But we think they furnish no evidence of such an agreement; they merely prove that the freight was paid in advance.

"Indeed, it will be seen at once that if the payment of freight thus proved were to be construed into a stipulation that it should not be recovered back, the whole doctrine of the marine law on this subject would be useless. The maxim is that freight paid in advance, if the goods be not carried, shall be returned, unless there be a stipulation to the contrary. Now, if the mere

payment proved such a stipulation, there would be no case for the rule to operate upon. So that, when Mr. Justice Bayley says that where there is an express stipulation to pay freight in advance, there must also be an express stipulation to pay it back in order to entitle the shipper to recover, he means something more than the mere payment of the freight, which may be equivocal. He means undoubtedly an express stipulation in the contract, because it might be inferred from such a stipulation that the parties had calculated hazards, and that an equivalent had been obtained in some form for the advance of money, which otherwise would be due only on a contingency. And he was there reasoning upon a case which might fairly sustain such an argument."

GAMING AND WAGERING.

No. 1. — DA COSTA *v.* JONES.

(K. B. 1778.)

No. 2. — ALLEN *v.* HEARN.

(K. B. 1785.)

No. 3. — GOOD *v.* ELLIOTT.

(K. B. 1790.)

No. 4. — JOHNSON *v.* BANN.

(K. B. 1790.)

RULE.

According to the common law of England, an action might be maintained on a wager, although the parties had no previous interest in the question on which it was laid, unless: —

1. It was necessary to give indecent evidence;
2. It tended to disturb the peace of the individual, and of society;
3. It was contrary to sound policy; or
4. It was respecting a matter prohibited by statute.

No. 1. — Da Costa v. Jones, Cowp. 729, 730.

Da Costa v. Jones.

Cowp. 729–736.

Wager. — Right of Action at Common Law.

An action will not lie upon a voluntary wager between two indifferent [729] persons, upon the sex of a third, apparently a man; having acted, and continuing to act, as such in various public characters. 1. Because such enquiry tends to indecent evidence. 2. Because it tends to disturb the peace of the individual, and of society. — But indecency of evidence is no objection to its being received, where it is necessary to the decision of a civil or criminal right.

This was an action of assumpsit upon a wager between the plaintiff and the defendant upon the sex of Monsieur Le Chevalier D'Eon; and who was so described in the declaration, which stated that the defendant on the 4th of October, 1771, in consideration that the plaintiff would then and there pay him seventy-five guineas, undertook to pay to the plaintiff three hundred pounds in case the Chevalier should at any time prove to be a female.

There were other general counts for money lent, money laid out and expended for the use of the defendant, and money had and received by the defendant to the use of the plaintiff. Plea, *non assumpsit*. The cause was tried before Lord Mansfield at Guildhall, at the sittings after Michaelmas Term, 1777, when the jury found a verdict for the plaintiff: damages £300, costs 40*s*. Mr. Bearcroft, of counsel for the defendant, had moved on the second day of this term to arrest the judgment; and if he should not succeed in that, then that the defendant might be at liberty to stay the proceedings, and obtained a rule to show cause. This motion was grounded upon an objection he took at the trial, that the plaintiff ought not to recover, because it was a wager upon a question tending to introduce indecent evidence. To this it was answered, that the objection, if founded at all, appeared upon the record; and Lord Mansfield being of that opinion, the objection was then overruled. Afterwards, on Tuesday, the 27th of January, in this term, Lord Mansfield mentioned this case, and applying to Mr. Bearcroft, said, he understood * his only [* 730] objection was, that the question led to indecent evidence.
But his Lordship added, " There is another ground which does not appear so strong upon the record as upon the evidence; which is, that it materially affects the interest of a third person. If I am

right in that objection, the plaintiff ought to have been nonsuited. Therefore I mention it, that you may move for a new trial at the same time, and so take in the whole of the question." This addition was accordingly made to the rule.

Mr. Wallace, Mr. Buller, and Mr. Dunning now showed cause, and argued, that by the law of England wagers upon every possible subject are lawful; such only excepted, as are specially prohibited by positive statute; viz., wagering policies upon ships, &c., interest or no interest, and such as are made void by the statutes against gaming. But even these were lawful antecedent to the statutes that restrain them. Every other subject, therefore, remains open to this species of contract, as it did at common law. And there, whether the parties were interested or not was totally immaterial. But if it were material in this case, the parties certainly were interested from the moment of subscribing to the policy. Any objection, however, to the legality of a wager is idle, when it is considered that even Courts of justice have adopted it as a form of legal proceeding, and try all feigned issues in that shape. The single question, therefore, is, Whether the sex of a person is an improper subject of a wager? And 1st, As to the objection that it tends to introduce indecent evidence; no doubt many such wagers have existed. Insurances upon the sex of children unborn are frequent. Master Holford's policy upon Lady Lade's child, if it had been brought to trial, would equally have led to indecent evidence; but no one ever thought it void or objectionable on that account. In pedigrees it is not uncommon for the same sort of evidence to arise. Suppose a wager, whether a particular act was done by a man or a woman, or a life insurance with an exception as to a particular disease; the discussion of these and many other subjects might involve the greatest indecency. But Courts of justice do not reject the contracts of parties, because the subject-matter of them happens to be indecent or indecorous. What can be a greater violation of all decorum than for two sons to run their fathers' lives against each other. And yet the case of the *Earl of March* v. *Pigott*, 5 Burr. 2802, was entertained, and solemnly adjudged in this Court in [*731] favour of the contract, without *a thought or idea of its being liable to any such objection. In the case of *Jones* v. *Randall*, Hil. 14 Geo. III., B. R.; Cowp. 37, which was a wager upon the event of a suit then depending, and part heard

No. 1. — Da Costa v. Jones, Cowp. 731, 732.

before the House of Lords, the objection of its being *contra bonos mores* applied in the strongest manner possible; because the essential requisite to the validity of a wager, namely, that there should be an equal chance of winning or losing, could only exist in that case upon the supposition that the House were so ignorant as not to know the law, or, knowing it, were so profligate as to decide contrary to law. But the Court were clear in overruling the objection, and confirmed the contract. Here, however, the objection is not even warranted by the fact. For the subject-matter was not only capable of being proved, but has been proved in three successive trials, without indecent evidence. The time to have objected would have been when any such evidence appeared, not because it possibly might appear. There is nothing, therefore, in this objection; and if there were, it is in this case premature. 2dly, As to the possibility of its affecting the interest of a third person; that objection, perhaps, may hold where the proceedings are merely fictitious or collusive, and where they are set on foot for no other purpose than to injure a third person who is innocent, as in *Muilman's Case*, Cas. temp. Hardwicke, 237. But the ground upon which the Court interferes in such a case is, that the proceedings are a contempt of the Court; and therefore, at the instance of the party liable to be injured, the Court will stay them and punish the contempt. So, if this had been a mere contrivance to affect an innocent person, the Court might have considered it as a contempt. But the cases are totally different. This is a fair *bonâ fide* wager, made no less than ten years ago, without the smallest intention of affecting the Chevalier D'Eon in the slightest degree. The silence of the parties till this time clearly shows that. And even now, the action would not have been brought to trial but for the evidence furnished by the Chevalier herself in her dispute with Demorand. But in what manner can it affect her? There is nothing criminal in having assumed the habit or the form and character of a man, and having fought the battles of her country or served it as a minister of state. But if it is criminal the consequences arising from it are the effect of her own conduct. She has imposed upon the world by assuming a character that did not belong to her; and therefore ought not to be protected in continuing * the cheat. So that, either [* 732] way, the objection falls to the ground. And if the Chevalier could not avail herself of it, *a fortiori* the defendant,

who is an indifferent person, cannot. But is it not every day's practice for third persons to be affected, and very materially so, by trials in the common and ordinary course of justice? What could be more painful to a father than to have a wager upon his own life laid by his son, publicly canvassed and discussed in a Court of justice? A wager was lately tried upon the place of nativity of the Duchess of Hamilton and her sister, whether it was in England or Ireland, which produced an inquiry that ascertained their ages: a very serious inconvenience probably to them, but it would have been no ground for staying the regular proceedings of a Court of justice. But here the objection itself fails, because all the public characters which the Chevalier has filled are past. As there is no substantial objection therefore, either upon principle or authority, nor any founded in fact, to bar the plaintiff's right of action in this case, the verdict ought to stand, and the rule be discharged.

Mr. Bearcroft and Mr. T. Cowper, *contra*, in support of the rule. — There is sufficient foundation for staying the proceedings upon both objections; and the ground is this, that to permit such a wager to be discussed in a Court of justice is *contra bonos mores*. 1. It tends to introduce indecent evidence, where it is not necessary for the purpose either of civil or criminal justice, upon a question in which the parties have no interest whatever but of their own creating. 2. It tends to violate the peace of society by exhibiting a third person, who is innocent, in a ridiculous and contemptible light to all the world, and to break in upon his private comfort and peace of mind. Wagers of this kind are in themselves a national disgrace. Ought it to be endured in any country, that two persons shall lay a wager upon an indecent subject, and then call upon the highest Court of justice in the kingdom to determine so improper a question? To obviate this objection it has been said that in point of fact no indecent evidence was given in this case; but that is not strictly so. The trial certainly was, and in the nature of it could not but be, indecent. And it is upon that the objection turns: not whether the language of the witnesses, or the mode of conducting the trial, was indecent; but whether the nature of the subject was such that the most guarded caution and wariness in the mode of expression could not prevent indecent ideas from arising out of the cause? Where the purposes of public justice require that

indecent * evidence should be given, as upon an indict- [* 733] ment for a rape, the Court must of necessity submit to the inconvenience; otherwise crimes would go unpunished, and offenders escape. So, if necessary to the decision of private wrongs, or to the rights of individuals. Mr. Justice BURNET therefore was clearly wrong (and it is not disputed that he was so) in refusing to try the action of defamation before him, in which a woman charged a man with having proclaimed to the world that she had a defect in a particular part of her body. The defendant by way of plea justified, averring that it was true she had such a defect. When the cause was called on Mr. Justice BURNET threw the record out of Court. But the plaintiff was an injured person; therefore he certainly ought to have entertained the suit. Suppose a question were to arise upon the right of inheritance of an hermaphrodite, who, Lord COKE says, "shall be heir, either as male or female, according to that sex which prevails (Co. Litt. 8 a, 29 b)." For the sake of private justice, it would be necessary to hear and decide upon the fact. So, in the case of a particular disease excepted out of a policy for life. But not, if it were a mere voluntary wager, whether such a person were an hermaphrodite, or had a particular disorder. No more would the Court tolerate a wager as to the cause why a married woman did not breed. And numberless other instances might be put. So palpable is the objection, that it is impossible to illustrate it by particular cases without falling into indecency. 2. It affects the peace and comfort of a third person, and, as such, the peace of society. The cases to which this has been compared bear no similitude to it. There is no ridicule attending a wager upon the sex of an unborn child. In the case of the *Earl of March* v. *Pigott*, the reproach did not fall upon those who were the subject of the wager, but upon the parties themselves who laid it. *Jones* v. *Randal* was a hedging wager by a party who was interested: it reflected on nobody. The event was quite uncertain; and the Court determined that there was no objection to it, either in morality or policy. (Lord MANSFIELD. — Never was a question more doubtful how it would be decided till it was actually determined.) But in this case the interest of D'Eon, as well as his private feelings, are most materially affected. By the investigation of his sex he may be exposed to ridicule and contempt. And if, as was assumed in the argument, it goes to prove him an

impostor, it is adding infamy to ridicule. It can never be that mere volunteers in a wager shall be permitted wantonly [* 734] to expose to the public view * every defect and imperfection of those they think fit to select for the purpose; and, in aid of the inquiry, disturb the peace of whole families, by calling confidential friends, professional attendants, near relations, and necessary attendants to give testimony of the fact. Therefore, upon principles of justice, the Court will now do what ought to have been done at the trial, and allow the objection.

Lord MANSFIELD. — This case, upon the trial of the first cause, made a great noise all over Europe; and soon afterwards I own I was sorry that the answer given to the objection made at the trial, "that it appeared upon the record," had been so hastily given way to by me. I was sorry that the nature of the action had not been more fully considered. I was sorry for another thing, that the witnesses who were subpœnaed had not been told they might refuse to give evidence if they pleased. But no objection was made on their behalf by the counsel for the defendant, nor did any of themselves apply for protection, or hesitate to answer. I have since heard that many of them were confidential persons, servants, and others employed in the way of their profession and business. Had any of them demurred, it would have opened the nature of the action. That two men, by laying a wager concerning a third person, might compel his physicians, relations, and servants to disclose what they knew relative to the subject-matter of that wager, would have been an alarming proposition; the bare stating it would have startled. Indeed, the objection being put upon the general crude ground of the cause leading to indecent evidence, and not upon the special nature of this case, did not strike me. For indecency of evidence is no objection to its being received, where it is necessary to the decision of a civil or criminal right; and upon that ground we think Mr. Justice BURNET did wrong in rejecting the case that came before him; for there the party had received an injury. But if it had been an action upon a wager, whether such a woman had such a defect or infirmity, it would have been nearly the present case. Indifferent wagers upon indifferent matters, without interest to either of the parties, are certainly allowed by the law of this country, in so far as they have not been restrained by particular Acts of Parliament; and the restraints imposed in particular cases support the general

rule. For where Parliament interposes and says, "Unless you have an interest in such a case, any wager or insurance upon it shall be void and of no effect;" it implies that in cases not specially * prohibited by Act of Parliament, parties [* 735] may wager or insure at pleasure. And this species of contract has, in fact, gone to an extent that is much to be complained of. Whether it would not have been better policy to have treated all wagers originally as gaming contracts, and so have held them void, is now too late to discuss. They have too long and too often been held good and valid contracts. But notwithstanding they have been so generally entertained, there must be a variety of instances where the voluntary act of two indifferent parties, by laying a wager, shall not be permitted to form a ground for an action or a judicial proceeding in a Court of justice. Suppose a wager between two people, that one of them, or that a third person, shall do a criminal act. To go from stronger cases to those that are less strong: "I lay you a wager you do not beat such a person. You lay that you will." Such a wager would be void, because it is an incitement to a breach of the peace. Suppose the subject-matter of a wager were a violation of chastity, or an immoral action, "I lay I seduce such a woman." Would a Court of justice entertain an action upon such a wager? Most clearly not; because it is an incitement to immorality. Suppose a wager upon a subject *contra bonos mores*, like the case of Sir Charles Sedley; would a Court of justice try a wager that incites to such indecency? It may be said there are no adjudged cases; but you offend; you misbehave by laying such a wager. To come nearer to the point: suppose a wager that affects the interest or the feelings of a third person, which is one of the grounds upon which the motion for a new trial in this case has been argued; for instance, that such a woman has committed adultery. Would a Court of justice try the adultery in an action upon such a wager? Or, a wager that an unmarried woman has had a bastard. Would you try that? Would it be endured? Most unquestionably it would not. Because it is not only an injury to a third person, but it disturbs the peace of society; and in either of these two last cases the party to be affected by it would have a right to say, How dare you bring my name in question? If a husband complains of adultery, he shall be allowed to try it, because he is a party injured. So, if it be necessary to justice to try whether

such a one is a bastard, it shall be tried. But third persons, merely for the purpose of laying a wager, shall not thus wantonly expose others to ridicule, and libel them under the form of an action.

We then come to the present case, which is shortly this: Here is a person who appears to all the world to be a man; is [* 736] * stated upon the record to be "Monsieur Le Chevalier D'Eon;" has acted in that character in a variety of capacities; and has his reasons and advantages in so appearing. Shall two indifferent people, by a wager between themselves, injure him so as to try in an action upon that wager, Whether (as was said in the argument) he is a cheat and impostor? or show that he is a woman, and be allowed to subpœna all his intimate friends and confidential attendants to give evidence that will expose him all over Europe? It is monstrous to state. It is a disgrace to judicature. And if the Chevalier, by application to the Court or otherwise, had come and said, "Here is a villainous wager laid to injure me; I pray the Court, as a third person whose interest it affects, to stop it," — the Court would instantly have done it, upon the same principle as the Court stayed the proceedings, upon the application of Mr. Muilman, in the case of *Coxe* v. *Phillips*, Cas. temp. Hardwicke, 237. Wherever a question arises upon a real matter of right, though the interest of third persons, not parties, may be affected by it, it shall be tried. If a witness lays a wager upon the subject-matter in dispute between a third person, it does not affect his evidence so as to defeat either party of it.

I think the other ground is material. The question is upon the sex of a person, to the appearance of all the world a man; and who, for reasons of his own, thinks proper to keep his sex a secret. The medium of proof upon such a question must arise from the circumstances that distinguish the sexes. This necessarily tends to introduce all the indecent evidence such an inquiry can involve. Suppose two persons were to lay a wager upon a mark or defect in a woman's body. Will the Court say they would suffer her chambermaid to be called, to give evidence upon such a question. The case mentioned in the argument, of an insurance by two sons upon the lives of their respective fathers, and other cases, where the life of one person is run against another, are not cases that injure or affect the individuals who happen to be made the subject of such wagers. They are no reflection or injury to them. So,

a wager whether the next child shall be a boy or a girl hurts no one. But the present case is indecent in itself, and manifestly a gross injury to a third person; therefore, ought not to be endured. We think the objection appears sufficiently upon the record, and that there is ground enough upon these allegations to arrest the judgment.

The three other Judges concurred.

PER CURIAM. *Rule for arresting the judgment absolute.*

Allen v. Hearn.

1 Term Rep. 56-60 (1 R. R. 149).

Wager. — Illegality. — Political Election.

A wager between two voters with respect to the event of an election of [56] a member to serve in Parliament, laid before the poll began, is illegal.

Assumpsit upon a wager. This was an action tried before Lord MANSFIELD at the sittings after last term, at Guildhall, to recover £100 won on a wager by the plaintiff of the defendant, on the event of an election of a member to serve in Parliament for the borough of Southwark, when the jury found the following special case: —

* That the borough of Southwark sends two members to [* 57] Parliament; and that on the 22d June, 1784, there was a vacancy in the room of Sir Barnard Turner. That Mr. Le Mesurier and Sir Richard Hotham were candidates for the said borough. That the plaintiff and the defendant were voters and partisans of the respective candidates, and had canvassed and taken decided parts on opposite sides; the plaintiff being for Mr. Le Mesurier, and the defendant siding with Sir Richard Hotham, before the bet was made. That the bet stated in the first count of the declaration was made before the poll began, and both parties voted for their respective friends, and solicited other voters. That Mr. Le Mesurier was duly elected, and returned as member of the said borough at the said election.

The question is, whether the plaintiff is entitled to recover in this action?

Le Mesurier for the plaintiff observed, that as wagers in general were legal he might put it on the defendant's counsel to show in what respect the present instance was an exception from that

general rule. However, he would show that this was not within any of the exceptions yet laid down in Courts of law upon this subject. The objection at the trial was, that such a wager was against sound policy, and so against common law; but at common law everything was not considered as contrary to sound policy, which might be injurious to society, or which might tend to make men bad citizens; otherwise all gaming contracts would have been void at common law; so would insurances without interest; so would stock-jobbing, — without the necessity of particular statutes being passed for that purpose. What, then, were the decisions? There were only two cases in which wagers were unlawful, both of which are laid down in *Da Costa* v. *Jones*, Cowp. 729 [p. 377, *ante*]. First, where the interest of third persons is concerned, as when the discussion on which the wager depends may be injurious to them; in which case the law says an innocent person shall not suffer from a mere voluntary transaction between two strangers. Secondly, where the public is directly injured; as where the wager is an incitement to a breach of the peace, as if a man lay a wager that he will knock another down; or an inducement to immorality, as if he lay that he will seduce a woman. A third principle was attempted to be laid down in *Foster* v. *Thackery*, Tr. 21 Geo. III., B. R.,[1] that wagers were [*58] * unlawful from the magnitude and public nature of the subject-matter. But that was never decided; and he conceived even that that wager was good; for in 1 Lev. 33 there is a wager on Charles II.'s restoration, where the objection was never taken. And the Act of 7 Ann., c. 16, makes void all wagers on peace or war for a limited time. The Legislature must therefore have considered them to be lawful both before the passing and after the expiration of the Act. But the case of *Jones* v. *Randall*, Cowp. 37, is decisive; for there it was resolved that wagers may be laid on the administration of the laws. That was a subject of greater importance than the present. The question whether any particular member shall be returned to Parliament bears not the least comparison to it. The share which he has in the Legislature is so small, and the probability of the public being at all affected

[1] That was a wager that war would be declared against France within three months: the opinion of the twelve Judges was taken on the point whether that wager were void under the Stat. 14 Geo. III., c. 48. The Courts of B. R. and C. B. were of opinion that it was; and the Court of Exchequer *contra*. But no judgment was ever given on the case. [1 T. R. 57, n.; 1 R. R. 149, n.]

by his election is so remote, as not to be mentioned in competition with so momentous a question, as what measure shall be dealt out to the subject from the highest tribunal of justice. He concluded therefore that this question stood clear of any objection which had been yet allowed by the Court; for this was the case of a *bonâ fide* wager, the parties betting on the side in which they were engaged, and for which they had been canvassing. Had corruption been either intended or practised, the transaction would have worn a different complexion, and would then have been tried by different rules.

Wood, *contra*, contended that this wager was void on the general principles which had been adopted in *Jones* v. *Randall*, where it was to be collected that a wager was void if against the principles of morality or sound policy. That the case of *Jones* v. *Randall* was distinguishable from the present, for there neither of the parties concerned had any influence in the decision of the question, though they were interested in the event. That this action was not only repugnant to morality and sound policy, but particularly so to all the Acts of Parliament that had been passed for preserving the purity of elections. That it countenanced bribery in the highest degree; and at all events was the means of influencing voters before the election, for it was equivalent to binding themselves under such a penalty to vote for a particular person.

The case of *Jones, assignee of Knight*, v. *Parry* was a bet upon the Bristol election, which was tried before Lord MANSFIELD at Guildhall. There it did not appear whether the parties were voters or * not; for the moment Mr. Wallace had [* 59] opened the case, Lord MANSFIELD thought it was a colour for bribery, and nonsuited the plaintiff.

Le Mesurier, in reply, denied that the laws watched the exercise of that public trust which was lodged in the voter, with such jealousy as was contended for by the defendant's counsel. All it required was that he should not sell his vote: he was open to all other motives of partiality, prejudice, affection, or resentment, which are so highly criminal in other public trusts. He may withhold his vote entirely if he please, or he may engage it by a previous promise, and such a promise will bind many honest men much more forcibly than any influence arising from pecuniary considerations like the present.

No. 2. — Allen v. Hearn, 1 T. R. 59, 60.

The principle of elections is that they should be free; and that freedom is not affected by any restriction which the voter voluntarily imposes upon himself. But if this be an influence, it must be such an one as the candidate could employ; now he could not procure a vote by endeavouring to persuade a voter that he might gain by laying such a wager as the present. It is absurd to call this an influence which can operate only indirectly, but not directly; which is binding only when it originates with the voter himself, but which becomes ridiculous if suggested by the party for whose benefit it is to be created. And, in fact, it is no benefit to the candidate, for if it secure him one vote it equally alienates another.

Lord MANSFIELD, Ch. J. — Whether this particular wager had any other motive than the spirit of gaming, and the zeal of both parties, I do not know; but this question turns on the species and nature of the contract, and if that be in the eye of the law corrupt, and against the fundamental principles of the Constitution, it cannot be supported by any Court of justice. One of the principal foundations of this Constitution depends on the proper exercise of this franchise, that the election of members of Parliament should be free, and particularly that every voter should be free from pecuniary influence in giving his vote.

This is a wager in the form of it by two voters, and the event is the success of the respective candidates. The success, therefore, of either candidate is material; and from the moment the wager is laid both parties are fettered. It is therefore laying them under a pecuniary influence; it is making each of them in the nature of a candidate. If this be allowed, every other wager may be allowed. But this is not all — a gaming contract should not be encouraged if it has a dangerous tendency. What [* 60] is so easy as, in a case where a * bribe is intended, to lay a wager? It is difficult to prove that the wager makes him give a contrary vote to what he would otherwise have done; but still it is a colour for bribery. It has an influence on his mind. Therefore, in the case in Cowper, if the wager had been laid with a Lord of Parliament or a Judge, it would have been void from its tendency, without considering whether a bribe were really intended or not. This is of that nature, and therefore void.

WILLES, J., delivered his opinion to the same effect.

ASHHURST, J. — It is a very different case from engaging a vote

by a promise only, because many things may happen to release a man from such an engagement with perfect honour, as if the candidate's character were impeached, &c. ; but the bias occasioned by a wager cannot be so got rid of.

BULLER, J. — If you put the case of a wager between a voter and another person who is not one, it is a palpable bribe; it is a sum of money laid to procure a particular vote, and that case cannot be distinguished from the present. The bias is exactly the same; it is a pecuniary compensation. It is true, as the counsel for the plaintiff said, that the law leaves it to the voter to exercise his franchise or not; but it also requires him to be free till the last moment of giving or withholding his vote, which he cannot be, if he has laid such a wager as the present.

Let the postea be delivered to the defendant.

Good v. Elliott.

3 Term Rep. 693–706 (1 R. R. 803).

Wager. — Common-law Right of Action.

A wager that A had purchased a wagon of B is not void at common [693] law, nor prohibited by Stat. 14 Geo. III., c. 48; and an action may be maintained upon it.

This was an action upon a wager. The first count stated that there was a discourse between the plaintiff and defendant concerning a waggon lately belonging to David Coleman, and the question was whether one Susannah Tye had or had not before a certain day bought the waggon. That the defendant betted the plaintiff five guineas that Susannah Tye had before that time bought the waggon; and that the plaintiff betted the defendant five guineas that S. Tye had not before that time bought the waggon. That the bet was to be decided by D. Coleman and S. Tye. That each deposited 1*s.* in the hands of one E. Heath, to be paid to the plaintiff in case D. Coleman and S. Tye should say and determine that S. Tye had not before that * time bought [* 694] the waggon, or to the defendant in case they should say that he had, &c. There were other counts, laying the wager in different forms, but in substance the same. Plea, *non assumpsit.* After verdict for the plaintiff,

A rule was obtained in Michaelmas Term, 29 Geo. III., to show

cause why the judgment should not be arrested, which, after argument by Erskine and Shepherd, in support of the rule, and Garrow, *contra*, stood over for the opinion of the Court till this term.

Grose, J. [after stating the case]. — The ground of the motion in arrest of judgment is that all wagers are illegal where the party has no other interest in the subject-matter of them than that which he chooses to create by his bet. In thus stating the proposition, it seems admitted that some wagers are legal; and, indeed, it cannot, after the different authorities which have been decided, be doubted. *Andrews* v. *Herne*, 1 Lev. 33, and *Walcott* v. *Tappin*, 1 Keb. 56, 65, are in point. Those cases were on a wager of 20s. to £20 whether Charles Stuart would be King of England within twelve months then next following, which upon a motion in arrest of judgment was held good. It is true that that was not the objection there insisted upon; but those who objected would undoubtedly have made it, if it could have been supposed to have any foundation. But actions on wagers have been innumerable; and, as to this point, what was said by Lord Mansfield in the case of *Da Costa* v. *Jones*, Cowp. 729 [p. 377, *ante*], is decisive. It is there laid down that wagers are not void *quâ* wagers; and that the restraints imposed on certain species of wagers by Acts of Parliament are exceptions to the general rule, and prove it. It has been argued, however, that they are void as gaming contracts, and therefore against sound policy. If they were, the 14 Geo. III., c. 48, would have been unnecessary; neither would there have been any occasion for the elaborate opinion delivered by Lord Mansfield in *Da Costa* v. *Jones*, in which he took much pains to state the particular ground on which that wager was void. It would have been enough to have said that it was a gaming contract, and therefore void. On that ground every declaration on a wager would have been demurrable to; and there would have been an end to this species of action which we have so repeatedly heard of. Lord Mansfield, indeed, in that case, lamented that wagers [*695] were not void as gaming contracts. Every * wager, I admit, is not legal, and the grounds on which they may be void are fully stated by Lord Mansfield in *Da Costa* v. *Jones*; such as a wager which would be an incitement to a breach of the peace or to immorality, or one that would affect the feelings or interests of a third person, or expose him to ridicule, or libel him; and the reason he gives is, because they are not only injuri-

No. 3. — Good v. Elliott, 3 T. R. 695, 696.

ous to a third person, but disturb the peace of society; and he might have added, what was said in *Atherford* v. *Beard*, 2 T. R. 610 (1 R. R. 556), that those also are void which are against sound policy. We may then take the rule to be that those wagers are bad which, by injuring a third person, disturb the peace of society, or which militate against the morality or sound policy of the kingdom. Then has this bet any such tendency? It is a bet concerning a waggon then lately belonging to David Coleman, that Susannah Tye had bought it before the bet was made; which was to be decided by David Coleman and Susannah Tye. Now it does not appear to me that such a bet is an injury to any one but the loser; or that it disturbs the peace of society, or that it is against morality or sound policy. It may be said that it may involve a question whether S. Tye stole it; but it does not necessarily involve that question; and therefore, after verdict, we are to presume that it did not. It would be strange to presume that it did, when upon the face of the first count the bet is to be decided by her and Coleman. Then can it be said that the wager is void because it respects the interest of a third person? I cannot say so, because I find no such rule laid down in *Da Costa* v. *Jones*. Lord MANSFIELD, it is true, amongst wagers not to be permitted, classes those which affect the interest of third persons; but why? Because they are not only an injury to a third person, but disturb the peace of society. And, indeed, in most of the wagers that have been laid the interests of third persons have been in some degree involved. Upon that ground the wager in 1 Lev. 33 might have been held bad. I therefore think that the declaration is supportable at common law. But it hath been argued that since the 14 Geo. III. every wager of this sort is void. Now the case of *Da Costa* v. *Jones* was since that statute, and yet this objection did not occur either to the counsel who argued against the wager, or to Lord MANSFIELD. That was "an Act for regulating insurances upon lives, and for prohibiting all such insurances, except in cases where * the persons insuring shall have an interest [* 696] in the life or death of the persons insured." The preamble states that inconveniences had arisen from the making insurances on lives or other events wherein the party had no interest, and for remedy enacts that no insurance shall be made on lives, or any other event, wherein the person on whose account such policy shall be made shall have no interest, or by way of

gaming or wagering; and avoids every assurance made contrary thereto. If the Legislature had intended to make all wagers void, it is extraordinary that the statute did not enact "that all and every wager and wagers upon any event in which the person making the wager shall have no interest shall be void." It has been said, indeed, that such is the meaning of the words "by way of gaming or wagering." But to put such meaning on those words would, in my opinion, be to torture the plain sense of plain words. The statute evidently meant that every insurance on lives, or on any event, in which the assured has not an interest, shall be void, whether such insurance be effected in the form of a policy, or by way of gaming or wagering. And if the construction contended for by the defendant be the true one, it leads to this extraordinary proposition, that a statute which concerns every part of the community, and was passed in 1774, has never been understood by any one till 1790. To say that every wager is prohibited by this statute is to say that every wager is an insurance, and that the Parliament intended to describe a wager by calling it an insurance, which I am of opinion was not their intent. If it were, they have used a number of unnecessary words to render obscure what a few words would have made plain and obvious to the meanest capacity. For these reasons I think that every wager is not void, either at common law or by the above statute; that this wager is neither an incitement to a breach of the peace, or any immorality; that it neither exposes to ridicule, or libels any one; nor does it so affect the feelings or interest of any one as to cause any injury to him, or disturb the peace of society. And that after the cases which have been determined, to say that this action cannot be maintained would be to make law, and not to interpret it. Therefore I am of opinion that the rule for arresting the judgment ought to be discharged.

Buller, J. — This is an action upon a wager laid between the plaintiff and the defendant, whether Susannah Tye had bought a waggon. A motion has been made in arrest of judgment upon the ground that such a wager is illegal and void, and that [*697] therefore *no action can be maintained upon it. The case has been argued on two grounds: 1st, That it is void at common law; 2dly, That it is void by the statute 14 Geo. III., c. 48. The opinion which I hold on the first point would very well excuse me from discussing the question made on the statute;

but as that point has been agitated before, and perhaps may be so again, I will deliver my sentiments upon both the questions. For the plaintiff it has been insisted that it is now too late to discuss the question whether wagers in general are lawful or not; and an expression of Lord MANSFIELD'S in *Da Costa* v. *Jones*, Cowp. 735 [p. 383, *ante*], has been relied on, wherein he says, "Whether it would not have been better policy to have treated all wagers originally as gaming contracts, and so have held them void, is now too late to discuss; they have too long and too often been held good and valid contracts." With great deference to that very high and respectable authority, I doubt whether it be too late to consider that question or not; for in *Bruce* v. *Ross*, Dom. Proc. 14th April, 1788, a decree in Scotland was affirmed on the ground that all idle wagers were void. In the printed cases, which is all we have to go upon, it is stated that the rule and principle of the civil law relative to the *sponsiones ludicræ* were early adopted as common law in that kingdom, and have been constantly adhered to. And the great and laudable pains, which on all occasions have been taken to preserve an uniformity between the laws of that country and this, make that case of considerable authority here. The opinions of Lord Ch. J. HOLT in *Brewster* v. *Kidgell*, 5 Mod. 374, Comb. 425, and of Lord HARDWICKE in *Coxe* v. *Phillips*, Rep. temp. Hardw. 237, go a great way to support the same doctrine; and they rightly draw the line between feigned issues to try a real right and idle wagers between persons who have no interest. If actions on wagers were constantly allowed in those days, I think Lord Ch. J. HOLT would hardly have said that he would not have tried the action had he not thought that the issue had been directed by the Court of Chancery; and yet in the particular case I think he was mistaken, because that action was brought to try a real right. In the case quoted by my Brother GROSE of a wager whether Charles Stuart would be King of England, I presume no one will say that an action could now be maintained on any bet of that kind. Till the case of *Da Costa* v. *Jones* the question was never agitated, or the mischievous consequences of sustaining such actions discussed. But * however the question on wagers in gen- [* 698] eral may stand, I think there is a clear legal objection to this wager; and that I am supported by the opinions of Lord HARDWICKE and Lord MANSFIELD, in laying it down as a certain

rule of law that no two men, by means of a voluntary wager between themselves, shall be permitted to try any question upon the right or interest of a third person. In the case of *Coxe* v. *Phillips* Lord HARDWICKE said, "Mr. Muilman is particularly concerned to complain to the Court; for though the verdict, if it had passed against him, could not have been given in evidence against him, not being a party to the suit, yet it is a prejudice to a man to have the report of a verdict that he is married in this way." And yet let the marriage in that case have been decided in any way, it could not have involved Mr. Muilman in any crime or act of immorality; he might have been entitled to great pity, but that was all. In the case of *Da Costa* v. *Jones*, immediately after the passage above alluded to, which was quoted by the plaintiff's counsel, Lord MANSFIELD says (Cowp. 735, p. 383, *ante*), "Notwithstanding wagers have been so generally entertained, there must be a variety of instances where the voluntary act of two indifferent parties, by laying a wager, shall not be permitted to form a ground for an action or a judicial proceeding in a Court of justice." His Lordship then put cases of a wager on a criminal act or an immoral act; and afterwards he said, "To come nearer to the point; suppose a wager that affects the interest or the feelings of a third person, for instance, that such a woman has committed adultery, would a Court of justice try the adultery in an action on such a wager? or a wager that an unmarried woman had a bastard, would you try that; would it be endured? Most unquestionably it would not; because it is not only an injury to a third person, but it disturbs the peace of society; and in either of these last two cases the party to be affected by it would have a right to say, How dare you to bring my name in question?" Afterwards he said, "Third persons, merely for the purpose of laying a wager, shall not thus wantonly expose others to ridicule, and libel them under the form of an action." It is not material whether, in fact, evidence be given to disgrace or affect a third person; but if by possibility that may be the case, it is an objection to the action. We are now upon a motion in arrest of judgment, and therefore can only look at the record to see what might have been proved upon it. [* 699] * Suppose evidence had been offered that the woman had stolen the waggon, would it not have been pertinent to the issue? Suppose it were proved that there was a mistake in casting up an account which this woman had settled,

and by that mean the waggon remained unpaid for; might it not be the cause of another action against her? Suppose it were proved that the waggon was worth £20, but that she bought it for £4, when the owner was drunk, would she not be disgraced by it? If a man of high rank were to sell a horse at Newmarket, to a person just twenty-one years of age, for £5000, whatever the laws of Newmarket may justify, it would not be a pleasant thing to have it discussed in a Court of justice whether the horse were worth more than £25. If it appear on the record that the bet is founded on the private transactions or the interest of a third person, I think it is void. I take it to be agreed by all my Brethren, with whom I have the misfortune to differ, that if the wager concern the interest of the public, or impute a crime or disgrace to another person, it is void, and cannot be made the subject of an action. The question then is, whether there be any sound difference between a wager throwing an imputation on another, and a wager which respects his property only; I can find none. But, on the contrary, I go further; for I hold that though the wager imputes no crime or disgrace to another, and though it do not call in question any pecuniary interest of another, yet if it concern the person of another, no action can be maintained upon it, and therefore I am of opinion that a bet on a lady's age, or whether she has a mole on her face, is void. No third person has a right to make it a subject of discussion in a Court of justice whether she passes herself in the world as being more in the bloom of youth than she really is, or whether what is apparent in her face to every one who sees her is a mole or a wart: and yet these are circumstances which cannot in a Court of law be stated as an injury; for if a man say that a young woman who passes for twenty-three years of age is thirty-three, or that she has a wart in her face (which is considered as a nasty thing), no action will lie for it. I will put one case more, which, if it do not appear too ludicrous, perhaps may be found to bear upon the present question. Suppose a bet were made whether a young lady squinted with her right eye or her left eye, shall it be the subject of sober inquiry in a Court of justice how the organs of her eyes are formed, and which of them it is that looks directly to the object before her? Shall the parties in the action be permitted to say, the inquiry * is no injury to her, for everybody sees that [* 700] she squints, and it makes no difference to her whether it

be with one eye or the other? No. The answer is, you, the plaintiff and defendant, have no right by an idle, wanton bet of yours to bring her person or even her name in question. The principle of the cases in which it has been said that a bet respecting a third person is void, is not because it occasions a temporal loss to that third person, or because it subjects him to punishment, but because the laws of the country are calculated only to try adverse rights, and not to indulge or entertain the impertinent inquiries of others upon matters in which they are in no wise interested. What is it to the plaintiff or the defendant whether this woman bought the waggon or stole it, or whether she has paid for it, or is insolvent and never can pay for it? If it be permitted to these parties to try whether this woman owes £4 for the waggon to the former owner of it, the necessary consequence is, that any two men may try all the debts, the circumstances, and the solvency of another, which will afford a ready mean of making men in trade bankrupts before their time. If it appear on the face of the record that the interest of the public or of an individual is materially affected, the proper way of taking advantage of the objection is by demurrer, or by motion in arrest of judgment. *Da Costa* v. *Jones* and *Atherford* v. *Beard*, 2 T. R. 610 (1 R. R. 556), are express authorities upon this point; and by them it is established that if the action lead to improper inquiries it may be stopped *in limine*. The case of *Atherford* v. *Beard* can be supported on no other grounds; for in that case there was a confession by the defendant that he had lost the wager, and therefore it was unnecessary, and indeed it was not attempted, to unravel or examine any accounts respecting the public revenue. But where the inquiry affects the character or interests of an individual, justice can only be done by stopping it at the outset; for if the parties are permitted by their counsel to tell their own story at large in public, it is a very feeble and inadequate mode of protecting the character of the person traduced for the Court to say we cannot receive evidence of what has been stated, or, after the mischief has been done, to say it should not have been done. By the very statement of the case the busy curiosity and the foolish tattle of the world are set in motion; and it is beyond the reach of human jurisprudence afterwards to efface its effects.

Let us adhere, then, to the case of *Da Costa* v. *Jones*, and [* 701] much mischief will * be prevented, no inconvenience can

arise. The wisdom of that determination convinced the mind of every man who heard or who has read it; and I can find no reason for departing from it in one instance more than in another, in which it is said that the action cannot be maintained. One case in which it is determined that the action will not lie is where the bet affects the interest or the feelings of a third person. I subscribe to both the propositions. The interest or the feelings of a third person may both be involved in this inquiry; but if it affect her interest only, that decides against the plaintiff. And when we speak of the feelings of others, I know of no line to go by, but whether the matter at all concern the person or transactions of another. Men's feelings are as different as their faces; one man will exult in having made a sharping bargain, when another would blush at the mention of it; but the craft of the one and the remorse of the other are not to be put to the test by an action on an idle wager between other persons.

Upon the second question I can say very little more than what I expressed in *Atherford* v. *Beard*, namely, that either the Courts must restrain the 14 Geo. III., c. 48, to such cases as in form are policies, which would go a great way towards repealing the statute, or by pursuing the spirit of the Act they must extend it to all wagers where the parties have no interest. A gaming policy is a wager, and so was considered by the Legislature itself, and by the majority of the Judges in *Foster* v. *Thackery*, 1 T. R. 57 (p. 386, *ante*). In the 7 Anne (7 Ann., c. 16) an Act passed which was entitled an Act to prevent laying wagers relating to the public; and to prevent that, it is enacted that all policies relative to the war shall be void. The 14 Geo. III., c. 48, is entitled an Act for regulating insurances for lives, and for prohibiting all such insurances, except in cases where the persons insuring shall have an interest in the life or death of the person insured. The title of the Act is confined to insurances on lives; but the enacting clause extends to all other events where the parties have no interest, or by way of gaming or wagering. The present is the case of a wager where the parties have no interest; and the only question to be made is whether the Act shall be confined to what is in form a policy. If it be, every mischievous kind of gaming which the statute complains of may still prevail under the sanction of law, by altering the words only of the agreement, and letting the substance remain; or, in other

[* 702] * words, a man shall be permitted to do that indirectly which he is forbid to do directly. The case of *Foster* v. *Thackery* was not finally determined; but still I think it is a case of considerable authority. Lord MANSFIELD said, "What is a policy? — It is derived from a French word which means a promise. Is a particular form necessary? Must it begin "in the name of God, Amen," or refer to Lombard Street? A mercantile policy we all know; but a gaming policy is a mere wager. If the form were essential under the Act, it may be evaded immediately; for it may begin, "We promise, if war be declared, we will pay," &c. Apply that to mercantile events, "We promise to pay if the ship sails and does not arrive," &c. This case most certainly is within all the mischief and inconvenience intended to be prevented by the Act. That case, however, was never finally decided; but it is well known that a great majority of the Judges were of opinion against the action. The construction which I put upon the Act is that it has nothing to do with what in the true sense and meaning of the word is a policy, that is, a mercantile policy made on interest; but that it prohibits all wagers made on any event in which the parties have not an interest. Upon the whole, I am of opinion that the judgment ought to be arrested.

ASHHURST, J. — The question is, whether the plaintiff can retain his verdict either on general grounds, or from the particular circumstances of the wager. As to the general ground, namely, whether an action will lie on any wager, that question does not now appear open to argument; it having been settled by so many authorities, both ancient and modern, and particularly in the case of *Da Costa* v. *Jones*, where Lord MANSFIELD, though he expressed a strong wish that the practice of laying wagers could be abolished, said "that indifferent wagers upon indifferent matters, without interest to either of the parties, are certainly allowed by the law of this country in so far as they have not been restrained by any particular Act of Parliament; and the restraints imposed in particular cases support the general rule." And it is to be observed that this case was subsequent to the statute against gaming and wager policies or insurances. I think, therefore, I may now take it as settled law that all wagers are not illegal, since that point has been determined by so recent a case, supported by ancient authorities. The subject-matter of the wager

itself may, in many instances, render wagers illegal, as if they be against public policy, against decency, or tending to affect the particular interests of individuals. The * two [* 703] first of these clearly have nothing to do with the present question, and therefore I shall pass them over. And the latter of them does not, in my opinion, apply more; for we must remember that we are now deciding on a case which comes before the Court on a motion in arrest of judgment, and therefore no objection can be taken but what arises upon the face of the record. If (though it do not appear on the record) it had been proved at the trial that Coleman's waggon had, in fact, been lately stolen from him, it might have been said that the discussing of this question might naturally lead to the investigation whether Susannah Tye might not have been concerned in stealing it; but that ought to have been made a ground of objection at the trial by way of non-suiting the plaintiff, and cannot be taken advantage of in arrest of judgment. This point was intimated by Lord MANSFIELD in the case of *Da Costa* v. *Jones*, where (as he thought that some of the matters proved in evidence tended more strongly to prove how the interest of the Chevalier D'Eon was affected than anything that appeared on the record) he directed the defendant's counsel also to move for a new trial, that he might have the chance of that advantage as well as that of the indecency of the question, in case the defendant should not succeed on that point. This manifestly shows Lord MANSFIELD'S opinion, that a wager is not illegal, because by some possible supposition which ingenuity might devise it might affect the interest of a third person; but in order to make it illegal, it must appear that such circumstances did actually exist which must necessarily or naturally tend to affect the interest of a third person. But no such circumstance appears in the present case; it does not appear that any waggon had ever been stolen from Coleman, nor does any one circumstance appear which can make this more than a plain, simple matter of fact, and nothing is to be presumed that does not appear. As to the Stat. 14 Geo. III., c. 48, I think it cannot be made to apply to all wagers in general without doing the greatest violence to the construction of it. The grievance recited in the Act is the making mercantile transactions and transactions of business a cloak for gaming; it therefore forbids the making of policies on lives, or other events, in which the party has no interest; and it enacts

that no policy shall be made without inserting the names of the persons interested, and for whose benefit the policy is underwritten; and the same may be said of all the other provisions. But no member of either of the Houses of Parliament who concurred in passing that Act ever thought that a
[* 704] * wager was a policy. I perfectly agree that all wagers are foolish things: it is throwing away the money of the parties, and trifling with the time of Judges and juries to call on them to determine such questions; and I wish they were abolished. But where any public grievance or inconvenience exists, not provided for by law, it of right belongs to the Legislature, by our Constitution, to remedy such grievance; and it would be dangerous if Courts of justice were to assume such a power. The Legislature, I am satisfied, have not done it in this instance, and we must put the law in execution till it is altered. Therefore I am of opinion that the rule to arrest the judgment ought to be discharged.

Lord KENYON, Ch. J. — I have not entertained the least doubt upon this question from the time when it was argued down to the present moment. I entirely agree with what was said by Lord MANSFIELD in *Da Costa* v. *Jones*, that wagers have gone to an extent which is much to be complained of; and if we were sitting here in a legislative capacity, it might perhaps be prudent to declare that no wagers whatever ought to be allowed; but it is our duty *jus dicere* not *jus dare*; we can only pronounce what the law is, and if there be any defect in it, the Legislature alone is competent to remedy it. Now in order to know what the law has said upon this subject let us trace it back, and it will be found that from the earliest times the books all speak the same language. Before the time of Lord HOLT it was a question whether an *indebitatus assumpsit* would lie for a wager, and the cases agree that it would not; but, says Lord HOLT (Carth. 338), though the action does not lie in that particular form, yet an action formed on the wager itself, and laid by way of mutual promises, might be maintained. In some of the cases in which such an action has been supported the matter in dispute has not only been the most trivial that could be imagined, but it also respected third persons, as the case of a wager whether one of the players at backgammon was bound to move a man. *Pope* v. *St. Leger*, Salk. 344. In the *Earl of March* v. *Pigott*, 5 Burr. 2802, though the wager was in

its nature somewhat indecorous, there was no doubt, either on the bench or at the bar, but that the action was maintainable. From the earliest times, therefore, down to the case of *Da Costa* v. *Jones*, Cowp. 729 (p. 377, *ante*), there appears to have been * no doubt on the subject; and I desire to be con- [*705] sidered as acquiescing in those cases to the extent they have gone. As to the objection arising from the admission of indecent evidence in actions on some sort of wagers; in cases of descents it is often necessary to go into evidence respecting the sexes, and many questions must arise where the most indecent evidence is permitted whenever it is necessary for the ascertainment of facts to promote the ends of justice; in such cases it is our duty to admit it, however our feelings may be affected by the discussion. I wish not to be understood to contradict anything that may have been said in *Da Costa* v. *Jones* and the other cases; but at the same time let me avail myself of what Lord MANSFIELD there said, that "indifferent wagers upon indifferent matters without interest to either of the parties are allowed by the law of this country so far as they have not been restrained by particular Acts of Parliament; and the restraints imposed in particular cases support the general rule." And it is clear that the case of *Da Costa* v. *Jones* was never argued upon the ground that no action on a wager would lie, but only that that case formed an exception to the general rule. The case of *Bruce* v. *Ross*, 14th April, 1788, in the House of Lords, proceeded on a distinction between the law of Scotland and that of England; and it was argued on the ground that the civil law was adopted in that country, and governed the decisions of their Courts. And there are many cases in the House of Lords where they are bound to decide contrary to the law of England, as in the case of death-bed dispositions of property in Scotland, in which, though the law of that country is different from ours, that Court are as much bound to adhere to it as the council at the Cockpit is bound to adopt the laws of Jamaica or Barbadoes in appeals from those islands to the King in council. I have looked into most of the books of civil law on this subject, which by no means prohibit wagers in general. It would savour a little of pedantry to cite passages from them, therefore I will only mention a distinction taken by Vinnius, which is, that wagers respecting Cæsar are allowed, unless they affect the character of Cæsar, &c. Now what is there

in the present case that can affect the character of the woman who had bought the waggon? Nothing of that sort appears upon the record, and we can make no inference. The question is, whether the wagon was the property of A. or B., and they are to decide it. What is there at common law to make such a wager bad? If not, how is it affected by the statute law? All the [* 706] statutes respecting gaming * are so far parliamentary declarations that wagers and gaming had been lawful. The 16 Car. II., c. 7, s. 3, in vacating contracts for money lost at play and money betted on those who play, affords another parliamentary inference that such wagers were allowed before the statute. I remember a case in Wilson (*Blaxton* v. *Pye*, 2 Wils. 309), where an action was brought on a bet of 14 guineas to 8 on a horse-race. There the Court held that as the plaintiff might, under the Stat. 9 Ann. and 16 Car. II.,[1] have refused to pay the 14 guineas if he had lost, there was no mutuality in the wager, and therefore he should not recover the 8 guineas of the defendant. But had the wager been within the limits allowed by the statutes, there is no doubt but that it would have been held good. So in the case of a man running against time (*Lynall* v. *Longbotham*, 2 Wils. 36). My opinion proceeds on this ground, that being bound by former decisions, not having the power to alter the law, not finding any one case against the legality of wagers in general, and finding cases, without number, wherein wagers have been held to be good, and that the payment of them may be enforced, I think the wager in the present case good at common law. Then as to the second point, namely, whether the wager is void by the Stat. 14 Geo. II., I cannot but think that that Act of Parliament relates wholly to policies of insurance; and, as my Brother Grose has said, it would be strangely distorting the meaning of words to suppose that such a wager at the present could be within the meaning of the Legislature; for from the words used in the second clause it is apparent that they had written instruments only in contemplation, by requiring the names of the parties interested to be inserted therein. It seems to me extremely clear that the Act was meant to be confined to policies of insurance. I should be glad to go as far as I could to put a stop to the mischief arising from this species of gambling by wagers, but that would be, in my opinion, to make law; and those mischiefs therefore must be left

[1] The laying above £10 on a horse-race is a bet within those statutes.

to the correction of the Legislature, whenever they think proper to apply a remedy. *Rule discharged.*

Johnson v. Bann.

4 Term Rep. 1, 2 (2 R. R. 309).

Wager. — Illegal Race.

The Stat. 13 Geo. II., c. 19, s. 2, having prohibited horse-races for a smaller [1] stake than £50, no action to recover a wager on such a race can be supported.

This action, which was brought to recover a wager of £5 on the event of a horse-race, was tried at the last Chester Assizes; when, it appearing that the bet had been made on a horse-race for a smaller sum than £50, it was objected by the defendant's counsel that, as the subject of the wager was illegal, the wager itself was bad in law; and the CHIEF JUSTICE of Chester being of that opinion, nonsuited the plaintiff.

* Leycester now moved to set aside the nonsuit, contending [* 2] that as it was now determined in *Good* v. *Elliott*, 3 T. R. 693 (p. 389, *ante*), that wagers in general were legal, unless in some particular excepted cases; and as this wager did not come within either of those exceptions, the action might be supported. It is there said (p. 390, *ante*) that a wager is legal, unless it tend to a breach of the peace, or to immorality, or unless it affect the interest and feelings of a third person, or expose him to ridicule, or libel him, or unless it be against sound policy; now this wager is not void on either of those grounds. But

PER CURIAM. — It is sufficient, without adverting to cases, to say that the horse-race itself is prohibited by statute 13 Geo. II., c. 19, s. 2; and as the race, which is the subject of the wager, is illegal, so also is the wager. *Rule refused.*

ENGLISH NOTES.

It has been frequently regretted that the common law of England should differ from the rule of common sense long adopted by the Scotch Courts; namely, that the Courts were instituted to enforce the rights of parties arising from serious transactions, and that *sponsiones ludicræ* are not regarded by them. (Bell's Comm., Shaw's ed., p. 38.) This, however, is not the common law of England, as appears by the above principal cases, which have been selected as a sufficient illustration.

By the Gaming Act, 1845 (8 & 9 Vict., c. 109, s. 18), it was enacted that "all contracts or agreements, whether by parol or in writing, by

way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

Since the last-mentioned Act, many questions have arisen upon contracts in the nature of agency where one person has at the request, express or implied, of another made bets for a promised commission, or paid wagering liabilities, or has received money for another on account of wagering gains. In such cases the wagering contract, though it could not be directly sued upon, was, in general, held to be not illegal; and so the liability incurred upon new consideration, though indirectly arising out of the wager, has been given effect to. Such cases were *Johnson* v. *Lansley* (1852), 12 C. B. 469; *Jessopp* v. *Lutwyche* (1854), 10 Ex. 614, 24 L. J. Ex. 65; *Knight* v. *Fitch* (1855), 15 C. B. 566, 24 L. J. C. P. 122, 1 Jur. (N. S.) 526; *Knight* v. *Cambers* (1855), 15 C. B. 562, 24 L. J. C. P. 121, 1 Jur. (N. S.) 525; *Beeston* v. *Beeston* (1875), 1 Ex. D. 13, 45 L. J. Ex. 230, 33 L. T. 700, 24 W. R. 96; *Thacker* v. *Hardy* (C. A. 1878), 4 Q. B. D. 685, 48 L. J. Q. B. 289, 39 L. T. 595, 27 W. R. 158; *Read* v. *Anderson* (C. A. 1884), 13 Q. B. D. 779, 53 L. J. Q. B. 532, 51 L. T. 55, 32 W. R. 950; *Bridger* v. *Savage* (C. A. 1885), 15 Q. B. D. 363, 54 L. J. Q. B. 464, 53 L. T. 129, 33 W. R. 891; *Lilley* v. *Rankin* (1886), 56 L. J. Q. B. 248, 55 L. T. 814.

The law upon some of these points is now altered by the Gaming Act, 1892 (55 & 56 Vict., c. 9), which enacts as follows: "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of eighth and ninth Victoria, chapter one hundred and nine, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sums of money."

This Act effectually negatives the claim of an agent who has paid a bet, to be repaid by his principal. But it has been decided by a Divisional Court (Coleridge, C. J., and Day, J.) that it does not enable the agent who has received money on behalf of another, though in payment of a bet, to retain it for his own use. *De Mattos* v. *Benjamin* (1894), 63 L. J. Q. B. 248, 70 L. T. 560, 42 W. R. 284. It has been decided under the Act that a plaintiff who has at the request of the defendant paid money in settlement of debts cannot recover

although the plaintiff was no party to the betting. *Tatum* v. *Reere* (1892), 1893, 1 Q. B. 44, 62 L. J. Q. B. 30, 67 L. T. 683, 41 W. R. 174. It is to be observed that the former cases may still be important in a colony which has substantially adopted the Act of 1845, without having adopted the Act of 1892, as appears from the case of *Foyet* v. *Ostigny* (P. C. Appeal from Lower Canada) (1895), 1895, A. C. 318, 64 L. J. P. C. 62, 72 L. T. 399, 43 W. R. 590, where the decision in *Thacker* v. *Hardy*, *supra*, was followed.

The right of the depositor to recover money deposited in the hands of a stakeholder to abide the result of a wager is fully discussed under Nos. 42 and 43 of "Contract," 6 R. C. 477 *et seq.*, and *Addenda*. To a similar effect with the authorities there given as to securities deposited as cover for speculative stock-exchange transactions may be cited *Strachan* v. *Universal Stock Exchange* (C. A. 1895), 64 L. J. Q. B. 723, affirmed (H. L. 1896), 1896, A. C. 166, 65 L. J. Q. B. 428, 74 L. T. 468, 44 W. R. 497. The case has been distinguished where *money* deposited as "cover" has been appropriated by the broker, according to the arrangement, before an action is brought to recover it. *Strachan* v. *Universal Stock Exchange* (No. 2, C. A. 1895), 1895, 2 Q. B. 697, 65 L. J. Q. B. 178. Where the plaintiff had lent the defendant money to provide a stake for a boxing match, on the terms that the money should be repaid if he won, and the defendant had won and had the stakes paid over to him: — it was held by the Court of Appeal that the plaintiff could not recover the loan — being "money paid" (by the plaintiff) "in respect of a contract rendered null and void by the Act of 8 & 9 Vict.." within the meaning of the Gaming Act 1892. *Carney* v. *Plimmer* (C. A. 1897), 66 L. J. Q. B. 415. It seems difficult, in the face of this decision, to support *O'Sullivan* v. *Thomas* (1895), 1895, 1 Q. B. 698, 64 L. J. Q. B. 398, 72 L. T. 285, 43 W. R. 269, where a Divisional Court held a depositor entitled to recover his stake after the event turned out adversely but before the money had been paid over.

What are unlawful games under the English statutes, 33 Hen. VIII., c. 9 (so far as not repealed by the Gaming Act, 1845), and 17 & 18 Vict., c. 38, s. 4, was very much considered in the cases of *Jenks* v. *Turpin* (1884), 13 Q. B. D. 505, 53 L. J. M. C. 161, 50 L. T. 808; and *Fairclough* v. *Whitmore* (1895), 64 L. J. Ch. 386, 72 L. T. 354, 43 W. R. 421.

Mention may be here made of the Gaming Act, 1802 (42 Geo. III., c. 119), directed chiefly against lotteries. This is illustrated by the cases of *Allports* v. *Nicll* (1845), 1 C. B. 974, 14 L. J. C. P. 272, where a sweepstakes on a horse-race was held illegal; *Taylor* v. *Smetten* (1883), 11 Q. B. D. 207, where packets of tea were sold with the chance of a prize thrown in, and this was held illegal.

Other statutes relating to the subject in hand are the Vagrant Act

Amendment Act, 1873 (36 & 37 Vict., c. 38). See *Ridgeway* v. *Farndale*, 1892, 2 Q. B. 309, 61 L. J. M. C. 199, 67 L. T. 318, 41 W. R. 128: — The Betting Acts, 1853 and 1874 (16 & 17 Vict., c. 119, and 37 & 38 Vict., c. 15), illustrated by the cases of *Snow* v. *Hill* (1885), 14 Q. B. D. 588, 54 L. J. M. C. 95, 52 L. T. 859; *Reg.* v. *Hutton* (1891), 60 L. J. M. C. 116, 64 L. T. 572, 39 W. R. 540; *Hornsby* v. *Raggett* (1891), 1892, 1 Q. B. 20, 61 L. J. M. C. 24, 66 L. T. 21, 40 W. R. 111; *Reg.* v. *Preedy* (1891), 17 Cox C. C. 433; *Bond* v. *Plumb* (1893), 1894, 1 Q. B. 169, 70 L. T. 405, 42 W. R. 222; *Reg.* v. *Brown* (1894), 1895, 1 Q. B. 119, 64 L. J. M. C. 1, 72 L. T. 22, 43 W. R. 222; *Downs* v. *Johnson* (1895), 1895, 2 Q. B. 203, 64 L. J. M. C. 238, 72 L. T. 728, 43 W. R. 556; *Reg.* v. *Worton* (1894), 1895, 1 Q. B. 227, 64 L. J. M. C. 74, 72 L. T 29; *Stoddard* v. *Sayas* (1895), 1895, 2 Q. B. 474, 64 L. J. M. C. 234, 73 L. T. 215; *Liddels* v. *Lofthouse* (1895), 1896, 1 Q. B. 295, 65 L. J. M. C. 64, 74 L. T. 139, 44 W. R. 349; *Thwaites* v. *Coulthwaite*, 1896, 1 Ch. 496, 65 L. J. Ch. 238, 74 L. T. 164, 44 W. R. 295; *Hawke* v. *Dunn*, Q. B. 13th March, 1897.

AMERICAN NOTES.

This subject has been considered, *ante*, vol. 6, p. 491, under "Contract." See Browne's "Humorous Phases of the Law," title "Wagers."

Wagers are now generally prohibited by statute in this country; but the common-law doctrine, as enunciated in the Rule, has been recognized here. So in *Johnson* v. *Fall*, 6 California, 359; 65 Am. Dec. 518, a wager that a railroad would be completed at a certain time was held enforceable. Precisely to the same effect is *Beadles* v. *Bless*, 27 Illinois, 320; 81 Am. Dec. 231. (But the contrary in *Eldred* v. *Malloy*, 2 Colorado, 320; 25 Am. Rep. 752, the Court observing: "Notwithstanding the fact that contracts of wager have been regarded as valid at common law, a disposition has been steadily growing in all respectable Courts to discountenance and ignore them. It is generally conceded that the principle was engrafted on that system at a time when but little consideration was given to the subject, and the right to recover in such cases quite fully established before any searching inquiries were made into the moral tendencies of the doctrine." "If we enter upon the work of settling bets made by gamblers in one case, especially upon the time when the Colorado Central Railroad reaches Golden, or when it will reach Georgetown, we may despair of ever finding time for the despatch of those weightier matters which affect the personal and property rights of the respectable people in this Territory." "I can see no difference in principle in the bet that the faro dealer will turn up a Jack the next turn and the bet that the railroad will be built to Table Mountain in so many days.") So as to the result of a past election. *Smith* v. *Smith*, 21 Illinois, 241; 74 Am. Dec. 100.

In *Smith* v. *Brown*, 3 Texas, 360; 49 Am. Dec. 748, the Court, admitting that "at common law wagers were allowed to be a good ground of action, if not on a subject forbidden by law, or contrary to policy or good morals," refused to enforce a wager between attorneys on an abstract question of law,

and held them guilty of contempt in submitting a fictitious case. But the same Court, in *Dunman* v. *Strother*, 1 Texas, 89; 46 Am. Dec. 97, cited and approved *Da Costa* v. *Jones*, *Allen* v. *Hearn*, and *Good* v. *Elliott*, and held a wager on a horse-race valid. In *Kirkland* v. *Randon*, 8 Texas, 10; 58 Am. Dec. 94, the Court said: "Wagers upon horse-races may be regarded not only as indifferent wagers upon indifferent matters, and therefore not obnoxious to the law, but their exclusion from the general class of gaming contracts may be placed, and I presume is by the Legislature, upon the ground that they tend to stimulate and encourage an improvement in the breed and qualities of the horse. That such is the fact the history of this animal in England and the United States would doubtless abundantly prove." There is a very learned examination of this subject in *Monroe* v. *Smelly*, 25 Texas, 586; 78 Am. Dec. 541, citing *Good* v. *Elliott* and *Da Costa* v. *Jones*, and refusing to enforce the collection of money won at "ten-pins," on the ground that it is an "idle wager," and saying of the horse-racing cases, "it may be too late to question the wisdom and soundness of those decisions," and declining to extend the doctrine. In Maine and Illinois they are not so anxious about the improvement of horses: *Ellis* v. *Beale*, 18 Maine, 337; 36 Am. Dec. 726; *Shaffner* v. *Pinchback*, 133 Illinois, 110; 23 Am. St. Rep. 624; and this is undoubtedly the prevalent view under the modern statutes.

Allen v. *Hearn* is cited in *Bettis* v. *Reynolds*, 12 Iredell Law (Nor. Car.), 344; 55 Am. Dec. 417, holding void a bet on an election, though neither party was a voter; citing also *Atherfold* v. *Beard*, 2 T. R. 610, and *Gilbert* v. *Sikes*, 16 East, 150.

In *Bledsoe* v. *Thompson*, 6 Richardson Law (So. Car.), 44; 57 Am. Dec. 777, the Court held void a wager on a horse-race, observing that "the Courts of this State look with a stronger spirit of condemnation upon every class of cases involving gaming transactions than have the English Courts upon some of them."

"There can be no doubt that wager contracts upon indifferent matters were valid at common law." Citing *Good* v. *Elliott* and *Da Costa* v. *Jones*. "Of late years, by legislation and judicial decision, the hostility to wagers of every nature has been marked. This is doubtless due to the increase of betting and the evil consequences resulting therefrom." *Bernard* v. *Taylor*, 23 Oregon, 416; 37 Am. St. Rep. 693, holding void a wager on a foot-race. See note, 37 Am. St. Rep. 697.

In *Campbell* v. *Richardson*, 10 Johnson (New York), 406, a wager of 25 cents a shot against $20 a hit in shooting was sustained. The Court said: "If a wager of any kind is to be recognized as valid in law, the one made in this case is perhaps as harmless and liable to as little objection as any that could be made. It has long been matter of regret with Courts of justice that wagers should have been so far countenanced as to permit actions to be sustained for their recovery. The expression of this regret, however, is accompanied with the admission that the common law does recognize some wagers as valid; and we do not discover any solid reason for saying the present belongs to the class of *excepted* cases. Strong and cogent reasons might be urged to the proper tribunal for an alteration of the law on this subject; but as the law now stands, we do not feel ourselves authorized to say that the plaintiffs have no right to recover in the present case."

GIFT (INTER VIVOS).

No. 1. — IRONS *v.* SMALLPIECE.

(K. B. 1819.)

No. 2. — COCHRANE *v.* MOORE.

(C. A. 1890.)

RULE.

A GIFT *inter vivos* of chattels is invalid unless made *per verba de presenti*, accompanied by actual tradition or made by deed.

But where a gift is made of an undivided share in a chattel, it may be completed by deed of transfer of the chattel to a third party and parol declaration by that party of trust as to the share.

Irons v. Smallpiece.

2 Barn. & Ald. 551–554 (21 R. R. 395).

Gift of Chattel. — Delivery.

[551] A verbal gift of a chattel, without actual delivery, does not pass the property to the donee.

Trover for two colts. Plea, not guilty. The defendant was the executrix and residuary legatee of the plaintiff's father, and the plaintiff claimed the colts under a verbal gift made to him by the testator twelve months before his death. The colts, however, continued to remain in possession of the father until his death. It appeared, further, that about six months before the father's [* 552] death, the son having been * to a neighbouring market for the purpose of purchasing hay for the colts, and finding the price of that article very high, mentioned the circumstance to his father; and that the latter agreed to furnish for the colts any hay they might want at a stipulated price, to be paid by the son. None, however, was furnished to them till within three or four

No. 1. — Irons v. Smallpiece, 2 Barn. & Ald. 552, 553.

days before the testator's death. Upon these facts, ABBOTT, C. J., was of opinion that the possession of the colts never having been delivered to the plaintiff, the property therein had not vested in him by the gift: but that it continued in the testator at the time of his death, and consequently that it passed to his executrix under the will; and the plaintiff was therefore nonsuited.

Gurney now moved to set aside this nonsuit.

By the gift, the property of the colts passed to the son without any actual delivery. In *Wortes* v. *Clifton*, Roll. Rep. 61, it is laid down by COKE, C. J., that, by the civil law, a gift of goods is not good without delivery; but, in our law, it is otherwise; and this is recognized in "Shepherd's Touchstone," tit. Gift, 226. Here, too, from the time of the contract by the father to furnish hay for the colts at the son's expense, the father became a mere bailee, and his possession was the possession of the son; and an action might now be maintained by the defendant, in her character of executrix, upon that contract, for the price of the hay actually provided.

ABBOTT, C. J.: —

I am of opinion, that, by the law of England, in order to transfer property by gift, there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee. * Here the gift is merely verbal, and differs from [* 553] a *donatio mortis causâ* only in this respect, that the latter is subject to a condition, that if the donor live the thing shall be restored to him. Now, it is a well-established rule of law that a *donatio mortis causâ* does not transfer the property without an actual delivery. The possession must be transferred, in point of fact; and the late case of *Bunn* v. *Markham*, 2 Marsh. 532 (17 R. R. 497), where all the former authorities were considered, is a very strong authority upon that subject. There Sir G. Clifton had written upon the parcels containing the property the names of the parties for whom they were intended, and had requested his natural son to see the property delivered to the donees. It was therefore manifestly his intention that the property should pass to the donees; yet, as there was no actual delivery, the Court of Common Pleas held that it was not a valid gift. I cannot distinguish that case from the present, and therefore think that this property in the colts did not pass to the son by the verbal gift: and I cannot agree that the son can be charged with the hay which was provided for these colts three or four days before the father's death; for I can-

not think that that tardy supply can be referred to the contract which was made so many months before.

HOLROYD, J. : —

I am also of the same opinion. In order to change the property by a gift of this description, there must be a change of possession : here there has been no change of possession. If, indeed, it could be made out that the son was chargeable for the hay pro-
[* 554] vided for the colts, then the possession of the * father might be considered as the possession of the son. Here, however, no hay is delivered during a long interval from the time of the contract, until within a few days of the father's death ; and I cannot think that the hay so delivered is to be considered as delivered in execution of that contract made so long before, and consequently the son is not chargeable for the price of it.

BEST, J., concurred.

ABBOTT, C. J. : —

The *dictum* of Lord COKE in the case cited must be understood to apply to a deed of gift ; for a party cannot avoid his own voluntary deed, although he may his own voluntary promise.

Rule refused.

Cochrane v. Moore.

59 L. J. Q. B. 377-387 (s. c. 25 Q. B. D. 57 ; 63 L. T. 153 ; 38 W. R. 587).

[377] *Gift of Chattel. — Delivery. — Gift by Parol. — Sale of Chattel. — Undertaking by Purchaser of Chattel that Interest of Third Party therein should be "all right." — Trust in Favour of Third Party. — Bill of Sale. — Statement of Consideration. — Bills of Sale Act*, 1882 (45 & 46 *Vict.*, *c.* 43), *s.* 8.

A parol gift of a chattel without delivery does not pass the property to the donee. But a gift of an undivided share in a chattel may be completed by sale of the chattel to a third party, accompanied by a parol declaration by that party of trust as to the share.

B, by words of present gift, gave to the defendant, and the defendant accepted, one undivided fourth part of a horse. B, who remained in possession of the horse, being about to execute a bill of sale of certain property, including the horse, in favour of the plaintiff, mentioned the interest of the defendant in the horse ; the plaintiff thereupon undertook that the defendant's interest should be "all right," and the bill of sale was executed. *Held*, by BOWEN, L. J., and FRY, J., that, assuming the bill of sale to be valid, the plaintiff was a trustee for the defendant of one-fourth of the horse. *Semble*, that Lord ESHER, M. R., agreed with this opinion.

The consideration for a bill of sale was stated to be, amongst other things,

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£7575, thereby admitted by the grantor to be due. At the time the grantor was only indebted to the grantee on two bills of exchange for £8300 then current. *Held*, assuming that it was agreed at the time that the £8300 due *in futuro* should be taken as between the parties to be represented by £7575, that the bill of sale was void under the Bills of Sale Act, 1882, the consideration for which it was given not being truly stated.

Appeal from the judgment of LOPES, L. J., at the trial of an interpleader issue without a jury.

The issue was directed to try the right to one-fourth part of the proceeds of the sale of a horse called Kilworth. The plaintiff claimed to be entitled to the proceeds by virtue of a bill of sale of certain horses, including Kilworth, executed in his favour by one Benzon. The defendant claimed the proceeds under a prior gift of one-fourth of the horse from Benzon. The bill of sale, which bore date the 26th of July, 1888, was stated to be made in consideration of £10,000, — namely, £7575 thereby admitted by Benzon to be due, and a further sum of £2425 then borrowed. At the date of the bill of sale Benzon was only indebted to the plaintiff on two promissory notes then current for £3500 and £4800, payable respectively on the 9th of August and the 16th of September, 1888. The plaintiff contended that the gift to the defendant was void, the horse not having been delivered to him. The defendant contended that the bill of sale was void, because, amongst other reasons, the consideration was not truly stated, as required by the Bills of Sale Act, 1882. LOPES, L. J., held that the gift was valid, and that the bill of sale was void, and gave judgment for the defendant.

The plaintiff appealed.

The facts, so far as they are material, are fully stated in the judgment of the Lords Justices BOWEN and FRY.

Addison, Q. C., and Henn Collins, Q. C. (Kisch with them), for the plaintiff.

Pollard and Mitchell, for the defendant.

The arguments sufficiently appear from the judgment of FRY, L. J.

The following cases and authorities, in *addition to those [*378] mentioned in the judgments, were cited and referred to: *Smith* v. *Smith*, Strange, 955; *Tate* v. *Hilbert*, 2 Ves. Jr. 111, at p. 120; *Young* v. *Young*, 35 Sickels' N. Y. Rep. 422; "Williams on Personal Property" (12th ed.), at p. 44; note to *Lampleigh* v. *Brath-*

ante (2 Smith L. C., 9th ed., p. 166); "Sheppard's Touchstone," vol. 2, p. 227 (7th ed., by Preston); "Williams on Executors" (8th ed.), pp. 780, 786; "Blackburn on Sale" (2nd ed.), p. 266; and "Benjamin on Sale" (4th ed.), p. 3. *Cur. adv. vult.*

FRY, L. J. (on April 28, 1890). — The judgment I am about to read is that of Lord Justice BOWEN and myself.

The question in this interpleader issue arises in respect of a sum of money representing one-fourth of the proceeds of a horse called Kilworth, sold by Messrs. Tattersall. The plaintiff claims the money under a bill of sale executed by one Benzon, comprising this and other horses. The defendant claims it under an earlier gift of one-fourth of the horse to him by Benzon.

The relevant facts, as they appear in the judgment of Lord Justice LOPES, and in that part of the evidence to which he attached credence, are shortly as follows: —

The horse was in June, 1888, the property of Benzon, and was kept at the stables of a trainer named Yates, in or near Paris, and on the 8th of that month was ridden in a steeple-chase by Moore, a gentleman rider. In consequence, as it appears, of some accident, the horse was not declared the winner, and on the same day, according to the view of the evidence taken by the learned Judge, Benzon by words of present gift gave to Moore, and Moore accepted from Benzon, one undivided fourth part of this horse.

A few days subsequently Benzon wrote to Yates, in whose stable the horse was, and told him of the gift to Moore. But he did not inform Moore, nor did Moore know of any communication to Yates of the fact of the gift.

On the 9th of July, 1888, Cochrane advanced £3000 by way of loan to Benzon, and took from him a promissory note for £3500, payable on the 9th of August following.

On the 16th of July of the same year Cochrane advanced to Benzon a further sum of £4000, and took a promissory note for £4800, payable on the 16th of September.

On the 26th of July Cochrane advanced to Benzon two sums of money: One, £1680 10*s.* 11*d.* (to be paid to one Sherard, a trainer), and £745 — making together £2425 10*s.* 11*d.* And on the same day Benzon executed a bill of sale for £10,000, under which Cochrane claims. Kilworth and other horses were included in the schedule to this instrument.

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It is proved by the evidence of the witnesses, whom the learned Judge believed, that before the execution of the bill of sale, Benzon, with the assistance of a friend, Mr. Powell, was going through the list of horses to be included in the schedule, and that when Kilworth was mentioned Powell spoke of Moore's interest in the horse, and that thereupon a discussion arose as to what was to be done with it, and that Cochrane undertook that it should be "all right." After this the bill of sale was executed by Benzon.

On these facts, it was argued that there was no delivery and receipt of the one-fourth of the horse, and, consequently, that no property in it passed by the gift. The learned Judge has, however, held that delivery is not indispensable to the validity of the gift.

The proposition on which the LORD JUSTICE proceeded may perhaps be stated thus: that where a gift of a chattel capable of delivery is made *per verba de præsenti* by a donor to a donee, and is assented to by the donee, and that assent is communicated to the donor by the donee, there is a perfect gift, which passes the property without delivery of the chattel itself. This proposition is one of much importance, and has recently been the subject of some diversity of opinion. We therefore feel it incumbent upon us to examine it, even though it might be possible in the present case to avoid that examination.

The proposition adopted by the LORD JUSTICE is in direct contradiction to the decision of the Court of King's Bench in
* the year 1819 in *Irons* v. *Smallpiece*, 2 B. & Ald. 551 (p. [* 379] 408, *ante*). That case did not proceed upon the character of the words used, or upon the difference between *verba de præsenti* and *verba de futuro*, but upon the necessity of delivery to a gift otherwise sufficient. The case is a very strong one, because a Court consisting of Lord Chief Justice TENTERDEN, and Mr. Justice BEST and Mr. Justice HOLROYD, refused a rule *nisi*, and all held delivery to be necessary. The CHIEF JUSTICE said: "I am of opinion that, by the law of England, in order to transfer property by gift there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee," and he went on to refer to the case of *Bunn* v. *Markham*, 7 Taunt. 224, 2 Marsh. 532 (17 R. R. 497), as a strong authority. These observations of the CHIEF JUSTICE have created some difficulty. What did he mean by an instrument as contrasted with a deed? If he meant that an

instrument in writing not under seal was different from parol in respect of a gift *inter vivos*, he was probably in error; but if, in speaking of the transfer of property by gift, he included gifts by will as well as gifts *inter vivos*, then by instrument he meant testamentary instrument, and his language was correct. Mr. Justice HOLROYD was equally clear on the principal point: "In order to charge the property by a gift of this description" (by which we understand him to mean a gift *inter vivos*) "there must be a change of possession."

The correctness of the proposition thus laid down has been asserted in many subsequent cases of high authority.

Thus in *Reeves* v. *Capper*, 5 Bing. N. C. 136, the Court of Common Pleas, under Chief Justice TINDALL, referred to *Irons* v. *Smallpiece*, and the proposition "that a verbal gift of chattels, unaccompanied with delivery of possession, passes no property to the donee," as being good law, and without the expression of any doubt.

In 1849, in the case of *Shower* v. *Pilck*, 4 Ex. 478, 19 L. J. Ex. 113, the same question came before the Court of Exchequer, and the Court, without hesitation, affirmed the ruling of Lord TRURO, then Chief Justice WILDE, at Nisi Prius, and adopted the rule of *Irons* v. *Smallpiece*. The alleged gift in question was *per verba de futuro*, but in respect of chattels then in the possession of the intended donee. The gift was held open to both objections. "To pass the property," said Baron ALDERSON, "there must be both a gift and a delivery; here there is hardly a gift." "There must be a delivery to make the gift valid," said Lord CRANWORTH, then Baron ROLFE; "here there is a mere statement that the goods which the defendant has in her possession the owner will give her."

Again (in 1865), in *Bourne* v. *Fosbrooke*, 18 C. B. (N. S.) 515, 34 L. J. C. P. 164, Chief Justice ERLE adopted the rule in *Irons* v. *Smallpiece* as undoubted law; and in 1870, in *Douglas* v. *Douglas*, 22 L. T. (N. S.) 127, the Court of Exchequer declined to consider whether they should overrule that case, and expressed a decided leaning in its favour.

In Ireland, in like manner, the doctrine has been asserted, Lord PLUNKETT, as Lord Chancellor, holding delivery to be the only admissible evidence of the gift of a personal chattel. *Patterson* v. *Williams*, Ll. & G. temp. Plunkett, 95.

We have thus a great body of authority in favour of the neces-

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sity of delivery; but, on the other hand, there are several authorities which require consideration.

The first note of dissent was sounded in the year 1841, or twenty-two years after the decision of the case of *Irons* v. *Smallpiece*, by Serjeant Manning, in a note on the case of *The London and Brighton Railway Company* v. *Fairclough*, 2 Man. & G. 674, at p. 691, 10 L. J. C. P. 133, in which he impugned the accuracy of *Irons* v. *Smallpiece*, and asserted that after the acceptance of a gift by parol the estate is in the donee without any actual delivery of the chattel. The authorities cited in that note we shall hereafter consider.

In 1845, in *Lunn* v. *Thornton*, 1 C. B. 379, 14 L. J. C. P. 161, Mr. Justice MAULE interlocutorily observed * that he [* 380] had always thought Lord TENTERDEN'S opinion in *Irons* v. *Smallpiece* very remarkable, because by referring to instruments of gift he left it to be inferred that an assignment might be otherwise than by deed. But beyond this his criticism did not proceed. To the report of this case Serjeant Manning appended a note similar to that in the second volume of "Manning and Granger."

Two years afterwards (1847) Lord WENSLEYDALE, in *Ward* v. *Audland*, 16 M. & W. 862, quoted the passage from Lord TENTERDEN'S judgment already cited, and observed, "That is not correct." To which counsel replied by referring to the criticism of Mr. Justice MAULE, and the learned Judge made no further observation. The criticism of the two learned Judges was probably directed to the same point, — namely, the use of the expression "deed or instrument." Lord CRANWORTH was present as a Baron of the Exchequer during the argument in *Ward* v. *Audland*, and, as we have seen, two years afterwards unhesitatingly adopted *Irons* v. *Smallpiece*, and that without note or comment, — a course which he would hardly have pursued if he knew that Lord WENSLEYDALE considered the case itself bad law.

In 1852, in the case of *Flory* v. *Denny*, 7 Ex. 581, 21 L. J. Ex. 223, where the authorities lastly cited were mentioned, Lord WENSLEYDALE referred to the two notes of Serjeant Manning, and read a portion of the later, but expressed no opinion as to the correctness or incorrectness of the conclusion.

In 1861 the case of *Winter* v. *Winter*, 4 L. T. (N. S.) 639, came before the Court of Queen's Bench. In that case a barge belonging to a father had been in the actual possession of his son as his

servant. The father gave the barge to the son, and he subsequently, with the father's knowledge and assent, possessed and worked the barge as his own, and paid the wages of the crew. Mr. Justice WIGHTMAN upheld the title of the son on the ground of a change in the possession consequent on the gift; Mr. Justice CROMPTON, on the ground that actual delivery of the chattel is not necessary to a gift *inter vivos*, and that it was sufficient that the conduct of the parties showed that the ownership had been changed. Lord BLACKBURN, then Mr. Justice BLACKBURN, simply concurred. What, however, is most to our present point, Mr. Justice CROMPTON said that although *Irons* v. *Smallpiece* and *Shower* v. *Pilck* had not been overruled, they had been hit hard by the subsequent cases.

In 1883 the case of *In re Harcourt*, *Danby* v. *Tucker*, 31 W. R. 578, came before Mr. Baron POLLOCK, sitting as a Judge of the Chancery Division, and he declined to follow the decision of *Irons* v. *Smallpiece*, saying that he "certainly could not accede to the proposition generally that the actual delivery of a chattel is necessary to create a good gift *inter vivos*." "The question to be determined," he said, "is not whether there has been an actual handing over of property manually, but whether, looking at all the surrounding circumstances of the case, and looking particularly at the nature and character of the chattel which is proposed to be given, there has or has not been a clear intention expressed on the part of the donor to give, and a clear intention on the part of the recipient to receive and act upon such gift. Whenever such a case should arise again, I am confident that that would be the basis of the decision of a Court of common law, and, of course, the same result would follow in a Court of equity."

Lastly (in 1885), Mr. Justice CAVE, in the case of *In re Ridgway*, 54 L. J. Q. B. 570, 15 Q. B. D. 447, expressed his opinion "that it is going too far to say that retention of possession by the donor is conclusive proof that there is no immediate present gift; although, undoubtedly, unless explained or its effect destroyed by other circumstances, it is strong evidence against the existence of such an intention."

These two latter authorities have been followed by Lord Justice LOPES in the case now before us, feeling that when sitting as a Judge of the first instance he could not rightly depart from them.

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There is thus some difference of judicial *opinion as to [*381] the rule stated in *Irons* v. *Smallpiece*. We cannot think that the few recent decisions to which we have referred are enough to overrule the authority of that decision, and the cases which have followed it, but they make it desirable to enquire whether the law as declared before 1819 was in accordance with that decision, or with the judgment of Mr. Baron POLLOCK in *In re Harcourt, Danby* v. *Tucker*.

This enquiry into the old law on the point is one of some difficulty, for it leads into rarely trodden paths, where (as is very natural) we have not had the assistance of counsel, and where the materials for knowledge are for the most part undigested.

The law enunciated by Bracton in his book "De Acquirendo Rerum Dominio" seems clear, to the effect that no gift was complete without tradition of the subject of the gift. "Item oportet," he says (vol. i. c. 5, 12, p. 128; "Chronicles and Memorials of Great Britain and Ireland during the Middle Ages," vol. 70, 1878), "quod donationem sequatur rei traditio, etiam in vita donatoris, et donatorii, alioquin dicetur talis donatio potius nuda promissio quam donatio, et ex nuda promissione non nascitur actio, non magis quam ex nudo pacto, non enim valet donatio imperfecta, nec chartæ confectio, nec homagii captio cum omni solemnitate adhibita, nisi subsequuta fuerit seysina et traditio in vita donatoris." And again (c. 16, 12, p. 300): "Item non sufficit chartam esse factam & signatam nisi probetur donationem esse perfectam, & quod omnia, quæ donationem faciunt, rite præcesserunt, & subsequutam esse traditionem, alioqui nunquam transferri potest res donata ad donatorium. Poterit enim homagium præcessisse, & quod charta rite facta sit, & vera & bona & cum solemnitate recitata & audita, tamen nunquam valebit donatio, nisi tunc demum, cum fuerit traditio subsequuta, & sic poterit charta esse vera, sed sine facta seysina nuda." And to the same effect is another passage in chapter xviii. 1, p. 310.[1]

In Bracton's day, seizin was a most important element of the law of property in general; and, however strange it may sound to jurists of our day and country, the lawyers of that day applied the term as freely to a pig's ham ("Select Pleas in Manorial Courts,"

[1] "Item non valet donatio, nisi subsequatur traditio, quia non transfertur per homagium res data, nec per chartarum vel instrumentorum confectionem quamvis in publico fuerint recitata."

Selden Society's Publications, vol. 2, p. 142; see also Professor Maitland's papers on the Seizin of Chattels, the Beatitude of Seizin, and the Mystery of Seizin, "Law Quarterly Review," i. 324; ii. 484; iv. 24, 286) as to a manor or a field. At that time the distinction between real and personal property had not yet grown up; the distinction then recognised was between things corporeal and things incorporeal; no action could then be maintained on a contract for the sale of goods, even for valuable consideration, unless under seal; the distinction so familiar to us now between contracts and gifts had not fully developed itself. The law recognised seizin as the common incident of all property in corporeal things, and tradition or the delivery of that seizin from one man to another as essential to the transfer of the property in that thing, whether it were land or a horse, and whether by way of sale or of gift, and whether by word of mouth or by deed under seal. This necessity for delivery of seizin has disappeared from a large part of the transactions known to our law; but it has survived in the case of feoffments. Has it also survived in the case of gifts?

It has been suggested that Bracton, whilst purporting to enunciate the law of England, is really copying the law of Rome. But by the law of Rome, at least since the time of Justinian, gift had been a purely consensual transaction, and did not require delivery to make it perfect (Inst. ii. 7).

Coming next to the great law-writers of the reign of Edward I., they hold language substantially the same as that of Bracton, except, indeed, that the difference between transactions purely voluntary, or for pecuniary consideration, appears to be growing somewhat more important. "Donatio," says Fleta, "est quædam institutio, quæ ex mera liberalitate, nullo jure cogente, procedit, ut res a vero ejus possessore ad alium transferatur. Dare [* 382] autem est rem accipientis facere cum effectu, *alioquin inutilis erit donatio, cum irritari valeat et revocari" (Lib. iii. c. 3). He then proceeds to discuss various kinds of gifts, and says: "Alia perfecta, et alia incepta et non perfecta: ut si donatio lecta fuerit et concessa, et homagium captum, ac traditio nondum fuerit subsecuta" (*loc. cit.*; see also Lib. iii. c. 15).

In Lib. iii. c. 7, he discusses the necessary elements of donations, and, amongst other things, the effect of duress on a gift; and here the necessity of delivery is again clearly shown, because, according to Fleta, a promise made without duress followed by delivery

under duress is not a valid gift. "Refert tamen," he says, "utrum metus præveniat donationem vel subsequatur, quia si primo coactus, et per metum compulsus promisero, et postea gratis tradidero, talis metus non excusat; sed si gratis promisero et compulsus tradidero tunc excusat metus."

Britton held substantially the same language. In citing him we shall prefer the translation of Mr. Nichols to the Norman-French of the original. In his chapter on Gifts (Lib. ii. c. 3) he gives a very clear description of the nature of a gift. "A gift," he says, "is an act whereby anything is voluntarily transferred from the true possessor to another person, with the full intention that the thing shall not return to the donor, and with full intention on the part of the receiver to retain the thing entirely as his own without restoring it to the giver. For a gift cannot be properly made if the thing given does not so belong to the receiver that the two rights of property and of possession are united in his person, so that the gift cannot be revoked by the donor, or made void by another, in whom the lawful property is vested" (pp. 220, 221). And again (Lib. ii. c. 3): "Some gifts are complete, where both rights unite in the purchaser; others are begun, but not completed; and such titles are bad, as in case of gifts granted whereof no livery of seizin follows" (pp. 225–6). Passages of similar import will be found in Lib. i. c. 29, and Lib. ii. c. 8.

The third writer of the age of Edward I. is one of a very different character from Fleta and Britton — we mean Horne, the author of the "Mirror of Justices;" he attacked the Judges and the administration of the law in his days with a vehemence which it is to be hoped was undeserved. But though amongst the 155 abusions or abuses of the law which stirred his soul to wrath, some relate to seizin, yet he has nothing to say at variance with his contemporaries on the necessity of delivery; but, on the contrary, expressly affirms that "the law requires but three things in contracts: 1. The agreement of the wills; 2. Satisfaction of the donor; 3. Delivery of the possession and gift" (chap. v. sec. 1, par. 75). [See Selden Society's Publications, vol. 7, p. 163.]

In the reign of Edward IV. a step seems to have been taken in the law relative to gifts which resulted in this modification: that whereas under the old law a gift of chattels by deed was not good without the delivery of the chattel given, it was now held that the gift by deed was good and operative until dissented from by the

donee. Thus in Michaelmas Term, 7 Edw. IV., pl. 21, fol. 20, it was held by CHOKE and other Justices that if a man executes a deed of gift of his goods to me, that this is good and effectual without livery made to me, until I disagree to the gift, and this ought to be in a Court of record. In Hilary Term, 7 Edw. IV., pl. 14, fol. 29, it was alleged by counsel (Catesby and Pigot), that if a man give to me all his goods by a deed, although the deed was not delivered to the donee, nevertheless the gift is good, and if he chooses to take the goods he can justify this by the gift, although notice has not been given to him of the gift; and further, that if the donee commit felony before notice, &c., still the king will have the goods; and although notice may be material, nevertheless when he has notice, this would have relation to the time of the gift, &c. But the Court said that such a gift is not good without notice, for a man cannot give his goods to me against my will.

An earlier case in the same reign has been cited as bearing on the present question. In Michaelmas Term, 2 Edw. IV., pl. 26, fol. 25, a case arose on trespass of goods, in which Laicon was counsel for the defendant, and the Court was engaged in consider-
[* 383] ing the sufficiency of his pleas. * In the course of the discussion Laicon put this question, "Suppose I give to you my goods, which are at Everwike, and before that you are seized of them, a stranger takes them away, have you not a writ of trespass against the stranger?" Which he then proceeds to answer. "Yes, sir; for by the gift at once the property was in you, and the possession by the writ is adjudged in you presently." DANBY, the Chief Justice of the Common Pleas, seems to have assented apparently on the ground that pleading to such a writ by way of justification would confess the possession of the plaintiff and the taking by the defendant (*car la si vous pled. rr. matter accord, et justif, et vous confess. prisel hors de son poss.*). But immediately after this discussion Laicon found his argument so hopeless (*ridens opinionem curiæ contra eum*) that he seems to have amended his pleadings. This case seems to us of no authority on the point under investigation. What was said was not in discussion of what really passed by the gift, but only of the effect of pleading in preventing the denial of the plaintiff's possession. The question seems to relate to an effectual gift of goods without possession, but there is nothing to show whether the parties to the discussion had in contemplation a gift by deed or not. The cases already referred to,

which occurred a few years later, seem to show that the effect of a deed in passing the property without delivery of the chattel was claiming the attention of the lawyers of that day.

Brooke, in his "Abridgment" (Trespass, 303), cites this case of the 2 Edw. IV., and seems to put it upon a somewhat different ground to the "Year Book" itself. He says that Danby agreed in Laicon's argument, "for by the gift the property is in him, and then the law adjudges possession, which was not denied, and it seems to be the law, because goods are transitory whilst land is local." We can find no authority for these reasons in the entry which he professes to be abstracting. This case, as explained by Brooke, seems to underlie the proposition asserted twice in the case of *Hudson* v. *Hudson*, Latch, 214, 263, discussed in 2 Wms. Saunders, 47 b, to illustrate the right of an executor to sue in trover before actual possession. If, it was said, a man in London gives to me his goods in York, and another take them, I can bring trespass; for property, it was added, draws possession in chattels personal. The Court were not considering what gift of chattels did carry the property, but only illustrating the proposition that where the property has passed, as by the will to the executor, there the law attracts to it possession. This would be perfectly illustrated by the case of chattels in York transferred by deed executed in London. The whole supposition that this case lends any countenance to the notion that chattels can pass without delivery seems to be derived from the silence of the case as to the way in which the gift was made; and this point was not material to the matter under consideration by the Court. Moreover, where a legal result could only be produced by a deed, our elder law-writers were, we believe, less apt to mention the deed than their less technical descendants.

One other case in the reign of Edward IV. must be mentioned. In Michaelmas Term, 21 Edw. IV., pl. 27, fol. 55, it was said by Mr. Justice BRIAN that in detinue of chattels it was a good plea to say that the plaintiff after the bailment gave them to the defendant, and then he could have his law — *quod fuit concessum*. The case appears to go only to this, that if A. after bailing a chattel to B. then gives it to B., B. might defend himself by his suit in an action of detinue. If good law, it seems to establish that delivery first and gift afterwards is as effectual as a gift first and delivery afterwards.

One case in the reign of Henry VII. perhaps requires considera-

tion (Hilary Term, 21 Hen. VII., pl. 30, fol. 18). The question seems to have been whether the use of land was presently transferred by a bargain and sale, and in the course of the report the following passage occurs: "If I give to a man my cow or my horse, he may take the one or the other at his election: and the cause is that immediately by the gift the property is in him, and that of the one or the other at his will; but if the case were that I will [* 384] give * to him a horse or a cow in future time, then he cannot take either the one or the other, for then it is in my election to choose which of them I will give him." The case is interesting as the first one which we have found which emphasises the distinction in gifts between words in the present and in the future tense. But the passage we have cited appears to have no real weight of authority. It is only part of the argument of the Attorney-General, and the argument does not appear tenable; for surely it is open to question whether the gift, even a grant for valuable consideration, of one or other of two things at the election of the donee or grantee can pass the property in one or other or both of these things immediately and before the election of the grantee. It is further to be observed that the question before the Court turned on the doctrine of election; and whether the supposed gift was to be by deed or not is a point on which the report is silent. This silence is the only reason why the passage has been thought by some persons relevant to the present enquiry.

It was in the reigns of the early Tudors that the action on the case on *indebitatus assumpsit* obtained a firm foothold in our law; and the effect of it seems to have been to give a greatly increased importance to merely consensual contracts. It was probably a natural result of this that in time the question whether and when property passed by the contract came to depend, in cases in which there was a valuable consideration, upon the mind and consent of the parties, and that it was thus gradually established that in the case of bargain and sale of personal chattels, the property passed according to that mind and intention, and a new exception was thus made to the necessity of delivery.

This doctrine, that property may pass by contract before delivery, appears to be comparatively modern. It may, as has been suggested, owe its origin to a doctrine of the civil law that the property was at the risk of the purchaser before it passed from the vendor; but, at any rate, the point was thought open to argument

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as late as Elizabeth's reign (see Plowd. 11 b, and see a learned note, 2 Man. & Ry. 566).

Flower's Case, Noy, 67, which seems to have been decided in 39 Eliz. (see p. 59), appears to show that the necessity of delivery was then upheld by the Court. The case is thus stated by Noy (p. 67): —

"A. borrowed one hundred pounds of B., and at the day brought it in a bag and cast it upon the table before B., and B. said to A., being his nephew, I will not have it, take it you and carry it home again with you. And by the Court that is a good gift by parol, being cast upon the table. For then it was in the possession of B., and A. might well wage his law. By the Court, otherwise it had been, if A. had only offered it to B., for then it was *chose in action* only, and could not be given without a writing."

The Court seems to have held that delivery was necessary, but that by the casting of the money on the table it came into the possession of the uncle, and that the nephew taking the money in his uncle's presence and by his direction, there was an actual delivery by the uncle to the nephew — so that the nephew might wage his law — that is, might conscientiously swear that he was not indebted to his uncle (see the case discussed in *Douglas* v. *Douglas*, 22 L. T. (N. S.) 127).

In "Jenkins's Centuries" (3rd Century, Case ix.), it is said: "A gift of anything without a consideration is good: but it is revocable before the delivery to the donee of the thing given. *Donatio perficitur possessione accipientis.* This is one of the Rules of Law," — a statement made with little reference to the other matters treated of in the case. We know of no other authority exactly to the same effect as this, nor is it stated as having the authority of any judicial decision.

Blackstone's discussion of the subject of gifts of chattels is perhaps not so precise as might be desired; but his language does not seem to us essentially to differ from the earlier authorities: "A true and proper gift or grant is," he says, "always accompanied by delivery of possession, and takes effect immediately." "But if the *gift does not take effect by delivery of im- [*385] mediate possession, it is then not properly a gift but a contract: and this a man cannot be compelled to perform" (Book 2, c. 30, p. 441).

In 1818, the year before *Irons* v. *Smallpiece* was decided, the

then MASTER OF THE ROLLS, Sir Thomas PLUMMER, in *Hooper* v. *Goodwin*, 1 Swanst. 485, at p. 491, said: "A gift at law or in equity supposes some act to pass the property: in donations *inter vivos* . . . if the subject is capable of delivery, delivery."

These are, so far as we can find, all the relevant authorities before the decision in *Irons* v. *Smallpiece*, though they are not all the authorities that have been cited as relevant. But several that have been relied upon appear to us to have no real bearing on the point at issue. Thus in *Witts* v. *Clifton*, Michaelm. 12 Jac. I., Roll. 61, Coke, *arguendo*, uses as an illustration of the difference between the civil law and ours, — that in the civil law a gift is not good without tradition; but that it is otherwise in our law. Here, for aught that appears, the gift which the learned counsel referred to as good without delivery is a gift by deed.

In like manner several authorities which affirm that a gift of chattels may be good without deed and are silent as to delivery ("Perkins' Profitable Book," Grant, 57; 2 Shep. Touch. 227; Com. Dig., Biens, D. 2) have been cited as if they likewise asserted that a gift was good without delivery, — a proposition which they do not affirm, or, as we think, imply.

This review of the authorities leads us to conclude that, according to the old law, no gift or grant of a chattel was effectual to pass it whether by parol or by deed, and whether with or without consideration, unless accompanied by delivery; that on that law two exceptions have been grafted, one in the case of deeds, and the other in that of contracts of sale where the intention of the parties is that the property shall pass before delivery; but that as regards gifts by parol, the old law was in force when *Irons* v. *Smallpiece* was decided; that that case therefore correctly declared the existing law; and that it has not been overruled by the decision of Mr. Baron POLLOCK in 1883, or the subsequent case before Mr. Justice CAVE.

We are therefore unable in the present case to accept the law on this point as enunciated by Lord Justice LOPES in deference to the two latest decisions.

But assuming delivery to be necessary in the case of the gift of an ordinary chattel, two questions would remain for consideration in the present case, — the first, whether the undivided fourth part of the horse admits of delivery, or whether, on the other hand, it is to be regarded as incorporeal and incapable of tradi-

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tion; the other, whether the letter written by Benzon to Yates was either a constructive delivery of this undivided fourth part of the horse, or an act perfecting the gift of this incorporeal part so far as the nature of the subject-matter of the gift admits. On these points we do not think it needful to express any decided opinion, because in our judgment what took place between Benzon and Cochrane before Benzon executed the bill of sale to Cochrane constituted the latter a trustee for Moore of one-fourth of the horse Kilworth.

Another objection to Cochrane's title was based on the bill of sale, which bore date the 26th of July, 1888, and stated the consideration as a sum of £7575, then owing by Benzon to Cochrane, and of the further sum of £2425, then paid by Cochrane to Benzon, making together a sum of £10,000; whereas in fact at the date of the bill of sale Benzon was only indebted to Cochrane on two promissory notes then current, and payable respectively in August and September, and for sums amounting together to £3300. It is said that by an agreement arrived at at the time, this £8300 due *in futuro* was to be taken as between the parties as represented by the sum of £7575; but if so, this agreement should, in our opinion, have been stated in the bill of sale, and we are therefore of opinion that the document was void as not truly stating the consideration for which it was given.

For these reasons we are of opinion that this appeal should be dismissed with costs.

Lord Esher, M. R. — In my opinion, * it always was [* 386] the law of England that an owner of a chattel could transfer his ownership thereof to another person by way of exchange or barter, or by way of bargain and sale for a consideration, or by way of and as a mere gift, or by will. Once conclude that such was always the law, and it follows that it is the common law. That law could not and cannot be altered by mere judicial decision, but only by Act of Parliament. The authority of any judicial decision to the contrary would be overruled at any time, however remote, by a competent Court. But each of the above propositions is a fundamental proposition of law; that is, a proposition which is not evidence of some other proposition which has to be proved, but a proposition the existence of which — that is, the facts necessary to constitute which — is to be proved by evidence. The moment those facts are proved the proposition

of law is proved, to which the legal tribunal will give effect Although no Court can properly alter such a fundamental proposition, the amount or nature of the evidence which will satisfy a Court of the existence of such a proposition, as applicable to a particular case, may vary, and has varied, at different epochs. I have no doubt that in every one of the propositions above enumerated, unless it be in the case of a gift by will, there was a time when, as part of the evidence of the existence of the proposition in a particular case, the Courts always required that there should have been an actual delivery of the chattel in question. Though there was proof of a contract for good consideration, in a form which would now pass the property in a chattel without delivery, proof of actual delivery was required. Though the transfer was contained in a deed, proof of actual delivery was required. Equally the statement that one had declared in mere writing or in words that he did then, at the moment, transfer, without consideration, his chattel to another, and that the other did at the same moment state in writing or in words that he accepted such transfer, was not acted upon by the Courts as proof of a gift executed, without proof also of an actual delivery. The evidence required in all cases was not complete without proof of an actual delivery. But in some of the cases the Courts undoubtedly do not now require proof of an actual delivery. They do not require that piece of evidence. They do not in the case of a transfer by deed, or in the case of a transfer by a contract for good consideration, showing in its terms an intention that the ownership should pass at once before or without immediate delivery. If I thought that there was not a difference between those cases and the case of what has been called a gift in words by the donor, and an acceptance in words by the donee of a chattel, I should be strongly inclined to think that, even though the Courts would have required in such case proof of an actual delivery, up to and including the case of *Irons* v. *Smallpiece*, the Courts might now in such case, as former Courts did in the other cases, be satisfied by other evidence of the gift by the one and the acceptance of the gift by the other, which are the facts which constitute the proposition of a transfer of ownership of a chattel by way of and as a gift.

Up to the time of *Irons* v. *Smallpiece*, and afterwards, I have no doubt the Courts did require proof of an actual delivery in such a case. Upon long consideration, I have come to the con-

clusion that actual delivery in the case of a "gift" is more than evidence of the existence of the proposition of law which constitutes a gift, and I have come to the conclusion that it is a part of the proposition itself. It is one of the facts which constitute the proposition that a gift has been made. It is not a piece of evidence to prove the existence of the proposition; it is a necessary part of the proposition, and, as such, is one of the facts to be proved by evidence. The proposition is not that the one party has agreed or promised to give, and that the other party has agreed or promised to accept. In that case, it is not doubted but that the ownership is not changed until a subsequent actual delivery. The proposition before the Court on a question of gift or not is, that the one gave and the other accepted. The transaction described in the proposition is a transaction begun and completed at once. It is a transaction consisting of two contemporaneous acts, which at once complete the *trans- [* 387] action, so that there is nothing more to be done by either party. The act done by the one is that he gives; the act done by the other is that he accepts. These contemporaneous acts being done, neither party has anything more to do. The one cannot give, according to the ordinary meaning of the word, without giving; the other cannot accept then and there such a giving, without then and there receiving the thing given. After these two things done, the donor could not get possession of the chattel without bringing an action to force the donee to give it back. Short of these things being done, the donee could not get possession without bringing an action against the donor to force him to give him the thing. But if we are to force him to give, it cannot be said that he has given. Suppose the proposing donor offers the thing, saying, "I give you this thing — take it;" and the other says, "No, I will not take it now; I will take it to-morrow." I think the proposing donor could not in the meantime say correctly to a third person, "I gave this just now to my son or my friend." The answer of the third person would (I think rightly) be: "You cannot say you gave it him just now; you have it now in your hand." All you can say is: "That you are going to give it to him to-morrow, if then he will take it." I have come to the conclusion that in ordinary English language, and in legal effect, there cannot be a "gift" without a giving and taking. The giving and taking are the two contemporaneous

reciprocal acts which constitute a "gift." They are a necessary part of the proposition that there has been a "gift." They are not evidence to prove that there has been a gift, but facts to be proved to constitute the proposition that there has been a gift. That being so, the necessity of their existence cannot be altered unless by Act of Parliament. For these reasons, I think that the decision in *Irons* v. *Smallpiece* cannot be departed from, and I cannot agree with the decisions, which have been cited to us, of Mr. Baron POLLOCK and Mr. Justice CAVE.

I think, therefore, that we cannot agree with the main reason given by Lord Justice LOPES for his decision in the present case, which he gave because he thought that, sitting as a Judge of the Queen's Bench Division, he ought to follow the later decisions. His own opinion was in favour of maintaining *Irons* v. *Smallpiece*. But I do entirely agree with what I understand was another ground on which he was prepared to decide this case, and which he found as a fact existed in this case; namely, that the deed on which the claimant's case rested was obtained by a fraudulent misrepresentation and was repudiated by the giver of it as soon as he discovered the fraud.

For this reason, and the others mentioned by my Brother FRY, I think the appeal must be dismissed. I wish to say that I am not prepared to differ in any respect from the judgment of my learned brothers; but I wish to add my own particular reason.

Appeal dismissed.

ENGLISH NOTES.

It has been held that delivery first and gift afterwards of a chattel capable of delivery is as effectual as a gift first and delivery afterwards. *In re Alderson, Alderson* v. *Peel* (CHITTY, J., 1891), 64 L. T. 645.

A gift of household furniture belonging to A. in the house of his son-in-law B. has been held to be validly completed in favor of C. (the wife of B.) by words of present gift made by A. to C. while in the room where the furniture was, and by A. then leaving the house. *Kilpin* v. *Ratley* (1891), 1892, 1 Q. B. 582, 66 L. T. 797, 40 W. R. 479.

A. B., having Russian bonds, which are bonds to bearer and negotiable, signed a memorandum to the effect that he gave these bonds to certain of his daughters and others; he delivered the bonds, with a memorandum to the same effect, to C. D., directing him verbally to pay the interest to himself for life, and afterwards to hold the bonds for the persons named in the memorandum. The interest was paid

accordingly by C. D. to A. B. during his life; and at the death of A. B. the question arose whether there was a valid gift in favour of the daughters and others. The LORDS JUSTICES, reversing the decree of Vice-Chancellor STUART, held that there was a valid gift and a good trust created for these persons in the hands of C. D. *Langley* v. *Thomas* (1857), 26 L. J. Ch. 609.

As to what constitutes a gift of a specialty debt (not being a negotiable instrument), the question is much considered, as to *donatio mortis causâ*, in *Duffield* v. *Elwes*, 9 R. C. 845 *et seq.* The reason given by Lord HARDWICKE in *Snellgrove* v. *Baily* (1744), 3 Atk. 214, that you cannot sue at law without the bond because you must make a *profert* of it, seems to have been equally applicable to a gift *inter vivos* as to a *donatio mortis causâ*. But this reasoning would not apply now, and there is no modern case in which the delivery of a bond without more has been held sufficient to carry out the intention of a gift *inter vivos*.

In *Edwards* v. *Jones* (1836), 1 My. & Cr. 226, where an intending donor delivered a bond with a memorandum, not under seal, indorsed upon it, purporting to be an assignment of the bond, the transaction was held to be incomplete, and so not to constitute a valid gift *inter vivos*. There was no *donatio mortis causâ*, because there was no contemplation of death as a condition of the gift.

That a gift of a specialty debt may be completed by the delivery of the document with the intention of making a gift, appears to have been assumed in the judgment of the Court of Exchequer in *Barton* v. *Gainer* (1858), 3 Hurl. & N. 387, 27 L. J. Ex. 390, 4 Jur. (N. S.) 715. The contention, however, there was that the documents in question were in the form of debentures or mortgages under the seal of a company constituted under Act of Parliament which provided a statutory form of transfer of such mortgages, and that without such transfer the property could not have been vested in the donee. The effect of this argument is left open by the judgment, which decides that, at all events, there was no right in the executors of the donor to recover the deeds.

The decision in *Barton* v. *Gainer* was followed by the Court of Appeal in *Rummens* v. *Hare* (C. A. 1876), 1 Ex. D. 169, 46 L. J. Ex. 30, 34 L. T. 407, 24 W. R. 385, where a policy of life insurance had been delivered with the intention of making a gift. The action was for detention of the policy, and the Court held that, whoever had the right to the money, the executors of the donor had no right to recover the policy from the donee. The judges seem to have thought that the executors had a right to the money, but there was no actual decision upon the point.

It is stated in the report of *Rummens* v. *Hare* that the provisions of

the Act 30 & 31 Vict., c. 144, ss. 3, 5 (as to the assignment of policies), had not been complied with; and the expressions in the judgment appear to support the view that this circumstance prevented the gift being complete, as a delivery of a specialty with the intention of making a gift, according to the old cases. This view, as there is no actual decision on the point, appears to demand examination. The terms of the Act bearing on the point are as follows: "(Sect. 1.) Any person or corporation hereafter becoming entitled, by assignment or other derivative title, to a policy of life assurance, and possessing at the time of action brought the right in equity to receive, and the right to give an effectual discharge to the assurance company liable under such policy for monies thereby assured or secured, shall be at liberty to sue at law in the name of such person or corporation to recover such monies. . . . (Sect. 3.) No assignment made after the passing of this Act of a policy of life assurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the amount of such policy, or the monies assured or secured thereby, until a written notice of the date and purport of such assignment shall have been given to the assurance company liable under such policy at their principal place of business for the time being; or in case they have two or more principal places of business, then at some one of such principal places of business, either in England or Scotland or Ireland, and the date on which such notice shall be received shall regulate the priority of all claims under any assignment; and a payment *bonâ fide* made in respect of any policy by any assurance company before the date on which such notice shall have been received shall be as valid against the assignee giving such notice as if this Act had not been passed. . . . (Sect. 5.) Any such assignment may be made either by endorsement on the policy or by a separate instrument, in the words or to the effect set forth in the schedule hereto, such endorsement or separate instrument being duly stamped" The form of the schedule simply expresses the parties, the consideration, and has the operative words, "do hereby assign, &c." The Act thus gave certain facilities for giving a legal title by the statutory assignment. But it does not expressly say that a title cannot be acquired otherwise than by assignment; on the contrary, it implies that there may still be a "derivative title" otherwise than by assignment. It may therefore well be a question whether the title acquired by gift of the specialty without any assignment in writing would not be as good after the passing of the Act as before.

A somewhat similar question may arise under the Judicature Act, 1873 (36 & 37 Vict., c. 66), s. 25 (6), whereby an absolute assignment in writing of a debt or *chose in action*, gives (subject to any equity available against the original creditor) a legal right to the assignee to

sue in his own name. The question is, in order to complete a gift, is it necessary to take advantage of every novel statutory facility for completing the title of the donee?

In the case of *In re Patrick, Bills* v. *Tatham* (C. A. 1890), 1891, 1 Ch. 82, 60 L. J. Ch. 111, 63 L. T. 752, 39 W. R. 113, a voluntary settlement of property, including certain debts constituted by bills of sale under seal, was held to be complete and effectual,—the settlement containing a formal assignment under seal of the property with a power of attorney,—although the bills of sale themselves had not been delivered to the assignee. This seems to indicate that the complete assignment, and not the delivery of the instrument, is the true criterion.

It has been held by the Court of Appeal that a person having an equitable mortgage by deposit of a deed does not complete a gift of the mortgage debt by simply handing over the deed to the donee with the intention of making such a gift; and the executors of a person who has purported to make such a gift have been held entitled to the delivery up of the deed from the person claiming to be the donee, on the ground that the right to the deed was inseparable from the right to the debt and equitable mortgage. *In re Richardson, Shillito* v. *Hobson* (C. A. 1885), 30 Ch. D. 396, 55 L. J. Ch. 741, 53 L. T. 746, 34 W. R. 286.

In *Seales* v. *Maude* (1856), 6 De G., M. & G. 43, 25 L. J. Ch. 433, 1 Jur. (N. S.) 1147, Lord Cranworth, L. C., held that letters by a mortgagee promising that her executors should cancel the mortgage, and containing words of gift, were insufficient to effect a release.

The case of *Milroy* v. *Lord* (1862), 4 De G., F. & J. 264, 31 L. J. Ch. 798, is one very frequently cited as showing that an imperfect conveyance made with the intention of giving cannot be made use of to establish the gift, or to make the intending donor a trustee of the property for the purpose of carrying it into effect. The facts were that one T. Medley by a deed poll under his hand and seal in 1852 purported to transfer and convey to S. Lord "50 shares of the capital stock of the Bank of Louisiana, now standing in my name in the books of the bank," to hold upon certain trusts therein expressed. The certificate or scrip of the stock was delivered to S. Lord, and a power of attorney executed in his favour to receive the dividends upon the stock. It appeared also that S. Lord held a general power of attorney from T. Medley to transfer the stock of any incorporated company which might be standing in his name. After the death of T. Medley, during whose life the dividends had been applied according to the settlement of 1852, the question arose as to the right to the shares. It appeared that according to the constitution of the Bank of Louisiana the shares were transferable in the books of the company. No such transfer had been made, and the shares had remained in the name of

T. Medley. The question was whether there was any equity against the executors to have the shares transferred into the name of the trustee, S. Lord, or whether the executors, as representing T. Medley, could be treated as trustees for carrying out the purposes of the settlement. The Lords Justices (Knight Bruce and Turner) held that there was no such equity or trust. The law as laid down by Lord Justice Turner has always been considered as accurately stating the settled law on the subject. "I take the law of this Court," he says, "to be well settled, that in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon himself. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provisions will then be effectual; and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol. But in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to protect an imperfect gift. The cases, I think, go further, to this extent, that if the settlement is intended to be effectual by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

Milroy v. *Lord* is followed by Bacon, V. C., in *Warriner* v. *Rogers* (1873), L. R. 16 Eq. 340, 42 L. J. Ch. 581, 28 L. T. 863, 21 W. R. 766; by the Master of the Rolls in *Richards* v. *Delbridge* (1874), L. R. 18 Eq. 11, 43 L. J. Ch. 459, 22 W. R. 584; and by Bacon, V. C., again in *Hartley* v. *Nicholson* (1874), L. R. 19 Eq. 233, 44 L. J. Ch. 277, 32 L. T. 821, 23 W. R. 374; and *Bottle* v. *Knocker* (1876), 46 L. J. Ch. 159, 35 L. T. 545, 25 W. R. 209, in all of which there was evidence of a determinate intention not effectually carried out.

A sum of £500 was paid by A. to B. under circumstances which after B.'s death were explained to be that A. had offered the sum as a gift, but that B. had insisted upon paying A. during his life the interest which he would have got on current account with his bankers. B. had accordingly signed and delivered to A. a promissory note for the £500 with interest. It was held that the transaction must be regarded by the Court as a loan, the parol evidence being inconsistent with, and

not admissible to explain, the terms of the promissory note. *Hill* v. *Wilson* (1873), L. R. 8 Ch. 888, 42 L. J. Ch. 817, 29 L. T. 238.

On the other side of the line, though the distinction is somewhat fine, is the case of *Strong* v. *Bird*, decided by the MASTER OF THE ROLLS (1874), L. R. 18 Eq. 315, 43 L. J. Ch. 814. The case was as follows: A. borrowed from his step-mother (B.), who was living in his house on terms of paying board at the rate of £850 per annum by quarterly payments, a sum of £1000, to be paid off by instalments of £100 from the quarterly payments of the board. After deductions had been made for two quarters, B. declared she would make no more deductions, and thenceforth (for four years up to her death) paid the quarterly board in full. She died, having appointed A. her executor, but not having beneficially disposed of her residuary estate. The MASTER OF THE ROLLS held that the debt was effectually released, because (1) the appointment as executor being a release at law, the intention was sufficient to avoid any claim to the debt in equity; and (2) that the payment of the full quarterly payments, being more than equivalent to a return of the £900 if the same had been deducted by the quarterly instalments, was an actual completion of the gift.

A gift of stock in the public funds is complete where the donor transfers the stock into the name of the donee with the intention of making a gift; and it is immaterial that the donee should not have accepted the stock or should have been ignorant of the transfer. *Standing* v. *Bowring* (C. A. 1885), 31 Ch. D. 282, 55 L. J. Ch. 218, 54 L. T. 191.

Where the donee has altered his position on the strength of an imperfect gift, the case is altered, the transaction being then not regarded as merely voluntary, but something done or promised on what is regarded, at least in equity, as a consideration. Instances of this may be found in *Dillwyn* v. *Llewelyn* (1862), 4 De G., F. & J. 517; *Cole* v. *Pilkington* (1874), L. R. 19 Eq. 174, 44 L. J. Ch. 381, 31 L. T. 423, 23 W. R. 41; *Ungley* v. *Ungley* (C. A. 1877), 5 Ch. D. 887, 46 L. J. Ch. 854, 37 L. T. 52, 25 W. R. 733.

Where a cheque has been delivered as a gift, and the cheque is actually presented at the bank and refused payment by reason of the banker having a doubt as to the signature, it was held that as both donor and donee had left nothing undone to carry out the gift, it must be treated as completed; and that the donee was entitled to be paid out of the assets of the executors of the donor, who had died before the cheque was actually cashed. *Bromley* v. *Brunton* (1868), L. R. 6 Eq. 275, 37 L. J. Ch. 902, 18 L. T. 628, 16 W. R. 1006.

The father of a child nine months old put into its hands a cheque for £900, saying in the presence of his wife and of the nurse, "I give this to baby; it is for himself, and I am going to put it away for him."

The father having died suddenly a few days afterwards, it was held by Lord Cranworth, L. C., that — although there was no doubt as to the intention — this could not constitute a complete gift, nor did the transaction amount to a declaration of trust; and a claim on behalf of the child in the administration of the estate was disallowed accordingly. *Jones* v. *Lock* (1865), L. R. 1 Ch. 25, 35 L. J. Ch. 117, 11 Jur. (N. S.) 913.

Where a gift of jewels was completed by delivery by the owner to a daughter-in-law upon her marriage, the absolute effect of the gift was held not to be restrained by an accompanying request that the jewels should be left by the daughter-in-law as heirlooms. *Hill* v. *Hill* (C. A. from Q. B., 19 Feb., 1897), 66 L. J. Q. B. 329.

As to the gift of a sum contained in a cheque, see also notes to "Donatio Mortis Causa," 9 R. C. 861. And upon the question of setting aside a gift by reason of undue influence, see Nos. 76 and 77 of "Contract," 6 R. C. 834–878.

AMERICAN NOTES.

Mr. Thornton quotes largely from this case, and observes that it "is an exhaustive review of all the modern and old English cases, and finally settles the rule that a delivery is essential." (Gifts and Advancements, pp. 108, 124.) He also observes the Court "seems to have overlooked, at least in the opinion, that the gift was only a part of an article, and to require the donor to yield up the possession of the horse to the donee was to require him to part with the possession of the animal when his interest was three times as great as that of the donee." (Ibid. p. 131.)

The doctrine that manual delivery when practicable is essential to a gift by parol is extremely elementary and familiar. Mr. Thornton cites a great mass of authorities to this effect. See *Connor* v. *Trawick's Adm'r*, 37 Alabama, 289; 79 Am. Dec. 58; *Bullock* v. *Tinnen*, 2 Car. Law Repos. 271; 6 Am. Dec. 562; *Crawford's Appeal*, 61 Penn. State, 52; 100 Am. Dec. 609; *McWillie* v. *Van Vacter*, 35 Mississippi, 428; 72 Am. Dec. 127; *Marcy* v. *Amazeen*, 61 New Hampshire, 131; 60 Am. Rep. 320; *Curry* v. *Powers*, 70 New York, 212; 26 Am. Rep. 577; *Williams' and Harding's Appeals*, 106 Penn. State, 116; 51 Am. Rep. 505; *Dougherty* v. *Moore*, 71 Maryland, 248; 17 Am. St. Rep. 524; *Beaver* v. *Beaver*, 117 New York, 421; 15 Am St. Rep. 531; *Walker* v. *Walker*, 66 New Hampshire, 390; 27 Lawyers' Rep Annotated, 799. "The authorities all say that a gift *inter vivos* must be complete. The donor must divest himself of all dominion over the thing given, and the title to it must pass absolutely and irrevocably to the donee." *Bath Savings Institution* v. *Hathorn*, 88 Maine, 122; 51 Am. St. Rep. 382.

If manual delivery is impracticable, there must be some equivalent act: *Sanborn* v. *Goodhue*, 28 New Hampshire, 48; 59 Am. Dec. 398; "such as the nature of the property will admit, and the circumstances and situation of the parties render reasonably possible:" *Nolen* v. *Harden*, 43 Arkansas, 307; 51 Am. Rep. 563 (sack of gold coin to A. for young child B.).

In such cases a symbolical or constructive delivery will suffice, as branding

cattle with the donee's name: *Hillebrant* v. *Brewer*, 6 Texas, 15; 55 Am. Dec. 757; pointing out furniture in the house, given to the wife or child of the donor: *Allen* v. *Cowan*, 23 New York, 502; 80 Am. Dec. 316; *Harris* v. *Hopkins*, 43 Michigan, 272; 38 Am. Rep. 180; handing to the donee a savings or other bank pass-book: *Camp's Appeal*, 36 Connecticut, 88; 4 Am. Rep. 39; *Davis* v. *Ney*, 125 Mass. 590; 28 Am. Rep. 272; *Hill* v. *Stevenson*, 63 Maine, 364; 18 Am. Rep. 231; *Re Crawford*, 113 New York, 560; 5 Lawyers' Rep. Annotated, 71; a certificate of stock: *Reed* v. *Copeland*, 50 Connecticut, 472; 47 Am. Rep. 663 (*contra*, *Baltimore, &c. Co.* v. *Mali*, 65 Maryland, 93; 57 Am. Rep. 304); depositing a disinterred box of silver dollars in a house occupied by donor and donee: *Carradine* v. *Carradine*, 58 Mississippi, 286; 38 Am. Rep. 324; marking a note with child's name and handing it to a third person for him: *Second Nat. Bank* v. *Merrill*, 81 Wisconsin, 142; 29 Am. St. Rep. 870; delivery of one dollar instead of a negro slave, absent in another State: *Arrington* v. *Arrington*, 1 Haywood (North Car.), 1; delivery of an ear of corn to indicate a large quantity: *Lavender* v. *Pritchard*, 2 ibid. 478, 513.

Mere words will not suffice, even as between parent and child. *Medlock* v. *Powell*, 96 North Carolina, 499. But where a father gave a horse and buggy to his minor daughter, who lived at home, and told other members of the family that they were hers, and they must ask her if they wished to use them, and thereafter she had sole charge of them, and used them as she wished, without asking his permission, *held* sufficient to show a gift. *Matter of Wachter*, 16 Misc. (New York) 137. And where a purchaser under a chattel mortgage of household furniture, made by a husband, pointed out certain articles, and told the wife that he gave them to her, *held* a valid gift, although they continued in the house occupied by both. *Allen* v. *Cowan*, 23 New York, 502. So where a father bought a lottery ticket, declaring he gave it to his infant daughter, writing her name on it, and it drew a prize, and he subsequently declared he had given the ticket to her and that the money was hers, *held* sufficient to establish a gift. *Grangiac* v. *Arden*, 10 Johnson (New York), 293. But where a husband purchased an accident policy on leaving home, and laid it on a table in front of his wife, saying she should take it and take care of it, and if he was killed she would be so much better off, *held* not a gift. *Williams' and Harding's Appeals*, 106 Penn. State, 116; 51 Am. Rep. 505. A gift of furniture from mother to son may be inferred from her declarations and his remaining in the house where it was. *Harris* v. *Hopkins*, 43 Michigan, 272; 38 Am. Rep. 180. To the same effect, *Kellogg* v. *Adams*, 51 Wisconsin, 138; 37 Am. Rep. 815; *Ross* v. *Draper*, 55 Vermont, 404; 45 Am. Rep. 624 (piano to daughter).

Young v. *Young*, 80 New York, 422; 36 Am. Rep. 634, is a very instructive case. The intestate placed bonds in two envelopes, indorsing and signing a memorandum that they belonged to his sons W. and J. in specified proportions on his death, but that the interest was reserved and owned by him during his life. He showed the indorsed packages to their wives, stating that he believed he had made a valid disposition of the bonds. He then put and kept them in a safe in the house of his son W., where he himself lived, and in which safe W. also kept some papers, but of which safe the intestate had

practical control, and they were found there on his death. He cut off and used the coupons during his lifetime, and once gave a bond from one of the packages to a third person. He spoke of them as the bonds of the sons. The son J. had no access to the safe, and neither son exercised any control over the bonds as against the father. *Held*, neither a gift nor a declaration of trust. The Court observed: "To establish a valid gift a delivery of the subject of the gift to the donee or to some person for him, so as to divest the possession and title of the donor, must be shown; and the first question which arises under the peculiar circumstances of this case is whether it is practicable to make a valid gift *in præsenti* of an instrument securing the payment of money, reserving to the donor the accruing interest, and, if so, by what means this can be done. The purpose of such a gift may undoubtedly be accomplished by a proper transfer to a trustee, and perhaps by a written transfer delivered to the donee; but the question now is, can it be done in the form of a gift without any written transfer delivered to the donee, and without creating any trust. I can conceive of but one way in which this is possible, and that is by an absolute delivery of the security which is the subject of the gift to the donee, vesting the entire legal title and possession in him on his undertaking to account to the donor for the interest which he may collect thereon. But if the donor retains the instrument under his own control, though he do so merely for the purpose of collecting the interest, there is an absence of the complete delivery which is absolutely essential to the validity of a gift. A gift cannot be made by creating a joint possession of donor and donee, even though the intention be that each shall have an interest in the chattel, especially where, as in this case, the line of division between these interests is not ascertainable. The reservation of the interest on the bonds to the donor was for an uncertain period, — that is, during his lifetime; and until his death it was impossible to determine the precise proportion of the money secured by the bonds to which the donee was entitled.

"If therefore the donor retained the custody of the bonds for the purpose of collecting the accruing interest, or even if they were placed in the joint custody or possession of himself and the donee, there was no sufficient delivery to constitute a gift. But if an absolute delivery of the bonds to the donee, with intent to pass the title, was made out, the donor reserving only the right to look to the donee for the interest, the transaction may be sustained as an executed gift. *Doty* v. *Willson*, 47 N. Y. 580."

"It is impossible to sustain this as an executed gift, without abrogating the rule that delivery is essential to gifts of chattels *inter vivos*. It is an elementary rule that such a gift cannot be made to take effect in possession *in futuro*. Such a transaction amounts only to a promise to make a gift, which is *nudum pactum*. *Pitts* v. *Mangum*, 2 Bail. (S. Car. L.) 588. There must be a delivery of possession with a view to pass a present right of property. 'Any gift of chattels which expressly reserves the use of the property to the donor for a certain period, or (as commonly appears in the cases which the Courts have had occasion to pass upon) as long as the donor shall live, is ineffectual.' 2 Schouler Pers. Prop. 118, and cases cited; *Vass* v. *Hicks*, 3 Murphey (N. Car.) 494.

This rule has been applied even where the gift was made by a written instrument or deed purporting to transfer the title, but containing the reservation. *Sutton's Executor* v. *Holliowell*, 2 Dev. (North Car.) 186; *Lance* v. *Lance*, 5 Jones L. (North Car.) 413. The only question remaining therefore is whether a valid declaration of trust is made out."

"The difficulty in establishing such a trust is that donor did not undertake or attempt to create it, but to vest the remainder directly in the donees. Assuming, for the purpose of the argument, that he might have created such a trust in himself, for the benefit of his sons, and further, that he might have done so by simply signing a paper to that effect and retaining it in his own possession, without ever having delivered it to the donees, or any one for them, yet he did not do so. He simply signed a paper certifying that the bonds belonged to his sons. He did not declare that he held them in trust for the donees, but that they owned them, subject to the reservation, and were at his death to have them absolutely. If this instrument had been founded upon a valuable consideration, equity might have interfered and effectuated its intent by impelling the execution of a declaration of trust, or by charging the bonds while in his hands with a trust in favor of the equitable owner. *Day* v. *Roth*, 18 N. Y. 448. But it is well settled that equity will not interpose to perfect a defective gift or voluntary settlement made without consideration. If legally made it will be upheld, but it must stand as made or not at all. When therefore it is found that the gift which the deceased attempted to make failed to take effect for want of delivery or a sufficient transfer, and it is sought to supply this defect and carry out the intent of the donor by declaring a trust which he did not himself declare, we are encountered by the rule above referred to. Story's Eq. 706, 787, 793, b, c, d; *Antrobus* v. *Smith*, 12 Ves. 39, 43; *Edwards* v. *Jones*, 1 My. & Cr. 226; 7 Sim. 325; *Price* v. *Price*, 8 Eng. L. & Eq. 281; *Hughes* v. *Stubbs*, 1 Hare, 476. It is established as unquestionable law that a Court of equity cannot by its authority render that gift perfect which the donor has left imperfect, and cannot convert an imperfect gift into a declaration of trust merely on account of that imperfection. *Heartley* v. *Nicholson*, 44 L. J. (N. S.) 279, Ch. It has in some cases been attempted to establish an exception in favor of a wife and children on the ground that the moral obligation of the donor to provide for them constituted what was called a meritorious consideration for the gift: but Judge Story (2 Eq. Jur. § 987, and vol. i. § 433) says that that doctrine seems now to be overthrown, and that the general principle is established that in no case whatever will Courts of equity interfere in favor of mere volunteers, whether it be upon a voluntary contract or a covenant, or a settlement, however meritorious may be the consideration, and although the beneficiaries stand in the relation of a wife or child. *Holloway* v. *Headington*, 8 Sim. 325; *Jefferys* v. *Jefferys*, 1 Craig & Phillips, 138, 141."

A gift of a debt may be indicated by delivery of a receipt therefor. *Carpenter* v. *Soule*, 88 New York, 251; 12 Am. Rep. 248; *Gray* v. *Barton*, 55 New York, 68; 14 Am. Rep. 181; *McKenzie* v. *Harrison*, 120 New York, 260; 17 Am. St. Rep. 638.

But a Court of equity will effectuate a gift of lands by a father to his

child evidenced only by an unsealed instrument delivered to the child. *Marling* v. *Marling*, 9 West Virginia, 79; 27 Am. Rep. 535. But the contrary was held of a gift of stock evidenced only by transfer of the certificate, in *Baltimore, &c. Co.* v. *Mali*, 65 Maryland, 93; 57 Am. Rep. 304, disagreeing with *Stone* v. *Hackett*, 12 Gray (Mass.), 227, and *Cushman* v. *Thayer Manuf. Co.*, 76 New York, 365; 32 Am. Rep. 315. So where a father held a mortgage against his son, and gave him a receipt for a part of the debt, providing that it should be indorsed on the mortgage, *held* a valid gift, although never indorsed. *Carpenter* v. *Soule*, 88 New York, 251; 42 Am. Rep. 248. A promissory note will pass by delivery without indorsement. *Hopkins* v. *Manchester*, 16 Rhode Island, 663; 7 Lawyers' Rep. Annotated, 387. But a note does not pass by a sealed assignment without delivery of the note. *Gammon Theo. Sem.* v. *Robbins*, 128 Indiana, 85; 12 Lawyers' Rep. Annotated, 506; *Hall* v. *Knappenberger*, 97 Missouri, 509; 10 Am. St. Rep. 337.

Mr. Thornton lays it down that a delivery to render a gift good must be such that the title passes to the donee, citing *McDowell* v. *Murdock*, 1 Nott & McCord (So. Car.), 237, where it is said "there must be an actual transmutation of possession and property," and *Chevalier* v. *Wilson*, 1 Texas, 161, where it is said "the test of delivery (of the consummation of the parol gift of a chattel) is the change of property, — the immediate right to entire dominion over the subject of the gift: a perfect title, which is as good against the donor as any one else. . . . The change of property must in all cases be complete at the instant of the gift." This is the doctrine also of *Dickeschied* v. *Exchange Bank*, 28 West Virginia, 340.

The gift may be delivered to a trustee: *Love* v. *Francis*, 63 Michigan, 181; 6 Am. St. Rep. 290; *Second Nat. Bank* v. *Merrill*, 81 Wisconsin, 142; 29 Am. St. Rep. 870; so of a deposit in bank in the name of the depositor as trustee: *Minor* v. *Rogers*, 40 Connecticut, 512; 16 Am. Rep. 69; so of a deed of promissory notes for the benefit of an infant child, although reserving "the right to manage the above amounts as agent," etc.: *Walker* v. *Crews*, 73 Alabama, 412. The most recent consideration of this question in New York lays down the doctrine that if one opens an account in a savings bank in his own name, "in trust for another," and retains the pass-book, and does not disclose the fact of the deposit to the beneficiary, it is a valid gift if the depositor dies before the beneficiary, leaving the account open and unexplained; but not so if the beneficiary dies first. *Cunningham* v. *Davenport*, 147 New York, 43; 49 Am. St. Rep. 641. A finding of a gift *inter vivos* of a deposit in a savings bank by a father to his son is justified by evidence that the deposit was made in the name of the father in trust for the son, payable to the latter in case of the former's death; that the father stated at the time of the deposit that he wanted his son to have it after his death; that about four months after the deposit the father told the son to take the book; that the son looked it over, and saw what it was, and left it with his father until he died, saying he would leave it with him until it was called for; that the father reserved the right to draw what he saw fit, though the son knew that he would only draw a little at a time, and that the father told the son that he could have the money when he wanted it. *Scrivens* v. *North Easton Sav. Bank*, 166 Mass. 255.

Nos. 1, 2. — Irons v. Smallpiece; Cochrane v. Moore. — Notes.

Another recent and instructive decision is in *Bath Sav. Inst.* v. *Hathorn*, 88 Maine, 122; 32 Lawyers' Rep. Annotated, 377; 51 Am. St. Rep. 382: that (1) A voluntary trust is a gift, and requires all the essentials of a plain gift to sustain it; (2) the words "in trust for" in the entry of a savings bank deposit, with the same form used on the depositor's book, is sufficient to create a *prima facie* trust which will be a completed trust or gift in favor of the donee as against the estate of the donor, where all his declarations, acts, and conduct are consistent with the presumption arising from the entry itself. The Court observed: "Some of the cases are in conflict concerning the question now under consideration, more in the application of the law to the ever-varying facts in the numerous cases than otherwise; but our own cases are all consistent, and squarely hold to the doctrine that a trust in personal property may be created by parol, and that a deposit in bank in the name of another may be explained or controlled by evidence outside the written terms of the deposit. In this case the terms of the deposit clearly show an intended trust in favor of the donee, but may be controlled or limited by extrinsic evidence. This evidence confirms the trust, showing that it should cease at the death of the donor, and that the legal title should then pass to the *cestui*. When the deposit was made the treasurer of the bank told the donor that at his decease the money would go to the donee, and the donor replied that was his wish. All the subsequent acts and declarations of the donor show the same intent. The gift cannot be upheld as an absolute gift *inter vivos*, nor as a gift *causa mortis*, for these gifts require a delivery of the *res*, — a complete transfer of title. They differ from a gift in trust in that they purport to, and must, pass the whole title, so that the donor can have no dominion or control over them. But a gift in trust withholds the legal title from the donee. It may be transmitted to a third person, or it may be retained by the donor; but in either case the equitable title has gone from him, and unless the declaration of trust contains the power of revocation, or the wide discretion of Chancery attaches (*Coutts* v. *Acworth*, L. R. 8 Eq. 558; *Wollaston* v. *Tribe*, L. R. 9 Eq. 44; *Everitt* v. *Everitt*, L. R. 10 Eq. 405; *Lister* v. *Hodgson*, L. R. 4 Eq. 30; *Sharp* v. *Leach*, 31 Beav. 491; *Anderson* v. *Elsworth*, 3 Giff. 154; *Toker* v. *Toker*, 31 Beav. 629; *Phillips* v. *Mullings*, L. R. 7 Ch. 247; *Smith* v. *Iliffe*, L. R. 20 Eq. 666; *Welman* v. *Welman*, 15 Ch. Div. 570, 578, 579; *Prideaux* v. *Lonsdale*, 1 De G., J. & S. 433), it leaves him powerless to extinguish the trust. Of course the trust must be established by proof; and the fact that no evidence of a voluntary trust once created remains, or can be shown, does not alter the principle. Many rights fail of enjoyment from the lack of evidence that might once be adduced. So, a secret trust may be valid when it can be proved; but if the donor conceals the evidence of it, and later appropriates the fund to his own use, it is simply a wrong on his part, that prevails because of his perfidy, and goes unpunished and unnoticed because unknown. The *cestui's* rights are the same, although his remedy may have been destroyed.

"In the case of *Re Smith's Estate*, 144 Pa. 428, a lad of three years went to live with his uncle. When the lad was twelve the uncle placed $13,000 in bonds in an envelope, on which he had written and signed a declaration that he held them for his nephew. The bonds remained in the uncle's possession until his death, and the Court held a completed gift in trust for the nephew.

"In *Connecticut River Sav. Bank* v. *Albee*, 61 Vt. 571, the Court says: 'A completed trust, although voluntary, is valid, and may be enforced in equity. It is not essential to its validity that the beneficiary should have had notice of its creation or have assented to it. The owner and donor of personal property may create a perfect or complete trust by his unequivocal declaration in writing, or by parol, that he himself holds such property in trust for the purposes named. The trust is equally valid whether he constitutes himself or another person the trustee. In that case a father deposited money in a savings bank in the name of his son, naming himself trustee. It appeared that one motive of the father was to avoid taxation; but, said the Court, that fact does not negative the idea that he also intended to create a trust for the benefit of his son. It is perfectly consistent with it, and the retention of the pass-book is not inconsistent with such a purpose; he must have retained it as trustee.

"*Ray* v. *Simmons*, 11 R. I. 266; 23 Am. Rep. 447, is in point. One Bosworth deposited money in a savings bank in his own name as trustee for a step-daughter. He did not tell her what he had done, nor show her the pass-book; he kept that himself. After his death, the Court held that the step-daughter was entitled to the money, — that the transaction constituted a trust in her favor.

"So is *Martin* v. *Funk*, 75 N. Y. 134; 31 Am. Rep. 446. Susan Boone deposited $500 in a savings bank 'in trust for Lillie Willard.' Susan kept the pass-book, and Lillie had no knowledge of it until after Susan's death. Want of notice to Lillie and the retention of the pass-book by Susan were urged in defence; but the Court held a gift in trust complete. This is an exhaustive case, and contains a review of authorities by Chief Justice Church prior to 1878.

"So in *Minor* v. *Rogers*, 40 Conn. 512; 16 Am. Rep. 69. A widow deposited $250 in her own name, 'as trustee of William A. Minor,' the child of a neighbor. The child knew nothing of the deposit until after the depositor's death, and meantime did not have possession of the pass-book; and the Court held the trust complete, and allowed a recovery of the money from the depositor's executor.

"So is *Re Gaffney's Estate*, 146 Pa. 49. It appeared that Hugh Gaffney deposited $560 in his own name, as trustee for Polly Kim, and the Court held the entry itself *prima facie* evidence of the trust, and, unexplained, sufficient to uphold it.

"In *Gerrish* v. *New Bedford Inst. for Sav.*, *supra*, the Court says: 'No particular form of words is required to create a trust in another, or to make the party himself a trustee for the benefit of another. It is enough for the latter purpose if it be unequivocally declared in writing, or orally if the property be personal, that it is held in trust for the person named. When the trust is thus created, it is effectual to transfer the beneficial interest, and operates as a gift perfected by delivery.' The same case holds that notice to the beneficiary is unnecessary where the transaction is clear; but when ambiguous, or susceptible of different interpretations, it removes the doubt, and is decisive of the purpose of the donor. Some of the earlier Massachusetts cases seem to hold notice to the beneficiary essential to the validity of a trust; but, when considered in the light of this case, rather consider the notice a

controlling than an essential element in the creation of a voluntary trust. The prevailing doctrine now is that notice is unnecessary, but when shown has controlling effect.

"In this case the entry 'in trust for' is of clear and unmistakable import, and sufficient to create a *prima facie* trust. It might have been controlled by evidence that would have shown a contrary intention; but such evidence is wholly wanting. Moreover, all the declarations, acts, and conduct of the donor are consistent with the presumption arising from the entry itself, and show that it expresses the true import of the transaction, and creates a completed trust in favor of the donee."

In *Wagoner's Estate*, 174 Penn. State, 558, "a niece kept house for her uncle during the last fifteen years of his life. She did the household work, took care of cows, and worked in the garden. About eighteen months before the uncle's death he called on a justice of the peace and executed a bond in favor of his niece in the sum of $2000, payable to her absolutely in one year, with interest at the rate of five per cent, to which was appended the usual warrant of attorney to confess judgment. The bond was handed to the justice, to be kept by him, and delivered to the niece after the uncle's death. The justice suggested to him that the bond would draw interest during his life, and the uncle directed that the justice should mark the interest as paid at the end of each year from the date of the bond. The justice made one indorsement of the interest having been paid. Some time after the bond had been deposited with the justice the uncle told his niece that 'there was a bond of $2000 at the squire's, and that she was to leave it there as long as he lived, and at his death she was to go and get it.' A few days after the uncle's death the niece called for the bond, and the justice gave it to her. *Held*, (1) that there was a sufficient delivery to execute the gift to the niece; (2) that the fact that the justice was to indorse the interest paid during the uncle's lifetime was immaterial, inasmuch as it was obviously a plan to correct the mistake in the original draft of the bond; (3) that the contingency that the gift was not to take effect except in case of the survivorship of the niece did not render it void; (4) that the delivery of the justice to the niece after the uncle's death took effect by relation from the first delivery."

Where a gift is delivered *inter vivos*, it cannot be revoked on the ground of mistake on the part of the donor, — as where the donee was in the employ of the donor, and the gift was made at Christmas according to custom, but in forgetfulness of the fact that his salary had been raised. *Pickslay* v. *Starr*, 149 New York, 432. The gift was $2500. "This is a peculiar case," said the Court. In this case stress is laid on the fact that the donor was silent as to the mistake until the next May; but the circumstance is not regarded as that which concluded him, but as one which might have misled the donee, and warranted him in spending the money or changing his mode of life. It is evident that there was a perfect gift, and no mutual mistake.

If the subject of the gift is already in the possession of the donee, the delivery may be effectuated by words: *Miller* v. *McMechen*, 33 West Virginia, 199; 6 Lawyers' Rep. Annotated, 515; *Porter* v. *Gardner*, 60 Hun (N. Y. Sup. Ct.), 571; *Providence Inst.* v. *Taft*, 14 Rhode Island, 502; *Wing* v. *Merchant*, 57 Maine, 383.

GOODWILL.

TREGO *v.* HUNT.

(H. L. 1895.)

RULE.

A PERSON who has sold the goodwill of his business, or, in the case of a partnership, who has agreed that on the determination of the partnership, the goodwill of the business shall belong to the other partner or partners, may set up a rival business, but is not entitled to solicit the custom of those who have previously dealt with him or with the firm.

Trego v. Hunt.

65 L. J. Ch. 1–13 (s. c. 1896, A. C. 7; 73 L. T. 514; 44 W. R. 225).

[1] *Goodwill. — Right of Retiring Partner to Solicit Customers of Old Firm. — Injunction.*

A partner who, according to his partnership agreement, has no share in the goodwill of the business, is not entitled during the partnership to extract from the books of the firm the names and addresses of customers for the purpose of soliciting such customers on his own behalf after the termination of the partnership.

The sole question raised in this appeal was, in the words of Lord MACNAGHTEN, whether a person who has sold the goodwill of his business, or one in the position of the respondent who has been taken into partnership on the terms that on the expiration of the partnership the goodwill shall belong solely to his partner, is at liberty to solicit the old customers of the business to give their custom to him in preference over his former partner.

The facts sufficiently appear in Lord HERSCHELL'S judgment.

June 25, 27, 28. Graham Hastings, Q. C., and H. H. Cozens-Hardy, Q. C. (O. Leigh Clare with them), for the appellants. — A man cannot derogate from his own grant, or as Lord ROMILLY, M. R., said in *Labouchere* v. *Dawson*, 41 L. J. Ch. 427, L. R. 13

Eq. 322, depreciate what he has sold. The earliest decisions on the subject are those of Lord ELDON in *Shackle* v. *Baker*, 14 Ves. 468, *Cruttwell* v. *Lye*, 17 Ves. 335 (11 R. R. 98), and *Kennedy* v. *Lee*, 3 Mer. 452 (17 R. R. 110). But they are not decisive, as *Shackle* v. *Baker* was only in the form of remedy whether by injunction or damages; *and *Cruttwell* v. *Lye* was the case [*2] of a bankrupt's assignee who, as JESSEL, M. R., pointed out in *Ginesi* v. *Cooper*, 49 L. J. Ch. 601, 14 Ch. D. 596, was not in the position of an ordinary purchaser. PAGE-WOOD, V. C., in *Churton* v. *Douglas*, Johns. 174, 28 L. J. Ch. 841, thought that Lord ELDON'S definition of "goodwill" in the cases referred to above was not intended to be exhaustive. The modern authorities begin with *Labouchere* v. *Dawson*, decided in 1872, which is exactly in point. But there has been a conflict of authority since that date. JESSEL, M. R., emphatically approved *Labouchere* v. *Dawson*, and even extended it by prohibiting in *Ginesi* v. *Cooper* the retiring partner from dealing with the old customers. The extension, but the extension only, was overruled in *Leggott* v. *Barrett*, 51 L. J. Ch. 90, 15 Ch. D. 306. The principle of *Labouchere* v. *Dawson* in voluntary sales was recognised in *Walker* v. *Mottram*, 51 L. J. Ch. 108, 19 Ch. D. 355, though BAGGALLAY, L. J., seems to have disapproved *Labouchere* v. *Dawson*. COTTON, L. J., was also perhaps doubtful of that decision; but it has been expressly approved by the present MASTER OF THE ROLLS when Lord Justice, and by LUSH, L. J., and LINDLEY, L. J. It is immaterial whether the doctrine be implied contract or derogation from grant. BRETT, L. J., held it to be implied contract. Lord ROMILLY'S decision was also followed by FRY, J., in *Mogford* v. *Courtenay*, 29 W. R. 864. The balance of authority was strongly in favour of *Labouchere* v. *Dawson* until the Court of Appeal, in *Pearson* v. *Pearson*, 54 L. J. Ch. 32, 27 Ch. D. 145, overruled it. STIRLING, J., and the Court of Appeal in the present case felt bound to follow that case. But *Pearson* v. *Pearson* is wrong and ought to be overruled. See also *Cook* v. *Collingridge*, cited in Collyer on Partnership (2nd ed.), p. 209, and *Johnson* v. *Helleley*, 2 De G., J. & S. 446, 34 L. J. Ch. 179.

Sir R. E. Webster, Q. C., and H. Burton Buckley, Q. C. (George Henderson with them), for the respondent. — *Pearson* v. *Pearson* is good law, and ought to be followed. If solicitation of old customers is to be forbidden, it must be by express contract, and the rights of an outgoing partner cannot be restricted by implication.

The term "goodwill" was defined by Lord ELDON in *Cruttwell* v. *Lye* to be the habit of old customers to go to the old place. It implies that the outgoing partner must not represent his business to be that of the old firm, and must not use any trade name of the old firm. *Labouchere* v. *Dawson* is inconsistent with *Cruttwell* v. *Lye*. It is inconsistent on the one hand to forbid solicitation, and on the other to allow the retiring partner to set up next door to the old place. In some cases success depends upon personal skill. Why should a man be deprived of the benefit of his special skill and knowledge? Why should he not be allowed to say, "I was the brewer or the tea-taster of Messrs. A. & B.?" It is expressly provided in the articles of partnership that each member of the firm may take extracts from the books. It cannot be assumed that he does so for an improper purpose.

[They also cited *Dawson* v. *Beeson*, 22 Ch. D. 504, and *Hall* v. *Barrows*, 4 De G., J. & S. 150, 33 L. J. Ch. 204.]

H. H. Cozens-Hardy, Q. C., in reply. — All the appellant asks is an injunction to restrain the use of the extracts for the purpose of soliciting custom. The respondent has taken a list of five thousand names for the acknowledged purpose of canvassing customers.

The House took time for consideration.

Lord HERSCHELL. — A very important question, which has given rise to much difference of judicial opinion, presents itself for decision in the present case. For some years prior to 1876 William Henry Trego, the husband of the appellant Anna Trego, had carried on business as a varnish and japan manufacturer, at Bow and in London, under the name of Tabor, Trego, & Co. In [*3] that year he took the respondent *into partnership, but upon the terms that the goodwill of the business should be and remain the sole property of William Henry Trego. The partnership continued until his death. In February, 1889, a partnership agreement was made between the appellants and the respondent that they should carry on the business under the old style of Tabor, Trego, & Co. for a term of seven years. The agreement provided that the goodwill should nevertheless be and remain the sole property of Anna Trego. In December of last year the appellants found that the respondent had employed a clerk of the firm, out of office hours, to copy for him the names, addresses, and businesses of all the firm's customers. The respondent admits that his object in having the copy made was to acquire information

which would enable him, when the partnership comes to an end, to canvass these persons, and to endeavour to obtain their custom for himself. The appellants accordingly brought this action, and moved for an injunction to restrain the respondent from making copies of, or extracts from, the partnership books for any purposes other than the business of the partnership. Mr. Justice STIRLING, in the course of his judgment, said: "It has been admitted in the argument, and for the purposes of it, that the defendant intends, in the event of the partnership coming to an end at the beginning of next year, to use this list for the purpose of soliciting the customers of the present firm. He proposes then to engage in a business of a similar nature to that carried on by the firm, and the question which I have to decide is whether he is entitled to make such a use of the list." It seems clear, therefore, that the point in contest before the learned Judge who heard this motion was whether the respondent was entitled to make use of the list of the customers of the firm which he had obtained in order to canvass them when he started business on his own account. I mention this because it may have been open to contention on behalf of the respondent that he was, at all events, entitled, whilst he remained a partner, to make copies of the partnership books, and that it was premature to come to the Court to restrain the use of these copies even if he were not entitled when he ceased to be a partner to canvass the customers of the firm; but in view of the fact that the respondent threatened to use the list for the purpose of canvassing the persons named therein, and having regard to the course taken before the learned Judge, I think it would have been open to him to grant an injunction, though not in the terms prayed for, if the canvassing of those customers would be a wrongful act on the part of the respondent.

Mr. Justice STIRLING and the Court of Appeal had, I think, no alternative but to refuse to grant any injunction. They were bound by the decision of the Court of Appeal, in the case of *Pearson* v. *Pearson*, that even though the goodwill belongs to one of the partners, it is lawful for the other, on the termination of the partnership, to canvass the customers of the firm. Consistently with that decision, I think it would have been impossible to hold that the appellants were entitled to an injunction. That case is, however, open to review by your Lordships, and the real question in the present case is whether it was well decided. The question

whether a person who had sold the goodwill of his business was entitled afterwards to canvass the customers of that business came first before the Courts for decision in the case of *Labouchere* v. *Dawson*. Lord ROMILLY, Master of the Rolls, answered in the negative. He was of opinion that the principles of equity must prevail, and that persons are not at liberty to depreciate the thing which they have sold. He considered that the defendant was not entitled personally, or by letter, or by his agent or traveller, to go to any one who was a customer of the firm and to solicit him not to continue business with the old firm, but to transfer it to him, that this was not a fair and reasonable thing to do after he had sold the goodwill. He accordingly granted an injunction to restrain the defendant, his partners, servants, or agents, from applying to any person who was a customer of the old firm prior to the date of the sale, privately, by letter, personally, or by a traveller, asking such customer to continue to deal with the [* 4] * defendant, and not to deal with the plaintiffs.

In the case of *Ginesi* v. *Cooper*, Sir GEORGE JESSEL, Master of the Rolls, followed the decision in *Labouchere* v. *Dawson*, and expressed in very strong terms his concurrence with it. He granted an injunction restraining the defendants, their clerks, servants, agents, workmen, or others, from soliciting, or in any way endeavouring to obtain, the custom of, or orders for, goods similar in character to those dealt in by the old firm from such of the customers as were customers of the old firm, or from attempting to take away any portion of the business bought by the plaintiff. This was all the plaintiff in that case asked for; but the learned Judge went further, and expressed a strong opinion that a man who sold the goodwill of his business must not only refrain from soliciting the old customers to deal with him, but must not deal with them. It was not, he said, necessary to decide it on that occasion, but he stated it because he thought what the meaning of selling the goodwill of a trade or business is should be thoroughly understood. In the case of *Leggott* v. *Barrett*, which came before the same learned Judge shortly afterwards, he acted upon the same view, and extended the injunction to restrain the defendant from dealing with the customers of the old firm. From this judgment there was an appeal; but the appellant confined his appeal to that part of the order which restrained him from dealing with the customers of the old firm. He made no objection to the

injunction so far as it restrained him from canvassing those customers. The Court of Appeal dissolved that part of the injunction of which the appellant complained. They thought they could not on any just principle prevent the defendant from supplying a man with goods if he applied to him; that there was no implied obligation upon him, either legal or moral, to shut his door against a customer who came to him of his own free will; that a sale of goodwill did not involve an implied contract not to deal with any customers of the old business the goodwill of which was sold. The case is chiefly important for present purposes in so far as it discloses the view taken by the learned Judges who on that occasion constituted the Court of Appeal on the point now under consideration. In the case of *Pearson* v. *Pearson*, to which I shall have occasion to refer immediately, Lord Justice COTTON stated that the decision in *Labouchere* v. *Dawson* was doubted in *Leggott* v. *Barrett* by Lord Justice JAMES and himself. This is no doubt correct as far as Lord Justice COTTON is concerned; but I am unable to find any very clear indication that this was the view of Lord Justice JAMES. It is quite true that in an early part of his judgment he said: "I do not like going much into the case, because what I should say might perhaps be considered to mean that the injunction which is submitted to is too wide." But in a later part of the judgment he says: "At first it did appear to me that we might, from the equity view of the case, say that the defendant should be prevented from dealing with any customer or customers whom he had so solicited; but it appears to me that was too vague and too wide." He pointed out that a man might give the order afterwards without any reference to previous solicitation. Further on, when discussing the effect of the agreement, and showing that there was no implied obligation not to deal with the customer, he says, "It means that you are not to solicit customers." The impression produced upon my mind by the whole of the judgment is that the learned Judge had not arrived at the conclusion that *Labouchere* v. *Dawson* was wrong. Lord Justice BLETT expressed a decided approval of that decision. He was of opinion that on the sale of a goodwill for a valuable consideration there was an implied contract that the vendor would not solicit former customers, who were really the people who formed the goodwill.

The next case in which the matter was brought under considera-

tion of the Court of Appeal was that of *Walker* v. *Mottram*. In that case the goodwill of the business carried on by a bankrupt had been sold by his trustees in bankruptcy. It was sought afterwards to restrain the bankrupt from soliciting the cus-
[* 5] tomers of * that business. Sir GEORGE JESSEL, Master of the Rolls, refused to grant an injunction, on the ground that the doctrine laid down in *Labouchere* v. *Dawson* did not apply to the case of a bankrupt whose business had been sold by his trustees. This judgment was affirmed by the Court of Appeal. Of the Lords Justices who then constituted the Court, Lord Justice BAGGALLAY expressed a strong doubt as to the correctness of the decision in *Labouchere* v. *Dawson*. He said that it appeared to him, as at present advised, that it went far beyond what any of the previous decisions would have sanctioned. Lord Justice LUSH and Lord Justice LINDLEY, the other members of the Court, said that the rule laid down in *Labouchere* v. *Dawson* had, it was believed, been recognised and acted upon in practice, and, whatever else might be said of it, the rule was in accordance with the general opinion of what was fair and right, and was easily applied in practice. In the case of *Pearson* v. *Pearson* the question came again before the Court of Appeal. The facts were there less favourable to the plaintiff than in the case of *Labouchere* v. *Dawson*; and Lord Justice BAGGALLAY and Lord Justice LINDLEY both considered that, even if *Labouchere* v. *Dawson* was rightly decided, the case then before them was not governed by it. Lord Justice BAGGALLAY and Lord Justice COTTON, however, distinctly rested their judgments on the ground that the decision in *Labouchere* v. *Dawson* was wrong, and ought to be overruled. Lord Justice LINDLEY, on the other hand, was of opinion that it was rightly decided. The reason of Lord Justice BAGGALLAY for dissenting from *Labouchere* v. *Dawson*, so far as it is disclosed by the report of his judgment, appears to be that it went beyond a number of decisions of a higher Court, and, as he thought, without sufficient reason. Even assuming that the decision in *Labouchere* v. *Dawson* went beyond previous decisions, this does not seem to me to afford any indication that it was wrong, unless it can be shown that it was in conflict with the principles involved in those earlier decisions. Lord Justice COTTON examined the earlier decisions, and arrived at the conclusion that Lord ELDON was against the notion that the vendor of the goodwill of a business was, in the absence of express

contract, to be restrained from carrying on a similar business in the way in which he might lawfully carry it on if there had been no sale of the goodwill. The learned LORD JUSTICE pointed out that Lord ROMILLY rested his decision in *Labouchere* v. *Dawson* on the principle that a man could not derogate from his grant. "But," he said, "it is admitted that a person who has sold the goodwill of his business may set up a similar business next door, and say that he is the person who carried on the old business; yet such proceedings manifestly tend to prevent the old customer from going to the old place. I cannot see where to draw the line. If he may, by his acts, invite the old customers to deal with him and not with the purchaser, why may he not apply to them and ask them to do so? I think it would be wrong to put such a meaning on 'goodwill' as would give a right to such an injunction as has been granted in the present case." I propose now to examine the older authorities. I may state at once, however, that I can find nothing in them inconsistent with the decision in *Labouchere* v. *Dawson*. It no doubt went beyond them, inasmuch as it dealt with a question not determined by them; but this seems to me to be no demerit, nor to afford any indication that it was wrong. The earliest case which has any bearing upon the point is that of *Cruttwell* v. *Lye*, before Lord ELDON. The business of a bankrupt, who was a carrier between Bristol and London, had been sold by his assignees in bankruptcy. He afterwards commenced carrying on the trade of a carrier between Bristol, Bath, and London, but though the termini were the same the route employed was different. He addressed direct solicitation to the public for the carriage of their goods, stating that he had been reinstated in his business; and there was further, in the opinion of the LORD CHANCELLOR, so much probability of direct solicitation to the customers of the old concern, in some few instances, that the fact might fairly be *assumed. Under these cir- [*6] cumstances, the purchaser of the bankrupt's business applied for an injunction. The case was therefore the same as *Walker* v. *Mottram*, where Sir GEORGE JESSEL, than whom no one has more strongly insisted upon the propriety of the decision in *Labouchere* v. *Dawson*, was of opinion that no injunction should be granted.

The bankrupt was no party to the contract of sale; there could, therefore, be no implied contract on his part to be derived from it. It is most material also to observe what was the nature of the

injunction then in question. It was whether the bankrupt was to be restrained from carrying on the trade which he was pursuing of carrying goods between Bristol, Bath, and London. The LORD CHANCELLOR held that he could not be so restrained, and I think it must now be taken as settled that the sale of the goodwill of a business, even when the vendor himself is a party to the contract, does not impose upon him any obligation to refrain from carrying on a trade of the same nature as before. But Lord ELDON certainly did not decide that such a vendor was entitled to solicit the customers of the old firm. He was not asked for an injunction to restrain the defendant from so doing. It was sufficient for the decision of that case that in the opinion of the LORD CHANCELLOR there was no principle arising out of the provisions of the bankruptcy law upon which the Court could hold that the bankrupt ought not to engage in the same trade and by the same road as before, though I think that, so far, the opinion of the LORD CHANCELLOR would have been the same if the sale of the business had been effected by the bankrupt himself, and not by his assignees.

The importance of the case consists in the definition which Lord ELDON gave of the goodwill there sold. He said, "The goodwill which has been the subject of the sale is nothing more than the probability that the old customers will resort to the old place. Fraud would form a different consideration; but if that effect was prevented by no other means than those which belong to the fair course of improving a trade in which it was lawful to engage, I should, in imposing it, carry the effect of my injunction to a much greater length than any decision has authorised or imagination ever suggested." These observations were much relied on by Lord Justice COTTON in *Pearson* v. *Pearson*. If the language of Lord ELDON is to be taken as a definition of goodwill of general application, I think it is far too narrow, and I am not satisfied that it was intended by Lord ELDON as an exhaustive definition. "'Goodwill,' I apprehend," said Vice-Chancellor WOOD, in *Churton* v. *Douglas*, "must mean every advantage, every possible advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself, that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business." The learned

VICE-CHANCELLOR pointed out in this connection that it would be absurd to say that when a large wholesale business is conducted, the public are mindful whether it is carried on in Fleet Street or in the Strand. The question, what is meant by "goodwill," is, no doubt, a critical one. Sir GEORGE JESSEL, discussing in *Ginesi* v. *Cooper* the language of Vice-Chancellor WOOD which I have just quoted, said, "Attracting customers to the business is a matter connected with the carrying on of it. It is the formation of that connection which has made the value of the thing that the late firm sold, and they really had nothing else to sell in the shape of goodwill." He pointed out that, in the case before him, the connection had been formed by years of work. The members of the firm knew where to sell the stone; and he asks, "Is it to be supposed that they did not sell that personal connection when they sold the trade or business and the goodwill thereof?" The present MASTER OF THE ROLLS took much the same view as to what constitutes the goodwill of a business. I cannot myself doubt that they were right. It is the connection thus formed, together with the circumstances, whether of habit *or otherwise, [*7] which tend to make it permanent, that constitutes the goodwill of a business. It is this which constitutes the difference between a business just started, which has no goodwill attached to it, and one which has acquired a goodwill. The former trader has to seek out his customers from among the community as best he can. The latter has a custom ready made. He knows what members of the community are purchasers of the articles in which he deals, and are not attached by custom to any other establishment. What obligations, then, does the sale of the goodwill of a business impose upon the vendor? I do not think they would necessarily be the same under all circumstances. In the case of *Cook* v. *Collinridge*, cited in "Collyer on Partnership" (2nd ed.), p. 209, Lord Chancellor ELDON had to determine what orders were to be given where a partnership had expired by efflluxion of time, and where the goodwill had to be valued. He declared that there existed no obligation upon the partners to restrain them from carrying on the same trade, or any of them wanting to do so; that a claim to have an estimated value put upon any subject that could be considered as described by the term "goodwill" could not be supported upon the same grounds or principles as those in which a value was received from a partner buying the share of

the partner going out of the business and retiring from the trade altogether. He thought that all that could be valued was the chance of the customers adhering to the old establishment, notwithstanding that the previous partners, or any of them, carried on a similar business elsewhere. In *Johnson* v. *Helleley* a bill was filed by the surviving partner to wind up the business of the partnership. The usual decree was made. The chief clerk certified that it was most beneficial that the business should be sold as a going concern. The MASTER OF THE ROLLS ordered it to be stated in the advertisement and particulars that the surviving partner would be at liberty to continue carrying on the business of a wine merchant in the same town and place. This judgment was affirmed by the LORDS JUSTICES. In *Hall* v. *Barrows* Lord Chancellor WESTBURY said: "I think the direction to value the goodwill should be accompanied by a declaration defining what is meant by it, at least negatively — that is to say, that a declaration that the goodwill is not to be valued upon the principle that the surviving partner, if he were not the purchaser, will be restrained from setting up the same description of business." In cases of this description, where a partnership has been dissolved by efflux-ion of time or death, the goodwill is regarded as a part of the assets, and subject therefore to realisation on winding up the partnership; but it would obviously be absurd that, because a partnership becomes thus dissolved, those who formerly constituted the firm, or survivors thereof, where the dissolution has been due to death, should thereafter be restrained from carrying on what trade they pleased. Whatever restriction the sale of the goodwill may impose, it is clear that in this class of cases it could not extend to prevent the former partners carrying on a similar trade to that in which they were previously engaged. It is noteworthy that in *Johnson* v. *Helleley* it was thought necessary to warn intending purchasers that, though the goodwill was being sold, one of the persons who had previously carried on the business might continue to trade in the same town; and Lord WESTBURY thought it necessary to give the same warning to the person who was to value the goodwill in *Hall* v. *Barrows*. These circumstances appear to me to afford an indication that the Courts recognized that their view of what was meant by "goodwill" and the effect of a sale of it differed from the popular conception. Where the goodwill of a business is not sold under circumstances such as

I have been discussing, but the sale is the voluntary act of the vendors, I am by no means satisfied that a different effect might not have been given to the sale and the obligations which it imposed. It might have been held that the vendor was not entitled to derogate from his grant by seeking in any manner to withdraw from *the purchaser the customers of the [*8] old business, as he would do by setting up a business in such a place or under such circumstances that it would immediately compete for the old customers. It is now, however, too late to make any such distinction. I think it must be treated as settled that whenever the goodwill of a business is sold the vendor does not, by reason only of that sale, come under a restriction not to carry on a competing business. This is really the strong point in the position of those who maintain that *Labouchere* v. *Dawson* was wrongly decided. Lord Justice COTTON says: "It is admitted that a person who has sold the goodwill of his business may set up a similar business next door, and say that he is the person who carried on the old business. Yet such proceedings manifestly tend to prevent the old customers from going to the old premises. I cannot see where to draw the line. If he may, by his acts, invite the old customers to deal with him and not with the purchaser, why may he not apply to them and ask them to do so?" I quite feel the force of this argument; but it does not strike me as conclusive. It is often impossible to draw the line and yet to be perfectly certain that particular acts are on one side of it or the other. It does not seem to me to follow that because a man may, by his acts, invite all men to deal with him, and so, amongst the rest of mankind, invite the former customers of the firm, he may use the knowledge which he has acquired of what persons were customers of the old firm, in order, by an appeal to them, to seek to weaken their habit of dealing where they have dealt before, or whatever else binds them to the old business, and so to secure their custom for himself. This seems to me to be a direct and intentional dealing with the goodwill and an endeavour to destroy it. If a person who has previously been partner in a firm sets up in business on his own account and appeals generally for custom, he only does that which any member of the public may do, and which those carrying on the same trade are already doing. It is true that those who were former customers of the firm to which he belonged, may, of their own accord, transfer their custom to him; but this

incidental advantage is unavoidable, and does not result from any act of his. He only conducts his business in precisely the same way as he would if he had never been a member of the firm to which he previously belonged. But when he specifically and directly appeals to those who were customers of the previous firm, he seeks to take advantage of the connection previously formed by his old firm, and of the knowledge of that connection which he has previously acquired, to take that which constitutes the goodwill away from the persons to whom it has been sold, and to restore it to himself. It is said, indeed, that he may not represent himself as a successor of the old firm, or as carrying on a continuation of their business; but this, in many cases, appears to me of little importance, and of small practical advantage, if canvassing the customers of the old firm were allowed without restraint. I do not think that in cases where an injunction was granted in the terms employed in *Labouchere* v. *Dawson* there would be any real difficulty in drawing the line and determining whether there had been a breach of it or not. In several cases such injunctions were granted, and there is nothing to show that any practical difficulty arose in enforcing them. It is not material to consider whether, on the sale of a goodwill, the obligation on the part of the vendor to refrain from canvassing the customers is to be regarded as based on the principle that he is not entitled to depreciate that which he has sold, or as arising from an implied contract to abstain from any act intended to deprive the purchaser of that which has been sold to him, and to restore it to the vendor. I am satisfied that the obligation exists, and ought to be enforced by a Court of equity. I have, so far, dealt with the case as if the goodwill had been sold; but I think the rights and obligations must be precisely the same, for present purposes, when on the creation of a partnership it has been agreed that the goodwill shall belong exclusively to one of the partners.

For these reasons, I think the judgment must be reversed, [* 9] and that an injunction *should be granted in the form adopted in *Labouchere* v. *Dawson*, with the modification rendered necessary by the circumstance that here the partnership has not yet expired.

Under the very peculiar circumstances I think that no costs should be given here or in the Court of Appeal, but that the respondent should pay the costs of the action.

Lord ASHBOURNE concurred.

Lord MACNAGHTEN. — The question for the House to determine is this: Is a person who has sold the goodwill of his business, or one in the position of the respondent, who has been taken into partnership upon the terms that, on the expiration of the partnership, the goodwill shall belong solely to his partner, at liberty to solicit the old customers of the business to give their custom in preference to him? In 1872, Lord ROMILLY, the then Master of the Rolls, decided the question in the negative in *Labouchere* v. *Dawson*. In 1884 the question was determined the other way by the Court of Appeal in *Pearson* v. *Pearson*; and *Labouchere* v *Dawson* was overruled by Lord Justice BAGGALLAY and Lord Justice COTTON, differing from Lord Justice LINDLEY, who thought Lord ROMILLY's decision right. In *Labouchere* v. *Dawson* the question arose out of a sale of goodwill. In the present case there is a subsisting partnership between the appellants and the respondent in the business of varnish manufacturers. One of the terms of the partnership is, that the goodwill "shall be and remain the sole property" of the appellant Anna Trego. The partnership will expire on the 1st of January, 1896. The business is extremely lucrative; the connection very large. The respondent is, or was when this action was commenced, employing one of the clerks in copying out the names and addresses of the customers of the firm, with the avowed intention of soliciting their custom as soon as the partnership expires.

The objection of the action was to obtain an injunction to restrain this proceeding on the part of the respondent. It is not necessary to consider whether the action at the outset was or was not open to objection on technical or other grounds. For this much, at least, is to be said in favour of the respondent, that he met the case fairly and frankly from the very first, without any attempt to embarrass the plaintiff or to conceal his own object. His case was — "The law allows it." There was, indeed, or there seemed to be at the last moment, if I am not doing injustice to the respondent, an attempt on his part to recede from the position which up to that time he had maintained, and to suggest difficulties in the way of any judgment in favour of the appellants. But I am quite sure that your Lordships will not for a moment listen to such a suggestion after the case has been fought out in all the Courts on the real issue between the parties.

After the observations of my noble and learned friend on the woolsack (Lord HERSCHELL), I do not think it is necessary to deal with the question at any length. The arguments on the one side and on the other are summed up in *Labouchere* v. *Dawson* and *Pearson* v. *Pearson*, and little remains but to choose between the conflicting views of very eminent lawyers. Nor do I think it necessary to do more than allude to the case in which the late MASTER OF THE ROLLS (Sir G. JESSEL) held that a person who had sold the goodwill of his business could not even deal with his former customers. There I think the MASTER OF THE ROLLS went too far. The decision trenched on the rights of the public. On the other hand, the MASTER OF THE ROLLS was, I think, clearly right in refusing to extend the principle of *Labouchere* v. *Dawson* to a sale in bankruptcy. There is, I think, all the difference in the world between the case of a man who sells what belongs to himself and receives the consideration, and a man whose property is sold without his consent by his trustee in bankruptcy, and who comes under no obligation, express or implied, to the purchaser from the trustee.

"A person not a lawyer," said Vice-Chancellor PLUMER in [* 10] *Harrison* v. *Gardner*, * 2 Madd. 219 (17 R. R. 207), in 1817, "could not imagine that when the goodwill and trade of a retail shop were sold the vendor might the next day set up a shop within a few doors and draw off all the customers. The goodwill of such a shop in good faith and honest understanding must mean all the benefit of the trade, and not merely a benefit of which the vendor might the next day deprive the vendee. The authorities, however, are strong to show that the sale of a goodwill does not import restraint, and that a person selling the goodwill of a business for however large a consideration is not prevented setting up the trade."

I agree, in substance, with the VICE-CHANCELLOR'S observations. What "goodwill" means must depend on the character and nature of the business to which it is attached. Generally speaking, it means much more than what Lord ELDON took it to mean in the particular case before him in *Cruttwell* v. *Lye*, where he says, "The goodwill which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place." Often it happens that the goodwill is the very sap and life of the business, without which the business would yield little or no fruit. It is the whole advantage, whatever it may be, of the

reputation and connection of the firm, which may have been built up by years of honest work, or gained by lavish expenditure of money. I do not think that "a person not a lawyer," to use the VICE-CHANCELLOR'S phrase, would suppose that a man might sell the goodwill of his business and then set to work to withdraw from the purchaser the benefit of his purchase. However, authorities, which it is now too late to question, do undoubtedly show that a man who has sold the goodwill of his business may do much to regain his former position, and yet keep on the windy side of the law. The common law has always been jealous of any interference with trade. It was a lighter matter to interfere with freedom of contract and avoid covenants under seal. And so, the common law being the final arbiter on these questions, too little attention perhaps was paid to what was fair and just between man and man. A person who has sold the goodwill of his business is under no obligation to retire altogether from the field. Trade he undoubtedly may, and in the very same line of business. If he has not bound himself by special stipulation, and if there is no evidence of the understanding of the parties beyond that which is common to all cases, he is free to set up in business wherever he chooses. But, then, how far may he go? He may do everything that a stranger to the business, in ordinary course, would be in a position to do. He may set up where he will. He may push his wares as much as he pleases. He may thus interfere with the custom of his neighbour as a stranger and an outsider might do; but he must not, I think, avail himself of his special knowledge of the old customers to regain, without consideration, that which he has parted with for value. He must not make his approaches from the vantage-ground of his former position, moving under cover of a connection which is no longer his. He may not sell the custom and steal away the customers. That, at all events, is opposed to the common understanding of mankind and to the rudiments of commercial morality. Is it conceivable that the respondent would ever have been taken into partnership if he had hinted at such a manœuvre while negotiations for a partnership were pending? It was said that you cannot draw the line; but I think the line may be drawn at this point. It is quite true that you cannot protect the purchaser completely. With Lord Justice LINDLEY, I am disposed to regret it. It is quite true that it would be better that the purchaser should protect himself by taking apt covenants

from the person with whom he is dealing. But this, I think, is rather a counsel of perfection than a reason for leaving the purchaser entirely at the mercy of the vendor.

The principle on which *Labouchere* v. *Dawson* rests has been presented in various ways. A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate the thing which he has sold; there is an implied covenant on the sale of goodwill that the * vendor does not solicit the custom which he has parted with: it would be a fraud on the contract to do so. These, as it seems to me, are only different turns and glimpses of a proposition which I take to be elementary. It is not right to profess and purport to sell that which you do not mean the purchaser to have; it is not honest to pocket the price, and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own.

[* 11]

I am of opinion that the appellants are entitled to judgment.

Lord Davey. — This appeal comes before your Lordships in a somewhat unsatisfactory form. The plaintiffs and the defendant are partners together for a term which will expire on the 1st of January, 1896. On the expiration of the partnership the goodwill of the trade or business will be the sole property of the plaintiff Anna Trego. The notice of motion asked that the defendant might be restrained from making any copy or extract from the books of the partnership for any purpose other than the business of the partnership. In my opinion, the relief asked was misconceived. As well under the general law as under the express provision of the articles of partnership, the defendant was entitled during the partnership to have access to the books and to make copies thereof or extracts therefrom. It is conceivable that, if the defendant proposed to use such extracts for purposes injurious or hostile to the interests of his firm, he might be restrained from so doing. But in such case it would not be the obtaining of the information, but the use the partner proposed to make of it, when obtained, which would be restrained. In my opinion, the plaintiffs have no right to prevent the defendant from making any extracts from the books he thinks fit. Indeed, in the present case, as was observed at the Bar, the list of the creditors of the firm would be of service to the defendant if the law as laid down in *Labouchere* v. *Dawson* be maintained in order to enable him to

know whom he may not solicit, and to keep himself within the law. It was, however, admitted that the defendant intends after the expiration of the partnership to set up a business on his own account similar to that carried on by his firm, and he claims the right, if he thinks fit to do so, to solicit custom for his own business from the customers of his present firm. The question which has been argued before your Lordships is whether he has any such right. Upon this question there has been a remarkable difference of judicial opinion.

The defendant has contracted for valuable consideration that, at the expiration of the partnership, the goodwill shall belong to the plaintiff Anna Trego. To the lay mind it would undoubtedly seem a remarkable state of the law that a person who has entered into such a contract should be at liberty to go to the customers of the old firm and solicit them not to deal with the plaintiff, but to deal with him, and thus endeavour to secure for himself the business connection which he has contracted shall belong to the plaintiff. But it would probably seem to the lay mind equally remarkable that a man who has sold a business and goodwill to another should be at liberty to set up a similar business on his own account in the same street, next door, or opposite to the premises on which the business he has sold was and is carried on; nay, more, that he may advertise himself as having been a partner in or the founder or manager of the business which he has sold, provided he does not represent that the business which he is carrying on is the same or identical business with that which he has sold. Yet it is well settled that he may do all this. It has been established by a series of cases that in the sale of a goodwill or business no covenant is implied that the vendor will not start a new business in opposition to the purchaser of the old business. It is enough to refer to *Cruttwell* v. *Lye*, *Churton* v. *Douglas*, *Johnson* v. *Helleley*, and the *dicta* in *Hookham* v. *Pottage* (L. R. 8 Ch. 91). An express covenant not to carry on business would be incapable of being enforced as a restraint of trade, if it was larger than the necessity of the case, having regard to the particular character of the business, demanded, or, perhaps, *unless [*12] it was restricted in some way, either in time or space. It seems to follow that a general covenant not to carry on business in competition with the purchaser, which would be invalid if expressed, cannot be implied. I think it is to be gathered from

dicta and expressions used by learned Judges in the Court of Chancery that the idea of goodwill and of what is comprised in the sale of a business has silently been developed and grown since the days of Lord ELDON, who, in one passage of his judgment in *Cruttwell* v. *Lye*, seemed to regard goodwill as only the habit of customers to resort to the old premises. In *Labouchere* v. *Dawson* (1872), Lord ROMILLY granted an injunction against the vendor of the goodwill of a brewery from applying to any person who was a customer of the old firm prior to the date of the sale "privately, by letter, personally, or by a traveller, asking such customer to continue to deal with the vendor, or not to deal with the purchasers." The judgment was based on the principle that a man cannot derogate from his own grant; that he cannot sell a thing and destroy the value of it. It was admitted in the judgment that a man may solicit customers in any public manner he pleases. It is agreed on all hands that the decision went considerably beyond the cases relating to goodwill decided before that time. In *Ginesi* v. *Cooper* Sir GEORGE JESSEL expressed himself as prepared to extend the injunction so as to prohibit the vendor from dealing with the customers; and in *Leggott* v. *Barrett* he granted an injunction to that effect, but that part of the order was reversed in the Court of Appeal, and I understand that no such order is now asked for at the Bar. I may remark, in passing, that the injunction in *Ginesi* v. *Cooper* went far beyond the order in *Labouchere* v. *Dawson*, and to an extent which, in my opinion, cannot in any event be supported. It restrained the defendant "from in any way endeavouring to obtain the custom of such of the customers of the petitioner as were customers of the old firm, or from attempting to take away any portion of the business bought by the petitioner." This form of order would prevent the petitioner from issuing public advertisements, or carrying on business in competition with the petitioner, as it is admitted he may do.

In the case of *Leggott* v. *Barrett* there was no appeal against that part of the order, which simply followed *Labouchere* v. *Dawson*. It was therefore unnecessary for the Court to express any opinion upon it. The present MASTER OF THE ROLLS, however, expressed his approval of the doctrine. Lord Justice JAMES and Lord Justice COTTON did not express any approval of it, and I think it may be inferred from their judgments that Lord Justice COTTON certainly, and Lord Justice JAMES possibly, were not prepared to do so. In

Pearson v. *Pearson* Lord Justice BAGGALLAY and Lord Justice COTTON expressed their dissent from *Labouchere* v. *Dawson* and overruled it, while Lord Justice LINDLEY expressed his approval of it. This is in substance an appeal from *Pearson* v. *Pearson*.

On the argument of this case at your Lordship's Bar, it certainly appeared to me that the logical result of the principle upon which I understand the case of *Labouchere* v. *Dawson* to be founded would be to restrain the vendor of the goodwill of a business from carrying on business in competition with the purchaser at all. Your Lordships were not asked to take that course. And having regard to the well-established doctrine against restraint of trade, it would be impossible, as I have already said, to imply such a general covenant. I doubted whether it was right, if you allowed the vendor to trade in competition, to impose fetters upon him which might prevent his doing so effectually or successfully. I was also struck with the vagueness and difficulty of applying the injunction as granted in *Labouchere* v. *Dawson*. Questions may arise as to the persons to be comprised under the designation of customers. The injunction also may operate most unequally. In a business of a special character it might practically prevent the defendant from carrying on business at all, whereas, in a business of a different character, it might have very little effect.

Further consideration, however, has satisfied me that the decision in *Labouchere* v. *Dawson* (although it does not go so far as I think would be abstractedly just) * is founded on a [*13] right principle, and the difficulty of doing complete justice should not prevent us from meting out such scanty measure of protection to the purchaser of a goodwill as the circumstances permit of; and although the difficulties I have pointed out exist, they are not insuperable or (probably) formidable in practice. The question whether any person is a customer within the meaning of the injunction is one fact to be decided when it arises according to the circumstances of the case.

I have had the opportunity of reading the judgment which has been delivered by my noble and learned friend now on the woolsack, and I desire to express my concurrence in the reasoning upon which it is founded. In particular I think that the principle on which the injunction asked for may be supported is, that the defendant is availing himself of the knowledge of the connection formed by his old firm, which knowledge he acquired only as a

member of that firm, to take away or depreciate the value of the goodwill and connection which he has contracted shall belong to the plaintiff. I agree as to the form of the injunction and also as to the costs.

Judgment appealed from reversed. Declare that the appellants are entitled to an injunction restraining the respondent, his partners, servants, or agents from applying privately, by letter, personally, or by a traveller to any person who was, prior to the dissolution of the partnership of Tabor, Trego, & Co., a customer of that firm, asking such customer to continue, after the dissolution, to deal with him (the respondent), or not to deal with the appellants. Order that the respondent do repay to the appellants the costs of the Court of Appeal which have been paid to him.

ENGLISH NOTES.

After the full review of the cases in the speeches of the learned Lords in the principal case, it seems unnecessary to add anything as to the legal meaning of "goodwill," or the effect of a sale of the goodwill. It will be seen that what is directly decided is briefly this: that a person who contracts that the goodwill of a business shall belong to another, is not entitled, on setting up a rival trade, to solicit the customers of that business.

It is at the same time clear that all the learned Lords regard it as settled law that a person who sells the goodwill of a business (without express negative covenants) is not to be debarred from setting up a rival business and dealing with customers of the old business who come to him unsolicited; nor (as Lord DAVEY observes) can he be prevented from advertising the fact of his former relation with the old business so long as he does not represent that he is carrying on that business.

It may further be safely assumed on the opinion of Lord MACNAGHTEN, supported (although his statement is less explicit) by that of Lord HERSCHELL, that a sale (or transaction purporting to be a sale) of the "goodwill" by a trustee in bankruptcy is no ground for restraining the bankrupt from making any use whatever of his former experience or connection. In effect, the decision of the Court of Appeal (affirming that of the MASTER OF THE ROLLS) in *Walker* v. *Mottram* (1882), 19 Ch. D. 355, 51 L. J. Ch. 108, to this effect stands unassailed and confirmed.

AMERICAN NOTES.

That the vendor of a goodwill may set up a rival establishment is *held* in *Bergamini* v. *Bastian*, 35 Louisiana Annual, 60; 48 Am. Rep. 216; *Hoxie* v.

Chaney, 143 Massachusetts, 592; 58 Am. Rep. 149. Even next door. *Cottrell* v. *Babcock, &c. Co.*, 54 Connecticut, 138. See *Knoedler* v. *Glaenzer*, 55 Federal Reporter, 895; 20 Lawyers' Rep. Annotated, 733; *Hanna* v. *Andrews*, 50 Iowa, 462; *Bassett* v. *Percival*, 5 Allen (Mass.), 345.

The vendor may not hold himself out as carrying on his former business at another place. *Hall's Appeal*, 60 Penn. State, 458; 100 Am. Dec. 584: *Chaney* v. *Hoxie*, 143 Massachusetts, 502; 58 Am. Rep. 149. Nor set up business next door under a closely similar name. *Myers* v. *Kalamazoo Buggy Co.*, 54 Michigan, 215; 52 Am. Rep. 811, holding that customers are not "to be invited and enticed away from the old establishment," especially by such deceit. But "the only restraint the grant of goodwill imposes on the grantor is to prevent his subsequent employment of his own name so as to deceive and mislead the public." *Vonderbank* v. *Schmitt*, 44 Louisiana Annual, 264; 15 Lawyers' Rep. Annotated, 462. In *Marcus Ward & Co.* v. *Ward*, 40 New York State Reporter (N. Y. Supr. Ct.), 792, it was held that the vendor, in absence of agreement to the contrary, might solicit the older customers, citing *Pearson* v. *Pearson*. Such is the holding in *Close* v. *Flesher* (N. Y. C. P.), 59 ibid. 284, and in *Cottrell* v. *Babcock P. P. M. Co.*, 54 Connecticut, 122, which seems to be the only American case in a Superior Court on this question, and which carefully reviews the English decisions, approving *Pearson* v. *Pearson*. The Court said: "Therefore, in the absence of any express stipulation to the contrary, Babcock might lawfully establish a similar business at the next door, and by advertisement, circular, card, and personal solicitation invite all the world, including the old customers of Cottrell & Babcock, to come there and purchase of him; being very careful always, when addressing individuals or the public, either through the eye or the ear, not to lead any one to believe that the presses which he offered for sale were manufactured by the plaintiffs, or that he was the successor to the business of Cottrell & Babcock, or that Cottrell was not carrying on the business formerly conducted by that firm. That he may do this by advertisements and general circulars Courts are substantially agreed, we think. But some have drawn the line here and barred personal solicitation. They permit the vendor of a goodwill to establish a like business at the next door, and by the potential instrumentalities of the newspaper and general circulars, ask the old customers to buy at the new place, and withhold from him only the instrumentality of highest power, — namely, personal solicitation. To deny him the use of the newspaper and general circulars is to make successful business impossible, and therefore is to impose an absolute restraint upon the right to trade. This the Courts could not do except upon express agreement. But possibly the old customers might not see these, and in some cases the Courts have undertaken to preserve this possibility for the advantage of the vendor, and found a legal principle upon it. Other Courts have been of the opinion that no legal principle can be made to rest upon this distinction; that to deny the vendor personal access to old customers even would put him at such disadvantage in competition as to endanger his success; that they ought not upon inference to bar him from trade either totally or partially; and that all restraint of that nature must come from his positive agreement. And such we think is the present tendency of the law."

GUARANTEE.

See also PRINCIPAL and SURETY.
As to Statute of Frauds, see also "CONTRACT," Sect. IV., 6 R. C. 230 *et seq.*

No. 1. — HOLMES *v.* MITCHELL.

(C. P. 1859.)

RULE.

ALTHOUGH by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict., c. 97), s. 3, the rule of *Wain* v. *Warlters* (6 R. C. 231) is abrogated so far as relates to the requirement that the consideration of a guarantee shall be contained in the writing, it is still necessary that the whole of the promise should be in the writing; and although a promise imperfectly expressed might have been explained by the consideration if that had been in the writing, it cannot be explained by parol evidence of the consideration.

Holmes v. Mitchell.

28 L. J. C. P. 301–304 (s. c. 7 C. B. (N. S.) 361; 6 Jur. (N. S.) 73).

[301] *Statute of Frauds. — Guarantee. — Parol Evidence to explain the Promise.*

The defendant addressed the following letter to the plaintiff, relating to a proposed mortgage of certain leasehold property: "I saw Mr. L. this day, and I told him he had better call on you, as he seemed very anxious to have the mortgage completed, and I thought he offered very fair; but do as you please about it. I will take any responsibility myself respecting it, should there be any." After the letter had been received, the plaintiff had an interview with Mr. L., and on the faith of such letter lent £400 to A. B. on the said leasehold security. *Held*, that the letter was not a sufficient guarantee within section 4 of the Statute of Frauds, as the whole promise could not be made out without reference to parol evidence.

The first count of the declaration stated, that theretofore in consideration that the plaintiff at the request of the defendant would advance and lend the sum of (to wit) £400 to one

No. 1. — Holmes v. Mitchell, 28 L. J. C. P. 302.

Hook Spooner and one *William Cubitt, at interest, on [* 302] mortgage of certain houses and land then belonging to the said Hook Spooner and William Cubitt, the defendant undertook and promised the plaintiff to take on himself any responsibility by the said Hook Spooner and William Cubitt incurred to the plaintiff by reason of the said loan on mortgage, and to indemnify and protect the plaintiff from and against all loss, costs, and expenses incurred or sustained by the plaintiff by reason of the said loan on mortgage. Averment, that the plaintiff, relying on the said undertaking and promise of the defendant, did advance the said sum to the said Hook Spooner and William Cubitt, at interest, on the security of a mortgage of the said houses and land. And that afterwards, &c., the said principal sum and a large amount of interest thereon became due and payable by reason of the said loan and mortgage from the said Hook Spooner and William Cubitt to the plaintiff, and the said Hook Spooner and William Cubitt made default in payment thereof, and that the plaintiff had been necessarily put to heavy and great costs and expenses in trying to obtain payment of the said principal and interest so due and payable as aforesaid, by endeavouring to sell the said houses and land according to the provisions of the said mortgage and otherwise, and that the said houses and land were of much less value than the said principal sum so lent as aforesaid, and altogether insufficient to indemnify the plaintiff from and against the loss, charges, and expenses of and relating to the said loan. Breach, that the defendant, although often requested so to do, and although all conditions precedent had been fulfilled, and everything had happened to entitle the plaintiff to maintain this action, did not nor would discharge the responsibility of the said Hook Spooner and William Cubitt to the plaintiff in respect of the said loan on mortgage, and did not nor would indemnify and protect the plaintiff against the loss, costs, and expenses incurred or sustained by him by reason of the said loan; and did not nor would pay to the plaintiff the said principal and interest, and the said costs and expenses incurred and sustained by the plaintiff as aforesaid, or any part thereof; but wholly neglected and refused so to do, and the same were still due and payable to the plaintiff.

The second count varied from the first by stating the consideration for the defendant's promise to be a transfer of £400 stock by

the plaintiff to the said H. Spooner and W. Cubitt; and the third count alleged the consideration to be a loan of money generally.

The defendant pleaded, *inter alia*, a denial of the promise. Issue thereon.

At the trial, before CHANNELL, B., at the Bristol Summer Assizes for 1858, it appeared that the plaintiff, who had, in 1856, £400 in the funds, was advised by the defendant to advance the same at £6 per cent interest to the said H. Spooner and W. Cubitt, who were builders, on a leasehold security of some buildings near the Hackney Wick Road, Surrey, the defendant assuring the plaintiff that there would be no risk incurred, as it was a good security for £600; and that if the proposed mortgagors would not take less than £600, the defendant would himself advance £200 to make up the required amount. The defendant also promised to see his solicitor, Mr. Lyne, on the subject; and, shortly afterwards, the plaintiff received the following letter from the defendant: —

"ENFIELD HIGHWAY, October 21, 1856.

"DEAR CHARLES, — I saw Mr. Lyne this day, and I told him he had better call on you, as he seemed very anxious to have the mortgage completed, and I thought he offered very fair; but do as you please about it. I will take any responsibility myself respecting it, should there be any.

(Signed) "W. MITCHELL."

In a day or two after the receipt of this letter, Mr. Lyne called on the plaintiff, and informed him that Spooner and Cubitt would be content with the £400; and the plaintiff then consented to make the advance. The plaintiff accordingly sold out the £400 stock, and lent the proceeds on the aforesaid leasehold security; the plaintiff stating at the trial that he did so on the faith of the above letter of the 21st of October, 1856. The interest was not paid when it became due, and the security turned out to be altogether insufficient, upon which the plaintiff brought this action for not indemnifying him against the loss he had sustained.

[* 303] The learned Judge, * being of opinion that the contract alleged in the declaration was not proved, directed a nonsuit to be entered, giving the plaintiff, however, leave to move to set it aside, and enter a verdict for the plaintiff for such amount of damages as should be assessed by an arbitrator, if the Court

No. 1. — Holmes v. Mitchell, 28 L. J. C. P. 303.

should think that there was sufficient evidence to support such contract, the Court being at liberty to draw the inferences of fact which a jury might have done. A rule *nisi* to that effect was accordingly obtained in Michaelmas Term, 1858; against which, in the following Easter Term,

Karslake showed cause (April 20). — The 19 & 20 Vict., c. 97, s. 3, which dispenses with the necessity of showing the consideration on the face of the guarantee, does not assist the plaintiff. No point, indeed, arises under that Act. It is submitted that the contract alleged in the declaration was not proved; there was no request by the defendant to the plaintiff to advance the money, and there was no guarantee accepted by any one, the letter being only an offer by the defendant to guarantee, and not an absolute guarantee. *M'Iver* v. *Richardson*, 1 M. & S. 557; *Mozley* v. *Tinkler*, 1 Cr., M. & R. 692, 4 L. J. (N. S.) Exch. 84; *Symmons* v. *Want*, 2 Stark. N. P. 371; and *Gaunt* v. *Hill*, 1 Stark. 10. The principle of all the cases is, that where the terms and limits of responsibility are not ascertained, the offer does not amount to a guarantee.

Edwards and Holl, in support of the rule.

[Byles, J. — Is there sufficient to satisfy the Statute of Frauds? Suppose the writing to be, "I agree to guarantee you against any loss in respect of the contract we agreed to by parol yesterday." That leaves all to be ascertained by parol evidence.]

Before the recent Act, 19 & 20 Vict., c. 97, the plaintiff was obliged to prove both the consideration and the promise by written evidence; that statute, however, enables the plaintiff to prove the consideration by parol, leaving the obligation to prove the promise by writing as before the statute. The effect of this is, that one may now make out a promise and consideration by taking the parol and written evidence together (for both the promise and consideration are necessary to form one contract); and if that were to be done in the present case, there would be sufficient to satisfy the Statute of Frauds.

[Byles, J. — You are seeking to do more than prove the consideration by parol. You are endeavouring to import the terms of the consideration into the contract in order to explain it.]

The effect of a different construction would be to nullify the Act of Victoria, and to require the consideration to be proved always by written evidence. The promise here is in writing, and it is a promise by the defendant to take upon himself the responsibility

respecting the mortgage. Parol evidence is admissible to identify it, and to show what is the mortgage to which the promise refers. *Wilson* v. *Hart*, 7 Taunt. 295; *Mildmay's Case*, 1 Co. Rep. 176; *Miller* v. *Travers*, 8 Bing. 248. In *Shortrede* v. *Cheek*, 1 Ad. & E. 57, 3 L. J. (N. S.) K. B. 125, the action was on the following guarantee: "You will be so good as to withdraw the promissory note, and I will see you at Christmas, when you shall receive from me the amount of it, together with the memorandum of my son's making in the whole £45." The memorandum was not produced at the trial, but a promissory note for £35, made by the defendant's son and payable to plaintiff, was proved, and it was held that the consideration, which was the withdrawing the note, was sufficiently stated to satisfy the Statute of Frauds, though the amount and maker's name were not specified, as there was no evidence of any other note to which the agreement could apply. The case of *Bateman* v. *Phillips*, 15 East, 272, is also strongly in favour of the plaintiff. In that case a letter was addressed by the defendant to the plaintiff's attorney, stating that "the bearer, Williams, has a sum of money to receive from a client of mine some day next week, and I trust you will give him indulgence till that day, when I undertake to see you paid;" and it was held that that [*304] *was evidence within the 4th section of the Statute of Frauds to charge the defendant with the debt from Williams to the plaintiff, upon parol proof of its amount, and of the person to whom it was addressed being the plaintiff's attorney, and of his having received it in that character from Williams.

Cur. adv. vult.

Byles, J., now delivered the following judgment of the Court:[1] —

The question in this case is, whether, in a letter written by the defendant to the plaintiff, relating to a proposed mortgage, the following words are a sufficient guarantee within the 4th section of the Statute of Frauds: "I will take any responsibility myself respecting it, should there be any." It will be observed that at the time the letter was written no mortgage existed. The letter is silent as to the sum to be advanced, as to the rate of interest, as to the nature of the security, whether a mortgage in fee or for years, and as to the land to be charged. The letter, if read by itself, without reference to any previous conversations, would be a

[1] Cockburn, C. J., Crowder, J., Willes, J., and Byles, J.

promise to be responsible for any sum of money, however large, at any rate of interest, secured by any kind of mortgage, on any land with any title. That, however, would be an unreasonable construction, and is not its true meaning. It evidently refers to previous conversations, in which these particulars were supplied. The whole promise, therefore, is not in writing, as the statute requires that it should be. It cannot be made out without reference to previous conversations. In *Shortrede* v. *Cheek* and *Bateman* v. *Phillips* an existing document or an existing debt was referred to in the writing, so that evidence of oral statements was not necessary to explain the promise. The recent statute, 19 & 20 Vict., c. 97, s. 3, it is true, abrogates the rule laid down in *Wain* v. *Warlters*, 5 East, 10 (6 R. C. 231), and enables a party to give parol evidence of the consideration for a guarantee. But a consideration expressed in writing formerly discharged two offices, — it sustained the promise and might also explain it. Now, however, parol evidence, though it may supply the consideration, cannot go further and explain the promise. We, therefore, think the ruling of the learned Judge at the trial was correct, and the rule must be discharged. *Rule discharged.*

ENGLISH NOTES.

The effect of the Statute of Frauds as to a guarantee, apart from the provisions of the Mercantile Law Amendment Act, 1856, is sufficiently shown in the case of *Wain* v. *Warlters*, 6 R. C. 231, and in the notes, 6 R. C. 249 *et seq.*

No. 2. — BARCLAY *v.* LUCAS.

(K. B. 1784.)

No. 3. — BACKHOUSE *v.* HALL.

(Q. B. 1865.)

RULE.

A DOCUMENT in terms a continuing guarantee, given to two or more persons, constituting a body fluctuating as to members, will in general continue in force only during such time as the body remains unchanged.

No. 2. — Barclay v. Lucas, 1 T. R. 291 n.

Barclay and others v. Lucas.

1 Term Reports, 291 n.–294 n. (s. c. 3 Dougl. 321; 1 R. R. 202 n.).

Guarantee. — Faithful Service to Partnership.

A guarantee for faithful service to persons in a partnership trade subsists only during the subsistence of the partnership.

[291 n.] This was an action of debt on bond. The defendant, after craving oyer of the condition of the bond (reciting that the plaintiffs, at the recommendation of the obligors, had agreed to take one Philip Jones into their service and employ as a clerk in their shop and counting-house, and the obligors had agreed to become security for his fidelity, as far as £500 each), which declared that if the said P. Jones should faithfully account for and pay to the plaintiffs all sums of money he should at any time receive, &c., in the service of the plaintiffs, and did not embezzle, &c., then the condition to be void: pleaded, first, *non est factum*. Secondly, that from the date of the bond, 23rd February, 1779, till the 24th of June, 1780, the plaintiffs carried on the business of bankers, as copartners, in their own names only. That the service intended to be performed by the condition was to the plaintiffs, in the trade of bankers, so carried on by the plaintiffs only, and not in partnership with any other person. That on the 24th of June the plaintiffs received into partnership Robert Barclay. That P. Jones then quitted the service of the plaintiffs; and again, on the 24th June, 1780, entered into the service of the plaintiffs and Robert Barclay. That P. Jones, during all the time he remained in the service of the plaintiffs alone, well and faithfully accounted, &c. Thirdly, that P. Jones entered into the service of the plaintiffs on the 23rd February, 1779, continued in the same till the 24th June, 1780, and then quitted the service of the plaintiffs, and during that service accounted, &c.

Plaintiffs replied to the second plea (protesting against the intention of serving the plaintiffs only) that the service was meant and intended to be performed to them in the business so then carried on by them during all the time they should continue in the same business, and the said P. Jones should continue to serve therein. That on the 24th June, 1780, they admitted the said R. Barclay into partnership in their said trade, and in the same house where they exercised it at the time of making the said

No. 2. — Barclay v. Lucas, 1 T. R. 291 n., 292 n.

writing obligatory, who by such admission became possessed and entitled to one-fourth share of the said trade, and hath so continued. That on the 23rd February the said P. Jones entered, &c., and continued in the service of the plaintiffs till the 16th February, 1781, and was not during all that time discharged.

The replication then assigned the breach, that after the said partnership, and while P. Jones so continued in the said service, to wit, on the 16th February, 1781, he received in his said office and employment of one Mark Groves the sum of £20 16*s.*, three-fourths of which, to wit, £15 12*s.*, was received by him on account of the plaintiffs; which sum the said P. Jones was afterwards requested to pay, &c.

The plaintiffs replied to the third plea that P. Jones [292 n.] did not quit the service of the plaintiffs from the 23rd February, 1779, till 16th February, 1781; and then assigned a similar breach.

Rejoinder to the first replication (protesting that the service was not intended to be performed as in the replication mentioned; protesting also that the plaintiffs did not take the said R. Barclay into partnership in their said trade, and in the same house, &c.), that after the said partnership all the monies received by the said P. Jones in his said office, &c., were received by him on the joint account of the plaintiffs and R. Barclay, as copartners — traversing the receipt of three-fourths of the money in the replication mentioned by P. Jones, on account of the plaintiffs.

Rejoinder to the second replication, that the said P. Jones quitted the service of the plaintiffs in manner and form, &c.; on which issue was joined.

The plaintiffs surrejoined to the first rejoinder that the said P. Jones did receive the said three-fourths of the said sum of money on account of the said plaintiffs; on which issue was joined.

This cause was tried at the sittings after last Trinity Term, at Guildhall, before Lord MANSFIELD, when a verdict was found for the plaintiffs, — damages 1*s.*, costs 40*s.*, — subject to the opinion of the Court on the following case: —

That the bond stated in the declaration is the deed of the defendant. That on the 24th of June, 1780, Robert Barclay was taken into partnership with the plaintiffs. That on the 16th of February, 1781, Philip Jones, the clerk mentioned in the condition

No. 2. — Barclay v. Lucas, 1 T. R. 292 n.

of the bond, received of Mark Groves £20 16*s.* on account of the new partnership, and has not paid it over to the plaintiffs.

The question for the opinion of the Court is, whether the defendant is liable to the plaintiffs in this action?

Chambre, for the plaintiffs.

The real question is, whether the defendant is discharged from the obligation of this bond, as to the embezzlement of the plaintiffs' share of the money which belongs to them jointly with R. Barclay, by their having taken in a new partner. But that circumstance cannot vary the obligation, because this bond was given to secure the fidelity of the clerk to the plaintiffs' banking-house, rather than to the plaintiffs in their individual capacity. This question would never have arisen had it not been for the case of *Wright* v. *Russel*, 3 Wils. 532, 2 Blac. Rep. 934. But that case differs from this in two very material circumstances: there, nothing turned on the intention of the parties, which is denied in this case by protestation; and the breach in that case was assigned in defrauding the partnership generally; here, it is only for that proportion of the sum which really belonged to the plaintiffs. In cases like the present, the intention of the parties is to be attended to; and this bond was indisputably given as an indemnity to the plaintiffs in their business. The case of *Arlington* v. *Merrick*, 2 Saund. 412, cited in *Wright* v. *Russel*, does not apply; for the security in that case was expressly given only for six months, and the Court would not extend it. The case in All. 10 is liable to the same objection. If a contrary construction were to prevail, and banking-houses were obliged to take fresh securities from every clerk, upon every change of partners, it would be productive of infinite inconvenience. An embezzlement of the plaintiffs' share of the £20 16*s.* by the clerk is sufficiently stated to the Court; for it is found that he received the whole sum, and has not paid it over.

Baldwin, for the defendant, contended that there was no material difference between this case and that of *Wright* v. *Russel*; and there the Court would not extend the words of the condition. The service in the contemplation of the parties was to be performed to the plaintiffs only, and was not meant to be extended to others. The inconvenience would be great if, upon an extension of trade, the securities should be still liable; while the inconvenience to the other party would be trifling, because they would only be obliged to send to their sureties upon the change of partners. Besides, in

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the present case, it does not appear to be an embezzlement of the separate effects of the plaintiffs; and, this being [293 n.] a joint injury to the plaintiffs and the other partner, the action cannot be severed.

Chambre in reply. — The cases which have already been determined on the subject prove that the strict letter of the condition has not always been attended to, and the Court has ever had recourse to the recital from which the intention of the parties is to be collected. The injury of which the plaintiffs complain is not a joint injury with the former partner; but the complaint which the plaintiffs have made on this record is only respecting the embezzlement of the plaintiff's property; and this the jury have found.

Lord Mansfield, C. J.

The question in this case turns upon the intention of the parties at the time of entering into the contract. In questions upon intention we must look to the subject-matter of the contract. It is notorious that there are many banking-houses in the city which continue for generations. This can only be done by a constant succession of partners; and even if they should not bear the same name with the first proprietors, yet still the house frequently continues under the original firm. To carry on this business it is necessary to have a great number of clerks, whose office is extremely beneficial; for besides the present fees and emoluments, they are frequently taken into partnership in process of time. But it is of the utmost consequence to these houses that the clerks should behave honestly; and therefore a security is taken for their fidelity. The circumstance of taking in a new partner makes no difference, either as to the quantity of the business or the extent of the engagement. He continues to carry on the business of the plaintiffs; and this contract is coextensive with his continuance in the house. This is a security to the house of the plaintiffs, and no change of partners will discharge the obligor. Thinking as I do upon the subject, I am very glad to find that there is a material distinction between this case and that in the Common Pleas. The defendant has objected that the present action is improperly brought; but I think that the plaintiffs are entitled to the whole sum embezzled, and if so, they are clearly entitled to less. I am therefore of opinion, from the manifest intention of the parties, and from the clerk's continuing in the business notwithstanding one of the partners has been changed, that the plaintiffs are entitled to recover.

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Willes, J. — The intention of the parties ought to govern the Court in making their decision; in order to discover which, we must look at the recital of the condition of the bond. Now this recital is very material, for it states that the service is to be performed in the shop and counting-house and not to the plaintiffs. The partners in a banking-house are perpetually changing; and where a number of clerks are employed, the inconvenience of demanding fresh securities from each upon every such change would be enormous. The introduction of a new partner does not increase the risk to the sureties; for a bond of this kind is an undertaking for the clerk's honesty.

I cannot say that I accede to the doctrine laid down by the Court of Common Pleas in the case of *Wright* v. *Russel*, to the extent to which it is there carried; but at present it is sufficient to say that this case differs from that.

In the case in 2 Saund. the recital of the condition showed that the engagement was limited to six months; and the Court would not extend it. And the case in All. 10 was governed by the same principle.

Buller, J. — The defendant has rested his case upon two grounds.

First, On the authority of the case of *Wright* v. *Russel*.

Secondly, On the form of these pleadings.

As to the first. This case is distinguishable from that in the Common Pleas; there, the breach assigned was for embez-
[294 n.] zling the whole partnership money; and I observe, from the report of that case, that Mr. J. Gould lays much stress upon the point that the breach assigned was for embezzling the partnership money, whereas it should have been for the plaintiffs' money only. I confess I do not see the force of that objection: but, however, it is not applicable to this case, for here the plaintiffs have confined the breach to that proportion of the money which was actually their property. Mr. Baldwin has said that the jury have not found that three-fourths of this money belonged to the plaintiffs, nor that it had been embezzled by the clerk, and that therefore the issues were found for the defendant; and that if only one of them were found for him, the defendant was entitled to judgment. But let us see how that stands. In the first replication (to the second plea) it is stated that £20 was received after the new partnership, three-fourths of which, namely, £15, were the property of the plaintiffs; this the jury have found for him. In the second

replication (to the third plea) it is alleged that the clerk received £15 on account of the plaintiffs, which he embezzled; this also is found for the plaintiffs. This brings it to the construction of the contract, which must depend on the intention of the parties. What has been said by my Lord seems decisive, that his bond appears on the face of it to be a security to the house, and not to the persons of the plaintiffs; and that as long as the clerk continues in that house, the defendant is liable. Lord C. J. De Grey seems to rely much on the taking in a new partner being the plaintiffs' own act, and says that it determined the obligation. But I wish he had gone farther, and said what would have been the case supposing there had been mutual bonds, the one that the plaintiffs should continue to employ the clerk, the other, that the clerk should act honestly, if the plaintiffs had taken in a new partner, whether they would not still have been obliged to employ the clerk? If that would not have discharged the obligation to employ, it is decisive; for both the obligations must be equally binding. Here the charge is not increased; the security is not given for the ability, but for the fidelity, of the clerk. If the construction contended for were to prevail, it might equally be said, that if the plaintiffs' trade had been but £300 per annum at the time of giving the bond, they should not increase it without an application to the sureties.

Per Curiam. *Let the postea be delivered to the plaintiffs.*

Backhouse v. Hall.

34 L. J. Q. B. 141–144 (s. c. 6 B. & S. 507; 11 Jur. (N. S.) 562; 12 L. T. 375; 13 W. R. 654).

Guarantee. — Change in Partners. [141]

The Mercantile Law Amendment Act, 1856 (19 & 20 Vict., c. 97), s. 4, — which enacts that no promise for the debt or default of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, or for the debt or default of such a firm, shall be binding in respect of anything done after a change in any one or more of the persons constituting the firm, or the person trading under the name of the firm, unless the intention of the parties that such promise shall continue notwithstanding such change, shall appear either by express stipulation, or by necessary implication from the nature of the firm or otherwise, — is only an affirmance of the law of England previous to the statute.

Three persons carried on the business of ship-builders under the name of "G. W. & W. J. Hall." No person of that name had been in the partnership for some time, and the plaintiff and defendant being both aware of the constitu-

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tion of the partnership, the defendant gave the plaintiff the following guarantee: "In consideration that you have at my instance and request consented to open an account with the firm of G. W. & W. J. Hall, ship-builders, I hereby guarantee the payment to you of the monies that at any time may become due not exceeding £5000." *Held*, that the guarantee ceased on the death of one of the partners, as a contrary intention did not appear by express stipulation, or by necessary implication from the nature of the firm or otherwise.

This was an action brought by the plaintiffs to recover from the defendant £5000, alleged to be payable under a guarantee; and the following case was stated without pleadings.

1. For some years before 1840 George Wilkin Hall and William Joseph Hall, brothers of the defendant, carried on business, in copartnership, as ship-builders, at Sunderland, under the style and form of "G. W. & W. J. Hall."

2 and 3. On the 25th of October, 1840, W. J. Hall died. After his death the business continued to be carried on by the surviving partner together with the widow, Sarah Hall, and the defendant, as executors of the deceased partner, under the name and style of "G. W. & W. J. Hall."

4. On the 18th of December, 1856, G. W. Hall died.

5. For some years after the death of W. J. Hall, the surviving partner in the original firm, G. W. Hall, acted as manager
[* 142] *of the firm of "G. W. & W. J. Hall," receiving a yearly salary of £400 for his services; and for a few years prior to the death of G. W. Hall he and the defendant had the joint management of the business of the firm. After the death of G. W. Hall, the defendant, together with Sarah Hall, the widow of W. J. Hall, and Elizabeth, widow of G. W. Hall, continued to carry on the business under the same style, and the defendant continued, as manager, to receive a salary.

6. On the 31st of December, 1857, the partnership then subsisting between James Hall, the son and sole executor of G. W. Hall, and the defendant and Sarah Hall, the executors of W. J. Hall, was dissolved, and an arrangement made by which the business was to be, for the future, carried on under the style or firm of "G. W. & W. J. Hall," by Sarah Hall and Elizabeth Hall, and their nephew, George S. Moore. The defendant, at the same time, ceased to act as manager of the business. Notice of this newly arranged partnership and its position was given by circular.

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7. In February, 1858, G. S. Moore applied to the plaintiffs, who had then opened a branch bank at Sunderland, to give the firm accommodation by allowing them to open an account to be overdrawn to the extent of £5000.

8. This the plaintiffs consented to do upon receiving the joint and several guarantee of the defendant and G. S. Moore; and accordingly, on the 25th of February, 1858, the defendant and G. S. Moore gave to the plaintiffs the following guarantee: —

"Sunderland, Feb. 25, 1858.

"To Messrs. Backhouse & Co., Bankers.

"Gentlemen, — In consideration that you have at our instance and request consented to open an account with the firm of G. W. & W. J. Hall, ship-builders, Monkwearmouth, we and each of us do hereby guarantee the payment to you of the monies that at any time may become due, not exceeding £5000, such payment by us not to be made at a shorter date than twelve months from this date.

(Signed) "G. S. Moore.
"J. C. Hall.

"We request you to become guarantee for us in manner set out.
"Elizabeth Hall.
"Sarah Hall."

9. In pursuance of this guarantee the plaintiffs from time to time gave accommodation to the firm of G. W. & W. J. Hall, and the firm thereby became indebted to the plaintiffs on a balance of account in a sum which on the 17th of September, 1858, exceeded £5000.

10. On the 5th of July, 1858, Elizabeth Hall died. This was known to the defendant at the time, but was not known to the plaintiffs until the year 1862. At the date of the death of E. Hall the balance of account due from the firm of G. W. & W. J. Hall was £3286 6*s.* 9*d.*

11. After the death of E. Hall the business of the firm of G. W. & W. J. Hall was carried on under that style as before by the surviving partners, S. Hall & G. S. Moore, and the plaintiffs as before kept the accounts of them as continued accounts.

12. On the 2nd of July, 1861, the plaintiffs received from the defendant's attorney a letter, giving them notice that the defend-

ant "would not hold himself liable to them after the receipt of this notice, for any monies to be hereafter advanced by them to the firm of G. W. & W. J. Hall."

14. On the 2nd of July, 1861, the balance of account due to the plaintiffs exceeded the sum of £5000. The whole of the advances upon which this balance accrued were made subsequently to the death of Elizabeth Hall.

15. The defendant in no other way, if at all, made himself responsible for that or any other balance unless by virtue of his guarantee of the 25th of February, 1858.

16. The firm of G. W. & W. J. Hall stopped payment on the 17th of February, 1862.

17. The Court is to be at liberty to draw all inferences of fact which a jury might draw.

18. The question for the consideration of the Court is, whether under the circumstances hereinbefore stated the defendant is liable under his guarantee to pay to the plaintiffs any and what portion of the balance due to the plaintiffs from the firm of G. W. & W. J. Hall on the 2nd of July, 1861.

Bovill (Karslake and Hannen with him), for the plaintiffs. — The question turns on the construction of the 19 & 20 Vict., c. 97, s. 4, which enacts that "No promise to answer for the debt, &c., of a firm consisting of two or more persons shall be binding [*143] on * the person making the promise in respect of anything done after a change shall have taken place in the persons constituting the firm, unless the intention of the parties, that the promise shall continue to be binding notwithstanding such change, shall appear either by express stipulation, or by necessary implication from the nature of the firm or otherwise." Here the guarantee was given, not for money to be advanced to the individuals trading under the firm, but to the firm of G. W. & W. J. Hall, all parties knowing that this was merely the name of the firm, and that none of the individuals composing it were of that name, and that the firm had been constantly changing. It therefore appears from the nature of the firm and otherwise that the guarantee was intended to be continuing.

[Blackburn, J. — It would appear that the statute, as far as the law of England is concerned, has made no difference.]

Lush (Watkin Williams with him), *contra*. — Before the statute a guarantee was at an end in case of any change in the firm to

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whom or on whose behalf it was given. *Weston* v. *Barton*, 4 Taunt. 673 (13 R. R. 726); *Simson* v. *Cooke*, 8 B. Moore, 588, 1 Bing. 452. *Barclay* v. *Lucas*, 3 Dougl. 321, 1 T. R. 291, n. (p. 470, *ante*), which is a contrary decision, must be taken as overruled, as pointed out by MANSFIELD, C. J., in *Weston* v. *Barton*.

[BLACKBURN, J. — In Chitty on Contracts, 473, 7th edit., it is said: "Before the statute 19 & 20 Vict., c. 97, it appears to have been held that when the security is given to a house, *e. g.* to a banking-house, and not to the members of a firm by name, the surety would still continue liable, notwithstanding a change of partners:" for which is cited in the note "*Barclay* v. *Lucas*; and see *Metcalf* v. *Bruin*, 12 East, 400 (11 R. R. 432); and *per Curiam*, *Chapman* v. *Beckington*, 3 Q. B. 703, 722." And it is added, "*Barclay* v. *Lucas* has been doubted; see 1 Bos. & P. (N. R.) 42; 4 Taunt. 681. But it gives the true principle, viz., that if the words show an intention that the security should continue, notwithstanding the accession of a new partner, the surety shall be liable."]

The editor of Chitty is mistaken as to *Barclay* v. *Lucas*, for the bond was there to the plaintiffs as individuals, and not to the firm.

[BLACKBURN, J. — In the notes to *Arlington* v. *Merricke*, 2 Wms. Saund. 414 *a*, n. (5), Serjeant Williams cites *Barclay* v. *Lucas* as good law; and there is no expression to the contrary in the notes to Mr. Justice Patteson's edition.]

Barclay v. *Lucas* must be considered to be virtually overruled, as a misapplication of the true principle on which such cases are to be decided, viz., that the intention that the guarantee shall continue must distinctly appear from express stipulation or other expressions in the instrument itself, or from the nature of the firm; see the notes 3 Dougl. 326, citing amongst other cases *Strange* v. *Lee*, 3 East, 484; see p. 490.

Bovill, in reply. — In *Weston* v. *Barton* and *Simson* v. *Cooke* the individual members of the partnership, and not the firm, were named.

[BLACKBURN, J. — In *Metcalf* v. *Bruin* it was decided that the guarantee continued, because the intention appeared on the face of the document that the guarantee was to be for faithful service to the company, which was a fluctuating body; and Lord ELLENBOROUGH and GROSE, J., put it expressly on the intention appearing, which the LORD CHIEF JUSTICE says was the principle on which *Barclay* v. *Lucas* proceeded. Is there anything in the

nature of this firm different from that of any other firm, where persons carry on business in the name of a "firm" instead of the names of the actual partners?]

1 Bell's Commentaries, pp. 374–5 (p. 285, 6th edit.), on the law of Scotland as to guarantees, was also cited; and "Smith's Mercantile Law," 5th edit. p. 54, n., as to the law of England before the statute.

Blackburn, J. — I am of opinion that our judgment ought to be for the defendant. The action is brought on a guarantee made in February, 1858, and signed by the defendant and another in the following terms. [The learned Judge read the guarantee.] At the time it was made the firm of G. W. & W. J. Hall had long ceased to be carried on by the persons of that name, but [* 144] the business had for very many years * been carried on in that name by different persons, and several changes in the actual partners had occurred, and at the time the guarantee was given the firm consisted of two widows and a third person; and all parties knew that. Afterwards one of the three partners died. The defendant was aware of that, but the plaintiffs were not, and the business was still carried on as before; it was not shown that there was any duty on the defendant to disclose the death to the plaintiffs, nor that the defendant concealed the death; but the plaintiffs not knowing of it, had no opportunity of exercising their option of whether they would continue their advances; but this can have no effect on the construction of the guarantee. The amount due at the time of the death has been paid off, but further advances have been made by the plaintiffs, and there is due a sum exceeding the amount guaranteed; and the question is, whether since the Mercantile Law Amendment Act, 1856, the guarantee was continuing after the death of Elizabeth Hall, so as to be binding on the defendant to make good these further advances. Before the Act passed it had been well established that a guarantee was not a continuing guarantee, so as to remain in force after the death of a member of a firm to or for whom it was given, unless it appeared by the terms of the instrument that it was the intention of the parties that it should so continue. Now, when this intention appeared by express stipulation in the instrument itself from the terms used, as when the firm was named, with the addition "and their successors," there was no difficulty. But when there was no such addition, as in

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Barclay v. *Lucas*, it has been doubted whether the intention was sufficiently expressed; and on the present occasion it is unnecessary for us to give any decisive opinion on that case, as the two cases are very different. In *Metcalf* v. *Bruin* the guarantee was given to trustees for the Globe Insurance Company, a non-corporate body; and the guarantee was for the faithful service to that body, and that the servant would faithfully account and pay over any balance in his hands to the company, or the directors for the time being; and the Court of King's Bench held that it sufficiently appeared to be the intention that the guarantee should be for faithful service to the fluctuating body who should from time to time constitute the company; and on the ground that the intention appeared from necessary implication on the face of the bond and the nature of the business, the plaintiff recovered as on a continuing guarantee. Then comes the Mercantile Law Amendment Act, not apparently altering the English law as settled by decided cases, but intended to make the law of Great Britain uniform: the Scotch law, if it differed, being assimilated to the English by c. 60 of the same session, s. 7. The 4th section of the English Act is as follows. [The learned Judge read the material parts of the section.] That does not alter the law, but fixes it at what the decisions had previously said was the law. The enacting part says that the change in a firm shall put an end to a guarantee: that was what decided cases had always said; and the saving clause is simply, that where there is an express stipulation, or as in *Metcalf* v. *Bruin* a manifest intention appears, the guarantee shall continue notwithstanding the change, as it is obviously right and just that it should. The question, therefore, is simply, does the intention that the guarantee should continue appear by express stipulation, or by necessary implication from the nature of the firm, or otherwise? Now, there is certainly no express stipulation, and there is nothing in the nature of the firm beyond those incidents common to every partnership, — that the partners had changed and might again change. If it was really intended that the guarantee should be a continuing one for the firm, a very few additional words would have shown that intention. If the defendant was at one time under the impression that he was bound by the guarantee as a continuing guarantee, that can have no effect upon the construction that is to be put upon the contract from its terms, or by necessary implication from the nature of the firm.

Although it is, therefore, hard upon the plaintiffs, there must be judgment for the defendant.

SHEE, J., concurred. *Judgment for the defendant.*

ENGLISH NOTES.

The rule of common law, as settled by the above cases, is confirmed by the Partnership Act, 1890 (53 & 54 Vict., c. 39), s. 18, which replaces the Mercantile Law Amendment Act, 1856 (19 & 20 Vict., c. 97), s. 4.

AMERICAN NOTES.

Backhouse v. *Hall* is cited in Brandt on Suretyship and Guaranty, sect. 118, with the following more or less analogous cases tending to uphold this principle: *Parham Sew. Mach. Co.* v. *Brock*, 113 Massachusetts, 194; *Shaw* v. *Vandusen*, 5 Up. Can. Q. B. 353; *Bell* v. *Norwood*, 7 Louisiana, 94; *Cremer* v. *Higginson*, 1 Mason (U. S. Sup. Ct.), 323; *Bill* v. *Barker*, 16 Gray (Mass.), 62; *State* v. *Boon*, 44 Missouri, 254.

If a surety becomes bound to or for several persons, the engagement must be understood to be in behalf of those persons collectively and jointly, and in case of the death of any of them it will not continue on behalf of the survivors, unless the obligation so states, or the persons to or for whom the surety is bound are described as a class, body, or the like, so as to plainly imply that the security is given to or for a class or body. *Gargan* v. *School District*, 4 Colorado, 53, citing *Barclay* v. *Lucas*.

Mr. Brandt cites *Barclay* v. *Lucas* (sect. 121), with the remark: "This decision can only be sustained upon the ground that it was the intention of the parties, and the effect of the obligation, to give the security to the house as a house, the same as if it had been a corporation, and regardless of who might compose it."

In the Colorado case above cited the Court said: "The doctrine that whenever a surety becomes bound for more than one person, his obligation does not extend beyond the death or retirement of any of those for whom he has engaged to be answerable, is established by an almost unbroken line of decisions, both English and American, reaching back for three-quarters of a century." The Court recognize the exception pointed out in *Barclay* v. *Lucas*, where the parties "are described as a class, company, bank, or the like."

HABEAS CORPUS.

No. 1. — HOBHOUSE'S CASE.

(K. B. 1820.)

No. 2. — EX PARTE JACQUES BESSET.

(K. B. 1844.)

RULE.

THE power of the Court of Queen's Bench (of which the powers are now vested in the High Court of Justice) to issue a writ of *habeas corpus* exists at the common law.

The common-law writ, although a writ of right, is not grantable of course.

Hobhouse's Case.

3 Barn. & Ald. 420–425 (s. c. 2 Chit. 215; 22 R. R. 443).

Habeas Corpus. — Common-law Writ.

The writ of *habeas corpus* at common law, although a writ of right, is [420] not grantable of course, but only on motion in term time, stating a probable cause for the application, and verified by affidavit. *Quære*, whether under the Stat. 31 Car. II., c. 2, which only applies to cases where the application is made to a Judge in vacation, the writ be grantable of course.

J. Evans moved, on Thursday, February 3, for a *habeas corpus* to bring up the body of John Cam Hobhouse, Esquire, on an affidavit that he was confined in Newgate by a warrant from the Right Honourable Charles Manners Sutton, Speaker of the House of Commons, a copy whereof was annexed. Being desired to point out his objections to the warrant, he contended that he was not bound to do so, because the writ of *habeas corpus* was grantable, in the first instance, as of course; and the proper time for pointing out the defects of the warrant would be upon the * return to the writ. And he cited *Rex* v. *Flower*, 8 T. R. [* 421] 324 (4 R. R. 662), where Lord KENYON said that the Court

were bound to grant the writ; and he also referred to Stat. 31 Car. II., c. 2, s. 10, where a Judge in vacation is directed to do it, under a penalty of £500 upon refusal; which was a proof of the opinion of the Legislature on the point. The Court, upon this (*absente* BAYLEY, J.), granted the writ; and upon the return of it the prisoner, in person, took several objections to the Speaker's warrant, which were overruled; and he was, accordingly, remanded. The prisoner having quitted the Court,

ABBOTT, C. J. — I wish to express my opinion as to the propriety of granting this writ of *habeas corpus*. It seems to me that the Court are not bound as of course, and without any cause shown, to grant this writ in the first instance. It would be a very strange inconsistency in the law of England if we were bound to do an act nugatory in itself, and that would be the case, if, upon a view of the copy of the warrant, a writ was, of course, to issue, the only effect of which would be that, upon the return to it, the prisoner must be remanded. When this application was made, we were referred to a *dictum* of Lord KENYON, in *Rex* v. *Flower*, and, in deference to that authority, we granted the writ. But I think, upon subsequent consideration, that we ought not to have granted it, inasmuch as it then appeared that it could be of no use whatsoever to the prisoner. There is a very elaborate opinion, delivered by Lord Ch. J. WILMOT, in 1758, in the House of Lords, in [*422] answer to a question put by that House, whether, in * cases not within the 31 Car. II., c. 2, writs of *habeas corpus ad subjiciendum*, by the law, as it then stood, ought to issue of course, or upon probable cause, verified by affidavit.[1] He there states it to be his opinion that those writs ought not to issue of course; adding, that a writ which issues on a probable cause, verified by affidavit, is as much a writ of right as a writ which issues of course. And again, page 87, he says, "There is no such thing in the law as writs of grace and favour issuing from the Judges. They are all writs of right, but they are not all writs of course." And in page 88, "writs of *habeas corpus* upon imprisonment, for criminal matters, were never writs of course; they always issued upon a motion, grafted on a copy of the commitment; and cases may be put in which they ought not to be granted." 1 Lev. 1; Comberb. 74. If malefactors under sentence of death, in all the gaols of the kingdom, could have these writs of course, the sen-

[1] Wilmot's Opinions and Judgments, 81.

tence of the law might be suspended, and perhaps totally eluded, by them. The 31 Car. II., c. 2, makes no alteration in the practice of the courts in granting them: they are still moved for in term time, upon the same foundation as they were before; and when a single Judge, in vacation time, grants them under 31 Car. II., c. 2, in criminal cases, a copy of the commitment, or an affidavit of the refusal of it, must be laid before him. He must judge, even in that case, whether treason or felony is specially expressed in the warrant of commitment; and there have been a great number of cases where a doubt has arisen on the frame and wording of the warrant; so that, even upon the Act, the probable cause of bailing is really disclosed * to the Judge, unless the copy [*423] of the commitment is refused, and then the law will presume everything against it; and in cases out of the Act, which take in all kinds of confinement and restraint, not for criminal or supposed criminal matter, and to which this question relates, it has been the uniform uninterrupted practice, both of the Court of King's Bench and of the Judges of that Court, that the foundation upon which the writ is prayed should be laid before the Court or Judge who awards it. I fully concur in this opinion, and, therefore, I desire that our having granted this writ may not be considered as any authority to show that this Court is bound to grant a writ of *habeas corpus*, as of course, and without any ground being stated for our interference.

Bayley, J., concurred.

Holroyd, J. — The *dictum* of Lord Kenyon in *Rex* v. *Flower* was the reason of our granting the writ in the first instance, although it was contrary to the impression on my mind at the time. Even upon 31 Car. II. I should think it very questionable whether the writ was grantable of course; for that act directs a Judge to grant the writ in vacation, upon view of the copy of the warrant. Now for what purpose is he to view the warrant, unless he is to judge of the validity of the commitment? It is admitted that he must judge of it afterwards, and must either discharge or remand the prisoner accordingly. Then why should he not do so at first? This, however, is not an application within that Act, being for a *habeas corpus* at common law; and in that case it is laid down by Lord Ch. J. Wilmot that the party applying for the writ must lay a reasonable * ground before the [*424] Court, in order to induce them to grant the writ.

No. 1. — Hobhouse's Case, 3 Barn. & Ald. 424, 425.

BEST, J. — When this writ was moved for, we were pressed with the opinion of Lord KENYON, in *Rex* v. *Flower*, which seemed to support the claim then insisted upon. The Court did not then think that that opinion was well founded. But, as it was a matter of great importance to the liberty of the subject, we thought it proper that the matter should be well considered. I am now convinced, that when we see that the party, when brought before us, must be remanded, we are not bound to grant the writ. It would be manifestly absurd to bring a person from Cornwall or Northumberland, when the Court knew, at the time when the writ was moved for, that the prisoner, when brought before them, must be remanded. The Court, in *Rex* v. *Schiever*, 2 Burr. 765, refused the writ, when it appeared that the person applying was a prisoner of war; and the same thing was done by the Court of Common Pleas, in the *Spanish Sailor's Case*, 2 Black. Rep. 1324. If the Court could not examine into the legality of the custody until the prisoner was brought before them, they ought to have granted the writs in both those cases; but they said, as the prisoners must be remanded when brought before them, they would refuse the writ. The cases in which prisoners have a right to the writ are where they are detained in prison, when they are entitled to be admitted to bail. This right is secured to such prisoners by the 31 Car. II., c. 2. Before the passing of that statute, prisoners com-
[* 425] mitted for bailable offences were sometimes * kept for a long time in prison, without being brought to trial. To prevent this grievous oppression, the *habeas corpus* act directs, that if any person be committed or detained for any crime, unless for treason or felony, other than persons convict, or in execution by legal process, he may apply to the LORD CHANCELLOR, or a Judge in vacation, and the person so applied to is to cause such prisoner to be brought before him, and to discharge him from imprisonment, upon his recognisance to appear in the Court where his offence is cognisable. In cases which come under this statute a single Judge may, perhaps, be obliged to grant the writ as of course, but in no other: and the provisions of this law do not apply to writs grantable by the Court in term time. I, therefore, fully concur in the opinions already pronounced on this subject.

The prisoner was remanded.

No. 2. — Ex parte Jacques Besset, 6 Q. B. 481, 482.

Ex parte Jacques Besset.

6 Q. B. 481–486 (s. c. 14 L. J. M. C. 17; 9 Jur. 66).

Habeas Corpus. — Common-law Writ.

Under the Convention Act, 6 & 7 Vict., c. 75, for committing and de- [481] livering up to justice, on requisition by an agent of the King of the French, persons accused of certain crimes done in France, a warrant to detain a party so accused "until he shall be discharged by due course of law" is insufficient; and the party imprisoned under it is entitled to his discharge on *habeas corpus*.

The *habeas corpus* for that purpose is claimable at common law.

On *habeas corpus*, and motion to discharge from such imprisonment for an offence committed abroad, the warrant being defective, the Court (assuming that they could look into the depositions referred to by the warrant) cannot on their own authority remand the prisoner as a person charged with a crime.

M. Chambers, in this term (November 2nd), moved for a *habeas corpus* directed to the gaoler or keeper of Her Majesty's gaol or prison in Giltspur Street, in the city of London, or his deputy, commanding him to have before the Queen at Westminster, immediately, &c., the body of Jacques Besset, being detained under the custody of the said gaoler, with the day and cause of his being taken and detained, &c., to undergo and receive, &c. The Court granted the writ; and the keeper now brought the prisoner into Court, and made return:

"That, before the said writ came to me, viz., on the 4th day of November, 1844, the said Jacques Besset was committed to my custody by virtue of a certain order or commitment (Stat. 6 & 7 Vict., c. 75, ss. 1, 3) the tenor whereof followeth; viz.:

"To all and every the constables and other officers of the peace for the city of London and the liberties thereof, whom these may concern, and to the keeper of the Giltspur Street Prison, in London.

"London to wit. } These are in Her Majesty's name to command you and every of you forthwith safely to * convey, and [* 482] deliver into the custody of the said keeper, the body of Jacques Besset, being charged before me, one of Her Majesty's justices of the peace in and for the said city and liberties, by the oaths of Philip Antoine Mathieu and others, taken and sworn in the presence and hearing of the said Jacques Besset, for that the said Jacques Besset is accused of having committed in France the

crime of fraudulent bankruptcy, as appears by the warrant of arrest issued by a competent Judge in France, and duly authenticated before me, and as also appears by the warrant of one of Her Majesty's principal secretaries of state requiring me to take cognisance of such crime, the said crime and the acts done being clearly set forth and proved before me by the oaths of the said Philip Antoine Mathieu and others, and by the depositions of several witnesses, taken in France, and duly proved by the said Philip Antoine Mathieu and others: whom you the said keeper are hereby required to receive, and him in your custody safely keep until he shall be discharged by due course of law. And for your so doing this shall be to you and each of you a sufficient warrant. Given under my hand and seal this 23rd day of September, 1844.

"WM. MAGNAY, Mayor of London."

"And this is the cause," &c.

The return having been read,

M. Chambers moved that the prisoner should be discharged.

E. James opposed the discharge. First, it is proposed [* 483] to show by affidavit that the party is a foreigner, and * the circumstances under which he stands charged with crime. Such affidavits, being merely explanatory, and not contradictory to the return, may be received. [Lord DENMAN, C. J. — The convention Act, 6 & 7 Vict., c. 75, under which the prisoner is committed, enacts (s. 1) that, "in case requisition be duly made, pursuant to the said convention, in the name of His Majesty the King of the French, by his ambassador," &c., "to deliver up to justice any person who, being accused of having committed" one of certain specified crimes within the French territories, shall be found within Her Majesty's dominions, it shall be lawful for one of Her Majesty's secretaries of state, by his warrant to signify such requisition, and require all justices, &c., to aid in apprehending such person, and committing him to gaol for the purpose of his being delivered up to justice according to the convention, and thereupon it shall be lawful for any justice, &c., to examine into the charge on oath, and, upon such evidence as would justify committing for trial if the crime of which the party is accused were committed here, "to issue his warrant for the apprehension of such person, and also to commit the person so accused to gaol,

No. 2. — Ex parte Jacques Besset, 6 Q. B. 483-485.

there to remain until delivered pursuant to such requisition as aforesaid." Here the commitment is "until he shall be discharged by due course of law." How do you get over that objection?] In the first place, the prisoner is not in a situation entitling him to the benefit of it. The Court will look at the depositions; and, if they see that the party is detained on charge of a crime for which he may be tried in another country, they will remand him to custody. [COLERIDGE, J. — On what law or statute do you consider the prisoner's application to be founded?] It appears to be under * Stat. 31 Car. II., c. 2. The object of [* 484] that Act is that parties charged with "criminal or supposed criminal matters" shall not be detained in person for offences which may be tried in this country. The provision in sect. 3, that surety shall be taken for the party's appearance in the Court of King's Bench or at the next assizes or sessions, agrees with this construction. Stat. 56 Geo. III., c. 100, is only an extension of the former Act, and does not require any different interpretation. And in *Rex* v. *Mackintosh* (1 Stra. 308) it was held that the statute of Charles did not apply to a person committed for treason done in Scotland. [Lord DENMAN, C. J. — Why may not we consider the writ as issued at common law?] If the Court will not act under the statute in the case of a person charged with a crime done abroad, neither will it interfere in such a case at common law. [Lord DENMAN, C. J. — According to your argument, our gaolers are gaolers for France without the convention.] If the writ lies, the objection pointed out is not fatal to the warrant. "Discharged by due course of law" means discharged by the course pointed out in the statute, namely, by being delivered up as the enactment requires. In *Ex parte Goff* (3 M. & S. 203) a warrant concluding in this form was held, on *habeas corpus*, sufficiently certain. It is true that the warrant there (by which a collector was committed for not accounting, under Stat. 25 Geo. III., c. 41) recited an adjudication that the party should be committed until he should have made a true and fair account, and paid over the moneys remaining in his hands; but here, if reference be made to the Convention Act, the course by which the prisoner is to be discharged becomes equally certain. [WIGHTMAN, * J. — [* 485] Suppose no requisition is made under sect. 3 of Stat. 6 & 7 Vict., c. 75, for an order to deliver the party up to an agent of the King of the French.] At the end of two months he will be dis-

charged, under sect. 4. In *Mash's Case* (2 W. Bl. 805), a warrant concluding "until he shall be discharged from thence by due course of law" was held insufficient; but there the things required for the discharge were acts to be done by the prisoner himself. [WIGHTMAN J. — The present case is within the terms of the judgment there, that where a man is committed for any crime, at common law or by statute, for which he is punishable by indictment, "he is to be committed till discharged by due course of law; but when it is in pursuance of a special authority, the terms of the commitment must be special, and exactly pursue that authority."] Supposing the return here defective, it will be a question whether the Court will not look into the depositions on which the warrant was granted, and, if they show a crime committed, remand the prisoner. [WIGHTMAN, J. — That could be only where a crime appeared for which trial might be in this country. Lord DENMAN, C. J. — The depositions are nothing to us, unless under the statute. COLERIDGE, J. — Does the statute give any power of this kind to us?] It does not limit the general authority of the Court.

Sir F. Thesiger, Solicitor-General, with whom was Gurney, appeared on behalf of the Lord Mayor, but only to abide such order as the Court should make.

M. Chambers, for the prisoner, was not further heard.

[*486] * Lord DENMAN, C. J. — I regret that, on the first application which has come before us under this statute, the warrant is so defective that we cannot allow the Act to take effect. Neither we nor the gaoler have any power but such as the statute gives; and its provisions have not been rightly pursued. We are asked to remand the prisoner on our own authority, as charged with a crime: but we know nothing of the crime unless as it is brought before us by the warrant; or, I should rather say, we have no authority of the kind in such a case. If we could act in the manner suggested, the statute would have been unnecessary. The prisoner must be discharged.

WILLIAMS, COLERIDGE, and WIGHTMAN, Js., concurred.

Lord DENMAN, C. J. — It is proper that it should be understood that this application is at common law. The statute 31 Car. II., c. 2, is not necessary to the right of making it.

Prisoner discharged.

ENGLISH NOTES.

There are several writs of *habeas corpus*, each of them being used for a particular purpose. Of these, much the most important is the *habeas corpus ad subjiciendum*, which is the remedy provided by the law of England for a person deprived of his liberty. As appears from *In re Jacques Besset*, No. 2, *supra*, the right to obtain this writ existed at common law. The Habeas Corpus Act (31 Car. II., c. 2), was only declaratory. "Though a very beneficial enactment, and eminently remedial in many cases of illegal imprisonment, it introduced no new principle, nor conferred any right upon the subject." Hallam's Constitutional History of England, 8th ed., vol. 3, p. 12. It is to be observed that the statute does not apply where the detention is for treason or felony (s. 1).

The jurisdiction to grant the writ was not confined to the Court of Queen's Bench, but belonged also to the Courts of Common Pleas: *Wood's Case* (1771), 3 Wils. 172; and Exchequer: see *Attorney-General* v. *Fadden* (1815), 1 Price, 403; and also to the Court of Chancery: *In re Belson* (1850), 7 Moore P. C. C. 114, 14 Jur. 631.

The writ issues in vacation as well as in term time. *Rex* v. *Mead* (1758), 1 Burr. 542; *Leonard Watson's Case* (1839), 9 Ad. & El. 731; s. c. *nom. Reg.* v. *Batcheldor*, 1 P. & D. 516, 2 W. W. & H. 19; *In re Carus Wilson* (1845), 7 Q. B. 984, 14 L. J. Q. B. 105; *In re Belson*, *supra*.

By 25 & 26 Vict., c. 20, the writ shall not issue into any colony or foreign dominion of the Crown where there is a Court having authority to grant such a writ. The statute, however, does not apply to the Isle of Man. *In re Brown* (1864), 33 L. J. Q. B. 193, 10 L. T. 458. It has been held that the writ issues to Jersey. *In re Carus Wilson*, *supra*; *Dodd's Case* (1857), 2 De G. & J. 510.

The writ will not issue where it is absolutely impossible to comply with it, as where the person detained has died: per Esher, M. R., in *Reg.* v. *Barnardo*, *Gossage's Case* (1890), 24 Q. B. D. 283, 59 L. J. Q. B. 345; and it appears now to be settled that it is not available where the party against whom it is applied for has parted with the custody of the person whose production is desired, even though he may have parted with such custody wrongfully, or for the purpose of evading the writ if issued: s. c. in H. L. *nom. Barnardo* v. *Ford* (1892), 1892, A. C. 326, 61 L. J. Q. B. 728; disapproving the law as laid down in *Reg.* v. *Barnardo* (1889), 23 Q. B. D. 305, 58 L. J. Q. B. 553, 61 L. T. 547, 37 W. R. 789; and *Reg.* v. *Barnardo*, *Gossage's Case* (1890), *supra*.

A member of Parliament committed by the House for breach of priv-

ilege cannot be discharged by *habeas corpus* during its session: *Brass Crosby's Case* (1771), 2 W. Bl. 754, 3 Wils. 188; nor can a person, not a member, be so discharged who has been committed for a similar cause by either the House of Lords: *Rex* v. *Flower* (1799), 8 T. R. 314, 4 R. R. 662; or the House of Commons: *Rex* v. *Hobhouse* (1820), No. I, *supra*: and where a committal by the latter House was returned to the writ, it was held that 56 Geo. III., c. 100, s. 3, did not apply so as to enable the Court to inquire into the existence of the alleged contempt: *In re Sheriff of Middlesex* (1840), 11 Ad. & El. 273.

The same rule applies where a person has been committed for contempt by a colonial legislature. *Speaker of the Legislative Assembly of Victoria* v. *Glass* (1871), L. R. 3 P. C. 560, 40 L. J. P. C. 17.

The writ lies to bring up a person wrongfully detained as a lunatic: *Rex* v. *Turlington* (1761), 2 Burr. 1115; *Rex* v. *Clarke* (1762), 3 Burr. 1362; *In re Greenwood* (1855), 24 L. J. M. C. 137; unless it is shown that it would be injurious to himself or others to set him at liberty: *Ib.*: but there must be an affidavit either by the person in whose name the application is made, or by the person really responsible for costs: *In re Carter* (13 May, 1893), 95 L. T. Journal, 37. The Court will not necessarily grant an immediate discharge, but may allow time for a medical examination. *In re Cody* (1860), 5 Ir. Jur. (N. S.) 175; *Reg.* v. *Rialt* (1860), 11 Ir. R. C. L. 279. The writ is available even where the detention is under a magistrate's order: *Ib.*: *Reg.* v. *Peacock* (1870), 12 Cox C. C. 21. A European British subject in India was arrested for homicide. A district magistrate on seeing him and hearing medical evidence, deemed him insane and unfit to be tried, and so reported to the Government of the Presidency, who made an order under 14 & 15 Vict., c. 81, s. 1, for his removal to England. On his arrival there, a royal warrant issued under sect. 2 for his reception into a lunatic asylum, where he was accordingly kept. It was held that his detention was lawful. *In re Maltby* (1881), 7 Q. B. D. 18, 50 L. J. Q. B. 413, 44 L. T. 711, 29 W. R. 678.

Formerly the rule appears to have been that a husband until guilty of cruelty, or until judicial separation, was entitled to detain his wife in his custody: *In re Price* (1860), 2 F. & F. 263; and see *In re Cochrane* (1840), 8 Dowl. P. C. 630: but it is now settled that where she refuses to live with him he is in no circumstances entitled to keep her in confinement, and if he does so, the writ will issue on her behalf: *Reg.* v. *Jackson* (1891), 1891, 1 Q. B. 671, 60 L. J. Q. B. 346, 64 L. T. 679, 39 W. R. 407, overruling *In re Cochrane, supra*. The Court has refused a writ to bring up a married woman on an affidavit that she was desirous of disposing of her separate property, and that her husband would not admit the necessary parties to see her. *Rex* v. *Middleton* (1819), 1 Chit.

654, 22 R. R. 826. Before the decision in *Reg.* v. *Jackson*, *supra*, where the wife was by her own desire living apart from her husband and was under no restraint, the Court refused a *habeas corpus* on the application of the husband for the purpose of restoring her to his custody. *Reg.* v. *Legatt* (1852), 18 Q. B. 781; s. c. *nom. Ex parte Sandilands*, 21 L. J. Q. B. 312. On a motion for a writ to issue to a private person on the application of the husband to bring up the body of his wife, the affidavit must state that she is detained against her will. *Rex* v. *Wiseman* (1805), 2 Smith, 617, 8 R. R. 724.

Where the custody of an infant is in question, the matter rests absolutely in the discretion of the Judge, and the interests of the child are primarily to be considered by him: *In re Taylor* (1876), 4 Ch. D. 157, 46 L. J. Ch. 399, 36 L. T. 169, 25 W. R. 69. Subject to this the Court will grant a writ of *habeas corpus* to the person having a legal right to the custody of the infant: *In re Matthews* (1860), 12 Ir. C. L. R. 233; *In re Andrews* (1873), L. R. 8 Q. B. 153, 28 L. T. 353, 21 W. R. 480; s. c. *nom. In re Edwards*, 42 L. J. Q. B. 99; but the applicant must show that he *primâ facie* possesses a legal right to the custody: *In re Harper* (1895), 1895, 2 Ir. R. 571. As to the persons to whom the Court will intrust the custody of children in particular cases, the reader is referred to the heading "Infant," in Vol. 13 R. C.

Where the object of the writ is to determine who is to have the custody of an infant, an appeal lies from the order of the Queen's Bench Division directing the writ to issue. *Barnardo* v. *M'Hugh* (1891), 1891, A. C. 388, 65 L. T. 423, 40 W. R. 97; *Barnardo* v. *Ford* (1892), 1892, A. C. 326, 61 L. J. Q. B. 728, 67 L. T. 1; and see now as to appeal in these cases, Judicature Act, 1894, s. 1, (1) (b) (i).

The writ will not issue to bring up a person who is properly detained under military arrest. *Blake's Case* (1814), 2 M. & S. 428; *Jones* v. *Dancers* (1839), 5 M. & W. 234, 7 Dowl. P. C. 394, 2 H. & H. 84. Where a commissioned officer in the Royal Navy had resigned his commission and left his ship without permission of the Admiralty, and had been arrested in naval custody with a view to being brought to trial before a court-martial, the Court refused to grant a writ for his discharge. *Reg.* v. *Cuming, Ex parte Hall* (1887), 19 Q. B. D. 13, 56 L. J. Q. B. 287, 57 L. T. 477, 39 W. R. 9. But a rule was made absolute for a *habeas corpus* to discharge a lieutenant in the army who had been tried by court-martial for a civil offence and imprisoned in the Queen's prison: *Reg.* v. *Allen* (1860), 3 El. & El. 338; and the writ will issue to bring up a person who has been wrongfully imprisoned as a deserter from the navy: *In re Thompson* (1889), 5 Times L. R. 565, 601.

The writ does not lie for an alien enemy, a prisoner of war. *Rex* v.

Schiever (1759), 2 Burr. 765; *The Spanish Sailor's Case* (1780), 2 W. Bl. 1324, 2 Ld. Ken. 473. As regards other aliens the writ will be granted where the detention is illegal, but not otherwise. See *Hottentot Venus's Case* (1810), 13 East, 195, 12 R. R. 320; *Folkein* v. *Critico* (1811), 13 East, 457; *Ex parte Besset* (1844), No. 2, *supra*.

Where a prisoner has been committed for extradition in respect of crimes *primâ facie* not of a political character, and there is no evidence that they are of a political character, or that his extradition is demanded in order to punish him for an offence of a political character, but only a suggestion to that effect, the Court will not grant a *habeas corpus*. *In re Arton* (1895), 1896, 1 Q. B. 108, 65 L. J. M. C. 23, 73 L. T. 687, 44 W. R. 238. See p. 98, *ante*.

The writ is not in general grantable where the party is in execution on a criminal charge after judgment on an indictment according to the course of the common law. *Ex parte Lees* (1858), El., Bl. & El. 828; s. c. *nom. Reg.* v. *Lees*, 27 L. J. Q. B. 403. The writ has been refused for the purpose of discharging a person convicted at the Central Criminal Court, on the ground that when the verdict was returned the Court was not fully constituted: *Rex* v. *Carlile* (1831), 4 Car. & P. 415; and on the ground that the offence was committed out of the jurisdiction of that Court: *In re Newton* (1855), 16 C. B. 97, 24 L. J. C. P. 148. But it has been held that the Court may discharge a prisoner if satisfied that the conviction was made without jurisdiction. *In re Authers* (1889), 22 Q. B. D. 345, 58 L. J. M. C. 62, 60 L. T. 454, 37 W. R. 320.

The writ may be used for the purpose of obtaining the release of a person, privileged from arrest on process of the County Court, who has been imprisoned under such process. *Ex parte Dakins* (1855), 16 C. B. 77.

The Court will grant a rule for a writ to bring up a prisoner, in order that the validity of the warrant of commitment may be discussed, where he has been summarily convicted: *Ex parte Cross* (1857), 2 Hurl. & Colt. 354, 26 L. J. M. C. 201; but not where he is under sentence of the High Court: *Ex parte Dunn* (1847), 5 C. B. 215, 5 D. & L. 345, 17 L. J. C. P. 105. The question will not be entertained in the absence of the prisoner. *Ex parte Martin* (1840), 9 Dowl. P. C. 194.

The writ will be granted to bring up a defendant to an information for the purpose of identifying him: *Attorney-General* v. *Fadden* (1815), 1 Price, 403; but not, without urgent necessity, to bring up for that purpose a prisoner committed on a charge of murder before the coroner's jury inquiring into the death of the deceased: *Ex parte Wakley* (1845), 7 Q. B. 653, 14 L. J. M. C. 188. It is available where access of relatives is improperly denied to the person detained: *Ex parte Thompson*

(1860), 30 L. J. M. C. 19; *In re Daley* (1860), 2 F. & F. 258; but not on the ground that a prisoner has been improperly removed to a particular part of the prison in which he is confined: *Ex parte Rogers* (1843), 7 Jur. 992; *Ex parte Cobbett* (1848), 15 C. B. 418.

This writ is not grantable as of right to bring up a prisoner merely in order that he may conduct his own case in person: *Rex* v. *Parkyns* (1820), 3 B. & Ald. 679 *n.*; *Attorney-General* v. *Hunt* (1821), 9 Price, 147; *Ford* v. *Nassau* (1842), 9 M. & W. 793, 1 Dowl. (N. S.) 631; *Ford* v. *Graham* (1850), 10 C. B. 369, 1 L. M. & P. 604; *Binns* v. *Moseley* (1857), 2 C. B. (N. S.) 116; *Ex parte Cobbett* (1858), 2 Hurl. & N. 155, 27 L. J. Ex. 199; *Weldon* v. *Neal* (1885), 15 Q. B. D. 471, 54 L. J. Q. B. 399, 33 W. R. 581; see, however, *Attorney-General* v. *Cleave* (1834), 2 Dowl. P. C. 668, where it was granted to enable a prisoner to defend a revenue information. But a prisoner is entitled to be brought up to be present at the hearing of a rule in which he is interested, if he can satisfy the Court that substantial justice cannot be done in his absence. *Clark* v. *Smith* (1847), 3 C. B. 984. The writ is not available for the purpose of bringing up a prisoner in order that he may vote at a parliamentary election. *In re Jones* (1835), 2 Ad. & El. 436, 4 N. & M. 340, 1 H. & W. 7. It is intended for the release of persons unlawfully detained, and should not be used as a punitive process against one who has illegally parted with possession of the person sought to be released. *Barnardo* v. *Ford* (1892), 1892, A. C. 326, 61 L. J. Q. B. 728, 67 L. T. 1, 41 W. R. 333.

As regards the manner of applying for this writ see Crown Office Rules, rr. 235–238, and R. S. C., 1883, Ord. 59, r. 1, g. Where it becomes necessary to bring up a prisoner to be present at the argument of an appeal from the Queen's Bench Division, the application for the writ should be made to that Division, and not to the Court of Appeal. *O'Brien* v. *Reg.* (1890), 26 L. R. Ir. 451. It has been held that a prisoner who has sued out a *habeas corpus* is not bound by the decision of any one of the Courts to which the application lies, but may take the opinion of them all as to the propriety of his imprisonment: *Ex parte Partington* (1845), 13 M. & W. 679, 2 D. & L. 650; and it would seem that this is still the practice: R. S. C., 1883, Ord. 72, r. 2; and see the judgment of Lord Herschell in *Cox* v. *Hakes* (1890), 15 App. Cas. 506, 60 L. J. Q. B. 89, 63 L. T. 392, 39 W. R. 145.

The motion should be made by counsel. *In re Newton* (1855), 16 C. B. 97, 24 L. J. C. P. 148. A wife has, however, been allowed to move on behalf of her husband. *Cobbett* v. *Hudson* (1850), 15 Q. B. 988.

As appears from *Hobhouse's Case* (1820), No. 1, *supra*, the application must be grounded upon affidavit. The affidavit should be that of

the person in custody, or it should be shown that he is so coerced as to be unable to make one: *In re Parker* (1839), 5 M. & W. 32, 7 D. P. C. 208, 2 H. & H. 45; and in any case there must be an affidavit showing that the application is authorised by him: *Ex parte Child* (1855), 15 C. B. 238. And see *Rex* v. *Wiseman* (1805), 2 Smith, 617, 8 R. R. 724. The writ will not issue without an affidavit either from the person in whose name the application is made, or by the person really responsible for costs. *In re Carter* (1893), 95 L. T. Journal, 37. The writ has been granted to bring up the person detained on an affidavit of his father: *In re Thompson* (1860), 30 L. J. M. C. 19; and of his sister: *In re Daley* (1860), 2 F. & F. 258. Where the affidavits on the application were conflicting, the Court directed an issue to be tried by a jury. *In re Guerin* (1888), 58 L. J. M. C. 45 *n.* Where the conviction under which a person has been imprisoned cannot be removed out of the inferior court, a copy of it, verified by affidavit, may be used to show whether the conviction is valid: *Rex* v. *Mellor* (1833), 2 D. P. C. 173.

The Court may either make an order absolute *ex parte* for the writ to issue in the first instance, or they may grant an order *nisi*. C. O. R. (1886), r. 236.

Where a rule was granted for a writ to discharge a prisoner committed on an order of magistrates for assisting to conceal a deserter, it was held that notice thereof should be served upon the Secretary-at-War. *Ex parte Gale* (1845), 14 L. J. Q. B. 316, 3 D. & L. 114. Where after the rule has been granted a warrant issues which makes the custody lawful, the Court will discharge the rule. *Ex parte Dauncey* (1844), 8 Jur. 829. On the argument of a rule *nisi*, the case is to be treated as if the prisoner had been brought up on a *habeas corpus* granted in the first instance, and the Court will look to the whole cause appearing upon the return. *Ex parte Bull* (1846), 15 L. J. Q. B. 235. Where a conditional order is made absolute, it has reference, as to the jurisdiction of the Court, to the date of the conditional order; and as to the responsibility of the party to whom the writ is addressed, to the date of service. *In re Matthews* (1869), 12 Ir. C. L. R. 241.

An appeal lies from an order of the Queen's Bench Division granting a writ: *Ex parte Cox* (1887), 20 Q. B. D. 1, 57 L. J. Q. B. 98, 58 L. T. 323, 36 W. R. 209; *Barnardo* v. *McHugh* (1891), 1891, A. C. 388, 61 L. J. Q. B. 721, 65 L. T. 423, 40 W. R. 97; *Barnardo* v. *Ford*, *Gossage's Case* (1892), 1892, A. C. 326, 61 L. J. Q. B. 728, 67 L. T. 1, 41 W. R. 333; or refusing one: *Ex parte Cox*, *supra*; *Reg.* v. *Jackson* (1891), 1891, 1 Q. B. 671; though not in the case of a person committed for an extradition crime: *Ex parte Woodhall* (1888), 20 Q. B. D. 832, 57 L. J. M. C. 71, 59 L. T. 841, 36 W. R. 655; and see *Reg.* v.

Weil (1882), 9 Q. B. D. 701, 53 L. J. M. C. 74, 31 W. R. 60. Such appeals, however, will not be encouraged. *Barnardo* v. *McHugh*, *supra*. It has been doubted whether an appeal lies from an order of a judge granting a writ. *Ex parte Emerson* (Feb. 4, 1895), 11 Times L. R. 218. See further, Judicature Act, 1894, s. 1, (1) (b) (i).

Where a writ has been granted, and an order made discharging the prisoner from custody, there is no right of appeal. *Cox* v. *Hakes* (1890), 15 App. Cas. 596, 60 L. J. Q. B. 89, 63 L. T. 392, 39 W. R. 145.

Where the prisoner is in custody on a criminal charge, the writ must issue on the Crown side of the Court: *In re Taylor* (1803), 3 East, 232; *In re Easton* (1840), 12 Ad. & El. 645, 4 P. & D. 558, 9 D. P. C. 207, 1 W. P. C. 49; and a proceeding under the Smuggling Act, 4 & 5 Will. IV., c. 13, was held a criminal matter within this rule: *Ib.*; but where the writ issued from the plea side and no objection was taken before the order was made for the prisoner's discharge, it was held that the irregularity had been waived: *Ib.*

The writ must be served personally, if possible: C. O. R. (1886), r. 239; and asking for time to answer affidavits does not waive the objection if service is not so effected: *Reg.* v. *Rowe* (1894), 71 L. T. 578.

The writ may be amended by leave of the Court. *Ex parte Davies* (1837), 4 Bing. N. C. 17, 5 Scott, 241, 6 D. P. C. 181. If it is improperly or fraudulently obtained it may be quashed. *Carus Wilson's Case* (1845), 7 Q. B. 984.

The writ may be issued returnable immediately and before a Judge. *Betteswerth* v. *Bell* (1766), 3 Burr. 1875. It may be issued in vacation by a Judge in Chambers, returnable in Court in term time: *In re Carus Wilson*, *supra*; or before himself in Chambers: *Watson's Case* (1839), 9 Ad. & El. 731, 744; and where so issued returnable immediately it does not expire by the commencement of term, but the party detained may be brought into Court: *Rex* v. *Shelbeare* (1758), 1 Burr. 460; *Rex* v. *Mead* (1758), 1 Burr. 542. Where a writ returnable immediately was served in the evening, the Court refused an attachment for not making a return on the following day, although the prisoners were in the immediate vicinity of the Court. *Stockdale* v. *Hansard* (1840), 8 D. P. C. 474. The Court will not receive the return before the return day. *Marsh's Case* (1772), 2 W. Bl. 805.

As regards the form of the return and the practice relating thereto, see C. O. R. (1886), rr. 241–245. A return is not invalid for mere want of form. *Rex* v. *Bethel* (1694), 5 Mod. 19. It does not require minute accuracy, if substantially correct. *Barne's Case* (1620), 2 Rol. Rep. 157; *Watson's Case* (1839), 9 Ad. & El. 731; s. c. *nom. Reg.* v. *Batcheldor*, 1 P. & D. 516, 2 W. W. & H. 19. And it will be taken

as true until it is impeached, and need not be verified by affidavit. *Ib.* But a return on the face of it ambiguous, if not fortified by affidavit clearing up all doubt, will be held bad. *Reg.* v. *Roberts* (1859), 2 F. & F. 272.

A return is sufficient which shows that the prisoner is detained under sentence of a Court of competent jurisdiction: *Rex* v. *Suddio* (1801), 1 East, 306; *Reg.* v. *Brenan* (1847), 10 Q. B. 492, 16 L. J. Q. B. 289; without specifying the particular circumstances necessary to warrant the conviction: *Rex* v. *Suddio*, *supra*.

Where the commitment set out in the return is bad on the face of it, the Court will not adjourn the case in order that the conviction may be brought up and the commitment amended by it. *In re Timson* (1870), L. R. 5 Ex. 257, 39 L. J. M. C. 129, 22 L. T. 614, 18 W. R. 849. Where the return shows a good warrant of commitment, it is no objection that that warrant has been substituted for another, which was bad. *Ex parte Smith* (1858), 3 Hurl. & N. 227, 27 L. J. M. C. 186; *In re Phipps* (1863), 11 W. R. 730.

A return will presumably be sufficient which shows satisfactory grounds for believing that the person detained is no longer in the custody, power, or control of the person upon whom the writ has been served, even though the latter had illegally parted with the custody. *Barnardo* v. *Ford* (1892), 1892, A. C. 326, 61 L. J. Q. B. 728, 67 L. T. 1, 41 W. R. 333. The Court will not give any advice to a gaoler as to the matter of which his return should consist. *In re Fletcher* (1844), 1 D. & L. 726, 13 L. J. M. C. 16.

Where it is returned that the prisoner is in custody under the sentence of a competent Court, affidavits will not be admitted for the purpose of questioning the facts upon which the sentence proceeded. *Ex parte Clarke* (1842), 2 Q. B. 619, 2 Gale & D. 780; *Cœus Wilson's Case* (1845), 7 Q. B. 984, 14 L. J. Q. B. 105, 201; *Reg.* v. *Brenan* (1847), 10 Q. B. 492, 16 L. J. Q. B. 289; *Ex parte Smith* (1858), 3 Hurl. & N. 227, 27 L. J. M. C. 186; *Reg.* v. *Dunn* (1840), 12 Ad. & El. 599, 4 P. & D. 405; *Rex* v. *Rogers* (1823), 3 Dowl. & Ry. 607. It is doubtful whether on a return affidavits are admissible raising objections which do not appear on the warrant of commitment, *e. g.* showing a former conviction for the same offence. *Ex parte Baker* (1857), 2 Hurl. & N. 219, 26 L. J. M. C. 155. It is competent for the prisoner to show by affidavit that his detainer is illegal by reason of his privilege from arrest: *Ex parte Eggington* (1853), 2 El. & Bl. 717, 23 L. J. M. C. 41; *Ex parte Dakins* (1855), 16 C. B. 77, 24 L. J. C. P. 131; or that the revenue officers in making an arrest on a charge of smuggling exceeded their jurisdiction: *Ex parte Beeching* (1825), 4 B. & C. 136, 6 Dowl. & Ry. 209, 28 R. R. 224.

On the person detained being brought up, if it appears that there is no reason for restraint, he will be discharged, and will, if necessary, receive the protection of an officer on going from the Court. *Rex* v. *Clarkson* (1720), 1 Str. 444; *Rex* v. *Brooke* (1766), 4 Burr. 1991; *Rex* v. *Greenhill* (1836), 4 Ad. & El. 624, 6 N. & M. 244. As he leaves he will be privileged from arrest on civil process, but not under a criminal charge. *In re Douglas* (1842), 12 L. J. Q. B. 49. The immunity from re-arrest under 31 Car. II., c. 2, s. 6, applies only where the second arrest is substantially for the same cause as the first. *Attorney-General of Hong Kong* v. *Kwok-a-Sing* (1873), L. R. 5 P. C. 179, 42 L. J. P. C. 64, 29 L. T. 114. It is not necessary to wait until the rising of the Court to move the discharge of the prisoner, where no notice of opposition to the motion has been given; the Court will order his discharge forthwith. *In re Howard* (1844), 2 D. & L. 536.

The Court has jurisdiction since the Judicature Act, 1890, to give costs to the successful party in proceedings for a writ of *habeas corpus*. *Reg.* v. *Jones* (1894), 1894, 2 Q. B. 382, 63 L. J. Q. B. 656, 70 L. T. 845, 42 W. R. 607; but there is no jurisdiction to grant costs against a person who is not on the record: *In re Carter* (May 13, 1893), 95 L. T. Journal, 37.

It was held that the Court of Chancery had authority to give the functionary who brought up the prisoner under a *habeas corpus* at common law the expenses of doing so: *Dodd's Case* (1858), 2 De G. & J. 510; but that the warden of the Fleet Prison could not demand an additional fee for expedition in making the return: *Johnson* v. *Smith* (1789), 1 H. Bl. 105.

If the writ be disobeyed by the person to whom it is directed, application may be made to the Court on an affidavit of service and disobedience for an attachment for contempt. C. O. R. (1886), r. 240. An attachment will not be granted against such person unless he has been personally served with the original writ, although he has appeared on several occasions and applied for further time to make the return without taking objection to the service. *Reg.* v. *Rowe* (Nov. 9, 1894), 71 L. T. 578. Where no formal return was made to a writ to bring up a man wrongfully imprisoned as a deserter from the navy, but the officer to whom the writ was directed brought him up under escort, the Court ordered an attachment to issue against the officer, and on its return convicted and fined him. *In re Thompson* (1889), 5 Times L. Rep. 565, 601. Where the writ was served upon and not obeyed by a person in France, the Court refused a rule absolute in the first instance for an attachment, although the English proceedings had been recognised and ordered to be obeyed by the French Courts. *Ex parte Wyatt*

(1836), 5 D. P. C. 389, W. W. & D. 76. The remedy is available against a peer. *Rex* v. *Earl of Ferrers* (1758), 1 Burr. 631. An attachment may be granted for making an insufficient return. *Rex* v. *Winton* (1792), 5 T. R. 89, 2 R. R. 546. An appeal lies to the Court of Appeal against the order for an attachment. *Reg.* v. *Barnardo, Tye's Case* (1889), 23 Q. B. D. 305, 58 L. J. Q. B. 553.

In order to bring up a prisoner for the purpose of giving evidence in judicial proceedings, recourse may be had to the writ of *habeas corpus ad testificandum*. By this writ a prisoner may be brought before an election committee of the House of Commons: *In re Sir Edward Price* (1804), 4 East, 587, 1 Smith, 284, 7 R. R. 637; *In re Pilgrim* (1835), 3 Ad. & El. 485; or before an arbitrator either under 52 & 53 Vict., c. 49, s. 18 (2), or independently of that statute: *Graham* v. *Glover* (1855), 25 L. J. Q. B. 10. The writ was granted to bring up a lunatic: *Fennell* v. *Tait* (1834), 1 Cr., M. & R. 584; but not a prisoner of war: *Furley* v. *Newham* (1780), Dougl. 419; nor a sailor on board a man-of-war, unless it is shown that he consents to attend: *Rex* v. *Reddam* (1777), Cowp. 672.

Owing to the power conferred upon Judges of the High Court and others by 16 Vict., c. 30, s. 9, and upon Judges of County Courts by 51 & 52 Vict., c. 43, s. 112, to issue a warrant or order to bring up prisoners confined on criminal process, this writ is not often used now. The application for a writ or for an order is made to a Judge at Chambers on affidavit. C. O. R., rr. 246, 247.

The *habeas corpus ad respondendum* issues where one has a claim against another who is in custody under process of an inferior Court, in order to remove the prisoner and prefer the claim against him in the higher Court. The application for this writ must be made on affidavit to a Judge at Chambers. C. O. R., r. 246; *Reg.* v. *Isaacs* (1851), 20 L. J. Q. B. 395. The Court refused a *habeas corpus* to remove a prisoner from gaol in order to take him before a magistrate in another county, to prefer another charge against him: but will grant the writ to bring him up for trial on a true bill being found against him at the Assizes on that charge. *Reg.* v. *Day* (1862), 3 F. & F. 526.

The writs of *habeas corpus ad deliberandum* and *recipias* are used for transferring a prisoner from one custody to another for the purpose of trial. The application for them also must be made to a Judge at Chambers. C. O. R. (1886), r. 246.

AMERICAN NOTES.

Hobhouse's Case is cited and followed by Chief Justice Shaw, in *Sim's Case*, 7 Cushing (Mass.), 285, and he undoubtedly expresses the common-law rule here as follows: "It is not granted as a matter of course; and the Court

will not grant the writ when they see that in the result they must remand the party. We think the same rule and practice have prevailed in this country." Citing Chief Justice MARSHALL's opinion to the same effect in *Watkins' Case*, 3 Peters (U. S. Supr. Ct.), 201. See also *Ex parte Kearney*, 7 Wheaton (U. S. Supr. Ct.), 38; *Ex parte Milligan*, 4 Wallace (U. S. Supr. Ct.), 2; *Com.* v. *Robinson*, 1 Sergeant & Rawle (Penn.), 353; *Ex parte Campbell*, 20 Alabama, 89; *In re Gregg*, 15 Wisconsin, 179; *Yates* v. *Lansing*, 5 Johnson (N. Y.), 283. The Court are bound to refuse it if it is clear that the judgment must be affirmed. *Williamson's Case*, 26 Penn. St. 9; 67 Am. Dec. 374, citing the Hobhouse case.

The subject is generally regulated by statute in this country: and so sacred is the right held in New York, that by the statute any Judge refusing the writ absolutely incurs a fine of one thousand dollars.

HAWKER AND PEDLAR.

GREGG *v.* SMITH.

(Q. B. 1873.)

RULE.

A SELLING at a profit from house to house does not necessarily constitute the seller a pedlar (and presumably a hawker) within the meaning of the Pedlars (or Hawkers) Acts.

Gregg v. Smith.

L. R. 8 Q. B. 302–304 (s. c. 42 L. J. M. C. 121; 28 L. T. 555; 21 W. R. 737).

Hawker or Pedlar. — Pedlars Act, 1871 (34 & 35 *Vict.*, *c.* 96), *ss.* 3, 4.

Twelve ladies, of whom respondent was one, having purchased mate- [302] rials and made them up into articles of wearing apparel, each in turn for one month carried these articles about in a basket, called a missionary basket, from house to house for sale. The ladies did not find the money to purchase the materials, but the money derived from the sales was applied towards the purchase, and the profits of the sales were devoted to a village school and religious purposes.

Held, that the respondent did not come within the definition of a "pedlar" in s. 3 of the Pedlars Act, 1871, and was not liable under s. 4 to a penalty for acting as a pedlar without a certificate.

Case stated by Justices of the parts of Lindsey, in the county of Lincoln, under 20 & 21 Vict., c. 43.

An information was preferred by the appellant, superintendent of police, against the respondent, under s. 4 of the Pedlars Act, 1871 (34 & 35 Vict., c. 96), charging that she, on the 26th of August, 1872, unlawfully did act as a pedlar without having obtained a certificate under the said Act.

Upon the hearing it was proved and admitted on the part of the appellant and respondent, and found as a fact, that twelve ladies, of whom the respondent was one, purchased materials and made them into aprons, handkerchiefs, chemises, shoes, and other articles of wearing apparel, and also wool mats and other articles for domestic use. These articles were carried about in a basket called a missionary basket from house to house for sale by the twelve ladies, each having the basket one month.

The respondent on the day mentioned in the information went on foot to "other men's houses" with the basket, and exposed for sale and sold some of the articles named above, and had no certificate authorizing her to act as a pedlar under the Act.

The twelve ladies do not find the money for the materials out of which to make the articles, but the money derived from the sales is applied toward the purchase of them. The profits of the basket are devoted to a school in the village of Laceby and religious purposes, but £10 of the profits was once given towards furnishing a minister's house.

[*303] It is also an admitted fact that under the Pedlars Act of 1870 *each of the twelve ladies took out a pedlar's certificate, the fee for which was 6*d.*; but now they do not, as, under the Pedlars Act, 1871, the fee for the certificate is 5*s.*

It was contended on the part of the respondent that the respondent did not come within the meaning of the term "pedlar" mentioned in the 1st clause of the 3rd section of the Pedlars Act, 1871, as she did not go about as a trader to sell for her own personal gain or profit, or as a means of livelihood, but simply for a charitable and religious purpose, which was not within the spirit or contemplation of the Act.

On the part of the appellant it was contended that the respondent was a pedlar within the meaning of the Act, and that she was not one of those persons defined by the 23rd section who do not require certificates: and that if the Legislature had intended to

exempt such cases as the going about from house to house and selling for charitable or religious purposes it would have defined them in the 23rd section.

The justices, having considerable doubt whether the respondent was a pedlar within the interpretation of the term "pedlar" mentioned in the 3rd section of the Act, so as to bring her within the operation of the 4th section, dismissed the information.[1]

The question for the Court was whether the respondent was a "pedlar" within the meaning of the Act, and liable to the penalties under the 4th section.

Cave, for the appellant, contended that the respondent came within the definition of a pedlar given in s. 3 of 34 & 35 Vict., c. 96,[1] and cited *Rex* v. *M'Gill*, 2 B. & C. 142; *Attorney-General* v. *Tonyue*, 12 Price, 51.

* Waddy, for the respondent, was not heard. * [304]

Blackburn, J. — It is quite clear that these ladies do not come within the mischief of the Act, and it is equally clear that they do not come within the definition of pedlar in s. 3. The definition says that person is a pedlar who travels and trades on foot. The Act talks of the person licensed carrying on the trade of a pedlar. It is impossible to say that the chief officer of police, who is to grant these certificates under s. 5, subs. 1, could be satisfied that these ladies "in good faith intended to carry on the trade of a pedlar." Again, the form of application for a pedlar's certificate is given in the second schedule, and on it the person applying is to state his trade and occupation, *e. g.* that he is a hawker, pedlar, &c. How is it possible for these ladies so to describe themselves? To say, therefore, that these ladies act as pedlars would be an abuse of language and common sense.

Quain, J. — There is a definition of pedlar in the Act, but that includes in it one who "trades," and there is no definition of "trader" or "trading;" we must therefore fall back on the ordinary meaning of that word; and I find this in Lee's "Bankruptcy," p. 488:

[1] 34 & 35 Vict., c. 96, s. 3: "The term 'pedlar' means any hawker, pedlar, petty chapman, tinker, caster of metals, mender of chairs, or other person who, without a horse or other beast bearing or drawing for him, travels and trades on foot, and goes from town to town or to other men's houses, carrying to sell, or exposing for sale, any goods, wares, or merchandise, or procuring orders for goods, wares, or merchandise immediately to be delivered, or selling or offering for sale his skill in handicraft."

Sect. 4: "No person shall act as a pedlar without such certificate as in this Act mentioned" . . . under a penalty not exceeding 10s. for the first and £1 for any subsequent offence.

"Whether or not a person is a trader does not depend upon his occasionally doing acts of trading, but upon the intention generally so to get his living." That certainly will not include these ladies.

ARCHIBALD, J., concurred. *Judgment for the respondent.*

ENGLISH NOTES.

A special Act of a Corporation requiring (under a penalty) any person who sells a commodity in a place in the borough other than his own house or shop, or the public market, to have a license from the Corporation, may be enforced, although a person so acting may be exempt from taking an excise license under the Hawkers Act, 1888 (51 & 52 Vict., c. 33). *Openshaw* v. *Oakeley* (1889), 68 L. T. 929.

AMERICAN NOTES.

There seems to be no fellow in this country to this uncharitable attempt. There are several cases defining "peddler," which may be found in Browne's "Judicial Interpretation of Common Words and Phrases."

A butcher who supplies the same customers daily at their doors is a peddler. *Davis* v. *Mayor*, 64 Georgia, 128. So is a milkman. *City of Chicago* v. *Bartee*, 100 Illinois, 61. So is a travelling salesman, crying chairs for sale on the "instalment plan:" *City of South Bend* v. *Martin*, 142 Indiana, 31; and one who goes about with a two-horse wagon selling patent medicines: *State* v. *Smithson*, 106 Missouri, 149; and one who sells and puts up lightning-rods: *State* v. *Wilson*, 2 Lea (Tennessee), 28.

Not so of a "drummer," who simply solicits orders: *City of Kansas* v. *Collins*, 34 Kansas, 434; *Ex parte Taylor*, 58 Mississippi, 478; 38 Am. Rep. 336 (*contra*, *Graffty* v. *City of Rushville*, 107 Indiana, 502; 57 Am. Rep. 128); nor one who sells by sample for future delivery: *State* v. *Lee*, 113 North Carolina, 681; 37 Am. St. Rep. 649; *Davenport* v. *Rice*, 75 Iowa, 74; *Com.* v. *Farnum*, 114 Mass. 267. *Contra*, *Morrill* v. *State*, 38 Wisconsin, 428; *Com.* v. *Jones*, 7 Bush (Kentucky), 502.

One may be a peddler although paid by a salary. *Re Wilson*, 8 Mackey (District of Columbia), 341; 12 Lawyers' Rep. Annotated, 624.

One who sells stoves by sample carried on a wagon from place to place is a peddler. *Wrought Iron Range Co.* v. *Johnson*, 84 Georgia, 754; 8 Lawyers' Rep. Annotated, 273. But a single sale of a sample itself does not constitute peddling, where sales by sample are excepted. *State* v. *Morehead*, 42 South Carolina, 211; 26 Lawyers' Rep. Annotated, 585.

A mere canvasser for books is not a hawker or peddler. *Emmons* v. *Lewiston*, 132 Illinois, 380; 8 Lawyers' Rep. Annotated, 328. So of delivery of goods previously sold. *Stuart* v. *Cunningham*, 88 Iowa, 191; 20 Lawyers' Rep. Annotated, 430. So of an agent who delivers from a wagon goods previously ordered, and takes other orders for subsequent delivery. *Hewson* v. *Englewood Township*, 55 New Jersey Law, 522; 21 Lawyers' Rep. Annotated, 736.

The definition of "hawker" usually accepted in this country is that given

by Chief Justice SHAW, in *Com.* v. *Ober*, 12 Cushing (Mass.), 493: "One who not only carries goods for sale, but seeks for purchasers, either by outcry, which some lexicographers concede as intimated by the derivation of the word, or by attracting notice and attention to them, as goods for sale, by an actual exhibition or exposure of them, by placards or labels, or by a conventional signal like the sound of a horn for the sale of fish."

One who supplies the same customers, regularly and continuously in a city, with small and petty things, is a peddler. *Davis* v. *Macon*, 64 Georgia, 128; *Chicago* v. *Bartee*, 100 Illinois, 61.

HIGHWAY (INCLUDING PUBLIC BRIDGE).

[The English notes to this title are by AUSTIN F. JENKIN.]

No. 1. — REG. *v.* INHABITANTS OF EAST MARK.

(Q. B. 1848.)

No. 2. — WINTERBOTTOM *v.* LORD DERBY.

(1867.)

RULE.

THE use for a long period of a road as a public road is evidence from which a dedication of the road to the public by the owner, whoever he was, may be presumed.

Where the evidence extends to the whole period of living memory, the presumption is not rebutted by showing that the land has been in lease for the whole time; for the dedication may be presumed to have been made by some owner before the commencement of the lease.

Reg. v. Inhabitants of East Mark.

11 Q. B. 877–884 (s. c. 17 L. J. Q. B. 177; 12 Jur. 332).

Highway. — Dedication. — Presumption against Crown.

On the trial of an indictment, for non-repair of a road, against a tithing, [877] bound by custom to repair all public roads therein, it appeared that the road had formed part of the waste of a manor, and had been set out as a private road by award of commissioners under a private inclosure act, and had been

No. 1. — Reg. v. Inhabitants of East Mark, 11 Q. B. 877, 878.

used by the public generally ever since it had been so set out. A portion of the waste had been allotted to the lord (as the Act directed) in respect of his interest in the soil.

After verdict for the Crown, it was argued, for the defendants, on motion to enter a verdict for them, that the soil of the road had been taken from the lord, and transferred to no other person, and therefore there was no owner, or none against whom a dedication to the public could be presumed; and that, if the Crown were the owner, the jury should have been directed that stronger evidence was necessary to raise a presumption of dedication than if the owner had been a private person.

Held, that dedication might be presumed against the Crown from long acquiescence in public user; and that the jury were rightly directed to consider whether the owner, whoever he might be, had consented to the public user in such a manner as to satisfy the jury that a dedication to the public was intended.

Indictment for non-repair of a road. The indictment alleged that the inhabitants of the tithing had been immemorially used, &c., to repair all common highways within the tithing, which, but for such usage, &c.; and that the road in question was such a highway. Plea, not guilty. Issue thereon.

On the trial, before WILLIAMS, J., at the Somersetshire Spring Assizes, 1847, it appeared that the road in question had been set out as a private road by commissioners appointed under Stat. 34 Geo. III., c. 15 (Private), "for dividing, allotting, and inclosing certain moors, commons, or waste lands, called Little Mark Moor and Summer Leaze, and all the other open, common, or waste lands in the manor of East Mark, within the parish of Mark, in the county of Somerset." Section 11 authorised the commissioners to extinguish all rights of common over the lands to be inclosed under the Act. Section 13 authorised the commissioners to set out both public and private roads on and by the sides of the lands to be divided [*878] and allotted; the public roads to be * repaired in such manner as other public roads are directed to be repaired by the laws of the realm; the private roads to be repaired by such persons and in such manner as the commissioners should award; the grass and herbage growing upon any of the public and private roads to be set out to be and for ever remain to and for the use and benefit of such persons as the commissioners by their award should appoint. Section 14 enacted: "That after the said commissioners shall have set out and allotted the several and respective parts and parcels of the said moors, commons, or waste lands, for the purposes aforesaid, they the said commissioners shall, and

they are hereby authorised and required to set out, allot, inclose, and award to and for" Michael Hicks Beach, "as lord or owner of the soil of the said moors, commons, or waste lands, in respect of his right and interest in the said soil in the said moors, commons, or waste lands, such certain parts or parcels thereof as to the said commissioners shall seem meet, so that such parts or parcels, so to be allotted and set out to the said lord of the said soil, be not more than one-twentieth part of the remaining parts of the said moors, commons, or waste lands (quality, situation, and convenience considered)." Section 17 authorised the commissioners to allot "all the residue and remainder of the said moors, commons, or waste lands unto, for, and amongst every person or persons, proprietor and proprietors, interested therein, in respect of their several and respective rights in, over, and upon the same." Section 28 provided "that nothing in this Act shall prejudice, lessen, or defeat the right, title, or interest of" M. H. B., "as lord of the said manor of East Mark, or any future lord or lords of the said manor, * in and to the seigniories, royalties, rights, and services [* 879] belonging thereto; but the said" M. H. B. "and all future lords," &c., "shall and may, from time to time, and at all times for ever hereafter, hold and enjoy all mines, minerals, goods, and chattels of felons and fugitives, felons of themselves, and persons put in exigent, deodands, waifs, estrays, forfeitures, and all other rights, royalties, jurisdictions, and pre-eminences whatsoever to the said manor appendant or appertaining (other than and except such for which compensation is directed to be made by this Act), in as full, ample, and beneficial manner as he and they could or might have held and enjoyed the same in case this Act had not been made." The last section also saved to the Crown, and to all persons and bodies politic and corporate, &c. "(other than and except the several persons to whom any allotment or allotments shall be made, and whose rights are intended to be hereby barred and extinguished), all such estates, rights, title, interest, claim, and demand, which they, any, or every of them had and enjoyed of, in, to, or out of the said moors, commons, or waste lands, so intended to be divided and inclosed, or exchanged as aforesaid, at the time of passing this Act, or could or might have held and enjoyed in case the same had not been made."

The award, dated Jan. 4, 1797, extinguished rights of common over the moor; and, after setting out the road in question

and other roads as private roads, directed that the said private roads should be kept in repair by the inhabitants of the tithing, and that the grass and herbage growing and renewing upon them should be and remain for ever for the use and benefit of [*880] the respective owners and occupiers for the * time being adjoining to such roads. Besides the other allotments directed by the Act, the award made an allotment to the lord of the manor "as lord or owner of the soil of the said moors, commons, or waste lands in respect of his right and interest in the said soil in the said moors," &c., "and to and for the future lord or lords of the said manor of East Mark." It was conceded that so much of this award as imposed the liability to repair the private roads upon the inhabitants was illegal, because the inhabitants derived no benefit from the inclosure.

Evidence was given of an immemorial custom to repair, as alleged in the indictment; and also that the road in question had been used by the public generally ever since it had been set out.

For the defendants it was contended that there was no evidence of dedication, inasmuch as the interest in the soil had been taken out of the lord by force of the allotment made to him in liêu of such interest; and that there was no owner, or, at all events, no owner by whom the dedication could have been made. *Poole* v. *Huskinson*, 11 M. & W. 827, was cited in answer, where PARKE, B., observes in his judgment: "As to the ownership of the soil, I do not apprehend that there is any difficulty. It remains in the lord of the manor; for that portion of the soil only is taken from him for which he receives compensation, and which is allotted to others." The learned Judge, after adopting the language of PARKE, B., in the same case, that "In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate — there must be an [*881] * *animus dedicandi*, of which the user by the public is evidence, and no more," added, that there could not be land without an owner; that, if the *dictum* of PARKE, B., were correct, the ownership remained in the lord; but that, at all events, it must be in somebody; and that it was for the jury to consider whether the owner, whoever he might be, had consented to the public user in such a manner as to satisfy the jury that he intended to dedicate a highway to the public. Verdict for the Crown; leave being given to move to enter the verdict for the defendants.

Cockburn, in Easter Term last, obtained a rule *nisi* accordingly. He cited *Barraclough* v. *Johnson*, 8 A. & E. 99; *Rex* v. *Edmonton*, 1 M. & Rob. 24; and *Harper* v. *Charlesworth*, 4 B. & C. 574 (28 R. R. 405); and contended that the learned Judge had directed the jury, on the authority of *Poole* v. *Huskinson*, 11 M. & W. 827, that the ownership of the soil was in the lord, whereas the award had taken it from him; and that the jury ought to have been directed that, if the ownership were in the Crown, much stronger evidence would be necessary to raise a presumption of dedication than if the ownership were in a private person.

Kinglake, Serjt., and Fitzherbert now showed cause. — There is no ground for entering a verdict for the defendants. The learned Judge did not state that the soil remained in the lord; but, passing by any question as to the ownership of the soil, directed the jury to consider whether the owner, whoever he might be, had dedicated the road to the public. This direction was
* correct, whether the lord or the Crown was the owner. [*882] But the lord was the owner; for so much only is taken from him as is allotted to others. *Poole* v. *Huskinson*, 11 M. & W. 827.

Cockburn and Barstow, *contra*. — The learned Judge was understood to direct the jury expressly, on the authority of *Poole* v. *Huskinson*, that the lord continued to be owner of the soil. But the statute clearly divested him of all interest in the soil; he is to have a certain portion of the soil in lieu of the whole; the express saving of his interest in the minerals by the Act favours this construction. To whom, then, did the soil belong? Perhaps to no one. *Rex* v. *Edmonton*, 1 M. & Rob. 24, seems to show that such a state of things is possible. At all events, to support this verdict, it is not sufficient that there was some owner; there must have been an owner who knew that he was so, or his consent to the public user cannot be presumed. And the jury should have been directed that much stronger evidence of dedication would be necessary as against the Crown than as against the lord, who is likely to be present in the neighbourhood, and to be cognisant of his rights and of any invasion of them.

Lord Denman, C. J. — The law, as lately laid down, has led the Courts into very inconvenient inquiries. If a road has been used by the public between forty and fifty years without objection, am I not to use it unless I know who has been the owner of it? The

Crown certainly may dedicate a road to the public, and [*883] *be bound by long acquiescence in public user. I think the public are not bound to inquire whether this or that owner would be more likely to know his rights and to assert them; and that we have gone quite wrong in entering upon such inquiries. Enjoyment for a great length of time ought to be sufficient evidence of dedication, unless the state of the property has been such as to make dedication impossible. The direction of the learned Judge seems quite right; he evidently stopped short of any inquiry as to the ownership of the soil.

Patteson, J. — The direction was quite right. There may be a dedication by the Crown; and I think in these cases we ought not to inquire very nicely into the ownership of the soil or into the evidence of any precise intention to dedicate. If property is under lease, of course there can be no dedication by the lessee to bind the freehold. My Brother Williams did not lay it down that the soil did belong to the lord; and I think it is quite unnecessary that we should now inquire to whom it belonged.

Wightman, J.—The direction was quite right. The fallacy has been occasioned by the reference to *Poole* v. *Huskinson*, 11 M. & W. 827, where it was held that the soil was in the lord. The learned Judge merely referred to that decision as showing what might be the case; but, if the whole of the summing up is looked at, it is clear that he did not state that the soil was in the lord; and he expressly left it to the jury to say whether the owner, whoever he might be, intended to dedicate.

[*884] *Erle, J. — In this case there was uninterrupted user of the road by the public for about fifty years. I think the learned Judge would have been quite justified in telling the jury that, although there must be an intention on the part of the owner to dedicate, such user was so strong an evidence of his intention that the jury ought to find in favour of the dedication, unless there was some evidence that he did not consent. The direction was much more favourable to the defendants than that would have been. *Rule discharged.*

Winterbottom v. Lord Derby.

L. R. 2 Ex. 316–324 (s. c. 36 L. J. Ex. 194; 16 L. T. 771; 16 W. R. 15).

Public Way. — Action for Obstruction. — Special Damage. — Dedication. [316] *— Evidence of User.*

In order to maintain an action for obstructing a public way, the plaintiff must suffer some substantial damage peculiar to himself, beyond that suffered by the rest of the public who use the way.

In an action for obstructing a public way, the plaintiff proved no damage peculiar to himself beyond being delayed on several occasions in passing along it, and being obliged, in common with every one else who attempted to use it, either to pursue his journey by a less direct road, or else to remove the obstruction: —

Held, that he was not entitled to maintain the action.

In order to prove that the way was in fact public, evidence was given of acts of user extending over nearly seventy years; but during the whole period the land crossed by the way had been on lease. The Judge told the jury that they were at liberty, if they thought proper, to presume from these acts a dedication of the way to the public by the defendant or his ancestor, at a time anterior to the land being leased.

Held, a proper direction.

Where leave is reserved by a Judge at Nisi Prius to enter a nonsuit, the Court will, notwithstanding the leave reserved being thus restricted in point of form, order a verdict to be entered for the defendant on one issue without disturbing the verdict found for the plaintiff on another, if that course seems most consistent with doing justice between the parties.

Declaration. That the defendant on divers days wrongfully obstructed a certain public footway, in the township of Pilkington, in the parish of Prestwich, in the county of Lancaster, by placing upon and across the said footway, in divers places, posts, rails, and fences, whereby the plaintiff was on divers days hindered and prevented from passing and repassing over and along the said footway, and using the same, and was obliged to incur, and did incur, on divers days, great expense in and about removing the said obstructions, in order that he might, and before he could, pass and repass over and along the said footway, and use the same in and about his lawful business and affairs, and was greatly hindered and delayed in and about the same.

Pleas: 1. Not guilty; 2. Traverse that the footway was a public footway. Issue thereon.

The action was brought to try the right of the public to use a * footway across some property belonging to the [* 317]

Earl of Derby, leading from a lane called Park Lane, in the township of Pilkington, to Prestwich, and thence to Manchester. At the trial before MELLOR, J., at the last Manchester Spring Assizes, it was proved that the plaintiff, who resided near Manchester, had from time to time made use of the footway without any objection on the part of the defendant or his agent. About three years ago, however, the defendant's agent, who lived close to the land crossed by the footway, began to make great alterations, and erected some fences and other obstructions upon the way. He also ploughed over a portion of it, and in some parts almost obliterated it. The plaintiff, in spite of the path having thus become less convenient, continued to use it. On Sunday, the 6th of May, 1866, whilst he was approaching the Park Lane end of the path, with a view of passing along it, he met the defendant's agent, who informed him that there was no road that way. The plaintiff replied that there was one, which he had often used before, and intended to use on that day, and after making this observation passed along the footway. On the 16th of August, 1866, he again, in company with some friends, went to Park Lane, with the intention of traversing the footway. He found it obstructed, and was delayed whilst some persons under his directions, and at his expense, removed the obstructions. On several subsequent occasions he renewed the attempt to use the path, but on each was either obliged to turn back, in consequence of obstructions being placed across it, or else was delayed whilst those obstructions were removed. He suffered no other damage beyond being thus forced, in common with all other persons attempting to use the path, either to retrace his steps and pursue his journey by another road, or else to remove the obstructions. The footway was the shortest and most convenient way from his house to Prestwich. He had been in the habit of using it either for the purpose of taking a walk, or of going to see friends at Prestwich, or otherwise for pleasure or profit.

In order to show that the way was a public way, acts of user over it were proved extending over nearly seventy years. But the land it crossed had, during the whole period, been on lease; and it was contended on behalf of the defendant that he, as [* 318] reversioner, * was therefore not bound by these acts, and that no dedication by him or his ancestors of the footway to the public could be presumed from them. But the learned

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Judge told the jury that, from long continued user, going back indeed as far as living memory could go, they were at liberty, if they pleased, to infer a dedication of the footway to the public, by Lord Derby's ancestor, at a time antecedent to the land being on lease. The jury found a verdict for the plaintiff, and leave was reserved to the defendant to move to enter a nonsuit, on the ground that the plaintiff had not given sufficient evidence of damage to entitle him to maintain the action.

April 17. Temple, Q. C. (Jones, Q. C., and J. A. Russell with him), moved accordingly, and in arrest of judgment, on the ground that the declaration did not allege any sufficient cause of action; and also for a new trial, on the ground that the verdict was against the weight of the evidence, and of misdirection on the part of the learned Judge in this, that he told the jury they might presume a dedication of the public footway against the defendant, the reversioner, from acts of user in the period during which the land had been on lease. In support of this last point he cited *Wood* v. *Veal*, 5 B. & Ald. 454 (24 R. R. 454), where it was held that there could be no dedication of a way to the public by a tenant for ninety-nine years, without the consent of the owner of the fee, and that permission by the tenant would not bind the reversioner after the expiration of the term. In that case there had been user as far back as living memory went. He also cited *Baxter* v. *Taylor*, 4 B. & Ad. 72.

The Court (Kelly, C. B., Martin, Bramwell, and Pigott, BB.), without desiring to cast any doubt on the authorities cited, thought that there had been no misdirection, and on that point, therefore, refused the rule. On the remaining points they granted a rule.

June 1, 6. James, Q. C., Quain, Q. C., and R. G. Williams, showed cause. — The plaintiff suffered an inconvenience peculiar to himself. He resided in the neighbourhood of the path, and his most direct road to a place to which he had frequent occasion to * go was along it. Then by the obstructions he [* 319] was delayed, either whilst he had them removed, or by being forced to go a roundabout way to his destination. He is thus damaged beyond the rest of the public.

[Kelly, C. B. — But he is not damaged more than others of the public who may happen to pass along the way. The result of this argument would seem to be that every individual who attempted to pass along this path could bring an action.]

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Every one actually obstructed, and who is driven either to go back or is delayed whilst removing the obstruction, could maintain an action; and if it be said this would lead to a multiplicity of actions, the answer is, that the person causing the obstruction would have brought them on himself. An indictment for obstructing a highway is grounded on the possibility, and not the fact, of the public being prevented from using it; but any one who suffers, personally, positive inconvenience from the obstruction need not have recourse to an indictment. He can maintain his action for the personal injury he has sustained. Com. Dig., Action for Nuisance (C.), 294; *Meynell* v. *Saltmarsh*, 1 Keb. 847; *Hart* v. *Bassett*, Sir T. Jones, 156; 4 Vin. Abr. 519; *Iveson* v. *Moore*, 1 Ld. Raym. 486; *Rose* v. *Miles*, 4 M. & S. 101 (16 R. R. 405); explaining *Hubert* v. *Groves*, 1 Esp. 148; *Rose* v. *Groves*, 5 M. & G. 613.

[CHANNELL, B. — The principle laid down in *Iveson* v. *Moore* and the other cases is sound. The question is as to the proper mode of applying it.]

That principle is, that delay, however caused, whether in removing the obstruction or going a less convenient way, is a cause of action. *Greasley* v. *Codling*, 2 Bing. 263 (27 R. R. 626); *Wiggins* v. *Boddington*, 3 C. & P. 544. In *Chichester* v. *Lethbridge*, Willes, 71, the action was held to be maintainable on either of two grounds: First, because the defendant had offered personal opposition to the nuisance being abated; and, secondly, because the plaintiff had been delayed; and ERLE, C. J., is in error in stating in *Ricket* v. *Metropolitan Railway Company*, 5 B. & S. 156, at p. 160, 34 L. J. Q. B. 257, at p. 259, that the decision rested on the first ground only.

[CHANNELL, B. — That ground seems the more intelli-
[* 320] gible. The * plaintiff in that case was prevented from abating the nuisance, and was thus entitled to bring his action.]

The decision of WILLES, C. J., rests distinctly on both grounds.

Temple, Q. C., Jones, Q. C., and J. A. Russell, in support of the rule. — All the cases cited are distinguishable. In all of those in which the action has been held maintainable the plaintiff has suffered a greater inconvenience than the rest of the public, who are obstructed in the exercise of their right. See per ERLE, C. J., in *Ricket* v. *Metropolitan Railway Company*, 5 B. & S., at p. 159; 34 L. J. Q. B., at p. 259. Thus, in *Hart* v. *Bassett*, Sir T. Jones, 156,

4 Vin. Abr. 519, the plaintiff was prevented from carrying home tithes. But in *Paine* v. *Partrich*, Carth. 191, where the plaintiff's damage, as here, was a short delay, it was held that this injury, not being beyond that suffered by the public in general, was not actionable. The rule of law is accurately laid down by Lord Ellenborough, C. J., in *Rose* v. *Miles*, 4 M. & S., at p. 102 (16 R. R. 405), who says that the damage must be "something substantially more injurious" to the individual than to other people. In the present case the plaintiff neither proved nor alleged such substantial injury.

Kelly, C. B. — The substantial point for our decision in this case is whether this action is maintainable. The rule of law on the subject, which is well laid down in the case of *Ricket* v. *Metropolitan Railway Company*, 5 B. & S. 156, 34 L. J. Q. B. 257, is, that in order to entitle a plaintiff to maintain an action, he must show a particular damage suffered by himself over and above that suffered by all the Queen's subjects. I will refer to one or two authorities in support of this proposition. The leading case is that of *Ireson* v. *Moore*, 1 Ld. Raym. 486; and it is laid down there by Lord Holt that there must be a particular damage done to a particular person in order to found an action, otherwise there would be danger of a multiplicity of actions. It was observed, indeed, during the argument, that people must be careful not to violate the law, and if they do so, they must take the consequences. Observe, however, to what this argument may lead. It often, for some reason or other, becomes absolutely necessary to set up an
* obstruction in a highway. For example, commissioners [* 321]
of sewers, gas companies, or commissioners for draining, paving, or lighting, may be obliged for a time to obstruct a highway. Now, suppose it were to turn out that there was some want of authority for the appointment of the commissioners, or some unintentional deviation from the statutory powers conferred on them, they would of course be liable to an indictment for wrongfully obstructing the highway. But if we were to hold that everybody who merely walked up to the obstruction, or who chose to incur some expenses in removing it, might bring his action on the case for being obstructed, there would really be no limit to the number of actions which might be brought.

Again, let us look further at the general nature of the cases where an action for obstruction has been held to be maintainable.

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In *Iveson* v. *Moore*, 1 Ld. Raym. 486, the plaintiff was the possessor of a colliery, and was obliged, in order to obtain the profits of his trade, to take laden carts and waggons, almost every day, along a certain highway. Then, by reason of that highway being obstructed, he personally sustained pecuniary damage. That was clearly special damage to the plaintiff alone. Once more, look at another case — a case which apparently makes most for the plaintiff — I refer to *Hart* v. *Bassett*, Sir T. Jones, 156, 4 Vin. Abr. 519. There the plaintiff, a farmer of tithes, was prevented, by the defendant's obstruction, from carrying them home, and the obstruction must have been attended with considerable loss to the plaintiff. He had to take tithe, and he was liable to an action if he allowed the tithe to be injured on the ground, or if it was not taken within a reasonable time. The plaintiff, then, in that case was obliged, in consequence of the obstruction, to spend extra money in the discharge of his lawful calling. That, therefore, was clearly a case where there was a peculiar pecuniary damage suffered personally by the plaintiff.

With regard to the cases cited for the other side, and to the law as to the cases where an action has been held to be not maintainable, it may, perhaps, be difficult to reconcile them. But it is impossible to look at the case of *Ricket* v. *Metropolitan Railway Company*, 5 B. & S. 156, 34 L. J. Q. B. 257, and at [*322] the observations in the judgments *of the learned law lords on it,[1] without seeing that they thought the law had been too far extended in the direction of allowing this description of action to be brought. In this case, therefore, where there was no pecuniary damage, — where the plaintiff merely, on one or more occasions, went up to the obstruction and returned, and on other occasions went and removed the obstruction; that is to say, where he suffered an inconvenience common to all who happened to pass that way, — I think that to hold the action maintainable would be equivalent to saying it is impossible to imagine circumstances in which such an action could not be maintained.

Then there is the particular allegation in the declaration as to expense, stating that the plaintiff "was obliged to incur, and did incur on divers days, great expense in and about removing the

[1] The judgment of the Court of Exchequer Chamber was affirmed in the House of Lords on the 16th of May, 1867, and the judgments of the learned law lords had been handed to the Lord Chief Baron during the argument. See the report in 1 R. C. 574

said obstructions." That raises the question whether this sort of damage is recoverable. I think not, for if it were, anybody who desires to raise the question of the legality of an obstruction has only to go and remove it, and then bring his action for the expense of removing it. There would then be two modes open to everybody of trying whether the obstruction was lawful, — namely, by indictment or by action. But if a person chose the latter way, and removes the obstruction, he only incurs an expense such as any one who might go to remove the obstruction would incur. The damage is in one sense special, but it is, in fact, common to all who might wish, by removing the obstruction, to raise the question of the right of the public to use the way. Upon the authorities, then, and especially relying on *Iveson* v. *Moore*, 1 Ld. Raym. 486, and *Ricket* v. *Metropolitan Railway Company*, 5 B. & S. 186, 34 L. J. Q. B. 257, I am of opinion that the true principle is, that he, and he only, can maintain an action for an obstruction who has sustained some damage peculiar to himself, his trade, or calling. A mere passer-by cannot do so, nor can a person who thinks fit to go and remove the obstruction. To say that they could, would really in effect be to say that any of the Queen's subjects could. We must therefore make the rule * absolute to [* 323] enter a verdict for the defendant on the plea of not guilty.

Martin, B. — I am of the same opinion. I do not think that damage of the sort proved here is sufficient to enable the plaintiff to maintain this action. I have, indeed, some doubt whether we ought not to arrest the judgment. But whatever course we take in point of form, I feel that we ought not to extend the rule which regulates the cases in which this description of action may be maintained.

Channell, B. — I am of opinion that the defendant is entitled to have a verdict on the plea of not guilty. The plaintiff cannot maintain this action without showing that he has suffered damage beyond and in excess of what other people have suffered; and he has, in my judgment, failed to show any such damage. But I do not think that we should arrest the judgment. The right course is, in my opinion, to enter a verdict for the defendant on the plea of not guilty. My reason for saying so is this: an application to arrest judgment assumes that all the allegations in the declaration are proved, either because they have not been traversed, or because, if they have been, the issues raised on them have been

found in favour of the party against whom the application is made. Therefore, though for convenience the two questions as to arresting judgment or entering a verdict are often argued together, a motion in arrest of judgment assumes that the verdict stands; and I am not prepared to say that, in that event, and assuming the truth of the declaration *in toto*, we should arrest the judgment. Then, again, I do not think we ought to enter a nonsuit. In point of form, leave was reserved to do so, and to do nothing else. But where a plaintiff has obtained a verdict on a material issue, it would not be just to enter a nonsuit, even though leave so to enter it was in form reserved. I think, however, that we ought to enter the verdict for the defendant on the first issue, just in the same manner as if the reservation had been to do that instead of to enter a nonsuit. The real meaning of reserving leave is to raise a point of law for the consideration of the Court, and they have to deal with the case as they think best in the interests of justice. Whether it is formally * to enter a verdict or nonsuit, or [* 324] to do only the one or the other, does not, in my judgment, make any difference in the power of the Court to deal with the case as they think best. *Rule absolute accordingly.*

ENGLISH NOTES.

In England all highways, except such as have been created by or in pursuance of statute, and possibly also such as are immemorial, have had their origin actually or theoretically in dedication. No formality is required to render the dedication of a highway effective. All that is necessary is that a person capable of dedicating the way should, with the intention of dedicating it, allow the public to pass along it, and that the public should thereupon make use of it as a highway. Numerous cases referred to below establish the necessity in theory of an intention to dedicate. As to the necessity of user by the public, see *Cubitt* v. *Maxse* (1873), L. R. 8 C. P. 704, 42 L. J. C. P. 278, 29 L. T. 244, 21 W. R. 789; *Attorney-General* v. *Biphosphated Guano Co.* (C. A. 1879), 11 Ch. D. 327, 49 L. J. Ch. 68, 40 L. T. 201, 27 W. R. 621. Mere dedication coupled with user by the public, however, does not now, in general at least, cast the burden of repairing the highway upon the public, as was formerly the case. See the notes to *Rex* v. *Inhabitants of West Riding of Yorkshire*, No. 14, p. 655, *post*.

The fact that a landowner who is in a position to protect his land from trespassers permits the public to pass along a way over his land for some time without interference, has always been recognised as evi-

dence of an intention on his part to dedicate. See in addition to the principal cases, *Rex* v. *Lloyd* (1808), 1 Camp. 260, 10 R. R. 674; *Jarvis* v. *Dean* (1826), 3 Bing. 447, 11 Moore, 354; *Poole* v. *Huskinson* (1843), 11 M. & W. 827; *Eyre* v. *New Forest Highway Board* (1892), 56 J. P. 517. And so strong is the inference of intention to dedicate arising from the fact that user is permitted, that it often overrides a mere expression of a contrary intention uncoupled with any act such as actually turning back persons using the way, or occasionally closing it. Hence ways used by the public constantly become dedicated against the real wishes of the landowner, notwithstanding the theory that an intention on his part to dedicate is requisite. Still the law does not regard the public as capable of acquiring a right of way, but regards the user as mere evidence. Accordingly, where it is sought to establish an intention to dedicate from the fact of user, all the circumstances have to be looked at to see whether they disclose such an intention. See *Roberts* v. *Kerr*: *Lethbridge* v. *Winter* (1808), 1 Camp. 262 *n.*, 263 *n.*, 10 R. R. 676 *n.*: *Barraclough* v. *Johnson* (1838), 8 A. & E. 99, 3 N. & P. 233, 7 L. J. Q. B. 172; *Grand Surrey Canal* v. *Hall* (1840), 1 Man. & Gr. 392, 1 Scott N. R. 264, 9 L. J. C. P. 329. It follows that there is no definite rule as to the length of time required to raise the presumption of dedication, and this was recognised by CHAMBRE, J., in *Woodyer* v. *Hadden* (1813), 5 Taunt. 125, 14 R. R. 706. The usual course where it is desired to allow the public to use a road without allowing the presumption of dedication to arise is to close the road one day in each year. See *British Museum Trustees* v. *Finnis* (1833), 5 C. & P. 460, per PATTESON, J., at p. 465.

The fact that a way has been used by the public as a highway for some time is not only evidence from which an intention to dedicate in the course of the period during which the user is proved may be presumed; it is also, without anything further, *primâ facie* evidence from which dedication at some anterior time may be presumed. Accordingly, where such user is proved, the onus is upon those denying the way to be a highway to show that there can have been no dedication at any anterior time. See, in addition to the ruling cases, *Reg.* v. *Petrie* (1855), 4 El. & Bl. 737, 24 L. J. Q. B. 167; *Vernon* v. *St. James Vestry* (1880), 16 Ch. D. 449, 49 L. J. Ch. 130, 42 L. T. 82, 29 W. R. 222, affirmed in C. A. 16 Ch. D. 449, 50 L. J. Ch. 81, 44 L. T. 229, 29 W. R. 222; *Powers* v. *Bathurst* (1880), 42 L. T. 123, also reported less fully, 49 L. J. Ch. 294.

An intention to dedicate may be proved not only by showing user by the public, but also by any acts or declarations of the landowner showing the intention. See *Spedding* v. *Fitzpatrick* (C. A. 1888), 38 Ch. D. 410, 58 L. J. Ch. 139, 59 L. T. 492, 37 W. R. 20.

It appears from the first of the principal cases that a way set out as an occupation road in pursuance of statute may be subsequently dedicated to the public, and that such a dedication may be inferred from user by the public. The circumstance that some user by the public may be explained by the fact that an occupation way is necessarily to some extent open, may, however, lessen the weight to be attached to evidence of public user in such a case. See *Reg.* v. *Inhabitants of Bradfield* (1874), L. R. 9 Q. B. 552, 43 L. J. M. C. 155, 22 W. R. 693, and the cases there cited; *Reg.* v. *Inhabitants of Horley* (1863), 8 L. T. 382, 11 W. R. 433.

Trustees holding land for public purposes, and bodies such as railway and canal companies holding land for undertakings authorised by statute, can dedicate highways over their land if the use of the land for the purposes of a highway is not inconsistent with the purposes for which the land is held, but not if it is inconsistent therewith. See *Grand Junction Canal Co.* v. *Petty* (C. A. 1888), 21 Q. B. D. 273, 57 L. J. Q. B. 572, 59 L. T. 767, 36 W. R. 795, and the cases there cited; *Greenwich District Board* v. *Maudslay* (1870), L. R. 5 Q. B. 397, 39 L. J. Q. B. 205, 23 L. T. 121, 18 W. R. 948.

It appears from the first of the principal cases that a highway may be dedicated by the Crown, and that dedication by the Crown may be presumed from user. See also *Harper* v. *Charlesworth* (1825), 4 B. & C. 574, 6 Dowl. & Ry. 572, 28 R. R. 405; *Turner* v. *Walsh* (1881), 6 App. Cas. 636, 50 L. J. P. C. 55, 45 L. T. 50.

A leaseholder cannot dedicate a highway so as to bind the reversioner without the concurrence of the latter. See, in addition to the second of the principal cases, *Rugby Charity Trustees* v. *Merryweather*, No. 7, p. 551, *post*; *Wood* v. *Veal* (1822), 5 B. & Ald. 454, 1 Dowl. & Ry. 20, 24 R. R. 454; *Bermondsey Vestry* v. *Brown* (1865), L. R. 1 Eq. 204, 35 Beav. 226, 13 L. T. 574, 14 W. R. 213; *Pryor* v. *Pryor* (1872), 26 L. T. 758 (as to this case see further 27 L. T. 257); *Hall* v. *Bootle Corporation* (1881), 44 L. T. 873, 29 W. R. 862; *Attorney-General* v. *Biphosphated Guano Co.* (*infra*). There may, however, be circumstances from which the concurrence of the reversioner may be presumed. See *Rex* v. *Barr* (1814), 4 Camp. 16, 15 R. R. 721; *Jarvis* v. *Dean*, *supra* (the two reports of this case differ materially); *Davies* v. *Stevens* (1836), 7 C. & P. 570. But it seems that such a presumption cannot be made on evidence of user of the way only, since the reversioner cannot prevent such user. See *Baxter* v. *Taylor* (1832), 4 B. & Ad. 72, 1 N. & M. 11, 2 L. J. K. B. 65. Whether a leaseholder can dedicate a highway so as to bind himself and his assigns, and thus create a temporary highway, was treated by the Court of Appeal as an open question in *Attorney-General* v. *Biphosphated Guano Co.* (1879),

11 Ch. D. 327, 49 L. J. Ch. 68, 40 L. T. 201, 27 W. R. 621, and there seems to be no direct authority on the point.

It seems, though the point has not apparently been decided, that a tenant for life, in the absence of a power in that behalf, is in the same position as to the dedication of a highway as a leaseholder. See *Reg.* v. *Petrie* (*supra*). Statutory powers which enable a tenant for life to dedicate highways so as to bind the reversioner or remainder-man are contained in the Settled Land Act, 1882 (45 & 46 Vict., c. 38, s. 16; see also 40 & 41 Vict., c. 18, s. 21).

A copyholder cannot, it seems, dedicate a highway so as to bind the freehold, though where a way over copyhold land has been long open, dedication at some anterior time when the lord was in possession may be presumed. See *Powers* v. *Bathurst* (*supra*).

In most urban districts, and in many rural districts, bye-laws are in force under the Public Health Act, 1875 (38 & 39 Vict., c. 55, s. 157), as to the width and construction of "new streets." And the dedication of a highway may, having regard to the definition of "street" in section 4 of that Act, amount to the laying out of a new street within such bye-laws. Though the cases as to the meaning and operation of bye-laws of the kind are numerous, there seems to be no authority on the question how far, if at all, such bye-laws operate to prevent acts which would otherwise effect the dedication of a highway from having that effect where the dedication would involve a breach of the bye-laws. Similar questions, as to which again there seems to be no authority, arise in London, where the formation of streets is regulated by statute, and in other places where local Acts containing provisions on the matter are in force.

Though dedication is perhaps the usual origin of new highways, highways may be, and frequently are, created by or in pursuance of statute, *e. g.*, under Inclosure Acts.

AMERICAN NOTES.

The doctrine of the first branch of the Rule is generally adopted here. See Elliott on Roads and Streets, pp. 124, 125, 127, and Angell on Highways, sect. 150, both citing the first principal case. Although some of the American cases attach undue importance to the element of time, yet Judge Elliott correctly states the general doctrine as follows: "If the use made of the way is such as could only be made of a public road or street, and is so open and notorious and unequivocal in character, and so long continued also that the discontinuance of the way would seriously injure the public, the intention to dedicate may be presumed against the owners. . . . No definite length of time is necessary to render a dedication effectual; but in cases of implied dedications, time is of importance as tending to prove an intention on the part of the owner of the soil to dedicate the way to the public. A dedication

may be presumed where the other evidence or circumstances are such as to show an intention to dedicate, although a very brief period of time has elapsed since the public user began." Judge DILLON says (2 Municipal Corporations, sect. 631): "No specific length of time is necessary to constitute a valid dedication; all that is required is the assent of the owner of the soil to the public use, and the actual enjoyment by the public for such a length of time that the public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment." Greenleaf is of the same opinion (2 Evidence, sects. 537, 546). The result of the authorities seems to be that dedication is a question of intention, and that lapse of time is only essential as evidencing the intention to dedicate. It is a legitimate mode of showing the intention to dedicate, and much less time is necessary than is demanded to found a prescriptive right.

This principle is derivable from the following cases: *Hobbs* v. *Lowell*, 19 Pickering (Mass.), 405; 31 Am. Dec. 145; *Estes* v. *Troy*, 5 Greenleaf (Maine), 368; *Pritchard* v. *Atkinson*, 4 New Hampshire, 9; *Colden* v. *Thurber*, 2 Johnson (New York), 424; *Ross* v. *Thompson*, 78 Indiana, 90; *State* v. *Hill*, 10 Indiana, 219; *City of Chicago* v. *Wright*, 69 Illinois, 318; *Town of Princeton* v. *Templeton*, 71 Illinois, 68; *State* v. *Catlin*, 3 Vermont, 530; 23 Am. Dec. 230; *Cincinnati* v. *White*, 6 Peters (U. S. Sup. Ct.), 431; *Barclay* v. *Howell's Lessee*, ibid. 498; *Irwin* v. *Dixion*, 9 Howard (U. S. Sup. Ct.), 10; *Gamble* v. *St. Louis*, 12 Missouri, 617; *Lewis* v. *San Antonio*, 7 Texas, 288; *Hoole* v. *Attorney-General*, 22 Alabama, 190; *Onstott* v. *Murray*, 22 Iowa, 457; *Saulett* v. *New Orleans*, 10 Louisiana Annual, 81; *Mayor* v. *Franklin*, 12 Georgia, 239; *Case* v. *Favier*, 12 Minnesota, 89; *Graham* v. *Hartnett*, 10 Nebraska, 517; *Blodgett* v. *Royalton*, 17 Vermont, 10; 42 Am. Dec. 476; *Barker* v. *Clark*, 4 New Hampshire, 380; 17 Am. Dec. 428; *Webber* v. *Chapman*, 42 New Hampshire, 326; 80 Am. Dec. 111; *Adams* v. *Iron Cliffs Co.*, 78 Michigan, 271; 18 Am. St. Rep. 441; *Mason* v. *City of Sioux Falls*, 2 So. Dakota, 640; 39 Am. St. Rep. 802; *Dwinel* v. *Barnard*, 28 Maine, 554; 48 Am. Dec. 507; *Cole* v. *Sprowl*, 35 Maine, 161; 56 Am. Dec. 696; *Weiss* v. *South Bethlehem*, 136 Penn. State, 294; *State* v. *Trask*, 6 Vermont, 355; *Harding* v. *Jasper*, 14 California, 642; note, 18 Lawyers' Rep. Annotated, 510; note, 27 Am. Dec. 564. In the latter note the editor says: "The question of what is sufficient evidence of the acceptance by the unorganized public, who cannot as a whole, or by a majority, expressly accept, is one of some difficulty. There is also a distinction as to the weight of such evidence. Some of the cases which recognize it to be conclusive evidence of an acceptance for the public to use the premises for twenty years, the statutory period, do not accord such weight to a user for a shorter period. *Mauck* v. *State*, 66 Ind. 177; *Bartlett* v. *Bangor*, 67 Me. 460; *Daniels* v. *Chicago & N. W. R. R. Co.*, 35 Iowa, 129. User for such a length of time would entitle the public to adopt one of two courses, — either to claim a permanent easement in the land, on the ground of a dedication, if the user was permissive: *Stevens* v. *Nashua*, 46 N. H. 199; or to set up a prescription where the user was adverse and under a claim of right: *State* v. *Tucker*, 36 Iowa, 485; Wash. on Eas. 177; *Kyle* v. *Logan*, 87 Ill. 64; *Mauck* v. *State*, 66 Ind. 177; *Stevens* v. *Nashua*, 46 N. H. 192. But on the first proposition, as to the conclusiveness of a seemingly permissive user for the statutory time, upon the fact of a complete

dedication, the Courts are not harmonious. The general principle herein laid down, that an intention to dedicate is essential, is relied upon in many instances to show that an apparent permission of the user was really given under mistake. *State* v. *Crow*, 30 Iowa, 258. And some Courts, notwithstanding such lengthy user, permit the owner to show any fact which would overcome the presumption. *Kyle* v. *Logan*, 87 Ill. 64. But there is no doubt, in all those cases which permit the evidence of user, at all, to prove an acceptance by the public, that an actual user for the period of the Statute of Limitations will be a sufficient acceptance of a dedication. Many of the decisions confound the user sufficient to establish a dedication with that requisite to give a right by prescription. The distinction however is clear. The intention of the owner is the deciding element. Against his intention to devote the land to the use of the public must be brought a continuous and adverse use for the period of limitation to give the public a permanent easement in his land, and that easement is a prescriptive right: whereas if an intention to set aside the land to the public use be shown, a user on the part of the public is pursuant to the dedication, and will, in the great majority of States, be sufficient evidence of a complete acceptance and dedication, if continued for the statutory time; and in many cases user for less than that time is sufficient. And another important feature is, that although the statutory time may have elapsed, yet the claim of right under a dedication may be overthrown by disproving the intention to dedicate: *Kyle* v. *Logan*, 87 Ill. 64; whereas an adverse claim for that time would establish an incontrovertible right by prescription.

"It is upon this latter branch of the subject, what evidence of acceptance is sufficient when the use has not continued for a period of time coeval with the Statute of Limitations, that the most delicate questions arise. A comprehensive summary of the facts of importance, as evidence to establish such acceptance, is given by Judge Butler in *Guthrie* v. *New Haven*, 31 Conn. 308, 321: 'The whole matter, acceptance as well as dedication, has been left by a majority of the Court to rest on the principles of the common law with which it originated. These principles authorize the gift, estop the giver from recalling it, and presume an acceptance by the public where it is shown to be of common convenience and necessity, and therefore beneficial to them. For the purpose of showing that it is beneficial, an express acceptance by the town or other corporation within whose limits it is situate, and who are liable for its repair, the reparation of it by the officers of such corporation, or a tacit acquiescence in the open public use of it, is important; and so are the acts of individuals, — such as giving it a name by which it becomes generally known, recognizing it upon maps and in directions, using it as a descriptive boundary in deeds of the adjoining land, or as a reference for locality in advertisements of property, etc., and any other acts which recognize its usefulness, and tend to show an approval of the gifts by the members of the community immediately cognizant of it; but the principal evidence of its beneficial character will be the actual use of it as a highway, without objection, by those who have occasion to use it for that purpose. *Green* v. *Town of Canaan*, 29 Conn. 157.'"

In *Cincinnati* v. *White*, *supra*, the Supreme Court of the United States seem to base the doctrine of dedication implied from long permissive use on the ground of estoppel, observing: "The law considers it in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication. It is a violation of good faith to the public, and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted." Other cases have adopted this reasoning (see *Town of Marion* v. *Skillman*, 127 Indiana, 130; 11 Lawyers' Rep. Annotated, 55); but Mr. Angell (Highways, sect. 156) strongly combats it, declaring it "not sanctioned by a single English decision," and that the true doctrine is that an intention to dedicate may be inferred from the fact of the long permissive use, and must be so found in order to support the public claim. The notion of estoppel, he declares, "is foreign to the principle on which dedication rests, and does but form an excrescence to mar the simplicity of the doctrine as established by English authority." This seems to be a mere dispute over phrases. The matter does not rest originally in bare estoppel; if there has been a dedicatory intent, there is no need of estoppel; but if the intention to dedicate is lacking, there may still be an estoppel; and this is probably all that Courts have meant by their invocation of the doctrine of estoppel.

Some cases hold that a very long user, such as forty, twenty, or fifteen years, establishes conclusive proof of dedication; but it would answer no useful purpose to cite them, as they do not hold that a shorter user would not answer. See *Lemon* v. *Hayden*, 13 Wisconsin, 159.

As to the second branch of the rule, it is essential, in the absence of other proof of intention, that the use by the public should be an exclusive use for highway purposes, and for the prescriptive time. *Weiss* v. *So. Bethlehem*, 136 Penn. State, 294; Dillon on Municipal Corporations, sect. 500. The latter says: "But where there is no other evidence against the owner to support the dedication but the *mere fact* of such user, so that the right claimed by the public is merely prescriptive, it is essential, to maintain it, that the user or enjoyment should be adverse; that it was with a claim of right, and uninterrupted and exclusive for the requisite length of time." Warranted by *Remington* v. *Millerd*, 1 Rhode Island, 93; *Thayer* v. *Boston*, 19 Pickering (Mass.), 511; 31 Am. Dec. 157; *Talbott* v. *Grace*, 30 Indiana, 389; 95 Am. Dec. 703; *Keyes* v. *Tait*, 19 Iowa, 123; *Detroit* v. *Detroit, &c. R. Co.*, 23 Michigan, 173; *Green* v. *Oakes*, 17 Illinois, 249; *Smith* v. *State*, 23 New Jersey Law, 130, 712; *Shawangunk Kill Br., in re*, 100 New York, 642; *Smith* v. *Gardner*, 12 Oregon, 221; 53 Am. Rep. 342; *Onstott* v. *Murray*, 22 Iowa, 157; *Cyr* v. *Madore*, 73 Maine, 53; *Le Roy* v. *Leonard* (Tennessee), 35 Southwestern Reporter, 884; *Madison Township* v. *Gallagher*, 159 Illinois, 105; *Stewart* v. *Frink*, 94 North Carolina, 487; 55 Am. Rep. 618; *State* v. *Bradbury*, 40 Maine, 154; *Manderschid* v. *City of Dubuque*, 29 Iowa, 73; 4 Am. Rep. 196. In the New York case the Court said: "Here the use of the road by the public was only for about four years; and if mere user by the public without any action by the town authorities, laying out or recording, or improving or accepting the road, can make a highway (a point we do not determine), such user must continue at least twenty years."

Nos. 1, 2. — Reg. v. Inhabitants of East Mark; Winterbottom v. Lord Derby. — Notes.

In Angell on Highways, sect. 143, it is said, after citing the first principal case: "But in a recent American case it was held that without some clear and unequivocal manifestation of an intention to dedicate, dedication would not be presumed until after the lapse of twenty years; and this seems to be the view more generally taken by American Courts." Citing *Hoole* v. *Attorney-General*, 22 Alabama, 190; *Noyes* v. *Ward*, 19 Connecticut, 250; *State* v. *Thomas*, 4 Harrington (Delaware), 568; *State* v. *Gregg*, 2 Hill (South Carolina), 387; *Penquite* v. *Lawrence*, 11 Ohio State, 274; *Epler* v. *Niman*, 5 Indiana, 459; *Lewis on* v. *Proctor*, 27 Illinois, 414; *Jackson* v. *Smiley*, 18 Indiana, 247; *Dodge* v. *Stacy*, 39 Vermont, 560; *Bigelow* v. *Hillman*, 37 Maine, 52; *State* v. *Green*, 41 Iowa, 693; and this is the conclusion stated in 3 Kent's Commentaries, 451: "The true principle on the subject, to be deduced from the authorities, I apprehend to be, that if there be no other evidence of a grant or dedication than the presumption arising from acquiescence on the part of the owner, in the free use and enjoyment of the way as a public road, the period of twenty years applicable to incorporeal rights would be required as being the usual and analogous period of limitation. But if there were clear, unequivocal, and decisive acts of the owner, amounting to an explicit manifestation of his will to make a permanent abandonment of the road, these acts would be sufficient to establish the dedication without any intermediate period." This view is taken in Washburn on Easements, p. 220, citing *Hoole* v. *Attorney-General*, *supra*; *Gould* v. *Glass*, 19 Barbour (New York Supr. Ct.), 179; *Smith* v. *State*, 3 Zabriskie (New Jersey), 130; *Hutto* v. *Tindall*, 6 Richardson Law (So. Car.), 396; *Day* v. *Allender*, 22 Maryland, 526.

Some cases are not so liberal, and hold that mere user by the public, although uninterrupted, and however long continued, unless accompanied by acts showing a claim of right, or acceptance, such as working the road, keeping it up, repairing, or removing obstructions, does not vest the right in the public. *Johnson* v. *State*, 6 Coldwell (Tennessee), 532; *Hall* v. *McLeod*, 2 Metcalfe (Kentucky), 101. In the latter the Court said: "It cannot be admitted that where the proprietor of land has a passway through it for his own use, the mere permissive use of it by others for half a century would confer upon them any right to its enjoyment. So long as its use is merely permissive, it confers no right; but the proprietor can prohibit its use or discontinue it altogether at his pleasure. A different doctrine would have a tendency to destroy all neighborhood accommodation in the way of travel, for if it were once understood that a man, by allowing his neighbors to pass through his farm without objection over the passway which he himself used, would thereby, after the lapse of twenty or thirty years, confer on him a right to have the passway to be kept open for his benefit and enjoyment, a prohibition against all such travel would immediately ensue." "According to the principles of the common law, a right to any incorporeal hereditament may be acquired by length of time. This mode of acquisition is denominated *prescription*, and is founded on uninterrupted use and enjoyment *time out of mind*, or in other words, for such a length of time that the memory of man runneth not to the contrary. Such an enjoyment of the use does not merely create a presumption of a right, but is conclusive evidence of its existence. The enjoyment however of an

incorporeal hereditament for twenty years only furnishes a presumption of a legal title, which may be confirmed or repelled by the circumstances incident to its use and enjoyment."

So in *Phipps* v. *State*, 7 Blackford (Indiana), 512, where a road through uncultivated lands of the United States had been used as a highway for more than twenty years, the Court said: "We do not think this doctrine of dedication, inferred from user, is at all applicable to the extensive uncultivated domain of the United States. There is no one to watch and guard against encroachment. It is impossible that the general government should know whether its unseated lands are used for highways or not. There cannot therefore exist that consent by the owner to the use of his land for a road, from which a dedication can be presumed." To the same effect: *Pritchard* v. *Atkinson*, 4 New Hampshire, 9; *State* v. *Nudd*, 23 ibid. 327; *Harding* v. *Jasper*, 14 California, 642; *Hutto* v. *Tindall*, 6 Richardson Law (So. Car.), 396; *Irving* v. *Ford*, 32 N. W. Reporter, Michigan, 601. And in *Root* v. *Commonwealth*, 98 Penn. State, 170; 42 Am. Rep. 614, where the owner of land on a river established a ferry across it, and for access to it opened and kept in repair a lane through his land, and the public used the lane for access to the river from a highway for more than twenty-one years, and the owner discontinued the ferry and barred up the lane, *held*, that the public had not acquired a prescriptive right of passage over the land.

The English rule however was adopted in Pennsylvania at an early day (since changed by statute), and mere use for twenty-one years was held *prima facie* evidence of the right. *Worrall* v. *Rhoads*, 2 Wharton, 427; *Reimer* v. *Stuber*, 20 Penn. State, 458.

The subject is regulated by statute in many of the States.

No. 3. — YOUNG *v.* CUTHBERTSON.

(H. L. APPEAL FROM SCOTLAND, 1854.)

No. 4. — DUNCAN *v.* LEES.

(SECOND TRIAL COURT OF SESSION, 1871.)

RULE.

WHERE (as in the law of Scotland) a public way is established by prescription: —

(*a*) It is necessary to show the *termini* in a public place at each end.

(*b*) It is sufficient to prove the public use of the way over the *locus* in dispute, and to prove that the people so using it proceeded on their way and

arrived at a public place, without showing how they got there. The presumption is that they proceeded lawfully from the place in dispute to the *terminus*.

(*c*) Where a small natural harbour on the sea-coast is proved from the time of living memory to have been occasionally, though not frequently, resorted to by fishing and pleasure boats, there is evidence from which a jury may infer that the harbour is a public place so as to be a good *terminus* for a way of which the public user for a like period has been proved.

Young v. Cuthbertson and others.

1 Paterson (Sc. App.), 309–315 (s. c. 1 Macqueen, 455).

Highway. — Public. — Right of Way. — Terminus of Way. — Evidence. — Issue. — Bill of Exceptions.

In an action of declarator that there existed a public right of way [309] through the lands of the defender, the Court of Session approved of this issue to try the question: "Whether, for forty years and upwards prior to the year 1827, or for time immemorial, there existed a public right of way for foot passengers from the Kirktown of Burntisland, and harbour and royal burgh of Burntisland, or one or more of them, leading westward, along or upon the margin of the sea beach, through the defender's lands, to the western extremity thereof, and thence proceeding to Starleyburn port and harbour, and to the port and harbour and old and new villages of Aberdour, or to one or more of them?" On a Bill of Exceptions: —

Held (affirming judgment), (1) That it was sufficient for the pursuers to prove that there existed a public road to Starleyburn, and that it was not necessary to prove that it was a public place; nor, supposing it not to be a public place, what means of exit the public had therefrom to a public place; and (2) That in considering what was the road put in issue, the issue alone was to be looked at, and that it was not competent to construe the issue by a reference to the record.

A public right of way means a right of way from one public place to another public place, but there may also be a public way like a *cul de sac* in a town.

Young brought this case under review of the House of Lords by two appeals, pleading in the first appeal that the interlocutor of

20th Dec., 1851, disallowing the exceptions to the ruling [*310] of *the Judge at the trial, should be reversed, because: "1. The words of the issue rendered it necessary for the respondents to prove a right of public footpath not only to Starleyburn, but beyond that place westward through the grounds or policy of Lord Morton, to the port and harbour or the old or new villages of Aberdour. — (1st exception.) 2. At all events, in order to entitle the respondents to claim a verdict establishing a right of public way only so far as Starleyburn, it was necessary for them to prove that Starleyburn port and harbour was a public place, and as such had existed for forty years prior to 1827. — (2nd, 3rd, and 1st part of 5th exception.) Stair, ii., tit. 7, § 10; *Rodgers* v *Harvey*, 4 Murr. 29; *Crawford* v. *Menzies*, 11 D. 1130. 3. It was not competent to direct the jury to return a verdict finding a public right of way from Kirktown to Starleyburn, and from Starleyburn directly north to the turnpike road between Burntisland and Aberdour. — (First part of 4th and 5th exceptions.) 4. The direction that it would be sufficient to support the right of way claimed in the issue, if parties going from Burntisland to Starleyburn 'from thence *could* and *did* proceed by the road to Aberdour,' was erroneous; inasmuch as it left it to the jury to find a public right of way from Starleyburn to the turnpike road, although passengers had not used the road between Starleyburn and the high road for forty years prior to 1827. — (Last part of fourth exception.) 5. There was no proper evidence of possession by the public of such line of road between Starleyburn and the turnpike road during forty years prior to 1827, sufficient to go to the jury. — (6th exception.) 6. A direction ought to have been given to the jury that evidence of the interruption of the right of way claimed for twenty-two years after 1827, acquiesced in by the public during that period, was sufficient to exclude the right claimed on the part of the public. — (7th exception.) Bell's Principles, § 946; *Rodgers* v. *Harvey*, 10th July, 1827; F. C.; 3 W. S. 258. 7. The 8th exception ought to have been sustained, which was taken to the following direction of the presiding Judge: 'That if evidence was given to the jury satisfactory to their minds of the existence of a public footpath as far back as the memory of living witnesses could be expected to extend, although such testimony did not, either in any instance, or only in a few cases, go back distinctly as far as forty years prior to 1827, it was com-

No. 3. — Young v. Cuthbertson, 1 Paterson (Sc. App.), 310.

petent for the jury to presume, and when the evidence was consistent and uncontradicted, the jury ought, in point of law, to presume from such proof of the exercise of a right of way uninterrupted so far back as living testimony can go, a previous enjoyment corresponding to the manner in which it had been enjoyed during the period embraced in the evidence, if in itself satisfactory to them as to that period; and that the defender was not entitled to the verdict, on the ground that the evidence so laid before them did not positively apply to the first years of that period of forty years, supposing that the testimony, in their opinion, did not directly reach to these earlier years.'"

By a second appeal, he maintained that the interlocutor of 26th January, 1850, repelling a preliminary defence to the title to sue, and that of 27th June, 1851, fixing the form of issue to try the case, should be reversed, because: "1. Effect ought to have been given to the preliminary defences stated by him. *Crawford* v. *Menzies*, 11 D. 1130. 2. If it should be held that the proper construction of the issue settled by the interlocutor of 27th June, 1851, relieves the respondents from the *onus* of proving that the road claimed by them proceeds throughout its course along or near to the seashore or top of the sea beach from Kirktown of Burntisland to the two villages of Aberdour, or, at all events, to some public place, that interlocutor should be reversed. 3. That interlocutor was erroneous, in so far as it did not allow the appellant an issue of acquiescence on the part of the public in the obstructions which prevented the use of the road between 1827 and 1849, a period of twenty-two years; or, at all events, in so far as the issue excluded from the investigation the period between 1827 and 1849, the date of the action. 4. The exceptions stated for the appellant to the charge of the presiding Judge ought to have been allowed. 5. The verdict ought to be set aside, in respect of ambiguity, because not establishing by what line of way foot passengers are to proceed from Starleyburn to Aberdour; and in respect of surprise on the part of the appellant, as it necessarily adopted a line of road of which no previous notice was given on the record. 6. The pleas of acquiescence and homologation stated by the appellant ought to be sustained."

The respondents in their printed case supported the findings of the Court and verdict on the following grounds: "1. As the jury found that foot passengers exercising the right of way in dispute

did, prescriptively or immemorially, proceed onwards from Starleyburn port and harbour to the port and harbour and to the old and new villages of Aberdour, it was unnecessary to consider what might have been the rule of law applicable either to a finding expressly negativing the exercise of a right of way from Starleyburn onward to Aberdour, or of a finding simply affirming such right of way from Burntisland to Starleyburn. 2. Supposing the jury had affirmed the right of way simply from Burntisland to Starleyburn port and harbour, that would have been a valid and sufficient verdict for the respondents. 3. No verdict having been returned in the terms referred to in the appellant's sixth exception, that exception became inapplicable; and, even if it were otherwise, the exception itself was erroneous, both in law and with reference to the evidence, and the relative direction objected to, in the appellant's fourth exception, was unobjectionable. 4. Because proof that foot passengers exercising the right of [*311] way in dispute through the appellant's lands, *and proceeding onwards to Starleyburn port and harbour, could and did, prescriptively or immemorially, proceed thence to the port and harbour and old and new villages of Aberdour, whether through the grounds of Lord Morton or by the highway, or otherwise, was, in any view, competent and sufficient to entitle the respondents to a verdict; and it was not necessary for the respondents to prove that such foot passengers passed exclusively through the grounds of Lord Morton, or substantially and conclusively to establish a right of public footpath through his Lordship's grounds. 5. Because the question to be tried under the issue was simply the right of way through the appellant's lands, and it was *jus tertii* to the appellant in what line or lines foot passengers, exercising that right, afterwards proceeded onwards to the port and harbour and old and new villages of Aberdour, or how they passed through the lands of other parties whose rights could not be adjudicated upon in this cause. 6. Because the appellant's seventh exception — which was not insisted on in the Court below — was excluded by the terms of the issue, besides being in itself untenable both in fact and in law. 7. Because evidence of the exercise of a public right of way as far back as living testimony can be expected to extend, although not in every instance, or only in a few instances, reaching backwards for forty years, presumes the exercise of the right for the full period of forty years; and the

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direction of the presiding Judge objected to in the appellant's eighth exception was correct and sound in law.

Lord Advocate Moncrieff, Rolt, Q. C., and A. A. Hutchison, for appellant. — The pursuer having claimed a definite line of road, which was described in the summons, that was all which he was at liberty to establish by evidence, and any issue which varied in its description was incompetent. Now, the summons described the road as proceeding from the Kirktown of Burntisland, along the seashore *by* Starleyburn to Aberdour, — thereby using Starleyburn merely as a finger-post to indicate the direction. But the issue set up a road proceeding from the Kirktown *to* Starleyburn and old and new Aberdour, or to one or more of them, — thereby making Starleyburn the terminus, which it was not alleged to be in the summons. This was, therefore, an entirely new and distinct road, and such an issue ought not to have been allowed, even assuming that Starleyburn was a public place. But Starleyburn was not a public place, in fact, and was proved not to be so at the trial. Now, by the law of Scotland, there can be no public right of way which does not lead to some public place as a terminus. Stair, ii. 7, 10, per Adam, Chief C., in *Rodgers* v. *Harvey*, 4 Murr. 29; also 3 W. S. 251; *Crawford* v. *Menzies;* per Lord Fullerton, in *Cuthbertson* v. *Young;* per Lord Cranworth, L. C., in *Campbell* v. *Lang*, 1 Paterson, 236; 1 Macq. App. 451; 25 Sc. Jur. 393. There can be no such thing as a servitude of recreation or sauntering over another's ground. *Dyce* v. *Hay*, 1 Paterson, 83; 1 Macq. App. 305; 24 Sc. Jur. 465. There is also an English authority, *Woodyer* v. *Hadden*, 5 Taunt. 125 (14 R. R. 706). The only apparent hostile authority is Elchies' Annot., but that is an apocryphal work, the author being unknown. Such, therefore, being the law, it was absolutely necessary for the pursuers, seeing that Starleyburn had not been a public place for the prescriptive period, to prove that the road went to Aberdour, which could only be done by proving that it went through Lord Morton's lands (first four exceptions). But the Judge told the jury it did not matter whether Starleyburn had been for forty years a public place or not, and that it was enough if passengers could get in any way from Starleyburn to the turnpike road leading to Aberdour; whereas there was no proof of any right of way between Starleyburn and the turnpike road, nor was any such road alleged in the summons.

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[Lord Chancellor. — Why go back to the summons? The summons might perhaps show that no such issue ought ever to have been granted; but in considering whether a direction to the jury was proper under a particular issue, of what use is it to refer to the summons?]

In construing an issue we can't go beyond the record. That can only be proved which is alleged in the summons. If, therefore, the summons set forth a particular road, no other road could be proved at the trial; and yet the Judge told the jury it was immaterial to prove that this road went through Lord Morton's ground; indeed, he said that even if the passengers trespassed through Lord Morton's lands after reaching Starleyburn, that would be immaterial.

[Lord Chancellor. — That, certainly, would be bad law to lay down to a jury. It is not very happily expressed, but the Judge no doubt meant that it was not necessary to prove that there was a public right of way through Lord Morton's grounds, it being presumed that people could get lawfully to some public place beyond Starleyburn. The substance of the issue was, whether there was a public right of way through the appellant's lands.]

There was, however, no evidence that people could get lawfully from Starleyburn to the turnpike road. Then the issue was wrongly framed, inasmuch as it laid the use to be for forty years prior to 1827, instead of forty years prior to 1849, the commencement of the action. This was also a variance from the summons, and it operated unjustly, because it prevented us giving evidence of the important fact, that the public by acquiescence since 1827 had lost the right of way, if they ever had any. The acquiescence of the public for so long a period as twenty-two years would, in point of law, exclude their claim altogether. Bell's Pr.; s. 945; *Ayton* v. *Melville*, Mor. App., "Property," No. 6; *Marquis of Abercorn* v. *Langmuir*, 20 May, 1820, F. C.; *Duke of*
[* 312] *Portland* v. *Samson, 5 D. 476. Such at least is the case of private individuals, and there seems no reason why the public should not lose a right of this nature in the same way.

[Lord Chancellor. — But how can a few individuals, by acquiescence, bind the public? A proprietor may cause an interruption, but it does not follow that a jury would hold such interruption to be lawful.]

The private proprietor can raise a declarator against two or

three individuals, and a decree in that declarator will effectually bind the public. So, conversely, there seems no reason why the public may not lose by disuse or acquiescence their right of way. Lord LYNDHURST, in *Rodgers* v. *Harvey*, 3 W. S. 251, said, "A subsequent interruption not acquiesced in will not bar the public;" thereby implying, that, if acquiesced in, it would bar the public. This is not like the case of a public trust, against which prescription would not run, but it is a *quasi* patrimonial right, which, though it might be gained by forty years' prescription, might be lost by interruption and acquiescence for a much shorter period. (The eighth exception is fully noticed in the judgment.)

Solicitor-General Bethell, and Anderson, Q. C., for respondents, were not called upon.

Lord Chancellor CRANWORTH. — My Lords, in this case there are two appeals: one against the interlocutor settling the form of the issue, and the other upon certain exceptions which were taken by the defender to the direction of the learned Judge who tried the issue. The reason why I am proceeding to move your Lordships to give judgment in this case, after having heard the case of the appellant only, is, because I am of opinion that the arguments have not at all shaken the propriety of the course which was taken in the Court below, and therefore there is no necessity for further occupying your Lordships' time.

The question arose in this way: A claim was set up to a right of way to the public from Burntisland to the seashore, in front of property now belonging to the original defender, the present appellant, Mr. Young, to a place called Starleyburn, and from thence on to Aberdour. The summons was set out; the defender denied that there was any such right of way, and eventually an issue was directed in these terms: "Whether for forty years and upwards prior to the year 1827, or for time immemorial, there existed a public right of way for foot passengers from the Kirktown of Burntisland, and harbour and royal burgh of Burntisland, or one or more of them, leading westwards, along or upon the margin of the sea beach, through the defender's lands, to the western extremity thereof, and thence proceeding to Starleyburn port and harbour, and to the port and harbour and old and new villages of Aberdour, or to one or more of them?"

Now, one of the pleas before your Lordships is as to the propriety of that issue. It is said that the issue was directed in an improper

form upon one or two grounds. First of all, it was said that the issue was, Whether, for forty years prior to the time of commencing the proceedings, there existed this public right of way? I am rather inclined to think that that would have been a more correct mode of directing the issue; but that is an objection which cannot lie in the mouth of the present appellant. It was the other party who would have had to complain of his being put to prove more than he ought to have been put to prove; namely, that he was put to prove the right of way for time immemorial, or for forty years and upwards prior to the year 1827, — that is, from the year 1787, — whereas, in truth, it would have been sufficient for him to have proved the right of way for forty years prior to the commencement of these proceedings, which was in the year 1849. I am rather inclined to think that that would, in the respondents' mouth, have been an objection; but it does not at all lie in the mouth of the present appellant to set up that objection, because to him it was an advantage instead of a disadvantage that there was too onerous an issue imposed upon the other side. It was supposed that, by this form of directing the issue, he, the appellant, was shut out from an advantage which he otherwise would have had, in proving that during twenty-two years (from 1827 to 1849) he had been in possession of the property, and that he had either constantly, or nearly constantly, shut out people from the enjoyment of this supposed right of way. That is quite immaterial. The issue had not shut him out from proving these facts, because when the pursuer undertook to prove that, for time immemorial, or for forty years and upwards prior to 1827, there existed a public right of way, the fact that for the last twenty-two years the public had been excluded (if they had been excluded) would have been just as relevant as upon an issue, whether for forty years preceding the action there had been a public right of way. The issue has, in the form in which it was directed, imposed upon the party who was to maintain the affirmative the burden of proving the right of way too far back probably; but that is an objection not lying in the mouth of Mr. Young, though it would have been a good objection in the mouth of the other party. I think, therefore, there is no ground for setting aside this interlocutor.

Then it is said the issue was, Whether there was this public right of way to Starleyburn port and harbour, and to the port and harbour and old and new villages of Aberdour, or to one or more of

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them? That, it is said, was an objectionable form of framing the issue, for this reason: Starleyburn port and harbour, it is alleged, is not a public place, and if it is not a public place, * the right of way up to that non-public place would not [*313] be a public right of way. But this objection is involved in two contradictions, inasmuch as what the pursuers undertook to prove was the existence of a public right of way "to Starleyburn port and harbour, and to the port and harbour and old and new villages of Aberdour, or to one or more of them." Assuming that a public right of way means a right of way from one public point to another public point, the pursuers, in order to establish this right of way, must prove either that Starleyburn port was of itself a public place, or if not, that this right of way was a public right of way, because it went on beyond Starleyburn port. Although I do not think that this issue is framed in the most apt mode in which the issue might have been framed, yet it distinctly raises the point which was meant to be tried, and the only point which ought to be tried, namely, whether there was a public right of way for forty years in front of the grounds of the defender, Mr. Young?

Obiter, there was an objection made as to whether the law had been rightly laid down in some prior cases. One case which was before your Lordships' House last sessions suggests that a public right of way means a right of way from one public place to another. I believe that, for a common purpose, that is quite accurately stated; by which I mean, if Starleyburn had been a mere private house, and the public had been in the habit of going from Burntisland to Starleyburn and back again, that would not have been a public right of way. The proof of that is this: If the owner of the lands through which the way went had purchased this private house, he could have destroyed the house and shut the way, and there would have been an end of it. Generally speaking, a public right of way means a right of way from one public place to some other public place. It was suggested that that description may not be always perfectly accurate, because there may be a place like a *cul de sac* in a town; and perhaps the existence of such places may show that there may be cases in which that description is not quite accurate; but for a common purpose it is accurate to say, that a public way means a public way from one town to another, or from one public road to another public road, with a

public terminus at each end. That being so, that settles the appeal, so far as relates to the form of the issue.

Now, my Lords, I come to the more material arguments, upon which I think there is no doubt at all, namely, the numerous exceptions which were taken to the directions given by the learned Judge to the jury. There were no less than eight exceptions taken, and it appears to me that they have all entirely fallen to the ground. I have only to state what those exceptions are, and the few observations I shall make will show why I think they are utterly unfounded.

The first exception is: "His Lordship directed the jury that the pursuer's case, under the words of the issue, did not render it necessary for them to prove a right of footpath through the grounds or policy of Lord Morton to the port and harbour or the old or new villages of Aberdour." No doubt the road which was described was the road passing through the grounds of the defender Mr. Young, and described as continued on to Aberdour through the grounds of Lord Morton. I take it, it was so. I think that that is not quite accurate, because the road is described in the summons and condescendence as going through the grounds of Lord Morton after it had left the defender's grounds. It was perhaps necessary to show that the road which went through the defender's ground, in some mode or other, went through Lord Morton's ground on towards Aberdour. Perhaps that was so; but it would be tying up the pursuers far too strongly and strictly to say, having proved all that was held to be material between the pursuers, who are the public, and the defender, Mr. Young, namely, that there was a public right of way through his grounds, that they would be thrown back, because they did not carry it on to Aberdour precisely in the mode they had indicated. That is not a part of the issue. All that was material in the issue was, whether there was a right of way through the defender's grounds to Aberdour, so as to become a public right of way. The circumstance that the road went to Aberdour through Lord Morton's grounds was immaterial to the issue. So the learned Judge thought, and, as I think, quite rightly. Therefore the first exception falls to the ground.

Then it is said in the second exception: "His Lordship directed the jury that it was sufficient if a public right of way should be established to Starleyburn." The issue raised the point whether

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there was a public right of way *inter alios locos* to Starleyburn; and his Lordship directed that it was quite sufficient if the jury found that there was such a public right of way. No doubt that was perfectly right. If Starleyburn port is not a public place, upon which subject there is a good deal of conflicting evidence, then, in order to prove a public right of way, the party must prove that the road at Starleyburn, and beyond Starleyburn, on to Aberdour, is a public road. So the learned Judge held, and so I quite think.

The third exception is: "His Lordship directed the jury that, to support such public right of way, it was not necessary that Starleyburn port and harbour should have existed for forty years prior to 1827; and if the port and harbour of Starleyburn is the private property of Lord Morton, that fact would be no answer to the pursuer's claims of a right of way, if proved in point of fact." The learned Judge was perfectly right in making that statement. In order to prove a public right of way, it could not be necessary to show that Starleyburn port had existed for forty years. As I said in the course of the argument, you might as well contend that you could not prove a public right of way through Addison Place, because Addison Place had not existed from *time immemorial, or for a certain number of years. It [*314] would not be necessary to prove that Addison Place had existed, but that the *locus* had existed as a place through which a public right of way went. Therefore, it is perfectly clear that the learned Judge gave a right direction.

Then the fourth exception is: "His Lordship directed the jury that the right of way claimed would be completely established for the pursuers, as against the present defender, if foot passengers using that right of way could and did proceed from Starleyburn to the harbour or villages of old and new Aberdour by the high-road, without going through Lord Morton's policy grounds; and that, even if the pursuers should fail in proving in this action any right of way through such policy grounds, — a right which they could not vindicate or make effectual in this process, — still the right of way might be fully proved and found by the jury as far as Starleyburn, if parties from thence could and did proceed by the road to Aberdour, supposing any such exit from Starleyburn is necessary in point of law." The learned Judge could give no other direction. If there is a foot-road to the public from Burnt-

island to Starleyburn, and thence by the high-road to Aberdour, it is quite immaterial whether it goes through Lord Morton's grounds or not, though the parties in the summons thought it did. All that is essential to prove is, that the road went through the defender's ground. They may prove it a part of the way, and then, I think, the right beyond Starleyburn is settled, by showing that the passengers went from Starleyburn by the high-road or by any other mode. The exception suggests that that would be trespassing, and that the parties went by trespass on from Starleyburn. I think that would be a violent interpretation, indeed, when it is said that it is sufficient to prove the right of way to Starleyburn, and from thence parties could and did proceed by the high-road to Aberdour. Of course it is meant that they could lawfully proceed; nobody can be misled by that.

Then the appellant says that the learned Judge was wrong for not giving three directions. First of all, "That it was necessary for the pursuers, in order to entitle them to a verdict under the issue, to prove either that Starleyburn had been a public place for forty years prior to 1827, or to prove a public right of way for that period along the sea beach, through Lord Morton's grounds, from Burntisland or Kirktown to the port and harbour or the old or new villages of Aberdour." That forms just the converse of what I have stated. It was not necessary for the learned Judge so to direct the jury, and if he had so directed the jury, he would have directed them wrong.

Then the appellant says that the learned Judge ought to have directed the jury, "That it is not competent under the issue and record to return a verdict finding a public right of way from Burntisland or Kirktown to Starleyburn port and harbour, and thence to the highway, and thence by the highway to the port and harbour or old or new villages of Aberdour." It was competent. If you could prove it to be a public right of way, it was not necessary for the learned Judge to direct the contrary. Then the appellant says: "But if it be competent, then there was, in law, no evidence to go to the jury of such a right for forty years prior to 1827." Although it is alleged that there is no evidence, I have found four witnesses who speak upon the subject, one of whom, an old woman, as I recollect from her evidence, distinctly says, that in the year 1775 she remembers folks used to go along that road ever since she was a child eight or ten years old; she

knew it very well. Starleyburn port was not built then, and they went on that road. Some say they went through Lord Morton's ground, and some by the high-road; but it is impossible to say that there was not evidence for the jury. Some jurymen might have thought it weak evidence, and some strong, but the learned Judge had only to leave the question to them, as the matter of fact went upon that which was clearly sufficient evidence.

Then it is stated that the learned Judge ought to have told the jury, "That evidence of the interruption of the right of way claimed for twenty-two years after 1827, acquiesced in by the public for that period, is sufficient in law to exclude such right of way on the part of the public." I can find no such provision as that in the law of Scotland, any more than I can in the law of England. A person excluding the public is a question of degree, and the acquiescence of the public is also a question of degree. Certainly the fact that a person has for twenty-two years prevented people from doing what they had done before for forty years, does not of itself destroy the right. The complaint is that the learned Judge did not tell the jury that it did.

Then there comes the last exception, which is that the learned Judge directed the jury, that if evidence was given to them, satisfactory to their minds, of the existence of a public footpath as far back as the memory of living witnesses could be expected to extend, although such testimony did not either in any instance, or only in a few cases, go back distinctly as far as forty years prior to 1827, it was competent for the jury to presume, and when the evidence was consistent and uncontradicted, the jury ought in point of law to presume, from such proof of the exercise of a right of way uninterrupted so far back as living testimony can go, a previous enjoyment, corresponding to the manner in which it had been enjoyed during the period embraced in the evidence, if in itself satisfactory to them as to that period, and that the defender was not entitled to the verdict on the ground that the evidence so laid before them did not positively apply to the first years of that period of forty years, supposing that the testimony, in their opinion, did not directly reach to those earlier years. In fact, the evidence did not reach to those * earlier years; but [* 315] the learned Judge was quite right in his direction, otherwise what an absurdity we are involved in, both in Scotland and in England, when we have to prove that parties have enjoyed an

established right from time immemorial; we never can carry it back to anything like proof of the commencement. The period here which they had to prove was, I think, erroneous in the way in which the issue was framed. The issue was framed as against the pursuers, but not as against the present appellant. The pursuers had to prove that the right had existed either from time immemorial, or for forty years prior to 1827. That would be the year 1787, and there is evidence which distinctly went beyond that. All that the learned Judge said was: You may, if the evidence satisfies you, if for any reason it cannot be carried quite back to 1787, go as far as the memory of living witnesses goes; and the law authorises you in so doing. Upon all these points it seems to me that the learned Judge gave the jury an accurate direction. I confess I must observe upon this occasion, as I have on one or two other occasions, that the learned Judges in Scotland are a little loose in their way of framing issues, and sometimes a little loose in the mode in which they direct the juries; and if I had thought that there was anything really wrong here, I should, perhaps, have felt myself bound to have yielded to these exceptions; but I am happy to say that I see nothing wrong. There is, I may remark, one expression which I think a Judge would not have used in directing a jury in England, namely, "when the evidence was consistent and uncontradicted, the jury ought, in point of law, to presume;" that is not the happiest way of expressing it; only he goes on to negative what had been contended on the other hand, that it was not competent to them so to find. They could not find the forty years' enjoyment without distinct evidence of that period of time. He says: That is not so; you may presume it, if the evidence seems to you to be all consistent. The law delights in favouring possession as it has been enjoyed, and authorises you in one sense, and not only sanctions, but directs you to act upon it.

It appears to me, my Lords, that both those appeals have been brought without any sort of foundation. I shall therefore move your Lordships to dismiss them, and affirm the interlocutors of the Court below.

Interlocutors in each appeal affirmed with costs.

No. 4. — Duncan v. Lees, 9 Ct. of Sess., 3rd Ser., 855.

Duncan v. Lees, &c.

9 Court of Session, 3rd Series, 855–860.

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Public Right of Way. — Terminus.

Held, refusing a new trial on issues of public right of way, that suffi- [855] cient evidence had been adduced of resort by fishing and other boats to a natural harbour to constitute that part of the seashore a public place, in the sense necessary to make it a terminus to a public footpath.

Upon a previous trial of these cases (in one of which the tenant of the land was pursuer (or plaintiff), and in the other was defender) the questions were tried by a jury (1) Whether for forty years and upwards before the date of action there existed a public footpath or right of way along a certain path leading along the cliff by the sea from St. Andrews to a certain natural object called the "Rock and Spindle," and to a natural landing-place for boats called "Kinkell Harbour;" and (2) whether there was a like public right of way in continuation of the same path from Kinkell Harbour to Boarhills. The jury found in favour of the public right on the former, and against the public right on the latter question Upon motion for a new trial, the Court affirmed the verdict on the latter question, there being no sufficient evidence of public user of the footpath. Upon the latter question they allowed a new trial, on the ground that although there was considerable evidence of the public user of the footpath, the "Rock and Spindle," though much visited as an object of curiosity, could not be a public place in contemplation of law; and they doubted whether there was sufficient evidence that the place called Kinkell Harbour was such a harbour as to constitute a public terminus of the way.

These cases were again tried before the LORD ORDINARY and a jury on the issue, which was substantially as follows: "Whether, for forty years and upwards prior to 1869, or for time immemorial, there existed a public footpath, or right of way for foot passengers, in the direction marked on the plan in process from St. Andrews to Crail, by the margin of the East Sands, thence along the lands of Brownhills, and thence along the lands of Kinkell to 'Kinkell Harbour'?"

The jury returned a verdict in the affirmative.

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A motion for a new trial on the ground that the verdict was against evidence, having been argued: —

On considering the cause the judges gave their opinions as follows: —

Lord President. — My Lords, this case was originally tried under issues in which the pursuers claimed a right of way from a point on the turnpike road from St. Andrews to Crail along the coast as far as a place called Boarhills, and at that trial the jury returned a verdict partly in favour of the pursuers and partly in favour of the defenders. They found for the pursuers in so far as concerned the first portion of the road from St. Andrews to the Rock and Spindle and Kinkell Harbour, and they found for the defenders in so far as concerned that part of the road which lies between Kinkell Harbour and the village of Boarhills. We refused to disturb the verdict in so far as regarded the latter part of the road, and it thus became finally fixed that there was no road between Kinkell Harbour and Boarhills; but we granted a [*856] new trial as regarded that *part of the verdict which was in favour of the pursuers, and we were led to do so from a variety of considerations. In the first place, there was the important one of not seeing sufficient evidence to justify the jury in finding that this public footpath terminated either at the Rock and Spindle or at the place Kinkell Harbour, the Rock and Spindle being clearly not a public place in any sense of the word, and the evidence as to Kinkell Harbour being very unsatisfactory. But it was not difficult to see the cause of this state of the evidence, and of this unsatisfactory condition of the case as regarded the first portion of the footpath, because the pursuers had been directing their attention to the proving of a footpath all the way from a point near St. Andrews to the village of Boarhills. Boarhills being undoubtedly a public place, they had to a great extent failed to see the great importance of proving that Kinkell Harbour was a public place, and they succeeded only in proving one-half of the footpath. For these reasons we gave a new trial in the case of the part of the road between St. Andrews and Kinkell Harbour. The issue sent to be tried in this second case was: "Whether for forty years and upwards prior to 1869, or for time immemorial, there existed a public footpath, or right of way for foot passengers, in the direction of the red line on the plan No. 17 of process, leading from a point of the turnpike road from

St. Andrews to Crail, marked ' A ' on the said plan, by the margin of the East Sands, thence along the lands of Brownhills, and thence along the lands of Kinkell to Kinkell Harbour?" There is a corresponding issue as regards another branch of the road, which it is not necessary to advert to. They both depend on the same evidence. There can be little doubt that the main point of controversy on this second trial, as was foreseen when the new trial was granted, was whether Kinkell Harbour is in the proper sense of the term a public place, because that there was a considerable use of the footpath for a period exceeding forty years was sufficiently established by the evidence at the former trial. That evidence naturally would be repeated in the second trial, and the ground upon which we are now asked to set aside this second verdict, and to appoint the cause to be tried a third time, is solely that the verdict is against evidence in so far as it assumes, as it necessarily does, that Kinkell Harbour has been established to be a public place. Now, undoubtedly, the evidence upon this subject is narrow, and one may say, I think, without much fear of contradiction, that Kinkell Harbour is not a very public place. But at the same time, to make a good terminus for a public footpath it is not necessary that the place should be a very public place, or a place of great resort. The question is, whether it is a public place in the proper sense of the term; that is to say, a place to which the public resort for some definite and intelligible purpose. There is some ancient evidence, which I think not immaterial, which was not before the jury in the first trial. It is shown, in the first place, that for a very long period, and certainly back to a period before forty years, this place has been called Kinkell Harbour, indicating a certain use of the creek which exists there, which forms a natural harbour, though not a good one, — a natural harbour for very small craft certainly, but not the less that kind of natural harbour that these small craft do in point of fact resort to. Now, this mainly is to be found on maps of some authority which was prepared between 1820 and 1830, and it appears from the records of the local Admiralty Court that so far back as the end of the seventeenth century there were people who were designed as skippers at Kinkell, and who were summoned to appear at the instance of the fiscal of the Admiralty Court for the purpose apparently of considering the interests of the skippers and the fishermen on that part of the coast. It is

No. 4. — Duncan v. Lees, 9 Ct. of Sess., 3rd Ser., 856, 857.

thus certainly indicated that at an early period the place was a resort of boats — fishing-boats; and although there is a great deal of evidence on the part of the defenders to show that no fishing-boats of the present construction could possibly use this harbour, it does by no means follow that smaller boats may not have made this a place of resort; because everybody who is at all acquainted with the history of the herring-fishing of this country must be aware that in nothing has there been a change so much as in the size of the boats, and also in the size of the nets. Now, connecting this evidence with the testimony of the witnesses who were examined on the part of the pursuers, I am not able to [*857] say that there * is no evidence to show that this is a place of public resort. Certainly boats go there occasionally, although not frequently, and they are boats of no very great size; and it may also be admitted that the greater number of the boats that resort to this place are pleasure-boats; but I do not discount pleasure-boats. On the contrary, it appears to me that if the public resort to a particular place on the seashore for the purpose of pleasure and recreation, that may even of itself be sufficient to constitute that particular part of the seashore a public place as a terminus to a footpath. But it is not confined to a resort for pleasure-boats, because occasionally boats go there for other purposes, and there is evidence to show that people have used the footpath in question in connection with the boats that have resorted to this place. Therefore, while I am of opinion, as I said at the outset, that the evidence on this subject is narrow enough, I cannot say there was not a sufficient amount of evidence to go to the jury on the question whether Kinkell Harbour was a public place in the sense which was necessary to make it the legitimate termination of a public footpath. That being so, the case having been quite fairly dealt with by the presiding Judge, and the jury having affirmed by their verdict the road as leading to a public place, I do not feel myself justified in disturbing the verdict. I think the evidence on this second trial was materially different from what was led in the first in the particulars to which I have referred.

Lord Deas. — The thing we desiderated upon the last occasion as necessary to support the verdict of the jury in favour of the public path was evidence that what is called Kinkell Harbour was really a harbour. Apart from that, there was, and still is, suffi-

cient evidence of public use to go to a jury; and the question which the jury had latterly to try came substantially to this, Whether there was a harbour at Kinkell or not?

Now, there is not a great deal of evidence of a harbour, and I am not at all sure if I had been on the jury that I would have affirmed it to be a harbour; but undoubtedly there is a certain amount of evidence, and, I think, such an amount as to make it a fair jury question whether it is a harbour or not. The fact that for time immemorial it has been called Kinkell Harbour is of itself not to be laid out of view. There is no time that anybody can go back to, or any record to appeal to, which we can find or hear of, in which it was not called a harbour; and there is reason to suppose that much more use was made of it as a harbour in old than in recent times. We know that formerly much smaller boats were used by fishermen than are used now, and that the boats which were generally used upon the Fife coasts were small boats which might readily enter this harbour; and we see from the Admiralty record produced, that as far back as 1686, at a Court held at Anstruther Easter, there were, among the skippers convened, skippers representing the interests of the fishermen at Kinkell. There must have been boats there at that time — fishing-boats; and from the word "skippers" there must have been crews; and if crews and boats, the fishing trade must have been going on at Kinkell. To what extent that was so we do not know, but we know historically that there have been great variations in the extent of fishing on that coast. It is mentioned in "Sibbald's History of Fife" that dried fish for exportation used to be a staple article of trade there; that the white fishing was carried on all the year round in small boats, and the herring and mackerel fishing in larger boats at the season of the drove; that upon some occasions the herrings left the coast altogether, and when they did so, the haddocks left also, for this good reason, that the haddocks subsisted very much on the spawn and fry of the herrings; and so at different times the extent of the trade may have varied, and there is no improbability of Kinkell having been a harbour of considerable utility in former times. Undoubtedly, if used in the way suggested, it was properly enough called a harbour, — a fishing-harbour; and if a harbour, it was a public place. If a place has once been undoubtedly a public place, it will not readily lose that character, although the extent of the use of it has much

fallen off. Kinkell Harbour is used less or more at this hour, both by fishing-boats and pleasure parties; and if the place is fit to land boats, — if people, whether for pleasure or business, go and land there as a harbour, — that is to be taken into account [*858] in considering whether it is still a public place or *not. Another thing is, that we see upon the Ordnance plan it is not only mentioned as a harbour, but near it there is what is marked as Kinkell Castle. It is only a ruin, I suppose, now; but it must have been there a long time ago. Very probably there was some connection between the castle and perhaps a village and that landing, more particularly when we find, from the same historical author I have named, that as far back as the year 875 Bishop Kellach founded a chapel there. All that goes to support the notion that it was a harbour of some moment in former days, and it is not altogether discontinued now. I certainly think, as I have said in the outset, that the case is a very narrow one; but I cannot say that the jury are so wrong in deciding as they have done that we ought to disturb this verdict.

Lord Ardmillan. — When this case was before us on the first verdict, the Court decided that, as the proof then stood, the Rock and Spindle was not instructed to be in any sense a public place. It was, I think, the opinion of all your Lordships, as matter of law, arising on the proof adduced in regard to the position of the Rock and Spindle, and to the nature and character of the use and possession of the pathway to that place, that the Rock and Spindle is not "a public place," so as to be legitimately the terminus of a public right of way.

The Court, on considering the proof then adduced in regard to Kinkell Harbour, came to the same conclusion. But no such question of law arose on the proof in regard to Kinkell as had arisen in regard to the Rock and Spindle. The question was left open for decision on a new proof. I remember that I stated — and I think more than one of your Lordships also stated — that more evidence of the existence of a boat-harbour at Kinkell might be adduced on a second trial with the effect of sustaining a different verdict.

We have now, after a second trial and additional proof, a second verdict for the pursuers. The proof is not now the same as at the first trial. New evidence, written and parol, has been furnished, including the extracts from the old Admiralty record,

which I agree with your Lordships in thinking of some importance; and the jury, after consideration and discussion, and division of opinion, have by a majority decided in favour of the pursuers.

We are now called on by the defenders to set the verdict aside, and to give a second new trial. It is on no light grounds that we can do this, though it is quite competent to do so, if there be sufficient grounds. I have carefully considered the evidence. I view it as, to some extent, new and original, and to some extent a repetition, with additions and qualifications, of the evidence at the first trial. It is not for me to say whether I concur in the verdict. It may be that I do not. But there was on this last occasion a fair case for the consideration of the jury; and I cannot say that this verdict is absolutely contrary to evidence.

Lord KINLOCH. — This second verdict in favour of the pursuers appears to me to have greatly more support from the evidence than the first could pretend to. There were documents produced which might not unfairly warrant the jury in drawing the inference that there formerly existed a Kinkell Castle, and in connection with the castle a Kinkell Harbour, used for the purpose of receiving and mooring boats. In more modern times the creek could not be used availably for the larger boats which had come into use. But there was evidence to show that for smaller boats it was still employed as a mooring-place; and this in various emergencies, partly when the weather was rough and the boats could not easily make St. Andrews; partly when their owners were watching their sea-lines, or waiting for vessels to pilot; partly when they were there on previous arrangement, to take in cargoes of shell-fish gathered along the coast. The road in question was deponed to as having been used, more or less, in connection with all these uses of the creek. There was conflicting evidence on all these points; but I think there was enough of proof to authorise the jury to consider and determine whether this so-called Kinkell Harbour was not in the predicament of a public place, in the proper legal sense. To establish it to be such, it was not necessary to prove that there was an artificial harbour, or a harbour that was very good or useful. It was enough if there was here a mooring-place, used * to such an extent as fairly to [* 859] create a difference between this creek and the coast generally, and to establish a special and permanent use by the public of this particular part of the shore, in connection with which the

road in question was used. I think there was enough of evidence on this point to be fairly considered by the jury; and the jury having, on such consideration, given their verdict a second time for the pursuers, I am of opinion that the Court is not called on to interfere, and would not be warranted in disturbing the verdict. I agree, therefore, in holding that a new trial should be refused, and that the rule should be discharged.

Lord MURE. — I agree with your Lordships in thinking that this is not a case in which the verdict of the jury should be disturbed. The issue which was sent to trial left the question in a much more simple shape for the consideration of the jury than it was at the former trial, where they had to deal not with one harbour only, but two harbours, and various other termini. In the present case they had to deal with the simple question whether Kinkell Harbour was a public place in the sense in which that expression is commonly used in establishing a right of way. On that question there was a conflict of evidence as to what extent the place had been known and used as a harbour, and also as to its capacity for being so used. On the last of these points in particular the defenders made a strong case, as they adduced witnesses of great experience to show that the place was not one which could be called a harbour in any proper sense of the word, and this evidence struck me at the time as entitled to great weight. But there was, on the other hand, evidence, particularly of a fisherman who had used it for weeks consecutively in the course of salmon-fishing, and who said he had made use of it as a harbour for drying his nets and a harbour for his boats for several years during the salmon-fishing season. This evidence was in one respect not calculated to carry great weight in the case, because the witness was not there as one of the public, but the tenant of one of the parties to the question now raised; but as to the fact of the place being capable of being used as a harbour, he appeared to me to be a witness whose evidence was well worthy of consideration. And as with this conflict of evidence on these points the pursuer made out a case to the satisfaction of the jury, whatever our individual opinions may be, I do not think that the case is one in which the Court ought to interfere with the verdict of the jury. *The motion was refused accordingly.*

ENGLISH NOTES.

The rule that a highway must terminate in a public place at each end was laid down by Lord CRANWORTH, L. C., in *Campbell* v. *Lang* (1853), 1 Macq. 451, a Scotch case decided in the House of Lords shortly before *Young* v. *Cuthbertson*: and in that case Lord CRANWORTH said that he conceived the law on the point to be the same in Scotland as in England. In *Young* v. *Cuthbertson*, however, while the rule was again enunciated, it was recognised that a *cul de sac* may be a highway, and that this is so is now well established. See *Rugby Charity Trustees* v. *Merryweather*, and *Bateman* v. *Black*, Nos. 5 and 6, pp. 551, 552, *post*.

That a highway must terminate in a public place at each end, does not seem to have been decided in any reported English case. In Scotland the rule has received application in *Duncan* v. *Lees* and in the earlier case of *Darrie* v. *Drummond* (1865), 3 Macph. 496; but it does not seem probable that the doctrine would be followed in England.

It is, however, clear that according to English law a highway must lead from place to place. There cannot be a public "right of stray," that is, a right on the part of the public to wander about at pleasure in all directions over a piece of land: see *Eyre* v. *New Forest Highway Board* (1892), 56 J. P. 517; *Robinson* v. *Cowpen Local Board* (C. A. 1893), 63 L. J. Q. B. 235; though there may by custom be a right on the part of the inhabitants of a particular area to wander at large over a piece of land in that area for the purposes of recreation, &c.: see *Fitch* v. *Rawling*, No. 3 of "Custom," 8 R. C. 305 *et seq.*, and the notes thereto. The fact that the public have been permitted to wander at large over a piece of land may sometimes explain the existence of more or less defined tracks over the land, and wholly or to some extent rebut any presumption that such tracks have been dedicated to the public as highways arising from the user by the public. See *Schwinge* v. *Dowell* (1862), 2 Fost. & Fin. 845; *Chapman* v. *Cripps* (1862), 2 Fost. & Fin. 864. Though there cannot be a public right of stray, there may, it seems, be a highway between definite termini, though there is no defined track between them. See *Wimbledon and Putney Conservators* v. *Dixon* (1875), 10 R. C. 164 (1 Ch. D. 362, 45 L. J. Ch. 353, 33 L. T. 679, 24 W. R. 466).

AMERICAN NOTES.

These Scotch cases do not appear to have been cited in this country, and there seem to be very few analogous cases in our books.

"The character of the road does not depend upon . . . the places to which it leads; . . . If it is free and common to all the citizens, then no matter

whether . . . it leads to or from city, village, or hamlet . . . it is a public road." Elliott on Roads and Streets, p. 7.

In *South Branch R. Co.* v. *Parker*, 41 New Jersey Equity, 489, it was held that to establish a by-road from twenty years' uninterrupted adverse enjoyment, there must be a certain well-defined line of travel in the same place over the whole route. The Court said: "The material questions are, on this head, where did they make their exit from the lot, and enter upon it, at the end opposite the gates? And also, where did they travel, after passing the gateway, in reaching the other end?" "There is nothing which shows a well-defined line of travel for twenty years. . . . Therefore it is only left for one to consider whether or not there was a well-defined way over the Parker lot for over twenty years. . . . No one, however skilful, could take the testimony and from it lay out a road, and say it had been travelled in that particular line for twenty years."

In *Owens* v. *Crossett*, 105 Illinois, 351, it was held that evidence tending to prove that a road had been travelled over unenclosed prairie land for forty years, in a general direction, but the line of travel varying considerably, and had been changed within twenty years last past, is insufficient to show a road by user or prescription over a particular place in controversy, so as to justify a road commissioner in removing fences placed thereon.

A prescriptive public right to pass over land can only be acquired by travel in a definite, certain, and precise line or way. Slight deviations to avoid obstacles may be indulged, "but it is otherwise when the whole length of the road is abandoned for eight or nine years, and is not sufficiently travelled to prevent its becoming obstructed by the growth of weeds and brush." *Gentleman* v. *Soule*, 32 Illinois, 271; 83 Am. Dec. 264.

The facts that a road or lane, cleared off and fenced by the adjoining owners, is not a thoroughfare connecting at both ends with public roads, but terminates at one end in private unoccupied lands, and has never been used except by a few persons living along its line or near such private terminus, or by others for access to the lands of such persons, materially affect the presumption of a public right in such way, which might otherwise arise from user. *Tupper* v. *Huson*, 46 Wisconsin, 646.

If the location of the way is indefinite and uncertain, but there has been a user of a way answering in a general manner to the line described, the user will determine the limits and boundaries of the road. *State* v. *Vanderveer*, 17 New Jersey Law, 259; *Ehret* v. *Kansas City, &c. R. Co.*, 20 Missouri Appeals, 251. Where a line called for by legislative act cannot be traced, the line as practically located will be presumed to be the true one. *Freeholders* v. *Essex*, 43 New Jersey Law, 391.

No. 5. — RUGBY CHARITY *v.* MERRYWEATHER.

(1790.)

No. 6. — BATEMAN *v.* BLUCK.

(1852.)

RULE.

THERE may be a common highway in a *cul de sac*, and the dedication of such a way may be inferred from the existence of a paved court or street to which the public have free access only at one end, and the continued user of the court or street by the public.

Rugby Charity v. Merryweather.

11 East, 375 n.–376 n. (10 R. R. 528).

Highway. — Cul de sac.

A right of passage along a street may be established by evidence of fifty years' public user, although the *locus in quo* has been in lease for the whole time, and although the street is closed at one end by buildings.

Action of trespass brought by the trustees of the Rugby [376 n.] Charity against Merryweather. The action was brought to try a right of way in dispute between the plaintiffs and the governors of the Foundling Hospital. There were several pleas of justification on the record, amongst others, one stating that the *locus in quo* (which was Lamb's Conduit Street) was a common highway, and that the supposed trespass was committed in removing an obstruction there. At the trial before Lord KENYON, C. J., on the 26th of May, 1790, it appeared in evidence that the right of the soil was clearly in the plaintiffs; but there had been a common street there, though no thoroughfare, by reason of the houses at the end, for above fifty years. The plaintiffs accounted for not having put up a bar or the like, to denote that the way was not relinquished to the public at large, by showing that the *locus in quo* had been in lease for a long term up to the year 1780. Lord KENYON, C. J., asked what the plaintiffs had to say to the time from 1780 till about two years ago, when they had put up a bar. In answer it was said

that they had been in treaty with the Foundling Hospital, respecting the allowing them a right of way, which was finally broken off. Per Lord KENYON. — If this rested solely on the ground of a question of right between the plaintiffs and the Foundling Hospital, the former would certainly not have been barred by the time which elapsed from 1780 till the obstruction was put up, pending the treaty between them: but during all that time they permitted the public at large to have the free use of this way, without any impediment whatever, and therefore it is now too late to assert the right; for this is quite a sufficient time for presuming a dereliction of the way to the public. In a great case, which was much contested, six years was held sufficient. And as to this not being a thoroughfare, that can make no difference. If it were otherwise in such a great town as this, it would be a trap to make people trespassers. The Duke of Bedford preserves his right in Southampton Street, Covent Garden, by a bar set across the street, which is shut at pleasure, and shows the limited right of the public.

The jury found a verdict for the defendant upon the issue on the common highway.

Bateman v. Bluck.

18 Q. B. 870–878 (s. c. 21 L. J. Q. B. 406; 17 Jur. 386).

Highway. — Cul de sac. — Evidence.

[870] Trespass for entering plaintiff's close and pulling down a wall therein. Plea: That the close was a public pavement within the Metropolitan Paving Act, 57 Geo. III., c. xxix.; that plaintiff, unlawfully and contrary to the Act, erected thereon the said wall; and because the wall incumbered the pavement, and plaintiff refused, on defendant's request, to remove the same, defendant entered and pulled it down.

Held, on motion for judgment *non obstante veredicto*, that the plea was bad for not showing that it was absolutely necessary for defendant, in order to exercise the alleged right of passage, to remove the wall.

A public highway may, in law, exist over a place which is not a thoroughfare. Whether, in fact, it does exist or not, is a question for the jury.

Trespass for breaking and entering the close of plaintiff, in the parish of St. Sepulchre, in the county of Middlesex, and pulling down a wall of plaintiff in the said close.

First plea: Not guilty. Issue thereon.

Second plea: That the said close and the said wall were not, nor was either of them, the close or wall of the plaintiff. Issue thereon.

No. 6. — Bateman v. Bluck, 18 Q. B. 870–872.

Third plea: That the said parish of St. Sepulchre, before and at the time of the passing of Stat. 57 Geo. III., c. xxix., was a part of the metropolis included within the weekly bills of mortality; and the said close was, before and at the time when, &c., a paved public place within the true intent and meaning and subject to the provisions of the said Act, that is to say, a public footway pavement which had been and then was paved, cleansed, and lighted under the authority of the commissioners acting under Stat. 12 Geo. III., c. 68; * and that the said close was not [* 871] at the said time when, &c., nor was any part thereof, a turnpike road or any part of any turnpike road; and that, just before the said time when, &c., the plaintiff had, contrary to the provisions of the first-mentioned Act, unlawfully laid in and upon the said public footway pavement divers bricks, &c., and had therewith formed and constructed in and upon the said pavement the said wall in the declaration mentioned; and because, at the said time when, &c., the said wall remained on and incumbering the said public pavement, and because the plaintiff then, upon the reasonable request of the defendant, refused to remove the same, the defendant, at the said time when, &c., entered upon the said close for the purpose of pulling down the said wall, and removed the bricks and other materials to a small and convenient distance, and there left the same for the use of the plaintiff, doing no unnecessary damage: which are the same alleged trespasses, &c.

Replication: That the said close was not, at the time when, &c., a paved public place within the true intent and meaning and subject to the provisions of the said first-mentioned Act. Issue thereon.

Fourth plea: That, before and at the said time when, &c., there was and of right ought to have been, into, through, over, and along the said close, a public and common highway for all the Queen's subjects to go and return, pass and repass, on foot, at all times, at their own will and pleasure; that defendant, before and at the said time when, &c., was possessed of a dwelling-house abutting on and having a door opening into the said highway; and because the plaintiff had wrongfully erected * in and upon [* 872] the said highway the said wall so near to the said door of the defendant as to obstruct the same, so that defendant could not, without prostrating the said wall, pass along the said highway into and from the said house, and because plaintiff, at the time when, &c., refused, upon reasonable request of defendant then made

to him in that behalf, to remove the said wall, defendant, at the said time when, &c., entered upon the said close for the purpose of pulling down, and did pull down, the said wall, &c. (justifying as in the third plea).

Replication: That there was not, nor of right ought to have been, into, through, over, and along the said close, a public and common highway, &c., as in the plea alleged. Issue thereon.

On the trial, before COLERIDGE, J., at the Middlesex Sittings after last Easter Term, it appeared that the alleged close was a court opening into a public street in the parish of St. Sepulchre. There was no thoroughfare through the court. It contained fourteen or fifteen houses. The defendant was tenant of one of these houses, which had a door opening into the court, made by a previous tenant. The defendant had been required by the plaintiff to block up the door, which he refused to do; whereupon the plaintiff erected the wall in question and thereby blocked up the door; upon which the defendant pulled the wall down. The wall was erected on the pavement of the court; and the court had been paved, at the request of the plaintiff, by the commissioners under Stat. 12 Geo. III., c. 68, and was lighted under the powers of the same Act. It was objected, for the plaintiff, that the third and [* 873] fourth pleas were not proved, inasmuch as the court * was not a public place within the meaning of Stat. 57 Geo. III., c. xxix., and, not being a thoroughfare, could have no highway through it. The learned Judge directed a verdict for the plaintiff on the first issue and on so much of the second issue as related to the wall, and for the defendant on the residue of the second issue, and on the third and fourth issues, with leave to move to enter the verdict for the plaintiff on the third and fourth issues.

Knowles, in last Easter Term, obtained a rule *nisi* according to the leave reserved, and also to enter judgment for the plaintiff *non obstante veredicto* on the third issue.

Montague Chambers and Lush now showed cause. First, as to the fourth plea. The close in question is a highway. It is objected that there is no thoroughfare through it; but in *The Trustees of the Rugby Charity* v. *Merryweather* [p. 551, *ante*] Lord KENYON observed that a thoroughfare was not necessary to make a place a highway. *Woodyer* v. *Hadden*, 5 Taunt. 125 (14 R. R. 706), will probably be relied on; but the decision there did not turn upon this particular point, with respect to which CHAMBRE, J., in giving

judgment, remarked that the decision in *The Trustees of the Rugby Charity* v. *Merryweather* had been generally acquiesced in. [Lord CAMPBELL, C. J. — Unless the place be used as a public passage, what use can the public make of it?] That difficulty was suggested by * ABBOTT, C. J., in *Wood* v. *Veal*, 5 B. & Ald. [*874] 454 (24 R. R. 454), which will probably be cited on the other side; but the point was not expressly decided there. In the present case the public might have acquired the right to go round the court when passing between two points situate on either side of it.

Next, as to the third plea. The question whether the *locus in quo* was a public footway pavement is substantially the same as that which arises on the fourth plea. But, further, it is contended that the plaintiff is entitled to judgment *non obstante veredicto*, because a private person has no right to abate an obstruction in a public highway, unless it interferes with his passage along such highway. *Dimes* v. *Petley*, 15 Q. B. 276, will be relied on. But in that case, which was an action for negligence in navigating defendant's vessel, whereby plaintiff's jetty was injured, the defence set up, that the jetty was an unlawful obstruction in the river, and that the defendant, having occasion to navigate his vessel over that part of the river, and using all the skill that would have been necessary if the jetty had not been there, struck against it, was held bad, because it did not show that there was a necessity for the defendant to navigate his ship over that part of the river. But here the wall in front of the defendant's door must clearly be an obstruction, and must necessarily have been removed before the defendant could exercise his right of passage. [CROMPTON, J. — The plea does not allege such necessity.] The wall was an obstruction within sects. 65, 66, of Stat. 57 Geo. III., c. xxix [Lord CAMPBELL, C. J. — Those sections impose a penalty upon the party creating the obstruction, and direct the removal of it by the appointed authorities; but the statute does not enable a private individual to take the law into his own hands, * and [*875] remove the obstruction, unless it interfere directly and unavoidably with a right of his own.] That certainly makes it difficult to support the third plea.

Garth, *contra*. — As to the fourth plea, there was no evidence that the court in question was a highway. It appeared that it was a *cul de sac*; and it could not be a highway unless it were a

thoroughfare. [Lord CAMPBELL, C. J. — May not a square, or public promenade, having only one entrance, be a highway?] Perhaps so; but here there was no evidence to show that it was a public place. In "Hawkins's Pleas of the Crown," Book I. c. 76, s. 1 (Vol. II. p. 152, 7th ed.), it is said "that every way from town to town may be called a highway, because it is common to all the King's subjects, but that a way to a parish church, or to the common fields of a town, or to a private house, or perhaps to a village, which terminates there, and is for the benefit of the particular inhabitants of such parish, house, or village only, may be called a private way, but not a highway, because it belongeth not to all the King's subjects, but only to some particular persons, each of which, as it seems, may have an action on the case for a nuisance thereto." The correctness of the decision in *The Trustees of the Rugby Charity* v. *Merrywcather*, 11 East, 375 n. (p. 551, *ante*), was much questioned by MANSFIELD, C. J., in *Woodyer* v. *Hadden*, 5 Taunt. 125 (14 R. R. 706). [Lord CAMPBELL, C. J. — In the latter case it was held that there was no dedication to the public.] Here there is still less evidence of any dedication. In *Wood* v. *Veal*, 5 B. & Ald. 454 (24 R. R. 454), two of the Judges express their dissent from the doctrine laid down in *The Trustees of the Rugby Charity* v. *Merrywcather*.

[*876] *Lord CAMPBELL, C. J. — I am of opinion that the verdict upon the issue on the third plea was properly given for the defendant, inasmuch as the evidence went to show that the *locus in quo* was a public place within the statute. But I am also of opinion that, upon this issue, the plaintiff is entitled to judgment *non obstante veredicto*, inasmuch as the plea does not allege that the defendant enjoyed any right in the exercise of which it was necessary for him to remove the obstruction. He was bound, according to *Dimes* v. *Petley*, 15 Q. B. 276, and the cases there referred to, to show, not only that he had such a right, but that there was no way in which he could exercise it without the removal. On the issue raised by the fourth plea, I think the defendant is entitled to a verdict. That plea alleges that there was a public highway through the *locus in quo*, and that it was impossible for the defendant to pass along the highway without removing the wall. The jury found that there was such public highway; and we are bound to assume that finding to be good, unless, as is contended, there cannot, in law, be a highway through

No. 6. — Bateman v. Bluck, 18 Q. B. 876–878.

a place which is no thoroughfare. It seems to me that such a doctrine is incorrect. There may or may not be a highway under these circumstances. Take the case of a large square with only one entrance, the owner of which has, for many years, permitted all persons to go into and around it; it would be strange if he could afterwards treat all persons entering it, except the inhabitants, as trespassers. In *The Trustees of the Rugby Charity* v. *Merryweather*, 11 East, 375, n. (p. 551, *ante*), Lord KENYON laid down that there might be a highway through a place which was not a thoroughfare, and seems to have left it to the jury whether there was such highway or not. In *Woodyer* *v. *Hadden*, 5 Taunt. 126 (14 R. R. 706), the Court did [*877] not decide that there could not be a highway under such circumstances, but only that in that particular case there was none; and I do not find anything decided there which is necessarily inconsistent with what was laid down by Lord KENYON. The fourth plea, therefore, being proved, and being unexceptionable on the face of it, the defendant is entitled to our judgment.

COLERIDGE, J. — The third plea being given up, the question is, whether there was a highway through the *locus in quo*, as alleged in the fourth plea. It was proved that the court in question had one opening only into a public street; that it contained some fifteen houses, belonging to one person, but occupied by different tenants; that it was paved by the commissioners at the request of the plaintiff, and had always been lighted by the parish. The jury found that there was a public highway through it; and I am of opinion, as I was at the trial, that there was evidence for them, both of a dedication to, and of a user by, the public. The finding, therefore, upon the facts, is satisfactory. But it is objected that there cannot, in law, be a highway through a place which is not a thoroughfare, and that, therefore, I was not justified in telling the jury that there might be a highway through the court, and leaving it to them to say, upon the evidence, whether there was or not. I cannot see any such legal impossibility as has been suggested. It is suggested that the way through such a place as this must be assumed to be for the use of the inhabitants only; but surely it is for the jury to say whether there has or has not been a dedication and user. More or less user may be proved * according to the size and character of the place; but the [*878] principle does not vary.

Erle, J. — We are to say whether, in law, there can be a highway through a place which is not a thoroughfare. It seems to be clear, from the authorities, that there can; and I do not see any reason for holding that there should not. Whether, under the particular circumstances of each case, there is a thoroughfare, is a question for the jury.

Crompton, J., concurred.

Rule absolute for judgment non obstante veredicto on the third issue. Rule to enter verdict for plaintiff discharged.

ENGLISH NOTES.

The rule that there may be a public highway in a *cul de sac* laid down in the first of the principal cases was subsequently doubted in *Woodyer* v. *Hadden* (1813), 5 Taunt 125, 14 R. R. 706; *Wood* v. *Veal* (1822), 5 B. & Ald. 454, 1 Dowl. & Ry. 20, 24 R. R. 454; and *Campbell* v. *Lang* (1853), 1 Macq. 451; but in *Young* v. *Cuthbertson*, No. 3, p. 527, *ante*, the view was expressed that there might be a highway in a *cul de sac;* and that there may be such a highway is now fully recognised; see in addition to the second of the principal cases *Gwyn* v. *Hardwicke* (1856), 1 H. & N. 49, 25 L. J. M. C. 97; *Reg.* v. *Hawkhurst* (1862), 7 L. T. 268; *Souch* v. *East London Railway Co.* (1873), L. R. 16 Eq. 108, 42 L. J. Ch. 477; *Reg.* v. *Burney* (1875), 39 J. P. 599.

AMERICAN NOTES.

It is now well settled that a highway need not be a thoroughfare, but that a *cul de sac* may be a highway. *People* v. *Kingman*, 24 New York, 559, citing both principal cases. *Bartlett* v. *City of Bangor*, 67 Maine, 460, citing *Rugby Charity* v. *Merryweather*; *Sheafe* v. *People*, 87 Illinois, 189; 29 Am. Rep. 49, citing *Bateman* v. *Bluck*; *Adams* v. *Harrington*, 114 Indiana, 66; *Greene* v. *O'Connor*, 18 Rhode Island, 56; 19 Lawyers' Rep. Annotated, 262, citing both principal cases; *Peckham* v. *Town of Lebanon*, 39 Connecticut, 235, citing both principal cases; *Schatz* v. *Pfeil*, 56 Wisconsin, 429. A note appended in 29 Am. Rep. 51, considers both the principal cases. The American cases consider the modern English doctrine "as the more convenient and reasonable rule," and instance cases of a terminus on a navigable river without any public landing, or in wild and uncultivated lands, or at mills or manufactories. In the New York case the Court said: "Highways and streets having no issue at one extremity are quite common, and indeed indispensable in many parts of the country. Take the case of roads leading into the northern wilderness of this State. They extend as far as the country is settled, where they stop, and remain in that condition until the progress of the settlements warrants their further extension. If it were held that they could not be laid out unless they should run quite across the mountains to the northern slope, it would be impossible that

they should ever be established. The same remark is true of roads laid out in the newly settled portions of the State bordering upon the original forests. The roads are projected into the wilderness as far as it is necessary or practicable at the time to make them; and afterward they are extended from time to time as circumstances may require. For similar reasons, in many of the cities and villages there are short streets leading to ravines and cliffs, whence there can be no outlet, and where they must necessarily stop; and yet the owners of dwellings situate upon these passages find them quite indispensable to the enjoyment of their property; and they would be greatly surprised to be told that they were not legal streets. The same thing is true of streets running to unnavigable waters, or to points on the seashore where there cannot be a harbor or landing-place. Without spending more time upon these illustrations, I feel satisfied that the point insisted on, on behalf of the commissioners of highways, in this case cannot be maintained. If it was ever supposed to be the law in England, it was on account of certain peculiarities which have only a limited application here. Nearly all the highways in England are such by prescription, dedication, or user; and where a way is used by only a limited number of persons, the question will often arise whether it is a public highway or a private passage. This is a question to be determined by a jury; and the fact that the way is or is not a thoroughfare has a very strong bearing on the issue. It was this which caused Mr. Justice Crompton to make the remark that it was always a strong observation to the jury that the way leads nowhere."

No. 7. — REX *v.* WRIGHT.

(K. B. 1832.)

No. 8. — REG. *v.* UNITED KINGDOM ELECTRIC TELEGRAPH CO.

(1862.)

RULE.

Where a space of a certain width has been set out for a road under statutory powers, and a road through that space has been used by the public for a considerable period, the presumption is that the whole of the space so set out has been dedicated to the public.

And where an ordinary highway runs between fences, whether the distance between the fences is uniform or varying, the right of public user extends *primâ facie* to the whole space between the fences.

Rex v. Wright.

3 B. & Ad. 681-683.

Highway — Varying Width. — Public Right.

[681] On indictment for encroaching on a public highway, it appeared that in 1771, commissioners under an enclosure Act had been empowered to set out public and private roads, the former to be repaired by the township, the latter by such persons as the commissioners should direct. The public roads were to be sixty feet wide between the fences. The commissioners in their award described a road as private, and eight yards wide; but in setting it out a space of sixty feet was left between the fences: and they directed both the public and private roads to be repaired by the township. The centre only of the sixty feet was ordinarily used as a carriage road, and the township repaired it. The space said to be encroached upon was at the side of this road, and there was a diversity of evidence as to the use made of this space by the public, and its condition, since the time of the award.

Held, that the commissioners had exceeded their authority in awarding that private roads should be repaired by the township; but that on the whole of this evidence it was a proper question for the jury, whether or not the road in question, though originally intended to be private, had been dedicated to and adopted by the public.

Semble, per Lord TENTERDEN, C. J., that when a road runs through a space of fifty or sixty feet between enclosures set out by Act of Parliament, it is *primâ facie* to be presumed that the whole of that space is public, though it may not all be used or kept in repair as a road.

Indictment for a nuisance by encroaching on a public highway. At the trial before PARKE, J., at the Lancaster Summer Assizes, 1831, it appeared that the road in question was set out in 1771 by commissioners under an enclosure Act, which authorised them to set out public and private roads, "so as such public roads should be and remain sixty feet in breadth, at least, between the fences." It also provided that the public roads should be repaired by the township, and the private ones by such persons and in such manner as the commissioners should by their award direct. The present road was described in the award of the commissioners as a private road, and of the width of eight yards; but, in fact, a space of sixty feet was left between the adjoining fences till the time of the alleged encroachment, which was lately made by the defendant. The centre of this space was commonly used by the public as a carriage road, and had been repaired by the township for eighteen years before the encroachment. The commissioners, in

No. 7. — Rex v. Wright, 3 B. & Ad. 681-683.

their award, directed that the township should repair as well the public as the private ways. With * respect to the [* 682] use made of the spaces at the sides of the beaten road, and their condition from the time of the award, there was a diversity of evidence. The case, on behalf of the prosecution, was, that although the road was originally made private by the award, it had subsequently been dedicated to and adopted by the public, and ought therefore to have continued of the width of sixty feet. The learned Judge, in summing up, observed that the commissioners had exceeded their authority in awarding that a private road should be repaired by the township, but he left it to the jury to decide, upon the whole evidence, whether the road, though originally meant to be a private one, had not subsequently been dedicated to the public. He added, that the case was one which required strong evidence of dedication. The jury found a verdict of guilty. Jones, Serjt., in the following term, moved for a rule to show cause why there should not be a new trial, contending, first, that there was no evidence of any part of the road having been public; but, on the contrary, it had been set out as a private road, and the commissioners could not legally oblige the township to repair such road; nor would the inhabitants have been indictable for not doing so: *Rex* v. *Richards*, 8 T. R. 634 (5 R. R. 489); and the mistake of the commissioners in this respect could not make the road public; secondly, that the evidence of user did not sufficiently show an adoption by the public, to which point he cited *Rex* v. *St. Benedict*, 4 B. & Ald. 447 (23 R. R. 341); and, thirdly, that as to the sides of the road the evidence did not support the verdict. A rule *nisi* was granted, PARKE, J., however, noticing as a strong fact against the defendant that the original width between the fences was sixty feet.

* Starkie and Roscoe now showed cause, and contended [* 683] that it was rightly left to the jury, under all the circumstances, whether or not the road had become public.

Crompton and Tomlinson, in support of the rule, contended that there was no sufficient evidence of dedication of the part enclosed by the defendant; and that if he had become proprietor of that part (which they contended he had) he might lawfully enclose it, according to the judgment of Lord MANSFIELD in *Rex* v. *Flecknow*, 1 Burr. 465.

Lord TENTERDEN, C. J. — I think the case was for the jury, and

that they found a right verdict. I am strongly of opinion when I see a space of fifty or sixty feet through which a road passes, between enclosures set out under an Act of Parliament, that, unless the contrary be shown, the public are entitled to the whole of that space, although perhaps from economy the whole may not have been kept in repair. If it were once held that only the middle part, which carriages ordinarily run upon, was the road, you might by degrees enclose up to it, so that there would not be room left for two carriages to pass. The space at the sides is also necessary to afford the benefit of air and sun. If trees and hedges might be brought close up to the part actually used as the road, it could not be kept sound. The rule must be discharged.

LITTLEDALE and PARKE, Js., concurred. *Rule discharged.*

Reg. v. United Kingdom Electric Telegraph Co.

31 L. J. M. C. 166–169 (s. c. 9 Cox C. C. 174; 8 L. T. 378; 10 W. R. 538).

[166] *Highway. — Right of Passage. — Nuisance. — Obstruction. — Indictment. — Telegraph Posts.*

Where an ordinary highway runs between fences, one on each side, the right of passage which the public have along it extends *primâ facie*, and, unless there be evidence to the contrary, over the whole space between the fences. The public are entitled to the use of the entire space.

A permanent obstruction erected upon a highway without lawful authority, and which renders the way less commodious than before to the public, is an unlawful act, and a public nuisance at common law.

Where therefore the defendants, for the purposes of profit to themselves, placed telegraph posts upon a highway, with the object and intention of keeping them there permanently, and did permanently keep them there, such posts being of such sizes and dimensions and solidity as to obstruct and prevent the passage of carriages and horses or foot passengers, it was *held* that the defendants were liable to be found guilty upon an indictment for a nuisance.

Held, also, that if the posts were not placed upon the hard or metalled part of the highway, or upon a footpath artificially formed upon it, or if sufficient space was left for the public traffic, the defendants were still liable to conviction.

Indictment for a nuisance.

The first count charged the defendants with digging up, [* 167] removing and making * holes in the footway on the south side of the turnpike-road, from Beaconsfield to the river Colne, and erecting and placing posts, with wires fastened to both sides of the said posts, and obstructing the highway. The other

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counts charged the defendants with committing the same offences on other highways.

Upon the trial, which took place at the Bucks Lent Assizes, before MARTIN, B., it appeared that the defendants had erected posts by the side of the high-road for the purpose of supporting wires, which were used in order to establish telegraphic communication between distant places, London, Birmingham, Liverpool, &c.

After certain evidence had been given in support of the prosecution, the learned Judge interfered, and stated that he had made up his mind as to the propositions which he should lay down to the jury. He then stated those propositions, as they will be found set out in the judgment of the Court.

The defendants thereupon declined to submit their case to the jury, and a verdict of guilty was entered against them.

O'Malley (April 17) moved for a new trial, on the ground of misdirection. (The grounds upon which he moved are sufficiently referred to in the judgment of the Court.) He referred to the following cases: *The King* v. *Russell*, 6 B. & C. 567; *The Queen* v. *Russell*, 3 El. & B. 942, 23 L. J. M. C. 173; *The Queen* v. *Betts*, 16 Q. B. 1022, 19 L. J. Q. B. 531; *The Mayor of Colchester* v. *Brooke*, 7 Q. B. 339, 15 L. J. Q. B. 173; *The King* v. *Tindall*, 6 Ad. & E. 143, 6 L. J. (N. S.) M. C. 97; *Williams* v. *Wilcox*, 8 Ad. & E. 314, 7 L. J. (N. S.) Q. B. 229. *Cur. adv. vult.*

Judgment was now delivered by

CROMPTON, J. — This case was moved when the LORD CHIEF JUSTICE, myself, and my Brother BLACKBURN were the only Judges in Court. It came before the Court in rather an unusual shape. It appears that on the evidence for the prosecution being given, or rather before the evidence for the prosecution was fully given, my Brother MARTIN laid down what he should say to the jury as a direction to them; and upon that the defendants seem to have said that if that was to be the direction, it would be useless for them to go to the jury. My Brother MARTIN, therefore, very properly took the course of putting down exactly in writing what his direction was, and it now comes before us as a misdirection. The question is, whether we can see our way to any misdirection in the propositions laid down by him. The indictment was against the defendants for putting up their posts on a high-road so as to obstruct the public and passengers in the use of the high-road. We did not

give judgment before hearing the case of *The Queen* v. *Train*, 31 L. J. M. C. 169, because we thought it very possible that something might be said in the course of that case that we might wish to consider. However, having heard that case, it does not appear that there is anything to prevent our giving judgment at once.

My Brother MARTIN laid down two propositions, and if there is any misdirection, it must be taken that the case went to the jury on a misdirection; but before we can interfere by way of ordering a new trial, we must see distinctly that there is something wrong in what he said. His first proposition was this: "In the case of an ordinary highway, although it may be of a varying and unequal width, running between fences, one on each side, the right of passage or way, *primâ facie*, and unless there be evidence to the contrary, extends to the whole space between the fences; and the public are entitled to the use of the entire of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and for passengers." That seems to us to be a very proper direction. Mr. O'Malley put an objection in two ways. He said that that ruling would not apply to cases where there was a highway open to a considerable greensward or place which may be inclosed by the lord, if it were connected with the waste, or by the landowner, if it [*168] belonged to him, and that it would take in * a case of that kind where really the ground was not part of the highway. But I own it strikes me that my Brother MARTIN guarded carefully against that. He spoke of an ordinary highway as running between the fences, and he says, that *primâ facie* that is to be taken as a highway; and I think every one would say, as Lord TENTERDEN said in *The King* v. *Wright*, 3 B. & Ad. 681 (p. 560, *ante*), when you look at the highway between fences fifty or sixty feet apart, *primâ facie* that is really the highway. And that is according to one of the late cases, *Williams* v. *Wilcox*, where the Court, in considering whether the right of passage over water was the same as a right of passage over land, said that the latter extended over every part of it. That really, in effect, is what my Brother MARTIN says. He says, that *primâ facie*, and unless there is something to show the contrary, the public have a right to pass over the whole; and I think it must be taken in connection with what he says at the end, that the public are not confined to the part which may be metalled or kept in order for the more convenient use of carriages

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and foot passengers. And, therefore, he says that when you look to the highway simply, without any of the exceptions which Mr. O'Malley tried to establish, the public are not confined to the metalled part, or the part which is ordinarily kept in order. That is the principle which is laid down in *The King* v. *Wright*, which is a very strong case, and in several other cases which are there referred to. Taken altogether, I think it comes to this: that *primâ facie*, when you look at the highway running between fences, unless there is something to show the contrary, the public have a right to the whole, and are not confined to the metalled part of it. Mr. O'Malley was asked whether he would confine the right of the public to the metalled part, and he said he was unable to point out any other definite line. He said that the posts might have been erected on what was not a part of the highway, but which was a part of the waste, or part of the land of the freeholder, to which the road did not extend. If there was an acre of land before you got to the hedge itself, that would be excluded by what my Brother MARTIN said. So also Mr. O'Malley said that part of the space might be on a rock or something of that nature, on which there could be no passage. But that would not be any part of the highway. If there is a rock, or a house which was built before the road was dedicated to the public, it is not part of the road. The first direction, therefore, is correct, and in point of fact is little more than saying what was said in the authorities referred to and in others, that the public have a right of passage over the whole highway.

The second proposition is a larger one, and we have to see whether there is any misdirection in that. It is "that a permanent obstruction erected on a highway, placed there without lawful authority, which renders the way less commodious than before to the public, is an unlawful act and a public nuisance at common law; and that if the jury believed that the defendants placed, for the purposes of profit to themselves, posts with the object and intention of keeping them permanently there in order to make a telegraphic communication between distant places, and did permanently keep them there, and the posts were of such sizes and dimensions and solidity as to obstruct and prevent the passage of carriages and horses or foot passengers upon the parts of the highway where they stood, the jury ought to find the defendants guilty upon this indictment; and that the circumstances that the

posts were not placed upon the hard or metalled part of the highway, or upon a footpath artificially formed upon it, or that the jury might think that sufficient space for the public traffic remained, are immaterial circumstances as regards the legal right, and do not affect the right of the Crown to the verdict." That appears to us to be substantially a proper direction, because, in effect, it comes to this, whether there was a practical obstruction to the public using the highway. All the cases cited by Mr. O'Malley really come to that; and it was so explained in the case of *The Queen* v. *Russell*, that what was there called a mathematical obstruction, as was said, I think by myself, as where children build erections upon the sand, would be an obstruction, but not a practical one. It is necessary to see whether it is practically an obstruction, and my Brother MARTIN raised that point, I [*169] think, by saying that if the jury believed * that the defendants placed the posts so as to obstruct and prevent the passage of carriages and horses or foot passengers upon the parts of the highway where they stood, the defendants ought to be found guilty. In the later case of *The Queen* v. *Russell* we considered that the jury found in effect that there was no practical nuisance, and therefore I think that the indictment was answered; but where there is a practical obstruction, as I understand my Brother MARTIN to put it, on a part of a highway by which the public are prevented from using it, that is clearly a nuisance according to all the definitions of the word. The learned Judge was also right in saying that the circumstance that the part passed over is not metalled or repaired for purposes of convenience, as has been said in several cases, really makes no difference; nor does it make any difference that the jury hold that sufficient space was left. According to *The King* v. *Wright*, where Lord TENTERDEN went into the matter with great force, the public are entitled to the large space on the sides of the highway, as he said, for the purposes of air and sun; and parties cannot withdraw any part of the highway from the general purposes of traffic with impunity. We must take it that the jury found these facts in the way put before us, that the defendants did keep up the posts of such size and solidity, as to obstruct and prevent the passage of horses and carriages or foot passengers upon the parts of the highway where the posts stood.

It was put by Mr. O'Malley that the case ought to have been

left to the jury, for that some of the posts appeared, by a photograph that was produced, to be on inaccessible parts of the high-road. I think, upon this direction, if that had been so, it would not make any difference, because if half a dozen posts are on inaccessible parts of the highway, even supposing they could be lawfully put there, it would be no object to the company to have those few posts left. It was said that there were different counts, and that there was a verdict upon all those counts. I think, if any were subject to those exceptions, it ought to have been said that there were some of those posts which would come within the exceptions referred to. The defendants did not do that, and it would be quite useless to grant a rule as to two or three of these posts; indeed, we could not do it, as it is left to us, because Mr. O'Malley did not ask for a verdict as to those particular posts. We have not the power of granting a rule for a new trial, unless we see that there is something to be complained of in the above two propositions. I take them as amounting to this, that, *primâ facie*, the high-road is not confined to the metalled part, but extends to the fences or boundaries of the high-road, and that, if there is a practical obstruction upon that which prevents parties using it as a highway, that is a nuisance.

That is the effect of the summing up, which appears to me to be correct, and therefore I think that there should be no rule.

BLACKBURN, J. — I am of the same opinion, and I do not think it necessary to add anything to what has been already said.

Rule refused.

ENGLISH NOTES.

The right of the public in a highway is to use it for the purposes of passage only. See *Harrison* v. *Duke of Rutland*, No. 10, p. 582, *post*: *Rangeley* v. *Midland Railway Co.* (1868), L. R. 3 Ch. 306, per Lord CAIRNS, at pp. 310, 311, 37 L. J. Ch. 313, 18 L. T. 69, 16 W. R. 547. Any interference with the safe and convenient exercise of the public right of passage over the whole highway is, generally speaking, a public nuisance, rendering the guilty person, apart from any particular statutory remedy that may be available, liable to indictment and to an action by a person suffering special damage. The following are instances of acts interfering with the use of a highway that have been held to amount to a public nuisance:— Breaking up a highway to lay gas-pipes: see *Reg.* v. *Longton Gas Co.* (1860), 2 El. & El. 651, 29 L. J. M. C. 118; laying tramlines in the highway: see *Reg.* v. *Train* (1862),

31 L. J. M. C. 169, 9 Cox C. C. 180; holding hurdle-races on a highway: see *Sowerby* v. *Wadsworth* (1863), 3 Fost. & Fin. 734; leaving a roller on the side of a highway in such a position as to frighten horses: see *Wilkins* v. *Day* (1883), 12 Q. B. D. 110, 49 L. T. 399, 32 W. R. 123; causing a crowd to collect in the street: see *Barber* v. *Penley* (1893), 1893, 2 Ch. 447, 62 L. J. Ch. 623, 68 L. T. 662; using a steam-roller under certain circumstances: see *Jeffery* v. *St. Pancras Vestry* (1894), 63 L. J. Q. B. 618.

The right of passage of the public must be exercised reasonably, and acts in their nature justifiable may, owing to their amounting to an unreasonable or excessive use of the highway, amount to public nuisances. See *Rex* v. *Edgerley* (1641), March, pl. 210; s. c. *nom. Egerley's Case*, 3 Salk. 183, where the defendant was indicted for using a waggon of excessive weight. Cf *Reg.* v. *Chittenden* (1885), 15 Cox C. C. 725 (as to excessive weight and extraordinary traffic on highways, see sect. 23 of the Highways and Locomotive (Amendment) Act, 1878, 41 & 42 Vict., c. 77, on which there are very numerous reported cases); *Rex* v. *Sarmon* (1758), 1 Burr. 516, where the defendant was unsuccessfully indicted for standing on the highway to distribute hand-bills; *Rex* v. *Cross* (1812), 3 Camp. 224, 13 R. R. 794, where the indictment was in respect of stage-coaches which stood for an unreasonable time to take up passengers; *Reg.* v. *Mathias* (1861), 2 Fost. & Fin. 570, relating to wheeling a perambulator on the footpath.

As to nuisances to the highway arising from the state of the premises over or immediately adjacent to which the highway runs, see *Fisher* v. *Prowse*, No. 11, and the notes thereto, p. 603, *post*.

That any substantial permanent obstruction to a highway is a public nuisance, even though the real inconvenience to the public may be very slight, as in the second of the principal cases, has long been recognised. At the same time, there may be cases where even a permanent obstruction is so trifling as not to amount to a public nuisance. See *Reg.* v. *Lepine* (1866), 15 L. T. 158; cf. *Reg.* v. *Betts* (1850), 16 Q. B. 1022; *Reg.* v. *Russell* (1854), 3 El. & Bl. 942, 23 L. J. M. C. 173.

A temporary obstruction of the highway in the exercise of the right of access of an adjoining owner, as by causing carts to stand opposite the premises to be loaded, is not necessarily unlawful; and whether it is unlawful or not is a question of degree. See *Rex* v. *Russell* (1805), 6 East, 427, 8 R. R. 506; *Rex* v. *Jones* (1812), 3 Camp. 230, 13 R. R. 797; *Fritz* v. *Hobson* (1880), 14 Ch. D. 542, 49 L. J. Ch. 321, 42 L. T. 225, 28 W. R. 459. Again, it seems that an adjoining landowner is entitled to obstruct the highway by hoardings to a reasonable extent during building operations. See *Rex* v. *Jones, supra*; *Rex* v. *Ward* (1836), 2 A. & E. 384, per Lord Denman, C. J., at p. 405; 6 N. &

M. 38; see also *Bradbee* v. *Mayor, &c. of London* (1842), 5 Scott N. R. 79; s. c. *nom. Bradbee* v. *Christ's Hospital*, 4 Man. & Gr. 714, 2 Dowl. N. S. 164.

A slight temporary obstruction of a highway, even though it is not in the exercise of any right, is not necessarily a public nuisance. Thus, in *Edgeware Highway Board* v. *Harrow Gas Co.* (1874), L. R. 10 Q. B. 92, 44 L. J. Q. B. 1, 31 L. T. 402, an agreement between the plaintiffs and defendants, a gas company without parliamentary powers, under which the defendants agreed that if the plaintiffs should permit them to break up highways under the plaintiffs' control to lay gas-pipes, the company would make good the highway and pay the plaintiffs a certain sum per yard of the surface broken, was held to be enforceable, as the performance of the agreement did not necessarily involve a nuisance to the highway. Agreements of the kind under which highway authorities license or purport to license persons to interfere with highways are very numerous; and the case above cited shows that such agreements are not necessarily void, although highway authorities have no power to authorise any interference with a highway amounting to a public nuisance.

To induce the Court to grant an injunction to restrain persons from temporarily interfering with a highway on an information in the name of the Attorney-General, there must be reason to apprehend really substantial inconvenience to the public. See *Attorney-General* v. *Cambridge Gas Co.* (1868), L. R. 4 Ch. 71, 38 L. J. Ch. 94.

The Highway Act, 1835 (5 & 6 Will. IV., c. 50, s. 69, and see *Ib.*, s. 63; 27 & 28 Vict., c. 101, s. 51), gives a summary remedy in the case of an encroachment on a carriage-way within fifteen feet from the centre. This provision gave rise to a notion that the adjoining owners are entitled to encroach up to the fifteen feet. This notion, for which there was never any real foundation, was recognised as erroneous in *Reg.* v. *Johnson* (1859), 1 Fost. & Fin. 657.

By the Local Government Act, 1894 (56 & 57 Vict., c. 73, s. 26), it is made the duty of the councils of county boroughs and county districts to "protect all public rights of way" and to "prevent any unlawful encroachment on any roadside waste." The roadside wastes referred to appear to be simply those parts of highways at the side of the *via trita*, like the strips of land on which many of the telegraph poles were erected as in the second of the principal cases, which, though subject to the public right of passage, are not made into hard road. See *Curtis* v. *Kesteven County Council* (1890), 45 Ch. D. 504, 60 L. J. Ch. 103. It has been held that under the enactment in question a district council may remove an obstruction to a highway, and recover the cost of so doing from the responsible person. *Louth District Council* v. *West*

(1896), 65 L. J. Q. B. 535. But the soundness of this decision may be open to question. See *Bermondsey Vestry* v. *Brown* (1865), L. R. 1 Eq. 204, 35 Beav. 226; *Tottenham Urban District Council* v. *Williamson* (C. A. 1896), 1896, 2 Q. B. 353, 65 L. J. Q. B. 591, 75 L. T. 238, 44 W. R. 676.

The Local Government Act, 1888 (51 & 52 Vict., c. 41, s. 11 (1)), after providing that the "main roads" in each county shall be maintained by the county council, provides that the county council shall have the same powers as a highway board for, *inter alia*, "asserting the right of the public to the use and enjoyment of the roadside wastes," — that is, no doubt, of the roadside wastes at the sides of main roads. This is not a happy piece of legislation, for highway boards have no express powers as to roadside wastes; and moreover have no concern with the assertion of public rights of passage as such at all (see *Mill* v. *Hawker* (1874, '75), L. R. 9 Ex. 309, 10 Ex. 92, 43 L. J. Ex. 129, 44 L. J. Ex. 49); though where their duty to repair a road is questioned on the ground that it is not a highway, they may, no doubt, in a proper case fight the question, and so incidentally assert the public right of passage.

There are *dicta* in numerous cases and text-books of authority, all or most of them collected in *Arnold* v. *Holbrook* (1873), L. R. 8 Q. B. 96, 42 L. J. Q. B. 80, 28 L. T. 23, 21 W. R. 330, to the effect that if a highway is foundrous the public may go upon the adjoining land. In that case, however, it was held that such a right did not attach in the case of a footpath which had been dedicated subject to a right (established in *Arnold* v. *Blaker* (1871), L. R. 6 Q. B. 433, 40 L. J. Q. B. 185), on the part of the landowner to plough it up; and Blackburn, J., said with reference to the *dicta* above mentioned: "There are a great many *dicta* in the books, but they are all founded on *Duncomb's Case* (1634), in Cro. Car. 366; also to be found in 1 Rolle's Abr. 390 (A), pl. 1. In that case there was a prescriptive highway, and when it was out of repair the public used to deviate on the outlets, which I gather to be certain defined portions of ground over which the public had immemorially passed. . . . It is quite reasonable to say that where there is a prescriptive highway over a close there may be a prescriptive right to deviate on adjoining lands. But it would require strong authority to persuade me that where there is a limited dedication only, the public would have a right to deviate."

Where a landowner over whose land a highway passes obstructs the highway, the public have a right, in order to get round the obstruction, to deviate over his land. See *Absor* v. *French* (1670), 2 Show. 28. This right was recognised in *Dawes* v. *Hawkins*, No. 12, p. 618, *post*; but Willes, J., in that case said that if the obstruction is caused by the elements no right of deviation accrues to the public.

In *Duncomb's Case* above mentioned, Duncomb was held, by reason of his having inclosed the highway, to be bound to repair it. And it seems well established that where an immemorial highway is inclosed a liability *ratione clausuræ*, as it is called, attaches in respect of the land on which the inclosures are, at all events where there was a prescriptive right to deviate when the highway was out of repair. In *Steel* v. *Prickett* (1819), 2 Starkie, 463, 20 R. R. 717, ABBOTT, C. J., said that "if the same person was the owner of the land on both sides [of a highway], and inclosed both sides, he was bound to repair the whole of the road; if he inclosed on one side only, the other being left open, he was bound to repair to the middle of the road; and where there was an ancient inclosure on one side and the owner of land inclosed on the other, he was bound to repair the whole." The liability is upon the occupier of the lands and does not attach unless the highway is immemorial. See *Reg.* v. *Ramsden* (1858), El., Bl. & El. 949, 27 L. J. M. C. 296. Nor does it attach where the inclosure is made under an Inclosure Act. See *Rex* v. *Flecknoe Inhabitants* (1758), 1 Burr. 461. Further as to liability to repair highways *ratione clausuræ*, see *Henn's Case* (1632), W. Jones, 296; *Anon.* (1652), Styles, 364; *Rex* v. *Stoughton* (1660), 2 Wms. Saund. 157, 160; s. c. *nom. Rex* v. *Staughton*, 1 Sid. 164, 2 Keb. 665; *Rex* v. *Hillarsden* (1665), 1 Keb. 894; *Rex* v. *Hatfield Inhabitants* (1820), 4 B. & Ald. 75, per HOLROYD, J., at p. 83, 22 R. R. 631; 25 & 26 Vict., c. 61, s. 46.

There are traces of a general principle that wherever a person, for the benefit of his land, alters a highway to its detriment, he thereby attaches to his land a liability *ratione nocumenti* to repair the highway; though the principle is not well established or developed. The liability *ratione clausuræ* is perhaps merely an instance of a liability of the kind. See *Rex* v. *Kerrison* (1815), 3 M. & S. 526, 16 R. R. 342; *Oliver* v. *North Eastern Railway Co.* (1874), L. R. 9 Q. B. 409, 43 L. J. Q. B. 198.

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This doctrine prevails here. *Rex* v. *Wright* is cited in Angell on Highways, sect. 155, and both principal cases are cited in Elliott on Roads and Streets, p. 479, and the principle is recognized in *Cleveland* v. *Cleveland*, 12 Wendell (New York), 172; *Hannum* v. *Belchertown*, 19 Pickering (Mass.), 311; *Simmons* v. *Cornell*, 1 Rhode Island, 519; *Lawrence* v. *Mount Vernon*, 35 Maine, 100; *State* v. *Berdetta*, 73 Indiana, 185; 38 Am. Rep. 117; *Wayne Co. Sav. Bank* v. *Stockwell*, 84 Michigan, 586; 22 Am. St. Rep. 708; *Pillsbury* v. *Brown*, 82 Maine, 450; 9 Lawyers' Rep. Annotated, 91; *Marion* v. *Skillman*, 127 Indiana, 130; 11 Lawyers' Rep. Annotated, 55; *Western Railway of Alabama* v. *Alabama Grand T. R. Co.*, 96 Alabama, 272; 17 Lawyers' Rep. Annotated, 474; *Southern Pac. R. Co.* v. *Ferris*, 93 California, 263; 18 Lawyers' Rep. Annotated, 510; *Davis* v. *Clinton*, 58 Iowa, 389; *People* v. *Cunningham*, 1 Denio (N. Y.), 524; 43 Am. Dec. 709.

If the statute prescribes a maximum and a minimum width of roads, and a road is one only by prescription, its width is determined by the actual use and travel by the public.

In the California case cited above the Court held that user by the public of one side only of a dedicated street, laid out and mapped with two tracks, having a watercourse and a double row of trees between them, constitutes an acceptance of the whole dedication, observing: "But because the travel along the public road has been, by the choice of the travelling public, almost exclusively, if not entirely, on the other side of the road, and on the sixty-feet wide strip of it on the opposite side of the *zanja* from the defendant's land, the Court seems to have concluded that the public never used the sixty feet of the located road as recognized by proprietors of adjoining lands in building their fences and hedges, and therefore as to it there was never any user. This we take to be a mistake. As well might it be said that if the public travel had been down the centre of a road offered for dedication as a public highway, there was never any user of that part which lay on each side of the track used, and between it and the fences of the adjoining proprietors; or where the travel might be diagonally across the located road, from one side to the other, and from one end to the other of it continuously, that the portion of the ground fenced out by adjoining proprietors over which there had been no travel had never been used. A similar view of an abandonment of a public road was urged in *Watkins* v. *Lynch*, 71 Cal. 26, but it will be seen from the language which we now quote no such want of user was considered any evidence of an abandonment of the public road: 'Any ordinary observer travelling upon the public roads of the more thickly populated portions of this State will often perceive the land on one or both sides of a road-bed that is fenced out, sowed in grain, and pastured by the proprietors of adjoining land; and, while all the travel for many years has been confined to the centre of the road-bed, yet we do not see that such acts would of themselves be held to show either an abandonment of the use of the road by the public, or its adverse possession by the person who has thus sowed, reaped, and pastured his stock thereon.'"

This principle has been adopted in cases of obstructions on sidewalks of city streets, elevated railroads in streets, and the erection of telegraph poles on streets or roads. The question whether the last are an additional burden for which the owner of the fee in the soil is entitled to compensation has been frequently discussed, the weight of authority apparently being in the affirmative. See Elliott on Roads and Streets, p. 533.

A curious application of the doctrine is made in respect to the crooked Virginia rail or "snake" fences, it being held that the lines of the road go through the centre. Angell on Highways, sect. 155.

No. 9. — MERCER *v.* WOODGATE.

(Q. B. 1869.)

RULE.

THE owner of a field may dedicate a way through it to the public, reserving to himself the right from time to time to plough up the land; and it is sufficient evidence of a dedication of this kind, if from the time of living memory the public have enjoyed the footpath, and the occupiers have from time to time ploughed up the field without lifting the plough over the footpath.

Mercer v. Woodgate.

L. R. 5 Q. B. 26–33 (s. c. 10 B. & S. 833; 39 L. J. M. C. 21).

Highway. — Limited Dedication. — Right of Owner of Soil to Plough up Footpath. [26]

There may, in law, be a dedication to the public of a right of way, such as a footpath across a field, subject to the right of the owner of the soil to plough it up in due course of husbandry, and destroy all trace of it for the time.

As far as living memory went, the occupier for the time being of a field over which a footpath crossed had been in the habit, in due course of farming, of ploughing up the whole field, and so destroying the footpath. There was no evidence of the existence of the footpath before living memory.

Held, that the inference to be drawn was, that the owner had originally dedicated the right of way to the public, subject to this right of periodically ploughing it up.

Case stated by Justices of Worcestershire under 20 & 21 Vict., c. 43.

Upon the hearing of an information preferred by the respondent against the appellant under 5 & 6 Wm. IV., c. 50, s. 72, for unlawfully and wilfully destroying and injuring the surface of a certain highway by ploughing up the same, the following facts were admitted or proved: —

The appellant is the occupier of a field of arable land in the parish of Bellbroughton, across which is a public footpath leading from the village of Bellbroughton to the Stourbridge and Bromsgrove turnpike road and the hamlet of Fairfield; and in September,

1868, in due course of farming, he ploughed the field and ploughed up and destroyed all trace of the footpath.

The appellant *bonâ fide* claimed the right to plough and to continue to plough the footpath, and the previous occupier of the field had so ploughed at all times within living memory.

There was no evidence before the Justices either of the existence of the footpath or tillage of the field before living memory; and no witnesses were called on behalf of the appellant, nor was any evidence given of any partial or limited dedication of the land, or of any reservation of the right to plough up the land along the line of footpath, except as otherwise appears by the case.

On the part of the respondent it was contended that the footpath was a highway within the meaning of 5 & 6 Wm. IV., c. 50, and that under the circumstances the Justices ought to convict
[* 27] the appellant * under s. 72 for the destroying and injuring the surface of a highway.

On the part of the appellant it was contended that the footpath was not a highway within the meaning of the statute, but that if it were, he and the previous occupiers having ploughed it up as long as it was known to have existed, the public had a right only to the use of the footpath subject to its being so ploughed up.

The Justices were of opinion that the footpath was a highway within the meaning of the statute, and that the appellant, having destroyed and injured the surface of the footpath, they were bound in law to find the appellant's acts to be unlawful, no further evidence having been offered of any reservation by the owner, at the time of dedication or presumed dedication, of a right to plough up the surface of the footway; and accordingly they convicted the appellant.

The question for the opinion of the Court was, whether the footpath is a highway within 5 & 6 Wm. IV., c. 50; and if so, whether the Justices were bound in law to convict the appellant of an unlawful act, or whether the Justices would have been justified in finding the acts complained of to be lawful; and whether they had jurisdiction.

If the Court should be of opinion that the Justices were bound to convict the appellant, and that their jurisdiction was not ousted in consequence of the land having been ploughed at all times when necessary within living memory, the conviction was to be affirmed; otherwise it was to be quashed.

No. 9. — Mercer v. Woodgate, L. R. 5 Q. B. 27, 28.

Harington, for the appellant. — The only evidence in this case is that as long as the footpath has existed the occupier for the time being has been in the habit of ploughing it up, and the only inference that can be drawn is, that the highway was originally dedicated with a reservation of the right of the owner to plough over it when he ploughs the rest of his soil. Thus, in *Pelham* v. *Pickersgill*, 1 T. R. 660 (1 R. R. 348), where the liberty of passage over the soil and a toll for such passage were both shown to be immemorial, it was held that it must be presumed that the original grant was subject to the reservation of a toll. It is clear law that there can be a * qualified or limited dedica- [*28] tion of a highway. *Stafford* v. *Coyney*, 7 B. & C. 257, and *Fisher* v. *Prowse*, 2 B. & S. 770, 31 L. J. Q. B. 212, are direct authorities for that proposition.

Rew, for the respondent, was then called upon. The cases cited are quite distinguishable from the present. In those cases the highway was dedicated subject to a partial permanent obstruction, but such that the highway could still be used. Here there is a total destruction of the highway for the time, which is inconsistent with the dedication of a highway, and amounts to an illegal nuisance. In *James* v. *Hayward*, Cro. Car. 184, the rest of the Court held the erection of a gate across a road was a nuisance, which no doubt is good law. CROKE, J., however, says: "But it seemed to me that it is not any nuisance in itself, being so small a trouble, but much for the public good that there should be inclosures for the preservation of corn and grass from cattle straying. And the law accounts not such petty troubles as nuisances; for it appears that there are many gates in divers highways which have been always allowed; and if it were a nuisance in itself there should not be any gate, for there cannot be any prescription for a nuisance." In *Reg.* v. *Charlesworth*, 16 Q. B. 1012, 1020, which was an indictment for nuisance in a highway by cutting it up with tramways, Lord CAMPBELL, C. J., says: "It is argued that a right has been reserved by the landowner to make as many rail and tram roads as he pleases in all time to come, for the convenient use of his coal pits. But if this would be a nuisance, there could be no such right reserved. No authority has been cited for the reservation of a right in future to put up as many gates or make as many tramways as the landowner thinks proper. No such reservation could exist, if the acts would be a nuisance."

No. 9. — Mercer v. Woodgate, L. R. 5 Q. B. 28, 29.

[BLACKBURN, J. — PATTESON, J., is much more cautious; he only says: "We cannot suppose a reservation of right so large as that claimed."]

In *Bateman* v. *Burge*, 6 C. & P. 391, PARK, J., held that a stile or gate across a footpath could not be raised.

[COCKBURN, C. J. — No one is obliged to dedicate a high-
[* 29] way, and * if the public take it they must take it subject to any condition the owner imposes.]

Ploughing up is a destruction of the thing granted, and is thus inconsistent with the grant. In Wellbeloved on Highways, p. 443, it is said: "It may also be stated as clearly deducible from Lord ELLENBOROUGH'S decision in the case of *Rex* v. *Cross*, 3 Camp. 224 (13 R. R. 794), that it is a common nuisance to plough up a public footpath; not only because the public are obstructed in their accustomed passage, but more particularly as all traces of the way are thereby obliterated, and the public are left in ignorance as to the route which they ought to pursue. This is a point of law seldom attended to, and yet very frequently violated; but there can be no doubt that any occupant who thus infringes the public rights subjects himself to an indictment. In one case (*Griesley's Case*, 1 Vent. 4), where an information was laid against the defendant for stopping up the highway, the word was *obstupabat*; it was proved in evidence that he ploughed it up, and the Court resolved that it did well maintain the information."

[BLACKBURN, J., in the notes to *Doraston* v. *Payne*, 2 Sm. L. C., at p. 142, 6th ed., a case (*Morant* v. *Chamberlin*, 6 H. & N. 541 30 L. J. Ex. 299) is cited as showing that you may dedicate a way subject to the pre-existing right of the adjoining occupiers to obstruct it by placing their goods on it.]

That is only a partial obstruction; here is a total destruction. But all that was decided in *Morant* v. *Chamberlin*, 6 H. & N. 541, 564, 30 L. J. Ex. 299, 310, was that the Court could not draw the inference from the facts that the right of the occupiers had existed before or from the time of the dedication of the way; and the Court only expressed an inclination of opinion that there might be such a partial dedication.

[BLACKBURN, J. — If there cannot be such a qualified dedication, then there is no evidence of any dedication at all. But it is quite possible for any one to walk across a field immediately after it is ploughed up.

No. 9. — Mercer v. Woodgate, L. R. 5 Q. B. 29–31.

COCKBURN, C. J. — Suppose a swing-bridge dedicated to the public, but to be opened at times when it is necessary to let in the * ships of the person dedicating: surely that can [*30] be done. What is that but the present case? In *Rex* v. *Northampton*, 2 M. & S. 262 (15 R. R. 241), it was held that there could be a valid partial dedication of a bridge to the public, to be used at such times only as the ford across the river was dangerous.]

COCKBURN, C. J. — I am of opinion that this conviction was wrong. There is no doubt that as far as living memory goes back, while on the one hand the public has enjoyed this right of way, on the other hand the owner or occupier of the field during the same period has from time to time ploughed up the whole of his field without any regard to the particular track over which the footpath passes. The only proper inference to be drawn is, that the exercise of this right of the owner has been coeval with the exercise of the right of way of the public, and again the proper inference from that is, that the right of the public was granted, or the original dedication of the way was made, subject to this right in the owner periodically to plough up the soil. It must not be lost sight of that there is no obligation upon the owner to dedicate a right of way, nor, on the other hand, is there any obligation on the part of the public to accept the dedication; and therefore, if the owner in the present case had said to the public, you may come across my field as a convenient way, but it must only be subject to my right to plough across it at proper times, and if the public have chosen to accept the dedication on those terms, there is no injustice toward them to hold them bound by the terms; on the contrary, there would be great injustice and hardship to hold there had been an absolute dedication where the owner had clearly only intended a limited dedication. *Rex* v. *Northampton* is a direct authority that there may be in law such a partial dedication; and if there could not, then, as my Brother BLACKBURN has pointed out, the appellant is in this dilemma, that there is no dedication and no highway at all. Not only would there be injustice in holding otherwise, but it would be productive of mischief to say that such a state of things as shown in this case could not exist; every one knows instances of footpaths ploughed up as the time comes round for ploughing fields; and if the public or parish could insist on * converting such [*31] paths into gravelled ways, the owners would be chary in

allowing any accommodation to the public over their land. I am clearly of opinion that there may be, in law, a partial dedication like that contended for by the appellant in the present case; but if not, then there is no dedication at all shown, and the conviction would be equally wrong.

Blackburn, J. — I am of the same opinion. I quite agree that when a highway has been dedicated to the public (which as the Lord Chief Justice has said is a purely voluntary act on the part of the owner), anything afterward done by the owner interfering with that right of way would be a nuisance; and that ploughing up the pathway would be such an interference; and when a highway is dedicated, and the dedication accepted, not only is there a right in the public, but an obligation on the part of the parish to repair. But in the present case, in whatever way the owner may be taken to have given this right of way over his field, the inference from the evidence is, that he did not dedicate it *simpliciter* as a highway, but he dedicated it subject to the right of ploughing it up periodically; and if this right is inconsistent with a grant of a right of way to the public, then there was no dedication at all, and the present owner has a right to stop up the pathway altogether, and so prevent the parish from repairing the path in such a way as to interfere with his ploughing. But I can see no objection, in law, to such a partial dedication. The principle applicable to such cases is enunciated in the judgment of the Court in *Fisher* v. *Prowse*, 2 B. & S., at p. 780, 31 L. J. Q. B., at p. 218 (p. 613, *post*), very much in the same language as my Lord has used to-day: "It is, of course, not obligatory on the owner of land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them. If the use of the soil as a way is offered by the owner to the public under given conditions and subject to certain reservations, and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand great injustice and hardship would often arise if, when a public right of way has been acquired under a given [* 32] state of circumstances, * the owner of the soil should be held bound to alter the state of circumstances to his own disadvantage and loss, and to make further concessions to the public altogether beyond the scope of his original intention."

No. 9. — Mercer v. Woodgate, L. R. 5 Q. B. 32, 33.

MELLOR, J. — I am of the same opinion. The owner might have dedicated this pathway, in express terms, with a condition attached of ploughing it periodically; and we all know many such paths which the occupiers are constantly in the habit of ploughing up from time to time. Can we do otherwise than infer from the evidence in the present case that this was the limit and condition on which the owner dedicated this footpath? Mr. Rew said that the owner could not dedicate a highway subject to a nuisance, but in all the cases in which such a partial dedication has been sustained the act must have been a nuisance or the question could not have arisen.

HANNEN, J. — The authorities cited for the respondent go to this extent only, that where there has been an unrestricted dedication of a right of way, ploughing it up, though in due course of husbandry, would be a nuisance. *Fisher* v. *Prowse*, 2 B. & S. 770, 31 L. J. Q. B. 212, is undistinguishable in principle, and is a distinct authority that there may exist in law a highway subject to be interrupted at certain times when the convenience of the owner of the soil requires it. If this were not the law, the effect would be that all these ways over which the owner has always been used to plough would be stopped up, because in such a case there would be no dedication at all, as is pointed out by PARKE, B., in *Poole* v. *Huskinson*, 11 M. & W., at p. 830: "There may be a dedication to the public for a limited purpose, as for a footway, horseway, or driftway; but there cannot be a dedication to a limited part of the public. In that respect the direction of the learned Judge was quite correct; not so the alternative, that as such a partial dedication was invalid in law, it would nevertheless operate against the intention of the owner of the soil, in favour of the whole public. I think it would be merely void. In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate, an * *animus dedicandi*, of which the [*33] user by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment." It follows that the evidence in the present case shows a partial dedication only, and that either the right of the public is subject to the reservation or there is no dedication at all; in either case, the appellant was wrongly convicted. *Conviction quashed.*

ENGLISH NOTES.

The principal case was followed in the Exchequer Chamber in the precisely similar case of *Arnold* v. *Blaker* (1871), L. R. 6 Q. B. 433, 40 L. J. Q. B. 185; see also the sequel to that case, *Arnold* v. *Holbrook*, cited in the notes to *Rex* v. *Wright*, p. 570, *ante*. And there are several cases where it has been held that there might be a somewhat similar limited dedication of a highway. Thus, in *Le Neve* v. *Mile End Old Town Vestry* (1858), 8 El. & B. 1054, 27 L. J. Q. B. 208, it was held that there might be a dedication subject to a right of user by the occupiers of adjoining land to deposit goods thereon from time to time to the inconvenience though not to the actual obstruction of the public; see also *Morant* v. *Chamberlin* (1861), 6 H. & N. 541, 30 L. J. Ex. 299; *Spice* v. *Peacock* (1875), 39 J. P. 581; *Whittaker* v. *Rhodes* (1881), 46 J. P. 182. So in *Chelsea Vestry* v. *Stoddart* (1879), 43 J. P. 782, it was held that a mews might be dedicated subject to a right to obstruct it for the purpose of washing carriages, etc. Again, a highway may be dedicated subject to a right to hold a fair or market on it. See *Elwood* v. *Bullock* (1844), 6 Q. B. 383, 13 L. J. Q. B. 330; *Attorney-General* v. *Horner* (1885), 11 App. Cas. 66, 55 L. J. Q. B. 193. On the other hand, in *Reg.* v. *Charlesworth* (1851), 16 Q. B. 1012, 5 Cox C. C. 174, it was held that a way could not be dedicated subject to a right reserved on the part of the landowner to lay tram lines across the road wherever and whenever he should find it convenient for the purposes of his property. As to the dedication of a way subject to a permanent obstruction or danger, see *Fisher* v. *Prowse*, *Cooper* v. *Walker*, No. 11, p. 603, *post*, and the notes thereto.

A highway may be dedicated though it is impassable at certain seasons of the year: see *Reg.* v. *Brailsford Inhabitants* (1860), 2 L. T. 508; and a highway may be dedicated for use at certain times only: see *Rex* v. *Northampton Inhabitants* (1814), 2 M. & S. 262, 15 R. R. 241, where it was held that a bridge might be dedicated for use at times of flood and frost when a ford, used at other times, was impassable. A landowner cannot, however, dedicate a highway, reserving himself the right to close it again after a period, for "once a highway always a highway." See *Dawes* v. *Hawkins*, No. 12, p. 618, *post*. Whether a highway can be dedicated by a limited owner or leaseholder for the period of his estate or interest only is not settled. See the notes to *Reg.* v. *East Mark Inhabitants*, No. 1, p. 520, *ante*.

As to dedication of a highway subject to toll, see *Lawrence* v. *Hitch* (1868), L. R. 3 Q. B. 521, 37 L. J. Q. B. 209; *Austerberry* v. *Oldham Corporation* (1885), 29 Ch. D. 750, 55 L. J. Ch. 633.

How far there may be a dedication of a highway for limited classes

of traffic only is not fully settled. There are three well-recognised kinds of highways, — carriageways, horseways, and footways. See Co. Lit. 56 *a*. *Primâ facie*, at all events, a carriageway is also a horseway and footway and a driftway, *i. e.* a way for driving cattle. See Co. Lit. 56 *a*; *Rex* v. *Hatfield Inhabitants* (1736), Cas. temp. Hard. 315; *Davies* v. *Stevens* (1836), 7 C. & P. 570; and see per Lord Mansfield, C. J., in *Ballard* v. *Dyson* (1808), 1 Taunt. 279, 9 R. R. 770, and per Amphlett, J. A., in *Wells* v. *London, Tilbury, & Southend Railway Co.* (1877), 5 Ch. D. 126, at p. 132. So a horseway, *primâ facie* at least, includes a footway, and also apparently a driftway. See Co. Lit. 56 *a*.

The question whether there can be a dedication restricted to an arbitrarily limited class of traffic was raised in the *Marquis of Stafford* v. *Coyney* (1827), 7 B. & C. 257, but was not decided. There the suggestion was that a way had been dedicated for all classes of traffic except the cartage of coal.

A way along the bank of a river may be dedicated for the purposes of a towing-path only. See *Winch* v. *Thames Conservators* (1872), L. R. 7 C. P. 458, 41 L. J. C. P. 241, affirmed in Exchequer Chamber, L. R. 9 C. P. 378, 43 L. J. C. P. 167, 31 L. T. 128, 22 W. R. 879; see also *Lee Conservators* v. *Button* (1881), 6 App. Cas. 685, 51 L. J. Ch. 17, 45 L. T. 385, 30 W. R. 233.

There cannot be a dedication of a highway to a particular class of persons only, such as the inhabitants of a particular parish. See *Poole* v. *Huskinson* (1843), 11 M. & W. 827; *Bermondsey Vestry* v. *Brown* (1865), L. R. 1 Eq. 204, 25 Beav. 226.

AMERICAN NOTES.

The principal case is cited in Elliott on Roads and Streets, p. 109, with the observation: "An owner may grant whatever estate he sees fit, and may annex conditions and limitations to his grant at his pleasure, provided that such limitations and conditions are not inconsistent with the dedication, and will not defeat the operation of the grant." *Methodist E. Church* v. *Mayor, &c.*, 33 New Jersey Law, 13; 97 Am. Dec. 695 (land for city square); *Hemphill* v. *City of Boston*, 8 Cushing (Mass.), 195; 54 Am. Dec. 749 (footway); *Godfrey* v. *City of Alton*, 12 Illinois, 29; 52 Am. Dec. 476 (landing); *Heirs of David* v. *City of New Orleans*, 16 Louisiana Annual, 404; 79 Am. Dec. 586 (land for highway not convertible to market); *Schurmeier* v. *St. Paul & P. R. Co.*, 10 Minnesota, 82; 88 Am. Dec. 59; *Mowry* v. *City of Providence*, 10 Rhode Island, 52 (training-ground and burial place); *Antones* v. *Heirs of Eslava*, 9 Porter (Alabama), 527 (church for limited time); *Pettibone* v. *Hamilton*, 40 Wisconsin, 402 (open place); *Warren* v. *Grand Haven*, 30 Michigan, 24; *Bayard* v. *Hargrove*, 45 Georgia, 342; *City of Morrison* v. *Hinkson*, 87 Illinois, 587; *Price* v. *Thompson*, 48 Missouri, 361; *Warren* v. *Lyons*, 22 Iowa, 351. So a dedication for a highway may be made subject to a right to desig-

nate a portion for a railroad: *Ayres* v. *Penn. R. Co.*, 56 New Jersey Law, 478; and land dedicated "for street purposes only" may not be used for boring wells for a water supply: *O'Neal* v. *City of Sherman*, 77 Texas, 182; 19 Am. St. Rep. 743, citing *State* v. *Laverack*, 34 New Jersey Law, 201, and *St. Paul, &c. R. Co.* v. *Shurmeir*, 7 Wallace (U. S. Sup. Ct.), 272.

But the land dedicated is subject to improvement by the public like their other ways or easements of a similar kind in the same locality. *Richard* v. *Cincinnati*, 31 Ohio State, 506; *City of Des Moines* v. *Hall*, 24 Iowa, 234; *Jackson* v. *Hartwell*, 8 Johnson (New York), 422; *Trustees* v. *Peaslee*, 15 New Hampshire, 317. So the public may erect cottages on a dedicated camp-meeting ground. *Lennig* v. *Ocean City*, 41 New Jersey Equity, 606; 56 Am. Rep. 16.

Although the dedication may be limited as to time and extent and mode of enjoyment, yet it may not be limited to enjoyment by only a part of the public. *Mowry* v. *City of Providence*, 10 Rhode Island, 52; *Tupper* v. *Huson*, 46 Wisconsin, 646; *Illinois Ins. Co.* v. *Littlefield*, 67 Illinois, 368; *Tollwadge* v. *East River Bank*, 26 New York, 105; *Trustees* v. *Hoboken*, 33 New Jersey Law, 13 (most of these cases founded on *Poole* v. *Huskinson*, 11 M. & W. 827).

But this doctrine applies only to highways, and a dedication limited to part of the public is valid when that part alone can enjoy it, as in the case of a training-ground or burial-ground. *Mowry* v. *City of Providence*, *supra*.

No. 10. — HARRISON *v.* DUKE OF RUTLAND.

(C. A. 1892.)

RULE.

THE dedication to the public of a highway does not alter the ownership of the soil, and any person being on the ground for a purpose other than of using it as a highway is a trespasser against the owner.

Harrison v. Duke of Rutland and others.

1893, 1 Q. B. 142–161 (s. c. 62 L. J. Q. B. 117).

[142] *Highway — Trespass to Land. — Use of Highway otherwise than as such.*

The defendant was the owner of a grouse moor crossed by a highway, the soil of which was vested in him. On the occasion of a grouse drive upon this moor, the plaintiff went upon the highway, not for the purpose of using it as a highway, but solely for the purpose of using it to interfere with the defendant's enjoyment of his right of shooting, by preventing the grouse from flying towards the butts occupied by the shooters. The defendant's keepers having forcibly

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prevented the plaintiff from such interference, he brought an action for assault against the defendant, in which the defendant justified on the ground that the plaintiff was a trespasser upon his land on the occasion in question, and by way of counter-claim asked for a declaration to that effect.

Held, that inasmuch as the plaintiff was upon the highway for purposes other than its use as a highway, he was a trespasser: and, by LOPES, L. J., and KAY, L. J., Lord ESHER, M. R., dissenting, that the Court ought to make a declaration to that effect.

Motion by the plaintiff in an action for assault for a new trial or to enter judgment for plaintiff on the claim. Cross-motion by the defendants for a new trial or for judgment on certain issues on the claim and on the counter-claim.

The pleadings, the event of the trial, and the facts fully appear from the judgments, and are stated in detail in the judgment of LOPES, L. J.

The plaintiff in person.

Sir H. James, Q. C., and R. M. Bray for the defendants.

Cur. adv. vult.

Dec. 3. The following judgments were delivered: —

Lord ESHER, M. R. — In this case the plaintiff brought his action against the Duke of Rutland and the other defendants, who acted by the Duke's authority, for assault and false imprisonment. The defendants justified, and, alternatively, brought into * Court the amount of 5*s.*, as being sufficient to satisfy the [* 143] plaintiff's claim; and there was also a counter-claim by the Duke of Rutland.

The case came before the LORD CHIEF JUSTICE for trial, when the jury gave a verdict for the defendants on the claim; and on the counter-claim the LORD CHIEF JUSTICE directed a verdict for the plaintiff. The plaintiff appealed to this Court on the ground that the verdict for the defendants on the claim was wrong; the defendants also brought a cross-appeal against the LORD CHIEF JUSTICE'S ruling.

The main facts of the case are really not in dispute. The Duke of Rutland, with his friends, had a right to shoot on certain moors, and was on the occasion in question exercising that right. The plaintiff, from some perverted notion of desiring to interfere with the shooting, went on to a highway which crosses these moors, knowing that it was close to the place where the Duke and his

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friends were exercising their undoubted right. The land on both sides of this highway belonged to the Duke, and therefore the soil of the highway was vested in him. The plaintiff went on to this highway, not for the purpose of going to or coming from any place, not for the purpose of using the highway as a highway at all, but merely for the purpose of using the highway itself in order to incommode the Duke and his friends and prevent the exercise of their right. He went on to the highway near the butts, towards which grouse were to be driven by the Duke's keepers, solely for the purpose of preventing the grouse from coming in the direction of the butts, and so interfering with the Duke's exercise of his right. He did so interfere by obvious means, such as waving his pocket-handkerchief and opening and shutting his umbrella, for the mere purpose of keeping the grouse away. He was asked to desist, but he refused to do so. Thereupon the Duke's servants forcibly laid hold of him and held him down on the ground for the purpose of preventing him from interfering with the exercise of the Duke's right, until the drive was over and he could no longer interfere. They held him down only so long as was necessary for that purpose. That they did not do so with any unnecessary degree of violence seems to me to be clearly made out by [* 144] the evidence. The * defendants, as I have said, in case there was some excess, brought 5*s.* into Court, and they also pleaded a justification on the ground that the plaintiff was trespassing upon the Duke's land for the purpose of interfering with the Duke's enjoyment of his rights over his land, and that they used no more force than was necessary to prevent the plaintiff from doing so. There was therefore the issue on this plea of justification ; and the other issue would be whether, assuming that the defendants had exceeded their rights in what they did to the plaintiff, the amount of 5*s.* was sufficient by way of damages. The jury found a verdict for the defendants on the claim. That was a general verdict, and it may have been that the jury thought that, if there was an excess of force used, the amount paid into Court was sufficient. The Lord Chief Justice, in his anxiety to maintain the rights of the public over highways to their fullest legal extent, — an anxiety with which I fully sympathise, — appears to me not to have taken into consideration certain matters in the case which should have been considered, and he directed the jury that, as a matter of law, the plaintiff was not trespassing on

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the highway, and therefore was not trespassing on the land of the Duke. Notwithstanding that direction, the verdict for the defendants on the claim is right, because whichever way the case is looked at, the amount paid into Court may be sufficient, and it appears to me that it is. But the direction to the jury prevented the entry of a verdict for the defendants on the issue of justification, and the verdict has been entered on that issue for the plaintiff; and it prevented the entry of a verdict for the defendant, the Duke of Rutland, on the counter-claim, upon which accordingly the verdict has been entered for the plaintiff. The plaintiff appealed against the verdict for the defendants on the claim on the ground that it was against the evidence. I am clearly of opinion that that appeal cannot be entertained, because I think that, whichever way the case is looked at, the verdict of the jury on the claim was right. On the cross-appeal, the defendants' counsel asked the Court to enter the verdict for the defendants on the issue on their plea of justification, and to enter a verdict and judgment for the Duke of Rutland on the counter-claim. As to the result in respect of a portion of what is asked for on the *cross-appeal, I [*145] have no doubt. I think that the verdict should be entered for the defendants as regards the issue on the defendants' justification. And on the counter-claim, if it be asked for, I think there should be a verdict for the Duke for at the least nominal damages. I know that a claim to further relief was made in the counter-claim; but I will deal with that hereafter. The great difficulty to my mind in this case is to express the reasons for our judgment so carefully that we may not, in upholding the legal right of the owner of the land, interfere with the largest possible rights of the public to the enjoyment of the highway as such. The servants of the Duke in this case were no doubt taking a very strong course. The plaintiff was undoubtedly on a highway; he was not merely told to move on, but he was actually controlled and imprisoned for a time. That is a very strong measure, which ought to be employed with great care, and which puts the person who employs it in considerable jeopardy in a civil action. The plea of justification is founded on the allegation that the plaintiff was trespassing on the soil of the highway. The question is whether that is so. What is the true rule of law as to the user of a highway? It has been laid down in *Reg.* v. *Pratt*, 4 E. & B. 860. The LORD CHIEF JUSTICE at Nisi Prius, where a Judge cannot examine cases so

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closely as we can here, seems to have thought that the decision in that case depended in some way on its being a criminal case; but I think, if the judgments are examined, it will appear that the decision of that criminal case depended on whether the appellant was or was not a trespasser, and required the Judges to say whether he had or had not committed a trespass. In that case the land in question was a highway, and the prosecutor was the owner of the soil. The appellant was charged with the offence of trespassing on land in pursuit of game. The foundation of that charge was a trespass. The appellant there, like the plaintiff in this case, did not go on to the highway for the purpose of using it as a highway at all; but he went on to it only for the purpose of searching for game. That is so stated by Lord CAMPBELL, C. J. He said: "I think that the magistrates were perfectly justified in con-
[* 146] cluding that * Pratt was trespassing on land in the occupation of Mr. Bowyer in search of game. He was beyond all controversy on land the soil and freehold of which was in the owner of the adjoining land, — that is, Mr. Bowyer. It is true the public had a right of way there; but, subject to that right, the soil and every right incident to the ownership of the soil was in Mr. Bowyer. The road, therefore, must be considered as Mr. Bowyer's land. Then Pratt, being on that land, was undoubtedly a trespasser, if he went there, not in the exercise of the right of way, but for the purpose of seeking game, and that only. If he did go there for that purpose only, he committed the offence named in the Act." So, if a man goes on to part of a highway, the soil of which belongs to the owner of the adjoining land, not for the purpose of using such part of the highway as a highway, but only for some other purpose, "lawful or unlawful," — to use the words of CROMPTON, J., in the same case, — he is in so doing committing a trespass against the owner of the soil. That case is founded on other cases which had gone before, and there are subsequent cases in which it has been followed. Therefore, on the ground that the plaintiff was on the highway, the soil of which belonged to the Duke of Rutland, not for the purpose of using it in order to pass and repass, or for any reasonable or usual mode of using the highway as a highway, I think he was a trespasser. But I must observe that I think that, if the language of ERLE, J., and of CROMPTON, J., in *Reg.* v. *Pratt*, 4 E. & B. 860, were construed too largely, the effect might be to interfere with the universal usage as regards highways

in this country in a way which would be mischievous, and would derogate from the reasonable exercise of the rights of the public. Construed too strictly, it might imply that the public could do absolutely nothing but pass or repass on the highway, and that to do anything else whatever upon it would be a trespass. I do not think that is so. Highways are, no doubt, dedicated *primâ facie* for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of * using it, I do not think that he will [* 147] be a trespasser. Again, I do not think that such a trespass can be made out, except where acts other than the reasonable and ordinary user of a highway as such have been done on that particular portion of the highway, the soil of which belongs to the owner alleging a trespass to his land. If a person is passing along a part of a highway which belongs to a particular owner, in order to do something beyond, on land which does not belong to that owner, then, so far as that owner is concerned, he is merely passing along that part of the highway, and, whatever it may be his intention to do further on, there would be no trespass as against such owner. Again, if a man is passing along a highway, only intending, so far as the highway is concerned, to pass along it, though he intends to go from it and goes into other land of the same owner, and does something contrary to his rights, I do not think that there will be any trespass on the highway. But the plaintiff in this case, it should be observed, was doing that which comes within what Lord CAMPBELL, C. J., said in *Reg.* v. *Pratt*, 4 E. & B. 860, — he was using this part of the highway solely for the purpose of interfering with the rights which the owner of the land was exercising on another part of his land. He did not intend to go on the land of the Duke by the side of the highway, and thence interfere with the Duke's sport. He knew that would be a trespass. He stood on the highway, and walked up and down on it for the purpose of doing things which interfered with the Duke's enjoyment of his land near the highway. He was, therefore, not there for the purpose of using the highway as such in any of the ordinary and usual modes in which people use a highway. Under those circumstances, I think that he was a trespasser. Cases might arise in which it would be a question whether what a

person was doing was a reasonable and usual use of a highway. In such cases there might be a question for a jury as to whether such person was using the highway as a highway for passing, in accordance with the reasonable and ordinary user of it for that purpose. In this case, on the undisputed facts, it appears to me clear that the plaintiff was a trespasser, and therefore, on the [* 148] cross-appeal, I think that the defendants are entitled * to a verdict on the issue of justification. With regard to the counter-claim, I have the misfortune to differ to some extent from my learned brothers. What was originally asked for on the counter-claim was not damages only, but an injunction; but the counsel for the defendants, in argument before us, asked not for an injunction, but a declaration. I have, and always have had, a disinclination to have imported into ordinary common-law actions the procedure of the Court of Chancery, which I have no doubt is excellent for the purposes for which it was usually employed in that Court. I think it is a misfortune that such procedure should be introduced into common-law actions unless in exceptional cases. What is the nature of the case before us? It is a case of an ordinary trespass by a man of obstinate and ill-regulated mind for which no one could suggest that any considerable damages ought to be given. If the trespass were repeated, a fresh action might be brought, in which, no doubt, a jury would give larger damages. What would be the consequence of granting an injunction? If the plaintiff repeated the trespass, he might be sent to prison for an indefinite time. It does not seem to me necessary to bring into an ordinary common-law action such as this, this very severe procedure of the Court of Chancery. But the defendants' counsel do not venture to press for an injunction, and say that they will be satisfied with a declaration. I really do not see what the use of such a declaration in a case like this will be. Such a declaration ought, if the defendants' contention is correct, to have been made by the Judge at Nisi Prius. That is to say, after he has directed the jury as matter of law, that the plaintiff's conduct on the particular occasion amounted to a trespass, — a direction which might afterwards be vouched against the plaintiff, — he is to go on to make a declaration which is in effect that the direction he has just given to the jury was right in law. A declaration of this sort may be very usual and valuable in Courts of equity for some purposes, as where the direction of the Judge on a matter of law has to be

carried out by others; but I think it is misplaced and unnecessary in a case of this kind. It is now becoming the practice in every ordinary common-law action of this kind for the pleader, as a matter of course, to ask for an injunction or a *declaration, thus increasing expense and overloading the case with unnecessary complications. The intention of the Judicature Acts, no doubt, was that, where the principles of law and of equity differed, the principles of equity should prevail; but I do not think the intention was that the procedure of the Court of Chancery should be exercised in ordinary common-law actions. I think that the Duke of Rutland ought to have judgment on the counterclaim for nominal damages, but not for a declaration, which, to my mind, would in this case be futile, and have no effect. The result is that the plaintiff's appeal fails, and the defendants' appeal must be allowed. [*149]

Lopes, L. J. — This, to my mind, is a case of great importance, which must be my excuse for delivering a somewhat lengthy judgment.

This is an action of trespass to the person brought by the plaintiff against the defendants, claiming damages and an injunction. The defendants, amongst other defences, justified the alleged trespass on the ground that the plaintiff was trespassing upon the soil of the defendant, the Duke of Rutland, for the purpose of interfering with the legal right of shooting belonging to the said Duke, which by his friends and keepers duly authorised in that behalf he was then exercising, and alleging the use of no greater force than was necessary for the purpose of abating such trespass. The defendant, the Duke of Rutland, also counter-claimed against the plaintiff in respect of a trespass by the plaintiff to the soil of the said Duke, and for his interference with the exercise by the said Duke of his legal right of sporting over his said lands, alleging threats to continue and repeat such unlawful interference, and claiming an injunction and damages. Alternatively, the defendants brought into Court the sum of 5*s.* in satisfaction of all the causes of action of the plaintiff. The plaintiff joined issue on the defendants' defence and denied the allegations in the counterclaim.

The case came on to be tried before the Lord Chief Justice. So far as material, the facts may be stated as follows: At the times in question the Duke of Rutland was lawfully exercising

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sporting rights over certain moors belonging to him
[*150] These * moors were in certain parts intersected by certain highways. The soil of such highways, subject only to the easement of passing and repassing which belonged to the public, was vested in the said Duke, he being the owner of the lands on each side adjoining the said highways. Butts were erected, at some places near the said highways, at other places at a distance of two hundred yards from the highways, for the purpose of the sportsmen concealing themselves from the grouse which were to be driven towards them. The vision of the grouse is signally acute, and very little will induce them to shy away from the butts and follow a course which would be out of reach of the guns of the sportsmen occupying the butts. The plaintiff, knowing this and believing that he had cause of annoyance with the Duke or with his predecessor in title, placed himself, avowedly and admittedly, on the highway in such a position and so acted as to prevent the grouse from approaching the butts. The plaintiff had done this on former occasions, and had threatened to continue so to act whenever the Duke drove his moors. Some years before the moors had been let to a tenant. During that time the plaintiff, who had been paid by the tenant, had desisted from any interference with the shooting on the moors; but, so soon as the Duke resumed the shooting on his moors, so soon did the plaintiff renew his interference with the sport. It was an undisputed fact in the case that the plaintiff did not use the soil of the highway as one of the public for passing and repassing, or for the legitimate purpose of travel, but was at the times in question using it for the purpose of interfering with and obstructing the legal right of the Duke to exercise sporting rights over his said moors. There was a conflict of evidence as to the amount of force used by the defendants in their attempts to prevent the plaintiff interfering with the sport. In these circumstances the Lord Chief Justice directed the jury that the plaintiff was not a trespasser, and that therefore what the defendants did could not be justified; that the defendants had no cause of action on their counter-claim; and that the only question which they would have to consider was whether 5*s.* was enough to compensate the plaintiff for the acts of the defendants. The Lord Chief Justice said: "I do not think the plaintiff was a trespasser.
[*151] I do not * think, therefore, that what was done to him was lawful;" and again: "The trespass is hardly denied, and

is attempted to be justified on grounds that, in my judgment, fail. The trespass, therefore, remains a trespass, not a lawful act. It is an unlawful act. Five shillings has been paid in respect of that unlawful act. In your judgment, is 5*s*. enough? If 5*s*. is enough, verdict for the defendants. If 5*s*. is not enough, then verdict for the plaintiff, with such an addition to the 5*s*. as you think on the whole necessary." The jury thereupon found a verdict for the defendants on the claim, thinking 5*s*. enough, and the LORD CHIEF JUSTICE ordered judgment to be entered for the defendants on the claim, and for the plaintiff on the counter-claim and pleas justifying the trespass. The result is that, while the defendants succeed on the issue raised as to the 5*s*. paid into Court, the plaintiff has had entered for him the issues raised by the pleas of justification, and has judgment on the counter-claim. This arises from the holding of the LORD CHIEF JUSTICE that the plaintiff was not, under the circumstances, a trespasser. The plaintiff and defendants have both appealed to the Court, the plaintiff seeking judgment for him on the claim so far as the issue with regard to 5*s*. being enough to satisfy the claim is concerned, alleging the 5*s*. to be contemptuous and inadequate; and the defendants seeking to have judgment entered for them on the pleas justifying the trespass and on the counter-claim.

With great deference I am of opinion that the LORD CHIEF JUSTICE was wrong in directing the jury that on the facts as admitted the plaintiff was not a trespasser. In my opinion the LORD CHIEF JUSTICE ought to have told the jury that the plaintiff, on the admitted facts, was a trespasser, and that the pleas justifying the trespass and the counter-claim must be found for the defendants, and that the only question they had to consider was whether there had been an excess of force used in abating the trespass, and, if so, whether 5*s*. was enough to compensate the plaintiff for such excess. The LORD CHIEF JUSTICE ought further to have told the jury that if there was no excess then they must find everything for the defendants; but if there was an excess, then if 5*s*. was enough, they ought still to find everything for the defendants; but if, on the other hand, they thought * 5*s*. was not enough, [* 152] then they should find for the plaintiff for such sum as in their opinion he was entitled to beyond the 5*s*. The jury were of opinion that 5*s*. was enough to cover everything to which the plaintiff was entitled. Their finding on that issue is therefore con-

clusive, and the verdict and judgment in that respect must stand. But ought the LORD CHIEF JUSTICE to have told the jury that the plaintiff was not a trespasser?

The interest of the public in a highway consists solely in the right of passage; the soil and freehold over which that right of way is exercised is vested in the owner or owners of the adjoining land, who may maintain actions of trespass against persons infringing his or their rights therein; as, for instance, by permitting cattle to depasture thereon. In *Doraston* v. *Payne*, 2 H. Bl. 527, (3 R. R. 497), BULLER, J., says: "Whether the plaintiff was a trespasser or not depends on the fact whether he was passing and repassing and using the road as a highway, or whether his cattle were in the road as trespassers." Again, HEATH, J., says: "If it be a way, he must show that he was lawfully using the way; for the property is in the owner of the soil, subject to an easement for the benefit of the public." In the case of *Reg.* v. *Pratt*, 4 E. & B. 860, Pratt had been convicted by Justices under 1 & 2 Wm. IV., c. 32, s. 30, of committing a trespass by being in the daytime on land in the occupation of one Bowyer, in search of game. On appeal, a case was reserved by the sessions for the opinion of the Court, and the facts appeared to be that Pratt was in the daytime on a public road (the soil of which as well as the land on both sides belonged to Bowyer) carrying a gun and accompanied by a dog; that Pratt sent the dog into a cover by the roadside which was in the actual occupation of Bowyer, and that a pheasant flew across the road from the cover and was fired at by Pratt, who was still standing upon the road. Upon these facts the Court held that the conviction was right, the road being land in the occupation of Bowyer, subject only to the right of way of the public; and the evidence showed that Pratt was not on the road in the exercise of the right of way, but for another purpose, namely, the search for game, and that thus he was a trespasser. "On these facts," said Lord
[*153] CAMPBELL, C. J., "I think that the magistrates were * perfectly justified in concluding that Pratt was trespassing on land in the occupation of Mr. Bowyer in search of game. He was, beyond all controversy, on land the soil and freehold of which was in the owner of the adjoining land, that is, Mr. Bowyer. It is true the public had a right of way there; but subject to that right the soil and every right incident to the ownership of the soil was in Mr. Bowyer. The road, therefore, must be considered as

Mr. Bowyer's land. Then Pratt, being on that land, was undoubtedly a trespasser if he went there, not in exercise of the right of way, but for the purpose of seeking game and that only. If he did go there for that purpose only, he committed the offence named in the Act: he trespassed by being on the land in pursuit of game. The evidence of his being there for that purpose is ample. He waved his hand to the dog; the dog entered the cover and drove out a pheasant, and Pratt fired at it. The magistrates were fully justified in drawing the conclusion that he went there, not as a passenger on the road, but in search of game." ERLE, J., in the same case, says: "There can be no doubt, in fact, that Pratt was on land, and that he was in search of game; but it is said he could not be a trespasser because it was a highway. But I take it to be clear law that, if in fact a man be on land where the public have a right to pass and repass, not for the purpose of passing and repassing, but for other and different purposes, he is in law a trespasser, like the cattle in *Doeaston* v. *Payne*, 2 H. Bl. 527 (3 R. R. 497). CROMPTON, J., in the same case, says: "I take it to be clear law that if a man use the land, over which there is a right of way, for any purpose lawful or unlawful other than that of passing and repassing, he is a trespasser." I do not think the language used by the learned Judges in that case too large or that it in any way imperils the legitimate use of highways by the public. The LORD CHIEF JUSTICE, however, appears to have thought that this decision was founded on the fact that Pratt was committing an offence on the highway. The LORD CHIEF JUSTICE says — I quote his own words: "As he was using the highway not to pass and repass, but to be guilty of a criminal offence, the Judges held that, he being on the highway for the purpose of committing that criminal offence, he was none the *less doing that criminal [*154] offence because he was on the highway; but they could not take exception and say he had a right to be there as he had for all purposes, and try to make that a defence for being there for a criminal purpose." In my opinion that is not the ground of the decision. The ground of the decision is that Pratt was using the highway for purposes other than those of legitimate travel, and was, therefore, a trespasser on the soil and freehold of the adjoining owner; he could not have been convicted unless he had been a trespasser.

The conclusion which I draw from the authorities is that, if a

person uses the soil of the highway for any purpose other than that in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil, who has, subject to this easement, precisely the same estate in the soil as he had previously to any easement being acquired by the public.

If this is the law, the plaintiff, on the admitted facts, was a trespasser. He was using the soil of the highway, not for the purpose of passing and repassing, but for the purpose of interfering with the exercise of a legal right by the defendant, the Duke of Rutland. In these circumstances the defendants are entitled to judgment on the pleas of justification, and also on their counterclaim for nominal damages. The plaintiff's appeal will, therefore, be dismissed, and the defendants' appeal be allowed with costs. Sir H. James, on the part of the Duke, does not press for an injunction; if he had, I should have thought it ought to be granted; but he asks for a declaration that the plaintiff, on the facts appearing, was, at the time when he interfered with the legal right of the Duke, a trespasser. This I think he ought to have. An injunction is constantly granted by the Queen's Bench Division for trespasses threatened to be repeated. It is the effect of the Judicature Act and a most wholesome remedy. This action might have been brought in the Court of Chancery, and an injunction on the facts appearing would, in my opinion, have been readily [* 155] granted; and under Order xxv., * r. 5, there is full power to make a declaration such as we make.

Kay, L. J. — The soil of a highway belongs *primâ facie* to the owner of the land adjoining it. If the land on either side is the property of different owners, each is owner of the soil on his side *ad medium filum* of the highway. But this ownership is subject to the right of the public to use the highway. Any use of the soil of the highway other than the legitimate use of it for the purposes of a highway is a trespass upon that soil as against the owner to whom it still belongs. These propositions are amply established by judicial decisions. The only difficulty in applying them is in determining whether the particular act complained of is or not a user of the soil as a highway.

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The legitimate use of a highway is generally described as a "right of passage," or a "right of passing and repassing." In 1 Rolle's Abridg. 392 B., pl. 1, 2, referred to and adopted by Lord MANSFIELD in *Goodtitle* v. *Alker*, 1 Burr. 133, at p. 143, the law as to highways is thus stated: "The King has nothing but the passage for himself and his people, but the freehold and all profits belong to the owner of the soil." In the last-mentioned case it was held that trespass would lie for any interference with the owner's rights in the soil of a highway, and that he may maintain ejectment for an exclusion as by a building upon the soil of the highway. In *Sir John Lade* v. *Shepherd*, 2 Str. 1004, an action of trespass was brought by the owner of the soil for building a bridge across a ditch, "the end whereof rested on the highway." The plaintiff had judgment, the Court saying: "It is certainly a dedication to the public so far as the public has occasion for it, which is only for a right of passage. But it never was understood to be a transfer of the absolute property in the soil." Following these decisions, the grass or trees growing on the sides of the highway are held to be the property of the owners of the soil. *Turner* v. *Ringwood Highway Board*, L. R. 9 Eq. 418; *Curtis* v. *Kesteven County Council*, 45 Ch. D. 504.

The right of the public upon a highway is, in the language of * the Judges which I have quoted, described as a [*156] right of passage. In other cases it is defined as a right of passing and repassing. Probably this is sufficiently accurate and precise to enable any one to determine what in each particular instance is an improper use of the soil. Many of such instances may be too trivial to justify any action or prosecution. That is so in the case of every trespass. If a man walks into the field of another without permission, he is a trespasser: but an action for such a trespass, unless it were in assertion of a fancied right, would not be very likely to succeed. So, if by the side of a highway an artist set up his easel and made a sketch, he might be a trespasser. But no one in his senses would bring an action against him for an occasional trespass of that kind. There is no more danger of abuse of the law in the one case than in the other, and it is no argument against this well-settled law relating to highways to say that it is capable of such abuse. The answer is that the law of trespass, whether on the soil of a highway or on land over which the public have no rights at all, may be pushed to an

extreme in certain cases. But the discretion of a Court of justice is as capable of controlling any excessive assertion of right in the case of a highway as in any other case.

The other reported instances of trespass deserve consideration.

In *Doraston* v. *Payne*, 2 H. Bl. 527 (3 R. R. 497), cattle were taken by the defendant damage feasant on his land, which adjoined to a highway. It was pleaded that, being on the highway, they had escaped into the land by reason of the owner not having kept the fence which divided it from the road in repair. The plea was held bad because it did not aver distinctly that the cattle were using the highway for the purpose of passing and repassing. So that they might have been trespassing upon it, and an escape from land on which they were trespassing would not be a defence. HEATH, J., said that it was no excuse that the fences were out of repair if the cattle were trespassers, and it was necessary to show that they were lawfully using the road; for "the property is in the owner of the soil subject to an easement for the benefit of the public," and on the plea it did not appear "whether the cattle were passing and repassing, or whether they were trespass-
[*157] ing on the *highway." In *Stevens* v. *Whistler*, 11 East, 51, it was held by the Court of King's Bench that depasturing cattle upon a highway on one side of which the plaintiff had land was a trespass on that part of the soil of the highway which belonged to the plaintiff. In *Reg.* v. *Pratt*, 4 E. & B. 860, it was decided that a person who went upon the high-road with a gun, and attempted to shoot a pheasant which flew over it, was properly convicted of a trespass in search of game under 1 & 2 Wm. IV., c. 32, s. 30, upon the soil of the highway which belonged to the owner of the close adjoining such highway. "He was on land," said Lord CAMPBELL, C. J., "the soil and freehold of which was in the owner of the adjoining land. It is true the public had a right of way there, but subject to that right the soil and every incident to the ownership of the soil was in" the owner of the adjoining land. WIGHTMAN, J., said: "Though the public have a right to pass and repass on land which is a highway, they have no right to use the land for any other purpose than as a highway, and the appellant being on such land in pursuit of game was *primâ facie* a trespasser." ERLE, J., said: "It is said he could not be a trespasser because it was a highway. But I take it to be clear law that if, in fact, a man be on land where the public have a right to

pass and repass, not for the purpose of passing and repassing, but for other and different purposes, he is in law a trespasser like the cattle in *Dovaston* v. *Payne*, 2 H. Bl. 527 (3 R. R. 497)." CROMPTON, J., said: "If a man use the land over which there is a right of way for any purpose lawful or unlawful other than that of passing and repassing, he is a trespasser." These authorities were considered and followed by the Court of Queen's Bench in *St. Mary Newington* v. *Jacobs*, L. R. 7 Q. B. 47, where the law is stated thus: "The owner who dedicates to public use as a highway a portion of his land parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership not inconsistent therewith." MELLOR, J., who delivered the judgment of the Court, comments thus on *Reg.* v. *Pratt*: "Whether or not that case is open to doubt as to the construction put upon the Game Act, it truly expresses, as we think, the true limit of the public rights over a highway."

The *Court held that the owner of premises adjoining [*158] a highway, who had offered to take up the flags of a footpath and replace them by hard materials to enable him to cart heavy machinery into his yard, was not liable for damage done to the flags by carting the machinery over them, when his offer had been refused.

According to these authorities, the right of the public upon a highway is that of passing and repassing over land the soil of which may be owned by a private person. Using that soil for any other purpose lawful or unlawful is a trespass. I understand those words to mean that the purpose need not be unlawful in itself; as, for example, to commit an assault or a felony upon the high-road. It is enough that it should be a user of the soil of the high-road for a purpose other than that which is the proper use of a highway, namely, that of passing and repassing along it.

The peculiarity of the decision in *Reg.* v. *Pratt* is that the trespasser was passing along the highway, but his purpose in doing so made that passing a trespass. The purpose, however, was to do an act upon the highway itself which was beyond his right merely to pass and repass. If he had gone along the highway with the purpose of reaching a covert near the highway and taking game in that covert, though he might be a trespasser in that covert, I should not think he was a trespasser upon the highway. But, if a man goes along a highway for the purpose of cutting down the

trees or bushes which grow along the side of it, or taking the grass, or setting up a show upon the highway, or doing upon the highway itself — in the words of CROMPTON, J. — any act "lawful or unlawful other than that of passing and repassing, he is a trespasser." The words must be read with the obvious qualification that the "purpose" they refer to must be a purpose of using the soil of the highway itself otherwise than by merely passing and repassing.

In this case the highway was a cart and carriage road across a moor. The Duke of Rutland had the right of sporting over the moor. The soil in it and in the highway, I understand, belonged to him. He had butts, in which people stood to shoot [* 159] grouse * driven over them from the moor. These butts were some two hundred yards from the road, so that shooting from them would not infringe the provisions of s. 72 of 5 & 6 Wm. IV., c. 50, which prohibits any person from wantonly firing off any gun within fifty feet of the centre of any carriageway or cartway. Some old butts were within the prohibited distance. It was proved that the plaintiff went upon this high-road during a grouse drive for the express purpose of preventing the grouse from flying towards the butts, and thus interfering with the right of sporting which was being exercised by the Duke's friends. On this point the evidence was so conclusive that we are told the LORD CHIEF JUSTICE said it was superfluous to produce any more witnesses to prove it. The keepers seized the plaintiff, threw him down upon the road, and held him there during the grouse drive, to prevent his further interference.

The LORD CHIEF JUSTICE directed the jury that the plaintiff was not trespassing. Under that ruling they found that a nominal sum of 5*s.* paid into Court was sufficient damages for the assault upon him. Counsel then said that, after his Lordship's ruling, he could hardly press the counter-claim, which asserted that the act of the plaintiff was a trespass, and sought for an injunction to restrain the plaintiff from repeating it. This counter-claim is in fact a cross-action seeking equitable relief, which may now be brought in the Queen's Bench Division. See s. 24, sub-s. 3, Judicature Act, 1873. Where a trespass is committed in assertion of a fancied right, and it is shown that it will be repeated unless prevented, the Court of Chancery has constantly granted injunctions to prevent a repetition of the trespass.

Upon this point there is now before us a cross-appeal by the

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defendants. They asked for an injunction; but, upon being pressed by me, counsel said he would not insist upon the injunction, but desired the decision of this Court by declaration whether or not the act of the plaintiff was a misuse of the soil of the highway which amounted to a trespass. It is not unusual in the Chancery Division to make such a declaration without going on to grant an injunction. It clearly may be done under Order xxv., r. 5.

*Whatever may be thought of the so-called sport of [*160] standing in a butt and shooting at grouse driven over, it is not prohibited by law; and, subject to the provisions of the statute to which I have referred for the protection of wayfarers upon the high-road, it is a not unlawful exercise of the right of the owner of the land.

The plaintiff went upon this highway, not for the purpose of exercising as one of the public his right of passage, but of interfering with the grouse drive by placing himself upon the soil of the highway so as to prevent the grouse from flying over the butts. In his own language, taken from his evidence, he says: "I certainly meant to take up my position in front of the butts;" "I went there to defend the public right." With great deference, I am unable to agree that this was a use of the right of passing along the highway. I think it was an abuse of that right. In other words, it was a use of the soil of the highway for another purpose, which use interfered, and was intended to interfere, with a right which was then being exercised by the owner of the soil, and was incident to that ownership. Such a misuse of the soil of a highway is a trespass. There seems to have been sufficient evidence that the plaintiff was not only asserting a right to do what he did, but also that his intention was to repeat his interference. This strictly would entitle the defendants to the assistance of the Court by injunction to prevent a repetition of the act. But this is not pressed for; and I think that the defendants are entitled at any rate to a declaration under Order xxv., r. 5, upon their counterclaim, that under the circumstances the plaintiff, upon Oct. 8, 1890, when stopped by the Duke's keepers, was trespassing upon the soil of the highway. I am not so much impressed with the consequences of granting an injunction. The Court exercises the power of enforcing such an order by imprisonment with very great care and caution.

The damages given to the plaintiff for the alleged assault upon him by the keepers on the assumption that he was not a trespasser were only 5*s*. They would not be more on the ruling that he was a trespasser, and the defendants do not ask to alter the [* 161] amount. The plaintiff's appeal fails, and must * be dismissed. The defendants' appeal succeeds. Plaintiff's claim is dismissed with costs. The defendants' counter-claim is allowed with costs. *Judgment accordingly.*

ENGLISH NOTES.

Almost all the cases showing the nature of the landowner's rights in land over which a highway passes are discussed in the judgments in the principal case. The only other case to which it seems necessary to refer is *Goodson* v. *Richardson* (1874), L. R. 9 Ch. 221, 43 L. J. Ch. 790, where the landowner obtained an injunction to restrain the defendant from continuing water-pipes that he had laid in the highway without the landowner's consent. The ordinary rights of the landowner in the soil of a highway are slightly curtailed where the highway is "vested" in a local authority. See *Wandsworth Board of Works* v. *United Telephone Co.*, No. 13, p. 630, *post*, and the notes thereto.

The owner, or perhaps more accurately the occupier, of land adjoining a highway has a right of access to the highway at any or every point of his frontage, and that whether or not he has any interest in the soil of the highway, so that the right of access is not a mere incident of the ownership of the soil of the highway. See *Berridge* v. *Ward* (1860), 2 Fost. & Fin. 208 (as to further proceedings in this case see 10 C. B. (N. S.) 400, 30 L. J. C. P. 218); *Mayor, &c. of Manchester* v. *Chapman* (1868), 18 L. T. 640; *Fritz* v. *Hobson* (1880), 14 Ch. D. 542, 49 L. J. Ch. 321; *Ramsay* v. *Southend Local Board* (1892), 8 Times L. R. 700. In *St. Mary Newington Vestry* v. *Jacobs* (1871), L. R. 7 Q. B. 47, 41 L. J. M. C. 72, 25 L. T. 800, 20 W. R. 249, the owner of premises was held to be justified in conveying heavy machinery in waggons across the footway of a highway to his property, which adjoined the highway there: — it being found that he could not reasonably enjoy the property without so conveying machinery; that his exercise of his right of access and the public right of passage could be exercised jointly consistently with the general welfare; and that the highway authority had refused him permission to take up the flags and form a proper paved carriage-way to his premises. But the owner in question was owner of the soil of the part of the highway adjoining his premises; and the decision was rested on his rights in the highway as owner of the soil.

Primâ facie, the ownership of the soil of a highway, and of waste

land at the side of a highway, is in the owner of the adjoining land, not only as between him and strangers, but as between him and the lord of the manor. See *Steel* v. *Prickett* (1819), 2 Starkie, 463, 20 R. R. 717; *Doe d. Pring* v. *Pearsey* (1827), 7 B. & C. 304, 9 Dowl. & Ry. 908. The presumption may, however, be rebutted by proof of acts of ownership or otherwise, and frequently the ownership is found to be in the lord of the manor: see *Anon.* (1773), Lofft, 358; *Doe d. Barrett* v. *Kemp* (1831), 7 Bing. 332, 5 Moore & Payne, 173; s. c. in error, 2 Bing. N. C. 102, 2 Scott, 9, 4 L. J. Ex. 331; *Scoones* v. *Morrell* (1839), 1 Beav. 251; *Doe d. Harrison* v. *Hampson* (1846), 4 C. B. 267, 17 L. J. C. P. 225; *Salt Union* v. *Harvey* (1897), Local Government Chronicle, 1897, 391; and it seems that the presumption is rebutted, or at least weakened, where strips of waste at the side of a highway communicate with larger pieces of waste belonging to the lord of the manor: see *Headlam* v. *Hedley* (1816), Holt N. P. 463; *Grose* v. *West* (1816), 7 Taunt. 39, 17 R. R. 437; see also *Simpson* v. *Dendy* (1860), 8 C. B. (N. S.) 433, affirmed in Exchequer Chamber, 7 Jur. (N. S.) 1058. The presumption does not, however, arise in the case of roads set out under an inclosure award. See *Rex* v. *Edmonton Inhabitants* (1831), 1 Moody & Rob. 24; *Rex* v. *Wright* (No. 7, p. 560, *ante*); *Poole* v. *Huskinson* (1843), 11 M. & W. 827, per Parke, B., at p. 830.

The presumption where a highway is the boundary between lands of different owners is, that the ownership of each extends *ad medium filum viæ*. And where land abutting on a highway is conveyed, the presumption is that the conveyance includes the half of the highway, and it requires a clear indication of a contrary intention, either expressed in the conveyance, or to be gathered from the circumstances, to rebut this presumption. See *Lord* v. *Sydney Commissioners* (1859), 12 Moo. P. C. 473; *Pryor* v. *Petre* (C. A. 1894), 1894, 2 Ch. 11, 63 L. J. Ch. 531, 70 L. T. 331, 42 W. R. 435, and the cases there cited. It has been doubted, however, whether the presumption applies to a demise for a term of years. See *Landrock* v. *Metropolitan Railway Co.* (1886), 3 Times L. R. 162.

AMERICAN NOTES.

It would probably be difficult to find an exact parallel to the principal case in the American Courts; but there can be no doubt that the owner of the soil subject to the public easement, whether the public right has been established by condemnation or by dedication, has all the ordinary rights of the owner of a freehold, and that he may maintain trespass. He certainly loses nothing by the fact that he gave the right instead of being paid for it. Elliott on Roads and Streets, pp. 308, 536; *Adams* v. *Emerson*, 6 Pickering (Mass.), 57; *Cole* v. *Drew*, 44 Vermont, 49; 8 Am. Rep. 363; *Clark* v. *Dasso*, 34 Michigan, 83; *Baker* v. *Shepard*, 24 New Hampshire, 208. In the Vermont case it was

held that the owner of the soil could maintain trespass for the act of the defendant's wife in cutting and carrying away the grass from the road, in order that her children might go to and return from school without getting their feet wet. (Verdict for one cent damages; but the Court refused to apply the maxim *de minimis*.) To the same effect: *People* v. *Foss*, 80 Michigan, 559; 20 Am. St. Rep. 532. "The right of the citizen other than the owner of the fee in a suburban road is to use it for travel." Elliott on Roads and Streets, p. 310.

An analogous case is *Adams* v. *Rivers*, 11 Barbour (New York Sup. Ct.), 390, where the defendant stood on the sidewalk in front of the plaintiff's premises, and sang songs and used abusive language. This would undoubtedly cover the case of an organ-grinder who refused to "move on." So in *Fairbanks* v. *Kerr*, 70 Penn. State, 86; 10 Am. Rep. 664, it was held that one has no right to occupy the street to make a political speech, and that "a pavement before another's house may not be occupied to annoy him." So one may not use the sidewalk to warn the public away from another's shop by carrying a placard inscribed, "Beware of mock auctions." *Gilbert* v. *Mickle*, 4 Sandford (N. Y. Chancery Ct.), 357. See *People* v. *Cunningham*, 1 Denio (New York), 524 (delivery of distillery slops through pipes across sidewalk to wagons); *Dennis* v. *Sipperly*, 17 Hun (N. Y. Sup. Ct.), 69 (receiving barrels from cider press); *Callanan* v. *Gilman*, 107 New York, 360 (skidds across sidewalk); *Jaques* v. *Nat. Ex. Co.*, 15 Abbott's New Cases (New York), 250 (puppet-show on sidewalk); *State* v. *White*, 64 New Hampshire, 48 (beating drum by member of "Salvation Army"); *Turner* v. *Holtzman*, 54 Maryland, 148; 39 Am. Rep. 361 (stage-coach obstructing entrance to camp-meeting ground); *Costello* v. *State*, 108 Alabama, 45 (fruit-stand on sidewalk).

But gates and doors may be allowed to swing over the way and horses to stand upon it for a reasonable length of time: *O'Linda* v. *Lothrop*, 21 Pickering (Mass.), 292; and a sleigh may stand for ten or fifteen minutes, and farmers' vehicles may stand on the side of a village street during the greater part of the day, while the horses are feeding at an adjacent stable: *Sikes* v. *Town of Manchester*, 59 Iowa, 65. So a visitor at the house of a friend may leave his carriage standing at the door. *Norristown* v. *Moyer*, 67 Penn. State, 355. In the last case the Court, charging the jury, said: "The infamous habit of corner lounging, when not prohibited by special local legislation, is illegal. The loungers who occupy the public highway are, while lounging, not using it for the purposes of passage, and are therefore obstructions of the public right of way, and therefore nuisances." But a child may stop a few minutes to look at something across the street: *Hussey* v. *Ryan*, 64 Maryland, 426; 54 Am. Rep. 772; and a man may sit on a door-sill to tie his shoe: *Murray* v. *McShane*, 52 Maryland, 217; 36 Am. Rep. 367; or stand a few minutes to see a procession form: *Varney* v. *Manchester*, 58 New Hampshire, 430; 42 Am. Rep. 592.

No. 11. — FISHER *v.* PROWSE.

COOPER *v.* WALKER.

(1862.)

RULE.

If a way lies over a place where there is a dangerous excavation or obstacle not shown to be of recent origin, the presumption is that the way has been dedicated to the public and accepted by the public subject to the existence of the danger. In such a case a wayfarer falling into the danger and suffering damage has no right of action.

Fisher v. Prowse; Cooper v. Walker.

31 L. J. Q. B. 212–219 (s. c. 2 B. & S. 770).

Highway. — Ancient Obstruction. — Dedication. — Presumption. [212]

Where an obstruction or erection exists upon land, and afterwards the land or that which is immediately adjoining to it is dedicated to the public as a way, the dedication is subject to the inconvenience or risk arising from the obstruction or erection.

The defendant occupied a house adjoining a public street, with a cellar belonging to the house. The mouth of the cellar opened into the footway of the street by a trap-door. During the day the trap-door was open, but at night it was closed by a flap which slightly projected above the footway; and such had been the condition of the flap as long as living memory went back, and before the defendant had anything to do with the house. The plaintiff coming along the street fell over the flap and sustained injury, in respect of which he brought an action.

Held, that the proper conclusion to draw from this state of things was, that the street had been dedicated to the public with the cellar-flap upon it, and subject to its being continued there, and therefore that the defendant was not liable, as a maintenance of the cellar-flap in the same position was not unlawful.

A public street was subject to the right of the occupiers of a house adjoining, to have steps standing in the street and leading up to the house, all persons passing along having the right to go over them. While the steps were so standing, the vestry of the parish lowered the level of the street, and it became necessary for the convenient occupation of the house to erect new steps. This was done by the defendant, causing no greater obstruction than before. *Held*, in an action brought in respect of an injury caused by falling over these steps, that the defendant was entitled to keep them there, and therefore that the plaintiff could not recover.

Fisher v. Prowse.

The declaration alleged that the defendant unlawfully, carelessly, and negligently kept, maintained, and continued a cellar-flap raised and projecting over and upon a public street or highway, so as to be dangerous to and likely to injure, and the same was dangerous and likely to injure, persons passing along and using the said street; that the plaintiff, while passing
[* 213] *along the said street, tripped against and fell over the said cellar-flap, and was injured.

Pleas: first, not guilty; secondly, that the defendant did not keep, maintain, or continue the said cellar-flap raised or projecting as alleged; thirdly, that the said cellar-flap was not raised or projected as alleged.

Issues were joined upon these pleas.

At the trial, which took place before ERLE, C. J., at the Spring Assizes for the county of Kent, it appeared that the defendant was the owner of a house adjoining a street in Deptford; the house had a cellar belonging to it, the mouth of the cellar opening into the footway of the street by a trap-door, which was open during the day, but was closed at night by a flap which slightly projected above the footway. The cellar had existed in this condition before the defendant had anything to do with the house, and the flap had been in the state above described as long as any one could remember. The plaintiff, coming along the footway at night, stumbled over the flap, and sustained an injury, in respect of which he brought the present action. The learned Judge nonsuited the plaintiff; but gave him leave to move to enter a verdict for £75, if the Court should be of opinion that he was entitled to recover.

A rule *nisi* was subsequently obtained, against which cause was shown by

J. Browne (June 13 and Nov. 4, 1861). — The defendant is not liable in this action. If he were, every person who has such a thing attached to the house which he occupies would be liable. Such a ruling would entail a liability on the surveyor of highways for an accident occasioned by a person tripping against a curb-stone. No action will lie in respect of such an injury, as it might reasonably have been guarded against. The case is like *Cornman* v. *The Eastern Counties Railway Company*, 4 H. & N. 780, 29 L. J. Ex. 94, where the plaintiff fell over a weighing-machine which

had stood for about five years upon the platform of a railway station. The only difference between that case and the present is, that there the machine was on the platform, and here the flap was in the open street. MARTIN, B., said: "There is no evidence of any negligence on the part of the company. No doubt, if there had been an open place on the platform, through which any one might have fallen without perceiving it, that would have been negligence on the part of the company. Here, however, the platform was in the same condition in which it had been for five years. The accident was one of the misfortunes which will occasionally occur, and of which people must bear the consequences." And BRAMWELL, B., said: "I adopt the rule stated by WILLIAMS, J., in *Tooney* v. *The Brighton Railway Company*," 3 C. B. (N. S.) 146, 27 L. J. C. P. 39. "It is not enough to say that there was some evidence. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, would not justify the Judge in leaving the case to the jury; there must be evidence on which they might reasonably and properly conclude that there was negligence. Here the evidence was that the company might reasonably have anticipated that no mischief could occur, since no mischief had resulted from keeping the machine in the position in which it stood for so long a period." The learned Judge who tried the case was properly of opinion that the defendant had a right to keep the flap in the same position as it had always been. He might have maintained an action against the plaintiff if he had injured it.

[COCKBURN, C. J. — You must argue the case upon the supposition that there was no negligence of the plaintiff contributing to the injury.]

No doubt; but it must also be taken that the way was dedicated to the public with the flap in the same position as now, and the omission of that argument may account for the decision of Lord ELLENBOROUGH, in *Coupland* v. *Hardingham*, 3 Camp. 398 (14 R. R. 764), which was cited in moving for the rule. His Lordship held that the length of time during which the premises had been in the same position made no difference, but that view is not confirmed in *Barnes* v. *Ward*, 9 C. B. 392. 19 L. J. C. P. 195, where the decision was a good deal discussed; and the judgment of the Court, at page 419, shows that the area in question was not parcel of the road, but was meant to be fenced off from

[* 214] * it, in the usual manner. The ruling of Lord ELLENBOROUGH was given up. In *Cornwell* v. *The Metropolitan Commissioners of Sewers*, 10 Ex. 771, MARTIN, B., said of *Barnes* v. *Ward*, "That decision proceeded on the ground that the defendant had made an excavation adjoining an immemorial public way, which rendered the way unsafe to those who used it with ordinary care, and so was guilty of a public nuisance." The case itself was one in which it was held that commissioners of sewers were not bound to fence an ancient tidal ditch which they used as a sewer. So here the defendant was not bound to fence off or take away that which had always existed. The fact of the surveyor of highways not having interfered shows that it could not have been any new nuisance. It may be admitted that if newly erected, it would have been a nuisance; but that does not make out the case of the defendant. The law is laid down in 1 Russ. on Crimes, by Greaves, p. 347: "There is no doubt but that all injuries whatsoever to a highway, as by digging a ditch, or making a hedge across it, or laying logs of timber in it, or by doing any other act which will render it less commodious to the King's subjects, are public nuisances at common law. . . . If there be a stile across a public footway of a certain height, and a man raises this stile to a greater height, it is a nuisance; and it is clearly a nuisance at common law to erect a new gate in a highway, though it be not locked and open and shut freely, because it interrupts the people in that free and open passage which they before enjoyed, and were lawfully entitled to; but where such a gate has continued time out of mind, it shall be intended that it was at first set up by consent, on a composition with the owner of the land, on the laying out of the road, in which case the people had never any right to a freer passage than what they continue to enjoy." And reference is made to *Bateman* v. *Burge*, 6 Car. & P. 391, where there was a public footway, across which there had always been a stone stile two feet high; the defendant had removed the stile and put up a five-bar gate; and PARK, J., said, "If there was no gate there before, the defendant has no right to put a five-bar gate to give people the trouble of getting over it." There are numbers of highways with gates upon them, which, if erected anew, would be nuisances, but are not so as they have always existed. So a street is dedicated to the public subject to the right of breaking up the pavement when necessary.

No. 11. — Fisher v. Prowse ; Cooper v. Walker, 31 L. J. Q. B. 214, 215.

[COCKBURN, C. J. — In most of the streets in London there are holes through which coals are put down ; but they cannot be held to be nuisances for which the occupiers of houses are punishable.]

Just so ; and the same may be said with regard to doorways projecting into the street. It would be most mischievous if such an action as the present were allowed. He also referred to Vin. Abr., tit. Nuisance ; *Hardcastle* v. *The South Yorkshire Railway and River Dun Company*, 4 H. & N. 67, 28 L. J. Ex. 139, and to *Blyth* v. *Topham*, Cro. Jac. 159.

The plaintiff appeared in person to support the rule.

COCKBURN, C. J. — There is another case of the same nature in the paper, and we had better defer giving our judgment till that case has been argued.

Cooper v. Walker.

The declaration alleged that the defendant had negligently and improperly placed in a public street, called Christopher Street, certain stone steps, so that the same became and were an obstruction and hindrance to persons using the street, and dangerous to persons passing along it at night ; and that the plaintiff, when passing by night along the street, after the said steps had been so placed in the said street, and had been left unguarded and unfenced, while they were dangerous to persons passing along the said street by night, fell over them and was injured.

Pleas : First, not guilty ; second, that the street was subject to the right of the occupiers for the time being of a house adjoining it, to have steps standing in the highway on a part thereof, and leading up to the outer door of the said house for the convenient occupation thereof, all persons passing along the highway being entitled to pass on foot over the said steps, as part of the said * highway, but not to remove the steps, the highway [* 215] being at the part thereof which was occupied by such steps or way for foot passengers over the said steps, which steps were part of the said house. That before the said time, when and whilst the said highway was such a highway as aforesaid, and so subject as aforesaid, and while certain old steps were lawfully standing on the said part of the said highway leading to the said outer door for the convenient occupation of the said house, being the steps which the occupier of the house had a right to have there as aforesaid, the vestry of the parish of, &c., wherein the said

highway was situate, having lawfully authority so to do, and under and by virtue of the Act of Parliament for the local management of the metropolis, &c., lowered the level of the said highway round the said part of the said highway, whereby it became necessary for the convenient occupation of the said house that the old steps leading to the outer door thereof as aforesaid should be taken down, and other steps placed in the said part of the said highway, so as that none of the steps leading to the said outer door should be of an inconvenient height, as one of the old steps would have been after the said lowering; whereupon the defendant, for the making of the steps to the said outer door convenient for the occupation of the said house, and at the request and by the authority of the then occupier of the said house, who was also in possession of the said steps as part thereof, did take down the old steps and did place steps on the said part of the highway on which the old steps stood as aforesaid, such new steps being steps leading to the said house for the convenient occupation of the said house. That the taking down the old steps and putting up the new ones was done with the consent, approbation, and authority of the said vestry. That the new steps were placed on the same part of the highway on which the old steps had stood, and nowhere else; that they were proper steps, and caused no great obstruction, hindrance, inconvenience, or danger to persons passing along the lowered highway than did the old steps to persons passing along the highway before it was lowered.

Issues were joined on these pleas.

Upon the trial, before Hill, J., at Westminster, at the Sittings after Trinity Term, 1861, the jury found a verdict for the plaintiff on the issue joined on the first plea, and for the defendant upon the issue joined on the second plea.

A rule was subsequently obtained calling upon the defendant to show cause why judgment should not be entered for the plaintiff notwithstanding the verdict found for the defendant on the second plea.

H. Mills and Henry James showed cause against the rule (May 13). There is no doubt that these steps are an obstruction which could not have properly been erected after the way had been dedicated to the public; but it cannot be contended that a highway cannot be dedicated to the public with such an obstruction already existing upon it. These steps having been always there, the de-

fendant had a perfect right to replace them after they had been removed for the purpose of lowering the road; and the position of the defendant is the same as if they had never been removed at all. The public can still have all the use of the highway which they have ever had, or which they have any right to. A carriage-road may be dedicated with gates across it, and they will not be nuisances; such, indeed, exist in all parts of the country. In *Le Neve* v. *The Vestry of Mile End Old Town*, 8 El. & B. 1054, 27 L. J. Q. B. 208, the defendants had removed some erections placed by the plaintiff upon the space of ground intervening between the footway in front of his house and the carriageway; and it was held that they had no right to do so, the Court seeming to think that these erections were legitimately there. *Morant* v. *Chamberlin*, 6 H. & N. 541, 30 L. J. Ex. 299, will be cited on the other side; but there the Court held that they could not infer that the way had been dedicated to the public subject to the right claimed by him of putting obstructions upon it. *Coupland* v. *Hardingham*, 3 Camp. 398 (14 R. R. 764), is also not binding upon the defendant, for the presumed dedication of the highway subject to the incumbrances was not brought before the Court. So also *Barnes* v. *Ward* only amounts to this, that a new excavation cannot be made by the side of an immemorial public highway.

* [Crompton, J. — How can you dedicate to the public a [* 216] thing which is really dangerous?]

There was room for the public to go along the street without passing over these steps. In "Wellbeloved on Highways," p. 440, the following passage occurs: "Although it may perhaps be argued that a gate erected in a highway will be no nuisance, because if it were, it could not be justified by any prescription, as it is agreed that it may be; but to this it may be answered, that the erecting such a gate is a nuisance, because it interrupts the people in that free and open passage which they before enjoyed and were fully entitled to; whereas, where such a gate has continued time out of mind, it shall be intended that it was set up at first by consent, or on a composition with the owner of the land, on the laying out of the road; in which case the people had never any greater freedom of passage than what they still enjoy." So here, it must be supposed that the road was dedicated to the public, subject to the right to keep the steps there; and that being so, the defendant has done nothing which can alter his position. They also referred to

Jarvis v. *Dean*, 3 Bing. 447, and to *Elwood* v. *Bullock*, 6 Q. B. 383, 13 L. J. Q. B. 330.

Woollett, in support of the rule. — There can be no dedication of a highway with a right to maintain upon that highway an obstruction which would be a nuisance at common law. The steps here must be taken to be such a nuisance, for all the allegations in the declaration must be taken to have been proved, the jury having found a verdict for the plaintiff on the plea of not guilty.

[Cockburn, C. J. — What would you say to the steps leading to the church of St. Martin-in-the-Fields? It may be said that they are dangerous in this sense, that a person passing along the street at night might fall over them.]

They have not been found by a jury to be dangerous, as is the case here. It is the same as if a person were to dig a pit in a highway and were to continue it there, and were then to claim exemption from liability in respect of an injury suffered by a person falling into it. No person can justify an obstruction upon a highway. In "Hawkins's Pleas of the Crown," Vol. I. p. 700, it is stated, "Also an occupier, as such, though at will only, is indictable for suffering a house standing upon the highway to be ruinous, &c., and the words *ratione tenuræ*, &c., if added, are surplus." This passage is probably put in upon the authority of *The Queen* v. *Watts*, 1 Salk. 357, where the same was decided, the Court saying that "the house was a nuisance as it stood, and the continuing the house in that condition is continuing the nuisance."

[Blackburn, J. — The word "upon" means adjoining to; and the common law casts upon the occupier of such a house the duty of keeping it from becoming ruinous and dangerous. Mellor, J. — No doubt these steps amount to an obstruction, but are they a nuisance? The public have a right to walk over them, and the occupier of the house would have no right to fence them off. Crompton, J. — The defendant may say that this is not an obstruction of the highway, as the highway passes over it. The plea comes to this, that the highway has been dedicated with the steps upon it.]

Coupland v. *Hardingham* is expressly in point, and decides the case in favour of the plaintiff. So also in *Morant* v. *Chamberlin* the Court of Exchequer refused to draw the inference which this Court is now asked to draw; namely, that the highway was dedicated subject to the right to keep the obstruction upon it.

Cur. adv. vult.

No. 11. — Fisher v. Prowse; Cooper v. Walker, 31 L. J. Q. B. 216, 217.

BLACKBURN, J., now delivered the judgment of the Court. — The decision in both these cases depends upon the same question of law.

In *Fisher* v. *Prowse* the defendant was occupier of a house adjoining to a public street, with a cellar belonging to it, which cellar had existed before the defendant had anything in the house. The mouth of this cellar opened into the footway of the street by a trap-door. During the day this trap-door was open, but at night it was closed by a flap which slightly projected above the footway. The plaintiff coming along the footway at night stumbled over this flap, fell, and sustained injury, for which *he [*217] brought this action. At the close of the plaintiff's case, ERLE, C. J., before whom the case was tried, directed a nonsuit, but gave leave to the plaintiff to move to enter a verdict for £75, it being "to be taken as proved that as long as living memory went back the flap had been as described in the evidence." A rule *nisi* to enter the verdict for the plaintiff was obtained, against which cause was shown, by Mr. Brown, in the Sittings after last Trinity Term, the plaintiff appearing in person in support of the rule, in Michaelmas Term, before my Lord and myself.

We think we must on this reservation, coupled with the evidence, take it to have been proved that there was no negligence on the part of the plaintiff contributing to the accident, and that the flap did cause obstruction to the footway to such an extent that, if the flap had been put down for the first time after the highway was dedicated to the public, it would have been a nuisance, for the consequences of which those who maintained the nuisance would have been responsible. On the other hand, we must take it to have appeared that the flap continued in its original condition, and that the defendant had not altered it or suffered it to get out of repair so as to increase the danger and obstruction beyond what always must have existed since it was there. And we think that, on its being shown that the cellar-flap had existed in its present condition as far back as living memory went, the jury ought to draw the conclusion that it had existed as long as the street, and that the dedication of the way to the public was with this cellar-flap in it, and subject to the reservation of its being continued there, so far as by law the highway could be subject to it. It seems to us, therefore, that the question reserved was whether after the dedication of the highway the maintenance of such an ancient cellar-flap was unlawful.

No. 11. — Fisher v. Prowse; Cooper v. Walker, 31 L. J. Q. B. 217.

During the pendency of the rule in this case of *Fisher* v. *Prowse* a rule *nisi* had been obtained in the other case of *Cooper* v. *Walker*, and as the same question arose in that case, we delayed judgment in *Fisher* v. *Prowse* till after the case of *Cooper* v. *Walker* should have been argued.

In *Cooper* v. *Walker* the plaintiff declared against the defendant for negligence, and improperly placing in a public street certain stone steps, so that the same became and were an obstruction and hindrance to persons using the street, and dangerous to persons passing along it at night, and averred that the plaintiff passing along the street fell over them, and was injured. The defendant, in addition to the plea of not guilty, pleaded a second plea on which the present question arises.

This plea was, that the street was subject to the right of the occupiers of a house adjoining it to have steps standing in the highway on a part thereof, and leading to the outer door of the said house, all persons passing along the highway being entitled to pass on foot over the said steps as a part of the highway, but not to remove the said steps, the highway being at the part thereof which was occupied by such steps a way for foot passengers over the said steps, which steps were part of the said house. The plea then proceeded to show that the street was lowered under the Metropolis Local Management Act; that in so doing the old steps were necessarily removed and the present steps placed in their room; and it was averred that the new steps were placed on the same part of the highway on which the old steps had stood, and nowhere else; and that they were proper steps and caused no greater obstruction, hindrance, inconvenience, or danger to persons passing along the lowered highway than did the old steps to persons passing along the highway before it was lowered. Issue was joined on these pleas.

On the trial, before my Brother HILL, the jury found for the plaintiff on the plea of not guilty, but for the defendant on the second plea. Mr. Woollett having obtained a rule *nisi* for judgment *non obstante veredicto*, cause was shown against it in last term, before my LORD CHIEF JUSTICE, my Brothers CROMPTON and MELLOR and myself. No damages had been assessed at the trial, so that if we had thought the plea bad after verdict, the rule could not have been made absolute in this form, though probably it might have been moulded so as to afford an opportunity for a new

trial; but this we need not consider, as we are of opinion that the plea is good.

It was hardly disputed on the argument before us that if the former highway was *subject to a right on the [*218] part of the occupiers of the defendant's house to keep steps in it without their being, although to some extent obstructing the highway, a nuisance or illegal, the lowered highway must be subject to a similar right; the main contention was, that no such right could exist in law.

The plea of not guilty having been found for the plaintiff, we must take it to have been proved that the steps in question were so far an obstruction and hindrance and dangerous to passengers, that, if they had been placed on the highway after its dedication, they would have been improper and a nuisance, so that the party placing them there would have been responsible for any damage thence arising. We must construe the plea as confessing this, but avoiding it by showing that the highway was subject to the right to keep such steps there; and we think that, after verdict, this is sufficient, if in point of law there can be such a private right in a highway. This depends on the same principle as *Fisher* v. *Prowse*.

The law is clear that if after a highway exists, anything be newly made so near to it as to be dangerous to those using the highway, such, for instance, as an excavation: *Barnes* v. *Ward;* this will be unlawful and a nuisance; as it also is if an ancient erection, as a house, is suffered to become ruinous so as to be dangerous: *The Queen* v. *Watts;* and those who make or maintain the nuisance in either case are liable for any damage sustained thereby, just as if the nuisance arose from an obstruction in the highway itself. But the question still remains, whether an erection or excavation already existing, and not otherwise unlawful, becomes lawful when the land on which it exists or to which it is immediately contiguous is dedicated to the public as a way, if the erection prevents the way from being so convenient and safe as it otherwise would be; or whether, on the contrary, the dedication must not be taken to be made to the public, and accepted by them, subject to the inconvenience or risk arising from the existing state of things. We think that the latter is the correct view of the law. It is, of course, not obligatory on the owner of land to dedicate the use of it as a highway to the public. It is equally

clear that it is not compulsory on the public to accept the use of a way when offered to them. If the use of the soil as a way is offered by the owner to the public under given conditions and subject to certain reservations, and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand, great injustice and hardship would often arise if when a public right of way has been acquired under a given state of circumstances the owner of the soil should be held bound to alter that state of circumstances to his own disadvantage and loss, and to make further concessions to the public altogether beyond the scope of his original intention. More especially would this be the case when public rights of way have been acquired by mere use. For instance, the owner of the bank of a canal or sewer may, without considering the effect of what he is doing, permit passengers to pass along until the public have acquired a right of way there. It is often hard upon him that the public right should have been thus acquired; it would be doubly so if the consequence was that he was bound to fill up or fence off his canal.

The question whether the owner of the soil is under such an obligation arose in *Cornwell* v. *The Metropolitan Commissioners of Sewers*. ALDERSON, B., there says: "Suppose there is an inclosed yard with several dangerous holes in it, and the owner allows the public to go through the yard, does that cast on him any obligation to fill up the holes? Under such circumstances *caveat viator*." And PARKE, B., says: "This is not the case of a new sewer, and therefore we may dispense with the consideration of what the commissioners are bound to do when they make a sewer. This is an ancient sewer, which has existed with the highway time out of mind, and therefore the public have only a right to the highway subject to the sewer." The case of *Coupland* v. *Hardingham* (on which the plaintiffs in the present cases principally relied) was cited in the argument in *Cornwell* v. *The Metropolitan Commissioners of Sewers*. MARTIN, B., observes on it that "In all probability the road in that case had been used long before the house was [* 219] built." The statement of facts in the * report in 3 Campbell is perhaps scarcely consistent with this explanation, as it is there stated that "the premises had been exactly in the same situation as far back as could be remembered, and many years before the defendant was in possession of them." But

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Lord ELLENBOROUGH seems to have directed his attention principally to the part of the proposed defence grounded on the fact that the defendant did not himself erect what was alleged to be a nuisance. His ruling on that was, that he who maintains a nuisance is as much responsible as if he had erected it. If his attention was called to the other part of the defence, which from the report seems to have been raised on the facts, and he held that though the area had existed with the highway time out of mind, the public had a right to the way not subject to the area, his holding is inconsistent with the judgment of the Exchequer, and, being only a holding at Nisi Prius, though by a very great Judge, it must yield in point of authority to a judgment *in banc*. In *Jarvis* v. *Dean* the report leaves it uncertain whether the area in that case existed before the dedication of the way or not. As it is stated to have belonged to an unfinished house, it probably had not been long in existence; and as BEST, C. J., states in his judgment that the way had been a public thoroughfare for many years, it seems that the way must have been more ancient than the area, and that the present point could not therefore have been raised. It certainly does not appear to have been raised, and no opinion is given on it. There is no other authority that has been brought to our notice that conflicts with the decision of the Court of Exchequer. In *Barnes* v. *Ward* the judgment is carefully worded. The Court there say, "The result is, considering that the present case refers to a newly made excavation adjoining an immemorial public way." This is not a decision that the case would have been different if the way had been more recent than the excavation, but it rather implies that such was the leaning of the Court. In *Morant* v. *Chamberlin*, though it was unnecessary to decide the point, the Court of Exchequer state that it was the inclination of their opinion that the dedication of a highway might in point of law be made subject to the reservation of a private right to some extent interfering with the public way.

As was pointed out in the course of the argument, there are in many towns ancient streets in which steps descending from the houses are a permanent obstruction to the passengers. While in the foot pavements there are often flap-doors opening into vaults and cellars, and plates opening into coal-cellars, which when opened offer a temporary obstruction to the use of the way, and which therefore, unless justified as having been reserved as of right on

the dedication of the way, would obviously be illegal. So, in the country there are innumerable footways which would be much more convenient if the ancient stiles were removed or even lowered. Yet it has never been held, or even suggested, that such things were illegal and might be removed as nuisances; and it seems difficult to say how they can be legal on any other principle than that the way has been dedicated subject to them.

For these reasons we think that in both cases the rules must be discharged. *Rules discharged.*

ENGLISH NOTES.

The principal cases were followed in *Robbins* v. *Jones* (1863), 15 C. B. (N. S.) 221, 33 L. J. C. P. 1, where Erle, C. J., delivering the judgment of the Court, quoted with approval a long extract from the judgment of Blackburn, J., in those cases.

Premises over which a highway runs, or adjoining a highway, in such a condition as to be a source of danger to persons using the highway, except where the highway has been dedicated subject to the danger, as in the principal cases, constitute a nuisance. Thus, while apart from statutory provisions in that behalf (see 35 & 36 Vict., c. 77, s. 13; 50 & 51 Vict., c. 19; 50 & 51 Vict., c. 58, s. 37) there is no duty to fence an excavation even on uninclosed land so as to prevent accidents (see *Hardcastle* v. *South Yorkshire Railway Co.* (1859), 4 H. & N. 67, 28 L. J. Ex. 139; *Hounsell* v. *Smyth* (1860), 7 C. B. (N. S.) 731, 29 L. J. C. P. 203; *Binks* v. *South Yorkshire Railway Co.* (1862), 3 B. & S. 244, 32 L. J. Q. B. 26), an excavation so near to a highway that a person passing along the highway is liable to fall into it is a nuisance. See *Barnes* v. *Ward* (1850), 9 C. B. 392, 19 L. J. C. P. 195; *Hadley* v. *Taylor* (1865), L. R. 1 C. P. 53, 13 L. T. 368, 14 W. R. 59. It was held, moreover, in *Hurst* v. *Taylor* (1885), 14 Q. B. D. 918, s. c. *nom. Hirst* v. *Taylor*, 54 L. J. Q. B. 310, though exactly on what grounds it is difficult to see, that where a highway is diverted under statutory powers, it is the duty of those procuring the diversion to take steps, by fencing off the old line of road or otherwise, to protect reasonably careful persons from falling into danger though going astray at the point of diversion.

Further instances of nuisances to highways are: buildings adjoining a highway in a ruinous condition and likely to fall on the highway: see *Reg.* v. *Watts* (1703), 1 Salk. 357; s. c. *nom. Reg.* v. *Watson*, 2 Ld. Raym. 856; a heap of earth on land adjoining a highway likely to make horses shy: see *Brown* v. *Eastern & Midlands Railway Co.* (C. A. 1889), 22 Q. B. D. 391, 58 L. J. Q. B. 212; coal plates, fire

plugs, &c., in a dangerous condition: see *Pretty* v. *Bickmore* (1873), L. R. 8 C. P. 401, 28 L. T. 704, 21 W. R. 733; *Gwinnell* v. *Eamer* (1875), L. R. 10 C. P. 658, 32 L. T. 835; *Thompson* v. *Mayor, &c. of Brighton* (C. A. 1893), 1894, 1 Q. B. 332, 63 L. J. Q. B. 181, 70 L. T. 206, 42 W. R. 161. Where, however, the dangerous condition of a coal plate, fire plug, or the like arises, from the wearing away of the highway no responsibility attaches to the person who would be responsible if it were due to other causes. See *Robbins* v. *Jones* (1863), 15 C. B. (N. S.) 221, 33 L. J. C. P. 1; *Thompson* v. *Mayor, &c. of Brighton*, *supra*.

Primâ facie, where premises are in such a condition as to be a public nuisance, the occupier is liable, whether others are also liable or not, in respect of the nuisance, whether the nuisance arises from his own acts or the acts of his predecessors in title or of strangers. See *Barnes* v. *Ward*, *Hadley* v. *Taylor*, *supra*: *Silverton* v. *Marriott* (1888), 59 L. T. 61; *Attorney-General* v. *Tod Heatley* (1897), 66 L. J. Ch. 275; 76 L. T. 174; 45 W. R. 394. Where, however, the premises are let with a covenant on the landlord's part to repair, the tenant is relieved from responsibility in respect of a nuisance arising from want of repair. See *Payne* v. *Rogers* (1794), 2 H. Bl. 350, 3 R. R. 415; see also *Nelson* v. *Liverpool Brewery Co.* (1877), 2 C. P. D. 311, 46 L. J. C. P. 675, 25 W. R. 877; *Bowen* v. *Anderson* (1894), 1894, 1 Q. B. 164, 42 W. R. 236.

AMERICAN NOTES.

"An owner who dedicates a way to the public neither warrants nor represents that the land is fit for the purpose, but the public takes it as it is granted, and in the condition in which it is at the time of the dedication." Elliott on Roads and Streets, p. 99, citing the principal cases, which are also cited and precisely followed, with other English cases, in *State* v. *Society*, 44 New Jersey Law, 502, where the Court declare that the dedicated land is "taken by the public *cum onere*," and that "this doctrine is universally recognized and adopted in practice."

No. 12. — DAWES *v.* HAWKINS.

(1860.)

RULE.

ONCE a highway, always a highway.

Dawes v. Hawkins.

29 L. J. C. P. 343–348 (s. c. 8 C. B. (N. S.) 858).

Highway. — Illegal Obstruction. — Permanence of Right.

[343] In an action of trespass for breaking and entering the plaintiff's land, on an issue raised whether there was a highway over the *locus in quo*, there was evidence that there had been a highway over adjacent land, which was then, together with such *locus in quo*, an open common. There was evidence also that for many years the highway was obstructed by part of it being included in an inclosure, which had been illegally made on such common; and that during twenty years of that time the public had deviated a little from the line of way, by going outside such inclosure and on the *locus in quo*. At the end of such time, and before the plaintiff became the owner of the *locus in quo*, the use of such substituted line of way was discontinued by reason of a new road having been laid out in a different direction by an adjoining land proprietor. Afterwards the obstruction to the old road was removed, and the original line of way was reopened to the public. *Held*, by ERLE, C. J., and BYLES, J. (WILLIAMS, J., *dissentiente*), that there was no reasonable evidence upon the above facts on which a jury might find that there was, in addition to any other highway, a highway running over the *locus in quo*.

Trespass for breaking and entering certain land of the plaintiff's, situate in the parish of Whitwell, in the Isle of Wight, and near to a certain house, land, and premises of the defendant called "the Hermitage," and for pulling down and destroying a wall of the plaintiff; and also cutting down, damaging, and destroying the trees of the plaintiff then growing and being in and upon the said land.

The defendant pleaded — Thirdly, that before and at the said time when, &c., there was and of right ought to have been a certain common and public highway into, over, and along the said land of the plaintiff, in which, &c., for all the liege subjects of our Lady the Queen to go, return, pass, and repass, on foot, [* 344] and with horses and * other cattle, at all times of the day, at their free will and pleasure; wherefore the defendant,

being a liege subject of our Lady the Queen, and having occasion to use the said way, did at the said time when, &c., enter into and upon the said land of the plaintiff, and along the said highway, then using the same as he lawfully might for the cause aforesaid; and because the said wall in the declaration mentioned had been wrongfully erected, and was then standing in and across the said highway and obstructing the same, and because the said trees were planted in and upon and were then and there preventing the convenient use of the said highway, the defendant, in order to remove the said obstructions, and be enabled to pass and repass along the said highway, did necessarily pull down the said wall, and also remove the said trees from the said highway, doing no unnecessary damage, &c. Issue thereon.

At the trial, before MARTIN, B., at Winchester, at the last Spring Assizes, it appeared that there had always been from the time of legal memory a highway running from the village of Whitwell to the village of Chale, in the Isle of Wight; and that the highway passed over what was formerly a common or downland belonging to a Sir Richard Worsley, and afterwards to the Baroness de Villars. About 1809 or 1813 a Mr. Michael Hoy, who was the owner of adjoining property, called the Hermitage, inclosed a part of the common, including a portion of such highway; and afterwards, down to the year 1832, the public, passing along the highway, deviated in consequence of such inclosure to the south side of it, and went over that part of the common which subsequently became the plaintiff's garden, and for the alleged trespass on which the present action was brought. No objection appears to have been ever made to this encroachment by Mr. Michael Hoy. In 1832 the Hermitage became the property of Mr. Barlow Hoy, who made some plantations to the east of Michael Hoy's inclosure, which still further stopped the highway; and he formed a new road going towards the southwest and away from any part of the land which was the subject of this action. This new road was adopted as a substitution for the old road, and from that time, viz., 1832 to 1857, the old road was altogether abandoned. The plaintiff purchased, in 1844, from the Baroness de Villars the land on which he erected the garden wall mentioned in the declaration, and which land had been the downland on the south side of and adjoining to Michael Hoy's inclosure. At the same time the trustees of Mr. Barlow Hoy purchased from the Baroness de Villars

the land which had been so previously inclosed by Michael Hoy. In 1857 the defendant bought the Hermitage from the representative of the late Mr. Barlow Hoy; and at the same time the old road through this property, including the inclosure made by Michael Hoy, was opened by the public; and the defendant received an allowance out of the purchase-money for the Hermitage as a compensation in respect of such right of way. It was disputed, however, by the defendant at the trial that the right of way for which the compensation was paid him was the one which went through such inclosure; and it was also contended, on his behalf, that whether the old road ever existed or not was immaterial, as the public had used the way over the plaintiff's land, and across that part where the garden wall in question had been built for twenty years, so that even if the old road had existed, the public had gained a new road across this place of the plaintiff's.

The learned Judge expressed, as his opinion, that if for convenience a public road was diverted and taken a little to the side of the old road, the public would have a right to use the new substituted road so long as the old one remained closed up; but that if the public insisted on the old road being opened, it would then become the true road, and the obligation of the parish to repair would attach to the old road, and not to the new one; and his Lordship left it to the jury to say, whether they believed from the evidence before them the old road ran through the inclosure and plantations made by the Hoys, telling the jury that if such was the case the consequence would be, that there was no road where the plaintiff's garden wall had been built, and the defendant would be guilty of a trespass in pulling it down. The jury [* 345] * having found a verdict for the plaintiff, a rule *nisi* was afterwards obtained to set it aside, and for a new trial, on the ground of misdirection on the part of the learned Judge in telling the jury that two parallel public roads running to the same point could not exist together, as a parish could not be compelled to repair both such roads, and in not leaving to the jury the facts proved and necessary to enable them, as a matter of fact, to find whether the *locus in quo* was a highway or not.

Against this rule —

M. Smith and Karslake showed cause; and —

Edwards, Carter, and Kingdon were heard in support of the rule.

The following authorities were referred to: *Absor* v. *French*,

2 Show. 28 ; Hawkins P. C., c. 76, s. 6 ; Bac. Abr., tit. "Highway," D, 497 ; *The King* v. *Flecknow*, 1 Burr. 465 ; *Taylor* v. *Whitehead*, Doug. 749 ; *Duncombes' Case*, Cro. Car. 366 ; and *Roberts* v. *Hunt*, 15 Q. B. 17. *Cur. adv. vult.*

Erle, C. J. — On this rule the question was, whether there had been a misdirection at the trial. The issue was on a highway over the plaintiff's land. The existence of some highway was an admitted fact ; but the dispute was, whether the line of that way was on the plaintiff's or the defendant's side of the boundary separating the lands of these parties. At the close of the evidence the defendant's counsel contended that, even if the line of the original way should be found to be on the defendant's land, still there was evidence upon which the jury might find that there was also an additional parallel way running over the plaintiff's land. The Judge in substance directed the jury that there was no such evidence ; and this was the alleged misdirection. The question, therefore, on the rule is, whether there was such evidence. It was shown that a highway for horses passed over a common which was the property of a Lady Villars, and those under whom she claimed, until 1844. In that year she conveyed it in two portions, of which the northern has come to the defendant and the southern to the plaintiff. When the common was open, the line of way was very near the boundary between the two portions, and was found by jury to have been on the defendant's side of that boundary. Down to 1809 all the common was open ; and though the true line of way must be taken to have been as found by the jury, there was no obstacle to prevent persons using the way from the usual deviation according to inclination over a waste. Between 1809 and 1813 Mr. Hoy, without lawful excuse as against the public, and without lawful right as against the owner of the soil, and without objection or notice (as far as appeared), inclosed a part of this common with a ditch and bank, and included in this inclosure the line of way for more than one hundred yards, and after the inclosure, down to 1832, persons using the way, and arriving at the inclosure, for the most part deviated from the line of way a few yards to the south, and so passed along the outside of the inclosure, and returned to the line of way by turning a few yards towards the north at the other end, so that the deviation began at the obstruction and was commensurate therewith. The line of this inclosure

became afterwards the line of division between the plaintiff's and the defendant's lands, and therefore the travellers who thus deviated passed over what has since become the plaintiff's land. This user of the line of deviation, instead of the line of way, continued only till 1832, when the whole common was planted, and a way was laid out further to the south and altogether away from the place in question. In 1857 the obstruction was removed, and the original line over the defendant's land was reopened, and it remains to be seen whether, under these circumstances, there is any evidence that the line over the plaintiff's land has also become a highway; that is, whether it was dedicated by the owner of the soil and used by the public for a highway. Express evidence of dedication by the owner there was none; and there seems to me to be no analogy to the case where the owner of the soil of a highway shuts it up, and sets out a substituted highway over his own land in lieu thereof, which may be express evidence of an [* 346] * intention to give the public some right, either absolute or qualified, over the substituted way. Then, was there any evidence of user from which the jury might reasonably infer a dedication? The parties who passed intended to use the original highway, and probably deviated without knowing it; if they knew the true line and deviated by reason of the obstruction, the user of the line of deviation over the adjoining land by reason of a wilful obstruction is no more the user of a highway as of right, than the user of a deviation over the adjoining land by reason of the highway being founderous. I know of no decision and no principle making a distinction between a road impassable by nonfeasance — that is, neglect of repair; and a road impassable by misfeasance — that is, by a ditch and bank wilfully made. But even if the one deviation be a trespass, and the other be a justifiable act, still in neither case is it the user of a highway as of right, and therefore in neither case will the user alone of a line of deviation be evidence against the owner of a dedication. If the user of a line of deviation is not the user of a highway, then the user of such deviation for twenty years would not alter the nature of the act; for if the first traveller who preferred turning aside to beating down the bank, and passing through it, did not use a highway, neither did the second, or those that followed, — the number of passengers being for this purpose immaterial. According to this view the Judge was right in directing the jury that there was no reasonable

evidence to support the defendant's contention. I have taken this to be the effect of his summing up. In the argument much stress was laid on some observations by the learned Judge relating to the right of the public over the way of substitution, where a highway has been stopped by the owner of the soil, and a way of substitution set out by him over his own land, and afterwards the original highway reopened. I do not discuss those observations, nor the argument relating to them, as I consider the case to have been rightly disposed of by telling the jury that there was no reasonable evidence for them of the way in question.

WILLIAMS, J. — I regret that I cannot quite concur with my Lord in the judgment he has given in the case. I think there was some evidence of dedication of the way over the plaintiff's land used by the public during the time the old highway was obstructed by the inclosure. That user lasted for nearly twenty years at least, and some of the witnesses described the deviation as having been a formed line of road. It is incontrovertible that if this uninterrupted enjoyment by the public had stood alone, it would have afforded some evidence from which the jury might have inferred an intention on the part of the owner of the soil, whoever he might be, to dedicate the way to the public; but in the present case it is said that no such intention can be inferred, because the user may be accounted for by the evidence that the adjoining way, over which the public had a right to travel, had been wrongfully inclosed and obstructed, and that the deviation was not a trespass, but only done in the exercise of the public right of going on the adjacent ground when a common highway has become impossible. It is remarkable that in the text-books that right is confined to cases where the highway is founderous and out of repair [see 2 Saund. 160 b, note (12) to *The Queen* v. *Stoughton*; 1 Russ. on Crimes, 324, 3rd edit.; 2 Smith's Lead. Cas., vol. 2, p. 119, 4th edit., note to *Doraston* v. *Payne*]. And on principle it may be doubtful whether the burthen to which the adjacent soil is subjected when the parish has been guilty of a nonfeasance in neglecting to keep the highway in repair, ought to be likewise inflicted, because some wrong-doer has put an obstruction in the highway, which may be abated as a nuisance by any one who has occasion to use the road; at all events, unless the obstruction be of such a nature that practically it cannot be abated, and so the road is in effect impassable. However, in the

case of *Absor* v. *French*, which is very shortly and obscurely reported in 2 Show. 28, it seems to have been a good plea to an action of trespass that the plaintiff himself had stopped a highway so as the defendant could not pass, and therefore he went over the plaintiff's close, doing as little harm as he could. But even supposing that the right exists generally of going on the adjacent soil when a highway * is obstructed, still, if the owner of the soil for a great many years submits to such a burthen instead of causing the obstruction to be removed, this would afford some evidence, I conceive, of his intention to dedicate the substituted road to the public. It does not appear to have been distinctly shown who was the owner of the soil during the time of the public use of the road in question, whether it was the same person who obstructed the old highway or the owner of the adjacent down; but the law is clear that if there has been a public uninterrupted user of a road for such a length of time as to satisfy the jury that the owner of the soil, whoever he might be, intended to dedicate it to the public, this is sufficient to prove the existence of a highway, though it cannot be ascertained who the owner of it has been during the time the road has been used by the public. See *The Queen* v. *East Mark*, 11 Q. B. 877, 17 L. J. Q. B. 177 (p. 505, *ante*). If the soil over which the road passed in the present case belonged to the person who made the inclosure, and thereby obstructed the old highway, I think it plain that he intended a dedication, because his wish must surely be deemed to have been that the inclosure should always continue, and that the public should be deprived of the old road, and in lieu thereof have the substituted one. If the soil belonged to the owner of the down, Lady Villars, her acquiescence in the continuance of the inclosure which necessarily stopped the old highway, coupled with the uninterrupted continuance of the public user of the substituted road, afforded, I think, evidence which ought to have been laid before the jury of an intention on her part to dedicate. The effect of this evidence was certainly much weakened by the circumstance that after the substituted road had been used by the public for nearly twenty years, up to 1832, the use of it was discontinued by reason of a new way having been laid out in a different direction. And if, having before them all the circumstances of the case, the jury had thought fit to have negatived any intention to dedicate, I should have approved of their verdict. I, therefore, do not at all

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regret that my learned brethren should have come to the conclusion that there ought to be no new trial in the case. At the same time I think it is of such importance to adhere to what I conceive to be the law as to evidence of dedication of highways, that I have thought it my duty to express my opinion that, for the reasons above stated, there was some evidence of it in the present case. As it appears to the majority of the Court, however, that the effect of the summing up was to direct the jury that there was no reasonable evidence of that kind, and it likewise appears to them that this direction was right, this rule must be discharged; and I abstain, as my Lord has done, from expressing my opinion on the other points raised on the argument of the rule.

BYLES, J. — I think the direction of the learned Judge substantially correct. It amounts to this — that at the time in question, that is to say, after the old road had been reopened, the alleged new road did not exist. Indeed, I conceive that there was no reasonable evidence to be submitted to the jury that the alleged new road ever had existed. It is clear that there can be no dedication of a way to the public for a limited time, certain or uncertain. If dedicated at all, it must be dedicated in perpetuity. It is also an established maxim, once a highway always a highway; for the public cannot release their rights, and there is no extinctive presumption or prescription. The only methods of legally stopping a highway are, either by the old writ of *ad quod damnum*, or by proceedings before magistrates under the statute. The true question, therefore, seems to be this: Was there any reasonable evidence of a dedication of the alleged new way to the public by the owner of the soil? I collect from the evidence that the material facts were these: The old road was an ancient and undoubted highway, and was illegally stopped about 1813. The public, in consequence, deviated on to the adjoining land, which was an open down. The deviation was over various parts of the down, but the principal track was nearly parallel with the old road. The ownership of the soil, both of the old road and new tracks, was, at the time of the deviation, in the same person. About the year 1832 the principal track, called at the
* trial the new road, was stopped by the occupier building [* 348]
a wall thereon. For the last twenty-eight years that track has never been used by the public as a road; but about the year 1857 the old road was reopened to the public.

The contention of the defendant throughout the trial had been that the principal track of deviation was no deviation at all, but was the true ancient road. This contention the jury decided against him. But the learned counsel for the defendant, in his summing up to the jury at the close of the case, for the first time raised the further point, that the deviating track, even if not the ancient road, had been dedicated to the public, and had become a second highway parallel to the old one.

The facts, however, as above stated, do not appear to me to amount to any reasonable evidence of a dedication to the public. It was plain that the public had never used the deviating track except when they were shut out from the true ancient highway. The public user, therefore, was referable to the right of the public to deviate on to the adjoining land, which may be whenever the owner of the soil illegally stops a highway. *Absor* v. *French*. And it further appeared that the deviation was not confined to a single defined track, but was, at least occasionally, exercised widely over the down. It is difficult to suppose that the owner of the soil could have assented to so extensive a dedication as such an user would imply. Lastly, the deviating track had been built up and disused for twenty-eight years.

These facts seem to me very consistent with the exercise of a public right of deviation during the temporary obstruction of a road, but inconsistent with the permanent dedication to the public of a new way, whether parallel to the old road or straggling over the down, the old road still continuing to exist in point of law. But assuming the facts to be as consistent with the defendant's hypothesis as with the plaintiff's hypothesis, yet there is still no balance of probability in favour of the defendant's hypothesis; and if that be so, the burden of proof lying on the defendant, there is no evidence to be left to the jury.

Lastly, even assuming some evidence of a new road to exist, yet it is at most such a mere scintilla of evidence that if the jury had found a verdict for the defendant upon it, that verdict could, I think, certainly have been set aside as against the weight of evidence. If so, there can be no new trial. See the observations of the Court of Exchequer Chamber in *Avery* v. *Bowden*, 6 E. & B. 953, 26 L. J. Q. B. 3.

For these reasons I am of opinion that the rule for a new trial must be discharged. *Rule discharged.*

No. 12. — Dawes v. Hawkins. — Notes.

ENGLISH NOTES.

The maxim, "once a highway always a highway," has been recognised in many cases besides the principal case. See *Rex* v. *St. James Taunton Inhabitants*, Selwyn's N. P. 1264; *Rex* v. *Montague* (1825), 4 B. & C. 598, 6 Dowl. & Ry. 616, 28 R. R. 420, per Holroyd, J., qualifying what he had previously said in *Vooght* v. *Winch* (1819), 2 B. & Ald. 662, 21 R. R. 446; *Berridge* v. *Ward* (1860), 2 F. & F. 208 (as to further proceedings in this case, see 10 C. B. (N. S.) 400, 30 L. J. C. P. 218); cf. *Paine* v. *Partrich* (1691), Carth. 191; s. c. 1 Salk. 12, 1 Show. 243, 255, 3 Mod. 289, Cas. temp. Holt, 6. It seems, however, to mean little more than that mere non-user or obstruction of a highway, however long continued, does not extinguish the public rights over the highway, nor in the case of a highway repairable by the inhabitants at large, the public obligation to repair. There are several ways in which a highway may legally be extinguished.

In the first place, a highway may be extinguished by Act of Parliament, either directly or by necessary implication, as where an Act authorises the construction of works which necessarily physically destroy or completely obstruct the way. See *Yarmouth Corporation* v. *Simmons* (1878), 10 Ch. D. 518, 47 L. J. Ch. 792. The Railways Clauses Acts, it may be mentioned, contain provisions (8 Vict., c. 20, s. 46, and see ss. 49–66; 25 & 26 Vict., c. 92, ss. 7, 8) under which, subject to the special Act, a highway which a railway crosses is to be carried over or under the railway by a bridge. These provisions have been held not to apply to footways: see *Reg.* v. *Bexley Heath Ry. Co.* (C. A. 1896), 1896, 2 Q. B. 74, 65 L. J. Q. B. 469, 74 L. T. 540, 44 W. R. 501; but the Acts provide for the making of approaches, &c., where the railway crosses a footway: see 8 Vict., c. 20, ss. 46, 61. They also contain provisions as to level crossings (*Ib.*, ss. 46–48, 59–62; 25 & 26 Vict., c. 92, ss. 5–8), as to which see also 2 & 3 Vict., c. 45; 5 & 6 Vict., c. 59, ss. 9, 13. Similar provisions will generally be found in railway Acts not incorporating the Railways Clauses Acts, and except, of course, as to level crossings in canal Acts.

Again, there are numerous statutory provisions enabling highways to be stopped up and diverted. The most generally applicable enactments of the kind are those in the Highway Act, 1835 (5 & 6 Will. IV., c. 50, ss. 84–93; see also 25 & 26 Vict., c. 61, s. 44), under which, with few if any exceptions, any unnecessary highway may be stopped up altogether, and any highway may be diverted so as to render the same nearer or more commodious to the public. Important provisions of the kind are also contained in the Inclosure Act, 1845 (8 & 9 Vict., c. 118, ss. 62 67), and the Railways Clauses Consolida-

tion Act, 1845 (8 Vict., c. 20, s. 16), as well as in other Acts. The repeal of an Act under which a highway has been stopped up does not in general revive the highway. See *Gwynne* v. *Drewitt* (1894), 1894, 2 Ch. 616, 63 L. J. Ch. 870, 71 L. T. 190.

In *Bailey* v. *Jamieson* (1876), 1 C. P. D. 329, 34 L. T. 62, 24 W. R. 456, a highway left landlocked by the extinction of other highways leading to it, was held to have been itself impliedly extinguished.

The Local Government Act, 1894 (56 & 57 Vict., c. 73, ss. 13, 19), renders the consent of the parish council or meeting, as the case may be, and of the rural district council, necessary for the stopping or diversion of "a public right of way" in a rural parish, and enables the parish meeting to veto such a consent given by a parish council. These provisions, though expressed in general terms, may be held to be inapplicable where it is proposed to divert or stop up a highway under an enactment of special character.

A highway is extinguished where the way is physically destroyed by natural causes, such as encroachment by the sea or a serious landslip. And it is a question of degree whether in any particular case what has occurred amounts to destruction of the way or to damage only. See *Reg.* v. *Paul Inhabitants* (1840), 2 Moody & Rob. 307; *Reg.* v. *Bamber* (1843), 5 Q. B. 279, 13 L. J. M. C. 13; *Reg.* v. *Hornsea Inhabitants* (1854), 23 L. J. M. C. 59, 6 Cox C. C. 299; *Reg.* v. *Greenhow Inhabitants* (1876), 1 Q. B. D. 703, 45 L. J. M. C. 141. These cases had reference to the question whether an obligation to repair had been extinguished; but it seems clear that the public rights and the obligation, if any, to repair must stand or fall together.

Formerly a highway might be extinguished by means of a writ of *ad quod damnum*: see *Ex parte Vernon* (1754), 3 Atk. 766; *Ex parte Armitage* (1756), Ambler, 294; but this procedure is obsolete.

AMERICAN NOTES.

"'Once a highway, always a highway,' is an old maxim of the common law, to which we have often referred, and so far as concerns the rights of abutters, or others occupying a similar position, who have lawfully and in good faith invested money or obtained property interests in the just expectation of the continued existence of the highway, the maxim still holds good. Not even the Legislature can take away such rights without compensation. But where no such rights are involved, the public may either abandon or vacate a highway. . . . It is proper therefore to state that a highway may cease to exist, either by abandonment or by vacation according to law." Elliott on Roads and Streets, p. 658.

"In one of the oldest cases upon this subject it was declared that highways could only be discontinued by authority of law, and never by the act of individuals." Elliott on Roads and Streets, p. 55, citing the principal case.

No. 13. — Wandsworth Board of Works v. United Telephone Co. — Rule.

The modern American doctrine seems to be that if the public right is abandoned, the former incompatibility of private enjoyment ceases, and the suspended private right revives. *Cooper* v. *Detroit*, 42 Michigan, 584; *Fairfield* v. *Williams*, 4 Massachusetts, 427; *Railroad Co.* v. *Patch*, 28 Kansas, 470; *Newville Road Case*, 8 Watts (Penn.), 172; *Barclay* v. *Howell's Lessee*, 6 Peters (U. S. Sup. Ct.) 498; *Hooker* v. *Utica, &c. Co.*, 12 Wendell (New York), 371.

Non-user is evidence of abandonment, but not conclusive, unless for such a length of time as would work an adverse possession. Thus evidence of sowing of grain and pasturing of cattle at the sides of the road, but not upon the travelled track, is not sufficient to show abandonment. *Watkins* v. *Lynch*, 71 California, 21. So even where no work had been done on the road by the public authorities for fifteen years, and it was in bad condition, and sometimes impassable, and a new road had been established in the same vicinity, to which travel had been diverted for eleven years, and the old road had been partly fenced in. *Kelly Nail, &c. Co.* v. *Lawrence Furnace Co.*, 46 Ohio State, 544; 5 Lawyers' Rep. Annotated, 652. So of ten years' non-user and inclosing by an adjoining land-owner. *State* v. *Culver*, 65 Missouri, 607; 27 Am. Rep. 295. Abandonment will not be implied from mere non-user when the public need has not required the use. *Reilly* v. *Racine*, 51 Wisconsin, 526. But it may be implied from the alteration of the bounds as to the old parts not included within the new boundaries. *Brook* v. *Horton*, 68 California, 558; *Com.* v. *Cambridge*, 7 Massachusetts, 158. See *Commissioners* v. *Taylor*, 2 Bay (So. Car.), 282; 1 Am. Dec. 647; *Beardslee* v. *French*, 7 Connecticut, 125; 18 Am. Dec. 86; *Orr* v. *O'Brien*, 77 Iowa, 253; 14 Am. St. Rep. 277, and a valuable note, 278.

In respect to the loss of municipal rights in streets even by adverse possession, there is a notable conflict in this country, elaborately examined in Elliot on Roads and Streets, p. 665, and Dillon on Municipal Corporations, sect. 667, &c.

Cases of non-user and abandonment are very unusual, and the whole subject of reverter is probably regulated by statute generally in this country.

No. 13. — WANDSWORTH BOARD OF WORKS *v.* UNITED TELEPHONE CO.

(C. A. 1884.)

RULE.

WHERE by an Act of Parliament a "street" (including "highway") is "vested" in a local authority, that does not confer upon the local authority a right of property in the soil over which the traffic runs, nor in the air above; but the right vested in them is merely a statutory interest of a proprietary character in the surface of the street and in what is below the surface of the street, so as to enable

them to protect the street and the traffic; and, as to the air above the surface, such an interest only as is necessary to enable them to exercise the powers given to them by the statute for the protection of the street and the traffic.

Wandsworth Board of Works v. United Telephone Co.

13 Q. B. D. 904–928 (s. c. 53 L. J. Q. B. 449; 51 L. T. 148; 32 W. R. 776).

[904] *Telephone Company. — "Street." — Property of Vestry or District Board in "Street."*

The Metropolis Management Act, 1855, does not by s. 96 confer upon a vestry or a board of works (constituted under that statute) such a property in the streets situate within their district as to entitle them to maintain an action for an injunction against the erection of a telephone wire across a street, the telephone wire being erected at a great height and causing no appreciable danger to the public or to the traffic in the street.

Notwithstanding the Telegraph Act, 1869, s. 3, a telephone company registered under the Companies Act, 1862, and not incorporated under any special Act, does not fall within the phrase "the company" used in the Telegraph Act, 1863, and therefore is not forbidden by s. 12 of the last-named Act to erect its wires across a street, unless the consent of the body having the control of the street is obtained.

Action for an injunction to restrain the defendants from retaining or placing any wire or wires, for the purpose of telegraphic or telephonic communication or otherwise, over, along, or across any street vested in or under the control of the plaintiffs, except in cases where the defendants had received or might receive the plaintiffs' consent to retain or place the same.

At the trial before Stephen, J., in May, 1884, the following facts were either admitted or proved: —

The plaintiffs were the local authority under the Metropolis Management Act, 1855, for the parish of Putney in the county of Surrey. The defendants were a joint-stock company, not incorporated by any private Act of Parliament, but registered under the Companies Act, 1862. The defendants had lately erected for a private person in Putney a telephonic wire connecting two of his places of business in Putney, and had supplied it at each end with proper telephonic apparatus. The wire and the instruments were the property of the defendants, and were maintained
[* 905] * by them, the use thereof being regulated by a contract between them and their customer. The wire was attached

at eleven different points to chimneys, and was carried at several places for a considerable distance over highways in the district. At one place it passed over the High Street of Putney at a very obtuse angle, its height from the ground being about thirty feet, and its total length from the point of attachment on the east side to the point of attachment on the west side and thence to a third point of attachment on the east side being 430 feet, or 143 yards or thereabouts, the greater part of which was over the street.

STEPHEN, J., was of opinion, first, that the defendants were not a company subject to the provisions of the Telegraph Act, 1863 (26 & 27 Vict., c. 112), s. 12, and did not require the license of the plaintiffs to place a telephone wire over, or along, or across a street. He held, secondly, that the overhead wire in question was not a nuisance to the highway, and that apart from the question of property the plaintiffs were not entitled to have it removed; that the evidence given on both sides appeared to him to show that the wire in question was nearly new, that it was properly taken care of, and had been lately examined and found to be in perfect condition, and likely to last for several years without becoming perceptibly weaker than it then was; that it caused, and in the common course of events it was likely to cause, no perceptible danger to the public, though a violent storm might possibly blow it down; and that, upon the whole, though he could not say that absolutely no danger arose from the position of the wire, he did not think that it could be an indictable nuisance, and that if it had been erected with the consent of the district board, and if the defendants had been indicted for creating a nuisance at common law, he should not have hesitated to direct a jury that there was no evidence of such a nuisance as to justify a conviction. But STEPHEN, J., held, thirdly, that the plaintiffs, as owners of the soil under the Metropolis Management Act, 1855, s. 96, had an absolute right to prevent the defendants from suspending wires over the street in question upon the principle that the air immediately above the roadway was as much theirs as the roadway itself. The learned Judge relied upon the reasons of the LORDS JUSTICES in * their judgments delivered in [* 906] *Coverdale* v. *Charlton*, 4 Q. B. D. 104, and was of opinion that Parliament had intended to give to the district board proprietary rights over the "street," including in that word a certain space upwards as well as downwards, in order that the district

board might form a judgment as to the expediency on public grounds of permitting or refusing to permit various acts, which, without being actual nuisances in such a sense as to be indictable, might, nevertheless, be regarded as undesirable innovations. He further thought that the object of the Metropolis Management Act, 1855, s. 96, was to invest district boards with the character of owners, in order that they might use for the public convenience rights which a prudent private owner would use in his own interest and in the interest of his tenants.

For the foregoing reasons, STEPHEN, J., gave judgment for the plaintiffs in the terms claimed by them, but he ordered that, as the case was of great importance, and as the wire caused no appreciable actual danger to the highway which it crossed, the injunction was not to issue until after the hearing and final determination of an appeal to be brought by the defendants.

The defendants appealed.

June 12, 13. Webster, Q. C., and Cozens-Hardy, Q. C. (Moulton with them), for the defendants. — It is true that by the Metropolis Management Act, 1855 (18 & 19 Vict., c. 120), s. 96,[1] the streets within their district are vested in and under the control of the plaintiffs as the district board of works, but that does not give them such a right as the owner of the soil would have, according to the maxim, *cujus est solum ejus est usque ad cœlum*, but a more limited right. *Coverdale* v. *Charlton*, 4 Q. B. D. 104, as explained by *Rolls* v. *St. George's, Southwark*, 14 Ch. D. 785.

[*907] That case of *Coverdale* v. *Charlton* was decided with reference to s. 149 of the Public * Health Act, 1875 (38 & 39 Vict., c. 55), but that section is substantially the same as s. 96 of the Metropolis Management Act, 1855, and the decision shows, perhaps, that there is vested in the district board such an interest in the streets, including what is above and below the surface, as would be necessary to enable the board to prevent anything being done which should cause any appreciable injury to the traffic over the streets. Here, however, as is shown by the finding

[1] Metropolis Management Act, 1855 (18 & 19 Vict., c. 120), s. 96, "All streets being highways, and the pavements, stones, and other materials thereof, and all other things provided for the purposes thereof by any surveyor of highways, or by any person serving the office of surveyor of highways, or by any vestry or district board under this Act, shall vest in and be under the management and control of the vestry or district board of the parish or district in which such highways are situate."

of the learned Judge, there was not, in fact, any appreciable injury to the traffic by the telephone wires of the defendants affixed by them over the streets in question. The decision of the Judge was given in favour of the plaintiffs solely on the ground that the suspension of the wire over the streets was a trespass, in respect of which the plaintiffs, in whom the streets were vested, had a right to complain. In *Wandsworth Board of Works* v. *London and South Western Ry. Co.*, 31 L. J. Ch. 854, the railway company, for the purpose of widening a bridge which they had over a highway, put buttresses in the road without the leave of the district board, in whom the soil of the road was vested; and yet KINDERSLEY, V. C., refused an injunction to restrain the railway company from widening the bridge, because he did not think that what the railway company did was any real obstruction or injury to the public. In the opinion of Lord ELLENBOROUGH a trespass is not committed by firing across a field *in vacuo*, or by passing over it in a balloon. *Pickering* v. *Rudd*, 4 Camp. 219 (16 R. R. 777). In *Fay* v. *Prentice*, 1 C. B. 828, 14 L. J. C. P. 298, and *Battishill* v. *Reed*, 18 C. B. 696, 25 L. J. C. P. 290, the alleged injury was treated as a nuisance and not as a trespass.

Philbrick, Q. C., and Wilkinson (R. O. B. Lane with them) for the plaintiffs. — It is clear that a right of property in the soil of the streets is, at least to some extent, vested in the plaintiffs as the district board. That is borne out by the judgment of JAMES, L. J., in *Rolls* v. *Vestry of St. George, Southwark*, 14 Ch. D. 785. If the statute 18 & 19 Vict., c. 120, s. 96, gives, as it does, a right of property in the soil of the streets to the district board, is such board not to have the same right above the surface as any other * owner of the soil would have? They must [* 908] have the right, which any such owner would have, to prevent the owners of adjoining land from making a bridge over it. It is an infringement of the right of the owner of the soil to erect anything which passes over it; and this is sufficient to entitle the plaintiffs to an injunction, even although they admit that there is no evidence to show that the defendants have been guilty of an indictable nuisance. But there is some evidence of a nuisance of which a civil tribunal will take notice, for the wire might be blown down during a violent storm, and this risk is sufficient to entitle the plaintiffs to an injunction.

Further, a telephone is a telegraph within the meaning of the

Telegraph Acts, 1863, 1869, as was decided in *Attorney-General* v. *Edison Telephone Company of London*, 6 Q. B. D. 244, and therefore it was unlawful to put up a wire across a street within the plaintiffs' district without their consent. The Telegraph Act, 1869 (32 & 33 Vict., c. 73), by s. 2, incorporates the Telegraph Act, 1868 (31 & 32 Vict., c. 110), and by s. 3 the term "telegraph company" is interpreted to mean "any company, corporation, or persons for the time being engaged in transmitting, or by any instrument incorporating the same authorised to transmit, telegrams within the United Kingdom of Great Britain and Ireland, for money or other consideration." The Telegraph Act, 1868, by s. 2, incorporates the Telegraph Act, 1863 (26 & 27 Vict., c. 112), and by s. 12 of the latter statute it is enacted that "the company shall not place a telegraph over, along, or across a street or public road . . . except with the consent of the body having the control of such street or public road." It is true that the Telegraph Act, 1863, owing to the terms of ss. 2, 3, applies only to companies authorised by special Act of Parliament, and therefore, if it stood alone, its provisions would not extend to the defendants, who are merely registered under the Companies Act, 1862; but, as has been shown, it is incorporated with the Telegraph Act, 1869, and as the defendants are a "telegraph company" within s. 3 of the last-named statute, they are forbidden by s. 12 of the Telegraph Act, 1863, to erect a telephone wire across a street within
[* 909] the * plaintiffs' district without their consent. It follows, therefore, that on this ground alone the plaintiffs are entitled to maintain this action for an injunction.

[Bowen, L. J. — This argument on behalf of the plaintiffs is an attempt to apply the interpretation of a phrase occurring in one Act of Parliament to the interpretation of a similar but different phrase occurring in another Act of Parliament; in the Telegraph Act, 1863, s. 3, the phrase used is "the company," while in the Telegraph Act, 1869, the phrase used is "telegraph company."]

Cozens-Hardy, Q. C., in reply. — Section 41 of the Telegraph Act, 1863, which provides that every telegraph shall be open for the messages of all persons alike, shows that none of the provisions of that statute can apply to an invention like a telephone, as described in *Attorney-General* v. *Edison Telephone Company of London*, 6 Q. B. D. 244. The object of the Telegraph Act, 1869, was merely to give to the Postmaster-General a monopoly as to

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the transmission of telegraphic messages; it was not intended to interfere otherwise with the powers of companies which might be lawfully carrying on business.

BRETT, M. R. — It seems to me that the main point of this case must be decided on what is the true construction of the Metropolis Management Act, 1855, s. 96, as applied to the circumstances proved at the trial. Now, the circumstances of the case are, that a telephone wire is fixed to the chimneys of certain houses, and therefore is above the level of the roof of the houses, and passes diagonally across a street, the owners of the houses making no objection. Those are the circumstances with which we have to deal. The question is, whether the district board of works have a right to object, not to the wires being fixed to the chimneys, — for it is not pretended that they have any right to interfere with that which is done by the leave of the owners, — but whether they have a right to object to the wire as it passes across the area of the street, that is, the area which is between the lines of houses, and to object to this extent, that they are entitled to have an injunction against the Telephone Company to prevent them from any longer keeping that wire * across the street. [*910] The solution of this question must depend on the construction of the Act of Parliament which gives powers to the board of works. Whatever the extent of the powers of the board of works may be, I think it cannot be doubted that if they had shown that these wires were a nuisance to the street, or interfered with the proper user of the street as a street, they would have been entitled to an injunction. If the wire had been dangerous to the use of the street, it would then have been, as I think, a nuisance to the street; and I do not doubt that the board of works might, in that case, have maintained an action for an injunction. But whether this wire was a danger, and in that sense a nuisance to the street, was a question of fact. Upon that question of fact I think there was evidence on both sides. I do not deny that there was evidence which had to be considered by the learned Judge who tried the case, as to whether this wire was dangerous to the street or not; but there was very strong evidence, indeed, on the other side, that it was not of any practical danger; there was very strong evidence, which really was not contradicted in the least, that this wire, put up as it was, with ordinary care, and being of ordinary material, would not begin to deteriorate so as to

become dangerous for several years after it had been put up, and that even after several years it would take many more years before it became really dangerous. Upon that evidence, having considered it, the learned Judge, who saw the witnesses, and who had the means of estimating what credit ought to be given to their care and their truthfulness, came to this conclusion, that there was no appreciable danger in the wire at present, and for some considerable time to come. If there is no appreciable danger, that, in fact as well as in law, means that there is no danger at all. It cannot be said that wires fixed to the tops of chimneys above the street really can interfere with the traffic and use of the street in its ordinary acceptation, and therefore there is no ground upon which this injunction can be maintained, unless it be that the mere fact of putting the wire where it was, was a trespass upon the property of the board of works. It comes to that — and the learned Judge, as I understand it, did decide in favour of the plaintiffs upon that ground — that this wire was a trespass upon the property of the plaintiffs, and there-
[*911] fore, whether * it injured the plaintiffs or not, they were entitled to have an injunction.

That really raises the question whether this wire was a trespass upon the property of the plaintiffs. Now, what belongs to the plaintiffs is given to them by an Act of Parliament; they have no rights except under an Act of Parliament. The Court of Appeal had to consider, in the case of *Coverdale* v. *Charlton*, 4 Q. B. D. 104, a similar Act, namely, the Public Health Act, 1875, s. 149. The words of the Act of Parliament, upon which the plaintiffs found their claim, being almost the same as they were in *Coverdale* v. *Charlton*, I take the result to be this, that the Metropolis Management Act, 1855, s. 96, vests in the board of works the street, and therefore the same questions arise as did arise in that case; namely, what, in that Act of Parliament, is the meaning of the word "vests," and what is the meaning of the word "street," and what is the true effect of that Act of Parliament when both those words have been duly interpreted? In *Coverdale* v. *Charlton* the first point that the Court of Appeal did consider was, what was the meaning, in the Public Health Act, 1875, s. 149, of the word "vests," as applied to the subject-matter of the Act? There was not only the word "vest," but there were other words as to the control of the street; and the Court of Appeal had to consider

what was the meaning of that phrase "vest in," accompanied, as it was, by the other words as to control. Much has been said, and much must always be said, of the judgment of Lord BRAMWELL upon the point. No more valuable judgment could be given upon any point than one given by Lord BRAMWELL. I do not deny that there is some difficulty in now following what exactly was his view upon each point of the case, — that is to say, how far he thought that the property, in whatever was the subject-matter, passed under the word "vests." He certainly was of opinion that the word "vest" gave the local board so much property in the grass (which was the question then being discussed) that they could give a right to the possession of that grass to the plaintiff in that action. It gave them such an interest in the grass that they could pass an interest in it to somebody else. I shall not go further with regard to Lord BRAMWELL's judgment * in [*912] that case as to the meaning of the word "vest." My own view at that time was that it passed in whatever was the subject-matter to be dealt with, — the property; it passed the property so as to enable the local board, as far as anybody else than the public was concerned, to do with it what any other owner might do. There might be a breach of their duty to the public, but with regard to anybody else than the public they could do with it as any other owner could do, — that is, without infringing that which was their primary duty, namely, to keep it as a street. I thought, then, that an Act of Parliament must be interpreted according to the ordinary meaning of the words as applied to the subject-matter of it; and that, inasmuch as the subject-matter was that which was usually called "property," when the Act of Parliament said that property should vest in the local board, it vested in them just as property does vest in any person to whom it is transferred; but it was not necessary to decide in that case, although I have not the least doubt that it was clearly in our minds, the question whether that was a vesting of the property for ever, or whether it was only a vesting of the property for a limited time. In the subsequent case of *Rolls* v. *St. George's, Southwark*, 14 Ch. D. 785, it came to be necessary to consider, not what kind of property vested, — *i.e.*, the extent of the right that was given whilst it existed, — but the length of the existence of the right; and in that subsequent case the Court of Appeal came to the conclusion that whatever the right was, it existed only as long as the piece of ground was a

street; that was a decision as to the duration of the right, not as to the extent of the right whilst it lasted. Therefore agreeing entirely, I need hardly say, with *Rolls* v. *St. George's, Southwark*, it seems to me, that the opinion which I at all events formed in that case of *Coverdale* v. *Charlton*, 4 Q. B. D. 104, comes to this, that the property in the street passed to the local board, which became their property as long as the piece of ground was a street. If the piece of ground ceased to be a street, then their property also ceased. It is a condition subsequent; but, as long as the piece of ground was a street, whatever was the street was their property, vested in them as their property by the Act of Parliament.

[* 913] * Now comes the question, which arose also in *Coverdale* v. *Charlton*, namely, what is the meaning of the word "street" in the Act of Parliament, because what vests in the board of works is in terms "the street." They have a property in the "street." What is the "street"? In considering that case, it was suggested that the street was only a right of way. But the Court of Appeal certainly went further than that, and held that the property of the local board was something more than a right of way or control over the right of way. Then it was suggested that it was only the surface, on which the public walk, which is called the "street." The Court went further than that, and came to the conclusion that the property of the local board went below the mere surface. I want to see what each of the Judges, or, at all events, what Lord BRAMWELL thought about this point, and what I myself thought about it, for it seems to me that this point was the foundation of the judgment, and is therefore the principle on which that judgment passed. Very considerable doubts were expressed by Lord BRAMWELL in the course of his judgment, for doubts often struck his mind, which saw both sides of a disputed question; but I incline myself to think, although I do not say I am right about it, that his real judgment as to the meaning of the word "street" is contained in these words (*Coverdale* v. *Charlton*, 4 Q. B. D., at p. 118): "'Street' comprehends what we may call the surface, that is to say, not a surface bit of no reasonable thickness," — not a mere mathematical surface, — "but a surface of such thickness as the local board may require for the purpose of doing to the street that which is necessary for it as a street, and also of doing those things which commonly are done in or under the

streets," — that is what he thought it comprehended, — " and to that extent they had a property in it." That seems to me to be the real ground of his judgment in that case. That judgment seems to me to show that the property passes to a certain depth, and that depth is what may be called " the area of user : " not the area of an accidental user, of an user for once, but the area of the ordinary user, that is, the ordinary user such as is usually needed for the ordinary works which are done in a street. If that is taken to be Lord BRAMWELL'S judgment, I confess that I do not think it differs * from what I also endeavoured to say in that [* 914] case. I find that I said (*Coverdale* v. *Charlton*, 4 Q. B. D., at p. 121) : " The words of this section vest the property in the street ; and the street does not include the houses by the side of the street ; it includes the space between the houses which is used as the footway and roadway. ' Street ' means more than the surface, it means the whole surface, and so much of the depth as is or can be used, not unfairly, for the ordinary purposes of a street. It comprises a depth which enables the urban authority to do that which is done in every street, namely, to raise the street and to lay down sewers, for at the present day there can be no street in a town without sewers, and also for the purpose of laying down gas and water pipes. ' Street,' therefore, in my opinion, includes the surface and so much of the depth as may be not unfairly used as streets are used. It does not include such a depth as would carry with it the right to mines, neither would ' street ' include any buildings which happen to be built over the land, because that is not a part of the street within the meaning of such an Act as this. If the enactment gives the local board that property in so much of the land, it gives them the absolute property in everything growing on the surface of the land. The Legislature have, because the right of owners to the soil in a ' street ' is of so little value, intentionally taken away that right, and have given it, to the extent I have mentioned, to the local board." I think my Brother COTTON'S judgment is the same. Therefore, the groundwork of that judgment is, as to the depth at all events, that in the Public Health Act, 1875, s. 149, in which the word " street," a popular word, is used, and the word " land " is not used, the word " street " must receive the popular meaning existing at the time when the Act of Parliament was passed. With regard to the width, it is the width between the houses, and is actually the

popular meaning of the word "street." With regard to the depth, it is what may be called in this case the area of ordinary user existing at that time, and nothing beyond or below that. If that is the principle of the judgment in *Coverdale* v. *Charlton*, then it seems to me that that case is an authority for a principle, which must be applied in the present case. I confess that, after
[* 915] all I have now heard, not only do I * think that case binding as an authority with regard to the principle on which it was decided, but I am still more convinced than I was before that the statement of that principle, with regard to the interpretation of the Public Health Act, 1875, s. 149, was and is right, and that it points out the only interpretation which can be given to the words of the Act of Parliament. Therefore the word "street" is interpreted to mean that which contains the area of ordinary user of a portion of the ground as a street. Having applied that to the depth below the surface, we must apply it to the height above the surface. I think the word "street" must include something above the surface. What does it include? It has been argued before us that because the surface passes, therefore everything above the surface *usque ad cœlum* passes under the words of the Metropolis Management Act, 1855, s. 96. I am not about to question that which has been laid down by Lord Coke in Co. Litt. 4 a, namely, that where a piece of land is granted or is conveyed in England by a grant from the King or by a conveyance from party to party, under the word "land" everything is passed which lies below that portion of land down to what is called the centre of the earth — which is, of course, a mere fanciful phrase — and *usque ad cœlum* — which to my mind is another fanciful phrase. By the common law of England the whole of that is transferred by the grant or the conveyance under the term "land." But I am of opinion that it does not follow that in a grant or conveyance the word "street" would produce the same result. I am not clear about that: but even although it would have that effect in a grant or a conveyance, that is not the question here. The question is, what is the meaning of the word "street" in the Metropolis Management Act, 1855, s. 96? and when we are dealing with the meaning of it in that Act of Parliament we must consider for what purpose that Act of Parliament was passed, and with what and with whom it is dealing. It is dealing with streets of which the public have the use, and it is dealing with the persons who

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have, for the benefit of the public, the guardianship of, and the property in, those streets. If the word "street" comprises merely the area of user below the surface, what is there to show that it can include anything but the area of user above the surface? It seems to me * really logically to follow that [* 916] those who came to the conclusion that in the Public Health Act, 1875, s. 149, the word "street" includes downwards from the surface only that which is within the area of ordinary user of the piece of ground as a street, must, if they are consistent, hold that the same rule applies to that which is above the surface, and therefore that it includes only so much of the area which is above the surface as is the area of the ordinary user of the street as a street. That cannot be measured by saying that it is a foot higher or a foot lower, according as a hay-cart is loaded a foot higher or a foot lower. That is not the way to deal with practical matters. It cannot be said that the ordinary user of the street is measured by the height of a particular thing: it is measured by the ordinary height of things which use the street as a street. I doubt very much whether the ordinary user is confined to the present height of a fire-escape. A fire-escape is, at all events, used in a street, and some fire-escapes are higher than others; but at the present time no fire-escape is as high as a tower, and therefore we need not deal with this suggestion. The ordinary user of a "street" may go as high as the top of a fire-escape, for anything that I know, but I am not about to measure exactly to what height it goes; it is enough for me to say that it goes above the surface to the height of the ordinary user of a street as a street.

Now comes the question, how is that rule to be applied to the case of a wire which is fixed to the top of chimneys? No one uses a street, in the ordinary course of using a street, by walking along the tops of the chimneys, or by going through the air at the height of an ordinary chimney. That is not the ordinary use of a street; it is not within the area of ordinary user of a street as a street. In ordinary language, that is not in the street, but it is above the street. I am of opinion that this Act of Parliament by the use of the word "street" does not pass any property above or over the street, it only passes property in the street. It therefore passes only that which is the ordinary space occupied by men or things, which use the street as a street. Under those circumstances, it appears to me that no property passed in that part of the air

through which, or in which, this telephone wire was placed. [* 917] If this telephone wire as placed had been * dangerous to that which did pass, that is to the "street" as I have interpreted it, an injunction would have been properly granted against the use of it; because it would have been a danger to the street and to the public, who have a right to use the street, and the board of works, who are the legal owners of the street and the trustees for the public of the street, would have properly interfered. But in the absence of danger, and when the case is put simply and solely on the ground that there is a trespass on that space of the air which is above the roadway and footway, I am of opinion that although the board of works have the property in certain parts of the earth, namely, the street as it is a "street," yet this wire was not in that part of the earth which was the property of the board of works, and was not in the "street." To say what anybody in ordinary language would say of it, it is a wire passing over the street, and it is not a wire in the street. I think, therefore, my Brother STEPHEN construed the meaning of the word in the Metropolis Management Act, 1855, s. 96, too largely, and that he could not grant an injunction on the mere ground that this was a trespass upon the property of the plaintiffs.

Another point was raised by the plaintiffs' counsel with which I do not think it necessary to deal elaborately. What I have disposed of is the real strength and pith of the argument in this case; but another point was that the wire could not be put up without the leave of the board of works, although it was not put up on the property of the board of works. That depended on the construction of certain Acts of Parliament. I agree with what my Brother BOWEN pointed out during the argument, namely, that the plaintiffs' counsel were endeavouring to apply an interpretation occurring in one Act of Parliament, and confined to a particular phrase in that Act, to the interpretation of a similar but different phrase to be met with in another Act of Parliament. They wished to read the phrase "telegraph company," occurring in 32 & 33 Vict., c. 73, s. 3, and there interpreted to mean any company or corporation engaged in transmitting telegrams, as applying to the word "company" to be found in the Telegraph Act, 1863, ss. 3, 12. If this were a correct construction, the plaintiffs would [* 918] be entitled to an injunction against the * defendants, who have not obtained their consent. But it seems to me to

be an erroneous construction, when two Acts of Parliament are incorporated, to apply the interpretation in the one Act of Parliament of one phrase to the interpretation of another phrase occurring in the other Act of Parliament.

I think that we must follow *Coverdale* v. *Charlton*, and that this case comes within its principle, and that this wire is placed upon no property of the plaintiffs so as to entitle them to an injunction on the ground that there is a trespass on their property. I am of opinion that no nuisance with regard to it has been proved, and therefore that no injunction ought to have been granted in this case. I wish to repeat that I agree with the decision in *Rolls* v. *St. George's, Southwark*.

Bowen, L. J. — I entertain no doubt that if appreciable danger to any street, or to the traffic of any street, which is vested in the board of works, is shown, the Courts will interfere by injunction to prevent anything being done in the area above the street, which is the cause of danger; and if in the present instance it had been proved, and was the reasonable conclusion to be drawn from the evidence, that there was any substantial risk at all, or in other words, any appreciable danger to the public, it would be the duty of this Court to compel the removal of this wire which overhangs the thoroughfare. But the counsel for the plaintiffs did not deny that it was hopeless in the present state of the evidence in this case (whatever might be the result in other cases), to controvert the opinion of the learned Judge who saw and heard the witnesses, that there was no appreciable danger to the public in this wire being hung where it was. The real question which we have to decide is whether, when there is no appreciable danger to the public or the traffic in the street, the board of works in whom the street is vested are entitled under the Metropolis Management Act, 1855, s. 96, to put a veto upon the putting up of the wire, unless their consent is obtained. This point of law we have to decide. Have the board of works vested in them such property in the streets as to enable them to interfere at their own mere will and pleasure with a wire which, * it is conceded for [* 919] the purpose of this point alone, involves no danger whatever to the street or the traffic, and is no interruption? It is obvious that this is a very important point. It is important not only to those who wish to develop the telephonic communication of this country in large cities, where I have no doubt it is more

valuable than in the country, but it is also very important because if the suggested construction of the Act is right it confers on the board of works practically the power of levying a toll in the air, unrestricted by the interests of the public, or by the interests of the traffic in the street; for, *ex concessis*, there is no danger to the traffic in the street or to the public. The question is, whether where there is no danger they can still refuse their consent. If the board of works were in the position of simple owners of land, or if land had been vested in them by an ordinary conveyance, I should be extremely loath myself to suggest, or to acquiesce in any suggestion, that an owner of the land had not the right to object to anybody putting anything over his land at any height in the sky. It seems to me that it is not necessary to decide upon what exact legal fiction, or on the existence of what legal theory, one is to justify the principle which I think is embodied in the law, as far as I have been able to see, that the man who has land has everything above it, or is entitled, at all events, to object to anything else being put over it. But this is not a conveyance, nor is it the transfer of landed property from one person to another, nor of the ownership of land in the ordinary sense of the term. The board of works have what the Metropolis Management Act, 1855, has given to them; they have no more and no less, and what we really have to decide is whether, under s. 96 of 18 & 19 Vict., c. 120, the board of works had given to them, not merely some interest in the soil, but the same sort of extensive proprietary rights that belong to the owners of land throughout this country, namely, to have nothing placed above it between themselves and the sky. That must, of course, depend on the terms of the Act of Parliament. Parliament can do exactly what it pleases, and the only matters to be borne in mind in construing the section are two rules. It seems to me, first, that words of popular meaning must be taken in their popular sense, unless there [* 920] is something * in the context to alter it; and, secondly, that if a word in its popular sense, and read in an ordinary way, is capable of two constructions, it is wise to adopt such a construction as is based upon the assumption that Parliament merely intended to give so much power as was necessary for carrying out the objects of the Act, and not to give any unecessary powers. The section of the Act which we have to construe deals with streets, and it enacts that the streets are to vest in and be

under the management and control of the vestry or district board of works. Although a street in one sense may be said to be capable of being strictly defined by a lawyer as the right of the public to pass along a way, one knows that in ordinary parlance that is not what is meant by the "street;" and it seems to me that it is impossible to read the Metropolis Management Act, 1855, and the subsequent Acts which bear on the same subject, without coming to the conclusion that the Legislature was not dealing with a simple right of passage when it vested streets in the local board; it was dealing with something material and physical; and "the street" seems to me to be treated as a material thing. That I think is the basis, or one of the bases, at all events, of the decision in *Coverdale* v. *Charlton*. But, assuming that something physical is meant to be vested, we still have to construe both the term "vest" and the term "street." Now, to my mind, when in a section of an Act of Parliament the expression occurs that a street is to vest, it is impossible to advance very far by taking the term "vest" by itself, and asking one's self what it means. The true method of construction is to ask one's self also whether any light is thrown on the word "vest" by the fact that the statute is dealing with the word "street," and whether any light is thrown on the word "street" by seeing that the word "vest" is used in regard to it. We have to see what the Act of Parliament meant by the combined expression. In ordinary cases, when land is said to be "vested," I suppose it is meant that an estate in land is vested; but the term "vest" is used not only with regard to an ordinary interest in land, but also with regard to proprietary rights which are transferred to, or placed in, or made to reside by Act of Parliament or by the will of the parties in, some person, whether an individual or a body corporate. * Accordingly it may have a different [* 921] meaning, according as the proprietary right which is said to be vested is capable of different meanings. Two of the views — I will not say the only views — but two of the views which may be taken of this section seem to me to be these: first, that the Act of Parliament means definitely to plant in the board of works a right analogous to a freehold interest at common law in at least some portion of the soil; or, secondly, that in using the term "vest" in regard to the special statutory right of property, all that it means to do is to plant in a board of works such a

statutory interest in the possession of the soil and surface as is necessary to enable them to carry out the powers of the Act. These two views seem to me to be distinct. Which view is the true interpretation of the Act of Parliament? Passing to *Coverdale* v. *Charlton*, I think myself that the case decides one point, but that the language of the LORDS JUSTICES extends rather beyond what the mere decision which they have given requires. That does not render the authority valueless, or one to which I should be less glad to pay respect, but all that seems to me to be necessary for the decision in *Coverdale* v. *Charlton*, and all that it did, in fact, decide, is that there was vested in the local board such a statutory property or interest in the surface of the soil as was sufficient to justify them in giving exclusive possession of the surface. That reduces the point down to an academical question as to whether what passes in the surface, and the soil below the surface, is in the ordinary sense the right of a landowner, or whether what passes is a statutory right, to be defined by collecting the powers of the Act together, and seeing what the Act meant to be done with the surface and soil; and reading the language of the three Judges in *Coverdale* v. *Charlton*, I am not sure that they all took exactly the same view of this academical point. Lord BRAMWELL'S judgment has been discussed at length, and the MASTER OF THE ROLLS has explained what his own view was. With regard to the judgment of COTTON, L. J., I am not sure that he meant to go further than to say that whatever the Public Health Act, 1875, s. 149, does pass, at all events the interest is large enough to give to the local board the right to transfer [* 922] the grass * growing on the soil. When a similar subject came before this Court in the case of *Rolls* v. *St. George's, Southwark*, it was necessary, in one point of view, to consider how far *Coverdale* v. *Charlton* had gone, because in *Rolls* v. *St. George's, Southwark*, the question was whether the duration of the interest was the same as the ordinary duration of property in the owner of freehold land, or whether it was, so to speak, a statutory duration, limited by the objects and powers of the Act. Therefore it was by no means immaterial to consider whether, in the first case of *Coverdale* v. *Charlton*, the Court had been considering the interest to be an ordinary interest vested indefeasibly in a certain extent of the surface of the soil, whatever that extent might be, or whether, so to speak, it was a statutory interest the

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limits of which must be ascertained from the Act of Parliament; because, as the one or the other view was taken some light might be thrown on the question for what time the interest of the bearer was to last. When it came to the judgment of COTTON, L. J., in *Rolls* v. *St. George's, Southwark*, he explained that all he meant to decide in the first case was that some property in the soil had passed to the local board; and when it came to the judgment of THESIGER, L. J., he said that the effect of the former case was substantially this, that only some right of property or some possessory right which would enable the local board to maintain actions in respect of that property or possessory right was given, and that the decision of the Court did not mean to go one step beyond that. If I may speak my exact opinion with perfect frankness, I do not think the decision did go beyond that which the language of THESIGER, L. J., stated. The point was whether the statutory interest conferred upon the local board by the Public Health Act, 1875, s. 149, whatever it might be, was not sufficient to prevent any possession being taken or any enjoyment of any portion of the surface without any leave of the local board; and therefore it became unnecessary to discuss in *Coverdale* v. *Charlton* whether what was given was the ordinary ownership of land, the ownership of the surface and soil, or whether it was a statutory ownership for the purposes of the Act. Having discussed the term "vest," we come to the term "street." What is the meaning of the term * "street"? Now we come to language [* 923] which I do not myself consider is the basis of the decision in *Coverdale* v. *Charlton*. I do not myself see that it was necessary for the Court in that case to say how far below the surface the "street" went. Therefore, I do not think that any expression of opinion by the Court of Appeal as then constituted would be binding in a later case, though no one follows the authority of preceding Judges more gladly than I do. However, I see no reason to doubt that the "street" covers, at all events, the area of user or the zone of user, the two terms which may be applied. I think that whatever meaning is put on the word "vest," and whatever meaning is put on the word "street," some statutory interest of a proprietary character in the surface and some portion below the surface is, at all events, granted in the soil, so far as is necessary to protect the "street" and traffic passing along it from injury, and to enable the board to exercise all their powers

with regard to it. Now, with regard to the air above the "street" (again I am trying to distinguish, as far as I can, what is necessary for the decision and what is not, because I think a Court always decides with much more certainty, and precision, and accuracy when it confines itself to what is necessary to be decided), all that I feel called upon to say is, that I am satisfied the board of works have not any proprietary interest above the "street," except what is necessary to protect the street and the traffic from interruption or danger, or to enable them to exercise their powers in the "street." Whatever the vesting of the "street" means, it does not mean more than that. I think, therefore, without wishing to derogate or to undermine in any way the supposition that the owner of land, as land, has a full right of enjoyment of everything above his land, that the answer to the present plaintiffs' case is that the board of works are not, and are not meant to be, absolute owners of land, but that a defined and limited right is given to them, not in land as land, but in a street as a street. Reference must be made to the Act to see what that means, and I think it was not within the purview of any possible object of the Legislature that a public body in this country should be invested with more power of interference with the exercise of pri-
[* 924] vate enterprise and * adventure than was really necessary for the protection of those public interests, which are entrusted to their charge. I think, therefore, with great respect for his judgment, that the learned Judge was wrong in carrying the legal right of the board of works so far as he did.

As to the construction of the Telegraph Acts, 1863, 1868, 1869, the MASTER OF THE ROLLS has said all that I need say.

Again, I only wish to emphasise that with which I began, namely, that this decision does not show that if a danger to the street, or traffic, or public is made clear, it is not the duty of the Court to interfere, or that the board of works would not have a *locus standi* to complain.

FRY, L. J. — The plaintiffs in this action have sued for an injunction on any one of three grounds. In the first place, they have claimed it on the ground that the wire in question is a nuisance in consequence of the danger which it creates to the traffic of the street; secondly, they have claimed it on the ground that it is an invasion of their proprietary rights; and, in the third place, they have urged that there was a want of statutory consent,

which they were entitled to give or refuse. Those points must, of course, be considered separately. It appears that the wire in question is thirty feet above the street. I think the conclusion from the evidence must be considered to be that at which the learned Judge arrived, that no appreciable danger has been shown to exist from this wire. The Judge saw the witnesses, he knew what weight to attach to the different persons who bore testimony before him, and it appears to me that it is impossible for us to interfere with the decision on any ground of difference of opinion, with regard to the question of nuisance. In saying that, I am not for a moment intimating that I in any way differ from the conclusion at which he has arrived.

The second question is the one which has given rise to the most protracted argument. Is there in this case any invasion of the proprietary rights of the plaintiffs? Now that turns on the meaning of words, which I cannot help feeling are somewhat obscure. The 96th section of the Metropolis Management Act, 1855, has declared that the streets, being highways, and the pavements, * stones, and other materials thereof, and all other [* 925] things provided for the purposes thereof, shall vest in and be under the management and control of the vestry or district board of the parish or district in which such highways are situated. What at once strikes the mind is this, that the object of the section is to give something more than the management and control over these streets. It is to "vest" the streets in the board, whatever that may mean; and, undoubtedly, difficulty arises from this reason, that the word "street" expresses rather a popular than a legal conception, and that there is great difficulty in understanding what the meaning of "vesting a street" is, when we bear in mind that the Act is silent with regard to the duration of the interest, with regard to the extent of the property to be vested in the board, and with regard to the quality of the estate which they are to take. If the matter had been entirely uncovered by decision, I am not certain that I might not have come to the conclusion that the safer view was this, — namely, that the statute intended to vest as land, with all its rights, the area which was covered by the street; in other words, everything beneath and above the superficies of the street. But that proposition has not been argued before us, and it has not been argued before us for this very plain reason, that the case of *Coverdale* v. *Charlton* is

inconsistent with that proposition in the breadth in which I have stated it. It appears to me that in the case of *Coverdale* v. *Charlton* the Court must be taken to have put a definition on the word "street;" and though some parts of that definition may not have been necessary to the decision of the case actually before them, I cannot help thinking that that decision must be treated as binding upon the same Court when sitting in another case. I think it is not the right way to treat a judgment to consider, when it contains a definition of words in a statute, whether every portion of that definition was necessary to the case in hand. I will state shortly what I conceive to have been the decision in that case, at any rate of the majority of the Court, — I mean of Lord BRAMWELL and the present MASTER OF THE ROLLS; Lord Justice COTTON's judgment appears to me to be somewhat less express on the point. When one considers what a street is, and the [* 926] interest of bodies like boards, who have * the management of streets, it is evident that there is a certain area which is ordinarily used for the purposes of the street. That will include, of course, the surface of the street; it will include a certain though undefined distance below the surface of the street, and another undefined distance above the surface of the street. That is what has been called, in the course of this discussion, the "area or zone of ordinary user." It is equally apparent that above and below that area there will be other areas or zones, from which interference may take place with the street. Let me take the case of what is below. It is quite plain that below the ordinary depth, in which the board would require to make any excavation for the purposes of the street, beds of coal or other minerals may exist, the removal of which might imperil the safety and convenience of the street. Now, was it the intention of the Legislature to vest that area as well as the area of user? That is a question which I will refer to by-and-by. In the same manner above the area in which the street is used above its surface, there will be another zone or area from which a possible interference might take place. It is quite evident there may be above the street — above that height which is ordinarily used — something which may imperil the convenient user of the street. Suppose, for instance, something were erected over the street which might cause inconvenience by things falling from it; and, in fact, the wire in question is an illustration of a possible source of danger to a street, arising from

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an object above the ordinary space which is used for the purposes of the street. Now was it the intention of the Legislature, when vesting the street in the board, to vest in them these areas of possible interference with the street, both above and below the area of the ordinary user of the street? It appears to me that that question has been answered by the decision of the majority of the Court in the case of *Coverdale* v. *Charlton*, because the *ratio decidendi* of two of the learned Judges, who delivered judgment in that case, was this, as I read it, that the "street," which is vested by the Act in the board, includes the area of ordinary user, and nothing more; and, therefore, they excluded from their definition the areas of possible interference. I repeat that it appears to me that when a definition * has been given of [* 927] words in an Act by the Court of Appeal as the ground of a decision, it is not for the Court of Appeal, sitting in another case, to overrule that definition. Therefore, in the present case, I feel myself bound by the definition of the meaning of the word "street" as laid down by the majority of the Court in *Coverdale* v. *Charlton*. I think that the Court has plainly negatived the idea that the area of possible interference in the subjacent soil passes to the board. They have said that it is the surface, not the minerals to any depth, which passes to the board, and therefore it appears to me to follow that they confined the definition of "street" to the area of ordinary user. It is quite true that no words are to be found in the judgments which deal explicitly with the area of possible interference above the surface, but the principle of the decision, which confines it to the area of ordinary user, must apply above as well as below the surface. Therefore, I have come to the conclusion that the true definition of "street," as laid down by the majority of the Judges in that case, must be taken to be that it vests some proprietary right in the area of ordinary user, and nothing more. Is this wire within that area of ordinary user? It appears to me on the evidence that it plainly is not; and, therefore, I think the plaintiffs have failed to show any proprietary right in the space which is occupied by the wire. I wish to observe that in coming to this conclusion I am not expressing the slightest doubt with regard to the rights of the ordinary proprietors of land. That question is not before us. As at present advised, I entertain no doubt that an ordinary proprietor of land can cut and remove a wire placed at any height above

his freehold. The point is one not necessary for decision. I wish to observe, further, that I am not in this case deciding anything with regard to the rights of the adjoining proprietors, who may be the owners of the subsoil of the "street," to interfere with any person who may pass a wire across the stratum of air above the "street," provided it passes above the area of ordinary user. For anything I know or intend to determine in the present case, that column of air may be vested in the proprietors of the subsoil.

[*928] Those are points on which I express no opinion in the present case: I only * desire to say I am not expressing an opinion adverse to the rights of those persons.

Only one other observation remains, which is this: it has been contended before us that the plaintiffs have a statutory power of preventing the construction of any wire across their "streets" under the 12th section of the Telegraph Act, 1863. It appears to me to be plain that in terms that Act applies only to those companies which are constituted by Act of Parliament for the purpose of telegraphic business. It has been contended that by reason of the incorporation of the Act of 1863 with the subsequent Act of 1868, and of the incorporation of the Act of 1868 with the Act of 1869, and of the definition clause contained in the Act of 1869, every telegraphic company within the Act of 1869 is brought within the prohibition of the Act of 1863. I confess that I had some difficulty in following that argument, and I come to the conclusion that it is untenable.

I think, therefore, that the learned Judge in the Court below, although he proceeded, in my view, entirely on the right lines, erred when he came to apply the case of *Coverdale* v. *Charlton*, and, intending to follow that case, extended the area which was vested in the board of works beyond the area of user, and made it include the area of possible interference. That is the precise point in which, in my judgment, the learned Judge went wrong; and it follows that the judgment must be reversed, and judgment must be entered for the defendants with the costs of the action.

Judgment for the defendants.

ENGLISH NOTES.

Main roads in an administrative county, with the exception of such as have been retained by an urban authority under the Local Government Act, 1888 (51 & 52 Vict., c. 11, s. 11 (2)), are by that Act (*ib.*

s. 11 (6)), "vested" in the county council. But in *Curtis* v. *Kesteven County Council* (1890), 45 Ch. D. 504, 60 L. J. Ch. 103, it was held that the vesting does not extend to roadside wastes forming part of the main road as regards the public right of passage.

In an urban district all streets being highways repairable by the inhabitants at large, are vested in the urban authority by the Public Health Act, 1875 (38 & 39 Vict., c. 55, s. 149). But this provision, except in county boroughs, where there is no difference in this respect between main roads and other highways repairable by the inhabitants at large, must now be read subject to an exception in the case of main roads that have not been retained. "Street," in the Public Health Act, 1875, is defined as including "any highway (not being a turnpike road), and any public bridge (not being a county bridge), and any road lane footway square court alley or passage whether a thoroughfare or not" (38 & 39 Vict., c. 55, s. 4). It is beyond the scope of these notes to deal with the numerous cases as to the meaning of this and similar definitions. There seems no ground for arguing that the vesting clause in the Public Health Act does not extend to roadside wastes; and there is accordingly much doubt, while the decision in *Curtis* v. *Kesteven County Council* stands, as to the vesting of roadside wastes at the sides of main roads in urban districts. The soundness of that decision may, however, be questioned.

In London, main roads that have not been "retained" are vested in the County Council, as elsewhere; and except in the City, "all streets being highways," with the exception now of such main roads, are vested in the vestry or district board, as the case may be, by the Metropolis Management Act, 1855 (18 & 19 Vict., c. 120, s. 96), which contains a definition of "street" (*ib.* s. 250) very similar to that in the Public Health Act, 1875. This vesting clause is not in terms confined to highways repairable by the inhabitants at large, but it should perhaps be read as so confined by implication.

Highways other than main roads in rural districts are not vested in any authority, unless it be by virtue of a local Act, or of the application of urban provisions in this respect by order of the Local Government Board.

The nature of the rights conferred on a local authority by the "vesting" of a highway in them has been recently considered by the House of Lords in *Mayor, &c. of Tunbridge Wells* v. *Baird* (1896), 1896, A. C. 434, 65 L. J. Q. B. 451, 74 L. T. 385, where it was held that the vesting of a street in the local authority did not entitle them to construct an underground urinal below the street. In *Coverdale* v. *Charlton* (C. A. 1878), 4 Q. B. D. 104, 48 L. J. Q. B. 128, 40 L. T. 88, 27 W. R. 257, it was held by the Court of Appeal that the vesting of a street in an urban authority entitled them to demise the pasturage in

the street; and Bramwell, L. J., expressed the opinion that for the purposes of the vesting clause "'street' comprehends what we may call the surface, — that is to say, not a surface bit of no reasonable thickness, but a surface of such a thickness as the local board may require for the purpose of doing to the street that which is necessary for it as a street, and also of doing those things which commonly are done in or under the streets." And to that extent, he said, the authority had a property in the street. Brett, L. J., expressed a similar opinion. In the *Mayor, &c. of Tunbridge Wells* v. *Baird*, however, all the law Lords, while they did not suggest that the actual decision in *Coverdale* v. *Charlton* was wrong, disapproved of the view there expressed that the vesting gives the authority rights in the street which enable them to do "what is commonly done in or under the streets," such as laying gas-pipes; and Lord Herschell said, "The vesting of the street vests in the urban authority such property, and such property only, as is necessary for the control, protection, and maintenance of the street as a highway for public use." *Fareham Local Board* v. *Smith*, W. N. 1891, p. 76, where an urban authority were held to be entitled, by virtue of the vesting of the street in them, to set up poles and wires in the street for the purpose of lighting their district with electricity, must therefore be regarded as overruled. On the authority of the *Tunbridge Wells Case* it has been held that the vesting of a street in an urban authority does not enable them, as against the owner of the subsoil, to authorise the laying of pipes for trading purposes in the street, even though the pipes are entirely within the macadam or made surface of the roadway. *Droitwich Salt Union* v. *Harvey*, Local Government Chronicle, 1847, 391. The Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict., c. 77, s. 27), contains a saving for rights to minerals under streets vested in a local authority by the Public Health Act, 1875; but it is clear, as indeed was recognised in *Rolls* v. *St. George, Southwark, Vestry* (1880), 11 Ch. D. 785, 49 L. J. Ch. 691, that this saving was unnecessary.

Where a highway vested in a local authority is legally closed, the vesting clause ceases to operate, and the owner of the soil resumes full dominion over the land. *Rolls* v. *St. George, Southwark, Vestry, supra.*

AMERICAN NOTES.

The precise doctrine of the principal case does not appear to have been applied here; but it is the general rule that if telegraph poles are erected within the limits of a street or highway, without legislative sanction, immediate or delegated, they are nuisances, and may be removed. *Com.* v. *Boston*, 97 Massachusetts, 555; *Domestic Teleg., &c. Co.* v. *Newark*, 49 New Jersey Law, 344; *Julia Bldg. Ass'n* v. *Bell Teleph. Co.*, 88 Missouri, 258.

No. 14. — REX *v.* INHABITANTS OF WEST RIDING OF YORKSHIRE.

(K. B. 1802.)

No. 15. — REX *v.* INHABITANTS OF ST. GILES, CAMBRIDGE.

(K. B. 1816.)

No. 16. — REX *v.* INHABITANTS OF ECCLESFIELD.

(K. B. 1818.)

RULE.

By the common law, counties are chargeable with the repair of public bridges, unless it is shown that the burden is thrown upon some other persons or body, and the liability may be enforced by an indictment against the inhabitants of the county.

The inhabitants of a parish are likewise by the common law liable to indictment for non-repair of the highways lying within the parish, unless they can show that the burden is cast by law upon some other persons. And for this purpose it is not sufficient to show that the inhabitants of another parish have immemorially repaired; for the inhabitants are not a corporate body capable of binding their successors; nor could there be any permanent benefit to those inhabitants which could be presumed as a consideration for a continuing liability.

But the inhabitants of a township or particular district within the parish may, by immemorial user, be shown to be liable to repair the highways within their district.

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2 East, 342–356 (6 R. R. 439).

Bridge. — Liability of County to repair.

The county or riding is liable to the repair of a bridge built by trustees [342] under a Turnpike Act, there being no special provision for exonerating them

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from the common-law liability, or transferring it to others; though the trustees were enabled to raise tolls for the support of the roads. If a bridge be of public utility, and used by the public, the public must repair it, though built by an individual: *aliter*, if built by him for his own benefit, and so continued, without public utility, though used by the public. A bridge built in a public way without public utility is indictable as a nuisance; and so it is if built colourably, in an imperfect or inconvenient manner, with a view to throw the onus of rebuilding or repairing it immediately on the county.

An indictment against the defendants for the non-repair of a public bridge (which was removed into this court by *certiorari*) charged, that a certain common public bridge called Pace Gate Bridge, otherwise Kesh-Beck Bridge, situate upon a certain rivulet called Kesh-Beck, at the parishes of Skipton and Fewston in the West Riding of the county of York, in the King's highway there leading from the town of Skipton, &c., in, through, and over the several townships of Bearnsley, &c., to the town of Knaresbro' in the same riding, used for all His Majesty's liege subjects on foot and on horseback, and with their carriages, &c., on the 22nd of November, &c., was and yet is very ruinous for want of repairs, &c., against the form of the statutes, &c., and against the peace, &c. And that the inhabitants of the West Riding of the county of York aforesaid of right ought to repair and amend the said ruinous bridge when and so often as need requires it.

To this the defendants pleaded that after the making of a certain Act of Parliament in the 17 Geo. III. (c. 102), entitled, an Act for repairing and widening the road from the town of Skipton to the turnpike road leading from Leeds to Rippon, near [*343] Okbeck in the township of Bilton with * Harrowgate, and from thence to communicate with the road leading from Knaresbro' to Wetherby in the West Riding of the county of York, to wit, on the 1st of December, 1779, the said bridge in the said indictment mentioned, the same being and consisting of one arch made of stone and timber, was first directed and made by the order and direction of certain trustees in the said Act of Parliament named, in pursuance of and according to the directions in the said Act in that behalf contained, and for the purposes in the said Act in that behalf mentioned, in and upon the said road in the said Act mentioned; and that no bridge had ever been there erected or made before the time of the making of the said bridge in the said indictment mentioned, &c. To this there was a demurrer.

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Holroyd in support of the demurrer.

The county at large is *primâ facie* liable to the repair of all public bridges within its limits, in the same manner as parishes are bound to repair all public ways within their district, unless they can show a legal obligation on some other persons or public bodies to bear the burden. This is most explicitly stated by Lord Coke (2 Inst. 700–1) in his comment on the Stat. of Bridges, 22 Hen. VIII., c. 5, which was made in affirmance of the common law. The matter stated in the plea is no answer to the indictment; because though the bridge in question were built by the trustees, yet the law not having imposed on them the burden of repair, it necessarily devolves on the county; for the demurrer admits that it is a common public bridge used for all the King's subjects. If indeed a miller make a new bridge over a new cut of water for his own profit, the county shall not be * bound [* 344] to repair it, though it be used by the public, according to 1 Roll. Abr. 368. But there it does not appear to have been made for the common benefit; and the same book recognises the general law. By 13 Rep. 33 it appears that others than the inhabitants of the county can only be charged *ratione tenuræ*, or by prescription in the case of bodies corporate, or, as it is said, on account of taking toll or other profit; but this latter must be understood of toll claimed by prescription or grant upon condition of bearing the burden of repair, and where the party takes such toll for his own profit, — which does not apply to these trustees, against whom no indictment will lie for non-repair. Nor could they by any mode be made personally liable, or be made to lay out anything beyond the amount of the tolls received; wherefore if the expense of the repair wanted exceeded that sum, the public would be without remedy, unless the county were liable. To an indictment against the county of Middlesex for not repairing Langforth bridge (Cro. Car. 365), alleged to be an ancient bridge, the defendants, protesting it was not an ancient bridge, pleaded that it was lately erected by the King for the benefit of his mills; and judgment was given for the King, though it do not expressly appear whether upon the form or merits of the plea. In *R.* v. *The County of Wilts*, Salk. 359, and *vide* s. c. Holt's Rep. 340, Northey, Attorney-General, cited a case where it was adjudged that if a private person build a bridge which afterwards becomes a public convenience, the county is bound to repair it. So

R. v. *Bucknal*, 6 Mod. 151 n. The authorities on this subject were all considered in *Rex* v. *The W. R. of Yorkshire*, 5 Burr. [*345] 2594, in the case of Glusburne bridge, * where to an indictment against the riding for the non-repair, the plea stated that there was an ancient foot-bridge over the same stream which the township of Glusburne, who were bound to repair it, took down, and in lieu thereof erected the carriage-bridge in question; and all the Court held the riding liable to the repair on the general principle above stated by NORTHEY. That case has been uniformly acted upon ever since; and in particular in the instance of Lunsbeck bridge, upon an indictment tried before Mr. Justice BULLER on the Northern Circuit. If it were otherwise the greatest inconvenience would ensue; for the subjects at large cannot know what particular persons are liable to the repair of public bridges: they can only resort to the county in the first instance, and they must be liable unless they can show some other who is so bound. He also referred to several clauses in the particular act in question.

Lambe, *contra*, admitted that the Stat. 22 Hen. VIII., c. 5, was in affirmance of the common law; but said it was to be collected from thence that the liability of the county to repair was confined to ancient bridges, the origin whereof, and by whom built and repairable, could not easily be traced, and therefore afforded a presumption that they were originally public works. It would be preposterous to suppose a law by which every individual might, by erecting a bridge over which others passed occasionally, thereby bring a great burden on the public, not merely for the reparation, but in many instances for the entire rebuilding of it. If it had been supposed that at any rate if the bridge were of public utility the county were bound to repair, it was nugatory to direct the magistrates, as the statute does, to inquire who were bound to [*346] the repair. *Again, who is to decide, or by what rule, whether a bridge be of public utility or not. If a new bridge be so built as to occupy the whole highway, the public have no choice whether they will use it or not if they pass that way; although perhaps it were not desired, and the passengers might have passed as well without it; or the public would rather have suffered even a trifling inconvenience than have incurred the burden of repair. The general rule contended for will have the effect of substituting the will or caprice of any private individual

in the place of the public discretion. The passage in 1 Roll. Abr. 368, is against the principle contended for *e contra*; and so is 13 Rep. 33, which says, that he who has the toll ought to stand to the repair, which comes nearer to the present case than any other authority; for by the Act in question the tolls which are collected on this road are vested in the trustees, by whom the bridge was built, for the very purpose of keeping it in repair. The *Glusburne Bridge Case*, 5 Burr. 2594, is distinguishable from this; for that was bound to be of public utility, as well as constantly used by the public; and what is still more important, the justices of peace in Quarter Sessions, who are the trustees for the county in this respect, signified the public assent to its erection by contributing to the expense of it out of the public stock: it may therefore be said to have been erected by and for the benefit of the county; in which case they could not discharge themselves by any protest from the burden of future repair attaching on them by law. In another report of the same case, 2 Blackst. 687, great stress is laid on the fact of its being of public utility; it is said to be the grand criterion. There was no necessity to traverse that this was a * common public bridge, because the plea shows [* 347] that before 1779 there was no bridge there; and therefore unless the county are bound to repair all new bridges erected by any persons, which the public may happen to use, they cannot be liable in this instance. The *Langforth Bridge Case*, Cro. Car. 365, did not establish so general a position; for that turned on the form of the plea. And it was admitted by the Court in the *Glusburne Bridge Case*, 2 Blackst. 687, that if a man erected a bridge principally for his own benefit, though collaterally of benefit to others, the public had nothing to do with it. He also argued upon some of the particular clauses of the Act in question; particularly that the clause providing against the discharge of any riding, &c., or private person chargeable with the repair of any road or bridge by reason of tenure, or by any law, ancient usage, or custom, must necessarily refer to bridges antecedently built; such ancient bridges as were intended by the Stat. 22 Hen. VIII.

Holroyd, in reply, observed, that a bridge built by the trustees of a public road, under an Act of Parliament, must be taken to be of public utility in point of fact. That if a bridge built in a public road by an individual were not of public utility, but detrimental to the public, it would be indictable as a nuisance, and

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that would be matter of defence on the trial; but the demurrer, by admitting that it is a common public bridge used by all the King's subjects, has admitted its adoption by the public and its utility.

Lord Ellenborough, C. J.: —

[* 348] This is a case of great consequence indeed to the public, but after the decisions * which have taken place, it does not appear to be of much difficulty. By the common law counties are chargeable with the repair of public bridges; unless it be shown, as the Stat. 22 Hen. VIII., c. 5, says, "what persons, lands, tenements, and bodies politic ought to make and repair such bridges." In the absence of such proof that burden is, by the operation of the common law, thrown on the inhabitants of the county in which the bridge lies. But in order to effect this it is not enough that a new bridge shall be built in a highway used by the public — it must also be useful to the public; but enough is stated to show that; the bridge being alleged to be in a public highway, and used for all the King's subjects, it is at least sufficient to throw the onus upon the inhabitants of the county of showing who else is bound to the repair, if they be not. I do not lay stress on the idea of the public having adopted the bridge by passengers going over it; because if it occupy the highway, they cannot help using it. I only rely on the using of it so far as to show that it does not appear to have been treated as a nuisance, but to have been acquiesced in by the public. If, however, it be built in a slight or incommodious manner, no person can, at his choice, impose such a burden on the county, and it may be treated altogether as a nuisance, and indicted as such. But if the public lie by without objection, and make use of it for some time, it is evidence that they adopt the Act; and the bridge becoming of public benefit, the burden of repair ought properly to fall upon the public. Lord Coke, in his comment (2 Inst. 700–1) on the Stat. 22 Hen. VIII., of bridges, after stating that particular persons are only bound *ratione tenuræ*, or by prescription, — that is, *ratione* [* 349] * *tenuræ*, in the case of private individuals; or by prescription, as against corporate bodies, — puts this case: "But admit none at all were bounden to the reparation of the bridge, by whom should it be repaired, by the common law? The answer is, By the whole county, &c., wherein the bridge is, &c.; because it is for the common good and ease of the whole county." Again he says: "If a man make a bridge for the common good of

all the subjects, he is not bound to repair it; for no particular man is bound to reparation of bridges by the common law, but *ratione tenuræ* or *prescriptionis*." Now that this bridge is for the common good is proved by the use of it by all the King's subjects passing that way, by its not having been treated as a nuisance, but acquiesced in. Then after having enjoyed the benefit of it, shall the public object to it when they begin to feel the burden of repair? The doctrine laid down by Lord COKE has been since recognised in the cases referred to, and in other books; particularly it was much considered in the case of *Glusburne Bridge*, 5 Burr. 2594; upon the authority of which other cases have been since ruled, one of which was alluded to at the bar, before Mr. Justice BULLER. The rule laid down by Mr. Justice ASTON in the *Glusburne Bridge Case* seems to be the true one, "that if a man build a bridge, and it become useful to the county in general, the county shall repair it." He says nothing about the adoption of it by the public; and there is good sense in not relying on that, except as evidence of its being a public bridge, and of utility to the public. Where it is stated to be used by the public, it cannot be presumed to be useless to them; but if intended to be objected to on * the ground [* 350] of inutility, it must be so stated in the plea. As to the objection that it ought to be repaired by the commissioners of the turnpike by whom it was erected, and who have authority to raise tolls for the purposes of the Act, I cannot find any authority for them to erect bridges under this Act. Where it is necessary to cut drains in the adjoining lands, a power is given them to raise arches over such drains; but this is a bridge built in the highway. However, not to proceed upon any such narrow view of the case, I will suppose they were authorised to erect the bridge; yet no fund having been specially provided by the Legislature for the repair of it, the burden must necessarily fall where the common law has placed it, namely, on the riding. I am aware of the extent of this opinion, and if the trustees under similar Acts throw this burden generally on the counties, it may be necessary to make special legislative provision in future; but this cannot vary the common-law rule, and I see no reason to arraign the doctrine in the case in 5 Burr., to which I have referred. If, indeed, as it is said in 1 Roll. Abr. 368, a man make a new cut for the benefit of his mill, and build a bridge over it, he shall be bound to the repair of it. But that is a case where the party is guilty of a nuisance in the

first instance in making a new cut across the highway, which the public might have prevented, and all along he continues it for his own benefit; the case goes no further than that, and does not apply to the present.

GROSE, J.: —

In the present state of the country, when great improvements are carrying on, and convenient bridges are become very necessary, this is a most material question to be settled. It is no new point; for I well remember the *Glusburne Bridge Case*, which was [* 351] most ably * argued by the counsel for the riding, who was a profound lawyer, and had exerted great industry in looking into all the authorities on the subject, and the case was decided on great consideration. Since then the same question has come before many of the Judges at Nisi Prius, and the same doctrine has been repeatedly considered and acted upon. Those who then doubted upon the subject did not sufficiently attend to this, that the Stat. 22 Hen. VIII. was founded on the common law; and the passages referred to in 2 Inst. are very strong to that purpose. Indeed, Lord COKE may be said to state this very case when he says, that if a man build a bridge for the common good of all the subjects, he is not bound to repair it. Then where no particular person is bound to the repair, how and by whom shall it be done? He had before answered that question, — that it shall be repaired by the whole county. Mr. Justice ASTON, commenting on this doctrine in the *Glusburne Bridge Case*, says, that it does not relate to new bridges which are not of public utility, and used by the public. But the bridge in question appears to be of this description; and like that case, except in this particular, which is stated by the defendants themselves in their plea, that this bridge was erected by trustees of a turnpike road, under a public Act of Parliament; and therefore I cannot suppose that it was not a public bridge, built for the benefit of the public, and of public utility, and not merely for ornament or for private benefit. This case therefore comes within the rule laid down in 5 Burr., which, having been acted on ever since, it would be dangerous to draw into doubt. There may be attempts to make a colourable use of this doctrine, as by building bridges at first in a slight and imperfect manner, for the purpose of throwing the ex- [* 352] pense immediately on the county; but if that were * shown, I should think that it was a public nuisance, and indictable.

The general doctrine, however, is too firmly established since the case in Burrow to be overturned.

LAWRENCE, J. : —

The principle to be collected from the case of *Glusburne Bridge* is, that if the bridge be of public utility, the county, who derive advantage from it, must support it. It so appears both from the report in Burrow and in Blackstone. But it is said that we cannot collect that the bridge in question is of such a description. But when we observe that it was erected by trustees of a turnpike road appointed by an Act of Parliament, we cannot suppose that it was erected for other purposes than for the public utility. Then this was assimilated to the case in 1 Roll. Abr., because it is said that the trustees are empowered to take tolls. But that is supposing that the trustees are to derive some private advantage from the tolls, which is not the case; whatever tolls are raised must be laid out on the maintenance of the roads. It might as well be contended that if a parish were to build a new bridge on a road within their limits, they would be bound to keep it in repair afterwards, and that the county would not be liable, as that the trustees are in this case, because the bridge is built in the turnpike road. In truth, the trustees are merely substituted in lieu of the parish. The case of *Glusburne Bridge* has been affirmed by subsequent decisions. One of these was *The King* v. *The Inhabitants of the County of Lancaster*, where a special verdict was found, which was argued before my Brother LE BLANC and myself, sitting in bank at Lancaster. I mention this because it was in a shape in which it might have been carried to another tribunal if the parties had been dissatisfied with our opinion. He then read another case of * *The King* v. *The In-* [* 353] *habitants of the West Riding of Yorkshire*, M. 28 Geo. III. (*infra*).[1] On the authority of these and the other cases mentioned, I agree that there ought to be judgment for the King.

[1] *The King* v. *The West Riding of Yorkshire*, Mich. 28 Geo. III., B. R. The inhabitants of the riding were indicted for not repairing a public carriage-bridge, which they were bound to repair, &c. Plea, that certain townships have immemorially repaired, and have been accustomed and of right ought to repair, the said bridge; and issue thereon. It appeared upon the trial that this had been a foot-bridge till the year 1745, when it was enlarged to a horse-bridge by the townships, and in 1755 to a carriage-bridge, at their expense. That the riding had never repaired it. There was another bridge which served for the same road.

The counsel for the prosecution insisted at the trial that the evidence did not prove the issue, which was that the town-

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[* 354] * Le Blanc, J. : —

If the Court felt any doubt upon the question, the magnitude of it would have induced them to have heard another argument. But the principle on which the case in 5 Burr. was determined, and which equally governs the present, was not new even at that time; for it is laid down in 2 Inst. that if a man build a bridge which is for the public benefit the public must repair it. That has been acted upon down to the period when the *Glusburne Bridge Case* was decided; and that again has been recognised in subsequent cases, and particularly in one instance, where the parties had an opportunity, if they had been so advised, of carrying it to the *dernier ressort*. The question then is, whether there be

ships had immemorially repaired a carriage-bridge; as it appeared clearly that the carriage-bridge had been first erected within time of memory. And Wilson, J., who tried the cause, was of that opinion; but the jury found for the defendants.

A new trial was moved for, and Wood, Heywood, and Lambe, for the defendants, showed cause, by contending that though the evidence might not strictly support the prescription as laid, yet if by another form of pleading the defendants would have been entitled to a verdict on the merits, the Court would not be inclined to set aside the verdict. That in order to charge the riding with the repairs of a bridge, it must at least appear that it was of public utility, which this was not; for the turnpike road ran within a few yards, and it was stated that there was another bridge. That the townships would thereby get rid of their obligation to support a foot-bridge. This was not like the case of *Glusburne Bridge*, 5 Burr. 2594, which was an entire new bridge, sixty yards distant from the old foot-bridge. This was the old foot-bridge widened.

The counsel on the other side were stopped by the Court.

Ashhurst, J. : —

There must be a new trial; for by the general law it is established that where a township or any private individuals build a new bridge and dedicate it to the public benefit, and it is used by them, the onus of repairing it will fall upon the county at large; for the county at large [* 354] are * bound to repair all public bridges, unless they can throw the burden on some particular persons. Now here the riding have pleaded that these townships have been immemorially bound to repair this carriage-bridge, which cannot be true, as it appeared from the evidence that it was not made a carriage-bridge till a few years ago. Therefore there must be a new trial.

Buller, J. : —

The indictment states it to be a carriage-bridge, and the defendants in their plea admit it to be a carriage-bridge. But they allege that other persons are bound by prescription to repair it. Now there is no evidence whatever which tends to support that: on the contrary, it is shown that this never was a carriage-bridge till within these few years, but was a foot-bridge, which was kept in repair by the townships. Where a party is bound to repair a foot-bridge, he shall not discharge himself by turning it into a horse or carriage bridge, but still he shall only be bound to repair it as a foot-bridge, that is, *pro ratâ*: but otherwise the county are bound to repair all bridges of public utility.

Grose, J., declared himself of the same opinion.

The Court offered the defendants liberty to amend on payment of costs, which, not being accepted at that time.

Rule absolute.

Qu. if the defendants did not afterwards amend their plea before the second trial and obtain a verdict?

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any distinction between this and the other cases? As to this not being expressly stated to be for the public benefit, [* 355] it is sufficient when the indictment states that the bridge was used for all the King's subjects. Then it is said that this was not built, as in other cases mentioned, by a private individual, but by trustees under an Act passed for making a public road. If, however, the cases are to be distinguished on this ground, this rather appears to be a stronger case than the others; because the bridge was built by trustees under an Act of Parliament, to which the defendants must be considered as parties and assenting, and by those to whom the Legislature have delegated the trust of determining whether it were proper to build the bridge: it is therefore a stronger case against the defendants than where an individual has in the first instance exercised his own discretion. If any inconvenience be to ensue from this decision, it must be provided for by the Legislature in future Acts of this description. The clause referred to in the Act which enables the trustees to cut drains and throw arches over them is confined to grounds lying contiguous to the roads, and was merely for the purpose of excusing them from being considered as trespassers, and not by way of throwing on them an additional burden of repairing such bridges. And the subsequent clause, which provides "that nothing in this Act contained shall be construed to be a discharge of any riding, &c., or person, for making, repairing, &c., any road, bridge, causeway, arch, drain, or sewer, which they have been accustomed, or of right ought to make, repair, &c., by reason of any tenure, or by any law, ancient usage, or custom," affords an argument that this Act was not intended to make any alteration as to the general legal liability under the Stat. 22 Hen. VIII., or by the common law, either as to the repair of roads or bridges. * If this be the [* 356] true construction, then it stands thus: Certain persons are enabled by law to make a public bridge, and by the general law before public bridges were repairable by the public; and by the clause referred to, the Legislature in the particular Act have in effect provided, that notwithstanding that Act the same persons should continue liable as were before liable to the repair of bridges, &c. Then the defendants must be liable in this case, there being nothing shown to exempt them, and throw the burden on others.

Judgment for the Crown.

Rex v. Inhabitants of St. Giles, Cambridge.

5 Maule & Selwyn, 260–267 (17 R. R. 320).

Highway. — Liability of Parish to repair.

[260] Indictment against a parish for non-repair of a highway lying within it; plea, that the inhabitants of another parish have repaired, and been used and accustomed to repair, and of right ought to have repaired. *Held*, ill, for the plea ought to have shown a consideration.

Presentment for not repairing a highway in the parish of St. Giles, Cambridge. Plea, that the inhabitants of the parish of Great St. Mary, in the town of Cambridge, from time whereof, &c., until the passing of the Act 37 Geo. III., c. 179, have repaired, and been used and accustomed to repair, and during all that time of right ought to have repaired, and but for the passing of the said Act, and the provisions therein made respecting the repairs of the said part of the said King's common highway in the presentment mentioned to be in decay, from the passing of the said Act hitherto of right ought to have repaired, and still of right ought to repair, the said part of the said highway, when and as often as it hath been or may be necessary; and that by the said Act, intituled, &c., it was, among other things, enacted, that the said part of the said highway (setting it out) should, from and after the passing of the said Act, be repaired by trustees therein mentioned; and that the inhabitants of Great St. Mary should be exempted from repairing the same, in consideration of £150 agreed to be contributed by them towards the expense of making and repairing the same; and that in and by the said Act it was further declared that the said Act, and all the powers thereby given, should commence and take effect the day the same should receive the royal assent, and should continue thenceforth for twenty-one years next ensuing, [* 261] and thence to the end of the next session * of Parliament; and that the said Act is in full force. Without this, that the inhabitants of the said parish of St. Giles the said part of the highway ought to repair and amend, when and so often as should be necessary, as by the said presentment is above supposed, &c. Demurrer. Joinder.

This case was argued partly in the last term, and again on this day.

Marryat, in support of the demurrer, took several exceptions to

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the plea; 1st, Because the highway, lying wholly without the parish of St. Mary, the parish is nevertheless charged with the repairs by prescription, without showing any consideration; whereas prescription imports a lawful beginning, which, where there is no common-law liability, must have arisen from some consideration; so that the defendants, if they would plead that another ought to repair, ought to show for what cause; as *ratione tenuræ*, or by reason of inclosure; though it is otherwise if a corporation be charged, because they may be bound without consideration. But this is the first instance of a parish, which of common right ought to repair all the highways within it, attempting to shift the burden upon others, without showing in what manner they became bound to repair.

2dly, Supposing the plea good to charge the parish of St. Mary in the first instance, the Act of Parliament, which has exempted this parish from the repair, throws the burden back again upon the defendants, who are liable at common law: *Rex* v. *Inhabitants of Sheffield*, 2 T. R. 106 (1 R. R. 442); which burden is not removed from *them by the interposition of trustees for [*262] the repair of the highway, because the trustees are only in aid, not in lieu of the parish: *Rex* v. *St. George's, Hanover Square*, 3 Camp. 222 (13 R. R. 792); being appointed but for a term, and not being compellable to repair beyond the means in their hands; and therefore the general turnpike Act, 13 Geo. III., c. 84, s. 33, contemplates that the parish, and not the trustees, are indictable; but if the trustees were indictable, yet the plea is ill, because it ought to have shown with certainty, by naming the trustees, on whom the burden lay: *Rex* v. *The Inhabitants of Bridekirk*, 11 East, 304 (10 R. R. 514).

3dly, The plea is informal, because it amounts to the general issue; for upon not guilty it would have been competent to prove the liability of the trustees. *Rex* v. *St. George's, Hanover Square*, 3 Camp. 222 (13 R. R. 792).

4thly, The plea ought not to have concluded with a traverse of the defendants' liability. *Richardson* v. *Mayor of Orford*, 2 H. Bl. 182 (3 R. R. 579).

Gaselee, *contra*, as to the last objection, contended that it was the invariable practice to conclude with a like traverse to the present. See Crown Circ. Assist., ed. 1787, 402, 404; 5 Burr. 2594. As to the other objection of form, he argued that oftentimes matter

may be pleaded specially, though it may be given in evidence on the general issue; as in conspiracy, the defendant may plead a legal prosecution, Cro. Eliz. 87; in assumpsit, payment, 1 Salk. 394; in debt, a release, 1 Salk. 394. Yet all these may be proved on the general issue; and therefore to demur to this plea because it amounts to the general issue, without more, is not enough, for it is in the discretion of the Court whether the plea shall be allowed or not.

[*263] *With respect to the first objection, he admitted the doctrine of Lord Coke (13 Co. Rep. 33; 1 Hawk. P. C., c. 76), that a particular person cannot be bound by prescription, viz., that he and all his ancestors have repaired, if it be not in respect of the tenure of his land, or because that he hath the land adjoining; *aliter* of a corporation. And the distinction seems founded on this, because the act of the ancestor cannot charge the heir without profit; but a corporation, which hath a lawful being, may be charged, that they and their predecessors time out of mind have repaired, for the predecessors may bind their successors; and as in judgment of law a corporation never dies, if it were ever bound to repair, it must needs continue to be so. Now, though there is no precedent for charging the inhabitants of a parish with the repairs of a highway situate without the parish, yet there seems as good reason for charging them in a case like the present with the amendment of a highway, as there is for charging a part of a parish in exclusion of the parish at large with the amendment of highways within it; both are alike against common right; yet is it the daily practice in pleading to charge the inhabitants of a township that they have immemorially repaired, without showing any consideration;[1] the reason of which may be, that though not actually a corporation, they being a body subsisting by succession, may have been deemed a *quasi* corporation. In *Rex* v. *Marton*, Andr. 276, and *Rex* v. *Great Broughton*, 5 Burr. 2700, it was not doubted that

[*264] an indictment against the inhabitants *of a division of a parish, alleging that they had immemorially repaired, would be sufficient. And if a consideration may be implied in the case of a corporation, which is sometimes said to be the reason why prescription without more is good against them, why may it

[1] MSS. precedents to this effect, signed by Yates, J., and by Chambre, J., when at the bar, were referred to. Also, Cro. Cir. Assist. 404; 4 Wentw. Plead. 164; and *Rex* v. *West Riding of York*, 5 Burr. 2594.

not also be presumed in this case that at some period before time of memory lands were granted in trust for the parish of St. Mary, in respect of which they are bound to repair? or that the passage over this land, being more beneficial to them than to others, they took on themselves the repair of the highway, in consideration of having the land dedicated to this purpose? As to the remaining objection, that the Act of Parliament, by removing the burden from St. Mary's parish, throws it back upon the defendants, it is observable that in *Rex* v. *Sheffield* the duty of repairing was originally cast upon the parish by the same authority which empowered the making of the highway; for the Act of Parliament, by virtue of which the highway was made, directed that the highways to be made in pursuance of that Act should be highways to all intents and purposes, and should be repaired as such; and at the same time exempted the township of Sheffield, which would otherwise have been liable to repair. But in this case the road is an ancient road, repairable, as far as appears, from all time by St. Mary's parish, from the burden of which they have purchased their exemption by an equivalent agreed to be paid to the trustees. It would be strange, therefore, if under this agreement the Act should be held to relieve the parish of St. Mary at the expense of the defendants, who are strangers to the agreement; the intention of the Act plainly being to substitute the trustees for the parish of St. Mary.

* Lord Ellenborough, C. J. — Although this case has [*265] led to great length of discussion, I confess that my mind has not been much advanced since the first opening of the argument. The principle of law I take to be clear, that the inhabitants of a parish are liable of common right to repair the highways lying within it, unless they can show that this burden is cast upon some other persons, under an obligation equally durable with that which would have bound the parish, which obligation must arise in respect of some consideration of a nature as durable as the burden cast upon them. Now in the present case nothing of this kind appears; but all that is alleged is, that the parish of St. Mary has immemorially repaired. This I hold to be insufficient; and, therefore, the defendants having failed to show any consideration binding upon the persons whose liability they would needs substitute, the burden must rest with themselves. I do not go into the question touching the effect of the exemption, because my opinion is

founded on this, that no consideration being pointed out whereby to subject the inhabitants of the parish of St. Mary to the reparation of a highway lying *in aliena parochia*, the law will not cast this burden upon them. To hold otherwise would, I think, be raising a doubt as to the common-law liability of parishes to amend their own highways. It appears to me that the defendants are liable, inasmuch as they have not shown any others who are.

Bayley, J. — I am entirely of the same opinion. There is not any case which looks to an obligation like the present. [*266] Particular persons cannot be charged by *prescription without showing a consideration; but a corporation sole or aggregate may be bound to repair by usage or prescription, without more. Here I find no consideration alleged; and Mr. Gaselee was put to great difficulty in suggesting any. It was suggested by him that the land over which the highway lies might originally have been dedicated to the public, in consideration that the parish of St. Mary, who were chiefly benefited by it, would undertake the burden of its reparation. This struck me at first as plausible; but upon consideration I think that this cannot be, because the inhabitants of a parish cannot, as if they were a corporation, bind their successors; if they could, and were to become once liable, they must remain so for ever, however useless the highway might in after ages turn out to be.

Holroyd, J.[1] — I am of the same opinion. The only ground of distinction that can be suggested between this case and the case where particular individuals are to be charged has been suggested; viz., that inasmuch as a parish is composed of a body of inhabitants which has continuance by succession in like manner as a corporation, a parish may also be charged as a corporation, although like it the parish, individually, is perpetually changing. It has been said that it might have been for the convenience of the parish of St. Mary that this land was dedicated to the public for the purpose of a highway; and that in consideration of this boon the [*267] parish might have taken on themselves the burden of *its reparation. But I think, upon reflection, that this could not be a legal consideration binding on the successors, because a burden might thereby be imposed on them beyond the benefit which they were to receive; for they would have to repair the highway not only for their own use, but also for the public. This

[1] Abbott, J., was absent.

plea then is improperly pleaded; for when the highway lies out of the parish, a consideration must be shown. I say nothing as to the form of pleading where the highway lies within a township or division of a parish, which is charged with the repairs.

Judgment for the Crown.

Rex v. Inhabitants of Ecclesfield.

1 B. & Ald. 348–361 (19 R. R. 335).

Highway. — Liability by Immemorial User of District within Parish.

Indictment against the inhabitants of a parish for not repairing a road. [348] Plea, that the inhabitants of a particular district within the parish have immemorially repaired all the roads within that district, of which the road indicted was one. *Held*, that this plea was good, although it did not state any consideration for the liability of the inhabitants of the district.

This was an indictment (in the common form) against the inhabitants of the parish of Ecclesfield for the non-repair of a common highway there. Plea, as to part of the road indicted, that the inhabitants of a certain district or division, in the township of Bradfield, in the said parish of Ecclesfield called Ones Acre and Oughty Bridge, from time whereof the memory of man is not to the contrary, have repaired and amended, and have been used and accustomed to repair and amend, and of right ought to have repaired and amended, and still of right ought to repair and amend, when and so often as it hath been or shall be necessary, such and so many of the common highways situate in the said district or division of Ones Acre and Oughty Bridge as would otherwise be repairable and amendable by the inhabitants of the said parish at large. The plea then stated that the part of the said road indicted was situate in the district, and would, but for the said prescription or usage, be repairable and amendable by the parish at large; and concluded, that by reason of the premises the inhabitants of the said district or division of Ones Acre and Oughty Bridge, in the township of Bradfield, in the said parish of Ecclesfield, during all the time last aforesaid, ought to have repaired and amended, and still ought to repair and amend, the same part of the said common highway, so ruinous, miry, deep, broken, and in decay, in the introductory part of their plea particularly mentioned, when and so often as it hath been and
* shall be necessary; and that the inhabitants of the said [* 349]

parish at large ought not to be charged with the repairing and amending the same. And this, &c. Wherefore, &c. There were similar pleas as to the other parts of the road indicted, lying within other districts in the parish. Issues having been taken on these pleas, the case was tried at the Summer Assizes, 1816, for the county of York, before Wood, B., when a verdict was found for the defendants upon all the issues. In the following term, J. Williams moved to enter up judgment for the Crown, *non obstante veredicto*, on the ground that all the pleas were defective. When cause was shown, the Court ordered the question to be put into the form of a special case, which was argued in last Michaelmas Term.

J. Williams, for the Crown, stated that this was a new question, although for a long time it seemed to have been considered as *res judicata*, from the uniform course of the precedents. The principle which governs cases of this sort is the same as that which applies to bridges; for a parish, with respect to highways, stands in the same situation as a county with respect to bridges. Lord Coke, in his Commentary on the Statute of Bridges, says, 2 Ins. 700: "Some persons, spiritual or temporal, incorporate or not incorporate, are bound to repair bridges, *ratione tenuræ suæ terrarum sive tenementorum*, and some *ratione præscriptionis tantum. Ratione tenuræ*, by reason that they, and those whose estate they have in the lands or tenements, are bound in respect thereof to repair the same. *Ratione præscriptionis tantum*; but herein [* 350] there is a diversity between bodies politic or * corporate, spiritual or temporal, and natural persons; for bodies politic or corporate, spiritual or temporal, may be bound by usage and prescription only, because they are local, and have a succession perpetual; but a natural person cannot be bound by act of his ancestors without a lien or binding and assets." There is, therefore, a clear distinction between natural persons and corporations. So in 21 Edw. IV., Mich. Term, pl. 3, the same distinction prevails. Now, by natural persons must be meant either individuals, or the collections of individuals, as the inhabitants of particular districts. If so, then the inhabitants of a district cannot be bound *ratione præscriptionis tantum*. The same rule is to be deduced from Keilwey, 52, pl. 4, where the point was with respect to charging individuals *ratione tenuræ*. These latter words, indeed, imply a consideration; and on this ground, in *Rex* v. *Kerrison*,

1 M. & S. 435 (14 R. R. 491), it was held that they were of so technical a description that they could not be supplied by equivalent expressions, such as "owner and occupier of a certain navigation." In *Rex* v. *The Inhabitants of Bridekirk*, 11 East, 304 (10 R. R. 514), the plea stated a consideration. For there it set out that the parish was divided into districts (naming them), and stated a custom for all the districts separately and respectively to repair their own roads. Each district was, therefore, exempted from the repair of all roads not within it. That was a consideration for its repairing its own roads. In *The King* v. *Eardisland*, 2 Camp. 494, the pleas were similar. There is in this plea no traverse of the liability of the parish at large to repair. That is another objection. In *Rex* v. *The Inhabitants of the West Riding of Yorkshire, Glusburne Beck Case*, 5 Burr. 2594, that * traverse was introduced; and though Mr. Serjeant Wil- [* 351] liams in his note, 2 Saund. 159 *e*, says that such traverse is demurrable, that is not so. *Rex* v. *The Inhabitants of the County of Glamorgan*, 2 East, 356 n. (6 R. R. 450 n.), contained the same traverse; and the better precedents always have inserted it. This case is decided by *Rex* v. *St. Giles, Cambridge*, 5 M. & S. 260 (p. 666, *ante*). That was an indictment against the parish of St. Giles for not repairing a highway situated within it. The parish pleaded that the inhabitants of the parish of St. Mary's, from time immemorial, had repaired, and of right ought to have repaired, and still of right ought to repair, the road indicted. That was, therefore, a plea charging the inhabitants of St. Mary's *ratione præscriptionis tantum*. The Court there held that it was necessary to state a consideration for that prescription, and the plea was held bad on that account. He then referred to *Rex* v. *The Inhabitants of Rayley*, 12 Mod. 697; Crown Circuit Assistant, p. 227, and *Rex* v. *Great Broughton*, 5 Burr. 2700.

Littledale, *contra*, contended that if a traverse were necessary, that there was one in this case; for the plea, after stating the liability of the inhabitants of particular districts to repair and amend the road, concluded thus: "And that the inhabitants of the said parish at large ought not to be charged with the repairing and amending the same." This, therefore, is a traverse quite sufficient, if any traverse at all were necessary, which it is not. [He was then stopped, as to this part of his argument, by the Court, who said that certainly this was a sufficient traverse,

[* 352] if any traverse was required.] As * to the other point respecting the consideration for the prescriptive liability of the inhabitants of a particular district, no argument can be drawn from the form of plea in *Rex* v. *Bridekirk;* for that was adopted only with a view to let in evidence of the custom of repairing in the other districts of the parish. That form of pleading was also recommended by Mr. Serjeant Williams, in 2 Saund. 159 *c*, in the notes to *Rex* v. *Stoughton*, and was adopted in *Rex* v. *The Inhabitants of Leominster*, 2 Saunders. 159, note. But the form adopted here is the usual one. Formerly, indeed, the precedents were generally of an immemorial prescription to repair a particular road, it being considered doubtful whether an immemorial prescription could attach on modern roads. When that was established, the present form of plea was adopted. This form of pleading is found in *Rex* v. *The Inhabitants of Stretford*, 2 Ld. Raym. 1169; and though errors were there assigned, this objection was never taken. In *Rex* v. *Great Broughton*, Mr. J. Ashhurst says: "If you lay a charge upon persons against common right, you must show how they are bound. It is not enough to show that they immemorially ought to repair; it must be shown that they have repaired." That is shown here; and that is the way of showing how they are bound here. So in *Rex* v. *The Inhabitants of Sheffield*, 2 T. R. 106 (1 R. R. 442), the same learned Judge says: "Where the indictment is against a township or particular persons, it must allege that from time immemorial they are bound to repair." In *Rex* v. *Marton*, And. 276, and *Rex* v. *Penderryn*, 2 T. R. 514, the same point was ruled. But it never was a question in any of these cases whether any-

[* 353] thing more than a prescription to repair need be * stated. In *Rex* v. *The Inhabitants of the West Riding of Yorkshire*, 5 Burr. 2594, and in *Rex* v. *The Inhabitants of the West Riding of Yorkshire*, 2 East, 353 n. (p. 663, *ante*), the same form of pleading was adopted; and no objection was ever taken on this ground. The uniform course of the precedents printed, as well as MSS., is in favour of this plea. But even supposing a consideration to be necessary, it may be inferred from the word "inhabitants;" for inhabitants means here occupiers of land within the district. Then charging them as occupiers of land is in effect charging them *ratione* of their occupation of the land; and so there would be a consideration, viz., the occupation of the land laid in this

case. In the common case of *ratione tenuræ* you indict the tenant of the land. But an argument is founded on this, that here *non constat* but that the inhabitants of this district may be liable to repair the other roads of the parish: so they may; but that is not conclusive at all. The inhabitants of hundreds often repair bridges within the hundred, and yet contribute also to the general county bridge rate. So inhabitants liable to the repair of a particular chapel, nevertheless contribute to the church rate. And. 32. Here the inhabitants of a district may be considered as *tanquam* a corporation, and all the arguments relative to corporations apply to them. If so, then even on the authorities quoted by the other side it is sufficient to charge them by prescription. If a consideration be necessary to be stated, it must also be proved: and how can an immemorial consideration be proved at Nisi Prius.

* J. Williams, in reply, observed that the same argu- [* 354] ment, as to the course of the precedents, had been equally pressed in the case of *R.* v. *St. Giles, Cambridge,* and had failed there. In the cases quoted the objection was never taken and overruled. As to the word "inhabitants" importing a consideration, the same would apply to "owner" and "occupier;" yet those words were held insufficient in *Rex* v. *Kerrison.* A consideration might easily have been stated and proved, by showing that the inhabitants of this district did not repair the other roads in the parish. *Cur. adv. vult.*

Lord Ellenborough, C. J., now delivered the judgment of the Court.

This case stood over that the Court might look into the case of *Rex* v. *St. Giles, Cambridge.* It was an indictment against the parish of Ecclesfield for not repairing a road. The defendants pleaded as to part of the road "that the inhabitants of a certain district or division in the township of Bradfield, in the said parish, called Ones Acre and Oughty Bridge, from time whereof the memory of man is not to the contrary, have repaired, and have been used and accustomed to repair, and of right ought to have repaired, and still of right ought to repair, such of the said highways in that district or division as would otherwise be repairable by the inhabitants of the parish at large, and that the part pleaded to in that plea was within that district or division; that the district or division ought to have repaired it, and the parish ought

not." There were other similar pleas as to other parts of the road indicted. Issues were taken upon these pleas, and a [* 355] * verdict having been found for the defendants, an application was made to the Court to arrest the judgment, or to enter judgment for the Crown, notwithstanding the verdict. And the Court directed that the matter should be discussed before them upon a special case, which was done accordingly. Two objections were taken: first, that it is necessary to show some consideration to sustain a charge upon the inhabitants of any particular division of a parish to the repair of its highways, which is not done in this plea; and, secondly, that the plea does not conclude with a traverse of the obligation of the inhabitants of the parish at large. The case has been argued before us, and in the course of the argument we declared that we thought there was no weight in the second objection; because, supposing such a traverse to be necessary, the conclusion in this plea, in the words "and that the inhabitants of the said parish at large ought not to be charged," was, in our opinion, a sufficient and effectual traverse. In support of the first objection it was urged that the obligation upon the inhabitants of a parish to repair the highways within it is analogous to the obligation upon the inhabitants of a county to repair the bridges within the county; and that the inhabitants of the larger district are *primâ facie* subject to the obligation, and cannot discharge themselves from it, without showing, in certain, some other person or persons, either natural or politic, who are subject to it. It was further contended, upon the authority of Lord Coke's Commentary on the Statute of Bridges, that although a body politic may be charged in these cases *ratione præscriptionis tantum*, yet natural persons cannot be so charged; but [* 356] that, in order to charge * them some good consideration for the charge must be shown, such as the tenure of their lands or tenements; and it was said that the inhabitants of a particular portion of territory are to be considered as natural persons; much reliance, also, was placed upon the case of *The King v. The Inhabitants of St. Giles, in Cambridge*, lately decided in this Court; we are of opinion, however, that the plea in this case is good, and that judgment ought to be given for the defendants. The plea alleges, in substance, that the inhabitants of a particular division of the parish named in the plea have from time immemorial actually repaired the highway in question, and ought to

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have done so; so that it is not open to the objection which prevailed in some of the cases quoted in the argument, wherein the allegation was only "that the inhabitants of the minor district immemorially ought to repair, and there was no averment that they had in fact done so." The plea in the present case is conformable to the general course of precedents, both of indictments and pleas, relating to highways and bridges. Two instances only of a different form of pleading were mentioned at the bar: first, the case of *The King* v. *The Inhabitants of the Parish of Bridekirk*, 11 East, 304 (10 R. R. 514). In that case the plea of the parish was in a different form, and alleged that the inhabitants of the several townships of the parish repaired, each, the highways within their own township, and so showed an exemption, from the repairs of the highways, out of their own township, and by consequence a consideration for the sole obligation of repairing those that lay within it; but this was explained * by the gentleman who drew the plea to have been done [* 357] for the particular purpose of opening a larger field of evidence at the trial. The other instance of a different form of pleading was quoted from 2 Camp. 494. The reasons of the form there used are obvious upon the perusal of the case; little weight, however, could be attributed to two instances of departure from the usual forms, even if the reasons had not appeared. In the argument in support of the motion the matter of this plea was treated as a prescription; but we think it is more properly to be considered as a custom. There are two distinctions between custom and prescription mentioned by Lord COKE in *Gateward's Case*, 6 Co. Rep. 60 [10 R. C. 245], which are material to the present purpose. A prescription always is alleged in the person. A custom ought always to be alleged in the land or place. Every prescription ought to have by common intendment a lawful beginning; but, as is well expressed by Mr. Justice BLACKSTONE in his Commentaries, Vol. I. p. 77, "Customs must be reasonable; or rather, taken negatively, they must not be unreasonable; upon which account a custom may be good, although the particular reason of it cannot be assigned, for it sufficeth if no good legal reason can be assigned against it." Now the matter of this rule applies not to any particular individual, but to the inhabitants of a known district of country, and to a subject existing within that district; and it is of a local and not of a personal nature. It is a general rule of

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the common law that highways and bridges are (except in certain excepted cases) to be repaired by the inhabitants of the territory wherein they are situate, as a charge upon the land within [*358] that territory, to be *defrayed by the occupiers for the time being: the charge is upon the land (under which word houses, &c., are included), and upon the inhabitants in respect of the land, not in respect of their person or residence. An occupier of land is chargeable although he reside elsewhere; a resident, not being an occupier, such as an inmate or servant, is not chargeable. Taking this to be the general rule, the next thing to be considered is the extent of the territory chargeable. Lord COKE, in his Commentary on the Statute of Bridges, having shown how a corporation or natural person may be bound to repair a bridge, puts the case that none at all are bound, and then says that by the common law, if the bridge be not within a franchise, the inhabitants of the shire shall repair it; thus naming the largest division of territory known in this respect to the law: if it be within a franchise, then those of the franchise shall repair it. But upon reference to the statute itself, it is obvious that districts smaller than a county were in some cases chargeable to the repair. For the statute begins by reciting that "in many parts of the realm it cannot be known or proved what hundred, riding, wapentake, city, borough, town, or parish, nor what person certain, or body politic, ought of right to make such decayed bridges;" and for remedy enacts, "That in every such case the bridges, if they be without a city or town corporate, shall be repaired by the inhabitants of the shire; and if they be within any city or town corporate, then by the inhabitants thereof." And in Magna Charta, cap. 15, it is enacted, "That no town nor freeman shall be distrained to make bridges or banks but such as of old time of right have been accustomed to make them in the time [*359] of King Henry our *grandfather." From both of which statutes it appears that towns or districts smaller than a county had been accustomed in some cases to make bridges; and so, in fact, they continue to do until this day. And, upon the whole, it seems manifest that the extent of the territory chargeable in this case is to be ascertained by usage and custom, and that in default only of an usage and custom to charge a smaller territory, the charge shall fall upon the larger, — that is, upon the county. And as the case of parishes, and highways within them,

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is analogous to that of counties and bridges, the charge of repairing a highway shall fall upon the parish, in default of usage and custom to charge the particular portion of the parish wherein it is situate; and as a hundred, or parish or other known portion of a county, may by usage and custom be chargeable to the repair of a bridge erected within it, so in like manner a township or other known portion of a parish may by usage and custom be chargeable to the repair of the highways within it. And upon an attentive perusal of the passages of Lord COKE's Commentary, which were cited in the argument, we think it plain that in drawing the distinction between bodies politic and natural persons, the learned writer speaks of individual persons, and not of an aggregate of the inhabitants of parishes or other places. "A natural person," he says, "cannot be bound by the act of his ancestor without a lien or binding, and assets." The case referred to in the Year Book was that of an individual. "Ancestor" and "heir" are words of well-known import in the law, but are not applied in strict legal language to the successive generations of inhabitants of a district. And, indeed, the inhabitants of a township, parish, or other known portion or division of the county * considered with [* 360] reference to matters belonging to it, and in which, from their situation, they have a common interest, bear a resemblance to corporate bodies; they may by custom claim and exercise easements in the land of an individual within the place, as a right to enter and remain upon it at seasonable times, for lawful pastimes and exercises: *Fitch* v. *Rawling and others*, 2 H. Bl. 393 (8 R. C. 305); or to pass over it in their way to their parish church. In ancient times the inhabitants of towns not corporate were charged and sued *pro rege* in the same manner as those of towns corporate, to aids and talliages, and for a firm or other debt due from their community, and for the receipt of the goods of felons and fugitives. Instances of these matters will be found in the *Firma Burgi* of Madox, c. 4 and 5. In all these cases, however, the subject of the charge or easement is some matter within the place. From what has been said, it will be obvious that the present case is clearly distinguishable from that of *The King* v. *The Inhabitants of St. Giles, in Cambridge*. In that case the highway in question lay out of the parish which it was attempted to charge; and upon that ground the Court there held the plea to be bad. All customs are purely local, and confined to particular

places. There cannot be a custom in one place to do something in another. The land in a particular place, and the inhabitants in respect thereof, may be charged by custom for matters within the place; but custom will not apply to matters out of it. Lord COKE observes, at the end of *Gateward's Case*, that the custom there alleged was insufficient and repugnant; because [*361] * it was alleged that the custom there was that every inhabitant of the town of S. had used to have common in a certain place in the town of H., which was another town. And in *Foiston* v. *Crachrood*, 4 Co. Rep. 32, it is laid down that a copyholder may claim common of pasture, &c., within the manor whereof his tenement is parcel, by the custom of the manor; but that if he claims it in land which is not parcel of the manor, he cannot claim it by the custom of the manor, for the custom is *quod infra manerium talis habetur consuetudo*, and therefore he cannot apply it, or by force thereof claim anything out of the manor. In the latter case the known course is to prescribe in the name of the lord. If, therefore, the inhabitants of one district can be charged at all for a matter out of their district (upon which point it is not here necessary to give any opinion, inasmuch as custom will not apply to the matter, and so they cannot be charged by custom), the only mode of charge will be that of prescription; and as no common intendment can be presumed for such a charge, it will be necessary to show some special matter, whereby a lawful beginning may be intended. Nothing of this sort was done in the case of *The King* v. *The Inhabitants of the Parish of St. Giles, Cambridge*. That case is distinguishable from the present in the particulars already noticed. And for the reasons given, we think the present plea is good, and the rule therefore must be

Discharged.

ENGLISH NOTES.

The *primâ facie* liability of the inhabitants of a county or equivalent area (see *Reg.* v. *Ely Inhabitants* (1850), 15 Q. B. 827, 19 L. J. M. C. 223; *Reg.* v. *Southampton Inhabitants* (1886), 17 Q. B. D. 424, 55 L. J. M. C. 158, 55 L. T. 322, 35 W. R. 10) to repair bridges was affirmed by the Statute of Bridges (22 Hen. VIII., c. 5), referred to in the first of the principal cases; but in this respect, as in certain others, the statute is merely declaratory of the common law, as appears from that case, as well as other authorities.

The liability of the county at common law and under the Statute of

Bridges extends only to bridges which may be described as "*super flumen vel cursus aquæ*," that is, over water flowing in a channel between banks more or less defined. The liability may attach though the stream runs dry in dry weather, and it may extend to arches that are not over the regular course of the stream. It does not extend to a mere culvert. The questions whether a particular structure is a bridge or part of a bridge, "*super flumen vel cursus aquæ*," and whether a particular structure is a bridge or a culvert, are to a great extent questions of fact and of degree. See 2 Co. Inst. 701; *Rex* v. *Oxfordshire Inhabitants* (1830), 1 B. & Ad. 289; *Rex* v. *Whitney Inhabitants* (1835), 3 Ad. & El. 69, 4 N. & M. 594, 4 L. J. M. C. 86; *Reg.* v. *Derbyshire Inhabitants* (1842), 2 Q. B. 745, 2 G. & D. 97, 11 L. J. M. C. 51; *Reg.* v. *Lancaster Inhabitants* (1868), 32 Justice of the Peace, 711.

In *Rex* v. *Salop Inhabitants* (1810), 13 East, 95, 12 R. R. 307, it was said that the liability extends to horse, foot, and carriage bridges alike. But in *Reg.* v. *Southampton Inhabitants* (Tinker's Bridge) (1852), 18 Q. B. 841, 21 L. J. M. C. 205, a small foot-bridge was held to be too trifling a structure to be *primâ facie* repairable by the county.

There are numerous cases in which a bridge of such a character as to be *primâ facie* repairable at common law by the county is nevertheless not so repairable.

Thus bridges, like highways, may be repairable by individuals or corporations, *ratione tenuræ*. See the notes to *Reg.* v. *Blakemore*, No. 20, p. 727, *post*.

Again, a bridge may by immemorial custom be repairable by an area other than a county, *e. g.* by a parish: see *Reg.* v. *Hendon Inhabitants* (1833), 4 B. & Ad. 628; or a hundred: see *Reg.* v. *Oswestry Inhabitants* (1817), 6 M. & S. 361, 18 R. R. 398; *Reg.* v. *Chart and Longbridge Inhabitants* (1870), L. R. 1 C. C. R. 237, 39 L. J. M. C. 107. In many cases, moreover, bridges in a borough are repairable by the borough; but in spite of the language of the Statute of Bridges, such a liability attaches, apart from modern legislation, only by immemorial custom or prescription, and possibly also where, though the custom or prescription is not strictly immemorial, the bridge and the borough existed before the Statute. See *Reg.* v. *New Sarum Inhabitants* (1845), 7 Q. B. 941, 15 L. J. M. C. 15; *Reg.* v. *Dorset Inhabitants* (1881), 45 L. T. 308. In some of the cases where a liability on the part of a borough to repair a bridge has been alleged, the liability has been alleged to be upon the corporation (see, *e. g.*, *Rex* v. *Mayor, &c. of Stratford* (1811), 14 East, 348; cf. *Reg.* v. *Mayor, &c. of Lincoln* (1838), 8 A. & E. 65, 7 L. J. Q. B. 161), and in others the liability has been alleged to be on the inhabitants generally (see, *e. g.*, *Rex* v. *Norwich*

Inhabitants (1718), 1 Str. 177; *Reg.* v. *New Sarum Inhabitants*, *supra*). But in none of the cases does any question appear to have been raised as to whether the inhabitants or the corporation were the proper party to charge.

It is clear that there may be a liability upon an area other than a county to repair a particular bridge, and that the fact that such an area is liable to repair a particular bridge does not show that the area is liable to repair other bridges in the area. See, *e. g.*, *Reg.* v. *Yorkshire West Riding Inhabitants* (Glusburne Bridge) (1770), 5 Burr. 2594, 2 W. Bl. 685. It seems, however, that there may be a liability on such an area to repair all bridges, new and old: see *Reg.* v. *Dorset Inhabitants* (1881), 45 L. T. 308; though the writer is not aware of any case in which such a liability has been held to exist.

According to the older cases it would seem that a new bridge of public utility is, like an old bridge, in all cases *primâ facie* repairable by the county. See the first of the principal cases. *Rex* v. *Yorkshire West Riding Inhabitants* (Glusburne Bridge), *supra*; *Rex* v. *Bucks Inhabitants* (1810), 12 East, 192, 11 R. R. 347; *Rex* v. *Lancashire Inhabitants* (1831), 2 B. & Ad. 813; *Reg.* v. *Ely Inhabitants*, *supra*. A recent case, however, in which there were two trials and two applications for a new trial (*Reg.* v. *Southampton Inhabitants* (1886), 17 Q. B. D. 424, 55 L. J. M. C. 158, 55 L. T. 322, 35 W. R. 10; *Reg.* v. *Southampton Inhabitants* (1887), 19 Q. B. D. 590, 56 L. J. M. C. 118, 57 L. T. 261), has left the law in this respect in a singularly vague and unsatisfactory state. The ultimate result of the case was that a verdict of not guilty was allowed to stand in the case of a new bridge, which seems to have been indisputably of public utility, and which was admittedly out of repair. It seems impossible to extract any logical principle from the judgments, and the practical effect of the case seems to be to leave it for a jury to decide in any particular case whether they think under the circumstances it is proper that a new bridge, which has been erected in compliance with the provisions of the Bridges Act, 1803, referred to below, should or should not be repaired at the public expense. The Bridges Act, 1803 (43 Geo. III., c. 59, s. 5), provides that bridges built after the date of the Act by individuals or bodies public or corporate shall not be repairable by the county unless they are made under the direction or to the satisfaction of the county surveyor or person appointed by the quarter sessions, that is, now by the county or county borough council. Bridges originally not repairable by the county for want of compliance with this provision may now, however, be made so repairable. See 41 & 42 Vict., c. 77, s. 21; 51 & 52 Vict., c. 41, s. 6. A bridge erected before the Bridges Act, 1803, remains repairable by the county although it has been improved, and

even to a considerable extent rebuilt since that Act, without compliance with the provisions above mentioned. See *Rex* v. *Lancashire Inhabitants* (1831), 2 B. & Ad. 813; *Rex* v. *Devon Inhabitants* (1833), 5 B. & Ad. 283, 2 N. & M. 212. The Annual Turnpike Acts Continuance Act, 1870 (33 & 34 Vict., c. 73), s. 12, provides that "where a turnpike road shall have become an ordinary highway, all bridges which were previously repaired by the trustees of such turnpike road shall become county bridges, and shall be kept in repair accordingly." It seems that this enactment would make a bridge formerly repaired by turnpike trustees, and situate in an area, other than a county, liable for the repair of all its bridges, repairable by that area and not by the county. See *Reg.* v. *Dorset Inhabitants, supra*; *Reg.* v. *Chart and Longbridge Inhabitants, supra*. The enactment extends to bridges which turnpike trustees ought to have repaired, though they may never have done so: see *Reg.* v. *Somerset Inhabitants* (1878), 38 L. T. 452; and to bridges actually repaired by turnpike trustees without legal authority: see *Reg.* v. *Buckingham Inhabitants* (1878), 43 J. P. 175.

At common law, as affirmed and defined by the Statute of Bridges (22 Hen. VIII., c. 5, s. 7), the liability of the county extended not only to the bridge itself, but also to the road over the bridge and to the roads approaching the bridge for a distance of three hundred feet from each end of the bridge. See *Rex* v. *Yorkshire West Riding Inhabitants* (1806), 7 East, 588, 8 R. R. 688, affirmed in the House of Lords, 5 Taunt. 284, 2 Dow, 1; *Reg.* v. *Mayor, &c. of Lincoln* (1838), 8 Ad. & El. 65, 7 L. J. Q. B. 161. And a like liability attaches *primâ facie* to an individual or to an area other than a county in the case of a bridge repairable by such individual or area. See *Reg.* v. *Mayor, &c. of Lincoln, supra*. The Highway Act, 1835 (5 & 6 Will. IV., c. 50), s. 21, provides, however, that in the case of a bridge built after that Act and repairable by a county or part of a county, the highways passing over and leading to the bridge shall be repairable by the parish, person, or body liable to repair "the said highways" before the bridge was built. It is doubtful whether the critical date is that of the passing or the commencement of the Act. Under the Public Health Act, 1875 (38 & 39 Vict., c. 55), s. 148, an urban authority or a rural district council with highway powers may by agreement with the county surveyor "take on themselves the maintenance," &c., of any road over any county bridge and the approaches thereto. Whether the effect of an agreement of this kind is to relieve the county of their duty as between the county and the public is doubtful.

Formerly bridges repairable by the county were under the charge of the quarter sessions under the Statute of Bridges and a number of other Acts which are still for the most part unrepealed, though in great meas-

ure obsolete. Now such bridges (except those in county boroughs) are under the charge of the county council, to whom the administrative business of the quarter sessions and the liabilities of the inhabitants of the county have been transferred by the Local Government Act, 1888 (51 & 52 Vict., c. 41), ss. 3, 79 (2). And it seems that the county council as successors of the inhabitants are indictable if they suffer such bridges to fall into disrepair. Bridges in a county borough which are repairable by the county at common law are now by virtue of the same Act under the charge of the council of the borough; and it seems that as regards such bridges the corporation of the borough have succeeded to the liabilities of the inhabitants of the county (51 & 52 Vict., c. 41, ss. 34, 79 (2)).

Other bridges in a borough, whether a county borough or not, "which the borough and not the county wherein the borough is situate is legally bound to maintain or repair," are under the charge of the council of the borough by virtue of the Municipal Corporations Act, 1882 (45 & 46 Vict., c. 50), s. 119.

The Highway Act, 1835 (5 & 6 Will. IV., c. 50), s. 5, defines "highways" as meaning "all roads, bridges (not being county bridges), carriage ways," &c. It was held in *Reg.* v. *Chart and Longbridge Inhabitants*, *supra*, that "county bridges" in this definition is not confined to bridges actually repairable by the county, but that it extends to a bridge of such a character as to be *primâ facie* repairable by the county but actually repairable by a hundred; and that a bridge repairable by a hundred is therefore not to be repaired by the highway authority. Probably, therefore, the bridges included in the expression "highways," and repairable accordingly by the highway authority, are such bridges as are of too trifling a character to be *primâ facie* repairable by the county, or as are not over running water. Perhaps, also, the definition includes in "highways" bridges of the character of county bridges, but repairable by custom by the highway parish, and renders such bridges repairable by the highway authority accordingly. The Public Health Act, 1875 (38 & 39 Vict., c. 55), s. 4, again, defines "street" as including *inter alia* "any public bridge (not being a county bridge)." Accordingly, bridges in an urban district which are not county bridges, and which are repairable by the inhabitants at large, are to be maintained by the urban authority as streets.

Highway boards and rural district councils with the powers of highway boards may erect bridges under the Highway Act, 1864 (27 & 28 Vict., c. 101, ss. 47–50), and bridges erected under these powers are no doubt repairable by the highway authority as highways. Urban authorities and rural district councils with the necessary urban powers may in certain cases be able to erect new bridges by virtue of the

powers in the Public Health Act, 1875, enabling such authorities to lay out new streets (38 & 39 Vict., c. 55, s. 154). And no doubt a bridge erected under these provisions would be repairable by the authority erecting it.

The Local Government Act, 1888 (51 & 52 Vict., c. 41), not only, as has been mentioned, makes the county council or county borough council responsible for bridges repairable by the county at common law, but also provides that "the county council shall have power to purchase, or take over on terms to be agreed on, existing bridges not being at present county bridges, and to erect new bridges, and to maintain, repair, and improve any bridges so purchased, taken over, or erected" (*ib.*, s. 6). The county council have also other powers for the improvement of bridges as successors of the quarter sessions. Further, the county council are required, subject to certain provisions, to maintain every "main road" in the county, "inclusive of every bridge carrying such road if repairable by the highway authority" (*ib.*, s. 11 (1)). The county council have also the powers of a highway board for the purpose of building bridges for improving main roads (*ib.*, s. 11 (1); and see 27 & 28 Vict., c. 101, ss. 47–50). As regards bridges in a county borough, the council of the borough appear to have the like powers as a county council under the enactments above referred to. Lastly, under the Highways and Bridges Act, 1891 (54 & 55 Vict., c. 63, s. 3), "the council of any administrative county and any highway authority or authorities, and the council of any adjoining county, may from time to time make and carry into effect agreements with each other for or in relation to the construction, reconstruction, alteration, or improvement, or the freeing from tolls . . . of any bridge (including the approaches thereto), wholly or partly situate within the jurisdiction of any one or more of the party (*sic*) or parties to the agreement."

It is impossible to enter upon any full discussion of the tangle of legislation above alluded to; but it may be observed generally that, particularly in the case of county councils and borough councils, a local authority may be under various kinds of obligations to repair bridges, and that the nature of the obligation and the incidence of the expense of its discharge may often be different in different cases according as the obligation attaches for one reason or another.

Bridges in the Cinque Ports, Kent, Sussex, the Isle of Wight, South Wales, and Montgomeryshire have been the subject of special legislation; and there are very numerous local Acts relating to particular bridges.

The *primâ facie* liability of the parish — that is, of the ancient common-law parish, as distinguished from a parish created for ecclesiastical purposes, or particular civil purposes, in modern times — for the repair of highways has long been recognised. See *Rex* v. *Shoreditch Inhabitants*

(1639), March New Cases, 26; *Rex* v. *Great Broughton Inhabitants* (1771), 5 Burr. 2700. And it has also long been recognised that by immemorial custom an area other than a parish may be liable for the repair of its own highways, and be, in short, in the position of a parish for this purpose. See *Rex* v. *Hatfield Inhabitants* (1820), 4 B. & Ald. 75, 22 R. R. 631. As to the evidence that will establish the liability in the case of an area other than a parish, see *Rex* v. *Kings Newton Inhabitants* (1831), 1 B. & Ad. 826; *Reg.* v. *Barnoldswick Inhabitants* (1843), 4 Q. B. 499, 12 L. J. M. C. 44, 2 G. & D. 545; *Great Western Railway Co.* v. *Denchworth Surveyors* (1861), 25 J. P. 342; *Reg.* v. *Freeman* (1859), 7 W. R. 556; *Freeman* v. *Read* (1863), 4 B. & S. 174, 32 L. J. M. C. 226; *Dawson* v. *Willoughby-with-Sloothby Surveyor* (1864), 5 B. & S. 920, 34 L. J. M. C. 37; *Reg.* v. *Rollett* (1875), L. R. 10 Q. B. 469, 44 L. J. M. C. 190; *Reg.* v. *Ardsley Inhabitants* (1878), 3 Q. B. D. 255, 47 L. J. M. C. 65, 38 L. T. 71, 26 W. R. 405.

As to whether the inhabitants of an area can be liable, otherwise than by statute, for the repair of a highway not within the area, see *Reg.* v. *Ashby Folville Inhabitants* (1866), L. R. 1 Q. B. 213, 35 L. J. M. C. 154, and the cases there cited.

A common-law parish is often divided into two or more areas, each liable by custom to repair its own highways; but, though there seems to be no reason against it, no case has come to the writer's knowledge where an area extending beyond the limits of a single common-law parish is so liable by custom.

The expression "highway parish" may be conveniently employed to designate an area, whether an ancient parish or not, liable (subject to the modern legislation altering the incidence of the expenses of highway maintenance) to repair its own highways; though in some recent statutes the expression is used in a slightly more extended sense.

The following is a sketch of the legislation in force as to the highway authorities in whose charge the maintenance of highways is placed, and as to the main sources from which the necessary funds are derived.

To render the course of the legislation intelligible, it must be premised that under a system which began about the beginning of the eighteenth century and reached its height between 1860 and 1870, it was customary to constitute important roads turnpike roads, placing their management in the hands of turnpike trustees, with power to take tolls for the use of the roads by animals and vehicles. The powers of turnpike trustees were determined partly by the special Acts constituting the several turnpike trusts, and partly by a long series of general turnpike Acts. Since 1870 steps have been taken to wind up turnpike trusts, and there are now none left. The existence of turnpike trusts has, however, left certain permanent traces in highway law.

The first of the general Highway Acts still in force, the Highway Act, 1835 (5 & 6 Will. IV., c. 50), provided, subject to certain saving clauses (*ib.*, ss. 112–117), for the appointment in every highway parish of one or more persons to the office of "surveyor" (*ib.*, s. 6, and see ss. 7–17), or in certain cases of a parish board, not to be confused with a highway board, to discharge the office of surveyor (*ib.*, ss. 18, 19). The expression "highway surveyor" is generally used to include a person or persons or parish board filling the office of surveyor under the Act of 1835. Highway boards and other highway authorities, to be mentioned later, employ surveyors to superintend the highways under their control; but such surveyors must not be confused with highway surveyors under the Act of 1835. In some places the highways are still temporarily managed by highway surveyors under the Act of 1835. The expenses of highway maintenance in a highway parish under such a surveyor are mainly defrayed out of the highway rate levied in the parish by the surveyor (*ib.*, s. 27, and see ss. 16, 28, 29, 31–34, 82, 111), now supplemented by grants under the Agricultural Rates Act, 1896 (59 & 60 Vict., c. 16).

The Highway Acts, 1862 and 1864 (25 & 26 Vict., c. 61, 27 & 28 Vict., c. 101), provided for the grouping of highway parishes — and for this purpose some areas not liable in the ordinary sense for the maintenance of their own highways are highway parishes: see *Reg.* v. *Central Wingland Inhabitants* (1877), 2 Q. B. D. 349, 46 L. J. M. C. 282, 36 L. T. 798, 25 W. R. 876 — into "highway districts," each under the management of a "highway board," consisting of way-wardens representing the constituent parishes and places and of certain *ex-officio* members. The expenses of highway maintenance in each constituent parish and place under these Acts remained at first substantially a separate charge on that parish or place; but this was altered by the Act of 1878, mentioned below. Highway boards still exist temporarily in certain cases.

Under the Public Health Act, 1875, which re-enacted with modifications similar provisions in the Acts which it consolidated, every urban authority were and still are the highway authority for their district (38 & 39 Vict., c. 55, s. 144), and in some instances their jurisdiction as highway authority extends temporarily beyond their district (*ib.*, s. 216; 56 & 57 Vict., c. 73, s. 25 (4)). The highway expenses of an urban authority are in general defrayed out of rates levied over the whole district without regard to parish boundaries (38 & 39 Vict., c. 55, s. 216, and see ss. 207, 211), now supplemented in some exceptional cases by grants under the Agricultural Rates Act, 1896 (59 & 60 Vict., c. 16).

The Highway (and Locomotives) Amendments Act, 1878 (41 & 42 Vict., c. 77), made very important changes in the law of highways.

In the first place, it contains provisions casting the highway expenses of a highway board (subject to certain exceptions) upon a common fund, now supplemented by grants under the Agricultural Rates Act, 1896 (59 & 60 Vict., c. 16), to which, subject to exceptions, the several highway parishes in the district contribute rateably (41 & 42 Vict., c. 77, s. 7; and see 59 & 60 Vict., c. 16, s. 3). Secondly, it provided that, subject to exceptions, every turnpike road disturnpiked since 31st December, 1870, whether before or after the Act of 1878, should be a "main road," enabled other roads to be declared "main roads," and with exceptions provided that half the cost of maintaining "main roads" in each county should fall on the county at large or in some counties on the several hundreds (41 & 42 Vict., c. 77, ss. 13–20). Thirdly, the Act required that highway districts should, as far as practicable, be formed so as to be coextensive with or wholly contained in rural sanitary districts, and enabled the functions of a highway board whose district was coextensive with a rural sanitary district to be transferred to the rural authority (*ib.*, ss. 3–5).

The Local Government Act, 1888 (51 & 52 Vict., c. 41, s. 11), transferred the maintenance of main roads (other than main roads in county boroughs) in each county to the county council, subject to a provision (*ib.*, s. 11 (2)), which has been largely acted upon, enabling an urban authority to retain main roads in their district, in which case they receive an annual contribution from the county council towards the maintenance of the roads retained. The expenses of main road maintenance in a county are "general expenses," and therefore, so far as they are not defrayed out of the exchequer contribution account of the council (as to this account, see *ib.*, ss. 20–27; 53 & 54 Vict., c. 8, s. 7; 53 & 54 Vict., c. 45, s. 17; 53 & 54 Vict., c. 60, ss. 1, 4; 57 & 58 Vict., c. 30, s. 19), are defrayed out of the sums raised by means of the county rate as general county contributions (see 51 & 52 Vict., c. 41, ss. 11 (1), 68), now supplemented by grants under the Agricultural Rates Act, 1896 (59 & 60 Vict., c. 16). An exceptional arrangement as regards the expenses of main road maintenance is, however, in force in Lancashire (*ib.*, s. 11 (13); and see *Reg.* v. *Dolby*, 1892, 2 Q. B. 736, 61 L. J. Q. B. 826, 67 L. T. 619). Main roads in a county borough are maintained by the council of the borough, the expenses being chargeable on the borough fund (*ib.*, s. 34), though the expenses of the maintenance of other highways in a borough generally fall on a different fund.

Finally, the Local Government Act, 1894 (56 & 57 Vict., c. 73, s. 25), transferred the functions of all existing highway authorities in rural districts to the rural district councils, subject to a provision enabling the county council to postpone the transfer for a period which will expire about the end of 1897; or, with the consent of the Local

Government Board, for longer. This provision did not affect the maintenance of main roads by the county councils, which are not highway authorities within the Act. The highway expenses of a rural district council fall, subject to exceptions, on a fund, now supplemented by grants under the Agricultural Rates Act, 1896 (59 & 60 Vict., c. 16), to which the several "contributory places" in the district contribute rateably (56 & 57 Vict., c. 73, s. 29; and see 38 & 39 Vict., c. 55, ss. 229, 230; 59 & 60 Vict., c. 16, s. 3). The Act of 1894 seems to have been drafted in almost complete forgetfulness of the fact that poor-law parishes, highway parishes, and contributory places are not necessarily identical with each other; and this circumstance renders some of the provisions of the Act as to highway expenses almost hopelessly unintelligible. Another very serious difficulty arises from the fact that the powers as to highways of a rural district council frequently differ in different parts of their district, owing to their having succeeded to the functions of highway authorities of different kinds. In particular, difficulties of this kind arise as to the powers of such councils to borrow money for the purposes of highway improvements.

In the City of London the Commissioners of Sewers (see 11 & 12 Vict., c. clxiii., ss. 5, 119, 120; 14 & 15 Vict., c. xci.), and elsewhere in London the vestry or district board, as the case may be (18 & 19 Vict., c. 120, s. 96), are the highway authority. But main roads in London which have not been retained by the highway authority are maintained by the county council as elsewhere (see 51 & 52 Vict., c. 41, s. 41 (4)).

The highways in South Wales (see 23 & 24 Vict., c. 68; 41 & 42 Vict., c. 34) and in the Isle of Wight (see 53 Geo. III., c. xcii.; 46 & 47 Vict., c. ccxxvi.) have been the subject of special legislation. But the Local Government Acts, 1888 and 1894, apply to these places (see 51 & 52 Vict., c. 41, ss. 12, 13, and as regards the Isle of Wight, *Re Isle of Wight Highway Commissioners*, 1895, 72 L. T. 569). In South Wales, where the transfer of the functions of highway authorities to the rural district council is postponed, there are highway boards of peculiar character.

At the present time, therefore, the following are the several kinds of highway authorities: highway surveyors under the Highway Act, 1835; highway boards under the Highway Acts, 1862 and 1864; highway boards in South Wales; urban authorities; rural district councils with highway powers; vestries and district boards in London, and the Commissioners of Sewers in the City of London. Of these, however, the first three exist temporarily only.

It will be observed that when the transfer of highway functions to the rural district councils is complete, the expense of maintaining the highways in a "highway parish" falls on that highway parish sepa-

rately only in exceptional cases, and in such cases only owing to the accident that the highway parish is coextensive with some other area; and that highway parishes are not, save again fortuitously, even separately rated towards highway expenses as constituent parts of larger areas. The highway parish as such will therefore shortly have ceased to be an area of any substantial importance for administrative purposes.

Neither the appointment of a surveyor under the Highway Act, 1835, nor the inclusion of a highway parish in a highway district, relieved the inhabitants from liability to indictment if the highway was suffered to fall into disrepair. See 5 & 6 Will. IV., c. 50, s. 95; 25 & 26 Vict., c. 61, ss. 18, 19; *Reg.* v. *Sandon Inhabitants* (1854), 3 El. & Bl. 547, 23 L. J. M. C. 129. Nor again did the making of a highway into a turnpike road relieve the inhabitants of the highway parish from liability to indictment: see *Reg.* v. *Lordsmere Inhabitants* (1850), 15 Q. B. 689, 19 L. J. M. C. 215; see also *Rex* v. *Netherthong Inhabitants* (1818), 2 B. & Ald. 179; *Rex* v. *Oxfordshire Inhabitants* (1825), 4 B. & C. 194, 6 Dowl. & Ry. 231; *Sunk Island Turnpike Trustees* v. *Patrington Surveyors* (1861), 1 B. & S. 747, 31 L. J. M. C. 18. So also local Acts providing for the maintenance of highways by commissioners, or by a canal company, have been held not to relieve the inhabitants from liability. See *Rex* v. *St. George, Hanover Square, Inhabitants* (1812), 3 Camp. 222, 13 R. R. 792; *Rex* v. *Brightside Bierlow Inhabitants* (1849), 13 Q. B. 933, 19 L. J. M. C. 50; see also *Little Bolton Inhabitants* v. *Reg.* (1843), 12 L. J. M. C. 104.

It seems, therefore, that even in the case of a highway in an urban district, or in a rural district where the council are the highway authority, the liability of the highway parish to indictment remains notwithstanding that for administrative purposes the highway parish has ceased to have any distinct existence. Even in the case of a main road repairable by the county council it is by no means clear that the liability of the highway parish to indictment is extinguished. See, in addition to the cases above referred to, *Reg.* v. *Mayor, &c. of Wakefield* (1888), 20 Q. B. D. 810, 57 L. J. M. C. 52, 36 W. R. 911. The Local Government Act, 1894 (56 & 57 Vict., c. 73, ss. 6 (1, *a*), 19 (4); and see the definition of "vestry" in sect. 75 (2), and see *Reg.* v. *Mayor, &c. of Poole* (1887), 19 Q. B. D. 602, 683, 56 L. J. N. C. 131, 57 L. T. 485, 36 W. R. 239), however, render it somewhat doubtful whether the indictment should not now, in the case of a highway parish coextensive with a rural parish, be against the parish council or parish meeting, as the case may be, instead of against the inhabitants.

Recourse to an indictment of a parish, where it is sought to enforce the repair of a way alleged to be a highway repairable by the inhabitants at large, can, however, now very generally be avoided, as advan-

tage may be taken of certain statutory remedies. The most generally available remedy of the kind is that provided by the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict., c. 77, s. 10), under which a complaint may be made to the county council, and after preliminary steps, if the liability to repair is denied, the highway authority may be indicted. See *Reg.* v. *Cheshire Justices* (1883), 50 L. T. 483; *Reg.* v. *Mayor, &c. of Wakefield, supra*. This remedy is, however, apparently not available in the case of a road in a county borough, nor in the case of a way alleged to be a main road repairable by the county council. The statutory remedies available in such cases (5 & 6 Will. IV., c. 50, ss. 94, 95; 25 & 26 Vict., c. 61, ss. 18, 19) are imperfect, since if the liability to repair is denied, the procedure either breaks down altogether or leads up to a common-law indictment of the parish. There is accordingly at present much difficulty where it is desired to enforce the repair of a road alleged to be a main road repairable by the county council, or of a road in a county borough alleged to be repairable by the inhabitants at large.

In this connection reference must be made to provisions in the Local Government Act, 1894 (56 & 57 Vict., c. 73, ss. 16, 19 (8), and see s. 63), under which parish councils and parish meetings have special remedies where a rural district council make default in maintaining a highway which it is their duty to maintain.

Formerly the liability of the highway parish to repair a highway attached upon the dedication of the way, without any formal adoption on the part of the parish: see *Rex* v. *Leake Inhabitants* (1833), 5 B. & Ad. 469, 2 N. & M. 533; *Reg.* v. *French* (1879), 4 Q. B. D. 507, 48 L. J. M. C. 175; *Eyre* v. *New Forest Highway Board* (1892), 56 J. P. 517; if the highway was actually used by the public: see *Cubitt* v. *Maxse* (1873), L. R. 8 C. P. 704, 42 L. J. Q. B. 278; *Attorney-General* v. *Biphosphated Guano Co.* (1879), 4 Ch. D. 327, 49 L. J. Ch. 68. Since the Highway Act, 1835 (5 & 6 Will. IV., c. 50), however, a formal adoption of the highway under sect. 23 of that Act, or under some similar enactment (*e. g.* 25 & 26 Vict., c. 61, s. 36; 38 & 39 Vict., c. 55, s. 152), is in general necessary to render a new highway repairable at the public expense. See *Reg.* v. *Dukinfield Inhabitants* (1863), 4 B. & S. 158, 32 L. J. M. C. 230. It therefore may frequently become material to inquire whether a particular highway was a highway before the Act or not. Whether the critical date is August 31st, 1835, the date of the passing of the Act, or March 20th, 1836, the date of the commencement of the Act, is doubtful. See 5 & 6 Will. IV., c. 50, s. 119, repealed by the Statute Law Revision (Nov. 2) Act, 1888; 33 & 34 Vict., c. 73, s. 12.

There are cases in which a highway made since the Act of 1835 becomes repairable by the inhabitants at large without formal adoption;

e. g. a highway made by a local authority under statutory provisions in that behalf: see *Kingston-upon-Hull Local Board* v. *Jones* (1856), 1 H. & N. 489, 26 L. J. Ex. 33; or a road made by turnpike trustees since the Act and allowed to remain open after the expiry of the Turnpike Act: see *Reg.* v. *Thomas* (1857), 7 El. & Bl. 399. As to roads disturnpiked since August 9th, 1863, see 33 & 34 Vict., c. 73, s. 10. Roads disturnpiked since December 31st, 1870, are generally main roads, as has been mentioned.

It has been suggested that sect. 23 of the Highway Act, 1835, does not apply to footpaths, and that footpaths still become repairable by the inhabitants at large upon dedication; and the question, upon which there is no authority, is certainly open to argument.

AMERICAN NOTES.

The statement of the common-law doctrine in the first paragraph of the Rule is recognized as correct in *Commissioners* v. *Martin*, 4 Michigan, 557; 69 Am. Dec. 333; *Hill* v. *Boston*, 122 Massachusetts, 344; 23 Am. Rep. 332; *Washer* v. *Bullitt County*, 110 United States, 558; *People* v. *Dover, &c. Comm'rs*, 158 Illinois, 197; *Rowe* v. *Portsmouth*, 56 New Hampshire, 291; *Rapho* v. *Moore*, 68 Penn. State, 404; *Richmond* v. *Long's Adm'rs*, 17 Grattan (Virginia), 375; *Cooper* v. *Athens*, 53 Georgia, 638; *Aldrich* v. *Tripp*, 11 Rhode Island, 141; 23 Am. Rep. 434.

But "the rule of the common law imposing upon counties or hundreds the duty of repairing public bridges has not been sustained by many of the American Courts; and the decisions of these Courts are very decidedly opposed to the rule:" Elliott on Roads and Streets, p. 40. The same writer continues (p. 319): "The type of the American county is the British shire; but the American county is a stronger and more compact organization than the British shire, and it is invested with more comprehensive powers. It is in truth a political unit. The Normans seem to have framed the county system, and under the system as they framed it the county was governed by the sheriff, whose power was almost autocratic. It seems that the American decisions which have followed the English doctrine respecting the hundred and the shire have wandered somewhat from the true path, inasmuch as they have lost sight of the important fact that an American county is much more completely organized and possesses much more extensive powers with respect to local affairs than did the English shire or county. In following the English theory, the Courts have in many instances applied a rule in American counties that it is not easy to sustain on solid principle. . . . The common-law responsibilities of counties to repair bridges has never prevailed in the United States." 2 Dillon on Municipal Corporations, sect. 728 n., 997. To this effect: *Hedges* v. *Madison*, 1 Gilman (Illinois), 567; *Hill* v. *Livingston County*, 12 New York, 52; *Huffman* v. *San Joaquin County*, 21 California, 426; *Mower* v. *Inhabitants*, 9 Massachusetts, 247; 6 Am. Dec. 63; *Whitall* v. *Freeholders*, 40 New Jersey Law, 302; *Askew* v. *Hale County*, 54 Alabama, 639; 25 Am. Rep. 730; *Dosdall* v. *County of Olmstead*, 30 Minnesota, 96; 44 Am. Rep. 185

(sidewalk adjacent to courthouse); *Wabash County* v. *Pearson*, 120 Indiana, 426; 16 Am. St. Rep. 325; notes, 2 Am. St. Rep. 591; 68 Am. Dec. 291–300; *Heigel* v. *Wichita County*, 84 Texas, 392; 31 Am. St. Rep. 63; *Soper* v. *Henry County*, 26 Iowa, 264; *Sutton* v. *Board*, 41 Mississippi, 236; *Barbour County* v. *Horn*, 48 Alabama, 566; *Hamilton County Comm'rs* v. *Mighels*, 7 Ohio State, 109. The doctrine is uniformly laid down that the liability of a county for the repair of highways and bridges is purely statutory, and it is generally the subject of statutory provision.

The first principal case is cited in *State* v. *Hudson County*, 30 New Jersey Law, 137; but it is there held that no indictment lies against the inhabitants of a county for not repairing bridges over rivers, "because the statute law of the colony placed that duty on the townships," and no statute has imposed it on the State. The Court make the following interesting observations: "The truth of the whole matter is obviously this: By the common law of England, the inhabitants of counties, from time immemorial, had been charged for the repairs of bridges within their bounds, and were indictable in the King's Bench for not doing so. They were not indictable as a corporation, but individually and by reason of their inhabitancy of the county, like hundreds were under the constitution of King Alfred, for a loss within their bounds by robbery. This was an inconvenient arrangement. The inhabitants had no, or very inconvenient, machinery to raise the money or fine among themselves. The sentence went against them individually, and enforced against the first the officers could catch, and kept on till the bridge was repaired; and those who were so unlucky as to be caught had to get contribution from the rest of the inhabitants as best they could. Then came the statute of 22 Henry VIII., upon which have been built and framed all the acts passed both in England and this State since, and by paring, chipping, and patching which our own present statutes have been formed. The statute of 22 Henry VIII. had two objects in view: one was to give the Quarter Sessions jurisdiction over indictments at common law for not repairing bridges, and so bring justice near the people; and the other was to provide convenient machinery to raise taxes to repair bridges, and by that means prevent the necessity of indicting the inhabitants for not repairing. The statute of 22 Henry VIII. consequently left there untouched the common-law principle, that the inhabitants of counties should repair, and gave, first, jurisdiction to the Quarter Sessions, as well as the King's Bench, to try and present the inhabitants for not repairing; and second, by giving to certain officers power to raise taxes to repair bridges. This statute consequently left the inhabitants of counties in England liable to indictment if for any reason the bridges were not repaired.

"But when this colony began to be settled, almost the first thing they did was to relieve the inhabitants of counties from the obligation to repair, by putting it on the townships, and so the liability remained here for a hundred years, and until the Revolution."

No. 17. — RUSSELL *v.* MEN OF DEVON.

(K. B. 1788.)

No. 18. — PENDLEBURY *v.* GREENHALGH.

(C. A. 1875.)

No. 19. — COWLEY *v.* NEWMARKET LOCAL BOARD.

(H. L. 1892.)

RULE.

No action will (at common law) lie by an individual against the inhabitants of a county or parish for injury sustained by want of repair to a bridge or highway which the county or parish ought to have repaired.

Nor will an action for such cause lie against the surveyor of highways or local board upon whom the same duty of repair has devolved by statute.

But where a surveyor of highways undertakes repairs, and leaves the work to be done in a manner which is dangerous, and the plaintiff is thereby injured, he has a good cause of action against the surveyor.

Russell v. Men of Devon.

2 Term Reports, 667–673 (1 R. R. 585).

Non-repair of Bridge. — Action by Individual does not lie.

[667] No action will lie by an individual against the inhabitants of a county for an injury sustained in consequence of a county bridge being out of repair.

This was an action upon the case against the men dwelling in the county of Devon, to recover satisfaction for an injury done to the waggon of the plaintiffs in consequence of a bridge being out of repair, which ought to have been repaired by the county; to which two of the inhabitants, for themselves and the rest of the men dwelling in that county, appeared, and demurred generally.

Chambre, in support of the demurrer, insisted that by the laws of this kingdom no civil action can be maintained against the inhabitants of a county at large for any injury sustained by an

No. 17. — Russell v. Men of Devon, 2 T. R. 667. 668.

individual in consequence of a breach of their public duty. No instance can be found of any attempt to support such an action as the present, which is a strong argument to show that such an action will not lie, especially where the circumstances, which should give occasion to it, are in daily occurrence; for on principle there can be no distinction between any special injury arising from a neglect in not repairing a bridge and a highway.

But this * does not rest on general observation only; for [* 668] if the principles on which this action must be supported are examined, it will be found equally clear. Consider, first, who are the necessary parties to all civil suits; they must either be brought against individuals who are to be particularly named, or against corporations, or against persons who are rendered liable by the provisions of particular Acts of Parliament: if it be brought against individuals, all of them must be brought before the Court; they must appear before the Court or be outlawed. This mode of bringing actions against large bodies of men would render nugatory the privileges of the Crown of creating corporations, and would destroy the mode of suing corporations in their corporate capacity. And no Act of Parliament has yet made the inhabitants of a county at large liable in this case. Besides, here the defendants are the men of Devon, who must be taken to mean the inhabitants of that county at the time of purchasing the writ: but the inhabitants of a county are a fluctuating body, and before judgment obtained other persons may have come to reside in the county, when the whole damages may be levied on such innocent persons; whereas, if the action could be maintained at all, the damages should be paid by those who were inhabitants at the time when the injury was sustained. And it is a principle of law that no man shall be responsible for any injury unless occasioned by his own act or default. If it be contended that this mode of suing is founded on the analogy it bears to actions on the statute of hue and cry, and actions on the 9 Geo. I., c. 22, s. 7, to recover damages sustained by fire, the answer is that the Legislature has given a remedy in those particular instances; and when an Act of Parliament renders any description of men liable to an action, the Courts of law must devise some means by which they may be sued. But the statutes of hue and cry furnish an argument to show that the present action cannot be maintained. The obligation to make hue and cry subsisted at common law, 2 Inst. 172,

or at least by the Statute of Westminster 1st, 3 Ed. I., c. 9, which was prior to the Statute of Winton, 13 Ed. I., st. 2, s. 6, by which the inhabitants of a hundred were subjected to an action. But if the hundred had been liable to a civil action by the common law, or the Statute of Westminster, which raised the duty, the Statute of Winton would have been nugatory. But it was only on the ground of the hundred's not being liable before that [* 669] * time that the Legislature made them responsible in a civil action. The consequence of permitting these sort of actions to be maintained deserves the serious attention of the Court, since it must necessarily lead to a multiplicity of actions; for as the whole damages to be recovered might be levied on any one individual, he must have recourse to numberless suits in order to reimburse himself for the excess which he must pay beyond his own proportion. The principle which decides against this kind of action is in Bro. Abr., title " Accion sur le case," pl. 93, where it is said that if a highway be out of repair, by which my horse is mired, no action lies, *car est populus et surra reforme per presentment;* which must be understood to mean that, as the road ought to be repaired by the public, no individual can maintain an action against them for any injury arising from their neglect.

Gibbs, *contra.* — The general principle is, that where one person receives an injury by any other person or persons omitting to do what by law he or they are bound to do, he may maintain an action on the case to recover satisfaction for the damage he has received in consequence of that omission. In the present case the county were bound to repair this bridge; they omitted to do so; and the plaintiffs received a particular injury by that omission. It is true that this neglect in the county was a public nuisance, and was an injury to all the King's subjects, and that no individual could have brought an action for his share of the general injury; but this is a special damage sustained by the plaintiffs, who have therefore a right to recover a satisfaction in damages. In *Iveson* v. *Moore,* 1 Ld. Raym. 486, it was held that an action on the case for stopping a public way, whereby persons were prevented from coming to the plaintiff's colliery, might be supported. So that there is no objection to this action from the nature of the injury. If any individual, or a corporation, ought to have repaired this bridge, there can be no doubt but that the action would have lain. Now there is no difference between an

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action against an individual, or a corporation, and the present, which is brought against the men residing in the county of Devon, who have been guilty of the same neglect. With respect to the plaintiffs, the injury is the same; they are equally innocent, and have suffered by the default of others, who were bound by law to perform a duty which they neglected: they therefore, * upon every principle of reason and justice, ought to have [* 670] reparation. With respect to the defendants, they are equally guilty of a breach of duty, and are at least equally able to make this compensation; they therefore, on the same principles of reason and justice, ought to make satisfaction to the plaintiffs who have suffered by their neglect. *Et ubi eadem est ratio idem est jus.* Upon principle, therefore, the plaintiffs are entitled to recover a satisfaction against the defendants; but the defendants wish to shelter themselves under the forms of law, and say that, though in justice they ought to make a compensation, there is no mode by which they can be compelled to do it. However, there is no ground for such an objection, because they may be compelled to appear in a civil action by the same process by which they are brought into Court in an indictment, namely, by *venire* and *distringas*. With respect to the statutes of hue and cry, from which part of the defendant's argument was drawn, it will appear, on consideration, that the cases which have been determined on those statutes furnish an argument in favour of this action. All actions against the hundred are brought on the 13 Ed. I., c. 2: 1 Ventr. 235; Yelv. 116; and not on the statute 27 Eliz., c. 13; and therefore if a declaration were to conclude *contrà formam statutorum* it would be bad. The statute 13 Ed. I., c. 2, enacts that inquests shall be made in the hundred, &c., where felonies are committed, so that the offender may be attainted, and if the county will not answer for the bodies of such offenders, every county, that is, the people dwelling in the county, shall be answerable for the robberies done, and also the damages, so that the whole hundred where the robbery shall be done shall be answerable. And "by construction upon the Statute of Winton, 13 Ed. I., if the country do not apprehend the felon within forty days, an action lies against the inhabitants of the hundred where the robbery was committed for the money or goods whereof the party was robbed." 3 Com. Dig., tit. Hundred, C. 2. Now it is to be observed that the statute does not prescribe the form of action or

the mode of proceeding against the hundred — it merely declares that they shall be answerable; but the common law interfered and supplied the form of action and the process by which they are to be brought into Court. Then to argue by analogy: as in that case the common law furnished the form of action to recover [* 671] against the hundred * that satisfaction which the Legislature declared they should make, so in the present case it will afford a remedy, and compel the county to make that compensation which it says on principle they are bound to do. It has been said that great injustice might be done to those who are not inhabitants of the county at the time when this injury was sustained, by making them responsible for the neglect of their predecessors; but that objection would apply with equal force to the action on the statutes of hue and cry as to this. With respect to the argument drawn from the novelty of the action, it may be answered by recollecting that the persons who are bound to repair bridges and roads are generally compelled by indictment to repair them before any special damage has been sustained. As to the case in Bro. Abr., perhaps it was not considered to be such a partial injury for which an action would lie. The instance put is only that of miring a horse; but it does not follow that, if there had been any serious damage,[1] the action would not have lain. However, it is to be observed that, at the time when that case was determined, doubts were entertained concerning other actions upon the case, which are now clearly held to be maintainable; for it was doubted by Baldwin, C. J., whether an action could be supported for a special damage arising from a nuisance in a highway; though Fitzherbert, J., was indeed of a different opinion. *Vid.* 5 Co. Rep. 73 a.

Chambre, in reply, was stopped by the Court.

Lord Kenyon, C. J. — If this experiment had succeeded, it would have been productive of an infinity of actions. And though the fear of introducing so much litigation ought not to prevent the plaintiff's recovering, if by law he is entitled, yet it ought to have considerable weight in a case where it is admitted that there is no precedent of such an action having been before attempted. Many of the principles laid down by the plaintiff's counsel cannot be controverted; as that an action would lie by an individual for an

[1] The case in 5 Ed. IV., 2, from which the passage in Brooke is taken, supposes a damage to be sustained in consequence of miring the horse.

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injury which he has sustained against any other individual who is bound to repair. But the question here is, whether this body of men, who are sued in the present action, are a corporation, or *quâ* a corporation, * against whom such an action [* 672] can be maintained. If it be reasonable that they should be by law liable to such an action, recourse must be had to the Legislature for that purpose. But it has been said that this action ought to be maintained by borrowing the rules of analogy from the statutes of hue and cry; but I think that those statutes prove the very reverse. The reason of the Statute of Winton was this: as the hundred were bound to keep watch and ward, it was supposed that those irregularities which led to robbery must have happened by their neglect. But it was never imagined that the hundred could have been compelled to make satisfaction till the statute gave that remedy; and most undoubtedly no such action could have been maintained against them before that time. Therefore, when the case called for a remedy, the Legislature interposed; but they only gave the remedy in that particular case, and did not give it in any other case in which the neglect of the hundred had produced any injury to individuals. And when they gave the action, they virtually gave the means of maintaining that action — they converted the hundred into a corporation for that purpose; but it does not follow that, in this case, where the Legislature has not given the remedy, this action can be maintained. And even if we could exercise a legislative discretion in this case, there would be great reason for not giving this remedy; for the argument urged by the defendant's counsel, that all those who become inhabitants of the county, after the injury sustained and before judgment, would be liable to contribute their proportion, is entitled to great weight. It is true, indeed, that the inconvenience does happen in the case of indictments; but that is only because it is sanctioned by common law, the main pillar of which, as Lord COKE says, is unbroken usage. Among the several qualities which belong to corporations, one is, that they may sue and be sued; that puts it, then, in contradistinction to other persons. I do not say that the inhabitants of a county or hundred may not be incorporated to some purposes; as if the King were to grant lands to them, rendering rent, like the grant to the good men of the town of Islington. Dyer, 100. But where an action is brought against a corporation for damages, those damages

[* 673] are not to be recovered against the corporators in * their individual capacity, but out of their corporate estate; but if the county is to be considered as a corporation, there is no corporation fund out of which satisfaction is to be made. Therefore I think that this experiment ought not to be encouraged. There is no law or reason for supporting the action, and there is a precedent against it in Brooke; though even without that authority I should be of opinion that this action cannot be maintained.

Ashhurst, J. — It is a strong presumption that that which never has been done cannot by law be done at all. And it is admitted that no such action as the present has ever been brought, though the occasion must have frequently happened. But it has been said that there is a principle of law on which this action might be maintained; namely, that where an individual sustains an injury by the neglect or default of another, the law gives him a remedy. But there is another general principle of law which is more applicable to this case, — that it is better that an individual should sustain an injury than that the public should suffer an inconvenience. Now if this action could be sustained, the public would suffer a great inconvenience; for if damages are recoverable against the county, at all events they must be levied on one or two individuals, who have no means, whatever, of reimbursing themselves; for if they were to bring separate actions against each individual of the county for his proportion, it is better that the plaintiff should be without remedy. However, there is no foundation on which this action can be supported; and if it had been intended, the Legislature would have interfered and given a remedy, as they did in the case of hue and cry. Thus this case stands on principle: but I think the case cited from Brooke's Abridgment is a direct authority to show that no such action could be maintained; and the reason of that case is a good one, namely, because the action must be brought against the public.

Buller, J., and Grose, J., assented.

Judgment for the defendants.

Pendlebury v. Greenhalgh.

1 Q. B. D. 36-41 (s. c. 45 L. J. Q. B. 3; 33 L. T. 472; 34 W. R. 98).

[36] *Negligence. — Surveyor of Highways, Liability of, for Misfeasance.*

Defendant was surveyor of highways, appointed by the vestry of a parish at a salary. By a resolution of the committee of management for the highways,

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appointed by the vestry, it was ordered that about 150 yards of a road should be raised, and the defendant, as surveyor, was directed to carry out the resolution. Defendant contracted with G. to do the labour at 3½*d.* per yard, the vestry finding stones and materials. G. worked himself, and employed and paid his own men, and the defendant, as surveyor, employed men to cart materials to the ground. Defendant set the work out and determined the levels, but had nothing to do with the paving himself, except superintending on behalf of the committee. The work was carried out by raising one half of the width of the road about a foot, leaving the other half at its old level: and a considerable length of road was so left without light or fencing at night: and in consequence of this the dog-cart of the plaintiff, which he was driving along the road, was upset and he was injured. Defendant had been previously warned of the dangerous condition of the road. The jury found that leaving the road in its then state, without * light or warning, was negligence: but that de- [*37] fendant did not personally interfere in doing the work, or directing the road to be left as it was.

Held, the Court having power to draw inferences of fact, that the defendant was liable.

Semble, that s. 56 of 5 & 5 Vict., c. 50 (which imposes a penalty on a surveyor who causes any heap of stones or other matter to be laid on the highway, and allows it to remain there at night without proper precautions), did not apply to such a case.

Appeal from the decision of the Court of Queen's Bench, making absolute a rule to enter a verdict for the defendant.

The cause was tried before MELLOR, J., at the Manchester Winter Assizes, 1872.

The defendant is the surveyor of highways for the township of Tottington Lower End, appointed by the vestry at a salary; and the action was brought to recover damages for personal injuries sustained by the plaintiff through a fall from a dog-cart which he was driving along a road within the said township, under the following circumstances: —

Shortly before the accident in question it had been ordered by a resolution of the committee of management for the highways, appointed by the vestry, that a part of the road, about 150 yards in length, should be raised, and the defendant was, as such surveyor, directed to carry out such resolution.

The defendant accordingly contracted with one John Greenhalgh to do the labour at 3½*d.* per yard, the vestry finding stones and materials.[1]

[1] In answer to the Court it was stated by counsel that the agreement was not in writing.

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John Greenhalgh worked himself, and employed and paid his own men, and proceeded to perform the work accordingly, and the defendant, as surveyor, employed men to cart materials to the ground.

The defendant stated that he set the work out and determined the levels, but had nothing to do with the paving himself, except superintending on behalf of the committee.

The work was being done by raising about one half of the width of the road about a foot or fifteen inches, leaving the other half at its old level, and at the time of the occurrence in question [* 38] a considerable * length of road had been so dealt with, one half of the width being a foot or more higher than the other half.

No fence, or light, or any other protection was put up to warn persons using the road at night of the difference of level.

On the night of the 23rd of May, 1872, the plaintiff, in driving along the road, came in contact with the part of the road which had been raised to a higher level, and his vehicle was upset, and he himself injured.

The plaintiff was not guilty of any contributory negligence.

The defendant, before the accident, had been warned by persons using the road that its condition was dangerous, but took no steps to provide any protection until after the accident, when he caused a light to be put up.

The jury found that the leaving the road in its then state, without light or warning, was negligence, but that the defendant did not personally interfere in doing the work or directing the road to be left as it was.

A verdict was entered for the plaintiff, damages £20, and leave was reserved to the defendant to move to enter the verdict for him, the Court to have power to draw inferences of fact. A rule was obtained accordingly, on the ground that no personal liability on the part of the defendant was shown.

This rule was afterwards made absolute, following the decision of the Court in *Taylor* v. *Greenhalgh*, L. R. 9 Q. B. 487, which was another action arising out of the same accident.

Ambrose, Q. C., for the plaintiff. — The defendant took an active part in the levelling of the road, and was not the mere instrument by whom the contract was made on behalf of the committee with John Greenhalgh, as the Court of Queen's Bench seem to have

thought. First, the interference with the highway was an illegal act; there was no power in the vestry to give the order to alter the level; all that the surveyor or committee of management can do is to keep the roads in repair. See ss. 6, 9, and 18 of 5 & 6 Wm. IV., c. 50.

[Lord COLERIDGE, C. J. — Surely the parish have power to alter the level.]

* Not without first obtaining an order of Justices. But, [* 39] secondly, assuming the work to be *primâ facie* authorised in law, still the defendant is liable for the negligent mode in which the work was left.

[Lord CAIRNS, C. — Is there any case in which a surveyor of highways has been held liable?]

There is a class of cases, such as *Young* v. *Davis*, 2 H. & C. 197, in which a surveyor has been held not liable; but that is only for nonfeasance, and the principle is, that he stands in the position of the parish, and a parish can only be indicted for the non-repair of a highway. Here the act is an act of misfeasance in leaving the road in a dangerous state without fence or light. *Foreman* v. *Canterbury*, L. R. 6 Q. B. 214, shows that such a public body as the committee of the vestry for highways would be liable, and the same principle applies to the defendant, their surveyor, if he be himself guilty of negligence. In *Newton* v. *Ellis*, 5 E. & B. 115, 24 L. J. Q. B. 337, it was a question of notice of action, but it was never suggested that the surveyor would not have been liable for personal negligence under similar circumstances to the present.

[Lord CAIRNS, C. — It must be taken that the defendant employed a competent person to do the work.]

John Greenhalgh was only employed to do the labour. Although the jury have found that the defendant did not personally interfere in doing the work and in directing the road to be left as it was, yet the Court are to draw inferences of fact, and the defendant himself stated that he superintended the work on behalf of the committee; and he had express notice of the dangerous state the road was left in. Lastly, the defendant would be liable by virtue of s. 56 of 5 & 6 Wm. IV., c. 50,[1] which imposes a penalty

[1] 5 & 6 Wm. IV., c. 50, s. 56: "If any surveyor shall lay, or cause to be laid, any heap of stone, or any other matter or thing whatsoever, upon any highway, and allow the same to remain there at night to the danger or personal damage of any

on a surveyor who leaves stones or other matter in a danger-
[* 40] ous * position on a road, on the principle of the cases cited in the Court below [L. R. 9 Q. B., at p. 489, n. (1)].

[Lord Cairns, C. — That section applies to leaving materials in a dangerous position; it was the road itself here that was dangerous, not the materials.]

J. Edwards, Q. C., for the defendant. — No point was made at the trial that the act of raising the level of the road was unlawful: it must be taken, therefore, for the present purpose, to have been lawful; and then the case simply amounts to an attempt to make the defendant, *quâ* surveyor, liable, although he did not personally interfere.

[Lord Coleridge, C.J. — Is that so on the facts? *Foreman* v. *Canterbury*, L. R. 6 Q. B. 214, seems very much in point.]

Ambrose, Q. C., was not heard in reply.

Lord Cairns, C. — Although the conclusion at which this Court has arrived does not agree with that of the Court of Queen's Bench, the difference is not so much a difference on any point of law as a difference between the view taken by the Court of Queen's Bench of the facts and the view which this Court takes of the facts as stated in the case. The first question, as in most of these kinds of cases, is one of fact, and we have to ascertain what was the precise state of facts with regard to the steps taken by the defendant to carry out the work directed to be done by the resolution of the committee. We may assume that what the committee resolved should be done was perfectly lawful if done in a proper manner, viz., the alteration of the level of the highway. The case states: "It had been ordered by a resolution of the committee of management for the highways appointed by the vestry that a part of the road, about 150 yards, should be raised, and the defendant was, as such surveyor, directed to carry out such resolution." Now, I will assume that the defendant, as he could not have carried out the resolution with his own hands, would not have been responsible in the present instance, if he had contracted in a proper manner with a third person to carry out the work with all its incidents. But he did not contract with John Greenhalgh for the performance of the work as a whole. He contracted, at

person passing thereon, all due and reasonable precaution not having been taken by the surveyor to guard against the same, he shall forfeit for every such offence any sum not exceeding £5."

No. 19. — Cowley v. Newmarket Local Board, 1892, A. C. 345.

* most, for the performance of a part only. The case pro- [*41]
ceeds: "The defendant accordingly contracted with one John Greenhalgh to do the labour at 3½*d.* per yard, the vestry finding stones and materials. John Greenhalgh worked himself, and employed and paid his own men, and proceeded to perform the work, and the defendant, as surveyor, employed men to cart materials to the ground. The defendant stated that he set the work out and determined the levels, but had nothing to do with the paving himself, except" — a most material exception — "superintending on behalf of the committee." It was very properly admitted on the argument that it was necessary that during the night the road under alteration should be fenced off or lighted, in order to avoid danger to persons driving along it. Now, the work to be done was of a complex kind; it consisted of four parts, — the materials, labour, superintendence, and, as incident to the work, lighting and fencing during the night. We have, therefore, to look and see what the defendant contracted for with John Greenhalgh out of these four items. I cannot see that he — it is stated expressly — contracted for anything except labour; the materials were found by the vestry, superintendence by the defendant, as surveyor. By whom was the fencing and lighting to be supplied? The defendant, no doubt, might have stipulated that the man supplying the labour should supply the light or fencing. The contract, we are informed, was not in writing, and we must take it that the labour alone was contracted for. If the defendant did not contract for the fencing or lighting, then the duty of fencing and lighting remained in the defendant, for which he remained responsible. Therefore, without laying down any general rule, I think, under the circumstances of this case, the defendant continued liable, and that the plaintiff is entitled to judgment.

Lord COLERIDGE, C. J., BRAMWELL, B., and BRETT, J., concurred. *Judgment reversed.*

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1892, A. C. 345-355 (s. c. 62 L. J. Q. B. 65; 67 L. T. 486).

Surveyor of Highway. — Liability to Action for Non-repair of Highway. [345]
— Statutory Duty, Breach of.

A highway was, by virtue of the Public Health Act, 1875, vested in and under the control of a local board as the urban authority for the district. Sects. 144 and 149 of that Act provide that the urban authority shall have and

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be subject to all the powers, duties, and liabilities of surveyors of highways, and shall from time to time level, alter, and repair the highways vested in them as occasion may require. An owner of land adjoining the highway, in making an approach to his land without the sanction or authority of the local board, made a drop in the level of the highway and left it in a dangerous condition. The appellant walking along the highway fell down the drop and was injured. In an action by him against the local board for suffering the highway to be [*346] out of repair and in a dangerous * condition, it appeared that the local board was chargeable only with nonfeasance and not with misfeasance.

Held, affirming the decision of the Court of Appeal, that no action lay against the local board.

Appeal from a judgment of the Court of Appeal affirming a judgment of the Queen's Bench Division.

The appellant brought an action against the respondents, alleging in his statement of claim that the defendants wilfully, wrongfully, and negligently built and placed and suffered to remain on the footway of the highway leading from Newmarket to Bury St. Edmunds, at a point opposite to the entrance of the yard and stables of one Captain Machell, a brick wall and a declivity formed thereby, without any guard or light or means to prevent persons from falling over the same; also that the defendants wrongfully suffered and permitted the footway to be and continue out of repair and in a state and condition dangerous to foot passengers using the same; and that by means of the said wrongful and negligent acts of the defendants the plaintiff, while lawfully using and walking upon and along the footway after daylight had ceased, fell over the brick wall and down the declivity and sustained severe injuries.

At the trial before DENMAN, J., and a common jury at Ipswich, the following facts were proved or admitted: —

The Bury Road where the plaintiff was injured was a portion of a highway within the district for which the defendants were the urban authority. In 1873 Captain Machell, being the owner of property adjoining the Bury Road, made an entrance into his stable yard by cutting through the footpath which formed part of the highway. His property being on a lower level than the highway, the entrance sloped downwards towards the stables, and Captain Machell built two dwarf walls to sustain the footpath on each side of the slope, thus making a drop of about eighteen inches in the footpath. This was done without the authority or sanction of the local authority. Up to 1886 the footpath at the

point in question was covered with grass; after 1886 it was gravelled by the defendants. The plaintiff, walking along the footpath one evening after dark, in January, 1889, fell over one of the dwarf walls into the slope and was [* 347] hurt. The nearest lamp to the spot where he fell was about seventy yards.

The jury found a verdict for the plaintiff for £200, and in answer to questions put by the learned Judge found that there was no negligence on the part of the plaintiff; that the defendants were guilty of negligence, and that the negligence consisted of "the combination of leaving the dwarf wall there and not supplying sufficient light." Upon further consideration, DENMAN, J., being of opinion that no cause of action had been made out, entered judgment for the defendants. This decision was affirmed by the Court of Appeal (Lord ESHER, M. R., LINDLEY and LOPES, L. JJ.).

May 17, 19. A. H. Poyser and F. K. North for the appellant: —

The decisions appealed against went upon the ground that the defendants were in the same position as that of a surveyor of highways under the old law, and not chargeable with misfeasance, but only with nonfeasance. But for several reasons those decisions are unsound. No doubt under the old highway law it was held that no action would lie by an individual against the inhabitants of a county for an injury sustained in consequence of a county bridge being out of repair: *Russell* v. *The Men of Devon*, 2 T. R. 667 (p. 694, *ante*); nor against the county sued in the name of the surveyor: *McKinnon* v. *Penson*, 8 Ex. 319, 9 Ex. 609; nor against the surveyor for an accident caused by his neglect to repair the highway: *Young* v. *Davis*, 2 H. & C. 197. But those decisions rested on the grounds that the surveyor being an individual it would be highly inconvenient to have actions brought against him, and that a penalty was imposed on the surveyor by the Highway Act (5 & 6 Wm. IV., c. 50). A local board would not be subject to any penalty, for the liability to specific penalties is not transferred by the general words of the Public Health Act, 1875. The liability of the defendants rests on the provisions of that Act (38 & 39 Vict., c. 55). By sect. 144 the urban authority is to execute the office of and be surveyor of highways, and to have and be subject to all the powers, authorities, duties, and liabilities of surveyors of highways under the law for the time being in

[* 348] force. Sect. 149 creates * a distinction between the old surveyor and the urban authority. It enacts that highways shall vest in and be under the control of the urban authority. The highway was not vested in the surveyor. Then sect. 149 enacts that the urban authority shall from time to time cause the highway to be levelled, paved, &c., altered and repaired, as occasion may require, with power to cause the soil of the streets to be raised, lowered, or altered, as they may think fit, and to place and keep in repair fences and posts for the safety of foot passengers.

The verdict of the jury finds that there was a clear breach by the defendants of the duty imposed by sect. 149 in not repairing this highway and in leaving it in a dangerous condition. By sect. 161 the urban authority has power to contract with any person for the lighting of the highways, and may provide such lamps and other materials and apparatus as they may think necessary for lighting the same. And the neglect to provide a sufficient light is also found by the verdict. For these breaches of statutory duties the defendants are liable on the principle established by *Couch* v. *Steel*, 3 E. & B. 402. The decision in *Gibson* v. *Mayor of Preston*, L. R. 5 Q. B. 218, no doubt seems adverse to this contention; but that case should be overruled: it is not consistent with *Hartnall* v. *Ryde Commissioners*, 4 B. & S. 361, which is a strong authority in favour of a right of action for breach of a statutory duty. There the judgment went on the ground that the defendants being liable to be indicted for the non-repair, an action lay by a person specially aggrieved. See also *Ohrby* v. *Ryde Commissioners*, 5 B. & S. 743, and *Bathurst* v. *Macpherson*, 4 App. Cas. 256.

Further, the defendants are liable for leaving the highway in a state of danger of the nature of a trap; they caused the footpath to be gravelled, and so invited the public to walk on it, with the risk of falling over the dwarf wall into the slope. This makes them liable (even though there be no misfeasance) upon the principle of the cases exemplified by *Barnes* v. *Ward*, 9 C. B. 392, and *White* v. *Hindley Local Board*, L. R. 10 Q. B. 219, 223; and see *Wandsworth Board of Works* v. *United Telephone Company*, 13 Q. B. D. 904 (p. 630, *ante*).

[* 349] * Winch, Q. C., and W. Baugh Allen, for the respondents, were not heard.

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The House took time for consideration.

Aug. 9. Lord HALSBURY, L. C. :—

My Lords, the effective part of the plaintiff's complaint is to be found in the third paragraph of the statement of claim: "That the defendants wilfully, wrongfully, and negligently built, and placed, and suffered to remain on the footway of the highway leading from Newmarket to Bury St. Edmunds, at a point opposite to the entrance of the yard and stables of one Captain Machell, a brick wall and a declivity formed thereby, without any guard or light, or means to prevent persons from falling over the same." And (paragraph 6) "that the plaintiff while lawfully using and walking upon and along the said footway after daylight had ceased fell over the said brick wall and down the said declivity, and suffered damage accordingly."

The facts were that the defendants are the Newmarket Local Board of Health, and the footway and the highway referred to were within the limits and under the care and management of the defendants as such local board of health; and the question appears to resolve itself into whether the public authorities in whom the highways are vested by the statute can be held liable in an action for any defect in the repair. I think in this case the liability would have to be put upon the ground that there was default in the construction of the highways through which an accident happened to a passenger. The wide consequences of the existence of such a right of action would be very serious.

As long ago as 1788 a question of an analogous character was raised in the Court of King's Bench; and the argument then, as now, was that where one person receives an injury by reason of any other person or persons omitting to do that which by law he or they are bound to do, he may maintain an action in the circumstances to recover satisfaction for the damage he has received in consequence of that omission.

In that case it was said (which seems to me to be decisive of this case) that the principle which decides against this kind of *action is accurately stated in Brooke's Abridg- [*350] ment, tit. Action on the Case, pl. 93, where it is said that "if an highway be out of repair by which my horse is mired no action lies, *car est populus et surra reforme per presentment*, which must be understood to mean that as the road ought to be repaired by the public no individual can maintain an action against

them for any injury arising from their neglect." *Russell* v. *The Men of Devon*, 2 T. R. 667 (p. 694, *ante*).

That that has been considered to be the law for now more than a hundred years is certain, and as has been pointed out the objection in point of form to an action against the surveyor of the highways was not only an objection of form, but underlying it there was the objection of substance.

The question of whether it was form or substance came before the Court of Exchequer in *McKinnon* v. *Penson*, 8 Ex. 319, 9 Ex. 609. The effort there had been to argue that inasmuch as the county could not in point of form be sued, and that previous judgments had referred to that fact, the 43 Geo. III., c. 59, s. 4, which enacted that the county might be sued in the name of its surveyor, disposed of the objection of form, as, indeed, it did. But the Court went on to say that that statute did not give, and was not intended to give, an action for such an injury against the county, but that in cases where rights could be maintained against the county an action might be brought against them in the name of their surveyor. That was therefore a distinct authority that no new right of action was intended to be created, and so far as I am aware that has continued to be the state of the authorities down to the present time.

It is true that in the case of *Hartnall* v. *Ryde Commissioners*, 4 B. & S. 361, a construction was placed upon a particular local Act which rightly or wrongly was assumed from its particular terms to have established and created for the first time a right of action for an injury resulting from a breach of the duty cast upon the Ryde Commissioners to repair their streets. Whether that case is quite consistent with the principles upon which cases of the class now before your Lordships have been decided or not it is immaterial to discuss. The language of the statute was different,

[* 351] and the ground of the decision was that a new and peculiar right had *been created. No such question, to my mind, arises here. With the exception to which I have last alluded, the principle has been maintained for certainly more than a century, and I am of opinion that in this case no ground has been put forward on which the long current of authorities should be disturbed.

I therefore move your Lordships that this appeal should be dismissed.

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Lord HERSCHELL: —

My Lords, the question which arises in this action is whether the defendants are liable in respect of an accident which happened to the plaintiff, owing to the existence of a drop of eighteen inches in the level of a footway vested in the defendants, in consequence of which the plaintiff fell and sustained considerable injury. The difference of level in the footway arose from a carriageway having been made for the purpose of access to Captain Machell's stable, the yard of which adjoined the footway. This work was executed by Captain Machell in the year 1873. The plaintiff in his statement of claim asserted that the defendants had wrongfully suffered and permitted the footway to be out of repair and in a condition dangerous to passengers. It appeared clearly at the trial that there had been no misfeasance on the part of the defendants. The utmost that could be charged against them was nonfeasance. It was strongly urged at the bar that the highway including the footway being vested in the defendants, they were responsible if it was not kept in proper condition and repair to any one who was injured by reason of its not being so kept. In support of their contention they relied mainly on the 144th and 149th sections of the Public Health Act, 1875. By the former of those sections every urban authority is to execute the office of surveyor of highways, and to exercise and be subject to all the powers, duties, and liabilities of surveyors. By the latter it is provided that the urban sanitary authority shall from time to time cause all streets vested in them to be levelled, paved, metalled, flagged, channelled, altered, and repaired, as occasion may require. Amongst the duties thus imposed upon the urban authority was undoubtedly the duty of keeping this highway in repair, and it is said that any person injured by the non-performance * of a [*352] statutory duty is entitled to recover against the person on whom that duty rests. I entertain very grave doubts whether the proposition thus broadly stated can be maintained. The principal authority in support of it is the decision of the Court of Queen's Bench in the case of *Couch* v. *Steel*, 3 E. & B. 402. But in the case of *Atkinson* v. *Newcastle Waterworks Company*, 2 Ex. D. 441, the late Lord CAIRNS and COCKBURN, C. J., and the present MASTER OF THE ROLLS all expressed serious doubts whether the case of *Couch* v. *Steel* was rightly decided, and whether the broad general proposition could be supported, that whenever a statutory

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duty is created any person who can show he has sustained injury from the non-performance of that duty can maintain an action for damages against the person on whom the duty is imposed. I share the doubt expressed by these learned Judges and the opinion expressed by Lord CAIRNS that much must "depend on the purview of the Legislature in the particular statute and the language which they have there employed." In the case of *Glossop* v. *Heston and Isleworth Local Board*, 12 Ch. D. 102, 109, JAMES, L. J., made some observations bearing on this point, which seem to me to be of great weight. In that case the plaintiff claimed an injunction to restrain a nuisance on the ground that the defendants had neglected to perform the statutory duty cast on them as the sanitary authority of a particular district. The learned LORD JUSTICE said: "It appears to me that if this action could be sustained, it would be a very serious matter, indeed, for every ratepayer in England in any district in which there is any local authority upon whom duties are cast for the benefit of the locality. If this action could be maintained, I do not see why it could not, in a similar manner, be maintained by every owner of land in that district who could allege that if there had been a proper system of sewage his property would have been very much improved." And he expressed the opinion that such a contention was not supported either by principle or authority. It is to be observed that the Highway Act, which defines the duties of surveyors of highways, prescribes the mode of proceeding when the duty of repairing the highway is unfulfilled and the liability [* 353] * which is then to attach to the surveyor. By sect. 94 he may be summoned before the justices, and if it appears either upon the report of a person appointed by them to view, or on their own view, that the highway is not in a state of thorough and perfect repair, they are to convict the surveyor in a penalty, and to make an order on the surveyor to repair it within a limited time; and if the repairs are not made within the time so limited the surveyor is to forfeit and pay to a person to be named and appointed in a second order a sum of money equal to the cost of repairing the highway. I think it, to say the least, doubtful whether, apart from the reasons to which I am about to refer, the contention that an action lies against the local board for a breach of their statutory duty to repair the highways can be maintained.

It was held as long ago as the case of *Russell* v. *The Men of*

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Deron, 2 T. R. 667 (p. 694, *ante*), that an action could not be maintained at common law by one of the public in respect of an injury sustained through a highway being out of repair. This decision was no doubt largely, but it was not exclusively, founded on the fact that the inhabitants of the county are not a corporation, and cannot be sued collectively. In the subsequent action of *McKinnon* v. *Penson*, brought against the county in the name of their surveyor for a similar cause, it was urged that the 43 Geo. III., c. 59, s. 4, which enacted that the county might be sued in the name of their surveyor, had removed the only difficulty in the way of the plaintiff. It was held, however, that the effect of the statute was not to create a new liability, but only a more convenient method of enforcing existing rights. And in *Young* v. *Davis* it was held in the Exchequer Chamber that a surveyor of highways was not liable to an action for injuries resulting from the breach of his duty to keep the highways in repair. It was argued in *Gibson* v. *Mayor of Preston* that the Public Health Act, 1848, did something more than impose upon the corporation the duties and subject them to the liabilities of surveyors of highways, and that under the provisions of that statute they were liable to a person suffering through the non-repair of a highway. The Queen's Bench, however, in a considered judgment, rejected this argument, and held that the *defendants [*354] were not liable. The provisions of the Public Health Act, 1875, on which the appellant now relies, are precisely similar to those upon which the judgment in *Gibson* v. *Mayor of Preston* proceeded. Your Lordships are asked to overrule that decision. I am not prepared to do so. The Legislature in 1875 re-enacted unaltered the provisions upon which this construction had been placed, and I cannot think that it was intended by the Legislature to impose the liability now contended for. The only case which can be relied on as affording any support to the appellant's contention is *Hartnall* v. *Ryde Commissioners*. But the legislation on which that case turned was not precisely the same, and the arguments which were so carefully considered and which prevailed in *Gibson* v. *Mayor of Preston* do not appear to have been insisted upon. For it appears to be assumed in the judgment that if the defendants were liable to be indicted for the non-repair of the highway as for a misdemeanour, an action would lie by any one specially aggrieved. No reasons are given for this conclusion,

which seems to have been treated as a necessary consequence. I think the judgment appealed from ought to be affirmed.

Lord HANNEN: —

My Lords, the plaintiff in his statement of claim alleges that the defendants (the Newmarket Local Board) negligently built, and placed, and suffered to remain on the footway of a road under their care, management, and control, a brick wall and a declivity formed thereby without any guard or light, whereby the plaintiff, while walking along the said footway after daylight had ceased, fell down the declivity and sustained injury.

The wall and declivity complained of were not constructed by the defendants, but were made many years ago by the owner of premises adjoining the footway for the convenient access of his horses from the road to his stables. This was done without the leave of the local authority. The only act done by the defendants in connection with this footway is that they have gravelled a portion of it in recent years. This was a proper thing in itself, and had nothing to do with the accident complained of.

The question, therefore, is reduced to this, whether the [* 355] defendants * in whom the powers and liabilities of surveyors of highways are vested by statute have thereby imposed upon them a liability to be sued for a cause of action which could not have been maintained against the surveyor of highways. This is a subject which has engaged the attention of the Courts on many occasions. The governing principle was stated in the Exchequer Chamber as long ago as 1863, in the case of *Young* v. *Davis*, 7 H. & N. 760, 2 H. & C. 198, that the surveyor of highways was not liable to be sued for damage resulting from the highway being out of repair because no action could have been brought against the parish, and that the Act of Parliament requiring the surveyor to keep the roads in repair was not passed for the purpose of creating a new liability, but simply in order to provide machinery whereby the duty of the parish to repair might be conveniently fulfilled.

This principle is equally applicable where the duties and liabilities of the surveyor have been transferred to other bodies, unless a distinct intention on the part of the Legislature can be inferred from the particular statute under consideration to create a new liability. This was laid down in 1870, in the case of *Gibson* v. *Mayor of Preston*, where the previous authorities were

considered; and, unless this House is prepared to overrule that case, it governs the present. After careful attention to the arguments which have been addressed to your Lordships, I adhere to the judgment given in the case of *Gibson* v. *Mayor of Preston*, and I therefore think that the judgment appealed from should be affirmed.

Lord MACNAGHTEN: —

My Lords, I concur, and have nothing to add.

Judgments appealed from affirmed and appeal dismissed.

Lords' Journals, 9th August, 1892.

ENGLISH NOTES.

The rule that no action will lie against the inhabitants of a county or parish in respect of special damage incurred by reason of neglect on the part of the inhabitants to repair, seems to be based on the fact that the inhabitants being a fluctuating unincorporate body could not be sued at all, and the rule that no action lay against the highway surveyor for mere non-repair appears originally to have been based on the ground that the duty to repair was that of a mere servant of the inhabitants in whom the real duty to repair remained.

Lately, however, and particularly in *Cowley* v. *Newmarket Local Board*, the immunity of the highway authority from actions in respect of mere neglect to repair has been to some extent treated as an example of a broad rule that local authorities are not liable to actions for damages for mere nonfeasance of a statutory duty, though they are for misfeasance. This doctrine, however, though now firmly established, is as yet not very fully developed. See *Gibraltar Sanitary Commissioners* v. *Orfila* (1890), 15 App. Cas. 401, 59 L. J. P. C. 95; *Pictou Municipality* v. *Geldert* (1893), 1893, A. C. 524, 63 L. J. P. C. 37, 69 L. T. 510, 42 W. R. 114; *Sydney Municipality* v. *Bourke* (1895), 1895, A. C. 433, 64 L. J. P. C. 140, 72 L. T. 605; *Brabant* v. *King* (1895), 1895, A. C. 632, 64 L. J. P. C. 161, 72 L. T. 785, 44 W. R. 157; *Robinson* v. *Mayor, &c. of Workington* (1897), 1897, 1 Q. B. 619; 66 L. J. Q. B. 388, 75 L. T. 674; as to the last case, see also *Peebles* v. *Oswaldtwistle Urban District Council* (1897), 1897, 1 Q. B. 625, 66 L. J. Q. B. 392, 76 L. T. 315.

AMERICAN NOTES.

The first principal case is cited in Elliott on Roads and Streets, p. 40, and in 2 Dillon on Municipal Corporations, sect. 962, and its doctrine has been followed. *Mower* v. *Leicester*, 9 Massachusetts, 247; *Weightman* v. *Washington Corp.*, 1 Black (U. S. Sup. Ct.), 39; *Morey* v. *Newfane*, 8 Barbour (New York Sup. Ct.), 645; *Young* v. *Edgefield R. Comm'rs*, 2 Nott & McCord (So.

Car.), 537; *Beardsley* v. *Smith*, 16 Connecticut, 375; *Gilman* v. *Laconia*, 55 New Hampshire, 130; 20 Am. Rep. 175; *McConnell* v. *Dewey*, 5 Nebraska, 385. To the same effect, *Board* v. *Pearson*, 120 Indiana, 426; 16 Am. St. Rep. 325; *Downing* v. *Mason County*, 87 Kentucky, 208; 12 Am. St. Rep. 473 (obstruction of watercourse); *Brabham* v. *Supervisors*, 54 Mississippi, 363; 28 Am. Rep. 352; *Kincaid* v. *Hardin*, 53 Iowa, 430; 36 Am. Rep. 236 (imperfect lighting of court-house); *Wehn* v. *Comm'rs*, 5 Nebraska, 494; 25 Am. Rep. 497 (jail nuisance); *Arkadelphia* v. *Windham*, 49 Arkansas, 139; 4 Am. St. Rep. 32; *Bates* v. *Rutland*, 62 Vermont, 178; 9 Lawyers' Rep. Annotated, 363; *Templeton* v. *Linn County*, 22 Oregon, 313; 15 Lawyers' Rep. Annotated, 730; *Flynn* v. *Canton Company*, 40 Maryland, 312; 17 Am. Rep. 603; *Board* v. *Arnett*, 116 Indiana, 438; *Mahanoy Township* v. *Scholly*, 84 Penn. State, 136; *Eastman* v. *Clackamas County*, 32 Federal Reporter, 24; *Larkin* v. *Saginaw County*, 11 Michigan, 88; *Hughes* v. *Monroe County*, 147 New York, 49 (injury by machine in insane asylum).

In *Weightman* v. *Corporation of Washington*, *supra*, it was held that a municipal corporation required by its charter to keep a bridge in repair is liable, if it has the means to repair it and neglects to do so, to an individual injured by reason of such neglect, distinguishing the first principal case and approving it. The Court said: "Contrary decisions are undoubtedly to be found; but most of the cases are based upon a misapplication of what was decided in *Russell* v. *The Men of Devon*, to which reference has already been, and which certainly is not an authority for any such doctrine at the present time." And the doctrine of the Weightman case is universal in this country, except in Michigan (*Detroit* v. *Blakeby*, 21 Michigan, 84; 4 Am. Rep. 450), and Texas (*City of Navasota* v. *Pearce*, 46 Texas, 525; 26 Am. Rep. 279).

The second branch of the Rule is recognized, citing the first principal case, in *Bartlett* v. *Crozier*, 17 Johnson (New York), 449; 8 Am. Dec. 428; *Dunlap* v. *Knapp*, 14 Ohio State, 64, citing the first principal case; *Lynn* v. *Adams*, 2 Indiana, 143; *McConnell* v. *Dewey*, 5 Nebraska, 385, and *Waltham* v. *Kemper*, 55 Illinois, 349, both citing the first principal case; *City of Providence* v. *Clapp*, 17 Howard (U. S. Sup. Ct.), 167; *Adams* v. *Wiscasset Bank*, 1 Maine, 361; *Baxter* v. *Winooski Turnpike*, 22 Vermont, 123; *Eastman* v. *Meredith*, 36 New Hampshire, 284; 72 Am. Dec. 302 (town hall); *Daniels* v. *Hathaway*, 65 Vermont, 247; 21 Lawyers' Rep. Annotated, 377; *Weet* v. *Brockport*, 16 New York, 161, citing the first principal case. In the last case the Court observe: "The only reported case which I have been able to find, either in this State or in England, which conflicts with this view, is that of *Adsit* v. *Brady*, 4 Hill, 630."

As to the third branch of the Rule: A highway officer who negligently performs a duty enjoined upon him is liable to an individual for any special loss or injury he may have sustained by his negligent performance of it, if the law has placed at his commands the funds necessary to enable him to perform that duty. Elliott on Roads and Streets, p. 508; *Hover* v. *Barkhoof*, 44 New York, 113; *People* v. *Board*, 75 New York, 316; *County Comm'rs* v. *Gibson*, 36 Maryland, 229; *State* v. *Demaree*, 80 Indiana, 522; *Hathaway* v. *Hinton*, 1 Jones Law (No. Car.), 243; *Huffman* v. *San Joaquin County* 21

California, 426; *Sawyer* v. *Corse*, 17 Grattan (Virginia), 230; *Corbett* v. *Bradley*, 7 Nevada, 106; *Koch* v. *Bridges*, 45 Mississippi, 247.

The same is true of a county. *Board* v. *Pearson*, 120 Indiana, 426; 16 Am. St. Rep. 325.

Authority conferred and means granted are sufficient without mandatory words. *Mason* v. *Fearson*, 9 Howard (U. S. Sup. Ct.), 248; *Supervisors* v. *United States*, 4 Wallace (U. S. Sup. Ct.), 435; *People* v. *Supervisors*, 51 New York, 442; *City of Indianapolis* v. *McAvoy*, 86 Indiana, 587.

No. 20. — REG. *v.* BLAKEMORE.

(C. C. R. 1852.)

RULE.

LIABILITY to repair a road *ratione tenuræ* is conclusively proved by a conviction against a former tenant with whom the person charged is in privity of estate.

Reg. v. Blakemore.

21 L. J. M. C. 60-65 (s. c. 2 Den. C. C. 410; 16 Jurist, 154).

Highway, Indictment for Non-repair of. — Liability Ratione Tenuræ. [60]

An indictment for non-repair of a highway charged the defendant as liable to repair by reason of his tenure of S. P. Field. He pleaded not guilty. On the trial, evidence was given on the part of the prosecution of the conviction in 1801 of one S., a former owner of S. P. Field, for the non-repair of the road in question, the liability being charged as arising in respect of the tenure of the S. P. Field. Proof was also given of repairs done since 1801 by the owners of the above-mentioned field. For the defendant, evidence was adduced of a certain agreement and award previous to 1801, which found in effect that the owner of S. P. Field was liable to repair the road, and directed that S. should plead guilty to an indictment for non-repair *ratione tenuræ*. The jury convicted the defendant, but the Court reserved the question "whether the usage or liability in respect of which the defendant was charged in the indictment was established."

Held (PLATT, B., *dissentiente*), that the question reserved must be taken to mean whether there was evidence for the jury of the usage or liability charged in the indictment.

Held, further (PLATT, B., *dissentiente*), that the conviction of S. was conclusive evidence of liability against the defendant by way of estoppel.

The following case was stated from the Shropshire Court of Quarter Sessions: —

The defendant was indicted at the Shropshire October Sessions, 1849, in pursuance of an order of two Justices, made at a Special

Sessions for the highways, in and for the division of Ford, in the said county of Salop, for not repairing two portions of a public carriage highway in the said division, the one of the length of 241 yards and of the breadth of 8 yards, and the other of the length of 249 yards and of the breadth of 8 yards, situate in the parish of St. Chad, in the said county of Salop, which it was alleged he was liable to repair by reason of his tenure of certain lands and tenements situate in the said parish.

At the Shropshire April Sessions, 1851, the defendant pleaded not guilty, and the hearing of the case was thereupon proceeded with.

The evidence on the part of the prosecution, so far as the same relates to the question of law hereby reserved for decision, consisted, first, of the record of conviction upon a presentment by a Justice of the Peace for the town and liberties of Shrewsbury, at the April Sessions, 1801 (within the jurisdiction of which Court the said highway was then situate), of one William Smith, Esq., for not repairing a certain highway (which was proved to be the same as that mentioned in the indictment), by reason of his tenure and occupation of certain lands and tenements, called the Saw Pit Field, in the parish of St. Chad aforesaid. The said presentment alleging, that "the said William Smith and all other occupiers of the said lands and tenements, by reason of his and their tenure and occupation of the said lands, the said highway from time immemorial had repaired, and of right ought to have repaired, when and as often as need or occasion had required." Upon which presentment the said William Smith was convicted on his own confession, and adjudged by the Court to pay a fine of 1*d.*, which was paid by him accordingly. Secondly, that the highway in question was subsequently to the before-mentioned conviction, namely, between the years 1810 and 1843, at different times repaired by the occupiers of the farm of which the lands called the "Saw Pit Field" formed a part, and the expense of which repairs was repaid to such occupiers by the said William Smith during his lifetime, and by the agent of his representatives after the death of the said William Smith. Thirdly, that the said land, called the "Saw Pit Field," was with other lands offered for sale by public auction, by the representatives of the said William Smith, on the 21st of August, 1840, and that the particu-
[* 61] lars * of such sale contained the following statement, viz. :
"That the proprietor of piece No. 2 (which was the Saw

No. 20. — Reg. v. Blakemore, 21 L. J. M. C. 61.

Pit Field) is liable to the repair of 490 yards of roads near thereto, as shown in plan, which will be produced at the time of sale, and may be in the meantime seen at the office of the vendors' solicitor in Shrewsbury," being the 241 yards and 249 yards of highway mentioned in the present indictment; and further, that at such sale by auction the defendant, Robert Baugh Blakemore, was a bidder for the lot which included the said piece of land. Lastly, it was proved on the part of the prosecution that the defendant was the owner and occupier of the said lands called the "Saw Pit Field," formerly belonging to the said William Smith, at the time when the highway was alleged to be out of repair.

On behalf of the defendant, the evidence given with reference to the question of law hereby reserved consisted of, first, an award, dated the 27th of June, 1768, of Thomas Bell, John Probert, and William Corfield, commissioners, which recites certain articles of agreement, dated the 9th of July, 1767, for the inclosure of a certain common or waste land called "Bickton Heath," in the township of Bickton, and whereby the said commissioners were authorised to allot the common and waste lands amongst the several persons having right of common thereon. And by the said award the commissioners did allot to John Hollings, as proprietor of lands and tenements, with common to the same belonging, a parcel of land marked No. 13, containing by measure 2 a. 2 r. 27 p., and bounded as therein described, which piece of land was admitted to be the same as that called "The Saw Pit Field" in the before-mentioned conviction.

The said award then further proceeds to state that the commissioners had further ascertained, set out, and appointed, through the lands intended to be inclosed (*inter alia*), one public horse, carriage, and drift road over the east end of the common, which road was admitted to be the highway mentioned in the present indictment.

The said award also contained the following provisions: "And the said public horse, carriage, and drift roads being now very ruinous and threatened to be indicted, we, the said Thomas Bell, John Probert, and William Corfield, further award, order, direct, and appoint that the same shall be forthwith repaired, and for that purpose that the sum of £50 shall be raised by the said several proprietors in the space of one month from the date thereof, in the proportions mentioned in the schedule annexed, and paid

into the hands of Mr. Thomas Wright and Mr. William Probert, to be employed as aforesaid; and that whatever further sum of money shall be wanted to complete the repair of the said roads, shall be raised in the like proportions and paid in one month after demand by the said proprietors into the hands of the said Thomas Wright and William Probert, or any other person appointed to receive the same, and be employed for the purpose aforesaid. And we do also award that the said public roads shall be at all times for ever hereafter repaired and kept in repair by and at the expense of the said proprietors, in the like proportions, and that the money to be raised for that purpose shall be paid into the hands of the surveyor of the highways, or such other person or persons as shall be from time to time appointed by the said proprietors, or the major part of them, for that purpose."

Secondly, articles of agreement, dated the 1st of June, 1797, between John Mytton, Esq., the said William Smith, and several other parties, proprietors of lands in the said township of Bickton, reciting the before-mentioned articles of agreement of the 9th of July, 1767, and the award of the 27th of June, 1768, and that the commissioners did allot the lands and set out the roads hereinafter mentioned, and that the said William Smith was then the owner of the lands allotted by the said last-mentioned award to John Hollings, being No. 13 on the plan. And further reciting as follows: "And whereas the said several public ways or roads ascertained, set out, and appointed in and by the said award as hereinbefore mentioned, being very ruinous and in bad repair, and a difference or dispute having arisen or taken place between the inhabitants in general of the parish of St. Chad in the said county of Salop, in which the same roads are situate or being, and the owners and occupiers of the said several pieces or [*62] *parcels of land inclosed by virtue of or under the said recited articles of agreement, whether the said last-mentioned roads should be repaired and kept in repair by and at the expense of the said parish in general, or by such last-mentioned owners or occupiers in exclusion of the rest of the parishioners of the same parish: it was agreed by and between the parties interested therein that the said difference or dispute should be left to the determination of Thomas Plumer, of Lincoln's Inn, Esq., and Hugh Leycester, of the same place, Esq., and that their opinion and determination in the premises should be final

and conclusive. And whereas by a certain instrument in writing under the hands of the said Thomas Plumer and Hugh Leycester, bearing date the 12th of August, 1794, they, the said Thomas Plumer and Hugh Leycester, declared themselves to be of opinion that the said parish of St. Chad was not bound to repair the roads in question, the proprietors of the inclosed lands being liable to repair the same according to the proportions mentioned in the said award. And they directed that the roads in question should be divided by the said John Hall into distinct parts corresponding to the proportions above mentioned, having regard to the condition of the said parts, and the expenses of repairing the same, and the convenience of the several proprietors, which said several parts should at all times thereafter be separately repaired by the respective proprietors, and that separate indictments should be presented against each proprietor, describing accurately the part which the proprietor was to repair, and the lands in respect of which he was liable to repair the same, to which indictments the said several proprietors should plead guilty, and should execute an award to be thereafter more accurately drawn up by the said Thomas Plumer and Hugh Leycester to ascertain the part of the road which each proprietor was thereafter to repair for ever." It was witnessed that for carrying into effect the said award, and for other good causes and considerations them moving, they, the said John Mytton, William Smith, and others, did for themselves, their respective heirs, executors, and administrators, mutually covenant and agree with each other as thereinafter mentioned. And the said William Smith for himself, his heirs, executors, and administrators, did covenant, promise, and agree that he, his heirs and assigns, or the owners or occupiers for the time being of the piece or parcel of land allotted to the said John Hollings (being the piece of land called the Saw Pit Field aforesaid), should and would from time to time, and at all times thereafter, repair and keep in good order and repair certain portions of the road, which were proved to be the part of the highway mentioned in the indictment.

The case was submitted to the jury, who were directed to consider whether the highway was an ancient public highway; whether the usage in respect of which the defendant was charged had been proved; whether the defendant was the occupier of the Saw Pit Field at the time mentioned in the indictment; and

whether the highway was at such last-mentioned time out of repair.

The jury found the defendant guilty.

It having been contended on the part of the defendant by his counsel that the documentary evidence produced in his behalf had disproved the usage mentioned in the indictment, and the counsel for the prosecution having contended that notwithstanding such documentary evidence such usage was established by the conviction of the said William Smith, and the subsequent repairs by the occupiers of the land owned and held by the defendant, the Court in its discretion deems it right to reserve the question of law for the consideration of Her Majesty's Justices and Barons of the Courts at Westminster; viz., whether upon the evidence hereinbefore set forth, on the part of the prosecution, of the conviction of William Smith, the former occupier of the lands in question, called the Saw Pit Field, and of the repairs of the road indicted by the said William Smith and other occupiers of the land, and the evidence on the part of the defendant of the award of the 27th of June, 1768, and of the articles of agreement of the 1st of June, 1797, the usage or liability in respect of which the defendant was charged in the indictment was established.

[* 63] If the Court of Appeal should be of * opinion that the usage charged in the indictment was established, the conviction to be affirmed; if otherwise, reversed.

The judgment of the Court of Quarter Sessions was postponed, and the defendant entered into recognisances to appear and abide the judgment of the Court when called upon.

Kenealey for the defendant. — The case ought not to have been submitted to the jury. The Court of Quarter Sessions ought to have told them that the evidence offered by the defendant was a conclusive answer to that presented by the prosecutor. In prosecuting an individual for non-repair of a road a different amount of evidence is necessary than when a parish is prosecuted. In the former case the liability should be shown conclusively.

[Lord Campbell, C. J. — There must be evidence to rebut the presumption of the liability of the parish to repair, but it need not be conclusive evidence.]

It is manifest from the case that the principal piece of evidence for the prosecution, the record of the conviction of Smith, was a nullity. The facts show that Smith was in error in making the

admission of an immemorial liability. The conviction, it is clear, was obtained pursuant to the award of 1768 and the agreement of 1797. That agreement does not admit any immemorial liability. The arbitrators in 1768, though they are called commissioners, were not acting under any statutable authority, and had no power to impose on any individuals the burden of repairing a road; nor had the arbitrators in 1794 any power to direct those indictments to be presented.

[Lord CAMPBELL, C. J. — The arbitrators, no doubt, thought that if there was a conviction on an indictment for the non-repair of the road, it must settle the question and silence all disputes *in sæcula sæculorum.*]

The arbitrators do not say that the landowners were bound to repair by reason of tenure. Even if they did, they could not create such a liability. This conviction was, in fact, a fraud upon the public. No private agreement between parties to repair a road can exonerate the parish.

Scotland, in support of the conviction. — The question which the Sessions intended to submit to this Court is, whether there was any evidence of a prescriptive liability to go to the jury.

[Lord CAMPBELL, C. J. — No member of the Court has any doubt that there was a *primâ facie* case made out by the evidence for the prosecution; but a conclusive answer may possibly have been given.]

The evidence given by the defendant is not a conclusive answer to the case for the prosecution. On the contrary, it strengthens it. The agreement and award presuppose an immemorial liability to repair the road, or at least are consistent with it. The road was clearly an ancient road. Probably the proprietors of the common were bound to repair the roads on it. A grantee of a portion of the common, however small, would in law be liable for the non repair of the whole road; and therefore the proprietors of the soil thought it convenient to apportion the liability amongst themselves. But, supposing there was evidence which went to show that there was no *primâ facie* case, the defendant was precluded from raising it by reason of the conviction, on his own confession, of Smith, under whom he claimed. That conviction was an estoppel on the defendant, and precluded him from denying his liability. *The King* v. *St. Pancras*, 1 Peake, 286. (He was here stopped by the Court.)

No. 20. — Reg. v. Blakemore, 21 L. J. M. C. 63, 64.

Lord CAMPBELL, C. J. — I am of opinion that this conviction ought to be affirmed. No fault can be found with the manner in which the case was left to the jury. The jury found in the affirmative on all the questions submitted to them, and convicted the defendant. The question put by the Sessions to us is, whether the Court of Appeal are of opinion that the usage or liability, in respect of which the defendant was charged in the indictment, was established. Can it be said that the usage is not established within the meaning that must be put upon what the Sessions submit to this Court, namely, whether there was any evidence for the jury of an immemorial liability? and if there was a *primâ facie* case, whether that was conclusively answered by the defendant's evidence? Now, there was clearly a *primâ facie*
[* 64] * case for the prosecution made out by proof of the conviction, on his own confession, of William Smith, with whom the defendant was privy in estate. There was also evidence of a long course of repair of this road by the owners of Saw Pit Field. If the question had been put to us, whether the evidence of the conviction was conclusive by way of estoppel, I should be strongly inclined to answer in the affirmative. According to the case of *The King* v. *St. Pancras*, it would have been an estoppel if pleaded. But there was no opportunity of pleading it here, for the defendant pleaded not guilty. If there be an opportunity of putting an estoppel on record and it has not been embraced, the estoppel is not conclusive; but if there has been no such opportunity it may be conclusive. But waiving that point, I think that the defendant has given no answer by the evidence which he produced. It is consistent with it all that the road was an ancient road, and that the owner of Saw Pit Field was liable to repair it *ratione tenuræ*. There was, therefore, no answer made by the defendant to the *primâ facie* case for the prosecution.

JERVIS, C. J. — I concur in the opinion of Lord Chief Justice CAMPBELL, that the conviction is right. I do not think it necessary to give any opinion upon the question of estoppel. The question put to the Court of Appeal is, whether the usage or liability was established. I do not understand the Sessions as leaving the question to us as to a jury, but whether there was any evidence of the usage to go to the jury. I think that there was such evidence; for the case proves that before the agreement to refer was entered into, there was an ancient road. It is doubtful

who was liable to repair it, but it appears that certain parties took upon themselves the liabilities; that an indictment for not repairing the road was preferred against Smith, the party under whom the defendant claims; and that Smith acquiesced and submitted to a conviction.

POLLOCK, C. B. — I am of the same opinion. I consider the question to be, whether there was evidence upon which the jury could, in point of law, have found the verdict which, in point of fact, they did find. No objection can be taken to the direction of the chairman. On the question of estoppel, I am disposed to concur with Lord Chief Justice CAMPBELL.

PARKE, B. — I think the conviction is right. I take it that the question is not whether the verdict is right, but that the only question is the question of law, whether there was sufficient evidence to go to the jury to warrant their convicting the defendant on the ground of a liability to repair the road *ratione tenuræ*. But I go further, and think that this conviction was clearly an estoppel, on the authority of *Treriban* v. *Lawrence*, 2 Lord Raym. 1048, 1 Salk. 276; *Speake* v. *Richards*, Hob. 206; and *Magrath* v. *Hardy*, 4 Bing. N. C. 782, 7 L. J. (N. S.) C. P. 299. If, instead of pleading not guilty, the defendant had pleaded that he was not liable to repair *ratione tenuræ*, the prosecutor would have had to reply; and then the conviction of Smith might have been pleaded by way of estoppel; but as the defendant pleaded not guilty, no opportunity of pleading the conviction was afforded. In *Treriban* v. *Lawrence* Lord HOLT says, "If the defendant had pleaded *nil debet*, the plaintiff might have taken advantage of the estoppel upon the evidence, because the pleadings are not brought to such a point in the case as to give the plaintiff an opportunity of replying to the estoppel." I think, therefore, that in the present case there was not only evidence, but conclusive evidence, for the Crown.

ALDERSON, B. — It seems to me that the chairman ought to have told the jury that the prosecutor had conclusively proved his case. But if the evidence were not conclusive, it was very strong indeed. The award of the commissioners (private persons who had no authority to impose the burden of repairing the road on the proprietors of the lands) is rather an argument to show that the liability existed before. The arbitrator may have only defined and ascertained an ancient road, and set it out more clearly. The

decision is right if the road existed before the award, and was liable to be repaired either by the whole body of persons interested or by each person *pro ratâ*. The arbitrators awarded that [* 65] it was repairable *pro ratâ*, and fixed * the portion to be repaired by each, and directed that indictments should be preferred for non-repair of their respective portions, and that each party should plead guilty to the indictment. There is nothing in the defendant's case inconsistent with this view.

Patteson, J. — I have no doubt that this verdict must be supported. There clearly was evidence to go to the jury. Had it rested on the prosecutor's case alone, there was the proof of the conviction of Smith, under whom the defendant claimed, and by which the defendant was bound; and perhaps the case ought to have stopped there, as the conviction was an estoppel, which was conclusive. But supposing that it was competent for the defendant to have answered the case, I think that the defendant's evidence does not answer it. The road was manifestly an old highway. The award says that the landowners are to repair; that does not profess to impose any new liability to repair. There is nothing in the defendant's case inconsistent with the evidence for the prosecution.

Coleridge, J. — I am of the same opinion. I understand the question submitted to us to mean whether this verdict upon the evidence may be right. But further, I quite concur with what has been said, especially by my Brother Parke, respecting the estoppel, because I think that proof of this conviction of Smith was a good estoppel on the part of the prosecution.

Maule, J., Wightman, J., Cresswell, J., Williams, J., and Talfourd, J., concurred in the judgment.

Platt, B. — I am sorry to say that I do not quite concur with my learned brethren. I do not agree that the question put to us is to be read as meaning whether there was evidence for the jury. If, indeed, we are so to construe it, I cannot doubt but that there was evidence. The question put by the Sessions is, whether the usage or liability, in respect of which the defendant was charged in the indictment, was established. This looks to me like a question of fact; and I think that the liability was not established. There is no evidence of any repairs having been done to the road before the award was made by any of these parties to the award or of any liability existing in them. The articles of agreement

and award cannot fix upon the parties a liability to repair *ratione tenuræ*. If these facts enable us to see what the origin of the liability was, how can we say that they establish the prescriptive liability to repair? With regard to the question of estoppel, it seems to me that the prosecutor abandoned the effect of the conviction, for he did not set it up as an estoppel at the time, but he let in the evidence of the defendant. The matter, therefore, was left at large, and I think the jury were at liberty to find according to the facts. *Conviction affirmed.*

ENGLISH NOTES.

The liability to repair a highway or bridge *ratione tenuræ* in the strict sense must, it seems, be immemorial: see 2 Wms. Saund. 158 *f–h*; *Rex* v. *Middlesex Inhabitants* (1832), 3 B. & Ad. 201, 1 L. J. M. C. 16; *Rex* v. *Hayman* (1829), Moody & Malkin, 401; although Lord Denman, C. J., is reported to have expressed an opinion in *Reg.* v. *Beeby* (1839), 8 L. J. M. C. 38, that such a liability might, under certain circumstances, have arisen in modern times. The fact, however, that the owners and occupiers of particular premises have for a considerable time repaired a highway is evidence from which, in the absence of anything further, an immemorial liability may be presumed. And the tendency of late has been to hold that where a regular modern practice is proved a legal origin of the practice ought, if possible, to be presumed. See, *e. g.*, *London & North Western Railway Co.* v. *Fobbing Levels Commissioners of Sewers* (1896), 66 L. J. Q. B. 127.

The liability to repair a highway *ratione tenuræ* is, as towards the public, upon the occupier; but he may demand reimbursement from the owner. See *Baker* v. *Greenhill* (1842), 3 Q. B. 148, 2 G. & D. 435, 11 L. J. Q. B. 161; *Reg.* v. *Barker* (1890), 25 Q. B. D. 213, 59 L. J. M. C. 105.

Where lands subject to the liability are subdivided, the tenant of each parcel is liable to the public for the whole charge, but is entitled to contribution from the owners of the other parcels. See *Reg.* v. *Duchess of Buccleugh* (1704), 1 Salk. 358, 6 Mod. 150; the sequel to *Reg.* v. *Bucknall* (1702), 2 Ld. Raym. 792, 804, 7 Mod. 54, 98; Cas. temp. Holt, 128; *Rex* v. *Oxfordshire Inhabitants* (1812), 16 East, 223; *London & North Western Railway Co.* v. *Fobbing Levels Commissioners of Sewers*, *supra*.

The liability ceases if the character of the road is so altered under statutory provisions that the subject-matter of the liability has substantially ceased to exist. See *Reg.* v. *Barker*, *supra*; *Heath* v. *Weaver*-

ham Overseers (1894), 1894, 2 Q. B. 108, 63 L. J. M. C. 187, 70 L. T. 729, 42 W. R. 478.

The occupiers of lands liable *ratione tenurae* for the repair of highways were frequently exempt from liability to contribute towards the expense of maintaining other highways in the highway parish; and exemptions of this kind, in the shape of exemptions from the highway rate, were preserved by the Highway Act, 1835 (5 & 6 Will. IV., c. 50, s. 33). And the inclusion of the highway parish in a highway district under the Highway Acts, 1862 and 1864 (25 & 26 Vict., c. 61; 27 & 28 Vict., c. 101), did not affect the exemption even where the highway rate under those Acts was levied as part of the poor rate. See *Reg.* v. *Heath* (1866), L. R. 1 Q. B. 218, 7 B. & S. 285, 35 L. J. M. C. 113. Whether the exemption continues where an urban authority or a rural district council have become the highway authority, and extends to the part of the county rate levied for main road expenses, remains to be seen. An exemption of the kind ceases where the liability is extinguished. See *Heath* v. *Weaverham Overseers*, *supra*.

There are numerous statutory provisions under which the liability may be extinguished and the highway made repairable by the inhabitants at large, and under which the liability may be enforced by means other than indictment. And many of the provisions of the Highway Acts are applicable to highways repairable *ratione tenurae* as well as to other highways. See 5 & 6 Will. IV., c. 50, s. 5.

AMERICAN NOTES.

The principal case is cited in Angell on Highways, sect. 255; Chamberlain's Best on Evidence, sect. 591; 2 Van Vleet on Former Adjudication, p. 1248.

HUSBAND AND WIFE.

SECTION I. — *Marriage.*

No. 1. — LAUTOUR *v.* TEESDALE.

(C. P. 1816.)

RULE.

BRITISH subjects in a place in the British Dominions which is not governed by any local law are governed, with respect to marriage, by the law which existed in England before the Marriage Act, — namely, the canon law (as it existed before the Council of Trent); and this law is satisfied by the celebration by a Roman Catholic priest of a marriage between Protestants.

Lautour and others v. Teesdale.

8 Taunton, 830-838 (s. c. 2 Marsh. 243; 17 R. R. 518).

Marriage. — British Dominion. — Canon Law.

A marriage between two British subjects, solemnised by a Catholic [830] priest at Madras according to the rites of the Catholic Church, followed by cohabitation, but without the license of the governor, which it had been uniformly the custom to obtain, is valid.

This was an issue directed by the MASTER OF THE ROLLS to determine whether the defendants were legally married at Madras, in the East Indies, on the 17th October, 1808. The cause came on for trial before GIBBS, C. J., at the adjourned sittings after last Trinity Term at Guildhall, when a verdict was found for the plaintiffs affirming the marriage, subject to the opinion of the Court on the following case: —

No. 1. — Lautour v. Teesdale, 8 Taunt. 830, 831.

Francis Louis-Lautour, by his will dated 4th June, 1807, after bequeathing several legacies, gave all the residue of his personal estate to trustees; upon trust to divide the whole into aliquot parts, equal to the number of his children at his death, and to stand possessed of one of such aliquot parts for the benefit of each child, and his or her wife, or husband and family, with benefit of accruer or survivorship among the testator's children, in default of issue of any of them as therein mentioned, and appointed the trustees, together with Ann Lautour, during her widowhood, his executors and guardians of his children during minority. And the said testator's will declared, "that if either of his children should, before attaining the age of twenty-four years, intermarry without the consent of his trustees for that purpose first had and obtained in writing, such son or daughter so marrying without such consent, should forfeit one moiety of his or her aliquot share of his estate; and the trustees thenceforth should stand possessed of one moiety, upon such trusts as would take effect concerning
[* 831] * the same in case such child so marrying were actually dead without issue.

On the 1st October, 1808, the defendant, Christopher Teesdale, being of the age of twenty-six years, and the defendant, Barbara Ann Teesdale, of the age of nineteen years, and both British subjects and Protestants resident at Madras, in the East Indies, caused application to be made to Sir George H. Barlow, who was then the Governor of Fort St. George at Madras, with its dependencies, to grant a licence for the purpose of authorising a marriage between them at Madras; and such licence was accordingly granted on the 1st October; but in consequence of an application made to the said governor by James Oliver Lautour, a brother of the said defendant, Barbara Ann, who objected to such marriage, the said licence was afterwards, on the 2d October, revoked and withdrawn. It has for many years been the custom at Madras, in the case of marriages between Protestant Europeans, to require and obtain the previous permission of the governor, signified in writing, to the officiating clergyman of the settlement, and this custom has been strictly adhered to, — no instance having appeared to the contrary.

On the 17th of the above month of October the defendants went to the Black town of Madras, where they were attended by a Portuguese Roman Catholic priest, of the name of Entaguis, and

the marriage ceremony between the defendants was read and performed according to the Roman Catholic form by the above-mentioned priest, in a small room in the said town, in the presence of Joseph Baker, John Furcy Fortin, and Stephen Yttie; and the said John Furcy Fortin and Stephen Yttie acted as interpreters between the defendants and the said Entaguis when he spoke in the Portuguese language. The said Entaguis first informed the * defendants, that unless they were both Roman Catholics [* 832] the said ceremony would not render their marriage valid, and that it would be necessary for them to be married on their return to England, according to the forms of their own religion; and having stated this, he immediately afterwards, in the Portuguese language, asked the defendant, Christopher Teesdale, if he would take the said Barbara Ann to be his wife, and the said Barbara Ann, if she would take the said Christopher Teesdale to be her husband, to which the said Christopher Teesdale and Barbara Ann respectively assented; after which the defendants exchanged rings, the said Entaguis repeating some words in the Latin language.

Both the defendants subscribed their names to a certificate in the Portuguese language, which was also subscribed by the said Entaguis, and which, when translated into English, is to the following purport or effect, viz.: "I, the undersigned, certify that I married, this 17th October, 1808, in the presence of Mr. Baker, Mr. Fortin, and Mr. Yttie, a Mr. Teesdale with Miss Barbara Ann Lautour, according to the rites of the Roman Church." (Signed) "S. Entaguis, Christopher Teesdale, Barbara Ann Lautour." And the said Joseph Baker and John Furcy Fortin subscribed their names as witnesses thereto.

After the performance of the said ceremony the defendants remained at Madras for about a week, viz., until the 25th of the same October, when they embarked on board the *Preston East Indiaman*, on their voyage to England. They did not live together or pass as husband and wife whilst they so remained at Madras, but resided in separate houses five miles distant from each other, the said Barbara Ann retaining her maiden name; but afterwards, in the course of their voyage to England, they declared themselves husband and wife, * and cohabited together as [* 833] such, and they arrived in England in June, 1809.

On the 4th day of July, 1809, a licence was granted by the Faculty Office, Doctors Commons, London, for the solemnisation

of a marriage between the defendants, as Christopher Teesdale, bachelor, Barbara Ann Lautour, spinster, an infant, with the consent of the trustees, as her guardians; and on the 5th day of the same month of July, in pursuance of such licence, a marriage was solemnised between the defendants according to the form of the Church of England, of which the defendants were members, and of which they were both members in October, 1808, when the said first-mentioned ceremony was performed.

The question for the opinion of the Court was whether the defendants were legally married at Madras, in the East Indies, on the 17th day of October, 1808.

If the Court should be of opinion that the defendants were not legally married, a verdict was to be entered for the defendants; otherwise the verdict for the plaintiffs was to stand. The case was argued on a former day in this term.

Copley, Serjt., for the plaintiffs. — These parties were legally married at Madras, at the time mentioned; and there is difficulty in collecting the objections to it, as it appears free from doubt. The subject has been lately exhausted in *Dalrymple* v. *Dalrymple*, reported by Dr. Dodson, 1811, and it will, therefore, be sufficient to state the general authorities in favour of the marriage. This marriage was in an English settlement beyond sea, and as the Marriage Act, 26 Geo. II., c. 33, does not extend there, the marriage is good by English law. It was not until the reign of King John that marriages were required to be solemnised [* 834] * in a church. Afterwards, indeed, no priest was necessary to render the marriage valid and binding, but it was required under ecclesiastical censure to be solemnised in the face of the church. The mere contract *per verba de præsenti*, in which consummation was presumed, or *per verba de futuro*, followed by consummation, was valid between the parties themselves. *Bunting's Case*, 4 Co. Rep. 29, Moore, 169. In that case it was held that a marriage solemnised in the face of the church, and consummated, was void, and the heir illegitimised, by reason of a former marriage contract *per verba de præsenti*, not followed by consummation. In *Jesson* v. *Collins*, 2 Salk. 437, and in *Wigmore's Case*, 2 Salk. 438, Lord Holt said that a contract *per verba de præsenti* was a marriage, and not releasable, and so of a contract *per verba de futuro*, but that the latter was releasable. So the law is distinct and uniform, a contract *per verba de præsenti* was a marriage without the

intervention of a priest. It is unnecessary to enter on doubted points, whether dower, community of goods, &c., follow on a marriage without a priest; the question here is, whether this was a legal and irrevocable contract, not whether all the consequences follow.

But in this case there was a priest, and therefore all doubts are removed. In 1 Rolle's Abr., tit. Baron and Feme, 341, pl. 21, it is stated that "If a man and woman be married by a priest in a place which is not a church or chapel, and without any form of the celebration of mass, still it is a good marriage, and they are man and wife." So that if there be a marriage *per verba de præsenti* by a priest, the marriage is complete to all intents; and much more * than is necessary has been done [* 835] here; *Fielding's Case*, 5 State Trials, 610, is precisely in point. The facts throughout were the same in both cases. *The King* v. *The Inhabitants of Brampton*, 10 East, 282 (10 R. R. 299), is also strictly applicable; therefore on the whole current of authorities, ancient and modern, this is a valid marriage.

Best, Serjt., for the defendants. — The authorities which have been cited are not disputed, but the real question has not been touched. The doctrine laid down by Sir William Scott in *Dalrymple* v. *Dalrymple* is, that according to the law of Christendom a marriage *per verba de præsenti* is good, though not *in facie ecclesiæ*, but that in almost every state there had been alterations in that law. The law of marriage in Madras is controlled by the local laws that prevail there, and these persons are to be considered as persons subject to the law of Madras at the time. It is stated on the face of the case that the law of Madras varies from the general law of Christendom, and by the laws of Madras this marriage is void. The case states that they applied to the governor for a licence, which was granted, but was afterwards withdrawn. For many years it has been the custom at Madras to apply to the governor for a licence, and no instance has ever been known to the contrary. The parties choose to go without the Fort, but this does not enable them to marry; for the law extends to all the Black town, the inhabitants of which are within the protection of English law, and the custom must be supposed to be coeval with the British authority in that settlement. Without a license from the governor to the priest, the marriage by the law of Madras is invalid, though it may be good by the general law of Christendom.

[* 836] * Copley in reply. — It was submitted to the jury to find what the law of Madras was. It must be presumed that the law of England prevails until the contrary be shown, and that has not been done; a mere custom has been shown. The reason of obtaining the licence from the governor is that the governor has the power of sending any person out of the country who does not obey him, and by the order of the East India Company a licence is requisite to the clergyman, but that does not create a law.

Cur. adv. vult.

Gibbs, C. J., now delivered the judgment of the Court. (His Lordship first stated the case, and then proceeded thus:) Both the defendants are stated to be Protestants and British subjects, and the place in which the ceremony was performed was Madras, where they resided as part of the British settlement there; and the question is, whether under the laws of marriage, operating on them at Madras, this can be considered as a legal marriage. In order to decide this question, it is material to consider who the parties were, and among whom the ceremony took place. Now, British subjects settled at Madras are governed by the laws of this country which they carry with them, and are unaffected by the laws of the natives. The question therefore is whether by the laws of this country, to which they alone are subject, and by which alone their actions are to be governed, this marriage was legal. In this country we judge of the validity of a marriage by what is called the Marriage Act, but as that statute does not follow subjects to foreign settlements, the question remains whether this would have been a valid marriage here before that Act passed. The important point of the case, viz., what the law is by which such a question [* 837] is to be governed, was * most ably and fully discussed in the case of *Dalrymple* v. *Dalrymple*, which has been so often alluded to; and the judgment of Sir William Scott has cleared the present case of all the difficulty which might, at a former time, have belonged to it. From the reasonings there made use of, and from the authorities cited by that learned person, it appears that the canon law is the general law throughout Europe as to marriages, except where that has been altered by the municipal law of any particular place. From that case, and from those authorities, it also appears that, before the Marriage Act, marriages in this country were always governed by the canon law, which the defendants

therefore must be taken to have carried with them to Madras. It appears also that a contract of marriage, entered into *per verba de præsenti*, is considered to be an actual marriage; though doubts have been entertained whether it be so, unless followed by cohabitation. In the present case, a ceremony was performed, the regularity of which it is unnecessary to discuss, because it was followed by cohabitation. All that is required therefore by the canon law has been amply satisfied. Indeed, this was admitted on the part of the defendants, and the ground on which they rested was that this case was excepted from the general rule by the local regulations of the place; that a custom has existed at Madras, that when two British subjects are married, they should obtain a licence from the governor, and that no instance has occurred in which that rule has been dispensed with. That may be the case. It is very possible that there is no priest within that jurisdiction who would celebrate a marriage without the consent of the governor, but that does not constitute the law, nor can it alter the law which the defendants carried with them; that circumstance, therefore, makes no difference. Another circumstance on which the defendants relied was that the priest told the parties that unless they
* were Roman Catholics the ceremony would not be bind- [* 838]
ing upon them; in answer to that, it is only necessary to say that he was mistaken, and indeed that circumstance was not much relied on. It follows from what I have stated that this was a legal marriage; since it was a marriage between British subjects, celebrated in a British settlement, according to the laws of this country as they existed before the Marriage Act, and which, if it had been celebrated here before that statute, would have been valid. *Judgment for the plaintiffs.*

ENGLISH NOTES.

Christian marriage is "the voluntary union for life of one man and one woman, to the exclusion of all others." Per Lord PENZANCE, in *Hyde* v. *Hyde and Woodmansee* (1866), No. 9 of "Conflict of Laws," 5 R. C. 833, 837. "Very many and serious difficulties arise if marriage be regarded only in the light of a contract. It is indeed based upon the contract of the parties, but it is a *status* arising out of contract, to which each country is entitled to attach its own conditions, both as to its creation and duration." Per HANNEN, J., in *Sottomayor* v. *De Barros*, 5 R. C. 814, 821. The expression "Chris-

tian marriage" is used in contradistinction to a polygamous marriage, or a mere temporary union. A marriage contracted by a man and woman in a country where polygamy is allowed between persons professing a polygamous faith does not become a Christian marriage because at the time of the marriage neither of the parties had another husband or wife. *Hyde* v. *Hyde and Woodmansee, supra.*

The question what is and what is not a Christian marriage is well illustrated by the two following cases: *In re Bethell, Bethell* v. *Hildyard* (1888), 38 Ch. D. 220, 57 L. J. Ch. 487, cited 5 R. C. 846, and *Brinkley* v. *Attorney-General*, fully reported 5 R. C. 841.

There are three elements which determine the validity of a Christian marriage: 1. The capacity of the parties; 2. The consent in fact; and, 3. The form of celebration.

1. *Capacity to contract.* The capacity of the parties to contract a valid marriage — the essentials of the contract — depends on the law of the contracting parties' domicil. *Sottomayor* v. *De Barros*, 5 R. C. 814. The validity of the marriage so far as the form is concerned depends on the law of the place of celebration. *Brook* v. *Brook* (1861), 5 R. C. 783; *Warrender* v. *Warrender* (1835), 2 Cl. & Fin. 488, 531. According to English law the consent of parents or guardians is part of the form of marriage, and is not a matter affecting the personal capacity of the parties to contract marriage. *Sottomayor* v. *De Barros, supra; Grierson* v. *Grierson*, 2 Hagg. C. R. 99.

No persons are capable of contracting a valid marriage until they have attained the age of consent. This is by the common law (following the Roman) fourteen in males, and twelve in females. There must also be a capacity to understand the nature of the contract and the duties and responsibilities which it creates. *Durham* v. *Durham* (1885), 10 P. D. 80, 82. A deaf and dumb person able to do this may enter into a valid contract of marriage: *Harrod* v. *Harrod* (1854), 1 K. & J. 4; but the marriage of a lunatic, unless contracted in a lucid interval, is null and void: Blackstone, cited in *Browning* v. *Reane* (1812), 2 Phillimore, 69. Impossibility of consummation is also a disqualification rendering the marriage void *ab initio*. *G.* v. *G.* (1871), L. R. 2 P. & M. 287, 40 L. J. Mat. 83, 25 L. T. 510, 20 W. R. 103; *F.* v. *D.* (1865), 4 S. & T. 86, 34 L. J. Mat. 66, 11 Jur. (N. S.) 307, 12 L. T. 84, 13 W. R. 546; *F.* v. *P.* (1896), 75 L. T. 192.

2. *Consent in fact.* Courts of law have always refused to recognise as binding, contracts to which the consent of either party has been obtained by fraud or duress; and the validity of a contract of marriage must be tested and determined in precisely the same manner as that of any other contract. Public policy requires indeed that mar-

riages should not be lightly set aside, and collusion has to be guarded against; but, subject to the care and circumspection which these considerations impose on the Court, the principles on which a marriage contract may be avoided are the same as those relating to an ordinary contract. "Whenever," says BUTT, J., in *Scott* v. *Sebright* (1886), 12 P. D. 21, 24, 56 L. J. P. 11, 57 L. T. 421, 35 W. R. 258, "from natural weakness of intellect, or from fear, whether reasonably entertained or not, either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger. The difficulty consists, not in any uncertainty of the law on the subject, but in its application to the facts of each individual case." This principle has received illustration in several recent cases. *Cooper* v. *Crane* (1891), 1891, P. 369, 40 W. R. 127; *Clarke* v. *Stier* (1896), 1896, P. 1, 65 L. J. P. 13, 72 L. T. 632; *Bartlett* v. *Rice* (1894), 72 L. T. 122; and see *Miss Field's Case* (1848), 2 H. L. Cas. 48.

3. *Form of celebration.* By the canon law — which was, and still is, the basis of the marriage law of Christendom, so far as it has not been receded from by the laws of any particular country (per Lord ELDON, in *M'Adam* v. *Walker* (1813), 1 Dow, at p. 181, 14 R. R. 36) — a contract *per verba de præsenti* or *per verba de futuro subsequente copulâ* was sufficient alone to constitute a valid marriage; and in Scotland this still obtains, subject to certain rules of evidence. The common law of England — which prevailed over the Canon law — required something more to the validity of a marriage; namely, that it should be celebrated in the presence of a priest in holy orders. *Reg.* v. *Millis* (1844), 10 Cl. & Fin. 534. But about the middle of the last century the frequent scandal of clandestine and irregular marriages led to the passing of what is commonly known as Lord Hardwicke's Marriage Act (26 Geo. II., c. 33), — "an innovation on our laws and constitution," as Blackstone calls it. This Act engrafted on the simplicity of the common law a number of strict regulations as to the preliminaries necessary to the celebration of a valid marriage. The regulations related, however, only to England. Outside England — in British territory — the old common law, or so much as is applicable to the situation, still prevails, subject to any special *lex loci*. Thus a marriage on a British man-of-war, celebrated on the high seas in the presence of a priest merely, without the Marriage Act formalities, is valid. *Culling* v. *Culling* (1896), 1896, P. 116, 65 L. J. P. 59, 74 L. T. 252. So too — the residence of an ambassador being accounted British territory — marriages celebrated in the chapel of an embassy, where one at least of the parties is a subject of the ambassador's country, have always

been held valid in England. *Este* v. *Smith* (1854), 18 Beav. 112; *Lacy* v. *Dickinson*, 2 Hagg. C. R. 386 n.

Marriages *per verba de præsenti* by domiciled English people, contracted in the colonies or in non-Christian States, may under certain circumstances be valid. English people in a colony do not necessarily carry the whole common law with them; they take only so much as is reasonably applicable to their state and condition. *Maclean* v. *Christiall*, Per. Or. Cas. 75: s. c. 7 N. of C. App. xvii.; *Connolly* v. *Woolrick*, 11 Low. Can. Jur. 197.

Lord Hardwicke's Act is now repealed; but it has been replaced by the Marriage Acts, 6 Geo. IV., c. 76, and 6 & 7 Will. IV., c. 85.

No. 2. — REG. *v.* INHABITANTS OF BRIGHTON.

(Q. B. 1861.)

RULE.

A MARRIAGE (since the Act of 1835, 5 & 6 Will. IV., c. 54) of persons within the prohibited degrees of consanguinity, or of affinity, is void, although one of the parties is illegitimate.

Reg. v. Inhabitants of Brighton.

30 L. J. M. C. 197–201 (s. c. 1 B. & S. 447; 5 L. T. 56; 9 W. R. 831).

[197] *Settlement by Marriage. — Prohibited Degrees. — Affinity. — Illegitimacy.*

A marriage contracted with the daughter of the sister of a deceased wife is void, and no settlement can be derived through such a marriage. It makes no difference whether the sister of the deceased wife be or be not legitimate.

Upon appeal against an order of Justices for the removal of Elizabeth Morgan from the township of New Brentford, [*198] in the *county of Middlesex, to the parish of Brighton, in the county of Sussex, the Sessions confirmed the order, subject to a case for the opinion of this Court, as follows: —

Elizabeth Morgan, the pauper, was alleged to be settled in Brighton, by reason only of her marriage with John Morgan, whose settlement in Brighton was admitted, and who was dead at the date of the order of removal. The pauper's maiden name was Jones, and she was the legitimate daughter of Daniel Jones

No. 2. — Reg. v. Inhabitants of Brighton, 30 L. J. M. C. 198.

and Ann his wife. The pauper's mother, Ann, was the illegitimate child of Elizabeth Bartlett. After her birth, the said Elizabeth Bartlett married one Thomas Haines, and had by him, amongst other legitimate children, a daughter named Mary. The said Mary was legally married, in 1835, to John Morgan (the pauper's alleged husband), and died on the 19th of November, 1842. On the 19th of October, 1843, John Morgan was married to the pauper, at Chepstow, in Monmouthshire.

The question for the opinion of the Court was, whether the marriage celebrated between John Morgan and the pauper was valid. If the Court should be of opinion in the affirmative, the order of removal was to be affirmed. If the Court should be of opinion in the negative, the order of removal was to be quashed.

Metcalf and Poland, in support of the order of Sessions (June 5). — This was a valid marriage. There is no reason why a man should not marry the daughter of the bastard sister of his deceased wife. It was decided in *The Queen* v. *Chadwick*, 11 Q. B. 173, 17 L. J. M. C. 33, that a man cannot marry the sister of his deceased wife; but the question here is, whether the same rule can be said to apply to the case of a marriage with the daughter of the deceased wife's sister, that sister being illegitimate. In *The Queen* v. *St. Giles in the Fields*, which is reported with *The Queen* v. *Chadwick*, the Court seemed to be of opinion that the fact of the sister of the deceased wife being illegitimate made no difference; but the point was not much discussed, and the Court gave judgment in accordance with *The Queen* v. *Chadwick*, which they had before decided, and which had not been carried to a Court of error.

[Blackburn, J. — We must take it that the Court decided that the fact of illegitimacy made no difference.]

That may be so, but the case does not apply here; the sister was the illegitimate daughter of both parents. In *Wing* v. *Taylor*, 4 Law Times, 583, which was a case where the husband had before marriage had connection with his wife's mother, it was held that this would not constitute affinity so as to bring him within the prohibited degrees, and the marriage was held to be lawful. It was held that the provisions in 32 Hen. VIII., c. 38, upon this question have been repealed, and are no longer law. The statute which must now be looked at is the 32 Hen. VIII., c. 38, and it will be found that neither that statute, nor any other of Hen. VIII., contains any prohibition against a marriage with the daughter of

the wife's sister. It is true that such marriages are forbidden by the canons, but the canons are not binding upon the laity. Again, all the statutes require that the marriage should be consummated, and the case being altogether silent as to that fact, it cannot be presumed by the Court.

[Cockburn, C. J. — That point is not raised by the case. Blackburn, J. — Does not the question altogether turn upon what are the prohibited degrees?]

This marriage is nowhere prohibited by the Levitical law.

[Blackburn, J. — The statute does not mention the Levitical law, but "God's law."]

In *Wortley* v. *Watkinson*, 2 T. Jones, 118, 2 Lev. 255, 3 Keb. 660, a consultation was awarded, but the tendency of the opinion of the Court was to hold it invalid. Next, the question whether the illegitimacy makes any difference is very important.

[Cockburn, C. J. — Would you go the length of arguing that illegitimate brothers and sisters could marry? Wightman, J. — The case of *Hains* v. *Jessell*, 1 Ld. Raym. 68, is against you. It was held that the same prohibitions applied to bastards as to [*199] other persons. Cockburn, C. J. — Under the Scotch * law illegitimate children became legitimate upon the marriage of their parents. If you are right, the illegitimate brother and sister might marry one another; but if that were so, and they did marry, and subsequently to that marriage their parents were to marry, you would have the case of a legitimate brother and sister married to one another. When the blood relationship is known, we ought not to say that the prohibited degrees do not apply.]

The relationship of father and child is not recognised at all in the cases of bastardy, as appears from many authorities, amongst others, from *Homer* v. *Liddiard*, 1 Hag. Cons. 337, where it was held that the consent of parents under 26 Geo. II., c. 39, s. 11, was not applicable to the marriage of illegitimate minors. It is also stated in 1 Alison's "Criminal Law of Scotland," p. 565, that "incest is not committed by connection with bastard relations, how near soever." That the guilt of incest in a moral point of view is incurred by connection with a bastard relation of the nearest kind, as a daughter, mother, or sister, cannot be doubted; but there is no authority for holding that it is incest, which is confined to relations by blood or legal affinity. In the only case, accordingly, where this point occurred, that of George and his

niece Janet Johnston, June 18, 1705, the Court pronounced an interlocutor, finding the libel relevant only between "uncle and niece," which implies that if the relationship was natural, the charge fell to the ground; and, accordingly, the libel was found "not proven;" and the author refers to Hume, I. 452.

[BLACKBURN, J. — If I remember right, incest was a capital offence in Scotland; and there are many cases in which, *in favorem vitæ*, the offence was said not to have been committed between bastard children.]

In matters of marriage the canon law is the law of Scotland. Shelford on "Marriage and Divorce," pp. 21, 22.

[COCKBURN, C. J. — If anything short of an absolute decision can settle the question, *Hains* v. *Jessell* does so. It was assumed that illegitimacy makes no difference: I agree with the decision and with the argument. It would be a great public scandal if it went forth to the world that this Court entertained a doubt whether the prohibition extended to cases where only the natural ties of consanguinity existed.]

Denman and H. Matthews, for the appellants. — The question is, what are the "prohibited degrees" intended in the 5 & 6 Will. IV., c. 54. That statute does not itself enumerate the degrees which are prohibited, but makes void all marriages thereafter celebrated within the prohibited degrees of consanguinity or affinity. There are several earlier statutes of Hen. VIII. on this subject; namely, the 25 Hen. VIII. c. 22, the 28 Hen. VIII. c. 7, the 28 Hen. VIII. c. 16, and the 32 Hen. VIII. c. 38. Of these statutes the 32 Hen. VIII., c. 38, is unrepealed; but that also assumes, without enumerating them, the degrees prohibited by God's law. The 28 Hen. VIII., c. 16, is still in force, and section 2 refers to the 28 Hen. VIII., c. 7, which in section 11 does contain an enumeration of degrees within which marriage is unlawful. The last-mentioned statute is itself repealed by the 1 Mary, sess. 2, c. 1, but the reference to its provisions in 28 Hen. VIII., c. 16, s. 2, sufficiently incorporates them to make them part of the 28 Hen. VIII., c. 16. Even if that be not so, the result of the decisions is, that the repealed statutes *in pari materiâ*, namely, the 25 Hen. VIII., c. 22, and the 28 Hen. VIII., c. 7, must be looked to for the purpose of explaining what were the prohibited degrees spoken of in later enactments. *The Queen* v. *St. Giles* and *The Queen* v. *Chadwick*, *Brook* v. *Brook*, 4 Law Times (N. S.), 97. Turning, therefore, to the enumeration of

prohibited degrees in the 25 Hen. VIII., c. 22, and 28 Hen. VIII., c. 7, there is among them a prohibition of marriage between "the son" and "his uncle's wife." The whole question is, whether this prohibition must be confined to its express words, or whether it applies when the sexes are changed, and prevents "the daughter" marrying "her aunt's husband." In the first place, it is obvious that many of these statutory prohibitions indicate degrees of relationship, and cannot be confined to the particular case men-
[* 200] tioned. Thus, the "son" is * prohibited from marrying "his mother," but there are no express words against the analogous case of the "daughter" marrying "her father." Again, marriage between uncle and niece is prohibited only if it is included in the analogous "degree" of nephew and aunt. The cases above cited having decided that the whole matter of matrimonial prohibitions is contained in these statutes, and that they, and not the Book of Leviticus, or the ancient canon law, are to be looked to, it follows that they must be read as indicating "degrees," and not particular cases of prohibition, for otherwise marriage between father and daughter and uncle and niece would be lawful. This mode of construing the statutes is expressly affirmed by Coke, 2nd Inst. 683, and in *Ellerton* v. *Gastrell*, 1 Comyns's Rep. 318. It follows from this construction that the statutory prohibition excludes the marriage of a man and his wife's niece. In the next place, the authorities are uniformly against this marriage. At first some doubt appears to have existed. In *Wortley* v. *Watkinson* there were several arguments. The report in 3 Keb. 660 appears to show that a prohibition was granted to prevent the Ecclesiastical Court from avoiding such a marriage; but if the other reports be looked to, it is obvious that the plaintiff was only directed to declare in prohibition for the purpose of having a more solemn argument, and that ultimately a consultation was awarded. See 2 T. Jones, 118, 2 Lev. 254. So in *Mann's Case*, Mo. 907, Cro. Eliz. 228, referred to in *Ellerton* v. *Gastrell*, after several arguments prohibition was refused. The authorities are all considered and affirmed in *Ellerton* v. *Gastrell*, where it was held that such a marriage was unlawful. Since that case the question has not been raised again until the present time. Thirdly, the practice of the Ecclesiastical Courts is recognised in *The Queen* v. *St. Giles* as deserving consideration in determining what marriages are prohibited. That practice is apparent from the cases already cited, in

all which the Ecclesiastical Court was proceeding to dissolve the marriage. Moreover, the Ecclesiastical Courts have always obeyed the injunctions of the canons; and Canon 99 incorporates Archbishop Parker's table (prepared in 1853), in which the case of marriage between a woman and her aunt's husband is expressly mentioned as unlawful. 2 Burn's Eccl. L., p. 446. Upon the whole, it is quite plain that the marriage with the daughter of the deceased wife's sister is prohibited equally with that with the deceased wife's sister herself, and that by the 5 & 6 Will. IV., c. 54, the marriage is made null and void. *Cur. adv. vult.*

Cockburn, C. J., now delivered the judgment of the Court (Cockburn, C. J., Wightman, J., Crompton, J., and Blackburn, J.). My Brothers reserved their judgment in this case, not on account of entertaining any doubt as to what that judgment should be, but in consequence of my being absent during part of the argument, and from a wish to ascertain whether my opinion would coincide with theirs. It was a case of settlement, which depended upon the question, whether a marriage with the niece of a deceased wife was or was not valid. I now state (as the united opinion of this Court) that the marriage was not lawful. It was held in *Ellerton* v. *Gastrell*, in which all the authorities are collected, and which is an express authority upon the subject, that a marriage with the daughter of the wife's sister was bad. In that case the authorities are collected, and the Court was of opinion that such a marriage was within the degrees prohibited by the Levitical law; and then we have an Act of Parliament, 5 & 6 Will. IV., c. 54, which was passed with reference to the known state of the law as laid down in that case, and that statute, by section 4, enacts that all marriages which shall thereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever; and thus, as was pressed upon us, we have the law which was laid down by the Court in that instance sanctioned and confirmed by the Act of Parliament. We entertain no doubt, upon the authority of *Ellerton* v. *Gastrell*, and upon the Act of Parliament, that the * marriage was bad. Another point was made, in [* 201] the course of the argument, as to whether the illegitimacy of the sister of the deceased wife makes any difference. We settled that matter at the time of the argument, and I said that it would

be a great public scandal if it went forth to the world that we thought that legal as well as natural consanguinity was necessary to make such a marriage void. If this had not been perfectly plain, we should have ample authority for so holding. In *Haines* v. *Jessell* the Court repudiated any such doctrine; and the reporter states that the Lord Chief Justice held, and all the Court seemed to think, it would be very mischievous if a bastard should not be accounted within the statute 32 Hen. VIII., for by that rule a man might marry his own daughter. The order of Sessions must, therefore, be quashed. *Order of Sessions quashed.*

ENGLISH NOTES.

Impediments by reason of consanguinity and affinity were extended by the canon law to an extravagant degree; but at the Reformation they were restricted to those declared by 28 Hen. VIII., c. 7, s. 10, to be prohibited by God's law and contained in the 18th chapter of Leviticus. Marriages within those reduced limits were, however, liable during the lifetime of both parties to be adjudged incestuous, and void, and beyond the reach of ecclesiastical dispensation, and by the Marriage Act, 1835, were made absolutely void. It makes no difference, as the principal case shows, that one of the parties is illegitimate. The marriage of a man with a daughter of the half-sister of his deceased wife is by the Marriage Act, 1835 (5 & 6 Will. IV., c. 54), null and void. See the principal case, and *Priestley* v. *Hughes* (1809), 11 East, 1, 10 R. R. 406.

Marriage with a deceased wife's sister being forbidden by the laws of England, such a marriage contracted by British subjects temporarily resident abroad, but really domiciled in this country, though valid in the foreign country, and duly celebrated according to the forms required by the law of that country, is absolutely void here. *Brook* v. *Brook*, 5 R. C. 783. The fact that both parties at the time of the celebration were aware of the impediment is no ground for not annulling such a marriage. *Andrews* (*falsely called Ross*) v. *Ross* (1889), 14 P. D. 15, 58 L. J. P. 14, 59 L. T. 900, 37 W. R. 239. A person born of an English marriage with a deceased wife's sister was held not legitimate in Scotland as to the succession to heritable estate, although the marriage had been dissolved by death unchallenged before the Marriage Act, 1835. *Fenton* v. *Livingstone* (1859), 3 Macq. 497, 1 Paterson Sc. App. 862.

If the parties have a foreign domicil, and by the law of their domicil their marriage is invalid by reason of consanguinity, a marriage contracted by them in England will be held invalid by the Court in

England, though the impediment is not an impediment by English law. *Sottomayor* v. *De Barros*, 5 R. C. 814. This is merely a corollary from the principle that the personal capacity of parties to enter into the contract of marriage depends upon their domicil. See Nos. 7 and 8 of "Conflict of Laws," 5 R. C. 783 *et seq.*

AMERICAN NOTES.

This case is cited in 1 Bishop on Marriage, sect. 745, with approval.

No. 3. — MIDGLEY (FALSELY CALLED WOOD) *v.* WOOD.

(ECCLES. 1861.)

No. 4. — TEMPLETON *v.* TYREE.

(DIV. 1872.)

RULE.

BOTH parties must be privy to a mispublication of the banns in order that the marriage may be void under 4 Geo. IV., c. 76, s. 22.

Midgley (falsely called Wood) v. Wood.

30 L. J. Mat. 57–60.

Nullity of Marriage. — Publication of Banns. — Fraudulent Misnomer. [57] — 4 *Geo. IV., c.* 76, *s.* 22.

A marriage by banns, where the publication of banns was in the name of "John" instead of "Bower," the Christian name of the man, both parties being at the time of the solemnization of the marriage aware of such misdescription, was pronounced null.

The woman having consented to such publication on the faith of the statement of the man that the marriage would not thereby be invalidated, the Court condemned him in the costs of the suit of nullity instituted by her.

This was a suit of nullity of marriage, instituted by Margaret Midgley (falsely called Margaret Wood) against Bower Wood, by reason of the undue publication of banns.

The petition stated: 1. That the ceremony of marriage, according to the rites of the United Church of England and Ireland, was, on the 12th day of April, 1852, performed in the cathedral and

parish church of Manchester, in the county of Lancaster, by the Rev. R. Remington, clerk, between the petitioner and one Bower Wood. 2. That previous to the said ceremony of marriage, banns were published in the said cathedral church, but that there was no due publication of banns according to the statute in such case made and provided previously to the said marriage, inasmuch as the said Bower Wood was in the said banns described as "John Wood," John not being one of the Christian names of the said Bower Wood, nor a name by which he had ever been or was commonly called or known, and the said Bower Wood being so described in the said banns, by his own direction and with the knowledge of the petitioner, and for the purpose of concealing his marriage from his family, and deceiving them in relation thereto. 3. That there was no license obtained for the said marriage.

To this petition the respondent filed the following answer: —

"The respondent Bower Wood saith, that at the time of the publication of the said banns, and at the time of the solemnisation of the said marriage in the petition mentioned, the petitioner knew of, and assented to, the said purpose and purposes in the said petition alleged. Wherefore the respondent humbly prays that your Lordships will be pleased to reject the prayer of the said petition."

The suit came on for hearing on the 25th of November, 1859, before the JUDGE ORDINARY, WIGHTMAN, J., and BYLES, J.

It appeared that the petitioner, Margaret Midgley, was the daughter of a retired non-commissioned officer in the army, residing at Manchester, and that the respondent, Bower Wood, was the son of a solicitor, but that both his parents were dead at the time of the marriage, and that he was then dependent on his grandfather, Joshua Bower, a glass manufacturer, residing at Leeds. The respondent was baptised "Bower Wood," and had been always called and known by that name, but never by the name "John Wood." On the 12th of April, 1852, the parties went through the ceremony of marriage at the cathedral and parish church of Manchester, the petitioner being described in the register as Margaret Midgley, spinster, aged twenty, and the respondent as John Wood, bachelor, aged twenty-two. The father of the petitioner was present [* 58] at the marriage. * Previously to the marriage, in pursuance of directions given to the deputy parish clerk of the cathedral and parish church of Manchester, banns had been published on the

No. 3. — Midgley (falsely called Wood) v. Wood, 30 L. J. Mat. 58.

28th of March and the 4th and 12th of April, 1852, in the names of Margaret Midgley and John Wood.[1]

The evidence of the petitioner, Margaret Midgley, was as follows: —

In the beginning of 1852, when I was living at Manchester with my father, who had been a soldier, and was then a pensioner, I became acquainted with a man named Wood, whom I afterwards married in April, 1852. He was a clerk to his grandfather, Joshua Bower, a glass manufacturer. His father and mother were both dead. In April, 1852, I was twenty, and Wood was twenty-one years of age. He was then always called "Bower Wood." I knew of the publication of the banns the day after the first publication. The clerk called at my residence to see if I lived there. In consequence of what then passed, I had a conversation with Wood about the banns the same evening. I told him that the name "John Wood" was wrong, and that I never heard him called by that name. He said it was one of his names, though he had never been called by it. I asked him why he used the name "John." He said it was for fear any of his relations should know of his marrying me. I wished him to use the name "Bower." He said he should be disinherited if he did. I never heard of any alteration being afterward made in the banns. He said he would have the marriage published in the newspaper, and send it to my relatives in Yorkshire; and if his saw it, they would not know who he was. My father was present at the marriage. After the marriage we resided in Manchester ten weeks, and then went to Leeds, where his grandfather lived. After that he came to London, and went to the Military College at Chelsea to learn to be an army schoolmaster. He told me to go and reside with my relatives, or go into service. I was in Yorkshire seven months, and then he came down at Christmas, stayed a fortnight, and took me to London with him. I remained with him three days and nights. He then returned to the college. I met him afterwards occasionally for a fortnight, and then I went into service at St. John's Wood, and remained there nine months, occasionally seeing him on Saturdays. I last saw him in the early part of 1854, and do not know what then became of him. I next heard of him in 1858. We had no child. After the marriage I called him "John" sometimes, but mostly "Philip."

[1] The publication of the banns and the solemnisation of the marriage were proved by affidavits, in pursuance of permission given by the Judge Ordinary.

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He said his name was John Philip Bower Wood. I almost always called him "Philip" before the marriage. He promised to introduce me to his grandfather; but an opportunity never presented itself. I asked him if the marriage would be legal under the name of John. He said it would. It was a long time before I would consent to being married to him in the name of John. I did so, because he said, if I loved him I would marry him in that name, and would trust to him afterwards.

Dr. Phillimore, for the respondent. — The respondent has pleaded in confirmation of the petition. The petition as originally framed was demurrable, as it did not state that both parties were cognisant of the undue publication of banns. The respondent's advisers being in doubt whether it was so framed intentionally in order that the suit might fail, and the marriage be pronounced valid, or whether it was by mistake, and the respondent being anxious that the marriage should be annulled, an answer was filed, alleging that both parties were aware of the undue publication. The petition was then amended, but the answer remains. Both parties are equally anxious that the marriage may be annulled, but there is no collusion between them. I now propose to cross-examine the petitioner, and, if necessary, to examine the respondent, in support of the plea.

[The Judge Ordinary. — In the Ecclesiastical Court, in a suit of nullity, would it have been competent for the respondent to bring in an allegation setting up the same case as that of the petitioner, and then bring evidence in support of it?]

I know of no precedent, but I think it might have been done.

[*59] [* The Judge Ordinary. — In suits of nullity the Court is bound to follow the practice of the Ecclesiastical Court. The question is, whether the respondent should say nothing and allow the matter to go *pro confesso*, or whether he may call witnesses; for to cross-examine the petitioner in support of the answer is virtually to call witnesses.]

I know of no precedent, for in the Ecclesiastical Courts these suits were almost always opposed. There is no collusion here in the sense of putting a false case on the Court.

[The Judge Ordinary. — Suppose the parties assist each other in getting up the case on true evidence. Would that be collusion? There is this peculiarity in this suit, that either party might have instituted it on the same grounds, whereas in a suit for dissolution

by reason of adultery only one could do so; in the latter suit, if the parties were to concur in getting up evidence of the case, that would be collusion, though the case were a true one. In this case, either party might become actor; in that, only one could. Your application raises a question of great importance. You ask not only to cross-examine the petitioner, but to be allowed to adduce affirmative evidence for the respondent. Suppose the Court should in the result make a decree dismissing the petition, would that decree be binding upon both parties for the future? Suppose a suit of nullity had been instituted in the Ecclesiastical Court on the same grounds as this suit, and the husband had put in an answer confessing the allegations of the libel, that witnesses had been examined, and the suit had been dismissed, could the husband have afterwards instituted a suit of nullity on the same ground?]

I incline to think he could not, but that it would have been considered as *res judicata*.

[The Judge Ordinary. — It is a point of great importance, which I should like to have discussed on behalf of the husband before deciding it. If this case should result in the Court making a decree refusing to pronounce the marriage null, and that decree should bind both parties, it would certainly tend to support Dr. Phillimore's position, viz., that the respondent should be at liberty to call affirmative evidence; otherwise, the wife might institute a suit, and by supporting it faintly might procure a decree in favour of the marriage which would bar him from afterwards disputing its validity. We think that, at all events, you may cross-examine the petitioner *de bene esse*, and if we should afterwards think that the evidence elicited by it is inadmissible we can discard it.]

The petitioner was accordingly cross-examined by Dr. Phillimore. She said: I last saw the respondent in 1854. I occasionally received 10*s*. from him, but not weekly, and never after I resided in London. I was perfectly aware that the banns were published without the name Bower, in order to deceive his relatives, and I agreed to it. I did not know that our names had been given in before the clerk called. He gave me to understand how they had been given in. I do not know whether I was aware of it before the first publication or not.

By the Court. — The object of my presenting the petition is to ascertain whether my marriage is legal or not. I have wished to do for some years, but did not know where Wood was, and only

accidentally found out twelve months ago. I made inquiries at Chelsea in 1854. My brother, when he came home from India, in 1855, wished to know if I was married. A clergyman in Yorkshire was also very anxious to know if the marriage was legal. Wood had many cousins and uncles. Wood is a common name in Manchester.

The baptismal certificate was put in, from which it appeared that the respondent was baptised "Bower Wood."

John Hirst, a clerk in the glass-works of Mr. Joshua Bower, said that the respondent went by the name of "Bower Wood" all his lifetime; that he was never called John Wood.

Dr. Deane and J. D. Coleridge were for the petitioner.

Upon the evidence it was contended by the counsel for both parties that as each was aware at the time of the solemnisation of the marriage of the undue publication of banns, by reason of the respondent having been described therein as John Wood, whereas his real name was Bower Wood, the marriage was rendered [*60] null and *void by the 22nd section of the 4 Geo. IV., c. 76.[1]

They cited *Wiltshire* v. *Prince*, 3 Hag. Ec. 332; *Wright* v. *Elwood*, 1 Curt. 662; *Tongue* v. *Tongue*, 1 Moo. P. C. 90.

The Judge Ordinary delivered judgment. — The Court think that it is unnecessary now to express any opinion as to the cross-examination of the petitioner, for, independently of any facts elicited by it, we are of opinion that the allegations of the petition have been established. By the 4 Geo. IV., c. 76, s. 22, "if any persons shall knowingly and wilfully intermarry without due publication of banns or licence from a person or persons having author-

[1] 4 Geo. IV., c. 76, s. 22. — "Provided always, and be it further enacted, that if any persons shall knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein banns may be lawfully published, unless by special licence as aforesaid, or shall knowingly and wilfully intermarry without due publication of banns, or licence from a person or persons having authority to grant the same first had and obtained, or shall knowingly and wilfully consent to, or acquiesce in, the solemnisation of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void to all intents and purposes whatsoever."

Section 7. — "Provided always, and it is hereby further enacted, that no parson, vicar, minister, or curate shall be obliged to publish the banns of matrimony between any persons whatsoever, unless the persons to be married shall, seven days at the least before the time required for the first publication of such banns, respectively deliver or cause to be delivered to such parson, vicar, minister, or curate a notice in writing, dated on the day on which the same shall be so delivered, of their true Christian names and surnames, and of the house or houses of their respective abodes within such parish or chapelry as aforesaid, and of the time during which they have dwelt, inhabited, or lodged in such house or houses respectively."

ity to grant the same first had and obtained . . . the marriage of such persons shall be null and void to all intents and purposes whatsoever." Here there was not a due publication of banns, as the respondent was described in them as John Wood, whereas his real name was Bower Wood, and both parties were aware of this misdescription when the marriage was solemnised. Assuming the petitioner to have supposed that John was one of the names of Wood, and that the use of that name would be sufficient to make the marriage legal, yet, at the time of the marriage, she knew that there was not a proper publication of banns in his true Christian names. There may be a question as to the precise time when she first became aware that Bower was the respondent's name, whether before or after the banns were put up; but at all events she knew it before the marriage was solemnised. That, according to the authorities, is sufficient to make the marriage invalid. The Court, therefore, pronounces the marriage null and void.

Dr. Deane applied for the petitioner's costs. According to the practice of the Ecclesiastical Courts, the fact of a marriage having been established, the petitioner would be entitled to costs as a matter of course. *Cur. adv. vult.*

The Judge Ordinary (Dec. 7) said: It was said that, the fact of marriage being established, the petitioner was, according to the practice of the Ecclesiastical Courts, entitled to her costs as a matter of course. I think, however, that the Court is not bound to grant her costs upon any such principle. She is not the wife, and never was the wife, of the respondent. On another ground, I think, however, that I ought to grant her costs. The respondent did her a grievous wrong, for he induced her to go through the form of marriage by telling her that the marriage would be good, and she, supposing that she would become his wife, consented to the use of the wrong name. She was placed in a very distressing position, and, as she stated in her evidence, was naturally anxious to have it ascertained whether or not she was a wife. The Court will, on that ground, grant her costs.

Marriage pronounced null, with costs against respondent.

No. 4. — Templeton v. Tyree, 41 L. J. Mat. 86.

Templeton v. Tyree.

41 L. J. Mat. 86–88 (s. c. L. R. 2 Pr. & D. 420; 27 L. T. 429; 21 W. R. 81).

[86] *Nullity of Marriage. — Banns published without Knowledge of Wife. — 4 Geo. IV., c. 76, s. 22. — Fraud.*

The husband caused the banns to be published without the knowledge of the wife, a minor, to whom he proposed marriage only the day before it took place. For the purpose of concealment, the Christian name of the wife was wrongly stated, and the age and residence of the husband and wife were also falsely described. *Held*, that the marriage was valid, the wife having been unconscious of the irregularity in the publication of the banns.

The Court has no power to pronounce a decree of nullity of marriage, or to dissolve a marriage, because of fraud in its inducement.

This was a suit promoted by Richard Templeton for a decree of nullity of marriage, or of dissolution of marriage, between his daughter, Frances Templeton, a minor aged fifteen, and George Tyree, under these circumstances: The petitioner and his family lived in Channing Street, in the ecclesiastical district of St. Philip's, parish of Sheffield, county of York. George Tyree, the respondent, lived also in Channing Street. He was acquainted with Frances Templeton, who was afflicted with St. Vitus's dance and of feeble intellect, but had never courted or offered her marriage. On the 13th of January, 1872, he went to St. Thomas's church, in the ecclesiastical district of St. Thomas, Sheffield, and gave instructions for the publication of banns of marriage between "George Tyree, of Common Side, aged twenty-one, and Fanny Templeton, of Common Side, aged nineteen." Neither George Tyree nor Frances Templeton lived at Common Side, which was within the district of St. Thomas, and their ages were nineteen and fifteen, instead of twenty-one and nineteen. The banns were published without the knowledge or consent of Frances Templeton, and she did not hear of the contemplated marriage until the 3rd of February, when she was induced to leave her home by one Mary Wright, the sister of George Tyree, aided and assisted by another woman named Mary White. She was then told that the necessary arrangements had been made for the marriage, and on the following day, the 4th of February, she went to St. Thomas's church and was there married, without the knowledge of her parents, to George Tyree. After the ceremony she parted from him at the church-door and returned to her father's house. Mary Wright and Mary

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White were subsequently indicted for her abduction and convicted, and were sentenced to terms of imprisonment for the offence. A bill of indictment for the same offence was also found against George Tyree, but his trial was postponed pending the present suit. These facts were set out in the petition and were proved in evidence.

Waddy, for the petitioner, submitted that the Court ought to pronounce a decree of nullity by reason of undue publication of banns, or, supposing there had been no undue publication of banns, that the marriage should be dissolved because of the fraud by which it had been brought about.

The respondents did not appear. *Cur. adv. vult.*

Lord PENZANCE (on July 2). — The Court took time to consider whether a decree for nullity of marriage could, upon the evidence offered to it, be made in this case. The circumstances of the case are these: The husband is a young man of nineteen or twenty; the wife is a girl very little over fifteen years of age, subject * to St. Vitus's dance, not of strong health, and, although [*87] there is no proof that she is imbecile, possibly also not of strong mind. And it is imputed to the husband that the marriage was brought about in this way: He put up the banns in the church of a neighbouring district, but, according to the testimony of the girl, he never proposed the marriage until the day before it took place, and she had no hand in putting up the banns, and knew nothing at all at the time of the marriage as to what had been done. She imagined that some formalities were required, and she says that the sister of the husband told her that the matter had been all done and arranged, and under these circumstances she went next day to the church and was married to this young man. Immediately after the ceremony she came back to her parents and has remained with them since. Some proceedings of a criminal character have been taken against the sister of the husband and another woman who had aided in carrying out this scheme, the precise object of which does not appear from anything given in evidence before the Court. The girl is said to have some money coming to her on a future day under some settlement or will of her mother or grandmother, but that is all the Court knows about it. Application is now made to the Court to decree the marriage null and void on the ground that the banns were not duly published.

The authority of the Court to make a decree of that kind is derived directly from the statute of 4 Geo. IV., c. 76, which provides that when parties knowingly and wilfully intermarry without due publication of banns, the marriage shall be null and void. The question is, what is knowingly and wilfully intermarrying without due publication of banns? I pointed out to Mr. Waddy, when the case was heard, that the decisions ran in one direction, and that in order to constitute knowingly and wilfully intermarrying without due publication of banns, it is necessary that both parties should be conscious of the imperfection or irregularity in the publication of the banns. But at his desire I have further looked into the cases to see whether there was any case that would justify the Court in acting under the statute and holding that wilful knowledge on the part of the husband would also affect the wife. The case of *The King* v. *The Inhabitants of Wroxton*, 4 B. & Ad. 640, is a common-law decision upon the subject. There the man procured the banns to be published in a Christian and surname which the woman had never borne, but she did not know the fact until after the solemnisation of the marriage; and the Court held that inasmuch as the woman was not a party to the deception, the marriage was not void. There is then the case of *Tongue* v. *Allen*, 1 Curt. 46. That was a suit for nullity of marriage, by reason of undue publication of banns, brought by the father of a minor, the husband. There it was the husband who had been deceived. The wife put up the banns, misstating the name of the husband in order that he might not be recognised; and there the Court, with every desire to set the young man free, nevertheless held it was necessary in order to do so to prove that both parties were conscious of the deception and irregularity, and in the result it held that they were. *Wright* v. *Elwood*, 1 Curt. 662, was a suit by the husband. There the wife represented herself as a spinster and gave the husband a wrong Christian name, in which he caused the banns to be published. It turned out that instead of being a spinster she was a married woman; but the first husband died before the second marriage was celebrated, and therefore the case turned upon the question whether there had been a due publication of banns. It was held that there had not been a false publication of banns with the knowledge and consent of both parties, and that the marriage was valid. I have adverted to these cases because they are cases in which one of the parties was innocent

and entirely above blame, and where the innocent party endeavoured to set aside the marriage upon the ground of irregularity and the deception practised by the other side. But in all these cases both the Ecclesiastical and Common-Law Courts have held
*that it was absolutely necessary, under the statute of Geo. [*88]
IV., that both parties should be conscious of the irregularity in order to bring the case within the statute and make the marriage void, because of their having knowingly and wilfully intermarried without due publication of banns. It seems, therefore, to me that the Court has no power to make the decree that is asked for in this case.

It is further asked that the Court should set aside the marriage on the ground of the abduction and the general fraud and deception practised on the wife. *Miss Turner's Case*, Macq. H. L. 426, which was the subject of a bill in the House of Lords, was cited as an authority for the Court so acting; but an application of the kind proceeds upon a total misapprehension of the powers of this Court. This Court has no power except that conveyed to it by the statute 20 & 21 Vict., c. 85, and the power which the Ecclesiastical Court had of pronouncing a sentence of nullity under certain circumstances. In the *Case of Miss Turner*, the woman was taken away by fraudulent devices, and was ultimately induced to marry a man who sought her for her fortune; and in her case the House of Lords, and the House of Commons afterwards, passed a bill, not to declare the marriage void, but to dissolve the marriage. There is obviously no analogy between such a proceeding as that on the part of the Legislature and the power which this Court possesses. The Legislature may declare void or dissolve any marriage if it thinks proper so to do, and they have the same power to dissolve the marriage in this case as they had in the *Case of Miss Turner*. The circumstances of this case, however, do not disclose anything like that which appeared in the *Case of Miss Turner*. There the wife was imposed upon, here she was a consenting party throughout the whole transaction. Under these circumstances, the Court must dismiss the petition.

ENGLISH NOTES.

Marriage by banns may be legal though only one of the parties resided in the parish: *Robinson* v. *Grant* (1811), 18 Ves. 289; or though neither: *Nicholson* v. *Squire* (1809), 16 Ves. 259; nor will the

banns being published in false names render the marriage null and void under 4 Geo. IV., c. 76, s. 22, unless both parties knowingly and wilfully concurred in such undue publication: *Rex* v. *Wroxton* (1833), 4 B. & Ad. 641, 1 N. & M. 712; *Gompertz* v. *Kensit* (1872), L. R. 13 Eq. 369, 41 L. J. Ch. 382, 26 L. T. 95, 20 W. R. 313. Instances of misdescription by omitting Christian names by which the contracting parties were commonly known, for purposes of concealment, will be found in *Courtenay* v. *Miles*, 11 Ir. Rep. Eq. 284; *Bredly* v. *Reed*, 2 Curt. 833; *Midgley* v. *Wood*, *supra*; *Tongue* v. *Tongue* (1836), 1 Moore P. C. 90; *Wormald* v. *Neale* (1868), 19 L. T. 93. A clergyman celebrating a marriage by banns without making the inquiry directed by the Marriage Act is liable to ecclesiastical censure at least, perhaps to other consequences. *Nicholson* v. *Squire*, *supra*.

The following cases relate to marriages by licence: A. and B. intermarried at the parish church of Bradford, Yorkshire, on the 18th June, 1857. The licence for the marriage did not issue until 19th June, and the husband knew at the time of the marriage that the licence was not in existence; but the wife was ignorant of the fact, and believed that all necessary formalities had been observed. It was held that the parties had not knowingly and wilfully intermarried without licence within 4 Geo. IV., c. 76, s. 22, and the validity of the marriage was pronounced for. *Greaves* v. *Greaves* (1872), L. R. 2 P. 423, 41 L. J. P. & M. 66, 26 L. T. 745, 20 W. R. 802. Where a licence is granted in due form for a marriage at a particular church, the incumbent is under no obligation to inquire whether there has been a sufficient residence to justify the granting of the licence. His proper course is to assume the regularity of the licence and to perform the marriage ceremony. *Tuckniss* v. *Alexander* (1863), 4 Drew & Sm. 614, 32 L. J. Ch. 794, 9 Jur. (N. S.) 1026.

Where marriage is celebrated *in facie ecclesiæ*, it is not essential that all the words of the marriage service to be repeated by the man and woman should be actually said; but the ceremonies required by law are complied with when the hands of the parties are joined together and the clergyman pronounces them to be husband and wife, if they understand that by that act they have agreed to cohabit together and with no other person. *Harrod* v. *Harrod* (1854), 1 Kay & J. 4. The ceremonies enjoined by the rubric — as, addressing the congregation, putting the ring on the finger, pronouncing the benediction, &c. — are not, as said in *Beamish* v. *Beamish* (1859), 9 H. L. Cas. 274, essential to the validity of a marriage *in facie ecclesiæ*, the essential part being the reciprocal taking of each other for wedded wife and wedded husband and being declared married persons.

Marriage before a registrar is regulated by 6 & 7 Will. IV., c. 85

(commonly called Lord Russell's Act), and amending Acts 3 & 4 Vict., c. 72; 19 & 20 Vict., c. 119; 23 Vict., c. 18.

By the Foreign Marriage Acts, which are enumerated in the Foreign Marriage Act, 1891 (54 & 55 Vict., c. 74), marriages between parties one of whom at least is a British subject, solemnised in accordance with the provisions of the Acts, are as valid as if solemnised within the United Kingdom with a due observance of all forms required by law.

Section II. — *Property.*

No. 5. — COUNTESS OF STRATHMORE *v.* BOWES.

(ch. 1789.)

RULE.

A conveyance by a woman with the object of defrauding her intended husband of his rights in her property may be set aside by a Court of equity. But the husband may be debarred by the circumstances — for instance, if he has cozened the woman into the marriage — from claiming the assistance of the Court.

(This rule has, of course, little practical application since The Married Women's Property Act, 1882.)

Countess of Strathmore v. Bowes.

1 Vesey, Jr. 22–29 (1 R. R. 76).

Settlement. — Fraud on Marital Right.

A woman pending a treaty of marriage with A settled all her property [22] to her separate use with his approbation; a few days after, B by a stratagem induced her to marry him the day after she first thought of it; B had no notice of the settlement. The settlement was established, and a deed of revocation obtained by duress set aside.

Lady Strathmore being seised and possessed of great property, both real and personal, pending a treaty of marriage with Mr. Grey conveyed all her real and assigned all her personal property to trustees for her sole and separate use, notwithstanding any future coverture. This settlement was prepared with the approbation of

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Grey. A few days after the execution, hearing that Mr. Bowes had fought a duel on her account with the editor of a newspaper, who had traduced her character, she determined to marry him, and the marriage took place the next day. Bowes had no notice of the settlement. There were two bills: an original bill by Lady Strathmore to set aside a deed revoking the settlement as having been obtained by duress; and a cross-bill by Mr. Bowes to set aside the settlement as against the rights of marriage, and a fraud upon him, and to establish the deed of revocation. An issue was directed to try whether the deed of revocation had been obtained by duress, and the verdict in the Common Pleas was against the deed. The cause coming on upon the equity reserved, Mr. J. Buller, sitting for the Lord Chancellor, decreed in favour of Lady Strathmore, and dismissed the cross-bill with costs. It came on again upon the petition of Mr. Bowes for a rehearing, and reversal of that decree so far as it dismissed the cross-bill.

Mr. Richards, for Mr. Bowes.

The question is, whether this settlement made before marriage is valid or not, as being in derogation of the common [*23] *rights of marriage. A wife by the marriage contract becomes extinct from the nature of it for several civil purposes, with regard to which she merges in the husband. He becomes liable to all her debts, and answerable for all her acts that do not amount to felony; and even for that, if committed in his presence, because her mind is supposed to be under his coercion. In order to enable him to answer this, he has by the law all her property. It is absurd to say the wife shall by her own act deprive the husband of what the law has given him. It was not decided till lately that a legacy to a wife for her sole and separate use would have been good without the interposition of trustees; and this case is much stronger, because to be construed more strictly than a devise; nor can the interposition of trustees make any difference, because it cannot alter the nature of the thing. As to his not having made any settlement on her, many marriages are made without any; and in this case it could not be necessary, for she had £10,000 or £12,000 a year, a great estate for life, and much personal property. There is another principle very material: marriage by the law of England gives the husband the whole dominion over the property and also over the person of his wife, except as to murder; for by the old law he could not be punished

for cruelty towards her. The civil existence of the wife merged in that of the husband: he is the head of the family; to make another would be against the policy of the law. If the wife can by her own act, against the consent of the husband, make herself independent of him, it will destroy that subordination so necessary in families, which is analogous to that in the State, and tends to support it; for if Lady Strathmore is right in this, the husband is become a cipher in his own house; for he cannot educate his children, or do any other act which by law he has a right to do. The deed was executed on the 10th or 11th of January, and the marriage took place upon the 17th. If the deed had been meant fairly in contemplation of marriage, the husband would have been a party to it; there is no instance to the contrary, and it is necessary in order to testify the consent of the husband. In *Howard* v. *Hooker*, 2 Ch. Ca. 81, a settlement by the wife before marriage without notice to the husband was set aside. In *Lance* v. *Norman*, 2 Ch. Rep. 59, a bargain entered into by the wife before marriage was set aside, because the husband was not a party; and this case is stronger, because there the wife was only made poorer, but here she is *made quite inde- [*24] pendent of the husband. In *Carleton* v. *Dorset*, 2 Vern. 17, the estate was made over before marriage to trustees without privity of the husband; and a conveyance was decreed to the six-clerk, and the personal property to be paid into Court for the husband, because in derogation of the rights of marriage; and in *Edmonds* v. *Dellington*, cited in the foregoing case, a deed of settlement made before marriage without notice to the husband was set aside. In *Poulson* v. *Wellington*, 2 P. Will. 535, Lord KING said, that if a woman before marriage settled her property without giving notice to the intended husband, it would as to him be fraudulent and void. *Cotton* v. *King*, 2 P. Will. 358, 674. Lady Cotton, widow, had ten children by her first husband; and before the second marriage by indenture settled part of her fortune in their favour (reserving, however, a considerable portion), without notice to the husband. King filed a bill to have this deed delivered up to him: but as the transaction of making the deed had been public; as she had so many children by her first husband, for whom it was reasonable to provide, before she entered into a second marriage; and as her second husband was a person in mean circumstances, and had received a good fortune with her·

and as she had reserved something to herself, — King's bill was for these reasons dismissed. This decision shows that if it had not been for the benefit of the children by the first marriage, and on account of these several circumstances, it would have been good. Upon these cases, and the principle of the thing, this settlement is void, as being in derogation of common right. It is to be observed that in all these cases something was reserved; here there is nothing, for Lady Strathmore has conveyed all her real and assigned all her personal property to trustees for her own use; and the circumstance of appointing trustees will not alter the nature of the thing, though it drives us into a Court of equity.

For Lady Strathmore: Mr. Mansfield, Mr. Hardinge, Mr. Law, and Mr. King.

Lady Strathmore is in possession by a deed to trustees, giving her own property to her use. It was done in contemplation of marriage with another person, therefore not fraudulent as to Mr. Bowes; unless any deed by a *feme sole*, by which she disposes of her property, shall be construed to be fraudulent if not communicated to any future husband. Want of communication [* 25] * is the only circumstance that can be alleged; but that is very different from concealment, for which there can be no pretence here. It is true a man by marrying a woman gains a dominion over her property, and in a great degree over her person, though, perhaps, not in the extent contended. But he had nothing to do with this property, for it was not in her at the time of the marriage, having been previously vested in trustees; and as every man knows that a woman may settle her property so that a future husband shall not be able to touch it, Mr. Bowes ought to have inquired about it beforehand. There is no pretence of actual imposition upon him, nor even upon Grey. The deed was prepared by a gentleman of the first credit. She had several children by Lord Strathmore; she was going to marry Mr. Grey, and made this previous settlement for her children; and she acted meritoriously and honourably in so doing The deed was with Grey's knowledge and under his direction: his approbation of it appeared by his having called to know when it would be ready, and to hasten it; and it was prepared, though not executed, a month before the time of the marriage, therefore not fraudulent as to Mr. Grey; and there is no authority for vacating a settlement

made by a woman for the protection of her children, without fraud. Mr. Bowes made no settlement on Lady Strathmore; neither did King upon Lady Cotton in the case cited (which was one of the grounds of the decision in that case), though Bowes had some fortune by a former wife. He took Lady Strathmore, as she then was, with what she then had; therefore there is nothing fraudulent, or that can entitle him to relief in this Court. Knowing that she was a woman subject to sudden and violent impulses of generosity, he made use of a vile artifice to obtain her by means of a sham duel (for it is in every stage of the cause admitted to have been so) with the proprietor of a newspaper, who had traduced her; and the emotion and precipitation which he caused by this artifice was the cause which prevented the communication of the actual situation of her fortune. After this Mr. Bowes made use of the most reproachful means to set aside this deed; and the verdict was, that the revocation was obtained by violence. He would not have done this had he not thought the deed a good one. The reason of the case is (nor is there a *dictum* to the contrary) that where a woman about to marry represents herself as possessed of a fortune, which she had previously disposed of, this Court will not permit the * husband to be cheated. [* 26] *Howard* v. *Hooker*, to which all the cases refer, was of that kind, being a specific fraud upon the husband. The marriage had been broken off, and was brought on again by the interposition of friends, upon the idea of the husband that he was to enjoy the wife's fortune, in consideration of which he made a settlement on her of £500 a year. In *Lance* v. *Norman* the wife before marriage entered into a recognisance concealed from the intended husband; and the object of it was to enable the creditor, who was her own brother, to distress the husband; and they had made an attempt to defraud him before by getting him to sign a deed, which was in Latin, that he might not understand it, telling him it was only a memorandum. In *Carleton* v. *Dorset* the wife conveyed all her fortune to trustees to her own use, with permission to herself to appoint; and in default of appointment, to her own right heirs; and afterwards married. Here the case was that the husband had assurance that he was to enjoy the estate of his wife; and the decree was upon the ground that it was a trust for her with power to appoint; and as she made no appointment, it was resolved to be a trust for her husband. Besides, in that case the

fortune was paid into Court, and a reasonable allowance was to be made to her. It has been remarked that the foundation of the decree in *King* v. *Cotton* was that it was to provide for children, which has been said to be the only case in which this can be good; but the settlement on children or any one else will not make any difference; the question is, what right the husband has: if he has any right, notwithstanding any voluntary disposition without notice to him, because he was deceived, the manner in which that deceit was practised will make no difference with respect to him; for the ground for relief must be that he was cheated, because the settlement was not communicated to him. *King* v. *Cotton* is for Lady Strathmore; for Lady Cotton had disposed of her fortune so as to put it quite out of the power of her husband; and yet the settlement was established. As to *Edmonds* v. *Dellington*, Mr. J. Buller suspected that it was misreported in Vernon, where it is only a loose note cited at the bar; and on inspecting the register the decree turns out to be quite different from that report, for the deed was established upon the ground of distinct notice to the husband; and in that case, as in this, the settlement was of all her property. These cases therefore [* 27] only go on the ground of fraud on the husband, of * which there is no suggestion here. But this is not a question upon a deed executed by a future wife pending a treaty of marriage with a future husband; nor upon a deed made in prejudice generally of marital rights; nor of a settlement by a husband, by which he pays for his future power over the fortune of his wife. Suppose a husband to say he is indifferent as to the fortune of his wife, in order to appear disinterested; suppose, having a fortune, he makes no settlement; and suppose the marriage instantaneous, no time being given for communication or concealment, — is it enough for the husband to say his secret hope was disappointed? The only pretence here is, that he expected her fortune would have been greater than it proved, which expectation he did not disclose. To make this deed valid is only to put a safeguard in her hands against the consequences of an improvident marriage; and she had a right while *sui juris* to baffle for so much, what would otherwise have been the marital power of her husband. It is enough for us to say Mr. Bowes was not cheated.

Lord Chancellor (Lord Thurlow).

The mere question seems to be what is the true foundation for

setting aside an instrument *primâ facie* good. Can less be imputed to it than fraud? Or can it be void upon the notion of general policy, as has been urged for Mr. Bowes? If not, must not fraud be imputed? And if so, will the circumstances of its being made in contemplation of marriage affect it with fraud? Suppose a relation had given £10,000 for her sole and separate use; if she had represented it as her own absolutely, so that upon marriage it would have gone to her husband, this Court would have compelled the trustees to give it to the husband; but not otherwise; nor is there any difference between a fortune so circumstanced by an act of her own or of the donor. Consider what will be the effect of this void deed of revocation. If he had joined with her to revoke that settlement, and appoint new uses, he could not have rescinded that afterwards; because he had affirmed the deed by acting upon it. If he had acted honestly upon it, as in the case I have put, he could not have set that aside; his counsel are to show that he may, because he has acted dishonestly upon it; which at present I think rather a vain attempt.

LORD CHANCELLOR. [28]

I never had a doubt about this case. If it is to be considered upon the ground of its being against a rule of judicial policy, the arguments for Mr. Bowes would have had great weight. The law conveys the marital rights to the husband, because it charges him with all the burdens, which are the consideration he pays for them; therefore it is a right upon which fraud may be committed. Out of this right arises a rule of law that the husband shall not be cheated on account of his consideration. A case of this kind came before me a few days ago. A woman adult, about to marry an infant, made a settlement in contemplation of that marriage, in which he joined, though an infant, for the purpose of expressing his consent. As it was upon fair consideration, and no fraud to draw him in as an infant, I thought the circumstance of its being fair would bind him, though, as an infant, not capable of consenting; according to which I held the settlement good, as she was capable of conveying, and as it was a public and open transaction, with the consent of the family, and consequently no fraud; though his being privy to it would not have concluded him from any rights as being an infant. A conveyance by a wife, whatsoever may be the circumstances, and even the moment before the marriage, is *primâ facie* good, and becomes bad only

upon the imputation of fraud. If a woman during the course of a treaty of marriage with her makes without notice to the intended husband a conveyance of any part of her property, I should set it aside, though good *primâ facie*, because affected with that fraud. As to the morality of the transaction, I shall say nothing to that. They seem to have been pretty well matched. Marriage in general seems to have been Lady Strathmore's object; she was disposed to marry anybody, but not to part with her fortune. This settlement is to be considered as the effect of a lucid interval, and, if there can be reason in madness, by doing this she discovered a spark of understanding. The question which arises upon all the cases is, whether the evidence is sufficient to raise fraud. Even if there had been a fraud upon Grey, I would not have permitted Bowes to come here to complain of it. But there was no [*29] fraud even upon Grey, for *it was with his consent; and so I cannot distinguish it from a good limitation to her separate use. Being about to marry Grey she made this settlement with his knowledge; and the imputation of fraud is, that, having suddenly changed her mind, and married Mr. Bowes, in the hurry of that improvident transaction she did not communicate it to him; but there was no time, and could be no fraud, which consists of a number of circumstances. It is impossible for a man, marrying in the manner Bowes did, to come into equity and talk of fraud. Therefore the decree must be affirmed with costs; but let him have all just allowances as to what he paid when in receipt of the profits, and as to the annuities, which are declared not to be disturbed by the decree.

This decree was subsequently affirmed by the House of Lords. Lords' Journal, 19 July, 1797.

ENGLISH NOTES.

It has been held that even a settlement made by a widow, pending a treaty for a second marriage, on the children of the former marriage, may be treated as a fraud on the second husband, unless he had assented to it. *Hunt* v. *Matthews*, 1 Vern. 408. It makes no difference that the husband was ignorant of his wife having any property. *Taylor* v. *Pugh* (1842), 1 Hare, 608; *Goddard* v. *Snow* (1826), 1 Russ. 485. But if the husband knew of such a gift or settlement pending the treaty, and nevertheless went on and married the lady, the gift or settlement could not be treated as void in equity: *St. George* v. *Wake* (1833), 1 My. & K. 610; still less if he has assented to the gift, or

acquiesces in it: *Slocombe* v. *Glubb* (1789), 2 Bro. C. C. 545; *Maber* v. *Hobbs* (1836), 2 Y. & C. Ex. Cas. 317. A husband having seduced his intended wife, was barred from asserting any such right in equity, because by such seduction he put it out of her power to make terms. *Taylor* v. *Pugh, supra.*

AMERICAN NOTES.

This doctrine is sustained by *Green* v. *Green*, 34 Kansas, 740; 55 Am. Rep. 256; *Ferebee* v. *Pritchard*, 112 North Carolina, 83; *Glass* v. *Hulbert*, 102 Mass. 24; 3 Am. Rep. 418; *Baker* v. *Jordan*, 73 North Carolina, 145; *Williams* v. *Carle*, 2 Stockton (New Jersey Equity), 543; *Duncan's Appeal*, 43 Penn. St. 67; *Robinson* v. *Buck*, 71 ibid. 386.

The same is true of a conveyance by the intended husband to cut off dower. *Pierce* v. *Pierce*, 71 New York, 154; 27 Am. Rep. 22; *Butler* v. *Butler*, 21 Kansas, 521; 30 Am. Rep. 441; *Jones* v. *Roberts*, 65 Maine, 273; *Hamilton* v. *Smith*, 57 Iowa, 15; 42 Am. Rep. 39; *Smith* v. *Smith*, 2 Halsted (New Jersey Equity), 515; *Dearmond* v. *Dearmond*, 10 Indiana, 191; *Cranson* v. *Cranson*, 4 Michigan, 230; *Littleton* v. *Littleton*, 1 Devereux & Battle (No. Car.), 327; *Smith* v. *Smith*, 12 California, 217; *Petty* v. *Petty*, 4 B. Monroe (Kentucky), 215; 39 Am. Dec. 501; *Swaine* v. *Perine*, 5 Johnson Chancery (New York), 482; 9 Am. Dec. 318; *Murray* v. *Murray*, 90 Kentucky, 1; 8 Lawyers' Rep. Annotated, 95; *Flowers* v. *Flowers*, 89 Georgia, 632; 18 Lawyers' Rep. Annotated, 75, with notes.

But either party may thus provide for children by a former marriage, although it is done secretly. *Champlin* v. *Champlin*, 14 Rhode Island, 314; *Re Kesler's Estate*, 143 Penn. State, 386. So as to provision for the mother of the grantor. *Dudley* v. *Dudley*, 76 Wisconsin, 567; 8 Lawyers' Rep. Annotated, 814; *Hamilton* v. *Smith, supra*; *Butler* v. *Butler, supra.* But see *contra*: *Tisdale* v. *Bailey*, 6 Iredell Equity (No. Car.), 358 (even where the children were innocent).

A transfer of personal property by a husband, not parting with the absolute dominion over it during his life, but intending at his death to deprive his widow of her distributive share, is void as to her. *Walker* v. *Walker*, 66 New Hampshire, 390; 49 Am. St. Rep. 616, and cases cited. But if such transfer is in good faith, especially if made to provide for minor children, it is valid. Ibid.; *Lines* v. *Lines*, 142 Penn. State, 149; 24 Am. St. Rep. 487.

The principal case is cited in 1 Bigelow on Fraud, p. 604. This author says: "Voluntary ante-nuptial settlements are at common law voidable by the husband after marriage, provided it appear (1) that intermarriage was in the contemplation of the parties at the time; (2) that the woman executed the settlement in contemplation of the future marriage; (3) that she concealed it from her intended husband."

The principal case is largely cited in *Williams* v. *Carle, supra*, which gives a learned review of the authorities. It is there said: "There is some conflict of authorities as to whether the mere fact of concealment alone, on the part of the woman, is sufficient to constitute a fraud upon the intended husband's marital rights; and whether in addition to the concealment it must not be shown that the intended husband *knew* the woman to be possessed of the property which she disposed of."

No. 5. — Countess of Strathmore v. Bowes. — Notes.

The principal case is cited in *Gregory* v. *Winston's Adm'r*, 23 Grattan (Virginia), 102, 122, holding that mere concealment of the settlement is not sufficient to avoid the transfer; "the Courts will consider the nature of the provision, the situation of the husband in point of pecuniary means, and any other facts which tend to show that no fraud was intended. *King* v. *Cotton*, 2 P. Wms. 674; *Anonymous*, 34 Alabama, 435." In the last case cited the doctrine of *Taylor* v. *Pugh*, 1 Hare, 608, was followed, and the Court refused to set aside the transfer where the woman was at the time pregnant by the intended husband.

The most recent examination of this principle in the American Courts is in *Smith* v. *Smith*, 22 Colorado, 480, 34 Lawyers' Rep. Annotated, 49, where the decision is that a fraud upon the rights of a wife is committed when a husband strips himself of all his property just before death by delivering deeds of real estate that had been made some years before and giving a check for money which constituted all his personal property in order to defeat his wife's rights as his heir, after obtaining the full benefit of the property up to the end of his own life. The Court observed: "In the case of *Youngs* v. *Carter*, 10 Hun (N. Y. Supr. Ct.), 194, the facts were that Daniel Youngs, a widower, was engaged to be married to the plaintiff in August, but in consequence of his sickness the marriage was put off until September. In the interim he, without the knowledge of the plaintiff, conveyed nearly the whole of his real estate to two daughters by a former marriage, and took back from them a lease for his life. The plaintiff did not learn of this conveyance until after marriage, and then immediately brought suit to have the same set aside. The Court held that the conveyance was a fraud upon the inchoate right of the wife to dower, and adjudged her entitled to dower in the land so conveyed. In the course of the opinion, which is an instructive one, the Court advances the following argument: 'When the conveyance in controversy was executed, the relation of the grantor to the plaintiff was of a strictly confidential nature, and a natural expectation inspired as well as implied by it was, that upon its consummation she should succeed to all the legal rights of a wife in the property owned by him. She acquired by means of it an equitable claim upon him to that extent. But, at the same time, it was not so entirely controlling as to prevent him from discharging such other equitable obligations as he might have previously incurred to his children. It simply restrained him from disposing of his property fraudulently for the purpose of preventing it from becoming subservient to the rights which the laws of the State secured to a wife.' This principle is announced and carried to its logical result in the case of *Manikee's Adm'r* v. *Beard*, 85 Kentucky, 20, where the husband, in contemplation of death, gave to his children the whole of his personal estate, with the fraudulent intent to deprive his wife of the interest therein to which she would be entitled as his widow; and the Court did not hesitate to set aside the gift at the suit of the widow. This case is a much stronger one in favor of the widow than that case, for the reason that there the gift was of personal property only, over which the owner has, by the commercial law, greater freedom than over his real estate; and her dower interest remained in the lands left by the husband at his demise, and this dower

interest was sufficient to support her. Here, by the fraudulent conduct of the husband, the wife was stripped of all her rights as heir to his personal estate, and to his real estate as well. It is not necessary in this case, and it is not our intention, to say anything that will prevent the husband, during his lifetime, from selling his personal property or transferring his real estate for such consideration as he may be willing to accept, or without consideration, provided always that the transaction shall be absolute and *bonâ fide*, and not colorable only; but what we do say is, where, as here, the complaint charges, and the evidence shows, that the transaction complained of is colorable merely, and resorted to by the husband for the purpose of defeating his wife's rights as his heir, he hoping thereby to obtain the full benefit of the property to the last hour of his life, and at the same time to be able to deprive her of all interest therein as his heir, is as much of a fraud on the part of the husband as it is for a debtor having in contemplation the incurring of an indebtedness to put his property beyond his control, and the Courts have universally declared the latter to be in violation of the Statute of Frauds."

No. 6. — LADY ELIBANK *v.* MONTOLIEU.

(CH. 1801.)

No. 7. — MURRAY *v.* LORD ELIBANK.

(CH. 1804.)

RULE.

A WIFE may compel her husband to make a provision for her out of property which he claims *jure mariti*, if he cannot reach the property without the aid of a Court of equity.

Where a decree has been made for a settlement upon wife and children, upon the assertion of the wife's equity to a settlement, the children may, after the death of their mother without having waived her right, claim the benefit of that decree.

Lady Elibank v. Montolieu.

5 Vesey, 737-744 (5 R. R. 151).

Married Woman. — Equity to Settlement.

Upon the bill of a married woman, entitled to a share of the personal [737] estate as one of the next of kin of the intestate, against her husband and the administrator, the latter claiming to retain towards satisfaction of a debt by

No. 6. — Lady Elibank v. Montolieu, 5 Ves. 737, 738.

bond from the husband to him, it was declared he was not entitled to retain, but that the plaintiff's share was subject to a further provision in favour of her and her children, the settlement on her marriage being inadequate to the fortune she then possessed; and it was referred to the Master to see a proper settlement made on her and her children, regard being had to the extent of her fortune and the settlement already made upon her.

In 1795 Lady Cranstown died intestate, possessed of large personal property, leaving two brothers and two sisters her next of kin. Lewis Montolieu, one of her brothers, took out letters of administration to her.

The bill was filed by Lady Elibank, one of the sisters, against her husband, Lord Elibank, and against Montolieu, praying an account of the plaintiff's share, and that it may be settled on her and her family.

[738] The defendant, Montolieu, by his answer, claimed to retain Lady Elibank's share towards satisfaction of the debt due to him from Lord Elibank by two bonds: one dated the 31st of May, 1783, for £12,217 9*s.* 9*d.*, the other dated the 14th of November, 1794, for £1000, upon the ground of the provision made for the plaintiff by the settlement previous to her marriage with the defendant, Lord Elibank, in 1776. By that settlement the sums of £12,000 and £5000 New South Sea Annuities were settled in trust for Lord Elibank for life, and after his decease for Lady Elibank for life as a jointure and in lieu of dower or thirds, and after the decease of both in trust for the children. The sum of £4000 New South Sea Annuities were settled in trust for her separate use for life, and after her death for her children; and £2000 5 per cent Bank Annuities for her separate use for life, and after her death for her children, as she should by will appoint. All these sums were her property before marriage. The settlement also gave her some contingent interests.

In the entail of Lord Elibank's estate a power was reserved to charge £200 a year jointure, and £50 a year to each of his younger children, not exceeding, in the whole, £200 a year, under a condition that the estate should be chargeable with only one jointure at a time; and that, if the power of charging for children had been exercised by a preceding heir in tail, the heir in possession should not charge for his younger children. The defendant, Lord Elibank, by his answer stated that a former Lord Elibank did charge to the full extent of that power.

No. 6. — Lady Elibank v. Montolieu, 5 Ves. 738, 739.

The Solicitor-General, Mr. Grant, and Mr. Alexander, for the plaintiff.

The plaintiff desires an account of the personal estate of Lady Cranstown; and that a provision may be made for her. The defendant Montolieu insists that is not to be done; because he is a creditor of her husband; contending, that this case is out of the usual rule upon which the Court acts for a wife; and that there is no necessity to come to this Court: the fortune not being in Court, nor under the control of the Court. In *Jewson* v. *Moulson*, 2 Atk. 417, Lord HARDWICKE held, that is not a necessary ingredient to enable the Court to act upon the property: and that this Court would interfere to prevent the husband from obtaining it through a Court of concurrent jurisdiction, * as [* 739] the Ecclesiastical Court; because that Court cannot give the wife a remedy; though he doubted where it could be got at without the aid of this Court, or a Court of concurrent jurisdiction; and he states that the rule is as old as the time of King Charles I.; and cites a case from Tothill. There have been many instances of an injunction to restrain the husband from proceeding in the Ecclesiastical Court, refusing to make any provision for his wife; and that Court having no power to compel him. The cases upon this subject are collected in Mr. Cox's note to *Bosril* v. *Brander*, 1 P. Wms. 458; and the result is, that, where the property is a subject of equitable cognisance, it is not material whether the wife, or the husband, or his representatives or general assignees, come for the aid of the Court. A wife in the situation of this plaintiff therefore may come to this Court for the purpose of having that to which she is entitled secured to her and her family, and part settled to her separate use. She is entitled to the same reference as was directed in *Worrall* v. *Marlar* and *Bushnan* v. *Pell* (1 P. Wms. 459), for the purpose of receiving a proposal for a settlement. In *Wright* v. *Rutter*, 2 Ves. p. 693 (3 R. R. 24), the MASTER OF THE ROLLS observes that it is now determined that an action will not lie against the executor for property bequeathed to a married woman; and one of the reasons is that the husband would get it free from the condition a Court of equity interposes. It is not necessary, therefore, that the property should be in this Court, or in the hands of trustees; for if it was in the Ecclesiastical Court, or in the hands of an executor or an administrator, the interest of the wife is

[* 740] * protected. That case related to a residue of personal estate in the hands of an administrator; for which it was not necessary to come here; but that was held not to make any difference. But suppose the husband could sue at law, this defendant could not make this defence, that he will not pay; but will keep this fund in satisfaction of the husband's debt to him; for it is clear, at law, a creditor of the husband cannot set off the husband's debt against the demand of the husband and wife; and being entitled in her right he must sue with her. Still less should he be permitted to retain in Equity upon that ground; for where he is permitted to avail himself of the legal right, the right must be clear. There have been several other cases, in which the Court has acted upon a residue just as if the property was in the hands of trustees. The accident, that Montolieu is the administrator, cannot alter the right of the wife. In *Atherton* v. *Knowell*, a husband, entitled in right of his wife to an income, being unable to maintain her, the Court referred it to the Master to see what it would be proper to allow her out of that fund. *Sleech* v. *Thorington*, 2 Ves. 560; *Watkyns* v. *Watkyns*, there cited; *Milner* v. *Colmer*, 2 P. Wms. 638; *Oglander* v. *Baston*, 1 Vern. 396.

The only ground that can be taken against this bill is, that Lord Elibank became the purchaser of what might in future accrue to Lady Elibank; but there is no stipulation of that sort in the settlement; nor any indication of that intention. On the contrary, all the funds settled are her own; and a very scanty provision is made for her out of his estate. In *Burdon* v. *Blaster*, in 1775, the husband having become a bankrupt, the question arose between the assignees and the wife. The bill was filed by the assignees; and, though an objection was raised on account of the settlement, the wife obtained her equity. In *Pawlet* v. *Delaval*, 2 Ves. 663, it is laid down (2 Ves. 669), that though the Court will make a decree, where the husband and wife are parties, where the wife has a proper settlement, to pay to the husband and wife where the wife has not had a sufficient settlement, the Court will not. As to the form of this suit, the wife sues alone, it is true, not with her husband: but that was the case in *Worrall* v. *Marlar*. If she has the equity against her husband, she must be entitled to sue.

[741] The Attorney-General, Mr. Mansfield, and Mr. W. Agar, for the defendant, Montolieu.

The objection to the form of the suit would merely occasion delay; and a bill would be filed in their joint names.

There is no case in which the Court has decreed against a trustee, who had paid the husband without suit, that the wife had an equity to charge the trustee. The husband suing in the Ecclesiastical Court is suing persons unwilling to pay him; and the trustee or executor so sued has come into this Court to restrain him. That is quite a different case. Suppose the husband institutes a suit in the Ecclesiastical Court; and the trustee submits to pay: could the wife come here and say it was in fraud of her equity? Lord HARDWICKE, in *Jewson* v. *Moulson*, supposes a case where the husband can come at the property without the aid of the Court. All the instances are, where the person has refused to pay, unless compelled by a Court of equity. That gives the jurisdiction; and none can be produced, where the executor has been prevented from paying to the husband if he chose to do so; or where, having paid to the husband, he has been charged as upon a breach of duty by reason of that payment, and made to refund. The case of *Worrall* v. *Marlar* is a singular one; and was influenced by the insolvency of the husband: but this plaintiff has a competent provision.

This case is certainly new in the circumstance that the husband is debtor to the other defendant: but if he could have paid the husband, and the Court would not have made him refund, there can be no difference from his retaining against the husband. Suppose Lord Elibank had sued, and the equity of the wife, having a very large provision, was out of the question, this Court would never compel the administrator to pay that share to his debtor, unless the latter would allow the debt. This Court goes infinitely beyond Courts of law as to set-off. It would be strange to permit the wife to intervene against the administrator retaining, where she could not intervene to prevent his paying her husband and the husband paying his debt out of that. *Burdon* v. *Blaster*, *Jewson* v. *Moulson*, and all the other cases, go upon the same ground: that the property was in the Court; and the husband or his assignees could not have it without the assistance of the Court. In this case the plaintiff comes to get it from the administrator * contrary to the plainest equity between [* 742] him and her husband. There is no instance of a bill by the wife against her husband to have the property settled to her

separate use; which is the object of this bill. This property, though subject to the equity of the wife, is the property of the husband: *Packer* v. *Wyndham*, Prec. Ch. 412.

The Solicitor-General, in reply.

Packer v. *Wyndham* has nothing to do with this case. The wife being dead, and without issue, the question arose between the assignees of Mr. Packer and the next of kin of Mrs. Packer; and it was insisted that, if the agreement had been carried into execution, Mr. Packer would have been entitled to the money; and she having been provided for during her life, and being dead, and not having left any children, the purpose for which the Court laid its hand upon the property, to secure a settlement, was at an end. The rule is clearly laid down in *March* v. *Head*, 3 Atk. 720; and it is now a settled rule, that if a husband in right of his wife becomes entitled to any sum exceeding £200, this Court will not permit him to have it without a reference to the Master for the purpose of a settlement; unless the wife consents that it shall be paid to her husband. The rule is clear, that, wherever the husband becomes entitled to sue in right of his wife, she must consent that he shall have it, or he is under the necessity of making a settlement; unless the Master is of opinion that the settlement already made by the husband is such as to answer all the purposes of the wife. *Packer* v. *Wyndham* is mentioned by Lord Hardwicke in *Bates* v. *Dandy*, 2 Atk. 207, as consisting of many particular circumstances. *Worrall* v. *Marlar* has determined that the wife may file the bill by her next friend; and there can be no doubt that this plaintiff has an interest that will enable her to file such a bill for the purpose of having her property ascertained. Lord Elibank is passive. It is true, if he had assigned this to Montolieu, that might have bound the plaintiff: but he has not done so. This administrator stands in the character of trustee; and has no right to object merely for his own advantage. If this bill should be dismissed, the defendant would not be discharged: but on the death of Lord Elibank the right would survive; and she might file a new bill. It is not like a release. If a [* 743] proper * settlement has not been made, there must be a proposal laid before the Court, as in *Worrall* v. *Marlar*. That must be made by the husband, not by Montolieu, who has no more right than any other creditor.

No. 6. — Lady Elibank v. Montolieu, 5 Ves. 743, 744.

Lord Chancellor (Lord Loughborough).

I wish to consider this case.

Lord Chancellor.

The only difficulty I had in this cause was upon the form of the suit; whether a married woman by her next friend could be the plaintiff in this Court. With respect to the point made by the answer of Montolieu, that he had a right to retain against the debt of the husband, being possessed of the fund as administrator, and the wife being one of the next of kin, I am very clearly of opinion the defendant had no right to retain. The administrator is trustee for the next of kin: the plaintiff being one of them, if she has any equity against her husband with regard to this money, that equity will clearly bar any right of retainer he can set up to the property, of which he became administrator. With respect to the only difficulty I had, upon the point of form, if she is entitled, and there is no way of asserting her right against her husband except by a bill, that objection, I think, does not weigh much. If the defendant, Montolieu, had done what would have been the natural thing, and the right thing, and what he certainly would have done, but for his own interest, he would have been the plaintiff, desiring the Court to dispose of the fund, and for her benefit, to protect her interest in it. Then, upon all the circumstances, it is very clear, if it had come before the Court, it would have been matter of course to have pronounced upon her equity upon the bill of the administrator, praying that the money in his hands might be properly disposed of; and I would not have suffered this money to be paid to Lord Elibank without making a provision for her; for the provision upon her marriage was clearly not adequate to her fortune; and it is clear that provision was made upon the expectation that by circumstances to occur in his family there would be an opportunity to do better for her at a future period. The difficulty was, that it is very unusual in point of form; the bill coming on the part of the wife instead of the husband.

Declare that the defendant, Montolieu, is not entitled to [744] retain in satisfaction of the debt due from the defendant, Lord Elibank, to him; but that the distributive share of Lady Cranstown's fortune, accruing to the plaintiff as one of her next of kin, is subject to a farther provision in favour of the plaintiff and her children; the settlement made upon her marriage being

inadequate to the fortune she then possessed. Refer it to the Master to take the accounts, and to see a proper settlement made upon the plaintiff and her children; regard being had to the extent of her fortune and the settlement already made upon her.

Murray v. Lord Elibank.

10 Ves. 84–92 (s. c. 13 Ves. 1; 14 Ves. 496; 7 R. R. 346).

Equity to a Settlement. — Right of Children.

[84] Right of children to a provision out of the property of their mother under a decree, directing a settlement by the husband on her and her children; notwithstanding her death before the report. But she may in her lifetime waive the equity for herself and children.

The bill was filed by the infant children of Lord Elibank, stating the proceedings in the cause, *Lady Elibank* v. *Montolieu*, 5 Ves. 737 (p. 767, *ante*), and the decree, directing the Master to approve a proper settlement to be made by the defendant, Lord Elibank, on the plaintiff, Lady Elibank, his wife, and her children by him, regard being had to the extent of her fortune and the settlement already made upon her by Lord Elibank.

The bill farther stated that before any report Lady Elibank died intestate; and prayed that it may be declared that the plaintiffs and the defendant, Alexander Murray, another child of Lord and Lady Elibank, have, under the decree of the 19th February, 1801, a right to have a provision made for them out of the said one-fourth of the personal estate of Lady Cranstown; and that it may be referred to the Master to approve of a proper settlement to be made by the defendant, Lord Elibank, upon the plaintiffs and the defendant, Alexander Murray, being all the chil-
[* 85] dren; regard being had to the extent * of the fortune of Lady Elibank, and the settlement already made by Lord Elibank.

To this bill the defendant Montolieu put in a demurrer.

Mr. Alexander and Mr. Cooke, in support of the bill:

The question is, whether the children are entitled to sustain a supplemental suit; so as to have the benefit of the decree. This right is purely a creature of the Courts of equity of this country. Upon principle why should the interest, given by the decree to particular persons, beyond the interest of the parent, depend upon

the accident of death? But the interest of the children rests most safely on the uniform practice. In *Rowe* v. *Jackson*, 2 Dick. 604, it was said by Mr. Madocks, and assented to by the Court, that, where a husband sues for his wife's fortune, and is decreed to make a proposal for a settlement, and the wife dies, the husband shall be compelled to carry it into execution for the children; and he cited a manuscript case for that; and observed, that the same thing was said by Lord THURLOW in 1779, upon a motion by Mr. Mansfield: but it is otherwise if the wife dies before the decree. It is now decided that the creditors of the husband are exactly in the same situation. An order was made by Lord ALVANLEY, enforcing the equity for the children after the death of the wife, even against the assignment of the husband. It does not appear whether the husband had carried in a proposal before the death of the wife, or before the assignment: but that cannot make a difference, as the mere proposal could not bind more than the decree, in obedience to which it is made. The rule is now clearly
* settled, that the children have, through their mother, an [* 86]
interest in her fortune. The uniform language of the Court is, that the husband shall go before the Master, and lay proposals for a settlement upon the wife and children. It appears from *Hearle* v. *Greenbank*, 3 Atk. 695, that Lord HARDWICKE so considers it; and seems to think that decree might be made after the death of the wife; the children, even after her death having a right against the father for a provision. But here is a decree, establishing this right of the children in the life of the wife; and the settlement is to be considered as made at the date of the decree; and in the nature of an agreement sanctioned by the Court, giving the husband the fortune upon terms. In *Martin* v. *Mitchell*, the case before Lord THURLOW, in 1779, the Court, after the death of the wife before a settlement, carried the proposal into execution against an assignment to a creditor.

Mr. Richards and Mr. W. Agar, in support of the demurrer:

In the case, either of a sum of money, the property of a married woman, which belongs to her husband in her right, or a bond or note, a chose in action, or what Lord ALVANLEY called a chose in equity, which the husband may recover, but, if he does not, will survive, the debtor may pay the husband, who may release him. It is his property, subject to the contingency of survivorship. A Court of equity will not assist him, unless he will make a settle-

ment; but if the wife does not desire a settlement, the Court will not make one for her; and it has been held that the Court cannot refuse to the wife the power of giving the property to her husband. It is the property of the husband; to be extended to the wife and children, if she thinks fit; but the Court [*87] *would not upon her desire in Court permit her to give it to any one else; as she might, if it was hers, independent of the equity the Court attaches upon it. Having not the property, but an equity only, she has no interest to give up. There is no analogy, therefore, to the case of a fine; in which an interest does pass. The trustee is justified in paying the husband: but if the wife had an interest in it he would be answerable for that to her.

But, supposing the wife to have some interest, can the children have any? If she is dead, they cannot come here for a settlement: *Scriven* v. *Tapley*, Amb. 509; 2 Eden, 337. It is said, the Court has by the decree given them an interest. They were not parties before the Court at the time that decree was made. They have no more interest in the property than a stranger; but are considered by the Court in a manner comprehended in the mother, while she exists; who is therefore allowed to extend her plan of provision to them; but not as distinct and separate objects, having an interest independent of her. Suppose Lady Elibank had waived the order for a settlement; and desired the money to be paid to her husband: the Court, considering the equity hers, would have held that she might disappoint her children. The proposal, not completed and carried into execution by the Court, is only an offer; and if the wife dies before it is carried into execution, the husband is remitted to his legal right. In all these cases everything is given with reference to the wife: nothing independent of her. Only two authorities are produced for making any order for the benefit of the issue of the marriage after the death of the wife: the one, *Rowe* v. *Jackson*, a very short [*88] note; the other, an order made by Lord ALVANLEY *upon petition, by some slip in the absence of the assignees, who were not parties; and without even inquiring whether they had any objection to it. The property was very small; which, perhaps, might have had some influence. The Court cannot say what proportion the wife would have settled upon herself, and what upon her children. In *Macaulay* v. *Philips*, 4 Ves. 15, it was

No. 7. — Murray v. Lord Elibank, 10 Ves. 88, 89.

held that the decree gave no interest to the husband, but it survived to the wife; and Lord ALVANLEY says, if she died, notwithstanding his proposal, he would have been entitled. That opinion was given by Lord ALVANLEY with great deliberation; and takes the distinction between a settlement, approved by the Court, and a mere proposal.

The LORD CHANCELLOR (Lord ELDON).

There are two points upon this demurrer: one of the form, the other upon the merits. If the wife has this equity for a provision for herself and her children, up to the moment of the completion, it is competent to her to give it to her husband. A great variety of proceedings have occurred, in which the Master has stated that with reference to the point of settlement the party had waived it; and I apprehend, it will be found, that she may, between the period of the order and her death, waive the benefit of that order. The question then is, if, between the date of the order and her death she does not by some authoritative proceeding express an alteration of her mind, whether that order is to stand for the benefit of the children. The two decisions that have been mentioned are strong authorities for that. Let an inquiry be made into the circumstances of those cases; and as to the latter, whether the assignees of the husband were heard or not.

Mr. Alexander, for the plaintiffs, stated the case of *Martin* [89] v. *Mitchell*, from the Register's book, in which the motion before Lord THURLOW, in 1779, was made. In 1777, a decree was made for an account, and that what should be found due to Hannah Fearns should be paid into Court, to her separate account, with the usual direction for a settlement. The sum of £3000 was by the report stated to be due, and was carried over. After her death, in 1779, the motion, referred to in *Rowe* v. *Jackson*, to pay that sum to the husband, was made and refused; and an order was made, directing the husband to go before the Master and execute the order for a proposal. That proposal was carried into effect by petition at the Rolls; and under another order in 1803, stating all the proceedings, the children were paid.

It appears from these cases, that the equity of the wife does survive to the children; and their only mode of availing themselves of this interest is by supplemental bill. The case of *Macaulay* v. *Philips* is not applicable. The *dictum* of Lord ALVANLEY would have been inaccurate if there had been any

children: but there were no children. It amounts to no more than that the proposal did not sever the joint tenancy between the husband and wife. If, as your Lordship has observed, the wife can waive her right under the order, for the benefit of her children and herself, that cannot affect a case where she has not waived it, and is dead.

The Lord Chancellor:

The question is, what is the effect of such an order, as constituting a right in the issue to a provision, if the wife dies without any act done after the date of that order. If this case had been antecedent to the period when the manuscript case, to which [* 90] Mr. Madocks alluded, * was decided, it would have been very difficult, consistently with what the Court does with the wife's property, to say there was such a right as is now asserted, upon a proceeding, that went no farther than an order to lay a proposal before the Master. The husband, where he can, is entitled to lay hold of his wife's property; and this Court will not interfere. Previously to a bill, a trustee, who has the wife's property, real or personal, may pay the rents and profits, and may hand over the personal estate to the husband. Lord Alvanley, in *Macaulay* v. *Philips,* has laid down that after a bill filed the trustee cannot exercise his discretion upon that; that the bill makes the Court the trustee, and takes away his right of dealing with the property, as he had it previously. I have heard that otherwise stated in this Court, at the Bar, at least. But that case is the last; and, I think, contains very wholesome doctrine upon that point. I should have supposed a decree made in the cause proceeded upon the right or equity in the wife at the filing of the bill; for decrees are only declarations of the Court upon the rights of the parties when they begin to sue. The wife is entitled to call for a declaration that she then had a right to a provision for herself and her children; and yet it is clear, after such a bill filed, she might come into Court, and consent to her husband's having the fund entirely under his dominion If she does not, the Court, by the decree, orders a proposal to be made for a settlement upon the wife and issue.

It has been truly observed that this doctrine is a mere creature of the Court, founded altogether in its practice. The case of *Macaulay* v. *Philips* proves, what I should have had no [* 91] doubt upon, that, notwithstanding * that order for a pro-

posal, if either party died, while it rested merely in proposal, that would not affect the right by survivorship as between the husband and wife. There were no children in that case, certainly. It is not unfrequent, where the Master makes his report after a decree, for him to state that the parties had declined to lay a proposal for a settlement before him. That has occurred since I have sat here; but, when at the Bar, I was frequently concerned in this final arrangement; that, notwithstanding such order by the original decree, upon farther directions the wife came, consenting that the fund should be taken out of Court, and was permitted to do so. If, therefore, the issue have a right against the father, it is dependent altogether upon the will of the mother. There is perhaps some difficulty in making all the principles of the Court upon this subject consistent with the notion of such right in the children; but it is not for me to reconcile all these principles, if there is practice sufficient to establish a given course as to that. In *Rowe* v. *Jackson*, and I can from my own memory confirm both accounts of that case, upon an application where it was necessary to consider whether, the wife never having expressed any change of opinion between the period of the order for a proposal and her death, that order gave the children any right, Mr. Madocks stated that it was not according to the practice after that order to permit the husband to avail himself of the death of the wife to take the fund, leaving the children unprovided. His authority, always considerable, is in that instance peculiarly to be regarded, as he referred to another case, in which Lord THURLOW was satisfied that such was the rule, and acted upon it. But it does not rest there; for in a subsequent case it is clear, from the register's books, that Mr. MANSFIELD, after the death of the wife, moved that a sum of money should be paid to the husband, and Lord THURLOW
* refused that application, upon the ground that the order [*92]
for a proposal on behalf of the children was an obstacle.
That was followed by what Lord ALVANLEY did, upon a petition; whether regularly or not, will not shake the doctrine, considering what had been done before. In that instance Lord ALVANLEY would not deliver out that small sum, little more than £300, until satisfied that there was some provision for the children.

Taking all this together, however numerous the difficulties upon it, it is too much for me to say, upon the argument of a demurrer, all that has been done in the cases referred to is to go for nothing,

because it is difficult to say, *ab ante*, it should be done; and that I am to set up a different course of practice. I agree also with Mr. Alexander as to the *dictum* of Lord ALVANLEY in *Macaulay* v. *Philips*, which construction is necessary to make him consistent; and, attention being given to the circumstance that there were no children, there is no inconsistency in that case. The principle must be that the wife obtained a judgment for the children, liable to be waived, if she thought proper, otherwise to be left standing for their benefit at her death.

Next, as to the form; if the children have acquired a right by the judgment in the former suit, it is subsequent to the institution of the proceeding in that suit; and unless they can apply by petition, under the liberty to apply, I do not see how they can, except by supplemental bill.

The demurrer therefore ought to be over-ruled. If upon the hearing of the cause this should turn out to be wrong, it is infinitely better that it should go to the House of Lords upon a full hearing.

The cause was heard before Sir WILLIAM GRANT, M. R., on 21 and 22 May, and 21 July, 1806, when the cases cited in the previous argument were again cited, and Sir WILLIAM GRANT, after commenting on them, came to the conclusion that the plaintiffs were clearly entitled upon their supplemental bill.

ENGLISH NOTES.

Marriage by the common law of England merged the *persona* of the wife in that of the husband, and operated as a gift to the husband of the enjoyment of every kind of property of which the wife was possessed, or might become possessed, during the coverture, — an absolute right to the personal estate, a right to her *choses in action* if he reduced them into possession, and a right to the rents and profits of her real estate. The law gave the husband this enjoyment in consideration of the obligation he incurred in marriage to maintain his wife and the children of the marriage: but there was no security for the husband performing his part of the bargain. He might alien all the property coming to him *jure mariti*: he might become bankrupt: and in view of such contingencies the Court of Chancery, with a parental care for the married woman, at an early period required of the husband, if he had to come to the Court to get his wife's fortune, that he should, as a condition of getting it, make a provision out of it for his wife and children, — that, seeking equity, he should do equity. If the husband

could lay hold of the property without the aid of equity, he might, — so far equity respected the law; but if he could not, if it was an equitable *chose in action*, or the property was vested in trustees, and the trustees declined (as they were in equity entitled to decline) to pay it over to him: *In re Swan* (1864), 2 H. & M. 34, 37; or if it was a trust term: *Hanson* v. *Keating* (1844), 4 Hare, 1; or rents of real estate paid into Court: *Freeman* v. *Fairlie* (1847), 11 Jur. 447, — the husband had to submit to the Court's terms. In the principal case of *Lady Elibank* v. *Montolieu*, Lord Eldon greatly amplified the jurisdiction by holding that the wife might herself actively assert her equity as plaintiff in a suit without waiting for the husband's initiative. So, too, if the assignee of the husband had to come into the equitable jurisdiction to obtain the benefit of the property, the Court would not apply it to the use of the husband, and leave the wife, as Lord Rosslyn said, to starve. But an important distinction exists with regard to such assignee, according as the interest of the wife — the subject of the *jus mariti* — is a life interest or an absolute interest.

A life interest belonging to the wife is supposed to be given to the husband to maintain his wife; and so long as he does so, the wife is not entitled to any provision out of it. He may assign it for value, and the assignment is good against the wife: *Life Association of Scotland* v. *Siddal* (1861), 3 De G. F. & J., 271, 276; even if he is not maintaining his wife. For the assignee cannot be expected to know the state of circumstances between the husband and wife. *Tidd* v. *Lister* (1852), 10 Hare, 140. But if the husband becomes bankrupt: *Sturgis* v. *Champneys* (1839), 5 My. & Cr. 97; or deserts his wife without providing for her: *Watkyns* v. *Watkyns* (1740), 2 Atk. 96; or has forced the wife to separate from him by his cruel usage: *Oxenden* v. *Oxenden*, 2 Vern. 493, — the wife's equity attaches: for the husband has not kept the implied condition on which the law gives him the *jus mariti*.

Where the wife has an absolute interest, her right to insist upon a settlement being made upon herself and her children is not affected by her husband's acts and conduct. A married woman has an equity to a settlement, however small the sum. *In re Kincaird's Trusts* (1853), 1 Drew. 326. It is the wife's equity to a settlement, and she may waive it; but if she claims it, the settlement will always be extended to her children: *Johnson* v. *Johnson* (1820), 1 Jac. & W. 472; even by a former marriage: *Connington* v. *Gilliatt*, W. N. 1876, p. 276. The children have, however, no independent right to assert it themselves, unless the husband has agreed to make a settlement or the wife has got a decree. If the wife dies before decree or insistence on her right in an action, the children's right is gone.

The general rule is to settle one-half of the property; but the amount depends on the circumstances of each case, — the husband's conduct, the wife's means.

As to the effect of a separation, see *Eedes* v. *Eedes* (1841), 11 Sim. 569; *Coster* v. *Coster* (1839), 9 Sim. 597; *Greedy* v. *Lavender* (1850), 13 Beav. 62; *Boxall* v. *Boxall* (1884), 27 Ch. D. 220, 53 L. J. Ch. 838, 51 L. T. 771, 32 W. R. 896.

Questions of equity to a setttement are inapplicable as between persons married after the coming into operation of the Married Women's Property Act 1882 (1 January, 1883). As to the effect of this Act upon contracts, see notes to *Pike* v. *Fitzgibbon*, *Martin* v. *Fitzgibbon*, No. 5 of "Contract," 6 R. C. p. 67 *et seq.* The effect of section 19 of the Act (45 & 46 Vict. c. 75) has been held to be to exclude from the operation of the Act property which has been settled by the husband alone, and so far presents a curious survival of the marital right. See *Hancock* v. *Hancock* (C. A. 1888), 38 Ch. D. 78, 57 L. J. Ch. 396, 57 L. T. 906, 36 W. R. 417; *Stevens* v. *Trevor Garrick* (1893), 1893, 2 Ch. 307, 62 L. J. Ch. 660, 69 L. T. 11, 41 W. R. 412.

AMERICAN NOTES.

The doctrine of "equity of settlement," although no longer applicable generally in this country on account of the Married Women's Acts giving them ownership and control of their own property, was recognized at an early day, and probably still subsists in those few States where the wife's *status* is that of the common law and equity. Mr. Pomeroy cites this case, and refers, as sustaining the doctrine, to *Davis* v. *Newton*, 6 Metcalf (Mass.), 544; *Glen* v. *Fisher*, 6 Johnson Chancery (N. Y.), 33; 10 Am. Dec. 310; *Durr* v. *Bowyer*, 2 M'Cord Equity (So. Car.), 368; *Duvall* v. *Farmers' Bank*, 4 Gill & Johnson (Maryland), 282; 23 Am. Dec. 558; *Chase* v. *Palmer*, 25 Maine, 342; *Barron* v. *Barron*, 24 Vermont, 375, and some others in the same Courts. He treats the doctrine as obsolete in most States, because the right "is already more completely secured to her by the statutes."

No. 8. — Bernstein v. Bernstein, 63 L. J. P. D. & A. 3, 4. — Rule.

Section III. — *Divorce and Separation.*

NO. 8. — BERNSTEIN *v.* BERNSTEIN.

(C. A. 1893.)

RULE.

A MATRIMONIAL offence may be condoned, although the guilty party conceals from the other the commission of other matrimonial offences.

Where a petition for divorce is dismissed, the claim for damages falls with the petition.

Bernstein v. Bernstein.

63 L. J. P. D. & A. 3-16 (s. c. 1893, P. D. 292; 69 L. T. 513).

Divorce. — Condonation. — Claim for Damages Barred. [3]

The petitioner claimed a divorce from his wife, on the ground of her adultery with two co-respondents, T. and S., and damages from T. At the trial adultery with both was proved, and it was also proved that the petitioner had condoned the adultery with T., but that at the time of that condonation he did not know of the adultery with S. The President granted a decree *nisi* against S., and there was no appeal on that point. He also dismissed the petition as against T. with costs on the ground of condonation, and refused to entertain the claim for damages. The petitioner appealed from this part of the judgment: *Held* (affirming the decision of SIR F. JEUNE), that in order to constitute *condonation, a husband need not at the time when he forgave her any [* 4] particular act be aware of all the acts of adultery committed by his wife, and that there had been legal condonation. Although before the Act of 1857 condonation was no defence to an action for criminal conversation, it was under that Act a ground for dismissing a petition which asked for damages against a co-respondent as well as a divorce; the claim for damages was ancillary to and dependent on the petition, and fell with it; and the Court had power to dismiss the petition with costs, although adultery had been proved.

This was an appeal by the petitioner from a judgment of the President of the Probate and Divorce Division in a suit by a husband against his wife, in which he prayed for a divorce on the ground of her adultery with two co-respondents, Sampson and Turner; and he also claimed damages against Turner, and costs against both co-respondents. Mrs. Bernstein and Turner denied

the charges of adultery, and Turner alleged condonation by the petitioner of the adultery complained of with him. At the trial it was found by the jury that adultery had been committed with both the co-respondents; that the petitioner had condoned the adultery with Turner, but that at the time of that condonation he did not know of the adultery with Sampson. They did not assess any damages against Turner. Sir F. JEUNE granted a decree *nisi* against Sampson, and no question was raised on that part of the judgment. He also dismissed the petition against Turner with costs, on the ground that the husband had condoned the adultery with him, and refused to entertain the claim for damages against him.

The petitioner now asked for a new trial and argued that the learned Judge should have directed the jury — first, that there was no evidence to support the answer of the co-respondent Turner alleging condonation; secondly, that Turner was not entitled to rely on condonation as an answer to the claim for damages included in the petition; and, thirdly, that they must assess some damages against Turner. In the alternative he asked for an order that the judgment might be varied upon the ground that the learned Judge was wrong upon the findings of the jury in ordering that, as against the co-respondent Turner, the petition should be dismissed with costs; and for an order for a decree *nisi* and nominal damages with costs as against him, including the costs of the appeal.

Henry Kisch and H. J. Turrell for the appellant. — First, there has been no condonation by the husband in this case, because condonation implies a knowledge of all previous adulteries. It is quite conceivable that a husband might be willing to forgive one offence if it stood alone, yet might not be willing to forgive it if it were one of several, because he might infer from the repetition of the offence that the woman was an abandoned woman. *Dempster* v. *Dempster*, 2 Sw. & Tr. 438; 31 L. J. P. & M. 20.

[LINDLEY, L.J. — That proposition might be right as between husband and wife, and yet not right as against the co-respondent.]

Alexandre v. *Alexandre*, 39 L. J. P. & M. 84, seems to be inconsistent with *Dempster* v. *Dempster*, which was not cited, but it is not really a decision on the point, which was assumed and not argued. The Divorce Act throws no light upon the legal signification of condonation.

Secondly, condonation is not an answer to a claim for damages

against the co-respondent — *Pomero* v. *Pomero*, 54 L. J. P. D. & A. 93; 10 P. D. 174. Actions for criminal conversation are abolished by section 59 of the Divorce Act, but they are kept alive in effect by section 33, which provides that the same procedure shall be followed. The claim for damages is the modern equivalent of the action for *crim. con.*, to which condonation was not a bar. The jury not having given any damages against Turner, that must be treated as a verdict for nominal damages; but it was not competent for the Court to dismiss Turner from the suit— "Selwyn's Nisi Prius," Vol. I., p. 9; *Winter* v. *Henn*, 4 Car. & P. 494; *Ramsden* v. *Ramsden* * *and Luck*, 2 Times L. R. [* 5] 867; *Bromley* v. *Wallace*, 4 Esp. 237, and *Feise* v. *Thompson*, 1 Taunt. 121. The direction to the Court under section 30 to dismiss a petition for dissolution of marriage on proof of condonation does not apply to a petition where damages are claimed, but such petition is regulated by section 33. *Seddon* v. *Seddon*, 2 Sw. & Tr. 640, 31 L. J. P. & M. 101, which was followed in *Ravenscroft* v. *Ravenscroft*, 41 L. J. P. & M. 28, 2 P. & D. 376, would seem to be opposed to this view; but those cases are inconsistent with *Pomero* v. *Pomero* and *Ramsden* v. *Ramsden*.

In *Story* v. *Story*, 57 L. J. P. D. & A. 15, 12 P. D. 196, it was assumed that condonation might be a bar to damages; but *Pomero* v. *Pomero* was not cited.

[LINDLEY, L.J. — The reasoning in *Norris* v. *Norris*, *Lawson*, *and Mason*, 4 Sw. & Tr. 237, 30 L. J. P. & M. 111, is adverse to *Pomero* v. *Pomero*, and that seems to have been followed since.]

In that case there was no claim for damages. With regard to the question of costs, the Court would have had no jurisdiction at common law, under the circumstances, to make the petitioner pay the costs of the co-respondent; and it is submitted that section 51 of the Divorce Act has no application to that part of the petition which relates to damages, having regard to section 33.

Sir E. Clarke, Q.C., and Bargrave Deane, for Turner. — It is sought to read section 33 as excluding not only sections 28, 30, and 31, but also section 51; but that is not the right reading. The proceeding under section 33 is in one aspect a petition for divorce by reason of the wife's adultery with the co-respondent Turner, and in another aspect a claim for damages. The case must be treated on the same footing as if Sampson were not concerned in it; and, if that were so, the petition would be simply

dismissed by reason of the condonation, and the claim for damages would fail. *Pomero* v. *Pomero* is inconsistent with the current of authority.

Condonation is forgiveness of a conjugal offence with full knowledge of all the circumstances of the particular case — *Peacock* v. *Peacock*, 1 Sw. & Tr. 183, 27 L. J. P. & M. 71. There is no authority for saying that a husband cannot condone an offence where the wife has been guilty of other offences of which he is ignorant.

[Lindley, L.J., referred to *Bramwell* v. *Bramwell*, 3 Hagg. Ec. 619, 635; and Lopes, L.J., referred to *Keats* v. *Keats*, 1 Sw. & Tr. 334, 28 L. J. P. & M. 57.]

After condonation the offence may be revived as against the wife, but only by her subsequent misconduct — *Collins* v. *Collins*, 9 App. Cas. 205. Unless there has been revival, a petition cannot be founded on an offence which has been condoned. That is the present state of the law under the Act of 1857; and a petition which claims damages is in no better position than one which does not. The jury found that there was condonation, and the Court was then bound to dismiss the petition against Turner. Thereupon the claim for damages fell with the petition. As regards costs, in *Adams* v. *Adams*, 36 L. J. P. & M. 62, L. R. 1 P. & D. 333, the petitioner was ordered to pay the costs of the co-respondent, although he was proved to have committed adultery, and a verdict of one farthing was given against him.

Kisch, in reply. — In *Adams* v. *Adams* there was connivance, which would have been a defence to an action for criminal conversation.

[He also referred to *Turton* v. *Turton*, 3 Hagg. Ec. 338, 351, *D'Aguilar* v. *D'Aguilar*, 1 Hagg. Ec. 773, 786, *Rose* v. *Rose*, 52 L. J. P. D. & A. 25, 8 P. D. 98, *Durant* v. *Durant*, 1 Hagg. Ec. 752, "Bishop's Law of Marriage and Divorce" (6th ed.), Vol. II., ss. 44 and 66, and *Calcraft* v. *The Earl of Harborough*, 4 Car. & P. 499.] *Cur. adv. vult.*

[*6] * Lopes, L.J. (on Aug. 7). — The petitioner prayed for a divorce from his wife on the ground of her adultery with the two co-respondents (Turner and Sampson), claiming damages from Turner and costs against both co-respondents. Divers acts of adultery were alleged at divers times and divers places against

both co-respondents. The respondent and the co-respondent Turner denied the charges of adultery, and Turner set up condonation by the petitioner of the adultery complained of with him. Adultery with both Turner and Sampson was proved. At the trial it was proved that the petitioner had condoned the adultery with Turner, but it was also proved that at the time of that condonation he did not know of the adultery with Sampson. The President, after hearing the evidence, dismissed the petition against Turner, on the ground that the petitioner had condoned the adultery of his wife with him, and refused to entertain the claim for damages made by the petitioner against Turner, and ordered that the petitioner should pay Turner's costs. The President granted a decree *nisi* against Sampson. No question arises in the case so far as it relates to Sampson. The petitioner now appeals against the decision of the President, so far as it relates to Turner, on the following grounds, which Mr. Kisch has placed before the Court with great force and clearness. Mr. Kisch, on behalf of the appellant, contends that he is entitled to a new trial, because the President misdirected the jury in not telling them, first, that there was no evidence of legal condonation of the adultery with Turner, and because he should thereupon have granted a decree *nisi;* secondly, in not telling the jury that Turner was not entitled to rely upon condonation as an answer to the claim for damages; and, thirdly, in not telling the jury that they must assess damages against Turner, whose costs the petitioner could not be legally ordered to pay. With regard to the first point, it was contended that there could be no legal condonation of the wife's adultery with Turner, however complete and absolute the forgiveness, and however full and complete the knowledge of all the circumstances of that particular offence, if at the time of that condonation there was any other matrimonial offence of the wife unknown to the husband — in fact, that condonation, to be legal and effective, involved the knowledge by the husband of all the adulteries of the wife, with whomsoever committed, up to the time of the condonation; that he could not forgive one act of adultery, or the adultery with one person, all the facts and circumstances of which he well knew, and, knowing, elected to forgive and resume cohabitation with his wife, unless he also knew all her matrimonial delinquencies then existing. This view of condonation is not supported by the Act of Parliament (20 & 21

Vict., c. 85) which now regulates all proceedings for divorce, whether it be *a mensa et thoro* or *a vinculo*, nor, I think, by the authorities. I will deal first with the Act. Sections 27 and 28 provide the new remedy for dissolution of marriage. They create a power which the Ecclesiastical Courts did not possess, a power totally new in England, section 28 enacting that the adulterer is to be made a co-respondent, and, of course, the adulterers, if more than one. Section 29 declares it to be the duty of the Court, upon a petition for dissolution of marriage, to satisfy itself not only of the facts charged in the petition, but also, amongst other things, "whether or no the petitioner has condoned the adultery." I take that to mean the particular adultery relied upon, alleged to have been committed with the particular co-respondent charged with it. This is made more clear by section 30, which deals with the dismissal of the petition, for it says the Court shall dismiss the petition if it finds that the petitioner "has during the marriage condoned the adultery complained of." Complained of where? Surely in the petition and with the particular co-respondent charged with it, not adulteries of which the petitioner then had no knowledge and could not complain. Again, section 31, dealing with the power of the Court to pronounce a decree for dissolving the marriage, uses the words "has condoned the adultery complained of." I infer from the language of the Act that the Legislature contemplated the case of adulteries known to the husband and complained of, and not other adulteries not known,
[* 7] and therefore not complained * of; the former, known and capable of being condoned — the latter, not known and not capable of being condoned; and, with this state of things in their minds, advisedly provided for condonation in the one case and non-condonation in the other, never intending that no effective condonation should be possible unless all the matrimonial offences existing at the time were known to the forgiving party. As an abstract proposition, it seems to me most unreasonable to say that you cannot forgive an offence, all the circumstances of which you know, unless at that time you are also acquainted with other delinquencies of the person forgiven. It would introduce into forgiveness such uncertainty — such a power of retraction and revocation — as would to a great extent make forgiveness no forgiveness at all. I now proceed to deal with the authorities. *Dempster* v. *Dempster* was decided in 1861, and is an important

case. It seems to me to make it clear that, up to that time, the question as to what amount of knowledge of conjugal offences is necessary to constitute legal condonation was an open question, upon which the learned Judge (Sir C. CRESSWELL) who decided that case had not himself formed a concluded opinion. He deals with *Durant* v. *Durant*, *Turton* v. *Turton*, and *Bramwell* v. *Bramwell*, and says, "If the *dicta* from *Turton* v. *Turton* and *Bramwell* v. *Bramwell* are to be taken literally, they dispose of the question; but, if they are to be construed with reference to the facts of those cases, and with reference to *Durant* v. *Durant*, they seem to me to leave it an open question whether adultery by a husband with A may not be condoned, although he had previously been guilty of adultery with B, which, at the time of the alleged condonation, was unknown to the wife. In 1870 the case of *Alexandre* v. *Alexandre* (the Queen's Proctor intervening) came before Lord PENZANCE. The petition alleged two charges of adultery, and alleged that neither of them had been condoned. The Queen's Proctor intervened, and proved condonation of one adultery but not of the other, and the Court made a decree absolute on the ground of uncondoned adultery, notwithstanding the suppression of the material fact of condonation of the other adultery. That case proceeds on the assumption that one matrimonial offence may be condoned, notwithstanding the fact that at the time of such condonation there may be another matrimonial offence unknown to the other party to the marriage. Lord PENZANCE says: "As regards the adultery which resulted in the birth of the child, I think the facts now disclosed are a complete answer to the petitioner's claim to a decree, because he condoned it. But there is another charge of adultery, which was established on the first hearing, and which is not only not refuted now, but is really supported by what the respondent has told us." Then the learned Judge proceeds: "Then substantially the charge of adultery at Buckingham Place is proved; and what answer is there to that adultery? It has never been condoned, because the husband never knew of it." The adultery in Buckingham Place was anterior to the condoned adultery, but was carefully concealed from the petitioner when he condoned the subsequent adultery. It is clear to my mind that Lord PENZANCE did not consider that to constitute legal condonation there must be knowledge of all the conjugal delinquencies. It is clear he took the contrary view. In 1858 *Peacock* v. *Peacock* was decided. It

was a petition for judicial separation. The respondent, amongst other defences, set up condonation. The Judge Ordinary (Sir C. Cresswell) explained to the jury that condonation signified forgiveness of a conjugal offence with full knowledge of all particulars. It was not suggested that the forgiving party need know more than all the particulars of the particular offence forgiven. In 1859 *Keats* v. *Keats* came before the Court. The respondent denied the adultery and pleaded condonation, and the Judge Ordinary, addressing the jury on condonation, said, "Condonation means a blotting out of the offence imputed, so as to restore the offending party to the position which he or she occupied before the offence was committed." "A person may forgive in the sense of not meaning to bear ill-will, or not seeking to punish, still being far from meaning to restore the guilty party to his [* 8] or her original position. A * master may forgive a clerk or a servant who has robbed him. He may say, 'I forgive you,' without having the slightest intention to restore him to the position he has forfeited. I take it that condonation would mean more than that. To use the language of Lord Stowell, it is like the releasing a debt; it makes it as if the debt had never existed. Again, with reference to condonation, it has been held that the person condoning must know of the offence, otherwise he cannot be supposed to condone it." The definition of condonation given by the Judge Ordinary was afterwards sought to be impeached before the full Court, but the attempt failed. It will be observed that the learned Judge uses the words "blotting out of the offence imputed." Nothing is said of other offences not known at the time of the condonation, the existence of which might make the condonation inoperative. It appears to me that to hold condonation effectual only where the forgiving party knew of all the delinquencies of the party forgiven would lead to results which show that such cannot be the true meaning of legal condonation. An injured husband prays dissolution of his marriage on account of his wife's adultery with A.; the wife admits the adultery and pleads condonation: the condonation is proved and petition dismissed. A year afterwards the same injured husband prays dissolution of his marriage on account of his wife's adultery with B. Adultery with B. is proved, such adultery being before the condoned adultery with A. What is to happen? The husband condoned the adultery with A, not knowing of the adultery with

B.; the condonation cannot be recalled, for the petition has been dismissed, and no fresh proceeding can be taken against A. If the contention of the appellant here was maintained, the condonation of the adultery with A. would be inoperative, because there was existing at the time of the condonation adultery with B., of which the condoning husband knew nothing. But if the condonation of the adultery with A. is to be operative in the case I have put, it is simply operative, if the plaintiff's contention is supported, because there have been two petitions instead of one, making A. and B. both co-respondents. Condonation is a conclusion of fact, not of law, and, in my judgment, means the complete forgiveness and blotting out of a conjugal offence, followed by cohabitation, the whole being done with full knowledge of all the circumstances of the particular offence forgiven. The husband, in my opinion, need not be aware of all the acts of adultery committed by the wife when he forgives her any particular act of adultery. Condonation means a full and absolute forgiveness, with knowledge of all that is forgiven — it does not operate as a forgiveness of other unknown adulteries; but, on the other hand, there is no reason why it should not stand good, although the husband has since been made aware of other adulteries committed by the wife, which were unknown to him at the time of the condonation, and as to which every remedy remains. On this point I think the learned President rightly directed the jury, and properly dismissed the petition against Turner, so far as it related to the prayer for dissolution of the marriage.

But it is said, and strongly urged as a second point by the appellant, that, assuming that the learned President was right in holding that there was evidence of condonation, and that the jury rightly found condonation, still, the adultery of the wife with Turner being proved, the petitioner was entitled to damages, notwithstanding the condonation, and that the President ought so to have directed the jury. It was contended that condonation is no bar to the recovery of damages where the adultery is proved and damages are claimed, but that the same principle is to be applied as in the old action of criminal conversation. It is necessary to consider the law applicable to the old action of criminal conversation, and also the Act of Parliament, and especially section 33 of that Act. It is true that section 59 of the Act abolishes the old action of criminal conversation, but, inasmuch as the principles

of law and rules of practice which governed it are to apply to a claim for damages substituted for it by section 33, it is necessary to consider what the law and practice were upon the subject. The injured husband was entitled to recover compensation in [* 9] damages for the loss of * the society, comfort, and assistance of his wife in consequence of the adultery. The injured husband must have come into Court with clean hands. How far his misconduct was an answer to the action, or only went in mitigation of damages, was a question about which different opinions were entertained. The wife was no party to the action. If illicit intercourse was had with the wife and the husband was not privy to it at the time, but knew of it afterwards, and then received her back, the subsequent reconciliation went only in mitigation of damages — *per* Chief Justice De Grey, *Howard* v. *Burtonwood*, C. B. Sittings at Westminster, Tr. 1776; 5 Bac. Abr. 329. This was agreed to by the Court in *Duberly* v. *Greening*, 4 T. R. 651, and said by Mr. Justice Buller in that case to be settled law. Therefore, before the Act of Parliament, most clearly condonation was only available by the adulterer in mitigation of damages, and was no answer to the action; and the injured husband, however much he had forgiven his wife, could bring his action against the adulterer and recover damages, the condonation only going in mitigation. Now, how far has this state of the law been altered by the Act? Section 59 abolishes the old action of criminal conversation; it enacts by section 33, as regards the claim for damages, that it shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations, as actions for criminal conversation at the time of the Act coming into operation were tried and decided in Courts of law. It was an inseparable incident of the old action that condonation was no answer to the action, and only went in mitigation of the damages. Is there anything in the Act to show that this state of the law was no longer to exist? Sections 27 and 31 deal with petitions for dissolution of marriage in cases where no damages are claimed, section 30 enacting that in case the petitioner has condoned the adultery complained of, then the Court shall dismiss the petition. That the Court is compelled so to proceed where no damages are claimed is clear. But what is to happen if damages are claimed? This depends on the construction of section 33. That section permits the injured husband to

claim damages against the adulterer in a petition for dissolution of marriage or judicial separation, or in a petition limited to damages only. Such petition is to be served on the alleged adulterer and the wife; and then follow these words: "And the claim made by every such petition shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation are now tried and decided in Courts of common law; and all the enactments herein contained with reference to the hearing and decision of petitions to the Court shall, so far as may be necessary, be deemed applicable to the hearing and decision of petitions presented under this enactment." Did the Legislature, when it said that the claim made by every such petition was to be heard and tried on the same principles as actions for criminal conversation, intend to make condonation which had never before been a defence in actions of criminal conversation, an answer to the claim for damages? If there was nothing more in the section, I should say certainly not; but then follow these words: "And all the enactments herein contained with reference to the hearing and decision of petitions to the Court shall, so far as may be necessary, be deemed applicable to the hearing and decision of petitions presented under this enactment." This drives me back to section 30, and there it is made imperative on this Court to dismiss the petition if satisfied that the petitioner has condoned the adultery complained of. Here is the crucial question: Does the claim for damages when condonation is proved fall with the petition or does it survive? I have felt difficulty in giving an effect to condonation since the Act of Parliament, which it never possessed before, having regard to the words of the 33rd section. The chief difficulty arises in the case of a petition limited to damages only, when the dissolution of the marriage is not prayed and the adulterer sets up the condonation of the wife. If effect is given to section 30 the Court is * compelled to dismiss the [* 10] petition. The strongest ground, in my judgment, for thinking that the claim for damages falls with the petition where condonation is proved is this: Under section 30 the petition is to be dismissed in the following cases — first, if the Court is not satisfied that the alleged adultery has been committed; secondly, if the petitioner has, during the marriage, been accessory to or conniving at the adultery of the other party to the marriage; thirdly,

if he has condoned the adultery complained of; and, fourthly, if the petition is presented in collusion with either of the respondents. In the first two cases a good defence to the old action of criminal conversation would have existed at common law, yet condonation is put on the same footing as these cases. This leads me to think the Legislature intended to remodel the law in respect of condonation, and to make condonation a ground for dismissing a petition claiming damages if condonation was proved, just as if the alleged adultery had not been proved, or it had been proved that the petitioner had connived at the adultery of the other party to the marriage. I read the words at the end of section 30 thus: "Then and in any of the said cases the Court shall dismiss the said petition," whether it contains a claim for damages or not, including in the category condonation. I come, therefore, to the conclusion that, on the true construction of the Act of Parliament, the claim for damages is ancillary to and dependent on the petition, and falls with it. It is to be observed, too, that the damages, when recovered, are to be placed under the control of the Court. The claim, too, for damages, if the petition is for damages only, must be made by petition, and it is therefore a petition within section 30. It would be, too, somewhat inconsistent with the definition I have given of condonation implying an absolute and complete forgiveness of the offence complained of, followed by cohabitation, to hold that the injured spouse was still entitled to be compensated in damages; it would be analogous to holding that a creditor could sue for a debt which he had released. I will now deal with the authorities which seem to me to favour the construction which I have placed upon the Act of Parliament. The two directly in point are *Pomero* v. *Pomero*, decided in 1884, and *Story* v. *Story*, decided in 1887, taking different views of the matter in controversy. But of those cases presently; I will first deal with earlier cases. *Norris* v. *Norris*, decided in 1861, was a petition for dissolution of marriage where condonation was set up. There was no claim for damages, and the decision was on section 34 of the Act in respect of costs. The Judge Ordinary said, "The petitioner, by condoning his wife's adultery with Lawson, has waived all right to any proceedings against him in this Court." *Seddon* v. *Seddon* was before the Court in 1860. It was a petition for dissolution of marriage on the ground of the wife's adultery, claiming £3000 damages against the co-respondent. The answer

charged that the petitioner, by his wilful neglect and misconduct, had conduced to the adultery of the respondent, and counter-charged adultery. It was contended in argument that a co-respondent is precluded by the terms of section 33 of the Act from pleading such matters in answer to a petition in which the husband claims damages. In the course of the argument the Judge Ordinary asked the counsel this question: "Suppose a petition claims damages, and the adultery is clearly proved, but there is proof also of such misconduct on the part of the husband as would induce the Court to refuse a divorce, would the petitioner be entitled to his damages?" The learned counsel said "Yes." Whereupon the Judge Ordinary said, "He certainly would not, if the Court is to treat the claim for damages as an action for *crim. con.*; for, the petition being dismissed, he would be in the position of a non-suited plaintiff." This is strong to show the view the Judge Ordinary took of section 33. *Ramsden* v. *Ramsden and Luck* and *Ramsden* v. *Ramsden*, in 1886, were two suits which had been consolidated; the one was a suit to recover damages by the husband against Luck, not praying for a dissolution of the marriage; the other by the wife against the husband for dissolution of the marriage, on the ground of his adultery and cruelty.

* With regard to the adultery charged by the wife against [* 11] the husband, he set up condonation. The adultery by Luck with the wife was admitted. The jury found that Ramsden, the husband, had committed adultery; that the adultery had been condoned by the wife, but that it had been revived by the cruelty of the husband subsequent to the condonation. They further found that Mrs. Ramsden and Luck had committed adultery, and they assessed damages against Luck and in favour of Ramsden at one farthing. The President dismissed Mrs. Ramsden's petition on account of her adultery, but gave her costs against her husband. In the suit of Ramsden against Luck, he directed that each party should pay his own costs, and does not appear to have given judgment for one farthing. I now come to the two cases of *Pomero* v. *Pomero* and *Story* v. *Story*. These cases are directly in point. The first was a husband's petition for dissolution, and for damages against the co-respondent. The petitioner admitted in his evidence that he had condoned his wife's adultery and taken her back to live with him. It was urged that condonation of adultery committed by a wife with a particular person was a bar

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to any proceedings in the Court by the husband against that person. Mr. Justice BUTT thought section 33 of the Act clear, and said a great hardship would be inflicted by depriving a husband who had pardoned his wife of all remedy against the adulterer. He cites section 33, and then says condonation was no bar to the action for criminal conversation, and therefore, although condonation is proved and admitted, the case must go to the jury on the issue of connivance, and, if necessary, to assess the damages. The case does not appear to have been very elaborately argued, and the only authority cited was *Norris* v. *Norris*. It was decided in 1884, and in 1887 the case of *Story* v. *Story* was heard by Sir James HANNEN. It was a suit by the husband for dissolution of his marriage with the respondent, on the ground of her adultery with the co-respondent, and claimed damages. The respondent in her answer pleaded condonation, and counter-charged adultery, which the petitioner did not deny, but pleaded that the respondent had condoned the offence and lived with him afterwards. The jury found that the respondent and co-respondent had committed adultery, and that the petitioner had not connived at nor condoned the adultery. They assessed the damages at £300. The petitioner admitted his own adultery with a maid-servant, which was condoned by the wife. The learned Judge came to the conclusion that the petitioner, having shown himself regardless of the marital tie, was not entitled to come to the Court and claim a release from the marriage bond, and dismissed the petition. Counsel for the petitioner inquired as to the damages. The President said, "They go with my decision on the petition. As the petition is dismissed the petitioner is not entitled to damages." The case of *Pomero* v. *Pomero* was not cited. These two cases are directly in point, and are in direct conflict with each other. I have to decide which is to be followed. *Story* v. *Story* is decided in accordance with the construction which I place upon the Act of Parliament, and seems to me to be consonant with the authorities, and I am told it is in harmony with the practice of the Court. I think the claim for damages falls with the petition. *Story* v. *Story* ought, in my judgment, to be followed, and *Pomero* v. *Pomero* overruled. With regard to section 51, I have no doubt that it confers upon the Court the power to deal with the costs, whether damages be claimed or not. The result is that the judgment of the President must be affirmed, and the appeal dismissed with costs.

No. 8. — Bernstein v. Bernstein, 63 L. J. P. D. & A. 11, 12.

SMITH, L.J. — This is an appeal from the judgment of Sir F. Jeune in a suit by a husband against his wife for divorce, wherein he charged her with having committed adultery with two co-respondents, Sampson and Turner, and he also claimed damages against Turner. The learned Judge dismissed the petition against Turner, or, to state it more accurately, dismissed him from the suit upon the ground that it was established that the petitioner had condoned his wife's adultery with him, and he also adjudged that * the petitioner should pay Turner's costs. [*12] As regards the case against the co-respondent Sampson, a decree *nisi* was granted, and no question arises on this appeal thereon. Mr. Kisch, who argued the petitioner's case with great ability, asserted that this judgment was erroneous — first, because there was no evidence to constitute condonation by the petitioner of the adultery of his wife with Turner, and inasmuch as Turner's adultery had been proved he should not have been dismissed from the suit; and, secondly, upon the ground that, as damages were claimed by the petitioner against Turner, who had been proved to have committed the adultery charged, the petitioner was entitled as of right to a verdict and judgment for at least nominal damages against him, and consequently the petitioner could not be ordered to pay his costs. The short facts which raise the first point are these — It was proved that the petitioner, with full knowledge of his wife's adultery with Turner, forgave it and resumed cohabitation with her, but it was argued that, inasmuch as when he did so he did not know of the adultery which had then taken place between his wife and the other co-respondent (Sampson), there could be no condonation of the adultery with Turner, for to constitute condonation the husband must forgive all adulteries of his wife, whether known or not at that time. This raised a point which was new to me, but as it has been raised it must be examined. I first turn to the Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict., c. 85), which founded the present Divorce Court and its proceedings. Section 27 deals with the presentation of a petition for a divorce by husband against wife, or *vice versa*, in which damages are not claimed. Section 28 enacts that, unless excused, the husband in such petition shall make the alleged adulterer co-respondent. That means the alleged adulterers are to be made co-respondents if there are more than one; and it appears to me that in such circumstances the case

against each is separate and distinct. Section 29 enacts that the Court upon such petition is to satisfy itself as far as it reasonably can whether the petitioner has connived at or condoned the adultery — that means the separate adulteries charged if more than one — and also to inquire into counter-charges (if any); and section 30 enacts, amongst other things, that if the petitioner has connived at or condoned the adultery complained of — that is, the separate and distinct adulteries complained of in the petition, if more than one — the Court shall dismiss the petition.

But Mr. Kisch says that to constitute condonation the whole of the adulteries actually committed by the wife must be condoned, whether known or not, or complained of or not in the petition — that condonation is the forgiveness of the wife of all her adulteries, and not the forgiveness of the co-respondent; and that unless the husband knows of all the adulteries his wife has committed when he forgave a particular adultery and resumed cohabitation, it is not condonation at all, for in such circumstances he does not blot out all the offences of his wife which alone constitutes condonation.

He also says that unless the husband is informed of all the adulteries of his wife when he forgives a particular adultery, he is led to do so under circumstances which cause the forgiveness of the particular adultery not to be a forgiveness at all. It seems to me that as to this the most which can be said is that he might not have forgiven the particular adultery if he had known of all, but I do not understand how it can be said that it is not any forgiveness at all.

Test the correctness of these propositions in this way. Petition by a husband against a wife charging adultery with co-respondent A. Defence by A. that this adultery has been condoned by the petitioner. Did any one ever hear of a reply by a petitioner by way of confession and avoidance to such a defence — "I admit that I have forgiven and condoned my wife's adultery with you, but when I did so I did not know that my wife had also committed adultery with X., Y., and Z., and therefore I have not condoned the adultery with you?" Yet, if Mr. Kisch is correct, this would be a good reply. No such replication can be found in the books, although circumstances must, on very many occasions, [* 13] have existed, whereby * to get rid of a defence of condonation if the proposition is sound.

The cases of *Durant* v. *Durant*, *Turton* v. *Turton*, and *Bramwell* v. *Bramwell*, wherein somewhat equivocal language was used, were cited to support the point insisted upon, and also the case of *Dempster* v. *Dempster*, where Sir CRESSWELL CRESSWELL pointed to the two constructions which could be placed upon the language so used, and where he left the point undecided.

In my judgment, the law as to condonation was accurately and clearly stated by Sir CRESSWELL CRESSWELL in *Keats* v. *Keats*, where he described it "as a blotting out of the offence imputed so as to restore the offending party to the position which he or she occupied before the offence was committed"; and again in *Peacock* v. *Peacock*, where it is described as the forgiveness of a conjugal offence with the full knowledge of all the circumstances attending it. There is no authority that to constitute condonation there must be a forgiveness of all conjugal offences whether known or not; and indeed the case of *Alexandre* v. *Alexandre* is opposed to this contention. In this case the wife had been guilty of adultery with two different persons, one of which acts the petitioner had condoned and the other he had not, it not being then known to him; yet the Judge Ordinary (Lord PENZANCE) held that the offence which was disclosed was condoned, although the other was not, and he granted a decree for divorce upon that adultery which the petitioner had not condoned. His view of the condonation of the known offence is inconsistent with the contention of the appellant on the point now taken. We are asked to say that Lord PENZANCE was wrong. I decline to do so, for I believe his view to be in consonance with the law as long since administered in this country, as regards condonation; and, in my judgment, the first point raised is untenable.

Now, as to the second point — namely, that where damages are claimed and adultery proved against a co-respondent the petitioner is entitled as of right to a verdict and judgment for damages against that co-respondent in precisely the same way as if the suit were an old action for criminal conversation, and that, as condonation was no defence to such an action, so now in a petition by a husband, if he claims damages against the co-respondent under section 33, and the sole defence is condonation, the petitioner is entitled to a verdict and judgment in his favour for damages as of right. The first remark I wish to make upon this is: if this be so, why did the Legislature expressly abolish the old action of

criminal conversation, as it did by section 59, and frame in its place the somewhat elaborate section — namely, section 33 — which, beyond question, interfered with the petitioner obtaining the damages for himself, as in the action for criminal conversation he would have done? Secondly, if this argument be correct (and I now assume only one co-respondent with whom the wife has committed adultery, so as to get clear of the first point), this strange result would follow — that, whereas by section 30 it is unquestionably enacted that if "the adultery complained of" has been connived at or condoned, or if the petition has been presented in collusion, the Court shall dismiss the petition, yet, if the adultery has been condoned and the petitioner goes for and obtains damages against the co-respondent, the Court shall not dismiss the petition. I cannot find any indication of this in the statute, which enacts without qualification that, if the adultery complained of be connived at or condoned, the Court shall dismiss the petition. It should be noticed that connivance was a defence to an action of *crim. con.*, whereas condonation was not; yet by the Act the same consequences are now to follow from each — namely, that the petition shall be dismissed. Section 33 now empowers a husband to make a claim for damages against a co-respondent, either in a petition for dissolution of marriage or in a petition for judicial separation, or in a petition for damages only, and enacts that such claim for damages shall be "heard and tried" upon the same principles, in the same manner, and subject to the same rules and regulations as actions of *crim. con.* formerly were — that is, by a jury, by examination and cross-examina-
[* 14] tion of witnesses in open Court, by admission of * the same evidence, by a direction as to how damages are to be assessed, and with like speeches of counsel; but, in addition thereto (and this is what also now differentiates a petition asking for damages from the old action of *crim. con.*), that all the enactments of the Act as to the hearing and "decision" of the petition, so far as may be necessary, shall apply. Amongst the enactments which it is necessary to apply when the Court has to decide as to what is to be done with a petition proved after hearing and trial to be founded upon condoned adultery, is section 30, for that section enacts that such a petition shall be dismissed. In my judgment it is not correct to state that a petitioner is now in the same position as in the old *crim. con.* action days, for, to get damages

from an adulterer, he is now compelled by statute to proceed by way of petition in the Divorce Court; he cannot as of right get the damages for himself, and the statute is express that for connived-at as well as for condoned adulteries the petition shall be dismissed. It will be seen that, even where a petition is brought only to recover damages against an adulterer, under section 33, the petition is to be served upon the wife unless such service is dispensed with by the Court. This was not so in an action of criminal conversation.

In my opinion, when a petition under section 33 is dismissed, away goes the claim for damages, together with all other claims therein, for when the petition is dismissed there is nothing whatever to hang a judgment for damages upon, as argued by the petitioner. In my judgment, the true construction of the statute is that a petitioner cannot recover damages from an adulterer when he has either connived at or condoned the adultery for which he asks for damages, nor when he has presented his petition in collusion. The Legislature has now placed all matrimonial cases, whether damages are sought for therein or not, under the jurisdiction of the Court, to be dealt with as the statute prescribes.

So much for the statute. I now come to the cases. In the year 1861, in *Norris* v. *Norris*, the husband petitioned for a divorce upon the ground of his wife's adultery with the co-respondents. As to one co-respondent, the adultery had been condoned, though revived by subsequent adultery. The Judge Ordinary, as regards the condoned adultery, held "that the petitioner, by condoning his wife's adultery, had waived all right to any proceedings against the co-respondent in the Court." The learned Judge acted upon the provision of section 30, though it is true that in that case the petitioner did not ask for damages.

In *Seddon* v. *Seddon* (1862), the husband petitioned under section 33 for a divorce from his wife, claiming damages against the co-respondent. The jury found that the wife had committed adultery with the co-respondent, and that the petitioner had been guilty of conduct conducing to that adultery, and they assessed the damages at a farthing. The Judge Ordinary, acting pursuant to section 31, dismissed the petition. In a report of a proceeding in the case in 30 "Law Journal Reports," Probate and Matrimonial, at page 14, the Judge Ordinary stated: "It is reasonable that a co-respondent should have an opportunity of protecting

himself by appealing to the discretion of the Court and asking the Court, under the power conferred upon it by section 31, under certain circumstances to dismiss the petition. . . . If he can plead such matters in answer to a petition which does not claim damages, it would be a strange thing if a petitioner, by making such a claim, could preclude a co-respondent from raising a defence he might otherwise have made by appealing to the discretion of the Court. . . . The meaning of the 33rd section is that the question of damages is to be dealt with upon the same principle and in the same manner as in the Common Law Courts, not that the record is to be framed in the same manner."

In the next year (1867), in *Adams* v. *Adams*, there was a petition by a husband against his wife for a divorce claiming damages against a co-respondent. The jury found that the petitioner had connived at and had also condoned his wife's
[* 15] adultery, and found damages one farthing. *The Judge Ordinary dismissed the petition, applying to section 33 the provisions of section 30.

In 1872 Lord PENZANCE decided *Ravenscroft* v. *Ravenscroft*. In that case the petitioner recovered, by verdict of £100, damages against the co-respondent, yet, upon the Queen's Proctor intervening and proving that the petitioner had been guilty of adultery, Lord PENZANCE, applying the provisions of section 31, dismissed the petition.

In 1886 *Ramsden* v. *Ramsden* was decided. This was a very rare case of a petition by husband against a co-respondent, claiming damages only. The adultery of the co-respondent was proved, and so was a counter-charge of adultery against the petitioner. The jury assessed the damages at one farthing. The President (Sir James HANNEN) directed that each party should pay their own costs; and, if the argument now addressed to us be correct, he should have given judgment for the petitioner for one farthing, which, apparently, from the report, he did not.

In *Story* v. *Story*, in 1887, a petitioner established that his wife had committed adultery with the co-respondent, and the jury assessed the damages at £300; but they also found that the petitioner had committed adultery, which had been condoned by the wife. The President dismissed the petition, and held that the petitioner was not entitled to damages.

It will be seen that in all these cases, excepting the first, the

petitioners sought and recovered damages at the hands of the jury against the co-respondents, yet in each case the Court, when deciding as to what was to be done with the petitions, applied the enactments of section 30 or 31, and refused to allow the petitioners to reap the benefits of their verdicts; and not a single case has been produced in which a petitioner to whom the provisions of either section 30 or 31 applied has recovered by judgment the damages assessed.

It was, however, pointed out that Mr. Justice BUTT, in the year 1884, in *Pomero* v. *Pomero*, had decided that condonation of the wife's adultery by a petitioner was no answer to his claim for damages against the co-respondent; and it certainly appears to me that such was the opinion of the learned Judge when he decided that case. He held that under section 33 the claim for damages was to be "heard and tried" on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions of criminal conversation were at the time of the passing of the Act; but his attention does not seem to have been directed to the further provisions of the section — namely, that when hearing and deciding a petition under section 33, all the enactments of the statute, so far as might be necessary, should apply. That means, when deciding a petition under section 33, in which the adultery has been condoned by the petitioner, the provisions of section 30 shall apply; and when deciding a petition in which the petitioner has been guilty of any of the acts mentioned in section 31, the provisions of that section shall apply. I can find neither in the statute nor in the cases, any indication that, when deciding upon a petition in which damages are sought and condonation only is set up, section 30 shall not apply. The words are general and imperative — namely, that if the petition is founded upon condoned adultery it shall be dismissed. I am of opinion that the decision of Mr. Justice BUTT cannot be supported, and that when a petition under section 33 is adjudicated upon, the provisions of either section 30 or section 31 apply, as the case may be, and that the petitioner is not entitled as of right to a judgment for the damages awarded by the jury, and that Sir F. Jeune was correct when he dismissed Turner from the suit.

That Sir F. JEUNE had jurisdiction to make the order he did as to costs, assuming that the petitioner was not entitled to a judgment for damages as of right, is apparent upon reading section 51;

and that there were good grounds in this case for the exercise of his discretion cannot be doubted.

For these reasons the appeal fails, and must be dismissed with costs.

LINDLEY, L.J. — I have read the judgments which have just been read by the Lords Justices, and I concur in them.

[* 16] * I, however, wish to add some observations of my own.

A careful study of the various sections of the Divorce Act which bear upon the present appeal has convinced me that, when, in 1857, the Legislature dealt with the whole subject of divorce and adultery, Parliament not only abolished the old action of *crim. con.* (section 59), but remodelled the law applicable to claims for damage for adultery. My reasons are as follows: First, such claims are placed wholly under the jurisdiction of the Divorce Court; they can only be made by petition, and the damages recovered are placed under the control of the Court (section 33); secondly, the petition must be served on the wife, unless the Court dispenses with such service (section 33); thirdly, the petition must be dismissed, if the petitioner has been accessory to or conniving at the adultery complained of, or has condoned the same (sections 29, 30, and 33); fourthly, the claim for damages is, in my judgment, subject to all these overriding provisions. But, subject to them, the claim is to be "heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations" as the old common-law action for *crim. con.* The result is that, if a wife's adultery with a particular man has been condoned, no claim for damages against him is now maintainable. Under the present law such a conclusion is, in my opinion, highly reasonable, for to condone a particular act of adultery, and afterwards to make it the subject of a petition to which the wife is a party, to publish her condoned misconduct and to expose her to shame and misery, is to pursue a course of conduct so utterly inconsistent with condonation that I cannot bring myself to believe that the Legislature intended to allow it. The view thus arrived at is, no doubt, inconsistent with *Pomero* v. *Pomero*, but it is impossible, I think, to reconcile that case with a long line of authorities on the construction of the Act. The general view which I take of the Act is supported by *Seddon* v. *Seddon*, *Norris* v. *Norris*, *Lyne* v. *Lyne*, 37 L. J. P. & M. 9; L. R. 1 P. & D. 508, and *Story* v. *Story*, which is diametrically

opposed to *Pomero* v. *Pomero*. The latter case was at one stage of the present case followed by Sir F. JEUNE (62 L. J. P. D. & A. 16; [1892] P. 375), but he did not adhere to it when it became necessary to pronounce his final decision, and in my opinion he was right. *Pomero* v. *Pomero* cannot, in my opinion, be supported, and ought to be distinctly overruled. With respect to the question whether a husband can effectually condone his wife's adultery with one man, even although he is ignorant of her adultery with another, I have come to the conclusion that he can. I have carefully considered the older authorities, and the case of *Dempster* v. *Dempster;* but, having regard to the language of section 30 of the Divorce Act — namely, "having condoned the adultery complained of" — and having regard to the absurd consequences which would result from the opposite view now that condonation is an answer to a claim for damages, I cannot judicially hold that a man cannot condone his wife's adultery with one man although he may be ignorant of her offence with another. This was evidently the view taken by Lord PENZANCE in *Alexandre* v. *Alexandre*. It has been already decided that a subsequent offence by a wife will not enable her husband to obtain damages in respect of a previously condoned offence — *Norris* v. *Norris*, and that the condonation of one offence is no condonation of another which is unknown to the condoning party — *Alexandre* v. *Alexandre*. The costs of all petitions, whether they claim damages or not, are in the discretion of the Court (section 51), and there is no appeal on that subject. In my opinion this appeal fails, and must be dismissed with costs.

ENGLISH NOTES.

It was a cardinal principle of the Canon Law that marriage, being a sacrament, was indissoluble. It might be annulled by reason of a precontract, or impotence, or consanguinity, or other causes, but once duly constituted it could not be dissolved. After the Reformation, marriage, being no longer ranked as a sacrament, became dissoluble, but down to quite a recent date dissoluble only by special Act of Parliament.

The jurisdiction in matrimonial matters formerly exercised by the Ecclesiastical Courts was in 1857 transferred to a new Court created for that purpose — with new powers added — by the Matrimonial Causes Act 1857 (20 & 21 Vict. c. 85), and is now vested in the Probate and Divorce Division of the High Court of Justice.

The grounds on which the Court may grant dissolution of a marriage

are defined by sect. 27 of the Act as follows: "It shall be lawful for any husband to present a petition to the said Court praying that his marriage may be dissolved, on the ground that his wife has since the celebration thereof been guilty of adultery; and it shall be lawful for any wife to present a petition to the said Court praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensâ et thoro*, or of adultery coupled with desertion without reasonable cause for two years or upwards."

Section 16 of the same Act defines in what cases a judicial separation may be obtained: "A sentence of judicial separation (which shall have the effect of a divorce *a mensâ et thoro*, under the existing law, and such other legal effect as herein mentioned) may be obtained either by the husband or the wife, on the ground of adultery, or cruelty, or desertion without cause for two years and upwards." Upon any petition for the dissolution of a marriage, it is the duty of the Court (sect. 29) to satisfy itself so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same, and also to inquire into any counter-charge. If the Court finds either of these circumstances, or that the petition is presented in collusion with either of the respondents, the Court (sect. 30) is to dismiss the petition. If the Court is satisfied on the evidence that the case of the petitioner is proved, and does not find any of the above circumstances, the Court (sect. 31) shall pronounce a decree declaring the marriage to be dissolved; but the Court is not bound to pronounce such a decree if it finds that the petitioner has during the marriage been guilty of adultery, or of unreasonable delay in presenting or prosecuting the petition, or of cruelty towards the other party to the marriage, or of desertion, or wilful separation before the adultery complained of without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.

The tendency of modern decisions is to widen the definition of legal cruelty. Thus, where a husband habitually insulted his wife, and behaved towards her with neglect and studied unkindness, so as to impair her health, he was held guilty of cruelty. *Bethune* v. *Bethune* (1891), 1891, P. 205, 60 L. J. P. 18, 63 L. T. 259. But no general rule can be laid down as to what amount of mere insults or offensive conduct on the part of a husband towards his wife — apart from acts of physical violence — will amount to cruelty. *Beauclerk* v. *Beauclerk* (1891), 1891, P. 189, 60 L. J. P. 20, 64 L. T. 35. It is cruelty for a

wife to make against her husband and persist in a false charge of an unnatural crime. *Russell* v. *Russell* (C. A. 1895), 1895, P. 315, 64 L. J. P. 105, 73 L. T. 295, 44 W. R. 213.

To prove desertion, it must be shown to be against the will of the other spouse. *Smith* v. *Smith* (1859), 1 Sw. & Tr. 359.

A temporary separation between a husband and wife for mutual convenience is not regarded as altering the marital relations, and a husband who under such circumstances refuses to take his wife back again or to maintain her may be guilty of desertion under the Married Women (Maintenance in case of Desertion) Act 1886. *Chudley* v. *Chudley* (1893), 69 L. T. 617; and see *Drew* v. *Drew* (1891), 64 L. T. 840.

But where husband and wife have been living separate and apart by mutual consent, there can be no desertion by the one party without a prior resumption of cohabitation. *Fitzgerald* v. *Fitzgerald* (1869), L. R. 1 P. & M. 694; *Reg.* v. *Leresche* (C. A. 1891), 1891, 2 Q. B. 418, 60 L. J. M. C. 153, 65 L. T. 602, 40 W. R. 2; *Bradshaw* v. *Bradshaw* (1896), 75 L. T. 391.

What is a reasonable cause to bar a suit for restitution of conjugal rights, so that non-compliance with a decree in the suit may be made the ground of a petition for judicial separation under the Act of 1884 (47 & 48 Vict., c. 68), s. 5, was considered in *Russell* v. *Russell*, *supra*, where the conduct of the husband was held to be a bar. This may be contrasted with *Aldroyd* v. *Aldroyd* (1896), 1896, P. 175, 65 L. J. P. 113, 75 L. T. 281, where the conduct of the wife in having left the house owing to differences with her stepdaughters did not amount to reasonable cause for the husband insisting that she should stay away. An instructive case upon the subject of desertion without reasonable cause, which by an old Scotch statute is punishable by decree of divorce and forfeiture of property to the innocent spouse, is that of *Mackenzie* v. *Mackenzie*, 1895, A. C. 384, where the husband by a course of tyrannical conduct, not less galling in that he was always convinced that he was in the right, had driven his wife into ill health; and it was held by the House of Lords (affirming the decree of the judge of the Court of first instance, and of the division of the Court to whom the case was appealed) that the wife had reasonable cause for leaving his house and staying away from it.

In order to establish connivance by a husband at his wife's adultery, it must be shown that he gave a willing consent, that he was an accessory before the fact. Mere negligence, inattention, dullness of apprehension, or indifference will not suffice. *Allen* v. *Allen* and *D'Arcy* (1859), 30 L. J. P. M. & A. 2.

Condonation must be voluntary. A forced return to cohabitation is

no proof of condonation: *Cooke* v. *Cooke* (1863), 3 Sw. & T. 246; and it must be with full knowledge of the facts: *Peacock* v. *Peacock* (1858), 1 Sw. & T. 183; *Campbell* v. *Campbell* (1857), 5 W. R. 519. Condonation has been defined as being a blotting out of the offence imputed so as to restore the offending party to the same position which he or she occupied before the offence was committed. *Keats* v. *Keats* and *Montezuma* (1859), 1 Sw. & T. 334. Condonation is in each particular case a question of fact for the jury. *Peacock* v. *Peacock* (1858), 1 Sw. & T. 183. Continuance of cohabitation does not necessarily constitute condonation. *Curtis* v. *Curtis* (1858), 1 Sw. & T. 192. Condonation has, however, been held to be conditional on no offence of which the Court can take cognizance, being in future perpetrated. *Palmer* v. *Palmer* (1860), 2 Sw. & T. 61. The word "condonation" in 20 and 21 Vict., c. 85, s. 30, has the same meaning as it had in the ecclesiastical Courts, and the doctrine of revival has equally been applied to it. *Dent* v. *Dent* (1865), 4 Sw. & T. 105. Therefore, although the adultery complained of by the petitioner in a suit for dissolution of marriage may have been condoned, the petitioner has been held entitled to a decree if the right to it has been revived by subsequent cruelty. Thus, condoned adultery and cruelty may be revived by misconduct which falls short of adultery. A husband was guilty of adultery and cruelty which were condoned by his wife. He afterwards made improper overtures to and attempted to take liberties with a female servant in his house. It was held that the husband's misconduct had revived his condoned adultery, and that the wife was entitled to a decree of dissolution of the marriage. *Ridgway* v. *Ridgway* (1881), 29 W. R. 612. So in *Blandford* v. *Blandford* (1883), 8 P. D. 19, 52 L. J. P. 17, 48 L. T. 238, 31 W. R. 508, a husband having been guilty of desertion and adultery, the wife forgave him and they returned to cohabitation. He subsequently committed adultery. Held, that the subsequent adultery revived the desertion, and that the wife was entitled to a dissolution of the marriage. Condoned incestuous adultery may be revived by subsequent adultery not incestuous. *Newsome* v. *Newsome* (1871), L. R. 2 P. 306, 40 L. J. Mat. 71, 25 L. T. 204, 19 W. R. 1039.

The doctrine of conditional condonation, and consequent revival of previous offences on breach of the condition, does not hold in the law of Scotland, where it is clearly settled law that condonation of adultery (which by Scotch law is alone sufficient ground for a divorce) is a complete extinguishment of the offence, and a restoration to all conjugal rights as they previously existed. *Collins* v. *Collins* (1884), 9 App. Cas. 205. Indeed, in the opinion of Lord Blackburn, a doubt is thrown out whether the English decisions can be supported on principle. To the suggestion of any such doubt it may

be answered that where the grounds of divorce are simple and equal, as in Scotland, it is easy to treat the condonation as absolute. To say that in England the condonation is conditional, is only one anomaly the more, and it has the advantage of putting the parties on equal terms for the future. At all events, decisions which must have in numerous instances been acted on in the conduct of a delicate situation cannot be easily overturned.

A petitioner having obtained a decree *nisi* for dissolution of her marriage, more than six months afterwards went through the form of a second marriage, in the honest belief that the marriage had been dissolved by the decree *nisi*, but that she could not marry till the expiration of six months. After the death of the man with whom she had gone through the form of second marriage, she resumed cohabitation with her husband, but left him again on account of his cruelty. It was held that the condonation by resumption of cohabitation was conditional, and that the subsequent cruelty put the petitioner in a position to ask to have the decree made absolute. *Moore* v. *Moore* (1892), 1892, P. 382, 67 L. T. 530.

To a suit by a wife for dissolution of marriage on the ground of adultery, coupled with cruelty, condonation of the cruelty is no bar. *Dempster* v. *Dempster* (1861), 2 Sw. & T. 438. Condonation of cruelty is not lightly to be presumed from a continuance of cohabitation after the commission of one or even of several acts of cruelty, cruelty generally consisting in a series of acts. *Curtis* v. *Curtis* (1858), 1 Sw. & T. 192.

Concealment of condonation may be collusion. *Rogers* v. *Rogers* (1894), 1894, P. 161, 63 L. J. P. 97, 70 L. T. 699; and see *Butler* v. *Butler* (1890), 15 P. D. 66.

A decree *nisi* for dissolution does not alter the status of the parties. The coverture continues till the decree is made absolute. *Norman* v. *Villars* (1877), 2 Ex. D. 359, 46 L. J. Ex. 579, 36 L. T. 788. 25 W. R. 780. After decree absolute, the divorced woman is no longer a wife. She has not the rights nor has she the duties of a married woman. She is at liberty to marry again. The equitable doctrines of separate use and restraint against anticipation have no application to her until she does marry again. Whatever property she may have or acquire is her own; her former husband has no interest in it. He, on the other hand, is not bound to support her. She has no implied authority to pledge his credit even for necessaries. She is free from him, and he from her. Per Lindley, L. J., in *Watkins* v. *Watkins* (1896), 1896, P. 222, 225, 65 L. J. P. 75, 74 L. T. 636, 44 W. R. 677.

The Court of Divorce has power to make orders for the maintenance of a divorced wife (Divorce and Matrimonial Causes Act 1857, s. 32),

for the custody of the children of the marriage, and for the variation and execution of settlements for the benefit of the innocent party and of such children, and these powers have been enlarged by later Acts, all comprised in the description The Matrimonial Causes Acts 1857 to 1878 (see 59 & 60 Vict., c. 14).

The power of varying or making settlements under these Acts cannot be exercised after the death of the petitioner in a matrimonial cause by making the executor a party. *Thomson* v. *Thomson* (1896), 1896, P. 263, 65 L. J. P. 80, 74 L. T. 801, 45 W. R. 134.

By the Summary Jurisdiction (Married Women) Act 1895, a married woman whose husband has —

(a) been convicted of an aggravated assault upon her;

(b) been convicted upon indictment of assault upon her, and sentenced to a fine of £5 or imprisonment for more than two months;

(c) deserted her;

(d) been guilty of persistent cruelty to her, causing her to leave and live separately from him;

(e) been guilty of wilful neglect to provide reasonable maintenance for her or her infant children, whom he is bound to maintain, causing her to leave and live separately from him;

may apply for and obtain —

(a) a judicial separation;

(b) the legal custody of the children under sixteen;

(c) an order for payment by the husband of a weekly sum not exceeding £2;

(d) costs.

The jurisdiction of the justices to make an order for costs under this Act is exclusive; and where the Court has refused to make any order as to costs against the husband, the solicitor who acted for the wife cannot recover them against the husband by action. *Cale* v. *James* (1897), 1897, 1 Q. B. 418, 66 L. J. Q. B. 249.

AMERICAN NOTES.

No exact parallel to this case seems to have been adjudged here; but in *Shackleton* v. *Shackleton*, 48 New Jersey Equity, 364; 27 Am. St. Rep. 478, it was held that a wife should not be deemed to have condoned offences of which she had suspicions, but did not know. The Court said: "Forgiveness may be so expressed, certainly by words, and possibly by conduct without words, as to show that the injured party means to blot out the whole past, and to forgive everything, both offences known and unknown; but in no case should the Court so adjudge as against an injured wife, except the proofs show very clearly that such was her purpose. The question whether a matri-

monial offence has been condoned or not is always one of intention; and where a wife is the injured party the Court should be extremely careful not to absolve him from the consequences of a wrong which his wife never intended to forgive."

No. 9. — DURANT *v.* TITLEY.

(EX. CH. 1819.)

RULE.

AN agreement made, before or after marriage, which contemplates a voluntary separation at a future time of husband and wife, is void upon grounds of public policy.

Durant v. Titley.

7 Price, 577-590 (21 R. R. 773).

Husband and Wife. — Future Separation. — Illegality.

A deed made between husband and wife, and a third person (a trustee) [577] with a covenant by the husband to pay such third person an annuity, in case the wife should live separate and apart from her husband, and should take one of her children to reside with her, is (*semble*) void, as being a deed made in contemplation of a future separation at the pleasure of the wife, and therefore contrary to the policy of marriage.

Semble, a plea to an action of covenant on such a deed, that the wife afterwards lived and cohabited with the defendant for a long space of time, and then left him against his will and consent, and had ceased to live or cohabit with him since, is a good plea.

Judgment for plaintiff, on a demurrer to such a plea, by the Court of Exchequer, reversed, on a writ of error.

This was an action of covenant, on a deed of separation between the plaintiff in error and Mary Anne his wife, of the one part, and the defendant in error of the other part, bearing date the 22d November, 1809, whereby (reciting the marriage and subsisting differences) the plaintiff covenanted for himself, his executors and administrators, with the defendant, to pay him an annuity of £500 during the joint lives of the plaintiff and his said wife, in case she should live separate and apart from her husband, and should take one of her children by her said husband to live with her: and it was also agreed between them, that it should be lawful for her, whenever she * should live apart from [* 578]

her husband, to take any one of her children by her husband which she should fix upon, to reside and live with her, except the eldest.

The declaration averred, that on the 8th May, 1817, the wife had discontinued to reside and live with her husband, and did live separate and apart from him, and had ever since continued to do so, and that she had at all times since she had so lived separate and apart from her husband, been ready and willing to take one of the children by her husband, not being the eldest, to live with her; and that she did afterwards fix upon one of such children, named Anguish, and did request her husband to permit the said child to reside and live with her, and that he refused to permit the said child so fixed upon by her, to reside and live with her.

The defendant pleaded (protesting that the said indenture and the said declaration were bad in law), that after the making of the said supposed indenture, in the said declaration mentioned, and before the commencement of this suit, the said Mary Anne lived and cohabited with the said George for a long space of time, to wit, for the space of seven years and upwards, from the time of the sealing and delivering of the said indenture, and afterwards, to wit, on the said 8th day of May, 1817, the said Mary Anne, without the consent, and against the will of the said George, [*579] quitted and left the said George, and had *ceased from thence thitherto to live or cohabit with the said George; and the defendant further pleaded, that the said Anguish, the said child in the said declaration mentioned, was not born at the time of the sealing and delivering of the said indenture, but long afterwards.

To that plea the plaintiff demurred.

The Court of Exchequer having given judgment for the plaintiff, the defendant brought a writ of error: and the case now came on for argument before ABBOTT, Lord Chief Justice, and DALLAS, Lord Chief Justice (C. B.), in Serjeants' Inn, at the chambers of the Lord Chief Justice.

Peake, Serjt., in support of the errors assigned, contended, that the action could not be supported: or if it could, that the plea was a good defence; for that

1st. The deed being made in contemplation of a future separation of a husband and wife, at the pleasure of the wife, it was contrary to the policy of marriage, and void in law; and

No. 9. — Durant v. Titley, 7 Price, 579–588.

2ndly. That as the deed contemplated a separation in the state in which their family was at the time when it was made, and in such an event provided for the maintenance of the wife and one of the then existing children, it did not therefore apply to the event which had happened, of the wife leaving her husband, and taking with her an after-born child.

* The case of *Lord Rodney* v. *Chambers*, 2 East, 283, he [* 580] admitted, was an authority in some respects in favour of the validity of such a deed as this; but of the judgment of the Court in that case, he observed, that it had been reluctantly given, professedly under the pressure of authority; and although this sort of contract was there stated to be against the policy of the law. Since that determination, he submitted, the principle and the general application of it had been much narrowed; and first by what fell from Mr. Justice LAWRENCE, in the subsequent case of *Chambers* v. *Caulfield*, 6 East, 252, who said, in allusion to *Rodney* v. *Chambers*, "In that case there was an averment that the separation was with the consent of the trustees. We thought there was nothing illegal in the parties agreeing to refer the question, what was a good cause of separation, to a domestic forum, instead of applying to the Ecclesiastical Court for a divorce and alimony. The Court therefore only decided in that case, that a covenant for separation, and separate maintenance, with the consent of the trustees, was good; not that a covenant was good generally, that a wife might separate herself from her husband whenever she pleased; for that would be to make a husband tenant at will to the wife, of his marital rights."

On the second point, he submitted that if such a deed [588] were valid, under any circumstances, it would not be so under those of this case, as children were born after the deed was made; which with the subsequent cohabitation would render the deed void: and that doctrine was deducible from the case of *Fletcher* v. *Fletcher*, 3 Br. C. C. 619, *in notis*. Upon the whole therefore he submitted that this judgment ought to be reversed.

Puller, in support of the judgment, submitted that this was a pure question of strict law: and that it was fully and solemnly settled by the case of *Lord Rodney* v. *Chambers*, after the most elaborate discussion, that the legality of such a deed had been long established by a series of authorities not to be shaken — that this sort of contract was in effect nothing more than a provision

for any other separate property of the wife, to be exclusively enjoyed by her.

[590] The opinions of the two learned Chief Justices, before whom the case was argued, having been in the meantime signified by them to the Lord Chancellor, the Court of Error on this day *Reversed the judgment.*

ENGLISH NOTES.

Agreements for separation between husband and wife were until quite a recent period considered as contrary to public policy; and incapable of being enforced. *Warrender* v. *Warrender* (1835), 2 Cl. & F. 527, 561. "For a great number of years," says the Master of the Rolls (Sir Geo. Jessel), in *Besant* v. *Wood* (1879), 12 Ch. D. 605, 620, "both ecclesiastical judges and lay judges thought it was something very horrible and against public policy that the husband and wife should agree to live separate, and it was supposed that a civilized country could no longer exist if such agreements were enforced by Courts of law, whether ecclesiastical or not. But a change came over judicial opinion as to public policy, other considerations arose, and people began to think that after all it might be better and more beneficial for married people to avoid in many cases the expense and the scandal of suits of divorce by settling their differences quickly by the aid of friends out of Court, although the consequence might be that they would live separately, and that was the view carried out by the Courts when it became once decided that separation deeds *per se* were not against public policy." The crucial decision here referred to was in the case of *Wilson* v. *Wilson* (1848), 1 H. L. Cas. 538, and it is now quite settled that an agreement for separation may be upheld and enforced, although there are no circumstances in the case which would support a decree for dissolution of marriage or judicial separation. *Hart* v. *Hart* (1881), 18 Ch. D. 670. An agreement for a future separation is different and is void. *Cartwright* v. *Cartwright* (1853), 3 D. M. & G. 982; *Cocksedge* v. *Cocksedge* (1844), 14 Sim. 244; *Westneath* v. *Westneath* (1821), Jacob, 126.

An agreement for separation need not be in writing: *Macgregor* v. *Macgregor* (1888), 21 Q. B. D. 424; and it is immaterial whether the contract is between husband and wife direct or through the medium of a trustee for the wife: *Sweet* v. *Sweet* (1895), 1895, 1 Q. B. 12, 64 L. J. Q. B. 108, 71 L. T. 672, 43 W. R. 303. The machinery of a trustee was only resorted to to avoid the difficulties of the legal doctrine of the unity of person between husband and wife. If the trustee refuses to sue on this deed, the wife may do so. *Gandy* v. *Gandy*

(1885), 30 Ch. D. 57, 54 L. J. Ch. 1154, 53 L. T. 306, 33 W. R. 803.

In the case of an executory agreement for separation a valuable consideration is essential to entitle either party to specific performance. *Walrond* v. *Walrond* (1858), John. 18. A covenant by the trustees to indemnify the husband against the debts of his wife is considered a valuable consideration: *Wellesley* v. *Wellesley* (1839), 10 Sim. 256; or a withdrawal by the wife of pending proceedings: *Macgregor* v. *Macgregor*, *supra*. There is no implied condition in a separation agreement that the wife should remain chaste, a *dum casta* clause not being a "usual clause" in a separation deed: *Fearon* v. *Aylesford* (1884), 14 Q. B. D. 792, 54 L. J. Q. B. 33, 52 L. T. 954, 33 W. R. 331, and see *Gandy* v. *Gandy* (1882), 7 P. D. 1, 68, 75. The Court has power to deal with a separation deed as a "settlement" under the Matrimonial Causes Acts 1857 to 1878.

A separation agreement is put an end to for every purpose, if the parties subsequently become reconciled and return to cohabitation. *Bateman* v. *Ross* (1813), 1 Dow. 235, 14 R. R. 55.

AMERICAN NOTES.

So far as this country is concerned the cases have been sufficiently presented, *ante*, vol. vi. p. 375, under "Contract."

ILLEGALITY.

See "CONTRACT," Sect. V., 6 R. C. 325 *et seq.*

IMPOSSIBILITY.

See No. 10 of "ACCIDENT" and notes 1 R. C. 338 *et seq.*; Nos. 55 and 56 of "CONTRACT" and notes 6 R. C. 597 *et seq.*

INDEMNITY.

See also Lacey *v.* Hill; Crowley's Claim, No. 21 of "Agency," 2 R. C. 519; Barclay *v.* Lucas, &c., Nos. 2 and 3 of "Guarantee," p. 470, *ante*.

No. 1. — ANTROBUS *v.* DAVIDSON.

(ch. 1817.)

No. 2. — WOLMERSHAUSEN *v.* GULLICK.

(ch. 1893.)

RULE.

A person entitled to indemnity or contribution whose liability is ascertained, may obtain against the person liable to indemnify him a declaratory judgment establishing the obligation to indemnify or contribute.

The Court will not, however, entertain proceedings in the nature of a *quia timet* action by the person to be indemnified, while his own liability remains uncertain.

Antrobus v. Davidson.

3 Mer. 569-581 (17 R. R. 130).

Indemnity. — Quia timet action.

[569] Colonel of a regiment having taken a bond of indemnity from his agents, with another as surety, in respect of all charges, &c., to which he may become liable by their default; the agents having afterwards become bankrupt; and Government having given notice to the representatives of the Colonel (deceased) of a demand upon the Colonel's estate by virtue of an unliquidated account; a bill by the representatives of the Colonel against the representatives of the surety, to pay the balance due to Government, and also to set aside a sufficient sum out of their testator's estate, to answer future contingent demands, though attempted to be supported upon the principle of a bill *quia timet*, dismissed with costs.

Sir William Fawcett, being Colonel of the 15th Regiment of Foot, and subsequently also of the 3d Dragoon Guards, and

No. 1. — Antrobus v. Davidson, 3 Mer. 569-571.

Governor of the forts of Tilbury and Gravesend, appointed Messrs. Ross and Ogilvie his agents, who, as such agents, entered into a bond, by which they became bound to him, jointly, with Duncan Davidson, as their surety, in the penal sum of £10,000, conditioned from time to time when required, to account with him (Sir W. F.), his executors, &c., in respect of, and pay to him and them, all sums, &c., due from them as such agents, and to settle all public * accounts which had been, or should, [*570] or might be required, relative to their said concerns as agents, and also to indemnify him (Sir W. F.), his heirs, executors, &c., against all costs, charges, and expenses, which should or might be incurred by the neglect or default of them (Messrs. Ross and Ogilvie) in the premises, or in any manner relating thereto.

This bond was dated in August, 1794. In March, 1804, Sir W. Fawcett died. In the beginning of 1805, a commission of bankruptcy was issued against Messrs. Ross and Ogilvie; and shortly afterwards a notice was sent from the War Office to the plaintiffs, as representatives of Sir W. Fawcett, stating that, in consequence of the insolvency of Messrs. Ross and Ogilvie, they were liable to pay certain bills, and requesting them to pay into the hands of the Paymaster-General the amount of the bills, therein stated to be £3225 11*s.* 8*d.*

* The plaintiffs took no steps in pursuance of the notice [*571] so received by them, being at that time, and until long afterwards (as stated by their bill), in ignorance of the bond which had been given. In November following they applied, and were admitted, to prove under the commission of Messrs. Ross and Ogilvie for the amount of the demand so made upon them; and afterwards, in consequence of the advertisement of a dividend to be made on the 4th of August, 1806, another notice was issued to them from the War Office, requesting them to make certain arrangements for liquidation of the accounts of Messrs. Ross and Ogilvie. The plaintiffs finding, on inquiry, that no settlement of the bankrupts' accounts with Government had taken place, took no notice of these applications: but subsequently, being about to make a distribution of the funds in their hands, as representatives of the deceased, under a decree of the Court of Chancery, thought proper to apprize Government of such proceeding. After repeated applications for an answer upon the subject, the plaintiffs received

from the Secretary at War a letter dated 31st January, 1815, inclosing an account of sums "appearing to be due," from the representatives of the late Sir W. Fawcett, amounting to £6169 19*s.* 9*d.*; and stating that the balance was more likely to be increased than diminished in the final account.

[572] The bill, after stating the above particulars, went on to state that it was only a short time since the plaintiffs discovered the bond in which Davidson was a surety; and that immediately on the discovery thereof, they served the defendant (the personal representative of Davidson) with a copy, together with a copy of the foregoing statement of the account claimed by Government; and that having been so called on for payment

[* 573] * they had applied to the defendant, accordingly, to pay and discharge the balance already found due to Government, and (in order to enable them to make a just distribution of their testator's estate under the decree) to set apart a sufficient sum out of the estate of the said Duncan Davidson, to indemnify them in the event of a further sum being found due on a final adjustment, which was prayed accordingly.

The defendant, by his answer to this bill, said he believed that upon the balance of accounts with Ross and Ogilvie, as army agents, in respect of the several regiments for which they acted, a large sum would be found due to Ross and Ogilvie; and that any balance which might be found due from them in respect of the 15th Regiment of Foot would be set off against such general balance. The defendant further stated (and his answer

[* 574] was supported by evidence * to the same effect), that the ordinary course pursued in settling the accounts of army agents by the Paymaster-General is to treat them as one general account, and to set off sums which were due to the agent in respect of one regiment against moneys which might be due from the same agent in respect of other regiments; and also that it was not usual, or according to the ordinary practice of Government, in cases where they had been in the habit of settling accounts with any person as agent from time to time for any particular regiment, to call upon the colonel of that regiment for payment of any deficiency that might appear upon the said account, if there was money due to such agent in respect of other regiments sufficient to cover such deficiency.

[575] Sir S. Romilly and Roupell, for the plaintiffs,

No. 1. — Antrobus v. Davidson, 3 Mer. 575, 576.

Alleged that the bill was in the nature of a bill *quia timet*, and upon that principle to be supported, as in the case where Lord Keeper NORTH held, that if A. is bound for B., and has a counter-bond from B, and the money is become payable on the original bond, equity will compel B. to pay the debt, although A. is not troubled or molested for the debt, since it is unreasonable that a man should always have such a cloud hung over him. *Earl of Ranelagh* v. *Hayes*, 1 Vern. 190, 1 Eq. Ab. 79, pl. 5. The terms of the bond, in this case, are such as entitle us, not only to call for payment of what is actually now claimed by Government, but to be indemnified to the extent of the penalty against future payments.

Wetherell and Heald, *contra*.

This is only a claim made by the Secretary at War, not in respect of a settled account, — no debt actually due. The object is to compel the representatives of Mr. Davidson, as surety for Messrs. Ross and Ogilvie, to impound, by way of anticipation of a future possible demand, which the plaintiffs, as representatives of Sir W. Fawcett, may be compelled to answer. It is impossible to produce any case in which the Court has, by way of anticipation, called upon a surety to make good the engagements of his principal, before the person entitled * to indemnity [*576] has, in effect, been damnified. If such were the legal effect of the bond, the plaintiffs ought to go to law for their remedy, and can have no relief in a Court of equity. But if not, there is no equitable ground upon which they are entitled to have that relief here which a Court of Law would refuse them.

Sir S. Romilly, in reply.

This is not the case of principal against surety, but of surety seeking to compel payment by the principal debtor. Sir W. Fawcett was answerable to Government for his agents; but the agents themselves were the principal debtors; and thus the case comes within the principle upon which His Honor decided that of *Wright* v. *Morley*, 11 Ves. 12, 22 (8 R.R. 69), which was, that as the creditor was entitled to the benefit of all the securities the principal debtor had given to his surety, the surety had full as good an equity to the benefit of all the securities the principal gave to the creditor; that the surety had precisely the same right that the creditor had, and was to stand in his place, — therefore determining that the surety was not only entitled, with regard to the payments actually made, to stand in the place of the creditor, and

be reimbursed out of the fund assigned for the payment; but had also an equity to have the fund applied in his exoneration, that fund being provided by the principal debtor for the purpose of securing the payment. And it was accordingly decreed, according to the prayer of the bill, that the plaintiff should be reimbursed what he had paid out of the fund in question; and that a sufficient portion should be set apart to answer the accruing pay-
[* 577] ments. So in Mosely, * 318 (*Lee* v. *Rook*, Mos. 318), Sir Joseph Jekyll, Master of the Rolls, is represented to have said, — "If I borrow money on mortgage of my estate for another, I may come into equity (as every surety may against his principal) to have my estate disencumbered by him." It is nothing to say that such a bill as the present may have been seldom filed, or that no instance can be produced of such a decree as is prayed by it, if it can be shown, by analogy to decided cases, that it is according to principles upon which the Court usually acts, and which are completely established. The case of *Simmons* v. *Bolland*, 3 Mer. p. 547, decided here a few nights ago, was, in principle, much stronger than this. There, no covenants were broken; but the executor claimed and was allowed to retain, out of the residuary fund, sufficient to protect him against the consequences of any future possible breach of covenants. So, in the case of the Duke of Queensberry's leases. That cited from Aleyne (*Eeles* v. *Lambert*, Aleyne, 38; Styles, 37, 54, 73) is also in point with the present. But, in *Simmons* v. *Bolland* it was most improbable that any demand could ever arise in respect of the covenants of which it was sought to guard against the effects of a future possible breach. Here a demand has been made already; and it is in the ordinary course of Government transactions that such demands are established after a much longer lapse of time than in the present case. We had an instance, only a few nights ago, of such a demand, in respect of transactions which had taken place during the Seven Years' War. In this case, it
[* 578] should be * referred to the Master to ascertain what sum it will be proper to set apart to answer the demands to which the plaintiffs may eventually become liable on account of the agency of Ross and Ogilvie.

The Master of the Rolls (Sir William Grant).

The first point to be considered is, in what relation the parties to this bond stood to each other at the time of its execution.

Government allows the colonel of a regiment to appoint his own agent. The colonel is answerable for such agent, not by virtue of any security which he gives to Government, but because the law throws that responsibility on the principal. Large sums of public money pass directly into the hands of these agents, and accounts are kept and settled with them by Government, subject, however, to the ultimate liability of the colonel, by whom they have been appointed. The colonel, however, takes security from his agent to indemnify himself against the consequences of such liability.

In the case of an ordinary money bond, there is no distinction upon the face of it, between the principal and the surety: but it is otherwise in the case of a bond of indemnity. In the present instance, Mr. Davidson stipulates for no act of his own: he had no money to receive, no account to settle; but as surety for Messrs. Ross and Ogilvie, he engages that they shall duly account, and that he will indemnify Sir William Fawcett against the consequences of their neglect or default. In doing this Mr. Davidson incurred a definite legal obligation. Then the first question that arises is, why should the plaintiffs come into a court of equity to enforce a mere legal obligation? They say, because, as the representatives of Sir William Fawcett, they stand in * the [* 579] situation of a surety, and, as a surety, are entitled in equity to a relief which they cannot obtain at law. It is true that a surety may come here to compel the principal to relieve him of his liability, by paying off the debt. But Sir William Fawcett's representatives and Davidson do not stand in the relation of principal and surety in the sense in which the rule of equity considers that relation. Whatever loss there may be, it is true, will ultimately fall on Davidson, and therefore, in a certain sense, Davidson may be legally considered the principal debtor; but in equity he is no more the proper debtor than Sir William Fawcett. Both are answerable for Ross and Ogilvie; and though Davidson is bound to keep Sir William Fawcett indemnified, that obligation does not arise out of any principle of equity, but is created by special convention between the parties. Except for the bond, Davidson would have nothing to do with the debts of Ross and Ogilvie. The bond, therefore, which alone created, must determine the extent of his liability. There is no principle upon which a court of equity can extend the legal effect of the bond.

Its legal effect is to protect against the consequences of future deficiencies, but not to entitle the party to call for anticipated and precautionary payment, by way of preventing the risk of his being hereafter damnified. I say this upon the supposition that a debt had been actually established as due to the public; but of this there is no evidence, beyond the mere assertion of the Under Secretary at War, and that made not by way of claim upon Ross and Ogilvie, but merely in answer to the application of Sir William Fawcett's representatives to ascertain what that claim might probably amount to from the then state of the accounts. The £3225 11*s.* 8*d.*, stated to be the amount of payments for which Sir William had become responsible, in the first letter from the War Office, soon after the bankruptcy of Ross [* 580] and * Ogilvie, was not claimed by Government in respect of a debt actually due from Ross and Ogilvie, but in respect of unpaid bills, which had been taken up, and for which the Paymaster-General had become answerable. The application was therefore made to the representatives of Sir William Fawcett to replace those securities, without regard to the balance which might ultimately be found to be due to the agents upon a general account with Government; and, from its subsequent silence, it must be taken that Government had suffered them to pass into that general account.

The account transmitted to Sir William's representatives in 1815 contained the whole demand which Government then supposed itself to have upon Sir William's estate, accompanied with a statement that the balance was more likely to be increased than diminished. There is no evidence that any sum of money in particular was at that time actually due from Ross and Ogilvie to Government. The *dicta* in the cases cited (of Lord Keeper North in *Ranelagh* v. *Hayes*, 1 Vern. 190; and of Sir Joseph Jekyll in *Lee* v. *Rook*, Mos. 318) furnish no authority for the demand made in this instance; for they presume that, even where a proper surety comes into equity to compel payment of a debt by the proper principal, he is able to tell what that debt is. Can a surety say to his principal, "Bring money into Court by way of deposit, because it may eventually turn out that a debt may be found to be due by you for which I may become answerable"?

What is here asked is to have a new security, and one of a totally different sort from that which Davidson consented to give,

— a security by deposit of money, instead of a security by personal obligation.

* There is no analogy in this case to the provision which [* 581] the Court sometimes makes for an unascertained debt, as, for instance, where it refuses to direct a distribution of the estate among residuary legatees, if apprised that there are existing claims to which the executors may eventually become liable, in respect of covenants which their testator has entered into. The Court is not administering Mr. Davidson's estate. It is not called upon to distribute the residue, while it is uncertain whether a claim may not be made on the executor in consequence of this bond. The executor is not seeking its protection against an eventual legal liability. But a person who is as yet no creditor, and who may never become one, is claiming to force out of the hands of the executor the utmost extent of what can ever become due. I cannot make such a decree, without laying it down as a rule, that, whenever a person bound in an obligation of this sort dies, a court of equity will compel his executor to bring into Court the whole amount of the penalty of the bond. I can find no trace of the exercise of any such jurisdiction, and therefore must dismiss the bill. *Bill dismissed, with costs.*

Wolmershausen v. Gullick.

62 L. J. Ch. 773–781 (s. c. 1893, 2 Ch. 514; 68 L. T. 753).

[773] *Principal and Surety. — Right to Contribution. — Unascertained Liability. — Limitations, Statute of.*

A surety, against whom the principal creditor has established his claim for the full amount of the guarantee, may maintain an action against a co-surety before actual payment of the claim for a declaration of his right to contribution; and, where the principal creditor is a party to the action, he may obtain an order upon the co-surety to pay his proportion to the principal creditor. Where the principal creditor is not a party, the surety may obtain a prospective order directing the co-surety, upon payment by the surety of his own share, to indemnify him against further liability.

Under section 37 of the Bankruptcy Act, 1883, the liability of a bankrupt surety to contribution, though unascertained at the time when bankruptcy proceedings are taken against him, is a debt provable in the bankruptcy.

The Statute of Limitations does not begin to run against a surety claiming a right of contribution against a co-surety until the claim of the principal creditor has been established against him, although at the time of the action for

No. 2. — Wolmershausen v. Gullick, 62 L. J. Ch. 773.

contribution the statute may have run as between the principal creditor and the co-surety.

The costs incurred in proceedings by which the principal creditor's claim was reduced were included in ascertaining the contribution.

The plaintiff was the widow and executrix of George Wolmershausen, whose estate was being administered by the Court; and this action was brought by leave of the Court against Thomas Gullick and John Patton for a declaration that the plaintiff was entitled to a right of contribution against them as co-sureties with the deceased.

In 1871, Wolmershausen, Gullick, and Patton were directors of the Original Hartlepool Collieries Company, Limited, which became insolvent, and had since been wound up. In July, 1871, the company borrowed from its bankers, Messrs. Barclay, Bevan & Co., £25,000; and on the 29th of July, Wolmershausen, Gullick, and Patton, and two other directors, who subsequently became insolvent, gave to the bankers a joint and several promissory note for the amount of the loan as sureties for the company.

On the 21st of January, 1874, these five directors, as such sureties, gave a further joint and promissory note to the bankers for £10,000. Wolmershausen died in May, 1879, and an action for the administration of his estate was commenced in the following July.

In October, 1879, the bankers gave notice of a claim against the estate of the deceased for £6000, the balance alleged to be due to them upon the two promissory notes after allowing payments to the extent of £23,500 and £5500 on the said two notes respectively. The plaintiff resisted the claims, and an unsuccessful attempt was made in the administration to obtain leave to bring in the co-sureties under the third-party procedure, but there was no evidence that the defendants had any notice of this proceeding. The claim was finally adjudicated upon on the 26th of March, 1890, by STIRLING, J. His Lordship disallowed the claim to the extent of £1500, the balance alleged to be due on the first note, but allowed it to the extent of £4500, the balance on the second note with interest, after deducting therefrom a sum of £70, as the estimated amount which the bankers might have recovered from the trustee in bankruptcy of one of the insolvent directors. The plaintiff had not, as yet, paid any part of this sum. The plaintiff claimed a declaration that the defendants were jointly

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and severally liable to contribute with the plaintiff to the discharge of the principal debt, and an order upon the defendants, respectively to contribute with the plaintiff to pay to Messrs. Barclay, Bevan & Co. the amount of their debt; or, in the alternative, an order upon them to indemnify the plaintiff against any sums which she might pay to Messrs. Barclay, Bevan & Co., in excess of her proper share. * The defendant [* 774] Gullick pleaded that the action was not maintainable, as the plaintiff had not paid anything in respect of the debt.

The defendant, Patton, pleaded that in 1887 he had entered into a scheme of arrangement with his creditors, under the Bankruptcy Act, 1883, and that under such scheme 20*s.* in the pound had been paid to all creditors who had proved their debts, and that such scheme was a bar to the plaintiff's claim. No claim was made under the bankruptcy proceedings against this defendant in respect of his unascertained liability to contribution, nor was such liability included by him in his statement of liabilities.

The defendants also pleaded the Statutes of Limitation.

Farwell, Q.C., and Birrell, for the plaintiff. — First, an action for contribution can be maintained by a surety against his co-sureties after he has been called upon by the principal creditor to pay the full amount of the debt, although he has not actually paid any part of it. In *Dering* v. *Lord Winchilsea*, 1 Cox, 318; 2 Bos. & P. 270 (1 R.R. 41), which was approved by Lord Eldon in *Craythorne* v. *Swinburne*, 14 Ves. 160 (9 R.R. 264), contribution was ordered after judgment and before payment. In *Ex parte Snowdon*, 50 L. J. Ch. 540; 17 Ch. D. 44; 29 W. R. 654, James, L.J., expresses his opinion that a surety who has been called upon to pay a debt may compel his co-sureties to contribute towards the payment of the debt to the creditor, or to indemnify him against paying more than his proportion. And see *Hughes Hallett* v. *The Indian Mammoth Gold Mines Company*, 52 L. J. Ch. 418; 22 Ch. D. 561. To compel a surety to pay the whole debt before obtaining contribution may involve him in ruin, although he might be perfectly well able to pay his proper share.

Secondly, with regard to the Statute of Limitations, the last cited authority shows that the plaintiff could not have commenced this action until the claim of the bankers had been established against her, which was in March, 1890 and the statute only begins to run from that date.

Thirdly, with reference to the plea of the defendant, Patton, there was not at the time of the bankruptcy proceedings any liability for which the plaintiff could have proved. The claim of the bankers had not been established, and the defendants might never have been called upon to contribute. The right to contribute is distinct from a debt.

Haldane, Q.C., and Curtis Price, for the defendant Gullick. — It has always been held at common law that a surety is not entitled to contribution against his co-sureties until he has paid more than his proper proportion of the debt. There is no reason why a creditor who has obtained judgment against one surety may not afterwards obtain judgment against another, and *non constat* that the first surety will be solvent; therefore, until a surety has paid more than his proportion, it is not clear that he will ever be in a position to demand anything from his co-surety — *Davies* v. *Humphreys*, 6 Mee. & W. 153; 9 L. J. Ex. 263. And the same principle applies in equity — *Antrobus* v. *Davidson*, 3 Mer. 569 (p. 816, *ante*). *Ex parte Snowdon* and *Hughes Hallett* v. *The Indian Mammoth Gold Mines Company* are decisions in our favour. In *Dering* v. *Lord Winchilsea* the point was not argued, and that case has never been cited as an authority for the proposition that, for the purpose of enforcing contribution, a judgment is equivalent to payment. Further, an adjudication of a claim is not a judgment, and that distinguishes *Dering* v. *Lord Winchilsea* from the present case. As regards the Statute of Limitations, the defendants are statute-barred as between themselves and the principal creditor; and the question arises whether a surety who is not statute-barred can proceed against a surety who is. The object of the present action is to compel the defendants to pay an aliquot proportion of the debt to the principal creditor, but they are under no liability to him. The doctrine of contribution is based upon the theory of the sureties being subject to a common burden; but the sureties are no longer subject to a common burden, [* 775] and *this is due to the fault of the plaintiff, who ought not to have allowed the claim of the bankers to hang over her for ten years without taking steps to inform the defendants that she intended to enforce contribution against them.

Whitehorne, Q. C., and T. L. Wilkinson, for the defendant Patton. — The effect of the scheme of arrangement was to release the debtor from all debts provable in bankruptcy, and this con-

tingent liability to contribution was a debt provable in bankruptcy — *Hardy* v. *Fothergill*, 58 L. J. Q. B. 44; 13 App. Cas. 351, and *Flint* v. *Barnard*, 58 L. J. Q. B. 53; 22 Q. B. D. 90.

Farwell, Q. C., in reply. — *Davies* v. *Humphreys* is distinguishable on the ground that there the plaintiff was asking payment to himself, whereas this is an action for contribution in which the plaintiff asks payment to the creditor. A person entitled to contribution or indemnity may enforce his right before he has sustained actual loss — "Lindley on Partnership," p. 374. I ask for an order like that in *Wooldridge* v. *Norris*, 37 L. J. Ch. 640; L. R. 6 Eq. 410.

Wright, J., at the conclusion of the arguments, dismissed the action as against the defendant, Patton, with costs, but reserved judgment as between the plaintiff and the defendant, Gullick.

Wright, J. (on May 1). — This case raises an important question, with respect to which there is a remarkable absence of express authority. The plaintiff is the executrix of a person who became surety with four others for a large sum of money advanced by a bank to a company. The surety's estate is being administered in the Court, and the bankers put in a claim as creditors for the whole amount of the guarantee. The plaintiff resisted the claim, and succeeded in reducing it from £6000; but it has been finally allowed for a sum of about £4500. The plaintiff is now called upon to pay that sum, and brings this action against cosureties for contribution. The plaintiff has not yet paid anything. One defendant I have dismissed from the action on the ground that he is discharged by a composition under section 18 of the Bankruptcy Act, 1883, inasmuch as it appears to me that his liability to contribute, although not ascertained at the time of the bankruptcy proceedings, nor included in his schedule of liabilities or in the claims or proofs, and not a debt in respect of which an adjudication of bankruptcy could have been sustained, was a liability within the meaning of section 37 of the Act, and therefore a debt provable in the bankruptcy — compare *Hardy* v. *Fothergill*.

The principal defence of the other defendant is that the plaintiff is not entitled to maintain this action until she has paid more than her proportion, or, at any rate, until she has paid her proportion. The plaintiff is willing to pay her proportion, but she insists that the actual payment of it is not a condition precedent to her right to sue; and she says that, at any rate, she is not

obliged to pay the whole in the first instance and then sue for reimbursement. If she is obliged to pay the whole before actual contribution from the co-surety, the business in which the testator's assets are invested will be embarrassed by the withdrawal of so much of the capital even for a short time. Obviously, if a man were surety with nine others for £10,000, it might be a ruinous hardship if he were compelled to raise the whole £10,000 at once, and perhaps to pay interest on the £9000, until he could recover the £9000 by actions or debtor's summonses against his co-sureties.

The questions are whether the action can be maintained, and what is the precise extent of the relief (if any) which can be given. By the Roman law, as it stood in the time of Justinian, sureties had, generally speaking, a right to compel the creditor to enforce payment against them *pro rata* only. The superior Courts of common law in this country have never entertained any action for contribution by a surety against his co-surety, except the action for money paid; and from the time of *Davies* v. *Humphreys*, which was decided in the year 1840, it has been treated as settled law that the surety cannot maintain this action until he has [* 776] actually paid more than his own proportion, * because this action assumes a debt due and payable to the plaintiff, and there is no legal debt due and payable, and the creditor may yet enforce payment of the whole balance from the co-surety. Nor did the Courts of common law ever give in the case of co-sureties the equitable relief which they were accustomed to give in many other cases of joint or common liability, by compelling contribution after judgment and before execution by means of a writ of *audita querela* or *scire facias* to limit the creditor's execution to the proper share payable by the particular defendant. This will be seen from the collection of ancient cases in 3 Rep. p. 12, and following.

By the custom of the city of London, an equitable action lay in the city Courts by a surety before he had paid anything, to have it ordered that he and his co-sureties should be charged *pro rata* only — " ut uterque eorum oneretur pro rata " — *Offley and Johnson's Case* (26 Eliz.), 2 Leon. 166.

In the earliest reports and abridgments of cases in Chancery there is frequent mention of contribution, but there seems to be no reported instance of contribution between sureties before the

seventeenth century; and even in modern times there is very little express authority that the surety has any remedy until he has actually paid too much, and still less authority to show the precise extent of the relief to which he may be entitled before such payment. In nearly every reported case the surety had, before action, paid more than his share. Nearly every case and text-book refers to his right to contribution as the right of a surety who has paid more than his proportion. In a few cases the ambiguous expression is used, "when he is called upon to pay more than his proportion."

The following are, I believe, the only reported cases which throw any light on the subject. I begin with two, which are not cases of suretyship, but which illustrate a principle of equity, apparently established in other cases of contribution, and applicable to this. They are cited in Vin. Abr., tit. "Contribution," from Cary's Reports: —

"27. If a man grants a rent-charge out of all his lands, afterwards sells his lands by parcels to divers persons, and the grantee of the rent will from time to time levy the whole rent upon one of the purchasers only, he shall be eased in Chancery by a contribution from the rest of the purchasers, and the grantee shall be restrained by order to charge the same upon him only.

"28. Sir Edmund Morgan married the widow of Fortescue; he had his wife's lands distrained alone by the grantee of a rent-charge from her former husband, and therefore sued the grantee in Chancery to take a rateable part of the rent, according to the lands he held subject to the distress; and notwithstanding the Lord Chief Justice Popham's Report, who thought this reasonable, the Lord Chancellor Egerton would give him on this bill no relief, but ordered that he should exhibit his bill against the rest of the tenants and grantee both, the one to show cause why they should not contribute, the other why he should not accept of the rent equally; otherwise it was no reason to take away the benefit of distress from the grantee, which the law gave him."

Three cases of contribution between sureties in the time of Charles I. are reported. In *Peter* v. *Rich*, 1 Ch. Rep. 34, the principle was established that in equity, if one of several co-sureties is insolvent, the others contribute as if he had not been a surety. There the plaintiff had paid the whole. In *Morgan* v. *Seymour*, 1 Ch. Rep. 120, the principle upon which the above-cited cases

from Cary and the subsequent leading case of *Dering* v. *Lord Winchilsea* were decided seems to be applied in the fullest extent to the case of co-sureties, the principal creditor being made a party to the suit, and the co-surety being ordered to pay direct to the creditor. The report is as follows: —

"The plaintiff, with Sir Edward Seymour, the defendant, being bound with Sir William St. Johns for the proper debt of the said St. Johns to the defendant, Rowland, in a bond of £200 for the payment of £100, and the said Rowland sued plaintiff only on the said bond, the plaintiff seeks to have the said Seymour contribute * and pay his part of the said debt and damages, [* 777] the said St. Johns being insolvent. This Court was of opinion that the said Seymour ought to contribute and pay one moiety to the said Rowland, and decreed Rowland to assign over the said bond to the plaintiff and Seymour, to help themselves against the said St. Johns for the said debt."

In *Swain* v. *Wall*, 1 Ch. Rep. 150, the plaintiff surety had paid the whole of the creditor's demand, and the only point decided was that his claim for contribution might be controlled by express contract. In *Hole* v. *Harrison* (1673), 1 Ch. Cas. 246; Finch, 15, 203, the rule in *Peter* v. *Rich* was followed. In 1786, in *Lawson* v. *Wright*, 1 Cox 275, the plaintiff co-surety had paid off the whole liability, and he sued for contribution. Sir Lloyd Kenyon said that it had been established ever since the origin of the Courts of equity that one surety had a right to call upon another for contribution in cases of this nature. The only question was, whether proof of payment by the surety was enough without proof that the principal debtor was insolvent. The arguments seem to show that counsel and the Court thought that an action could be maintained by a surety before he had paid anything, if he could prove the principal debtor to be insolvent. In 1787 the leading case of *Dering* v. *Lord Winchilsea* was decided in the Exchequer, as a Court of equity, by Lord Chief Baron Eyre. There, a surety by bond for £4000 to the Crown had had judgment against him at the suit of the Crown, for nearly the whole amount, and he filed his bill for contribution against sureties bound by distinct bonds to the same creditor to secure the same liability of the same debtor, and the only point reported as argued or decided was whether there should be contribution between sureties bound under distinct contracts of suretyship without privity of contract between

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themselves. After deciding that the right to contribution depends primarily not upon contract, but upon the equitable principle that "*in equali jure* the law requires equality — the charging one surety discharges the other, and each, therefore, ought to contribute to the onus," the Court proceeded to declare the plaintiff's right to contribution, and ordered the other sureties to pay their shares to the creditor. No similar order is to be found in any other case of sureties except *Morgan* v. *Seymour*. But it is in strict accordance with the principle of the cases cited from Cary, and it is hardly possible to suppose that so obvious and important a matter as the jurisdiction to make such an order could have been overlooked. It appears, from the report of the case in 2 Bos. & P., though not from the report in 1 Cox, that the Crown, as creditor, was made a defendant to the bill under the name of the Attorney-General; and there could not have been any object in this except that the Crown should be controlled and prevented from enforcing its legal right inequitably against one alone of the sureties. That nothing so important was overlooked may be inferred from the remarkable observations of Lord Eldon, who had himself argued the case, and who said, in *Craythorne* v. *Swinburne* (1807), "In the case of *Dering* v. *Winchilsea*, which I recollect was argued with great perseverance, . . . it is decided that, whether they are bound by several instruments, or not, whether the fact is or is not known, whether the number is more or less, the principle of equity operates in both cases; upon the maxim that equality is equity: the creditor, who can call upon all, shall not be at liberty to fix one with payment of the whole debt; and upon the principle, requiring him to do justice, if he will not, the Court will do it for him. . . . I argued that case; and was much dissatisfied with the whole proceeding, and with the judgment; but I have been since convinced that the decision was upon right principles. Lord Chief Justice Eyre, in that case, decided that this obligation of co-sureties is not founded in contract, but stands upon a principle of equity; and Sir S. Romilly has very ably put what is consistent with every idea that, after that principle of equity has been universally acknowledged, then persons, acting under circumstances to which it applies, may properly be said to act under the * head of contract implied from the [* 778] universality of that principle. Upon that ground stands the jurisdiction assumed by Courts of law; . . . The doctrine of

contribution . . . stands upon this; that all sureties are equally liable to the creditor; and it does not rest with him to determine upon whom the burden shall be thrown exclusively; that equality is equity; and if he will not make them contribute equally, this Court will finally, by arrangement, secure this object."

Several other cases of contribution between sureties occur in the books in Lord ELDON's time, but in none of them is there any reference to the point in question. In *Ex parte Gifford* (1802), 6 Ves. 805 (6 R.R. 53), Lord ELDON said: "The principal is to discharge all the obligations of all the sureties: but they stand with regard to each other in a relation which gives rise to this right among others, that, if one pays more than his proportion, there shall be a contribution for a proportion of the excess beyond the proportion, which, in all events, he is to pay."

In *Craythorne* v. *Swinburne*, already cited, Lord ELDON states the right of the surety in these terms: "It has long been settled that, if there are co-sureties by the same instrument, and the creditor calls upon either of them to pay the principal debt, or any part of it, that surety has a right in this Court, either upon a principle of equity, or upon contract, to call upon his co-surety for contribution."

In *Antrobus* v. *Davidson* (1817) it was held that the creditor cannot bring an action *quia timet* against a surety to force him to set apart money to provide for the possibility of a debt becoming due from the principal debtor. In 1821, in *Stirling* v. *Forrester*, 3 Bligh, 575 (22 R.R. 69), in the House of Lords, Lord REDESDALE said: "The principle established in the case of *Dering* v. *Lord Winchilsea* is universal, that the right and duty of contribution is founded in doctrines of equity; it does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditor to exact or receive payment from one and to permit, or by his conduct to cause the other debtors to be exempt from payment. He is bound, seldom by contract, but always in conscience, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound. That was the principle of the decision in *Dering* v. *Lord Winchilsea*. . . . "The question depends upon equity,

not upon contract, and in this case a contract is to be implied. The decision in *Dering* v. *Lord Winchilsea* proceeded on a principle of law which must exist in all countries, that where several persons are debtors all shall be equal." In 1861, in *Reynolds* v. *Wheeler*, 10 C. B. (N. S.) 560; 30 L. J. C. P. 350, which was an action for money paid, Chief Justice ERLE said: "If one surety is called on to pay the whole debt, he is entitled to have contributions for his co-surety." And Mr. Justice WILLIAMS said: "It is now well established by many cases that where two parties stand in the relation of co-sureties, and one of them is applied to for more than his share, he is entitled to call upon his companion for reimbursement." But having regard to the common law, as settled by *Davies* v. *Humphreys*, it seems plain that these expressions must be understood as assuming actual payment by the plaintiff of more than his share. In 1868, in *Wooldridge* v. *Norris*, executors of a surety obtained an order for indemnity and payment by a person who had covenanted to indemnify the testator against his liability as surety, although the executors had not paid or been sued. The judgment, however, proceeded on the particular terms of the covenant. In the same year, in *Cruse* v. *Paine*, 37 L. J. Ch. 711; 38 *ibid.* 225; L. R. 6 Eq. 641; 4 Ch. 441, where a vendor of shares was entitled to be indemnified by his vendee against calls, Lord HATHERLEY declared the liability of the vendee for future calls, and ordered him to indemnify the vendor's estate, and to procure its release or discharge "either * by payment of the calls or otherwise," with [* 779] liberty to apply in chambers, &c. In 1872, in *Bechervaise* v. *Lewis*, 41 L. J. C. P. 161; L. R. 7 C. P. 372, Mr. Justice WILLES said: "The surety, . . . as soon as his obligation to pay is become absolute, has a right in equity to be exonerated by his principal." In 1874, in *Lacey* v. *Hill*, 43 L. J. Ch. 551; L. R. 18 Eq. 182, upon a creditor's claim in an administration, JESSEL, M. R., said: "Whatever may be the case at law, . . . it is quite plain that in this Court any one having a right to be indemnified has a right to have a sufficient sum set apart for that indemnity. It is not very material to consider whether he is entitled to have that sum paid to him, or whether it must be paid direct over to the creditor. If the creditor is not a party, I believe that it has been decided that the party seeking indemnity may be entitled to have the money paid over to him." In 1877, in *Lloyd* v.

Dimmack, 47 L. J. Ch. 398; 7 Ch. D. 398, Mr. Justice FRY refused to declare, prospectively, the right of the assignor of a long lease to indemnity against future breaches of covenant by the assignee; and in *Hughes Hallett* v. *The Indian Mammoth Gold Mines Company*, the same learned Judge refused to make an order *quia timet* against a person for whom the plaintiff held shares to indemnify the plaintiff, there being no evidence that calls were likely to be made; but said: "There have been, undoubtedly, cases in which, where a contract for indemnity existed, and a right to sue upon that contract had arisen, the Court has declared the right to indemnity generally, and has put matters in such a train that, when the subsequent right to indemnity should arise, the indemnity might be worked out. Some forms of judgments in that class of cases are to be found in the last edition of "Seton on Decrees"; and they show that where a person has taken shares for another, and a call has been made which has not been met by the person liable to pay it, the trustee who is entitled to an indemnity may obtain a declaration of his title generally, and may possibly obtain liberty to apply from time to time to work it out." So in the similar case of *Hobbs* v. *Wayet*, 56 L. J. Ch. 819; 36 Ch. D. 256, where a call on shares was also threatened, Mr. Justice KEKEWICH made a declaration of the right to indemnity.

The preceding cases, from *Cruse* v. *Paine* downwards, have been referred to, not as having any direct bearing on the rights of co-sureties, but as throwing some light on the nature and extent of the relief which can be given in equity in analogous matters. There are only two remaining authorities. In 1881, in *Ex parte Snowdon*, a surety who had paid his own share and no more, and who had not been called upon to pay more, issued a debtor's summons against his co-surety for half of what had been paid, and he obtained an adjudication of bankruptcy, which the Court of Appeal annulled on the ground that, until a surety had paid more than his share, there is no legal or equitable debt to sustain bankruptcy proceedings. Lord Justice JAMES is reported, in Law Rep. 17 Ch. D. p. 44, to have said: "I think your proper remedy is to call on Snowdon to pay the bank £541. . . I believe the proper course when a surety is called upon to pay a part of the whole debt for which he is liable would be to bring an action against his co-sureties to compel them to contribute to pay the

debt to the creditor, just as he would be entitled to call on them for contribution if he had been sued by the creditor, asking that he should be indemnified by his co-sureties against paying the whole debt, or whatever risk he ran." The report in 50 Law J. Rep. Chanc. 540 is as follows: "The proper course when a surety is called upon to pay the whole debt, for which he is liable with his co-surety, is to call upon his co-surety for contribution, and to indemnify him against paying the whole; and the only mode in which, in equity, you can compel a co-surety to pay his proportion of the debt is to show that you have paid your proportion, or more than your proportion, of the debt, and are liable for the residue." In 29 W. R., 654, it is: "The proper
* course when a surety is called upon to pay the whole [* 780]
debt for which he is liable would be to call upon his co-sureties for contribution, just as he would be entitled to have done if a bill had been filed against him by the principal creditor, asking that he should be indemnified against paying the whole." In 1883, in *Macdonald* v. *Whitfield*, 52 L. J. P. C. 70, 8 App. Cas. 733, Lord WATSON (*pro Cur.*) declared the right to contribution of a surety who had not paid, but had had judgment against him, in this form: "Entitled and liable to equal contribution *inter se.*" In Lord Justice LINDLEY'S work on Partnership, p. 374, it is observed that: "Before the passing of the Judicature Acts, a right to contribution or indemnity arising otherwise than by special agreement, was only enforceable at law by a person who could prove that he had already sustained a loss. But in equity it was very reasonably held that, even in the absence of any special agreement, a person who was entitled to contribution or indemnity from another could enforce his right before he had sustained actual loss, provided loss was imminent; and this principle will now prevail in all divisions of the High Court. Therefore, a person who is entitled to be thus indemnified against loss is not obliged to wait until he has suffered, and perhaps been ruined, before having recourse to judicial aid. Thus, in the ordinary case of principal and surety, as soon as the creditor has acquired a right to immediate payment from the surety, the latter is entitled to call upon the principal debtor to pay the amount of the debt guaranteed, so as to relieve the surety from his obligation; and where one person has covenanted to indemnify another, an action for specific performance may be sustained before the plaintiff has

actually been damnified; and the limit of the defendant's liability to the plaintiff is the full amount for which he is liable; or, if he is dead or insolvent, the full amount provable against his estate, and not only the amount of dividend which such estate can pay. In strict conformity with these principles, partners and directors who are individually liable to be sued on bonds and notes, which as between them and their co-partners are to be regarded as the bonds and notes of the firm or company, are entitled to call for contribution before these bonds or notes have been actually paid. So a trustee of shares liable to calls is entitled to be indemnified by his *cestui que trust* against them before they are paid."

This statement of the law is an authority in favour of the view that some relief can be given, but it does not specify the form or limit of the relief; nor do any of the authorities cited in the notes throw any further light on the matter. Nor have I been able to obtain assistance from English or American writers on equity or on the law of suretyship. The plaintiff's difficulties have been increased by this, that an application by her for leave to use the third-party procedure ordinarily applicable in cases of contribution or indemnity was refused in the administration action on the ground that the procedure is not available in an administration action. And even if the question had arisen upon third-party procedure, nearly the same difficulty would have occurred.

In this state of the authorities, I think that, if the plaintiff had made the creditor a defendant to the present action, I ought to have held that the allowance of the principal creditor's claim in the administration action was equivalent to a judgment against the plaintiff of the whole amount of the guarantee; and that, on the precedents of *Morgan* v. *Seymour* and *Dering* v. *Winchilsea*, the plaintiff would have been entitled to a declaration of her right to contribution and to an order upon the solvent co-surety to pay his proportion to the principal creditor. The principal creditor not being a party, I think that I cannot order payment to him, or directly prevent him from enforcing his judgment against the plaintiff alone. Nor can I at present order the co-surety to pay his half to the plaintiff, for the plaintiff cannot give him a discharge as against the principal creditor; and this case is not like the case of a plaintiff who merely claims indemnity, as in the cases referred to by Sir George JESSEL, M. R., in *Lacey* v.
[* 781] *Hill*, in which no question arises as to any other * party.

But I think that I can declare the plaintiff's right, and make a prospective order under which, whenever she has paid any sum beyond her share, she can get it back; and I therefore declare the plaintiff's right to contribution, and direct that, upon the plaintiff paying her own share, the defendant Gullick is to indemnify her against further payment or liability, and is, by payment to her or to the principal creditor, or otherwise, to exonerate the plaintiff from liability beyond the extent of her own share. The plaintiff must have liberty to apply in chambers, and generally to apply.

A point was made as to the Statutes of Limitation. The principal creditor's claim was put in in 1879. But I think that I must hold that, even if the statute can begin to run before the surety has paid more than his proportion, at any rate it does not run until his liability is ascertained; and that did not occur until 1890.

There was another point made, that the plaintiff ought to have proved against the estate of the co-surety Patton; but if that were so, so might the defendant Gullick. It is agreed that, if such proof could have been and had been made, it is to be taken that £200 would have been received. I think that the plaintiff and defendant should each bear half of this, and the defendant's liability to the plaintiff will be reduced accordingly by £100. I think that the plaintiff acted reasonably and in the interest of all parties in resisting and reducing the principal creditor's claim, and that the defendant ought in equity to contribute half the costs of those proceedings — see *Kemp* v. *Finden* (12 M. & W. 21, 13 L. J. Ex. 137), *Lawson* v. *Wright*, and *Hole* v. *Harrison*. I therefore give judgment in that form in favour of the plaintiff, with costs.

ENGLISH NOTES.

The subject of Indemnity, which has been touched on under the topics "Agency," No. 21 (2 R. C. 519), and "Guarantee," Nos. 2 and 3 (p. 470, *ante*), will be more fully dealt with under the topics "Insurance" and "Principal and Surety." In the meantime the above cases have been chosen as illustrating some of the principles relating to indemnity against a conditional and unascertained loss.

The following notes will supply further illustrations: —

A. effects with a guarantee company a policy to secure himself against embezzlement of money by his employee, B. The policy de-

clared that, "subject to the conditions herein contained, which shall be conditions precedent to the right on the part of the employer to recover under this policy," the company should, "at the expiration of three months next after proof satisfactory to the directors of the loss," reimburse any such pecuniary loss sustained by A. from the fraud or dishonesty of B. "as shall amount to embezzlement of money, and be committed and discovered during the continuance of the policy, and within three months of the death, dismissal, or retirement of the employed." And it was provided that "the employer shall, if, and when, required by the company (but at the expense of the company if a conviction be obtained), use all diligence in prosecuting the employed to conviction for any fraud" in consequence of which a claim shall have been made, &c. A. made a claim under the policy. The company pleaded that they had required A. to prosecute, but that he had not done so. On demurrer to this plea, it was held by the House of Lords, reversing the judgment of the Irish Court, that the proviso constituted a condition precedent, and that the plea was a good defence to the action. Lord SELBORNE, however, dissented from this judgment on the ground that the clause as to satisfactory proof to the directors was inconsistent with the intention that the complete sifting of evidence in a criminal Court should be a condition precedent. *London Guarantee Co.* v. *Fearnley* (H. L. 1880), 5 App. Cas. 911, 43 L. T. 390, 28 W. R. 893.

As illustrations of implied indemnities may be mentioned the right of the owner of goods which have been lawfully taken in execution for the debt of another, to be indemnified by the latter: *Edmunds* v. *Wallingford* (C. A. 1885), 14 Q. B. D. 811, 54 L. J. Q. B. 305, 52 L. T. 720, 33 W. R. 647; the right of a person delivering or refusing to deliver goods on the claim and peremptory requisition of another to be indemnified by him in an action for conversion by the owner: *Dugdale* v. *Lovering* (1875), L. R. 10 C. P. 196, 44 L. J. C. P. 197, 32 L. T. 155, 23 W. R. 391; *Betts* v. *Gibbins* (1834), 2 Ad. & El. 57; or of any person doing at the express direction of another an act which is not apparently illegal in itself: *Toplis* v. *Grane* (1839), 5 Bing. N. C. 636, 650. And where A., having been informed by his correspondent B. of his intention to ship a cargo of wheat per *Argo*, has requested a bank to accept the drafts of B. against bills of lading of certain quantities of wheat, per *Argo*, and the bank, having accepted and paid the drafts accordingly, — it having turned out that the bills of lading were forged, and no cargo shipped, and B., having been prosecuted and convicted of the forgery, — A. was held liable, upon an implied contract of indemnity, to reimburse the bank. *Wood* v. *Thiedeman* (1862), 1 H. & C. 478, 10 W. R. 846.

Nos. 1 & 2. — Antrobus v. Davidson; Wolmershausen v. Gullick. — Notes.

An ingenious application of the principle of implied indemnity was made by the decision of WILLIAMS, J., affirmed by the Court of Appeal in *Broderip* v. *Salomon* (1895), 1895, 2 Ch. 323, 64 L. J. Ch. 689, 72 L. T. 755, 43 W. R. 612, in the case of what has been called a "one man" company, where a trader avails himself of the facilities of the Companies Act 1862 to transfer his business to a company, with limited liability, while he himself retains the entire control and conduct of the business, and the whole substantial interest. Mr. Justice WILLIAMS held that the sale of the business purporting to be made to the company was in substance no sale, but an arrangement for the carrying on of the business of the vendor by the company as his agents, and that the company had a right to be indemnified by their principal against the liabilities to creditors of the business, — the result being, in effect, to make the vendor personally liable for the debts as if no such transaction had taken place. The Court of Appeal affirmed this view; the effect of their judgment being to treat the relations between the vendor and the company, either as that of principal and agent or of beneficiary and trustee, — the right to indemnity being the result of either alternative. This judgment was, however, reversed by the House of Lords on the 16th November, 1896 (reported s. n. *Salomon* v. *Salomon*, 1897, A. C. 22, 66 L. J. Ch. 35), who held that where a trader converts his business into a limited company, under the Companies Acts, by fulfilling all the statutory conditions, the Court is not entitled to go behind the register and the memorandum upon a speculative analysis of the motives of the transaction; and that the mere fact that the original trader is virtually the sole owner of the concern, and that he has as part of the purchase-money received debentures secured on the business, do not constitute the company his agent, or trustee, or operate to postpone his security over the assets to the claims of the unsecured creditors.

The effect of the Mercantile Law Amendment Act 1856 (19 & 20 Vict., c. 97), s. 5, has been held to be that the joint debtor who has paid the debt after judgment is entitled to the benefit of the judgment without any formal assignment of it by the other debtor. *In re McMyn, Lightbown* v. *McMyn* (1886), 33 Ch. D. 575, 55 L. J. Ch. 845, 55 L. T. 834, 35 W. R. 179. A right of distress is not a security or remedy which a person liable with another to pay rent can obtain by paying it, because the right of distress is gone when the rent is paid. *In re Russell, Russell* v. *Shoolbred* (C. A. 1885), 29 Ch. D. 254, 53 L. T. 365.

The obligation under a contract of indemnity will not, any more than any other legal obligation, be discharged by the mere expression of an intention to abandon it, or by conduct implying such intention,

although an expectation raised by such conduct may have been acted on. *Chadwick* v. *Manning* (P. C. 1896), 1896, A. C. 231, 65 L. J. P. C. 42. This is only an application of the principle that representation of an intention in the future, as distinguished from representation of a fact, is a mere promise, and if without consideration, is *nudum pactum* enforceable neither at law nor in equity. See *Jordan* v. *Money* (1854), 5 H. L. Cas. 185, 23 L. J. Ch. 865, cited in 11 R. C.

AMERICAN NOTES.

"This principle is universally recognized, and has been applied to a great variety of circumstances:" 1 Brandt on Suretyship and Guaranty, sect. 223, citing *Antrobus* v. *Davidson*. See *West* v. *Chasten*, 12 Florida, 315; *Irick* v. *Black*, 2 C. E. Green (New Jersey Chancery), 189; *Bishop* v. *Day*, 13 Vermont, 81; 37 Am. Dec. 582; *Thigpen* v. *Price*, Phillips (Nor. Car. Eq.), 146; *Saylors* v. *Saylors*, 3 Heiskell (Tennessee), 525; *Miller* v. *Stout*, 5 Delaware Chancery, 259; *Moore* v. *Topliff*, 107 Illinois, 241; *Stephenson* v. *Taverners*, 9 Grattan (Virginia), 398; *Kramer* v. *Farmers' & Mech. Bank*, 15 Ohio, 253; *Markell* v. *Eichelberger*, 12 Maryland, 78; *Scribner* v. *Hickok*, 4 Johnson Chancery (New York), 530, citing *Antrobus* v. *Davidson*; *Beaver* v. *Beaver*, 23 Penn. State, 127; *Norton* v. *Reid*, 11 South Carolina, 593; *Rice* v. *Downing*, 12 B. Monroe (Kentucky), 44; *Merwin* v. *Austin*, 58 Connecticut, 22; *Hellams* v. *Abercrombie*, 15 South Carolina, 110; 40 Am. Rep. 684; 3 Pomeroy Eq. Jur. sect. 1417 (citing *Antrobus* v. *Davidson*); *Bates* v. *Wiggin*, 37 Kansas, 44; 1 Am. St. Rep. 234.

A mortgagee, who is also surety for the debt secured by the mortgage, has no right to have the mortgaged premises sold before the debt becomes due, although they are dilapidated and growing more ruinous. KENT, Chancellor, said: "The security was taken with knowledge of the situation and character of the property, and of the risks to which it was exposed. It does not belong to the Court to give the party a better security than he elected to take, where there has been no fraud or mistake, nor any abuse or waste of the subject. I am not informed that there exists any precedent for a bill *quia timet* and adapted to such a case. All the cases in the English law in which even a surety may file a bill *quia timet* are those in which the debt was due from the principal debtor; and I do not know of any principle of equity that will justify us in giving aid to the surety before the debt is due, where the parties have not provided in their contract for such a case." *Campbell* v. *McComb*, 4 Johnson Chancery (New York), 534.

No. 3. — HOWARD *v.* LOVEGROVE.

(EX. 1870.)

RULE.

WHERE a covenant or agreement to indemnify justifies the resistance of legal proceedings, the person indemnified is entitled (by way of damages) to his costs of defence as between solicitor and client, and is not restricted to party and party costs.

Howard v. Lovegrove.

L. R. 6 Ex. 43-45 (s. c. 40 L. J. Ex. 13; 23 L. T. 396; 19 W. R. 188.)

Contract of Indemnity. — Indemnity against Costs. — Taxed Costs. — Extra Costs.

In an action by a lessee against the assignee of the lease for breach of a contract by the assignee to indemnify the lessee against a failure to perform the covenants contained in the lease, the plaintiff sought to recover, among other heads of damage, the whole costs, as well those paid by him on taxation as extra costs paid by him to his own attorney, properly incurred as defendant in an action brought against him by the lessor for breach of one of the covenants in the lease committed after the assignment: —

Held, that the lessee was entitled to recover both the extra costs paid by him to his attorney and the taxed costs.

Declaration by the lessee of one Newman against the assignee of the lease for a breach of the following undertaking addressed to the plaintiff: "I, the undersigned, William Lovegrove, hereby undertake, in consideration of your having this day assigned to me all your interest under the agreement between yourself and Mr. Newman, to indemnify you against payment of rent and performance of the covenants and conditions contained therein, 7th March, 1886." The defendant pleaded, among other pleas, a denial of the breach. Issue.

At the trial before MARTIN, B., at the Middlesex sittings, in Michaelmas Term, 1869, it appeared that the premises demised being out of repair in the year 1869, Mr. Newman gave to the plaintiff, his lessee, who was under a covenant to repair, contained in the lease, notice of the amount at which the dilapidations were valued, and of his intention to bring an action for that amount.

The plaintiff communicated the contents of this notice to the defendant, his assignee, who was then in possession of the premises, and afterwards proposed to him to come in and defend the action. The defendant did not adopt this course, and Newman's action proceeded against the plaintiff, who paid £30 into Court. That sum was accepted by Newman, and a *nolle prosequi* was entered. The present action was brought to recover the sum of £30, and the costs to which the plaintiff had been put in defending the action. A verdict was found for the plaintiff for £72 16*s.* 10*d.*, £12 9*s.* 4*d.* of which consisted of costs which had not been allowed on taxation between party and party, but had been
[*44] paid by the plaintiff to his * own attorney for services rendered in the action of *Newman* v. *Howard*.

Prentice, Q.C., moved for a rule for a new trial on the ground of misdirection and excessive damages. The extra costs beyond those allowed on taxation are not recoverable against the defendant, and the learned Judge should have told the jury in assessing the damages to exclude them from their consideration. In *Sinclair* v. *Eldred*, 4 Taunt. 7, it was held that in an action for malicious prosecution the plaintiff could recover no damages for extra costs, and Mansfield, Ch. J., (at p. 9) expresses an opinion that no action can be maintained for extra costs — *i.e.*, costs in excess of what the law allows. In *Grace* v. *Morgan*, 2 Bing. N. C. 534, commenting on *Sandbach* v. *Thomas*, 1 Starkie, 306 (18 R.R. 771), in an action for an excessive distress the plaintiff was held not entitled to recover anything beyond the taxed costs of his replevin on the distress. *Sandbach* v. *Thomas* is an authority in conflict with these cases, but it was a *nisi prius* decision, and must be considered as overruled. Again, according to *Cotterill* v. *Jones*, 11 C. B. 713; 21 L. J. C. P. 2, an action for "extra" costs is under no circumstances maintainable. In the present case the plaintiff, it is true, sues not in tort, but on an express contract of indemnity. Still, the principle of the authorities cited applies, and the only proper measure of damage here is the costs ascertained by the usual course of law.

Kelly, C. B.— In this case I think there should be no rule. The plaintiff was liable in the action brought against him by Newman, and with a view of preventing further litigation, after notifying the action to the defendant, he paid £30 into Court in satisfaction. This he is, of course, entitled to recover. Then

there are the costs incurred in defending the action, as to which the question before us arises. It is said that the defendant cannot be made liable for more than such costs as the master allows on taxation. But I am of opinion that *all* the costs the plaintiff incurred, both those allowed as between party and party, and also those properly incurred in addition between himself and his own attorney, were necessarily incurred. This being so, it would be unjust, and we should not give its full effect to the contract of indemnity entered * into with him by the defendant [*45] if we were to deprive him of these extra costs.

Martin, B. — I am of the same opinion. It is admitted that the plaintiff ought to recover the costs of the action brought against him by the landlord, and the question is what are these costs? I should say that they include everything which his attorney could recover against him. To give him the mere costs as taxed by the master, who acts according to a particular scale, would not be a complete indemnification. I was of this opinion at the trial, and I see no reason to alter it. It is not, in my opinion, the duty of the Judge in such a case to tell the jury that as a matter of law they can give nothing beyond the taxed costs. I must add that I think the same reasoning would apply to actions of tort, and I am, therefore, unable to assent to the principle of the decisions which have been cited to us.

Pigott, B. — I am of the same opinion. The case differs from those which have been referred to. Those were actions of tort, but here the action is for the breach of a contract of indemnity, and I think the plaintiff is entitled to recover the whole of the damages which the jury gave him. He did all he could throughout. He could not repair himself, his assignee being in possession; he could not prevent the landlord from bringing the action. When it was brought he informed the defendant, who might have taken up the defence if he had liked; but not taking that course, the plaintiff paid money into Court in satisfaction. Thus, from first to last he did nothing unnecessary, and these costs, both taxed and extra, appear to me the natural and necessary consequence of the defendant's breach of contract, and to be recoverable, as coming within the strict rule as to the mode in which damages should be measured.

Rule refused.

No. 3. — Howard v. Lovegrove. — Notes.

ENGLISH NOTES.

Notwithstanding the observation of MARTIN, J., to the effect that the same reason would apply to actions of tort, the distinction between the liability on an express contract of indemnity and the liability arising from a tort or from a breach of contract not being a contract of indemnity has been repeatedly given effect to. It is given effect to by the judgment of the Court of Exchequer Chamber in a case arising out of a sub-contract for carriage of goods. *Baxendale* v. *London, Chatham, & Dover Railway Co.* (1874), L. R. 10 Ex. 35, 44 L. J. Ex. 20, 32 L. T. 330, 23 W. R. 167. See particularly the judgment of QUAIN, J., who says: "If this had been a contract of indemnity, different considerations would have arisen. In such cases, though in form there may be two contracts, yet in substance there is but one, and that is known to both parties; therefore, when an action is brought against the surety, it is reasonable for him to call on the principal to defend it. But such cases have no application here, where there were two separate and distinct contracts with different stipulations." The decision of the Exchequer Chamber in the last-mentioned case was followed by the Court of Exchequer in a case of pure tort, where a tramway company, having incurred costs in defending an action against a person injured by the defective construction of the works, were held not entitled to recover these costs against their contractor, though they were entitled to recover what they had directly paid as compensation, and although this sum (being the result of a compromise) was much less than what had been claimed and might have been recovered by the plaintiff in the original action, if they had not defended it. *Fisher* v. *Val de Travers Asphalte Co.* (1876), 1 C. P. D. 511, 45 L. J. C. P. 479, 35 L. T. 366.

Mention may here be made of the facilities now given by the Rules of Court (R. S. C. Ord. 16, R. 48) for bringing in the person against whom indemnity is claimed by a third-party notice. It has been held that this procedure may take effect whether the right to indemnity has arisen before or after the commencement of the action. *Edison & Swan Electric Light Co.* v. *Holland* (1886), 33 Ch. D. 497, 56 L. J. Ch. 124, 55 L. T. 587, 35 W. R. 178.

The Court has refused leave to employ this procedure in a case where A. let to B. with covenant to repair, and B. let to C. with covenant in similar terms; and B. in an action brought against him by A. sought to bring in C. under a third-party notice. But it was held that here there was no question of indemnity; for though the covenants were similar, the measure of damages might be totally different. *Pontifex* v. *Foord* (1884), 12 Q. B. D. 152, 53 L. J. Q. B. 321, 49 L. T. 808, 32 W. R.

316. And it was further held in *Speller* v. *Bristol Steam Navigation Co.* (1884), 13 Q. B. D. 96, 53 L. J. Q. B. 322, 50 L. T. 419, 32 W. R. 670, that the procedure does not apply to a claim over against a third party arising upon an action for a tort, and that a person is only entitled to "indemnity" within the meaning of the rule where there is a contract, express or implied, to that effect.

AMERICAN NOTES.

That a surety, defending in good faith and on reasonable grounds, and incurring and paying costs, may recover them from the principal, is held in *Hulett* v. *Soullard*, 26 Vermont, 295; *Feamster* v. *Withrow*, 12 West Virginia, 611; *Wynn* v. *Brooke*, 5 Rawle (Penn.), 106; *McKee* v. *Campbell*, 27 Michigan, 497; *Apgar's Adm'r* v. *Hiler*, 4 Zabriskie (New Jersey Law), 812; *Bonney* v. *Seely*, 2 Wendell (New York), 481; *Beckley* v. *Munson*, 22 Connecticut, 299; *Whitworth* v. *Tilman*, 40 Mississippi, 76; *May* v. *May*, 19 Florida, 373; *Cranmer* v. *McSwords*, 26 West Virginia, 412.

Whether counsel fees are recoverable in an action on an injunction bond is a vexed question, elaborately treated by Mr. Beach (1 Inj., sects. 203–210).

END OF VOL. XII

NOTES

ON

ENGLISH RULING CASES

CASES IN 12 E. R. C.

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12 E. R. C. 1, FENTON v. CLEGG, 2 C. L. Rep 1014, 9 Exch. 680, 23 L. J. Exch. N. S. 197.

Derivation of executor's title from will.

Cited in note in 12 E. R. C. 9, on derivation of executor's title from will.

Right of executors to estate.

Cited in note in 12 Eng. Rul. Cas. 25, on right of executors to residuary estate undisposed of by will.

Cited in 1 Underhill Land. & T. 55, on rights of legatee and executor in term of years.

12 E. R. C. 3, GAYNOR'S GOODS, 38 L. J. Prob. N. S. 79, L. R. 1 Prob. & Div. 723, 21 L. T. N. S. 367, 17 Week. Rep. 1062.

Devolution of representation of estate.

Cited in note in 2 E. R. C. 116, on appointment of administrator de bonis non on death of sole executor or administrator.

12 E. R. C. 13, STACKPOOLE v. HOWELL, 9 Revised Rep. 200, 13 Ves. Jr. 417.

Bequests to executors as prima facie given to them in that character.

Cited in Kirkland v. Narramore, 105 Mass. 31, 7 Am. Rep. 497, on the presumption that bequests to persons who are executors are given to them in that capacity.

Cited in note in 12 E. R. C. 20, on legacies to executors.

Cited in 2 Beach Trusts, 893, on parol disclaimer by trustee.

Distinguished in Campbell v. Mackie, 1 Dem. 185, holding that under the statute allowing compensation to executors, there is no presumption that a bequest to one is given to him as executor.

— Similarity or disparity in amount.

Cited in Paton v. Hickson, 25 Grant, Ch. (U. C.) 102, holding that the mere fact of the inequality of the legacies to several executors did not rebut the presumption; Re Appleton, L. R. 29 Ch. Div. 893, 54 L. J. Ch. N. S. 954, 52 L. T. N. S. 906, 49 J. P. 708, holding that the mere fact that the gift of the

legacy precedes the appointment of the executor or the gift to several executors is different in amount does not overcome the presumption.

12 E. R. C. 16, DIX v. REED, 1 Sim. & Stu. 237, 24 Revised Rep. 171.

Presumption that gift to executor is given him as such.

Cited in Paton v. Hickson, 25 Grant, Ch. (U. C.) 102, holding that prima facie legacies to executors are given to them as such and the inequality of bequests to several executors does not overcome the presumption.

Cited in note in 12 E. R. C. 18, on legacies to executors.

— Rebutting presumption.

Cited in Chassaing v. Durand, 85 Md. 420, 37 Atl. 362, holding that where the testator made a bequest to the executor in a codicil and the testator by remarks showed an intention to give it as a friend the presumption was rebutted.

12 E. R. C. 20, LOVE v. GAZE, 8 Beav. 472, 9 Jur. 910.

Executor's right to the residue of the estate.

Cited in 1 Beach Trusts, 144, on executor as prima facie a trustee for the next of kin.

Questioned in Williams v. Arkle, L. R. 7 H. L. 606, 45 L. J. Ch. N. S. 590, 33 L. T. N. S. 187, 24 Week. Rep. 215, on the question whether a person is to take as executor or trustee for the next of kin, the residue of an estate, under the statute of distribution.

12 E. R. C. 29, KIRKMAN v. BOOTH, 11 Beav. 273, 13 Jur. 525, 18 L. J. Ch. N. S. 25.

Authority of executor to carry on trade of deceased.

Cited in Marvel v. Phillips, 162 Mass. 399, 26 L.R.A. 416, 44 Am. St. Rep. 370, 38 N. E. 1117; Porter v. Long, 124 Mich. 584, 83 N. W. 601; Pracht & Co. v. Lange, 81 Va. 711,—on the authority of an executor to carry on the trade of the testator, without authority by will.

Cited in note in 40 L.R.A.(N.S.) 204, 207, 217, on personal representative, testamentary trustee, or guardian carrying on business.

Cited in 1 Thomas, Estates, 954, on power to executors to continue testator's business.

— Authority conferred by will.

Cited in Eufaula Nat. Bank v. Manassas, 124 Ala. 379, 27 So. 258, holding that the authority to continue the business must be given by will, clearly expressed; Exchange Bank v. Tracy, 77 Mo. 594, holding that the executor can have no justification for continuing the testator's business unless clearly authorized by the will; Willis v. Sharp, 113 N. Y. 586, 4 L.R.A 493, 21 N. E. 705, holding that the power of the executor to continue a trade must be conferred by the will in direct, explicit, unequivocal language or it will not be deemed to be conferred; Ross v. Fitzgerald, 32 N. J. Eq. 838; Saperstein v. Ullman, 49 App. Div. 446, 63 N. Y. Supp. 626; Morrow v. Morrow, 2 Tenn. Ch. 549,—on the authority of the executor to continue the business of the testator when authorized by the will.

Distinguished in Re Chancellor, L. R. 26 Ch. Div. 42, 53 L. J. Ch. N. S. 443, 51 L. T. N. S. 33, 33 Week. Rep. 465, on the direction to postpone the sale, by the executors, as authorizing the continuance of the business.

Limited in Stainer v. Hodgkinson, 73 L. J. Ch. N. S. 179, 52 Week. Rep. 260,

holding that an executor may carry on a business for a reasonable time with a view to a more profitable realization of the property.

Authority of executor to charge estate.

Cited in Steele v. Steele, 64 Ala. 438, 38 Am. Rep. 15, on the power of the executor to bind the estate for money loaned to it; Hagan v. Barksdale, 44 Miss. 186, holding that where the will directed the executor to continue to cultivate his lands, it did not authorize him to create debts which would bind the estate or the devisees.

12 E. R. C. 42, LAND v. LAND, 43 L. J. Ch. N. S. 311.

Power of personal representative to carry on business.

Cited in note in 40 L.R.A.(N.S.) 210, on personal representative, testamentary trustee, or guardian carrying on business.

12 E. R. C. 47, BODY v. HARGRAVE, 2 Cro. Eliz. pt. 2, p. 711, 5 Coke, 31b. F. Moore, 566.

Liability of executor for rents falling due after entry upon the premises.

Cited in Miehenfelder v. Gunther, 66 How. Pr. 464, on the personal liability of an administrator for rents falling due after his entry upon the premises; Tilney v. Norris, Carth. 519, Ld. Raym. 553, Salk. 309, 12 E. R. C. 49, on the liability of an administrator for repairs under a lease.

Cited in note in 12 E. R. C. 58, on liability of executor or administrator for rent.

Excess of profits over the rents as assets of the estate.

Cited in Dennistoun v. Hubbell, 10 Bosw. 155, on the profits of the leased estates over and above the rent as assets.

12 E. R. C. 49, TILNEY v. NORRIS, Carth. 519, 1 Ld. Raym. 553, Salk. 309.

Action against executor of deceased lessee.

Cited in Walton v. Cronly, 14 Wend. 637, holding that covenant may always be maintained against a lessor or his representatives, although he may have assigned his term; Van Rensselaer v. Platner, 2 Johns. Cas. 17, holding that an action on express covenant will lie against the lessee and his executors.

Cited in note in 12 E. R. C. 58, 60, 64, on liability of executor or administrator for rent.

Executor as bound by contract of testator.

Cited in Chamberlain v. Dunlop, 126 N. Y. 45, 22 Am. St. Rep. 807, 26 N. E. 966, holding that a party making a contract is presumed to bind his executors, unless it is a contract for personal services requiring some personal quality of the deceased.

Cited in note in 23 L.R.A. 708, on effect on contract of death of party.

Cited in 1 Underhill, Land. & T. 619, on liability of personal representatives of covenantor for covenants of latter.

12 E. R. C. 50, HOPWOOD v. WHALEY, 6 C. B. 744, 6 Dowl. & L. 342, 12 Jur 1088, 18 L. J. C. P. N. S. 43.

Measure of executor's liability for rent under lease.

Cited in Inches v. Dickinson, 2 Allen, 71, 79 Am. Dec. 765, holding that administrator may show that rental value of premises occupied by him was of less value than that fixed by lease; Re Bowes, L. R. 37 Ch. Div. 128, 57 L. J.

Ch. N. S. 455, 58 L. T. N. S. 309, 36 Week. Rep. 393, holding that an executor who takes possession of a leasehold of a testator is personally liable as an assignee of the lease for subsequent rent up to the letting value of the holding.

Cited in note in 12 E. R. C. 60, on liability of executor or administrator for rent.

Liability of assignor of lease for subsequent breach.

Cited in note in 15 E. R. C. 509, on liability of assignor of lease for subsequent breach of covenant.

12 E. R. C. 64, CURTIS v. VERNON, 3 T. R. 587, 1 Revised R. 774, affirmed in 12 E. R. C. 68, 2 H. Bl. 18.

Legalization of acts of executor de son tort by taking out administration.

Cited in Tweedy v. Bennett, 31 Conn. 276, holding that by taking administration he legalized his prior proceedings; McClure v. People, 19 Ill. App. 105, holding that acts performed as an executor de son tort are legalized by taking out letters of administration before suit.

— Effect of taking out letters on action pending.

Cited in Rohn v. Rohn, 98 Ill. App. 509, holding that a person who is sued as an executor de son tort, cannot defeat the suit by taking out letters of administration, but he may render legitimate all his acts ab initio; Rattoon v. Overacker, 8 Johns. 126, holding that the taking out of letters of administration by an executor de son tort would legalize all tortious acts but not defeat an action which had been commenced.

Distinguished in Clements v. Swain, 2 N. H. 475, holding that if an executor de son tort take out letters of administration pending suit he cannot plead in abatement that he is administrator.

— Discharge by surrender of property to administrator before suit.

Cited in Israell v. King, 69 N. C. 373, holding that creditor cannot attack executor de son tort after payment over by him to rightful administrator; Crookshank v. Macfarlane, 7 N. B. 544, holding that an executor de son tort was discharged of liability by delivering the property to the administrator before action was brought; Hill v. Curtis, L. R. 1 Eq. 90, 35 L. J. Ch. N. S. 133, 12 Jur. N. S. 4, 13 L. T. N. S. 584, 14 Week. Rep. 125, holding that at law an executor de son tort cannot discharge himself unless he hands over the property to the rightful representative before action brought.

Cited in note in 2 E. R. C. 133, on relation back of title of administrator.

Actions against and defenses of an executor de son tort.

Cited in Brown v. Leavitt, 26 N. H. 493, on the defenses available to an executor de son tort; McIntire v. Carson, 9 N. C. (2 Hawks.) 544, holding that the executor de son tort may make such defenses in an action against him as the lawful executor, if it is for the benefit of the estate; Cameron v. Cameron, 23 U. C. C. P. 289, on the right to sue an executor de son tort.

Right of executor de son tort to retain for his own debt.

Cited in note in 12 E. R. C. 74, on liability of executor de son tort.

Cited in Kinard v. Young, 2 Rich. Eq. 247, holding that an executor de son tort has no right to retain for his own debt.

12 E. R. C. 70, HOOPER v. SUMMERSETT, 12 Revised Rep. 708, Wightw. 16.

What constitutes a person an executor de son tort.

Cited in Hill v. Curtis, L. R. 1 Eq. 90, 35 L. J. Ch. N. S. 133, 12 Jur. N. S. 4,

13 L. T. N. S. 584, 14 Week. Rep. 125, on what would constitute a person an executor de son tort.

Distinguished in Sykes v. Sykes, L. R. 5 C. P. 113, 39 L. J. C. P. 179, 22 L. T. N. S. 236, 18 Week. Rep. 551, holding that one who deals with the goods of a testator, as agent of the executor, cannot be treated as executor de son tort, whether the will has been proved or not.

12 E. R. C. 77, RE BELLENCONTRE, 17 Cox, C. C. 253, 55 J. P. 694, 60 L. J. Mag. Cas. N. S. 83, 64 L. T. N. S. 461, [1891] 2 Q. B. 122, 39 Week. Rep. 381.

Proof of crime sufficient to warrant extradition.

Cited in Re Martin, 2 Terr. L. R. 304, on what proof of crime is sufficient to warrant a committal for extradition; Re Murphy, 22 Ont. App. Rep. 386 (affirming 26 Ont. Rep. 163), holding that in extradition proceedings it must be shown that prisoner is liable to conviction for crime charged, according to law of both countries.

— Sufficiency of warrant.

Cited in Re Collins, 11 B. C. 436, holding a warrant of committal is sufficient if it states the offence for which prisoner is committed; Greene v. Vallee, Rap. Jud. Quebec, 14 B. R. 261, holding that order of committal need not state that the charges laid have been inquired into, that they relate to extradition crimes and that prima facie proof of guilt has been made.

Extraditable offenses.

Cited in Rex v. Watts, 3 Ont. L. Rep. 368, holding that "child stealing" is extraditable offense.

12 E. R. C. 100, STAPILTON v. STAPILTON, 1 Atk. 2.

Enforcement of family arrangements.

Referred to as a leading case in Melville v. Stratherne, 26 Grant. Ch. (U. C.) 52, holding that family arrangements should be enforced even though it was signed before reading the will which they agreed to abide by.

Cited in Noble v. Moses, 81 Ala. 530, 60 Am. Rep. 175, 1 So. 217, on the enforcement of family arrangements; Mercier v. Mercier, 50 Ga. 546, 15 Am. Rep. 694, holding that verbal contract made between two children during life time of their father, to divide father's property between them regardless of his will, is not enforceable; Wright v. Jones, 105 Ind. 17, 4 N. E. 281, holding that where husband, to secure life estate in homestead owned by wife, verbally promises to relinquish his claim to all other interest in her property, and she assents thereto agreement is valid; Williams v. Shipley, 67 Md. 373, 10 Atl. 144, holding that agreements to secure peace in families, will be supported, even though party may not have contributed any part of consideration; Apgar v. Connell, 79 Misc. 531, 140 N. Y. Supp. 705, holding that where those entitled to take under will did not object to family settlement by which disinherited daughter took for year after finding of will, they are estopped from denying settlement; Price v. Price, 133 N. C. 494, 45 S. E. 855, holding that a contract to devise land in consideration of a settlement of a family controversy relative to certain lands is valid and will be enforced in equity; Herkemeyer v. Kellerman, 2 Cin. Sup. Ct. Rep. 390, holding that family arrangements are regarded with favor and will be enforced in the absence of fraud; Barton v. Wells, 5 Whart. 225, holding that courts will enforce agreements to settle family disputes upon principles which are not applied to agreements generally; Harshberger v. Alger, 31 Gratt. 52, holding that contracts for separation of husband and wife will be

supported where separation has actually taken place prior to contract; Baldwin v. Kingstone, 16 Ont. Rep. 341, holding that division of property by supposed beneficiaries under a will is not a family arrangement; Stockley v. Stockley, 1 Ves. & B. 523, 12 Revised Rep. 184, holding that a family arrangement will be enforced under circumstances under which agreements between strangers would not.

Cited in note in 12 E. R. C. 136, 138, on enforcement of family arrangement.

Distinguished in Mallet v. Smith, 6 Rich. Eq. 12, 60 Am. Dec. 107, holding that where the agreement was against public policy as restraining a party from appealing to the courts, it would not be enforced.

— Mistake or fraud.

Cited in Freichnecht v. Meyer, 39 N. J. Eq. 551, to the point that court had power to relieve against mistakes in law as well as against mistakes in fact; Anthony v. Boyd, 15 R. I. 495, 8 Atl. 701, holding that it is not compromise where one party, knowing that he has not valid claim, deceitfully misleads other party into believing that he has one; Gray v. Tappan, Wright (Ohio) 118, holding that equity will compel a conveyance in favor of mere volunteers, nor in case of fraud; Gordon v. Gordon, 3 Swanst. 400, 19 Revised Rep. 230, 12 Eng. Rul. Cas. 110, on the effect of a concealment of facts upon the validity of a family settlement; Fane v. Fane, L. R. 20 Eq. 698, holding that a family settlement will not be supported if founded on mistake of either party to which the other is accessory, though innocently made.

Distinguished in Hewitt v. Crane, 6 N. J. Eq. 159, holding that a family agreement unfairly obtained will not be enforced; Cassie v. Cochrane, 20 Grant. Ch. (U. C.) 545, holding that a family arrangement obtained by undue influence and fraud should not be enforced.

— Sufficiency of consideration.

Cited in Smith v. Smith, 36 Ga. 184, 91 Am. Dec. 761, holding that termination of family controversies furnishes a sufficient consideration for a family settlement fairly made; Watkins v. Watkins, 24 Ga. 402, holding that a family settlement will be enforced if fairly made, independent of the rights surrendered as a consideration; Williams v. Shipley, 67 Md. 373, 10 Atl. 144, holding that agreements entered into to secure the peace of families will be enforced at the instance of any one benefited by it, though he does not furnish any part of the consideration; Leach v. Fobes, 11 Gray, 506, 71 Am. Dec. 732, holding that a family arrangement fairly made will be enforced without enquiry as to the consideration; Bell v. White, 76 N. J. Eq. 50, 73 Atl. 861, holding that family settlement free from fraud, where extent of widow's claim under will is doubtful, will not be set aside for inadequacy of consideration; Bailey v. Wilson, 21 N. C. (1 Dev. & B. Eq.) 182, holding that a fair family arrangement will be enforced in equity in the absence of a compromise of doubtful rights, or of consideration; Adams v. Adams, 70 Iowa, 253, 30 N. W. 795, holding that the settlement of an estate among contending heirs was a sufficient consideration for a mortgage in pursuance thereof; Supreme Assembly R. Soc. G. F. v. Campbell, 17 R. I. 402, 13 L.R.A. 601, 22 Atl. 307, holding that a fair family arrangement was supported by a sufficient consideration by surrender of rights; Fogg v. Middleton, 2 Hill, Eq. 591, Riley Eq. 198, holding that an agreement whose object was to heal family discord was supported by a sufficient consideration and would be enforced; Burnes v. Burnes, 70 C. C. A. 357, 137 Fed. 781, holding that family arrangements will not be avoided for inadequacy of consideration; Forrest v. Laycock, 18 Grant, Ch. (U. C.) 611, holding that release of wife's

dower to purchaser is good consideration for grant of reasonable compensation to wife.

Setting aside agreements of compromise.

Cited in Headley v. Hackley, 50 Mich. 43, 14 N. W. 693, holding that alleged compromise may be contested by showing that party relying on it had acted unfirmly for purpose of getting terms which have been nominally assented to; Lewis v. Cooper, Cooke (Tenn.) 467, holding an agreement in compromise, fairly entered into, will not be set aside because one of the parties was mistaken in law, and the parties cannot be placed in statu quo; Banner v. Rosser, 96 Va. 238, 31 S. E. 67, holding that contracts fairly and voluntarily entered into between parties having capacity to act cannot be set aside, however unreasonable it may seem; Queen Ins. Co. v. Devinney, 25 Grant, Ch. (U. C.) 394, holding that in order to prevent compromise of disputed claim being set aside there must have been matter of doubt to be settled, and there must be no fraud.

Cited in Parsons, Partn. 4th ed. 511, on refusal to open account between partners after lapse of time.

Sufficiency of consideration to support an agreement of compromise.

Cited in Seaman v. Seaman, 12 Wend. 381, holding that the withdrawing of a caveat by an heir at law to the proving of a will is a sufficient consideration for a promise by devisees to pay him a specific sum of money; Bond Debt Cases, 12 S. C. 200 (dissenting opinion), on the sufficiency of consideration of a compromise; Fink v. Farmers' Bank, 178 Pa. 154, 56 Am. St. Rep. 746, 35 Atl. 636, holding that notes given by surety on bond of bank cashier in settlement of defalcation are supported by sufficient consideration where it appears that bank forebore to sue on bond; Union Locomotive & Exp. Co. v. Erie R. Co. 37 N. J. L. 23, holding that consideration that would make binding agreement to release from former contract was extinguishment of such contract; Moberly v. Baines, 15 U. C. Q. B. 25, to the point that promising to forebear doing something which promisor has no right to do, does not supply sufficient consideration for promise made to him on that account.

Cited in note in 6 E. R. C. 20, on what may constitute consideration for contract.

— Surrender of doubtful rights.

Cited in Honeyman v. Jarvis, 79 Ill. 318; Read v. Hitchings, 71 Me. 590; Truett v. Chaplin, 11 N. C. (4 Hawks.) 178; Paxson v. Hewson, 37 Phila. Leg. Int. 50, 14 Phila. 174,—holding that a compromise of a disputed claim is a good consideration for an agreement; Troy v. Bland, 58 Ala. 197, holding that money paid in compromise of a disputed or doubtful claim, cannot be recovered; Bull v. Bull, 43 Conn. 455, holding that if liquidated claim is doubtful in fact or in law, any sum given will constitute sufficient consideration for compromise; Parker v. Enslow, 102 Ill. 272, 40 Am. Rep. 588, holding that the compromise of a supposed cause of action was a sufficient consideration for a note; Hanchett v. Ives, 171 Ill. 122, 49 N. E. 206, holding that an agreement to postpone an execution to a lien of attachment was a sufficient consideration, even though the judgment upon which the execution was issued, was of doubtful validity; Stoelke v. Hahn, 55 Ill. App. 497, holding that a surrender of a doubtful right is a sufficient consideration for a compromise agreement; Atchison, T. & S. F. R. Co. v. Starkweather, 21 Kan. 322, holding a compromise of disputed rights is sufficient to support an agreement; Mills v. Lee, 6 T. B. Mon. 91, 17 Am. Dec. 118, on the surrender of a doubtful right as a sufficient consideration of an agreement to compromise; Conover v. Stillwell, 34 N. J. L. 54, holding that compromise

of doubtful claim is, in law, sufficient consideration to support promise; Grasselli v. Lowden, 2 Disney (Ohio) 323, holding that the dismission of a suit brought in good faith upon a disputed right or claim was a good consideration for an agreement; Moyer v. Kirby, 2 Pearson (Pa.) 64, 2 Legal Chron. 331, on the compromise of a doubtful claim as a sufficient consideration to support a contract; Camoron v. Thurmond, 56 Tex. 22, holding that compromise of doubtful claim is valid, even though it is afterwards discovered that party receiving thereunder was mistaken; Moore v. Fitzwater, 2 Rand. (Va.) 442, holding a surrender of doubtful rights is sufficient to support an agreement to compromise the dispute and to convey the disputed land; Hartle v. Stahl, 27 Md. 157; Lydick v. Baltimore & O. R. Co. 17 W. Va. 427,—holding that the surrender of a doubtful or bad claim or rights is a sufficient consideration for a promise if the party bona fide believed it to be a valid claim; Cooke v. Turner, 17 L. J. Exch. N. S. 106, 15 Mees. & W. 727, on the validity of an agreement not to dispute any doubtful question of law or fact.

Cited in notes in 25 L.R.A.(N.S.) 284, on void, invalid, or unfounded claim as subject of valid compromise; 26 L. ed. U. S. 1187, on compromise of disputed claim.

Specific performance of an agreement.

Cited in Stoutenburgh v. Tompkins, 9 N. J. Eq. 332, holding that want of mutuality was an objection to specific performance of a contract; Fogg v. Price, 145 Mass. 513, 14 N. E. 741, on the specific performance of an agreement.

Cited in notes in 6 E. R. C. 717, on refusal to enforce specific performance of unfair contract or one involving hardship; 18 E. R. C. 230, on specific performance of covenant by mortgagor tenant in tail for further assurance.

Cited in Pomeroy, Spec. Perf. 2d ed. 80, on valuable consideration as essential to specific performance of contract; Pomeroy, Spec. Perf. 2d ed. 189, on possession as sufficient part performance of contract within statute of frauds; Pomeroy, Spec. Perf. 2d ed. 247, on time when unfairness in equity and lack of justice must exist to render contract unenforcible.

Specific performance against the heirs.

Cited in Moore v. Fitz Randolph, 6 Leigh, 175, 29 Am. Dec. 208, on the right to compel specific performance against the heirs of the contracting party.

Intention of parties as controlling the construction of a deed.

Cited in Vanhorn v. Harrison, 1 Dall. 137, 1 L. ed. 70, 1 Am. Dec. 229, on a covenant to stand seized to uses, as being governed by the intention of the parties; Rhoad's Estate, 3 Rawle, 420, holding that in every agreement the intention of the parties is to govern and will be enforced; Sherman v. Dill, 4 Yeates, 295, 2 Am. Dec. 408, holding that the court will depart from the words to enforce the intention of the parties; Creighton v. Bringle, 3 S. C. 77, holding that a court of equity will look to the general intent of the deed and give it such construction as supports that general intent, although inconsistent with a particular expression.

Relief grantable to an infant outside prayer of bill.

Cited in Walker v. Redding, 40 Fla. 124, 23 So. 565, holding that it is the duty of a court of equity to see that the interest of minors are protected in suits before it, whether the claim or defense be properly pleaded or not; Townshend v. Duncan, 2 Bland, Ch. 45; Kornegay v. Carroway, 17 N. C. (2 Dev. Eq.) 403,—on the relief to be granted under special and general prayers.

Estate tail as transferable by deed.

Cited in Whiting v. Whiting, 4 Conn. 179, on the power of a tenant in tail to transfer the estate in fee; Waters v. Margerum, 60 Pa. 39, on the transferability of an estate tail.

Implied and constructive trusts.

Cited in Miller v. Cotten, 5 Ga. 341, on the creation of a constructive trust through fraud.

12 E. R. C. 110, GORDON v. GORDON, 19 Revised Rep. 230, 3 Swanst. 400.

Enforcement of family arrangements.

Cited in Abbott v. Gaskins, 181 Mass. 501, 63 N. E. 933, on the power of the Probate Court to confirm an agreement of compromise, of a will; Wallis v. Andrews, 16 Grant. Ch. (U. C.) 624, holding that family arrangements are upon different footing than those between strangers and would be enforced if fair and reasonable; Cottle v. McHardy, 17 Grant, Ch. (U. C.) 342, holding that widow having by her conduct parted with her right to equitable dower, in favor of her son, a subsequent creditor of hers was not entitled to have her dower set out and applied to pay his demand.

Cited in note in 12 E. R. C. 136, on enforcement of family arrangement.

— Effect of mistake or ignorance.

Cited in Berkmeyer v. Kellerman, 32 Ohio St. 239, 30 Am. Rep. 577; Hewitt v. Crane, 6 N. J. Eq. 159; Vanmeter v. Jones, 3 N. J. Eq. 520,—holding that in family compromises must be no concealments of material facts; Herkemeyer v. Kellerman, 2 Cin. Sup. Rep. Ct. 390, holding that a family arrangement if fairly made will be enforced without inquiry into the consideration; Costello's Estate, 16 Phila. 242, 40 Phila. Leg. Int. 150, holding that attorney who represents several legatees will not be permitted to purchase for one of them judgment against another at nominal price and then obtain payment in full at distribution; Melville v. Stratherne, 26 Grant, Ch. (U. C.) 52, holding an agreement among the several heirs to abide by a will which had not been read would be enforced; Cassie v. Cochrane, 20 Grant, Ch. (U. C.) 545, holding that a family arrangement which was entered into under a concealment of facts in bad faith would not be enforced.

Cited in 1 Beach, Trusts, 491, on constructive trust by fraud from concealment; Hollingsworth, Contr. 172, on necessity for full disclosure in case of family settlements and compromises; 1 Page, Contr. 319, on false statement of law as actual fraud.

Distinguished in Baker v. Bradley, 18 E. R. C. 334, 7 De G. M. & G. 597, 2 Jur. N. S. 98, 25 L. J. Ch. N. S. 7, 4 Week. Rep. 78, holding that a mortgage upon a son's property would not be supported as a family arrangement if it was procured by undue influence of the father for his benefit; Fane v. Fane, L. R. 20 Eq. 698, holding that a family settlement will not be supported if founded on a mistake of either party to which the other party is accessory however innocently made.

— Correction of mistakes.

Cited in Pate v. Johnson, 15 Ark. 275, holding that a court of equity will not set aside a family arrangement on the ground of mistake, unless the mistake is clearly established.

Family settlement of disputed legitimacy.

Cited in Smith v. Mogford, 21 Week. Rep. 472, holding that the settling of

the legitimacy of one of the children was a sufficient consideration for a family arrangement and it would be enforced.

Relief on grounds not pleaded.

Cited in Robson v. Harwell, 6 Ga. 589, holding that no relief can be granted for matters not charged in bill: Peacock v. Terry, 9 Ga. 137, holding that no decree can be made outside of the case which the bill makes; Townshend v. Duncan, 2 Bland, Ch. 45, holding that before any relief can be granted some ground for relief must be shown by the pleadings; Neale v. Hagthrop, 3 Bland, Ch. 551, on relief being granted on a point not put in issue; Howell v. Sebring, 14 N. J. Eq. 84, holding that before a decree can be made on any ground, it must be distinctly charged in the bill.

— Proofs outside issues of bill.

Cited in Cuculler v. Hernandez, 103 U. S. 105, 26 L. ed. 322; Trapnall v. Burton, 24 Ark. 371,—holding that evidence on matters not noticed in the pleadings is admissible; Lingan v. Henderson, 1 Bland, Ch. 236, on evidence which is not applicable to some of the material allegations of the bill, as being inadmissible; Bradley v. Conner, 4 Cliff. 366, Fed. Cas. No. 1,775, holding that courts cannot act upon proofs which go to matters not pleaded; Shaw v. Patterson, 2 Tenn. Ch. 171, holding that evidence in relation to matters not put in issue by the pleadings furnishes no ground for a decree; Austin v. Ramsey, 3 Tenn. Ch. 118, holding that a court cannot notice matter, however clearly proved, not pleaded, or within the issues; Vallier v. Lee, 2 Grant, Ch. (U. C.) 606, holding that relief cannot be given upon evidence of circumstances which are not made a ground of complaint upon the record.

Surrender of doubtful rights as a sufficient consideration for an agreement.

Cited in Hunt v. Thorn, 2 Mich. 213, on the surrender of doubtful rights as a sufficient consideration for a bond.

Specific performance of contract.

Cited in Virgin v. Dinkins, 35 Ga. 128, holding that creditor cannot compel one who agreed to pay his debtor's debt out of purchase price of property purchased from debtor, to do so.

Relief in equity on ground of mistake.

Cited in Parsons, Partn. 4th ed. 511, on refusal to open account between partners after lapse of time.

Distinguished in La Trobe v. Hayward, 13 Fla. 190, holding that a court of equity will not grant relief on the ground of mistake, where there is simply an error of judgment.

Presumption of legality of a marriage.

Cited in Phipps v. Moore, 5 U. C. Q. B. 16, on the presumption of legality of a marriage.

Redemption by personal representative of mortgagor.

Cited in Re Adams, 4 Ch. Chamb. Rep. (Can.) 29, on the right of the personal representative of mortgagor to redeem.

Cited in note in 18 E. R. C. 377, on mortgagor's estate in mortgaged property till foreclosure.

Decision of questions in order of their priority.

Distinguished in Malone v. Malone, 8 Clarl. & F. 179, West. 637, 3 Ir. Eq. Rep. 536, 2 Drury & Wal. 491, holding that where the validity of a settlement depends

upon the legitimacy of a person, the latter question must be first determined and the party relying upon it must prove it or his case will be dismissed.

Personal feelings of judge.

Cited in Mercier v. Mercier, 50 Ga. 546, 15 Am. Rep. 694, on the duty of the judge not be influenced by his personal feelings.

12 E. R. C. 138, HUZZEY v. FIELD, 2 Cromp. M. & R. 432, 1 Gale, 165, 4 L. J. Exch. N. S. 239, 5 Tyrw. 855.

Nature and elements of ferry.

Cited in Atty. Gen. v. Boston, 123 Mass. 460, holding that a ferry is publici juris and cannot be created without license from the state and is a thing of public interest and use; Broadnax v. Baker, 94 N. C. 675, 55 Am. Rep. 633, holding that the essential elements of a ferry franchise, is the exclusive right to transport persons, with horses, vehicles, and other belongings; Montgomery v. Multnomah R. Co. 11 Or. 344, 3 Pac. 435, on the public nature of a ferry; State v. Faudre, 54 W. Va. 122, 63 L.R.A. 877, 102 Am. St. Rep. 927, 46 S. E. 269, 1 Ann. Cas. 104, holding that right to operate ferry must be acquired through legislative grant; Hackett v. Wilson, 12 Or. 25, 6 Pac. 652; Jellett v. Anderson, 7 Ont. App. Rep. 341 (affirming 27 Grant Ch. (U. C.) 411),—for a definition of a ferry; North Vancouver Ferry & Power Co. v. Bunbury, 16 B. C. 170, holding that provisions of Ferrie's act as to duration of franchise do not control granting of license for ferry to be established between municipalities; Cowes Urban Dist. Council v. Southampton, I. W. & S. E. Royal Mail Steam Packet Co. [1905] 2 K. B. 287, 74 L. J. K. B. N. S. 665, 69 J. P. 298, 53 Week. Rep. 602, 92 L. T. N. S. 658, 21 Times L. R. 506, holding a franchise of a ferry from will to will is a right known to law.

Cited in note in 59 L.R.A. 517, 547, 549, 551, on establishment, regulation, and protection of ferries.

Distinguished in People v. Mago, 69 Hun, 559, 23 N. Y. Supp. 938, 10 N. Y. Crim. Rep. 453, holding that the carrying of passengers for hire on Sundays and holidays from the shore to a picnic ground on an island, and route had no connection with a highway, it was not the operation of a ferry.

— Obligations imposed by ferry franchise.

Cited in New York v. Starin, 106 N. Y. 1, 12 N. E. 631, holding that the consideration for the grant of a ferry franchise is the obligation of the grantee to maintain a ferry with suitable accommodations; Atty.-Gen. v. Simpson [1901] 2 Ch. 671, 85 L. T. N. S. 325, 70 L. J. Ch. N. S. 828, 17 Times L. R. 768, on the liability imposed by a grant of a ferry franchise.

What constitutes invasion of ferry right.

Cited in Matthews v. Peache, 5 El. & Bl. 546; Newton v. Cubitt, 12 C. B. N. S. 32, 31 L. J. C. P. N. S. 246, 6 L. T. N. S. 860,—holding that where the plaintiffs maintained a ferry from one wharf on an island to the main shore, it was not an invasion of their right to run a ferry from another point on the island to the shore.

Cited in note in 12 Eng. Rul. Cas. 164, on ferry franchise and interference therewith.

Cited in 2 Farnham, Waters, 1248–1250, on what competition interferes with ferry license.

Distinguished in Ives v. Calvin, 3 U. C. Q. B. 464, holding that a person residing along a river may use his own boats to cross and even carry others who are not travellers provided it is not done for hire.

— Action for.

Cited in Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773 (dissenting opinion), on the right of action arising from an invasion of the right of ferry; Hopkins v. Great Northern R. Co. 12 E. R. C. 149, L. R. 2 Q. B. Div. 224, 46 L. J. Q. B. N. S. 265, 36 L. T. N. S. 898, on the right of a ferry owner to maintain an action against the person maintaining a bridge within the ferry limits.

Cited in 2 Farnham, Waters, 1256, on remedy for infringing of ferry rights.

— Injunction.

Cited in Smith v. Ratte, 15 Grant, Ch. (U. C.) 473, holding that one maintaining an opposition ferry without authority would be restrained by injunction.

Liability of master for acts of servant.

Cited in Cate v. Schaum, 51 Md. 299; Evans v. Davidson, 53 Md. 245, 36 Am Rep. 400; Gleadell v. Thomson, 56 N. Y. 194; Harris v. Brunette Saw Mill Co 3 B. C. 172,—holding that the master is liable for the tort of the servant done in the course and scope of his employment; Austin v. Davis, 7 Ont. App. Rep. 478; Oliver v. Great Western R. Co. 28 U. C. C. P. 143,—on the liability of the master for the acts of his servant or agent; Limpus v. London General Omnibus Co. 17 E. R. C. 258, 32 L. J. Exch. N. S. 34, 1 Hurlst. & C. 526, 9 Jur. N. S. 33, 7 L. T. N. S. 641, 11 Week. Rep. 149, holding that the master is liable for all tortious acts done within the scope and course of his duty; Barwick v. English Joint Stock Bank, 12 E. R. C. 298, L. R. 2 Exch. 259, 36 L. J. Exch. N S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, holding that the fraud of the servant may be imputed to the master, if it is done within the scope and course of his employment.

Cited in note in 27 L.R.A. 172, on civil responsibility for wrongful or negligent act of servant or agent towards one not sustaining contractual relation.

12 E. R. C. 149, HOPKINS v. GREAT NORTHERN R. CO. 46 L. J. Q. B. N. S. 265, 36 L. T. N. S. 898, L. R. 2 Q. B. Div. 224.

Grant of exclusive public right.

Distinguished in Winnipeg Street R. Co. v. Winnipeg Electric Street R. Co. 9 Manitoba L. Rep. 219, holding that under the statute a city had not the right to grant the exclusive right to use the city streets to a street railway company.

Maintenance of bridge as an invasion of right of ferry, or toll crossing.

Cited in Aubert-Gallion v. Roy, 21 Can. S. C. 456, on the maintenance of a free bridge as an invasion of a franchise of a toll bridge; Brigham v. R. 6 Can. Exch. 414, holding that the maintaining of a railroad bridge was not an invasion of ferry rights; Dibden v. Skirrow [1908] 1 Ch. 41, 1 B. R. C. 333, 77 L. J. Ch. N. S. 107, 71 J. P. 555, 97 L. T. N. S. 658, 24 Times L. R. 70, 6 L. G. R. 108 (affirming [1907] 1 Ch. 437 [1907] W. N. 30), holding that a franchise of a ferry was a grant of an exclusive right to carry by boat only, so that the maintenance of a free bridge connecting the same highways was not a disturbance of the ferry.

Cited in notes in 59 L.R.A. 548, on establishment, regulation, and protection of ferries; 1 B. R. C. 342, 345, on bridge as disturbance of ferry franchise.

Cited in 2 Farnham, Waters, 1253, on construction of bridge as violation of ferry franchise.

— Proximity of competing ferry creating disturbance.

Cited in Jellett v. Anderson, 7 Ont. App. Rep. 341, holding that the maintenance of ferry two miles below that of the plaintiff's and running to a point in a town was a violation of the plaintiff's ferry between the two towns; Cowes Urban Dist. Council v. Southampton, I. W. & S. E. Royal Mail Steam Packet Co. [1905] 2 K. B. 287, 74 L. J. K. B. N. S. 665, 69 J. P. 298, 53 Week. Rep. 602, 92 L. T. N. S. 658, 21 Times L. R. 506, on the proximity of the new passage by water, necessary to work a disturbance of a ferry.

Ferry or franchise as real estate.

Cited in Great Western R. Co. v. Swindon & C. R. Co. L. R. 9 App. Cas. 787, 53 L. J. Ch. N. S. 1075, 51 L. T. N. S. 798, 32 Week. Rep. 957, 48 J. P. 821, on a ferry as a hereditament within the meaning of the word land.

Damages for indirect injuries resulting from operation of railroad.

Cited in R. ex rel. Atty. Gen. v. Barry, 2 Can. Exch. 333, on the right to compensation for injury to land where no part is taken by the railroad company; McArthur v. Collingwood, 9 Ont. Rep. 368, on the right to recover damages for nuisance and noise resulting from the operation of a railroad; North Shore R. Co. v. Pion, 15 Quebec L. R. 228, holding that disturbance of riparian owner's right of access entitles him to damages; Parkdale v. West, L. R. 12 App. Cas. 602, 56 L. J. P. C. 66, 57 L. T. N. S. 602; Atty.-Gen. v. Metropolitan R. Co. [1894] 1 Q. B. 384, 9 Reports, 598, 69 L. T. N. S. 811, 42 Week. Rep. 381, 58 J. P. 342 (separate opinion),—on the right to recover for injuries resulting from the operation of a railroad.

Cited in note in 7 Eng. Rul. Cas. 380, on authorizing railroad to exercise its powers so as to inflict injury on third persons.

Stare decisis.

Cited in Stuart v. Bank of Montreal, 41 Can. S. C. 516, holding that only in very exceptional cases should the supreme court refuse to follow its own decisions.

12 E. R. C. 166, CARTER v. MURCOT, 4 Burr. 2162.

Right of public to fish in public waters.

Cited in Martin v. Waddell, 16 Pet. 367, 10 L. ed. 997 (dissenting opinion), on the right of the public to fish in public waters; Parker v. Cutler Mill-dam Co. 20 Me. 353, 37 Am. Dec. 56, holding that in public waters the right of fishery is common to all people; Moulton v. Libbey, 37 Me. 472, 59 Am. Dec. 57, holding that shell fisheries come within the common right of the public in public waters; State v. Leavitt, 105 Me. 76, 26 L.R.A.(N.S.) 799, 72 Atl. 875, holding valid, limitation by state during certain months of year, of right to take shellfish from tide water within town, to inhabitants; Com. v. Chapin, 5 Pick. 199, 16 Am. Dec. 386, holding that in a navigable river the right of fishery is common to all under government control, but it is otherwise in non-navigable streams; Hooker v. Cummings, 20 Johns. 90, 11 Am. Dec. 249, holding that in navigable rivers the right of fishery is common to all the public, but otherwise in non-navigable streams; Peck v. Lockwood, 5 Day, 22; Weston v. Sampson, 8 Cush. 347, 54 Am. Dec. 764,—holding that the right of taking clams on the land between high and low tide is in the public; Lincoln v. Davis, 53 Mich. 375, 51 Am. Rep. 116, 19 N. W. 103, holding that fishing upon waters remote from land is a maritime business and may be carried on by anyone; Hickey v. Hazard, 3 Mo. App. 480, holding that all rivers and navigable streams belong to the public and the right to fish in them is common to

all; Rogers v. Jones, 1 Wend. 237, 19 Am. Dec. 493, on the right of the public to fish in navigable rivers; Carson v. Blazer, 2 Binney, 475, 4 Am. Dec. 463, holding that the public have the right to fish in public waters unless it is granted by the state to some person; R. v. Robertson, 6 Can. S. C. 52; Gage v. Bates, 7 U. C. C. P. 116,—on the right of the public to fish in navigable waters.

Cited in notes in 60 L.R.A. 482, 487, 496, on right to fish; 12 E. R. C. 192, on public right of fishing in navigable and tidal waters.

Cited in 2 Farnham, Waters, 1362, on public right to fish.

Individual exclusive right of fishery in public waters.

Cited in Collins v. Benbury, 25 N. C. (3 Ired. L.) 277, 38 Am. Dec. 722, holding that no person has an exclusive right of fishery in any of the navigable waters of the state.

— Acquirement of right by prescription.

Cited in Chalker v. Dickinson, 1 Conn. 382, 6 Am. Dec. 250, holding that right of fishery in a public water is prima facie public, though the exclusive right may be acquired by grant or prescription; McFarlin v. Essex County, 10 Cush. 304, holding that the exclusive right of fishery on the land of another can be acquired by prescription; Cobb v. Davenport, 32 N. J. L. 369, holding that the exclusive right of fishery is in the owner of the soil but may be acquired separate from the ownership of the soil, by grant or prescription; Dogerty v. Power, Russell (N. S.) 419, holding that a person may acquire by prescription the exclusive right to fish in coves or arms of the sea.

Cited in note in 14 L.R.A. 386, on prescriptive rights of fishery.

Cited in 2 Farnham, Waters, 1384, 1386, on prescriptive fishery rights against public.

— Incidents of exclusive right to fish.

Cited in Parker v. Elliott, 1 U. C. C. P. 470, on the right to use the shores of a navigable stream under a grant of fishing rights.

Power of crown to grant exclusive fishing rights in public waters.

Cited in Gough v. Bell, 21 N. J. L. 156, holding that the crown could not grant the exclusive right of fishery to an individual; Wooley v. Campbell, 37 N. J. L. 163, holding that the state may grant the right of enjoyment of lands under the tidewater, to private persons, for the purpose of fishing and planting oysters; Re Provincial Fisheries, 26 Can. S. C. 444 (dissenting opinion), on the power of the crown to grant exclusive fishing rights, since the magna charta.

Cited in 2 Farnham, Waters, 1369, on right to grant exclusive fishery in tidal waters.

Title by prescription.

Cited in Folsom v. Freeborn, 13 R. I. 200, on the possession necessary to create title by prescription.

— In public streams or places.

Cited in Phinizy v. Agusta, 47 Ga. 260, on the obtaining of an easement by prescription as against the state; R. v. Meyers, 3 U. C. C. P. 305, on the right to acquire right of soil in the beds of navigable streams by grant or prescription.

Cited in note in 23 E. R. C. 790, on prescriptive right to take seaweed.

Incidents of ownership of banks of non-tidal or non-navigable stream.

Cited in Bowman v. Wathen, 2 McLean, 376, Fed. Cas. No. 1,740, holding

that the title of the owner of the banks of a non-navigable stream runs to the center of the stream, but in a navigable stream only to the high water mark; Warner v. Southworth, 6 Conn. 471, holding that the owner of the shores of a non-navigable artificial stream owns to the center thereof; Fletcher v. Thunder Bay River Boom Co. 51 Mich. 277, 16 N. W. 645; Claremont v. Carlton, 2 N. H. 369, 9 Am. Dec. 88,—as to whom the title to islands in the stream belongs; Atty. Gen. v. Delaware & B. B. R. Co. 27 N. J. Eq. 631, holding that the bed of the Delaware River above the flow of the tide passed with a grant of the shore; Canal Fund v. Kempshall, 26 Wend. 404, on the rights of the owners of the shores of non-navigable streams; Holbert v. Edens, 5 Lea, 204, 40 Am. Rep. 26, holding that the owner of the land on both sides of a non-navigable stream owns the bed of the stream.

Cited in notes in 42 L.R.A. 167, on title to land under water; 23 E. R. C. 754, on presumption of ownership of river bed.

—Fishery rights appurtenant to shore.

Cited in Adams v. Pease, 2 Conn. 481, holding that the owners of the shore of a river above the point where the tide ebbs and flows, have the exclusive right to fishery opposite their land; People v. Platt, 17 Johns. 195, 8 Am. Dec. 382, holding that the owner of both shores of a non-navigable stream has the exclusive right of fishery in the stream; Morgan v. King, 18 Barb. 277; Ingram v. Threadgill, 14 N. C. (3 Dev. L.) 59,—holding that the owners of the banks of non-navigable streams have the exclusive right of fishery opposite their lands; Woolever v. Stewart, 36 Ohio St. 146, on prescriptive rights to hinder passage of fish in non-navigable stream; Carson v. Blazer, 2 Binn. 475, 4 Am Dec. 463, on the right of the owners of the shores of non-navigable streams to the exclusive right of fisheries; Cates v. Wadlington, 1 M'Cord, L. 580, 10 Am. Dec. 699, on the right of the owners of adjacent soil to fish in non-navigable rivers.

What constitutes a navigable river.

Referred to as leading case in United States v. New Bedford Bridge, 1 Woodb. & M. 401, Fed. Cas. No. 15,867, on navigability and public character of tidal rivers and ways.

Cited in Scott v. Willson, 3 N. H. 321, holding that by common law, all rivers where the tide ebbs and flows is a navigable river; Palmer v. Mulligan, 3 Caines, 307, 2 Am. Dec. 270, on the distinction between a navigable and non-navigable river; Crenshaw v. State River Co. 6 Rand. (Va.) 245, on what constitutes a public river.

Cited in note in 42 L.R.A. 310, 324, on what waters are navigable.

Cited in 1 Farnham, Waters, 105, 110, as to what waters are navigable; 1 Farnham, Waters, 130, on determination of navigability of water.

—Control of state over navigable waters.

Cited in Mobile v. Hallett, 16 Pet. 261, 10 L. ed. 958, holding that the title to the bed of a navigable river is prima facie in the public; Spring v. Russell, 7 Me. 273, holding that it is within the power of the legislature to change the course of a public river, for the public convenience; People ex rel. Loomis v. Canal Appraisers, 33 N. Y. 461, holding that the beds of navigable rivers belong to the state; Brinckerhoff v. Starkins, 11 Barb. 248, holding that no person can acquire any rights in navigable waters except by grant from the state or by prescription; People v. Vanderbilt, 38 Barb. 282, on the power of the state to grant the use of the beds of navigable streams.

Riparian rights in navigable rivers.

Cited in Gould v. Hudson River R. Co. 6 N. Y. 522 (dissenting opinion), on the right of the owner of the shores of navigable stream, to recover for the obstruction of his access to the water.

What constitutes an arm of the sea.

Cited in The Martha Anne, Olcott, 18, Fed. Cas. No. 9,146, holding that Long Island sound is an arm of the sea; Young v. Harrison, 6 Ga. 130; Livingston v. Van Ingen, 9 Johns. 507,—on rivers in which the tide ebbs and flows, as arms of the sea; Smith v. United States, 1 Wash. Terr. 262, on what constitutes an arm of the sea within the common law meaning of that term.

12 E. R. C. 169, MALCOMSON v. O'DEA, 10 H. L. Cas. 593, 9 Jur. N. S. 1135, 9 L. T. N. S. 93, 12 Week. Rep. 178.

Right of public to fish in public waters.

Cited in Neill v. Devonshire, 23 E. R. C. 756, L. R. 8 App. Cas. 135, 31 Week Rep. 622, on the law applicable to the fishing rights in public waters; Hartman v. Tresise, 36 Colo. 146, 4 L.R.A.(N.S.) 872, 84 Pac. 685 (dissenting opinion), on the right of fishery as following the ownership of the water; Lincoln v. Davis, 53 Mich. 375, 51 Am. Rep. 116, 19 N. W. 103, holding that all persons have the right of fishing in the Great Lakes.

Cited in notes in 39 L.R.A. 583, on governmental control over right of fishery; 60 L.R.A. 489, 499, on right to fish.

Cited in 2 Farnham, Waters, 1392, on kinds of fishery; 2 Cooley, Torts, 3d ed. 676, on trespasses in fishing.

— Prescription of right.

Cited in Smith v. Andrews [1891] 2 Ch. 678, 65 L. T. N. S. 175, on the right of the public to acquire by prescription a right to fish in a non-tidal river.

Cited in note in 14 L.R.A. 386, on prescriptive rights of fishery.

Power of crown or state to grant exclusive right of fishery to individuals.

Cited in Wooley v. Campbell, 37 N. J. L. 163, holding that the state may grant the exclusive right to plant and fish oysters in the tide waters of the state; Rockeffer v. Lamora, 85 App. Div. 254, 83 N. Y. Supp. 289, on the power of the state to grant an exclusive right to fish.

Cited in 2 Farnham, Waters, 1372, on right to grant exclusive fishery in tidal waters.

— Since the Magna Charta.

Cited in R. v. Robertson, 6 Can. S. C. 52, on the power of the crown to grant the exclusive right of fishery since the magna charta; Re Provincial Fisheries, 26 Can. S. C. 445, on the operation of the magna charta in Canada to prevent the grants of exclusive right of fishery; Rose v. Belyea, 12 N. B. 109, holding that the right of fishing in a public river is in the public and since the magna charta the crown cannot grant an exclusive right; Donnelly v. Broom, 40 N. S. 585, holding that since the magna charta the crown could not convey an exclusive right of fishery in public waters; Wilson v. Codyre, 27 N. B. 320, holding that a grant of the soil to low water mark did not interfere with the public's right to fish there at high tide.

"Several" fishery.

Cited in Hanbury v. Jenkins [1901] 2 Ch. 401, 70 L. J. Ch. N. S. 730, 65

J. P. 631, 49 Week. Rep. 615, 17 Times L. R. 539, holding that a "several fishery" means an exclusive right to fish in a given place.

Exclusive fishery by prescription.

Cited in Goodman v. Saltash, L. R. 7 App. Cas. 633, 52 L. J. Q. B. N. S. 193, 48 L. T. N. S. 239, 31 Week. Rep. 293, 47 J. P. 276 (reversing L. R. 7 Q. B. Div. 106), on the proof of ancient existence of right of fishery, as showing exclusive right by prescription.

Distinguished in Edgar v. English Fisheries Coms. 23 L. T. N. S. 732, holding that proof of long exclusive enjoyment of a right to a several fishery raises a presumption of a grant from the crown before the magna charta, but this is rebutted by an inventory of a subsequent owner from which this was omitted.

Title of public to soil beneath public waters.

Cited in Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548, holding that the title to the soil beneath public waters is in the state except as surrendered by the constitutions; Coburn v. San Mateo County, 75 Fed. 520, on the title to the soil of the sea below high water mark, as being in the state, subject to the public's right of fishing; Atty. Gen. v. Emerson, 23 E. R. C. 739 [1891] A. C. 649, holding that prima facie Crown is entitled to every part of foreshore of sea between high and low water mark.

Cited in notes in 42 L.R.A. 162, on title to land under water; 23 E. R. C. 754, on presumption of ownership of river bed.

Proving of ancient documents.

Cited in Merwin v. Morris, 71 Conn. 555, 42 Atl. 855, holding that ancient documents are admissible to prove ancient possession; Boston v. Richardson, 105 Mass. 351, holding the licenses more than sixty years old, produced from proper custody, purporting to show the exercise of ownership of land, are admissible in proof of the licensor's title, without direct proof of the licensee's possession under it; Greenleaf v. Brooklyn, F. & C. I. R. Co. 132 N. Y. 408, 30 N. E. 762, 28 Abb. N. C. 161, holding that where a deed is so ancient that no person living can testify to acts of ownership under it, it is admissible in evidence without proof of contemporaneous possession of the land under it; Country Club Land Asso. v. Lohbauer, 187 N. Y. 106, 79 N. E. 844; Doe ex dem. Esterbrooks v. Towse, 24 N. B. 387,—on the proving of ancient documents; Chamberlain v. Torrance, 14 Grant, Ch. (U. C.) 181, on the production of an ancient deed from proper custody as proving itself; Bristow v. Cormican, L. R. 3 App. Cas. 641, on the admissibility and proof of ancient documents; Ex parte Tomline, 28 L. T. N. S. 12, 21 Week. Rep. 475, holding that an ancient judgment rendered between the parties is admissible as evidence of user; Blandy-Jenkins v. Dunraven [1899] 2 Ch. 121, 68 L. J. Ch. N. S. 589, 81 L. T. N. S. 209, holding an ancient document coming from the proper custody was admissible as proof of an act of ownership of the predecessor in title of the plaintiff.

"Weirs" defined.

Cited in Neill v. Devonshire, L. R. 8 App. Cas. 135, 31 Week. Rep. 622, 23 Eng. Rul. Cas. 756, as to the meaning of the word "wears" or "weirs."

What waters are navigable.

Cited in note in 42 L.R.A. 308, on what waters are navigable.

Cited in 1 Farnham, Waters, 115, as to what waters are navigable.

12 E. R. C. 184, NORTHUMBERLAND v. HOUGHTON, 39 L. J. Exch. N. S. 66, 22 L. T. N. S. 491, L. R. 5 Exch. 127, 18 Week. Rep. 495.

Power of the crown to grant a right to a several fishery since the Magna Charta.

Cited in Wilson v. Codyre, 27 N. B. 320 (dissenting opinion), on the right of the crown to grant right to a several fishery, as affected by the magna charta.

Cited in notes in 39 L.R.A. 583, on governmental control over right of fishery; 60 L.R.A. 489, 522, on right to fish.

Cited in 2 Farnham, Waters, 1372, on right to grant exclusive fishery in tidal waters.

— Power to regrant such right.

Cited in Saltash v. Goodman, L. R. 5 C. P. Div. 431, on the power of the crown to regrant the right to a several fishery.

Extinction of a franchise by a recession to the crown.

Cited in Atty.-Gen. v. British Museum Trustees [1903] 2 Ch. 598, 72 L. J. Ch. N. S. 743, 51 Week. Rep. 582, 88 L. T. N. S. 858, 19 Times L. R. 555, on the extinction of a franchise by an accession to it by the crown.

12 E. R. C. 193, ELWES v. MAW, 3 East, 38, 6 Revised Rep. 523.

What constitutes a fixture.

Cited in Sands v. Pfeiffer, 10 Cal. 258, holding that whatever is once annexed to the freehold becomes a part thereof and passes with a conveyance of the estate, though there are exceptions; Parker v. Redfield, 10 Conn. 490, on the exceptions to the rule that whatever is annexed to the freehold becomes a part of it; Towson v. Smith, 13 App. D. C. 48, holding that counters in room used as dry goods store are fixtures, if not designed for mere temporary use or intended to be severed from building; Spruance's Opinion, 8 Del. Ch. 539, on what constitutes a fixture; Charleston & W. C. R. Co. Hughes, 105 Ga. 1, 70 Am. St. Rep. 17, 30 S. E. 972, holding that railroad has right to remove improvements made upon land, under conveyance from life-tenant, if it intends to abandon premises at expiration of life estate; Johnson v. Wiseman, 4 Met. (Ky.) 357, 83 Am. Dec. 475, holding that chandeliers or gas burners in house are fixtures; Fifield v. Maine C. R. Co. 62 Me. 77, holding that rails and sleepers belonging to railroad contractor are personal property, although temporarily in use by railroad company after completion of construction of railroad; Coombs v. Jordan, 3 Bland, Ch. 284, 22 Am. Dec. 236, on what is a fixture so as to be subject to a judicial lien; State use of Kidney v. Marshall & Co. 4 Mo. App. 29, holding that status of property in dispute will not be determined by intent of owner, where question arises between two execution creditors, one of whom claims by virtue of judgment good as against realty, and the other by virtue of sale under execution against personalty; Buckley v. Buckley, 11 Barb. 43, holding that whatever is annexed or affixed to a freehold by being let into the soil or annexed to it or to some erection on it, is a fixture, as between mortgagor and mortgagee, vendor and vendee, heir and personal representative; Beardsley v. Ontario Bank, 31 Barb. 619, holding that rolling stock of railroad company will not pass by mortgage of railroad real estate, chattels real and franchises of company; Muir v. Jones, 23 Or. 332, 19 L.R.A. 441, 31 Pac. 646, holding purchaser of land without notice, not affected by parol agreement between prior owners reserving sawmill as person-

alty; Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634, holding that a fixture is a chattel, but which by annexation to the freehold becomes a part thereof; Cole v. Smith, 37 Tex. 413, holding that wooden cistern, placed by side of house, is fixture.

Cited in notes in 19 L.R.A. 443, on effect of agreement to prevent fixtures becoming part of realty; 10 E. R. C. 392, on what constitutes emblements and right thereto; 12 Eng. Rul. Cas. 222–227, on what constitutes a fixture.

— Annexation to freehold.

Cited in Merritt v. Judd, 14 Cal. 59, 6 Mor. Min. Rep. 62, holding that fixture is article of personal nature annexed to freehold, and may exist on public land; Capen v. Peckham, 35 Conn. 88, holding that to constitute fixture, it is necessary that it should appear from all circumstances, that permanent annexation was intended; Adams v. Smith, 1 Breese (Ill.) 283, holding that constable cannot enter upon land and take on execution fruit trees standing and growing; Snedecker v. Warring, 12 N. Y. 170 (dissenting opinion), on necessity of physical annexation of article to constitute it fixture; Freeman v. Lynch, 8 Neb. 192, holding that houses become fixtures, when they are intended as a permanent improvement, regardless of the character of their foundations; Latham v. Blakely, 70 N. C. 268, holding that where owner of inheritance attaches to freehold articles of personalty for better enjoyment of estate, such articles are realty and pass to heir or mortgagee; Bond v. Coke, 71 N. C. 97, holding that cotton gin and press annexed to freehold in usual way, become fixtures; State v. Martin, 141 N. C. 832, 53 S. E. 874, holding that mere intention to make a chattel a part of the freehold does not make it a fixture without some physical annexation, however slight; Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634, holding that machinery in a mill are not judged by the same criterion of annexation as other fixtures are; Fortman v. Goepper, 14 Ohio St. 558, to the point that actual severance, or notice of binding agreement to sever should be necessary to deprive purchaser of land of right to fixtures; Wilson v. Freeman, 7 W. N. C. 33, holding that where chattels are so annexed to freehold, that they cannot be removed without violence they become part of realty; Moody v. Aiken, 50 Tex. 65, holding that banker's safe even if inclosed within vault, walls of which would have to be partially taken down to effect its removal, is removable fixture.

Cited in note in 15 E. R. C. 247, on right of assignee to sue covenantor.

— Buildings and integral parts thereof.

Cited in Powers v. Harris, 68 Ala. 409, holding that prima facie intendment is, that houses and lumber out of which they are constructed constitute part of realty; Baldwin v. Breed, 16 Conn. 60, holding that where one tenant in common erected a permanent building on the land, it became a part of the land; Carr v. Georgia R. Co. 74 Ga. 73, holding that railroad company could not remove depot buildings after having abandoned possession of land for purpose it procured it; Peaks v. Hutchinson, 96 Me. 530, 59 L.R.A. 279, 53 Atl. 38, holding building erected on stone posts set in ground on another's ground, under parol agreement that it shall remain property of builder does not pass by conveyance of land; Carlin v. Ritter, 68 Md. 478, 6 Am. St. Rep. 467, 13 Atl. 370, holding that wooden buildings resting by their own weight on flat stones laid on the surface of the ground are not fixtures; Hamlin v. Parsons, 12 Minn. 108, Gil. 59, 90 Am. Dec. 284, to the point that where there is agreement, express or implied, between owner of land and owner of building, that building erected shall not become part of realty, such agreement may be

enforced; Foster v. Mabe, 4 Fla. 402, 37 Am. Dec. 749; Stillman v. Hamer, 7 How. (Miss.) 421,—holding that whenever the owner of the soil gives his consent to the erection of a building by another, the same does not become a fixture; Western North Carolina R. Co. v. Deal, 90 N. C. 110, holding that railroad company had right to remove depot building placed upon land with owner's verbal consent; State v. Elliot, 11 N. H. 540, holding that windows placed in a dwelling house are fixtures; Dame v. Dame, 38 N. H. 429, 75 Am. Dec. 195, holding that house built on another's land, under agreement that builder may remove it when he pleases, does not become part of real estate; Fisher v. Saffer, 1 E. D. Smith, 611, on whether a mere "shanty" resting upon the ground is a part of the freehold; Reid v. Kirk, 12 Rich. L. 54, holding that dwelling house erected by tenant on block pillars not set in ground, may be removed by tenant; Sherbondean v. Beaver Mut. F. Ins. Co. 30 U. C. Q. B. 472 (dissenting opinion), on a barn sitting upon an abutment of loose stones as a fixture; Phillips v. Grand River Farmers' Mut. F. Ins. Co. 46 U. C. Q. B. 334 (dissenting opinion), on a house set upon blocks, as a fixture.

— Machines and mechanical and trade structures.

Referred to as a leading case in Skinner v. Ft. Wayne, T. H. & S. W. R. Co. 99 Fed. 465, holding that the rails, ties, etc., of a railroad, built upon land over which it has obtained an easement, does not become a fixture; Hill v. Wentworth, 28 Vt. 428, holding that articles of machinery do not become fixtures where they are attached to the building only for the purpose of making them steadier, and where they may be removed without injurying the freehold.

Cited in Steers v. Daniel, 4 Fed. 587, holding that machinery attached must be treated as part of freehold; Powell v. Monson & B. Mfg. Co. 3 Mason, 459, Fed. Cas. No. 11,357, holding that the main mill-wheel and gearing of a factory attached to the factory and necessary for its operation are fixtures, to which dower attaches; Hermance v. Vernoy, 6 Johns. 5, holding that a stone for grinding bark, affixed to a mill is not a part of the freehold, where used in a business of a personal nature; Horne v. Smith, 105 N. C. 322, 18 Am. St. Rep. 903, 11 S. E. 373, holding that saw-mill and engine and boiler connected with and used to operate it, pass by deed of land, unless expressly reserved; Sturgis v. Warren, 11 Vt. 433, holding that machinery in a woolen factory is not a fixture; Sweetzer v. Jones, 35 Vt. 317, 82 Am. Dec. 639, holding that saw frames in marble mill fastened, at top and bottom, to building by bolts and nuts for purpose of steadying saws are not fixtures; Shelton v. Ficklin, 32 Gratt. 727, holding that machinery in factory permanent in character, and essential to purposes for which building is occupied, must be regarded as realty; Liscombe Falls Gold Min. Co. v. Bishop, 35 Can. S. C. 539, 2 Ann. Cas. 735, holding that stamp mill erected by licensees of mining area for purpose of testing ores, was removable fixture and subject to sale under execution; Wake v. Hall, 17 E. R. C. 797, L. R. 8 App. Cas. 195, 52 L. J. Q. B. N. S. 494, 48 L. T. N. S. 834, 31 Week. Rep. 585, holding that sheds built to cover the machinery used in operating a mine, and the machinery were not fixtures.

Trade fixtures.

Referred to as a leading case in Moody v. Aiken, 50 Tex. 65, holding that a banker's safe, even if enclosed in a vault which has to be partially taken down to remove the safe, is a removable trade fixture; Carscallen v. Moodie, 15 U. C. Q. B. 304, on the distinction between trade fixtures, and those necessary to the convenient enjoyment of the premises; Van Ness v. Pacard, 2 Pet. 146

7 L. ed. 377, holding that "trade fixtures" are fixtures designed solely for purpose of carrying on trade or business in building; Brown v. Reno Electric Light & P. Co. 55 Fed. 229, on the building and machinery of electric lighting plant as trade fixtures; Swift v. Thompson, 9 Conn. 63, 21 Am. Dec. 718, holding that machinery in a cotton mill was trade fixtures whether bolted to the floor of the building to hold them steady or not; Western & A. R. Co. v. State, — Ga. —, 14 L.R.A. 438, holding that lessee of railroad cannot remove rails as trade fixtures; Northern C. R. Co. v. Canton Co. 30 Md. 347, holding that the roadbed of a railway and the rails fastened to it and depots may be trade fixtures, where laid under an agreement upon another's land; Doty v. Gorham, 5 Pick. 487, 16 Am. Dec. 417, holding that a shop erected for the purposes of trade was not a part of the freehold; Wall v. Hinds, 4 Gray, 256, 64 Am. Dec. 64, holding that cisterns and sinks put into a hotel building by the lessee, though nailed to the walls, and fastened to pipes, are trade fixtures; Hanrahan v. O'Reilly, 102 Mass. 201, holding that a bowling-alley with its appurtenances, erected by a tenant for the purpose of profit, is a trade fixture; Watriss v. First Nat. Bank, 124 Mass. 571, 26 Am. Rep. 694, on the right of a tenant to remove his trade fixtures at the expiration of his second term; Reynolds v. Shuler, 5 Cow. 323, holding that a tenant may remove kettles, copper stills, and the like used in a distillery and placed there by him; Brooks v. Stimson, 44 N. C. (Busbee, L.) 72, holding that school room desks and tables were trade fixtures so that they could be removed by the school trustees; Texas & P. R. Co. v. Hays, 3 Tex. App. Civ. Cas. (Willson) 79, on the right to remove trade fixtures.

— Agricultural tenants' fixtures.

Cited in Carver v. Gough, 32 W. N. C. 72, holding that agricultural tenants are not within the exception as to trade fixtures, and a tobacco house erected by a tenant was a fixture; Alway v. Anderson, 5 U. C. Q. B. 34 (dissenting opinion), on right to distrain hop-poles left standing in ground, after hops growing upon them have been picked.

Cited in 2 Underhill, Land. & T. 1256, 1258, on right to remove domestic fixtures.

Distinguished in Dubois v. Kelly, 10 Barb. 496, holding that fixtures for agricultural purposes could be removed by the tenant.

Modified in Van Ness v. Pacard, 2 Pet. 137, 7 L. ed. 374, holding that the rule as to the removal of trade fixtures by the tenant extends to those of agricultural tenants; Harkness v. Sears, 26 Ala. 493, 62 Am. Dec. 742, holding that the same rule applies to agricultural tenants as to others with regard to trade fixtures; Perkins v. Sevank, 43 Miss. 349, holding that the rule is otherwise in the United States as to agricultural tenants, and they may remove their fixtures.

Fixtures as between vendor and vendee.

Cited in Smith v. Moore, 26 Ill. 392, holding that vendee in land contract has no right to remove from premises any annexations except trade fixtures; Waterhouse v. Gibson, 4 Me. 230, holding that all buildings on lands, whether upon foundations or not, are fixtures as to a purchaser at an execution sale; Hunt v. Bay State Iron Co. 97 Mass. 279, holding that rails of railroad track remain personal property as between vendor and vendee, under agreement that vendor shall retain title until paid for; Mills v. Peiree, 2 N. H. 9, holding that a store building erected by the owner of the land was a fixture and

passed to the purchaser; Kittredge v. Woods, 3 N. H. 503, 14 Am. Dec. 393, holding that when a farm is sold, manure lying about a barn on the farm, is a part of the farm and goes with it; Lathrop v. Blake, 23 N. H. 46, holding that machinery used in a paper mill was a fixture as between vendor and vendee, even though it could be removed without injury to the freehold; Wadleigh v. Janvrin, 41 N. H. 503, 77 Am. Dec. 780, holding that a cider mill was a fixture as between the vendor and vendee, though at the time removed for repairs; Miller v. Plumb, 6 Cow. 665, 16 Am. Dec. 456, holding that fixtures erected for purposes of trade become a part of the freehold as between vendor and vendee; Ford v. Cobb, 20 N. Y. 344, holding that salt kettles set in masonry were not fixtures as to the vendee of the land, where they were covered by a chattel mortgage; Wilson v. Steel, 13 Phila. 153, 36 Phila. Leg. Int. 137, holding that as between vendor and vendee, chattels affixed to realty are to be considered part of it; Shelton v. Ficklin, 32 Gratt. 727, on what constitutes a fixture as between vendor and vendee; Cockshutt Plow Co. v. McLoughry, 2 Sask. L. R. 259, holding that windmill placed upon premises by one holding under contract to purchase, is part of realty as between owner of land after default in land contract and one who sold mill retaining title until paid for; Bunnell v. Tupper, 10 U. C. Q. B. 414, holding that a barn whether affixed to the soil or not is as between the vendor and vendee a part of the freehold.

—As between mortgagor and mortgagee.

Cited in Hancock v. Jordan, 7 Ala. 448, 42 Am. Dec. 600, holding that a cotton gin is not a fixture so as to be covered by a trust deed; Fechet v. Drake, 2 Ariz. 239, 12 Pac. 694, holding that poles and wires on the street were fixtures and went with a mortgage of the electric light plant, as also did the electric current; Hunt v. Bay State Iron Co. 97 Mass. 279, holding that rails upon the roadbed of a railroad company were fixtures as to prior mortgagees who did not agree to having it otherwise, but not as to subsequent vendees or mortgagors with notice; Carpenter v. Walker, 140 Mass. 416, 5 N. E. 160, holding that a boiler and engine, cast together, were not fixtures as between mortgagor and mortgagee, where they were not annexed to the realty; Pettengill v. Evans, 5 N. H. 54, holding that a mortgagor has no right to remove a building erected by him; Best v. Hardy, 123 N. C. 226, 31 S. E. 391, holding that fixtures put upon land by owner, who then gives mortgage on land, cannot be removed to prejudice of mortgagee; Brennan v. Whitaker, 15 Ohio St. 446, holding that as between mortgagor and mortgagee saw mill and boilers, engine and saws, attached so as to show that they were designed to be permanent, are fixtures.

Cited in note in 18 E. R. C. 141, on right of mortgagee to accretions or substitutions.

—As between life tenant and remainderman.

Cited in Austin v. Stevens, 24 Me. 520, on the right of the tenant for life to remove improvements made by him; McCullough v. Irvine, 13 Pa. 438, holding that tenant for life cannot remove from premises two story brick dwelling house, which was erected thereon by him; Cannon v. Hare, 1 Tenn. Ch. 22, holding that the representative of a life tenant is not entitled to remove buildings of a permanent character erected by the life tenant.

—As between heir and personal representative.

Cited in Fay v. Muzzey, 13 Gray, 53, 74 Am. Dec. 619, holding that manure on the homestead is a part of the land and does not go to the administrator;

Tuttle v. Robinson, 33 N. H. 104, holding that as between heir and executor a heavy stone placed by the ancestor in a fireplace, which could not be removed without injury to the fireplace, was a fixture.

— As between landlord and tenant.

Cited with special approval in Graeme v. Cullen, 23 Gratt. 266, on the right of a tenant to remove his fixtures.

Cited in Treadway v. Sharon, 7 Nev. 37; Sampson v. Camperdown Cotton Mills, 64 Fed. 939,—holding that right of tenant to remove building erected by him under terms of lease expires with lease; Bass v. Metropolitan West Side Elev. R. Co. 39 L.R.A. 711, 27 C. C. A. 147, 53 U. S. App. 542, 82 Fed. 857, holding that a building erected by the tenant under a covenant to erect it, the lessee to either pay for it, or renew the lease, the building became a fixture; Hensley v. Brodie, 16 A. & R. 511; Gaffield v. Hapgood, 17 Pick. 192, 28 Am. Dec. 290,—on what constitutes a fixture as between tenant and landlord; Hayes v. New York Gold Min. Co. 2 Colo. 273, holding that tenant has right to remove trade fixtures, such as boilers and engine in quartz mill, during his tenancy; Torrey v. Burnett, 38 N. J. L. 457, 20 Am. Rep. 421, holding that right of tenant to remove trade fixtures does not extend beyond his term; Holmes v. Tremper, 20 Johns. 29, 11 Am. Dec. 238, holding that a cider mill and press erected by a tenant from year to year for his own use is not a fixture; Cook v. Champlain Transp. Co. 1 Denio, 91, holding that engines and machinery in a mill, though firmly annexed to the freehold are when so annexed by the tenant for years; not fixtures; White v. Arndt, 1 Whart. 91, holding that a stable and two shops erected by a tenant were not fixtures, where such was agreed by the parties; White's Appeal, 10 Ga. 252, holding that an engine-house, partly of wood and of stone, erected by a tenant for years, was not a fixture, where he had the right to remove fixtures at the end of term; Hertzberg v. Witte, 22 Tex. Civ. App. 320, 54 S. W. 921, holding that renewal of lease for part of premises with grantee of lessor without recognizing right of tenant to remove building as agreed upon in original lease, does not prevent tenant from removing building after expiration of original lease; Wing v. Gray, 36 Vt. 261, holding that hop poles placed on a farm by the tenant for his own temporary use with the intention of removing them are not fixtures as to the landlord or his grantee; Childs v. Hurd, 32 W. Va. 66, 9 S. E. 362, on the right of the tenants to remove articles annexed by them to the freehold; London & C. Loan, etc., Co. v. Pulford, 8 Ont. Pr. Rep. 150, holding that tenant who neglects to remove fixtures before lease permitting removal expenses will be deemed to have made landlord a gift of them; Gray v. McLennan, 3 Manitoba L. Rep. 337, holding that tenant has right to remove trade fixture placed by him on premises, at any time during continuance of term of lease; Allan v. Rowe, 1 N. B. Eq. 41, holding that lessee of land under lease renewable from year to year cannot remove building erected upon premises by him.

Cited in 2 Cooley, Torts, 3d ed. 827, on tenant's right to annexations made for convenient and profitable enjoyment of his estate.

12 E. R. C. 208, HOBSON v. GORRINGE [1897] 1 Ch. 182, 66 L. J. Ch. N. S. 114, 75 L. T. N. S. 610, 45 Week. Rep. 356.

Annexation to soil as determining the character of a chattel as a fixture.

Cited in Miles v. Ankatell, 25 Ont. App. Rep. 458, holding that a small building of thin boards, lathed and plastered inside, resting by its own weight on

loose bricks laid on the soil, was a fixture so as to be covered by a mortgage of the land; Stack v. T. Eaton Co. 4 Ont. L. Rep. 335, holding that shelving, gas and electric lighting fixtures, screwed or attached to the walls were fixtures and passed by a conveyance of the building,

Cited in note in 12 E. R. C. 221–223, on what constitutes a fixture.

Cited in 1 Mechem, Sales, 532, on effect of annexing chattels conditionally sold to the freehold as against subsequent purchasers.

Distinguished in Lyon & Co. v. London City & M. Bank [1903] 2 K. B. 135, 72 L. J. K. B. N. S. 465, 51 Week. Rep. 400, 88 L. T. N. S. 392, 19 Times L. R. 334, holding that chairs, which were screwed to the floor of a place of entertainment, were not fixtures, where they were rented by the tenant with the option of purchasing them.

— Object and degree of annexation as showing intention.

Cited in Haggart v. Brampton, 28 Can. S. C. 174, holding that both the degree and object of the annexation should be considered in determining the intention of the parties as to whether the chattel is a fixture; Cronkhite v. Imperial Bank, 14 Ont. L. Rep. 270, on the degree and purpose of annexation as determining whether the chattel becomes a fixture; Hamilton v. Chisholm, 2 Sask. L. R. 227, holding that to be part of freehold, building must be affixed to it or something connected with it, or there must be evidence to show that it was intended that building should be part of freehold.

Machinery and motors as fixtures.

Cited in Palmateer v. Robinson, 60 N. J. L. 433, 38 Atl. 957, holding that machinery affixed to land of purchaser thereof, under contract that title would not pass until paid for, remains personalty as between seller and buyer; Gasaway v. Thomas, 56 Wash. 77, 105 Pac. 168, 20 Ann. Cas. 1337, holding that mining machinery used for prospecting by purchaser under contract remains personalty during time of work of prospecting; Cockshutt Plow Co. v. McLoughry, 2 Sask. L. R. 259, holding that windmill placed on premises by one holding under contract to purchase, is part of realty as between owner of land after default in land contract and one who sold mill, retaining title until paid for; Goldie & McC. Co. v. Hewson, 35 N. B. 349, holding that an engine fastened to the freehold by means of concrete and bolts, became a fixture so as to be covered by a mortgage, even though purchased under a conditional sale contract; Seeley v. Caldwell, 18 Ont. L. Rep. 472, holding that a tubular boiler, an air compressor, a receiver, and a pump, used in operating a mine were fixtures, as to a mortgagee; Reynolds v. Ashby & Co. [1904] A. C. 466, 1 B. R. C. 653, 73 L. J. K. B. N. S. 946, 91 L. T. N. S. 607, 53 Week. Rep. 129, 20 Times L. R. 766 (affirming [1903] 1 K. B. 87, 72 L. J. K. B. N. S. 51, 87 L. T. N. S. 640, 51 Week. Rep. 405, 19 Times L. R. 70), holding that machines, sold under conditional sale contract reserving title, which were affixed to concrete beds by nuts and bolts, were fixtures, though they could have been removed without injury to the freehold.

— Gas engines.

Cited in Crossley Bros. v. Lee [1908] 1 K. B. 86, 77 L. J. K. B. N. S. 199, 97 L. T. N. S. 850, 24 Times L. R. 35, holding that a gas engine, sold on a conditional sale contract reserving title in seller, became a fixture when put in place by tenant so as not to be distrainable for rent.

Right to fixtures.

Cited in James Leo Co. v. Jersey City Bill Posting Co. 78 N. J. L. 150, 73 Atl. 1046, holding that fence passes to innocent purchaser of land, free from

agreement between tenant of grantor and seller of fence, that latter might remove it; Goldie v. Bank of Hamilton, 31 Ont. Rep. 142, on rights of lienors in respect to fixtures where improvements and changes have been made; Andrews v. Brown, 19 Manitoba L. Rep. 4, holding that furnace passes with realty as between purchaser of land without notice and one who sold furnace retaining title until paid for.

Cited in notes in 37 L.R.A.(N.S.) 128, 129, on rights of seller of fixture retaining title or lien as against existing mortgagees of realty; 1 B. R. C. 675, 676, 686, 688, on rights of seller of fixtures retaining title or lien, as against purchasers or encumbrancers of realty; 18 E. R. C. 141, on right of mortgagee to accretions or substitutions.

12 E. R. C. 227, REG. v. JAMESON, 18 Cox, C. C. 392, 60 J. P. 662, 65 L. J. Mag. Cas. N. S. 218, 75 L. T. N. S. 77 [1896] 2 Q. B. 425.

Extra-territorial jurisdiction.

Cited in Re Criminal Code, 27 Can. S. C. 461, to the point that extraterritorial jurisdiction as to crimes committed abroad has been recognized.

Cited in note in 39 L.R.A.(N.S.) 822, on jurisdiction of homicide where wound inflicted in one place and death occurs in another.

12 E. R. C. 235, PASLEY v. FREEMAN, 1 Revised Rep. 634, 3 T. R. 51.

Elements of deceit.

Referred to as leading case in Pittsburgh Life & T. Co. v. Northern Cent. L. Ins. Co. 78 C. C. A. 408, 148 Fed. 674, on the doctrine underlying an action for deceit.

Cited in Busterud v. Farrington, 36 Minn. 320, 31 N. W. 360; Spead v. Tomlinson, 73 N. H. 46, 68 L.R.A. 432, 59 Atl. 376; Byard v. Holmes, 34 N. J. L. 296; Kuelling v. Roderick Lean Mfg. Co. 183 N. Y. 78, 2 L.R.A.(N.S.) 303, 111 Am. St. Rep. 691, 75 N. E. 1098, 5 Ann. Cas. 124; Boyd v. Browne, 6 Pa. 310; Cleghon v. Barstow Irrig. Co. 41 Tex. Civ. App. 531, 93 S. W. 1020; Crockett v. Burleson, 60 W. Va. 252, 6 L.R.A.(N.S.) 263, 54 S. E. 341; Ming v. Woolfolk, 116 U. S. 599, 29 L. ed. 740, 6 Sup. Ct. Rep. 489; Lane v. O'Shaughnessy, 32 N. B. 202; Derry v. Peek, 12 E. R. C. 250, L. R. 14 App. Cas. 337, 58 L. J. Ch. N. S. 864, 61 L. T. N. S. 265, 38 Week. Rep. 33; Hammatt v. Emerson, 27 Me. 308, 46 Am. Dec. 598,—on the elements essential to the maintenance of an action for deceit; Otis v. Raymond, 3 Conn. 413; Broome v. Beers, 6 Conn. 198 (dissenting opinion); Miller v. Welles, 23 Conn. 21; Bristol Mfg. Co. v. Gridley, 28 Conn. 201; Smith v. Richards, 29 Conn. 232; Eames v. Morgan, 37 Ill. 260; White v. Sutherland, 64 Ill. 181; Wiley v. Howard, 15 Ind. 169; Lamb v. Stone, 11 Pick. 527; Brown v. Blunt, 72 Me. 415; Danforth v. Cushing, 77 Me. 182; Melville v. Gary, 76 Md. 221, 24 Atl. 604; Cahill v. Applegarth, 98 Md. 493, 56 Atl. 794; Terrill v. Grove, 2 Mich. N. P. 3; Williams v. Bates, 15 Neb. 565, 20 S. W. 31; Munro v. Gardner, 1 Mill, Const. 328; Bank of Murfreesboro v. Doughty, 2 Shannon Cas. 584; Shoemaker v. Cake, 83 Va. 1, 1 S. E. 387; Cullum v. Branch Bank, 4 Ala. 21, 37 Am. Dec. 725,—on a concurrence of fraud and injury as being necessary to sustain an action or the case for deceit; Andalman v. Chicago & N. W. R. Co. 153 Ill. App. 169, holding that in action for deceit it must appear that representations were made with intention to deceive; Swift v. Rounds, 19 R. I. 527, 33 L.R.A. 561, 61 Am. St. Rep. 791, 35 Atl. 45, holding that purchasing goods on credit, intending not to pay for them, will render one liable to action of deceit; Hindman v. First

Nat. Bank, 57 L.R.A. 108, 50 C. C. A. 623, 112 Fed. 931, holding that in action for deceit, it is not necessary to show that person practicing deception was benefited thereby.

Cited in Benjamin, Sales, 5th ed. 474, on essential elements of fraud on purchaser of goods.

— Fraud as gist of action.

Cited in Redpath Bros. v. Lawrence, 42 Mo. App. 101; Bedell v. Stevens, 28 N. H. 118; Cowley v. Smyth, 46 N. J. L. 380, 50 Am. Rep. 432; Eibel v. Von Fell, 63 N. J. L. 3, 42 Atl. 754; Campbell v. Kinlock, 9 Rich. L. 300; Holmes v. Caldwell, 10 Rich. L. 311; Munro v. Gardner, 1 Treadway, Const. 1; French v. Skead, 24 Grant, Ch. (U. C.) 179; Hartford L. Ins. Co. v. Hope, 40 Ind. App. 354, 81 N. E. 595,—on necessity that false representation be also fraudulent to be actionable; Cross v. Peters, 1 Me. 376, 10 Am. Dec. 78, holding in order that a vendor may rescind a contract for fraud it must appear that the false representations of the purchaser were fraudulently made; Bayard v. Malcolm, 1 Johns. 453, on fraud as the gist of an action of deceit where no warranty; Bayard v. Malcolm, 2 Johns. 550, 3 Am. Dec. 450 (reversing 1 Johns. 453), on fraud as being the gist of action of deceit where no warranty; Farwell v. Metcalf, 61 Ill. 372; Fisher v. Mellen, 103 Mass. 503; Barker v. Nichols, 3 Colo. App. 215, 31 Pac. 1024,—on proof of fraud necessary to maintain an action as for a deceit; Pittsburgh Life & T. Co. v. Northern Cent. L. Ins. Co. 78 C. C. A. 408, 148 Fed. 674; Wilder v. De Cou, 18 Minn. 470, Gil. 421,—holding that injury caused by statement false in fact, but not so to knowledge of party making it, or with intent to deceive, will not support action; Cazeaux v. Mali, 25 Barb. 578 (dissenting opinion), on necessity that an intent to defraud and deceive be stated in an action for false representations; Hopper v. Warrick, 1 Ind. 176, holding that to render party liable for representations of character, made by him, it is necessary to prove that they were fraudulently made; Boody v. Henry, 113 Iowa, 462, 53 L.R.A. 769, 85 N. W. 771, holding that in action for deceit it must be shown that complaining party has been deceived to his injury.

Cited in Benjamin, Sales, 5th ed. 446, on fraud as ground for rescinding contract of sale; 2 Mechem, Sales, 733, on seller's knowledge of falsity of representation or lack of belief in its truth as essential to purchaser's right to avoid contract.

— Necessity of representation in terms.

Cited in Lindauer v. Gray, 18 Ill. App. 209, holding that in action for deceit suppression of truth may be considered as harmful as expression of falsehood; Chisolm v. Gadesden, 1 Strobh. L. 220, 47 Am. Dec. 550, holding an action for deceit would lie against a broker selling property knowing it to be subject to a lien and concealing such fact.

— Opinions and promises.

Cited in Veasey v. Doton, 3 Allen, 380; Bolds v. Woods, 9 Ind. App. 657, 36 N. E. 933,—holding representations by a vendor of land as to value are not actionable although known to be false; Schumaker v. Mather, 133 N. Y. 590, 30 N. E. 755, 4 Silv. Ct. App. 224, on an action for deceit as not lying for false or erroneous assertions concerning mere matter of opinion or judgment; Davis v. Sims, 1 Hill & D. Supp. 234, holding an action for fraudulent representations would not lie for expressions of opinion by defendant as to the quality thereof made on a sale of a farm to plaintiff where plaintiff viewed premises.

Cited in note in 35 L.R.A. 421, 422, on expression of opinion as fraud.

Cited in 2 Beach, Contr. 1879, on effect of fraudulent allegations of value by seller.

— Matters not of fact.

Cited in Starr v. Bennett, 5 Hill, 303, holding an action of deceit would not lie against a deputy who with intent to deceive represented that a return was made in due form of law whereupon a creditor filed a creditor's bill against the defendant in the fieri facias

— Reliance and inducement.

Cited in Tuthill v. Babcock, 2 Woodb. & M. 298, Fed. Cas. No. 14,275, holding that one who purchases land, relying on representation as to quantity of timber thereon, is not precluded from bringing action for fraud on ground of misrepresentation because he made examination before purchase; Hunnewell v. Duxbury, 154 Mass. 286, 13 L.R.A. 733, 28 N. E. 267, holding that false statements in certificate required to be filed by foreign corporation to enable it to do business in state will not render person signing it liable for deceit to one who relying upon them takes corporation's notes; Humphrey v. Merriam, 32 Minn. 197, 20 N. W. 138, holding that it is necessary for plaintiff in action for deceit to prove that he believed and relied on false representations in order to entitle him to recover; Weed v. Case, 55 Barb. 534, holding court erred in refusing to instruct that jury should find for defendant if they found that he believed the false representation to be true; McAleer v. McMurray, 6 Phila. 244, 24 Phila. Leg. Int. 260, holding a stockholder to maintain an action for fraud and deceit against the projectors of a corporation must show that it was their false representations that induced him to purchase; Lebby v. Ahrens, 26 S. C. 275, 2 S. E. 387, holding that in action for fraud in inducing sale, it is not necessary to prove that representations constituted sole inducement.

Cited in note in 37 L.R.A. 603, on right to rely upon representations made to effect contract as basis for charge of fraud.

— Damage.

Cited in Brown v. Blunt, 72 Me. 415, holding that proof of injury is essential to recovery for false representations in making conveyance of property; Rutherford v. Williams, 42 Mo. 18, holding that at law fraud without damage or damage without fraud will found an action; Freeman v. Venner, 120 Mass. 424, holding an action in tort would not lie for inducing the promisee in a note by fraudulent representations as to the effect of an indorsement to indorse it in blank, where no actual payment was made by the indorser; Ledbetter v. Morris, 48 N. C. (3 Jones, L.) 543; Morrison v. Lods, 39 Cal. 381,—on proof of injury as essential to a right to recover for false representations.

Distinguished in Nelson County v. Northcote, 6 Dak. 378, 6 L.R.A. 230, 43 N. W. 897, holding that damage resulting from fraud of person who loans money to county treasurer temporarily that he may cover up defalcation does not give rise to action against him by county.

Falsehoods constituting deceit.

Referred to as leading case in Medbury v. Watson, 6 Met. 246, 39 Am. Dec. 726, on when false affirmations are actionable.

Cited in Munter v. Rogers, 50 Ala. 283, holding that action lies for deceit in representing that corporate stock is of great value, where such representation is false to knowledge of person making it, and plaintiff suffers loss by buying

it, relying on representations; Coon v. Atwell, 46 N. H. 510, holding an action would lie for false and fraudulent representations as to the quantity of hay usually cut on a farm which plaintiff was about to purchase from defendant; Kelly v. Rogers, 21 Minn. 146, holding a false representation as to the time of redemption from a foreclosure sale is actionable where a junior mortgagee has been injured thereby; Newell v. Horn, 45 N. H. 421, holding an action might be maintained where a person was induced to buy land by fraudulent and false representations that the boundaries of the land described included certain parcels; Sandford v. Handy, 23 Wend. 260, holding a vendor of land might be held liable for a misrepresentation as to the cost of the land; Allison v. Tyson, 5 Humph. 449, holding plaintiff might maintain an action on the case for fraud where defendant sold a horse to plaintiff's son for the use of plaintiff as gentle and suitable as a riding horse, knowing that the horse was vicious and unmanageable; Young v. Hall, 4 Ga. 95; Smith v. Mitchell, 6 Ga. 458; State Bank v. Hamilton, 2 Ind. 457; Frenzel v. Miller, 37 Ind. 1, 10 Am. Rep. 62; Southern Development Co. v. Silva, 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. Rep. 881; Einstein v. Marshall, 58 Ala. 153, 29 Am. Rep. 729,—on when an action will lie for a false and fraudulent representation: Merchants' Nat. Bank v. Sells, 3 Mo. App. 85; Hoitt v. Holcomb, 32 N. H. 185; Bradbury v. Haines, 60 N. H. 123; Eggers v. Anderson, 63 N. J. Eq. 264, 55 L.R.A. 570, 49 Atl. 578; Benton v. Pratt, 2 Wend. 385, 20 Am. Dec. 623; Brown v. Ashbough, 40 How. Pr. 226; Hubbard v. Briggs, 31 N. Y. 518; Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30; Wells v. Cook, 16 Ohio St. 67, 88 Am. Am. Dec. 436; Merchants' Nat. Bank v. Armstrong, 65 Fed. 932; Mason v. Crosby, 2 Woodb. & M. 342, Fed. Cas. No. 9,234; Morrison v. Earls, 5 Ont. Rep. 434; Van Velsor v. Seeberger, 59 Ill. App. 322,—on false representations as grounds for a cause of action; Green v. Bryant, 2 Ga. 66 (dissenting opinion), on where false representations are actionable; Woodman v. Freeman, 25 Me. 531, on there being an adequate remedy at law for the recovery of damages occasioned by fraudulent representations; Hill v. Fraser, 3 N. S. 294, holding that where plans furnished to party contracting to build coffer dam represent existence of sufficient substratum, which does not in fact exist, he can only recover damages for work done till that fact was discovered.

Actionable representations as to credit, solvency or financial responsibility.

Cited in Endsley v. Johns, 120 Ill. 469, 60 Am. Rep. 572, 12 N. E. 247 (affirming 17 Ill. App. 466), holding an action might be maintained on the case against the agent of a purchaser, making false representations to vendor as to the credit of his principal on the strength of which the vendor took a worthless check; Hopkins v. Cooper, 28 Ga. 392, holding that representation that person may be safely credited, if it does not indicate, with reasonable certainty, amount for which it will be safe to credit him, is too uncertain to give right of action; Tryon v. Whitmarsh, 1 Met. 1, 35 Am. Dec. 339, holding in an action for the deceitful representation that a third person is entitled to credit, fraud in the defendant and damage to the plaintiff must appear; Hart v. Hanson, 14 N. D. 570, 3 L.R.A.(N.S.) 438, 105 N. W. 942, holding a director of a bank was not liable for deceit to creditors of the bank who extended credit after it was insolvent because he knew of the insolvency and took no steps to close the bank; Sherwood v. Salmon, 5 Days, 439, 5 Am. Dec. 167; Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141; Clark v. Dunham Lumber Co. 86 Ala. 220, 5 So. 560,—holding an action will lie for false representations as to the credit of a third

person when such representation is fraudulent and an injury results therefrom: Kidney v. Stoddard, 7 Met. 252, holding same where defendant represented that a person was entitled to credit but concealed the fact that he was a minor; Savage v. Jackson, 19 Ga. 305, holding defendant by representing that a third person was a "fine man and able to do well" did not become liable to plaintiff for the value of goods that he sold such person; Burr v. Willson, 22 Minn. 206, holding a false representation on the sale of a judgment as to the solvency of the judgment debtor was actionable on the part of the person purchasing who was injured; Weeks v. Burton, 7 Vt. 67, holding an action might be maintained on a false and fraudulent representation that a note was good; Morrison v. Morrison, 2 Dana, 13; Gallager v. Brunel, 6 Cow. 346; Gill v. Denton, 71 N. C. 341, 17 Am. Rep. 8; Iasigi v. Brown, 17 How. 183, 15 L. ed. 208 (dissenting opinion); Tupper v. Crowe, 15 N. S. 261; Turner v. Bowerman, 29 U. C. Q. B. 187; dissenting opinion in Addington v. Allen, 11 Wend. 374 (reversing 7 Wend. 9); Sylvester v. Henrich, 93 Iowa, 489, 61 N. W. 942,—on when an action will lie for false representations as to another's credit; Robbins v. Barton Bros. 50 Kan. 120, 31 Pac. 686, on representations as to another's credit, when actionable; Taylor v. Thomas, 55 Misc. 411, 106 N. Y. Supp. 538, holding a purchaser of stock in a national bank upon the report of the directors as to its financial condition which they had reasonable cause to believe was false may recover damages in an action against such directors; Childs v. Merrill, 63 Vt. 463, 14 L.R.A. 264, 22 Atl. 626, holding an action for fraud would lie where defendant to obtain credit falsely represents that he is the owner of certain named property.

Cited in 1 Brandt, Suretyship, 3d ed. 177, on false representations of another's credit as not within statute of frauds; Browne, Stat. Frauds, 5th ed. 226, on inapplicability of statute of frauds to false and deceitful representations as to credit or solvency of third persons; 1 Page, Contr. 152, on false representations as to credit of third person inducing contract.

Distinguished in Newsom v. Jackson, 26 Ga. 241, 71 Am. Dec. 206, holding an action for deceit did not lie where the debtor was given numerous credits over a long period and without due regard to the true and ascertainable facts; Hamer v. Johnston, 5 How. (Miss.) 698, holding the maker of a note representing to one about to purchase that it was good and would be paid at maturity could not as against such purchaser set up failure of consideration of which he was unaware when he made the representation; Lyons v. Briggs, 14 R. I. 222, 51 Am. Rep. 372, holding an action on the case for deceit will not lie against a person for obtaining credit by falsely representing himself to be a person safely to be trusted and given credit.

— Oral representations.

Referred to as leading case in Kemp v. National Bank, 48 C. C. A. 213, 109 Fed. 48, on the necessity that representation as to another's credit be in writing in order to be actionable.

Cited in Huntington v. Wellington, 12 Mich. 10, holding that statute which exempts persons from being charged upon parol representations concerning credit and ability of others, is confined to cases where representations form no part of contract; Upton v. Vail, 6 Johns. 181, 5 Am. Dec. 210, holding an action for deceit would lie on a parol affirmation as to the credit of a third person and on which plaintiff relied to his detriment; Grover v. Cavanaugh, 40 Ind. App. 340, 82 N. E. 104; Walker v. Russell, 186 Mass. 69, 71 N. E. 86, 1 A. & E. Ann. Cas. 688; Knight v. Rawlings, 205 Mo. 412, 13 L.R.A.(N.S.) 212, 104 S. W. 38,

12 Ann. Cas. 325; Huntington v. Wellington, 12 Mich. 10; Nevada Bank v. Portland Nat. Bank, 59 Fed. 338; Cook v. Churchman, 104 Ind. 141, 3 N. E. 759,—as causing the passage of statutes making representations as to another's credit actionable only when in writing.

Cited in Benjamin, Sales, 5th ed. 467, on liability of purchaser in case of both verbal and written representations where the latter were the substantial and main inducement to giving of credit.

Actionable fraud.

Cited in Flower v. Farwell, 18 Ill. App. 254, on mere legal fraud as not giving rise to a cause of action for damages; Brown v. Lobdell, 50 Ill. App. 559; Sims v. Eiland, 57 Miss. 83; Endsley v. Johns, 17 Ill. App. 466,—holding that in order to maintain action for fraudulent recommendation, there must be scienter misrepresentation, and consequent loss; Ward v. Center, 3 Johns. 271; Jacobsen v. Dodd, 32 N. J. Eq. 403,—on fraud as grounds for a cause of action; Moore v. Tracy, 7 Wend. 229; Culver v. Avery, 7 Wend. 380, 22 Am. Dec. 586; Tappan v. Powers, 2 Hall, 301; Barber v. Morgan, 51 Barb. 116; March v. Wilson, 44 N. C. (Busbee, L.) 143; Griffin v. Roanoke R. & Lumber Co. 140 N. C. 514, 6 L.R.A.(N.S.) 463, 53 S. E. 307; Gwinther v. Gerding, 3 Head, 197; Nudd v. Burrows, 91 U. S. 426, 23 L. ed. 286; Whitney v. Allaire, 4 Denio, 554,—on fraud and resulting damage as grounds for a cause of action; Miller v. Roberts, 9 Ga. App. 511, 71 S. E. 927, holding that contract of sale cannot be rescinded because of misrepresentations when means of knowledge are at hand and equally available to both parties; Freeman v. Venner, 120 Mass. 424, holding that action of tort for inducing promisee of note to indorse it in blank upon transfer by fraudulent representations as to legal effect of such indorsement cannot be sustained before actual payment by indorser; Randall v. Hazelton, 12 Allen, 412, holding that mortgagor can maintain no action against person who through fraud induced mortgagee to assign mortgage, so that assignee might exercise power of sale in opposition to mortgagee's verbal promise not to do so without notice; Cartwright v. Carpenter, 7 How. (Miss.) 328, 40 Am. Dec. 66, holding that one who caused another to act on mistake due to misrepresentations must make good the loss; Hughes v. McMurray, 6 Phila. 200, 24 Phila. Leg. Int. 44, holding that officers of oil company are necessary parties to bill brought by stockholders against parties alleged to have fraudulently obtained moneys, paid in by them and others, under false pretenses; Russell v. Clark, 7 Cranch, 69, 3 L. ed. 271, holding that fraudulent recommendation will subject person giving it to damages sustained by person trusting to it; Ward v. Clark, 4 B. C. 71, holding that action might be maintained by creditor on behalf of other creditors, against judgment debtor, who were strangers to case.

Cited in note in 12 E. R. C. 291, 294–296, on what constitutes fraud and liability therefor.

— Fraud practiced through or by third person.

Cited in Moody v. Burton, 27 Me. 427, 46 Am. Dec. 612, holding a creditor could not maintain an action on the case for damages caused by a fraudulent conveyance to defraud creditors.

— Of or by agent.

Cited in Hunsaker v. Sturgis, 29 Cal. 142, holding a person voluntarily acting as the agent of another in the negotiation of the sale of stocks is liable to principal for damages where he receives a sum from the purchaser for procuring a sale for less than the purchaser was willing to pay; Foster v. Swasey, 2 Woodb. & M. 217, Fed. Cas. No. 4,984, on liability of agent for false representations;

Veazie v. Williams, 8 How. 134, 12 L. ed. 1018, on liability of principal for fraud of agent.

Cited in Reinhard, Ag. 349, as to whether agent's fraud must be for principal's benefit to hold him liable.

— Where defendant is stranger to resulting transaction or benefit.

Cited in Weatherford v. Fishback, 4 Ill. 170, holding defendant who was a stranger to a transaction liable for deceit where his false representations induced plaintiff to purchase land of an inferior value in the belief that he was purchasing other land; Bean v. Herrick, 12 Me. 262, 28 Am. Dec. 176, on want of interest in person making false representations as not preventing his being held liable where another is damaged thereby; Trumbull v. January, 123 Mich. 66, 81 N. W. 970, holding an action for deceit will lie where defendant induces plaintiff to part with her property by fraud and she receives nothing therefor.

Cited in Benjamin, Sales, 5th ed. 451, on right of stranger to contract of sale to maintain action for deceit or negligence.

Fraud.

Cited in Chew v. Calvert, Walk. (Miss.) 54, on fraud consisting in suppression of fact; Perkins v. Challis, 1 N. H. 257, on what fraud may consist in; Gibbs v. Odell, 2 Coldw. 132, on a falsehood as amounting to a fraud where known to the asserter to be false.

— Effect as defense.

Cited in Eldridge v. Bush, Smith (N. H.) 288, holding in an action against sureties on a prison bond they could not set up the failure of creditor to make payment in advance for the debtor's support where such failure was secured by the fraud of the debtor in making a pretended escape; Armstrong v. Hall, 1 N. J. L. 178, holding fraud in obtaining a specialty is a good bar to an action in debt.

Conspiracy to defraud.

Cited in Place v. Minster, 65 N. Y. 89, holding an action for a conspiracy to defraud might be maintained where one of the parties to purchased goods on credit, made a sale of them to the other parties and then absconded.

Distinguished in Davis v. Minor, 2 U. C. Q. B. 464, holding an action on the case in the nature of a conspiracy does not lie against a person for supplanting another in the purchase of goods which had first been contracted for by the latter party.

Warranty.

Cited in Seixas v. Woods, 2 Caines, 48, 2 Am. Dec. 215; Oneida Mfg. Soc. v. Lawrence, 4 Cow. 440; Morrill v. Wallace, 9 N. H. 111,—on what necessary to constitute a warranty; Chapman v. Murch, 19 Johns. 290, 10 Am. Dec. 227, on how the existence of a warranty may be shown.

Cited in 1 Beach, Contr. 322, on warranty in sale of horses; Benjamin, Sales, 5th ed. 659, on necessity for special form of words to create express warranty; 2 Mechem, Sales, 1064, on warranty of goods sold as a collateral agreement; 2 Mechem, Sales, 1076, on mere expression of judgment or opinion by seller as a warranty; Smith, Pers. Prop. 182, on warranty on sale of goods as a collateral undertaking.

Warranty by representations.

Cited in Hastings v. Lovering, 2 Pick. 214, 13 Am. Dec. 420, holding in a sale note the words denoting a sale of a specific amount of "prime quality winter oil" amounted to a warranty that the oil would answer that description; Coolidge

v. Brigham, 1 Met. 547, holding a representation in a letter: "I inclose you the note of . . . as proposed," amounted to a warranty of the genuineness of the indorsements thereon, where the writer had agreed to procure the note with indorsements; Wertheimer-Swarts Shoe Co. v. McDonald, 138 Mo. App. 328, 122 S. W. 5, holding that statement by seller of chattels that his goods are equal in quality to other well known articles similar in kind, in express warranty; Childs v. Emerson, 117 Mo. App. 616, 93 S. W. 286, holding the description of a jack in a letter upon which the buyer relied on purchasing amounted to an express warranty; Ives v. Ellis, 50 App. Div. 399, 64 N. Y. Supp. 147, holding a statement by a vendor that a book is a genuine specimen of ancient typography does not constitute a warranty where the genuineness of the book was in dispute and plaintiff was familiar with specimens of ancient typography; Stranahan Bros. Catering Co. v. Coit, 55 Ohio St. 398, 4 L.R.A.(N.S.) 506, 45 N. E. 634, to the point that positive affirmation of material fact intended to be relied on as such, and which is relied on, constitutes in law a warranty; Boyd v. Anderson, 1 Overt. 438, 3 Am. Rep. 762; Foster v. Caldwell, 18 Vt. 176,—holding an instruction that an affirmation that sheep were free from foot rot was in legal effect a warranty of soundness was erroneous; Drew v. Edmunds, 60 Vt. 401, 6 Am. St. Rep. 122, 15 Atl. 100, holding on the sale of a chattel declarations of the seller as to their quality constitutes a warranty that they are as described; Gould v. Bourgeois, 51 N. J. L. 361, 18 Atl. 64; Bartholomew v. Bushnell, 20 Conn. 271, 52 Am. Dec. 338 (dissenting opinion),—on an assertion of title as amounting to a warranty; Potomac S. B. Co. v. Harlan & H. Co. 66 Md. 42, 4 Atl. 903, on an express affirmation of quality as amounting to a warranty; Shepherd v. Temple, 3 N. H. 455, on declarations as to quality amounting to a warranty; Inge v. Bond, 10 N. C. (3 Hawks.) 101; Stranahan Bros. Catering Co. v. Coit, 55 Ohio St. 398, 4 L.R.A.(N.S.) 506, 45 N. E. 634; Gregory v. Underhill, 6 Lea, 207; Cullers v. Wilson, 2 Tex. App. Civ. Cas. (Willson) 721; Rieks v. Dillahunty, 8 Port. (Ala.) 134; Ellis v. Abell, 10 Ont. App. Rep. 226; Ayers v. Parks, 10 N. C. (3 Hawks.) 59,—on affirmations as amounting to a warranty; Barker v. Sutherland, Addison (Pa.) 123, on whether assurances as to the integrity of another amounted to a warranty; Cameron v. Mount, 86 Wis. 477, 22 L.R.A. 512, 56 N. W. 1094, holding that representations that horse is safe for lady to drive resulting in injury creates liability in nature of tort for breach of warranty; Thomson v. Bell, 3 Sask. L. R. 170, holding that expression that second hand threshing machine "was doing better work than new machine" made upon sale could not be construed as express warranty.

—Reliance of buyer.

Cited in Burgess & Co. v. Wilkinson, 13 R. I. 646, holding an affirmation by the vendor of chattels in possession as to his ownership thereof amounts to a warranty; Limehouse v. Gray, 1 Treadway Const. 73, 3 Brev. 237, holding there was no implied warranty of soundness on the sale of a slave where it was visible that the slave was in bad health.

Implied warranty.

Cited in Smith v. Fairbanks, 27 N. H. 521, holding a person by selling chattels as his own property impliedly warrants the title thereto; Scranton v. Clark, 39 N. Y. 220, 100 Am. Dec. 430, holding there is no implied warranty of title on the making of a contract for the sale of a chattel not in possession; Goad v. Johnson, 6 Heisk. 340, holding there is no implied warranty of fitness where chattels after inspection are bought for a specific purpose known to seller; Faulks

v. Kamp, 5 Bann. & Ard. 73, 3 Fed. 898, holding the sale of a patent right creates an implied warranty as to title; Peuchen v. Imperial Bank, 20 Ont. Rep. 325, holding a bank receiving the indorsement of a bill of lading, for advances which it indorsed to plaintiffs were liable on an implied warranty of title where the goods were never received by plaintiffs owing to a custom's seizure and forfeiture; McCoy v. Arther, 3 Barb. 323, on possession of chattels by vendor as implying a warranty of title; Byrnside v. Burdett, 15 W. Va. 702; Bank of Virginia v. Craig, 6 Leigh, 399,—on warranty of title of chattels when implied; Beirne v. Dord, 5 N. Y. 95, 55 Am. Dec. 321, on sale by sample as amounting to a warranty; Furman v. Elmore, 2 Nott. & M. C. 189, on creation of warranty by implication of law; Eichholz v. Bannister, 23 E. R. C. 198, 17 C. B. N. S. 708, 34 L. J. C. P. N. S. 105, 12 L. T. N. S. 76, 13 Week. Rep. 96, holding there is warranty of title, if seller by words or conduct affirm goods to be his.

Cited in Benjamin, Sales, 5th ed. 599, 600, on implied conditions on sale of unredeemed pledge; Benjamin Sales 5th ed. 604, on distinction between goods in seller's possession and those not in his possession as to implied conditions.

Action on the case.

Cited in Griffin v. Farwell, 20 Vt. 151, on when an action on the case will lie.

— For a deceit.

Cited in Gonsouland v. Rosomano, 100 C. C. A. 97, 176 Fed. 481, holding that where person sustains pecuniary loss or damage by deceit of another, action on case lies; Morgan v. Patrick, 7 Ala. 185, holding an action on the case is the proper remedy where a purchaser has accepted a deed of land and has been defrauded by an omission to inform him of an outstanding incumbrance created by the vendor; Allen v. Addington, 7 Wend. 9, holding that action on case lies for false recommendation as to credit of one person, by which another sustains damage, if made with intent to deceive.

Sufficiency of declarations for false affirmations.

Cited in Pollak v. Dodge Mfg. Co. 78 Misc. 350, 138 N. Y. Supp. 429; Graves v. Horton, 132 Ga. 786, 26 L.R.A.(N.S.) 545, 65 S. E. 112, holding that complaint in action for deceit must allege intention to defraud; Young v. Vickers, 32 U. C. Q. B. 385; McKay v. Campbell, 8 N. S. 475, holding the declaration in an action for deceit alleging that the representations were made falsely and fraudulently was sufficient although it did not allege that defendant knew the representations made by him were false; Silver v. Kendrick, 2 N. H. 160, on the sufficiency of declarations for false affirmations; Murray v. Bowring, N. F. (1884–96) 143, holding that in actions for deceit complaint must show facts constituting falsity of representation, knowledge of person making it, assertions known to be unfounded, and that representations were acted on to plaintiff's injury.

Variance in pleading.

Cited in Journey v. Hunt, 1 N. J. L. 235, 1 Am. Dec. 202, on effect of variance between the declaration and the proof.

Right of jury to judge of fraudulent intent.

Cited in Cole v. White, 26 Wend. 511, on right of jury to judge of fraudulent intent.

Measure of damages in action for fraud.

Cited in McAroy v. Wright, 25 Ind. 22, holding the measure of damages where a purchaser of tobacco was induced by fraudulent representations was the difference between the market value of the tobacco ordered and that of the tobacco

delivered; Buschman v. Codd, 52 Md. 202, on the measure of damages recoverable in an action for deceit; Mayne v. Griswold, 3 Sandf. 463, on the measure of damages recoverable in an action for fraud; Graham v. Roder, 5 Tex. 141, on the measure of damages where an element of fraud enters into the controversy.

Objections to remedy or power to grant relief.

Cited in Baker v. Biddle, Baldw. 394, Fed. Cas. No. 764, on the time and mode of objecting to jurisdiction of remedy.

Actionable wrong.

Cited in Bristol Mfg. Co. v. Gridley, 28 Conn. 201, holding that whenever there is clear violation of right, it is not necessary, in action therefor, to show actual damages; Aldridge v. Stuyvesant, 1 Hall, 235, holding an action lies in favor of a landlord against a person who wrongfully and maliciously disturbs his tenants that they abandon the premises to his injury; Hammond v. Hussey, 51 N. H. 40, 12 Am. Rep. 41, on wrongful act resulting in an injury as grounds for a cause of action; Swain v. Johnson, 151 N. C. 93, 28 L.R.A.(N.S.) 615, 65 S. E. 619, holding that no action lies against one inducing vendor to break contract, unless vendor so acted though deception; Read v. Friendly Soc. [1902] 2 K. B. 732, 1 B. R. C. 503, 71 L. J. K. B. N. S. 994, 51 Week. Rep. 115, 87 L. T. N. S. 493, 19 Times L. R. 20, 66 J. P. 822, holding that one who has been deprived of position as apprentice by workman's society, by threats against his employer is entitled to damages against society.

Cited in notes in 21 L.R.A. 234, on liability for inducing breach of contract; 1 E. R. C. 527, on right of action arising from every injury; 25 E. R. C. 214, on infringement of trademark.

Cited in 1 Thompson, Neg. 760, on liability for vending article inherently dangerous.

Novel remedies or rights.

Cited in Beardsley v. Copeland, 8 N. B. 458, holding novelty of the facts no objection to administration of proper and known remedies; People v. Richards, 67 Cal. 412, 56 Am. Rep. 716, 7 Pac. 828, 6 Am. Crim. Rep. 112, on the failure to discover a precedent in which the principle was applied as being of little weight; Ewins v. Calhoun, 7 Vt. 79; M'Farlane v. Moore, 1 Overt. 174, 3 Am. Dec. 752,—on it not being necessary that there be a precedent to support an action if it be supported by principal; Johnson v. Gordwood, 7 Misc. 651, 28 N. Y. Supp. 151; Caldwell v. Julian, 2 Mill, Const. 294; Allen v. Flood, 17 E. R. C. 285, [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258; Alexander v. Greene, 7 Hill, 533,—on the application of a principle recognized in law to a case only new in the instance; Hoard v. Peck, 56 Barb. 202, on it being no objection to an action that it is new if it is not new in principle; Re Niagara Election Case, 29 U. C. C. P. 261 (dissenting opinion), on right of court where case is only new in instance and not in principle, and only question is upon application of principle, to apply principle recognized by law.

Foundation of law.

Cited in Curtis v. Leavitt, 17 Barb. 309; Ex parte McClenachan, 2 Yeates, 502; Lacaze v. State, Addison (Pa.) 59; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179,—on common sense and honesty as the basis of law; Pawling v. Pawling, 4 Yeates, 220, to the point that all laws stand on best and broadest basis which go to enforce moral and social duties; Veazie v. Williams, 8 How. 134, 12 L. ed. 1018, on laws which go to enforce moral and social duties as standing on the best and broadest basis; Beck v. Railway Teamster Protective

Union, 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13, on the aim of the courts in the adjudication of causes brought before them.

Notice of title by inquiry.

Cited in McDonald v. McDonald, 38 N. S. 261, on how knowledge of title of realty is to be acquired.

Comyn as legal authority.

Cited in Jordan v. Boone, 5 Rich. L. 528, as making mention of the ability of Comyn as a lawyer.

Estoppel.

Cited in Concord v. Norton, 16 Fed. 477, on equitable estoppel as defense at law.

12 E. R. C. 250, DERRY v. PEEK, L. R. 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. N. S. 864, 61 L. T. N. S. 265, 1 Megone, 292, 38 Week. Rep. 33, reversing the decision of the Court of Appeal reported in L. R. 37 Ch. Div. 541, 57 L. J. Ch. N. S. 347, 59 L. T. N. S. 78, 36 Week. Rep. 899.

Elements of actionable deceit.

Cited in Du Bois v. Nugent, 69 N. J. Eq. 145, 60 Atl. 339; Taylor v. Thomas, 55 Misc. 411, 106 N. Y. Supp. 538; Kountze v. Kennedy, 147 N. Y. 124, 29 L.R.A. 360, 49 Am. St. Rep. 651, 41 N. E. 414; Haines v. Franklin, 44 W. N. C. 420, 15 Lanc. L. Rev. 209; Crockett v. Burleson, 60 W. Va. 252, 6 L.R.A.(N.S.) 263, 54 S. E. 3 ; Wagner v. National L. Ins. Co. 33 C. C. A. 121, 61 U. S. App. 691, 90 Fed. 395; Hindman v. First Nat. Bank, 57 L.R.A. 108, 50 C. C. A. 623, 112 Fed. 931; Kimber v. Young, 70 C. C. A. 178, 137 Fed. 744; Pittsburgh Life & T. Co. v. Northern Cent. L. Ins. Co. 140 Fed. 888; Pittsburgh Life & T. Co. v. Northern Cent. L. Ins. Co. 78 C. C. A. 408, 148 Fed. 674; Gold Medal Furniture Mfg. Co. v. Lumbers, 26 Ont. App. Rep. 78 (affirming 20 Ont. Rep. 75); Steele v. Pritchard, 17 Manitoba L. Rep. 226; Fraser v. McLanders, 25 N. S. 542; Sachleben v. Heintze, 117 Mo. 520, 24 S. W. 54,—on the elements essential to the maintenance of an action for deceit; Goodwin v. Massachusetts Loan & T. Co. 152 Mass. 189, 25 N. E. 100; Nash v. Minnesota Title Ins. & T. Co. 159 Mass. 437, 34 N. E. 625; Donnelly v. Baltimore Trust & G. Co. 102 Md. 1, 61 Atl. 301,—on false representations sufficient to the maintenance of an action of deceit; Haines v. Franklin, 87 Fed. 139, on when an action of deceit is maintainable; Fraser River Min. & Dredging Co. v. Gallagher, 5 B. C. 82; Goold v. Gillies, 40 Can. S. C. 437,—on when false representations are actionable; Comstock v. Livingston, 210 Mass. 581, 97 N. E. 106, to the point that question raised in action as to whether release was induced by fraud does not make action one for deceit; O'Brien v. American Bridge Co. 110 Minn. 364, 32 L.R.A.(N.S.) 980, 136 Am. St. Rep. 503, 125 N. W. 1012, to the point that action for deceit rests upon fraudulent and not merely negligent misrepresentations; Seilert v. McAnally, 223 Mo. 505, 135 Am. St. Rep. 522, 122 S. W. 1064, to the point that fraud without damage or damage without fraud, does not give rise to cause of action; Conway Nat. Bank v. Pease, 76 N. H. 319, 82 Atl. 1068, holding that maintenance of silence, under circumstances calculated to mislead, may be found to be active intervention; Thompson v. Court Harmony, No. 7045, A. O. H. 21 Ont. L. Rep. 303, holding that "legal fraud" does not exist in sense distinguishing it from dishonesty or moral wrong doing; Hart-Parr Co. v. Eberle, 3 Sask. L. R. 386 (affirming 3 Sask. L. R. 34), holding that representations by agent which induce party to sign agreement more onerous than original, will if false entitle party so signing to relief.

Cited in notes in 46 L.R.A. 36, on right of servant to recover damages from

third persons for injuries in performance of duties; 7 L.R.A.(N.S.) 646, 648,— on American views of case of Derry v. Peek; 12 E. R. C. 291, 293, on what constitutes fraud and liability therefor; 19 E. R. C. 98, on liability to licensee for injury by defective or dangerous premises; 19 E. R. C. 507, on rights of person induced to enter partnership by misrepresentations; 25 Eng. Rul. Cas. 214, on infringement of trademark.

Cited in Benjamin, Sales, 5th ed. 476, on elements essential to action of deceit against seller of goods; Benjamin, Sales, 5th ed. 559, on effect of misrepresentations by seller of goods; 2 Mechem, Sales, 736, on necessity that representation be made to be acted on by the other party; 1 Page, Contr. 98, on definition and nature of fraud.

The decision of the Court of Appeal was cited in Hindman v. First Nat. Bank, 48 L.R.A. 210, 39 C. C. A. 1, 98 Fed. 562, to the point that fraud without damage gives no cause of action; Colton v. Stanford, 82 Cal. 351, 16 Am. St. Rep. 137, 23 Pac. 16, holding that misrepresentation not acted upon cannot be basis of action for deceit; Huckel v. Prettyman, 18 Pa. Dist. R. 275, holding that one who has been fraudulently induced to make exchange of properties may rescind and recover what he has parted with, or bring action for deceit; Ramey v. Meisner, 33 N. S. 339, on facts essential to be proven in action for deceit.

— Knowledge and intent.

Cited in Slater Trust Co. v. Gardiner, 183 Fed. 268, holding that person may be liable for false words, even when he believes them to be true; Serrano v. Miller & T. Commission Co. 117 Mo. App. 185, 93 S. W. 810, holding to sustain an action for deceit, scienter must be established; Adams v. Barber, 157 Mo. App. 370, 139 S. W. 489; Lovelace v. Suter, 93 Mo. App. 429, 67 S. W. 737; Ray County Sav. Bank v. Hutton, 224 Mo. 42, 123 S. W. 47,—holding that in action for fraud and deceit, scienter is an indispensable element; Spead v. Tomlinson, 73 N. H. 46, 68 L.R.A. 432, 59 Atl. 376, holding in an action for deceit proof must be made that the representation was not only false but made with fraudulent intent; Enright v. Fellheimer, 25 Misc. 664, 56 N. Y. Supp. 366, holding proof of an actual intent to defraud is necessary in an action to recover a chattel on grounds of fraud; Hartford L. Ins. Co. v. Hope, 40 Ind. App. 354, 81 N. E. 595; Farrell v. Portland Rolling Mills Co. 3 N. B. Eq. Rep. 508; Watson v. Jones, 41 Fla. 241, 25 So. 678,—on proof of fraud as necessary to the maintenance of an action for deceit; Brady v. Evans, 24 C. C. A. 236, 47 U. S. App. 416, 78 Fed. 558; Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co. 38 L.R.A. 70, 19 C. C. A. 316, 43 U. S. App. 75, 73 Fed. 653,—on necessity that actual bad faith be shown in an action of deceit; Shackett v. Bickford, 74 N. H. 57, 7 L.R.A. (N.S.) 646, 124 Am. St. Rep. 933, 65 Atl. 252; holding a suspicion by a seller that his representations as to the quality of the thing sold is false is sufficiently fraudulent to maintain an action for deceit; Tarault v. Seip, 158 N. C. 363, 74 S. E. 31, holding that actions for fraud and deceit rest in intention with which representation is made, and not on representations alone; Gold Medal Furniture Mfg. Co. v. Lumbers, 29 Ont. Rep. 75; Davis v. Burt, 3 Sask. L. R. 446,— holding that where defendant had honest belief in truth of statements which proved to be false, action for deceit does not lie; Gillis Supply Co. v. Chicago, M. & P. S. R. Co. 16 B. C. 254; Wolfson v. Oldfield, 2 D. L. R. 110; Kinsman v. Kinsman, 5 D. L. R. 871,—holding that fraudulent intent must be proved in action for deceit; Doyle v. Smith, 40 N. S. 157, holding an action of deceit for false representations involving the declaration of a dividend might be maintained if the representation was false and made with intent

that it should be acted upon and was so acted upon; Bank of Ottawa v. Harty, 12 Ont. L. Rep. 218, holding an action of deceit could not be maintained where the misrepresentations were made honestly and in good faith; Bank of Atchison County v. Byers, 139 Mo. 627, 41 S. W. 325; Montreal River Lumber Co. v Mihills, 80 Wis. 540, 50 N. W. 507; Clark v. Bellamy, 27 Ont. App. Rep. 435; Nash v. Minnesota Title Ins. & T. Co. 163 Mass. 574, 28 L.R.A. 753, 47 Am. St. Rep. 489, 40 N. E. 1039,—on nature of proof necessary to establish a charge of an actionable and fraudulent representation.

Cited in Benjamin, Sales, 5th ed. 474, 475, on unimportance of motive of seller making misrepresentations to purchaser; 2 Cooley, Torts, 3d ed. 958, on effect of wrongdoer's knowledge of falsity of representations made by him; 2 Mechem, Sales, 716, on innocent misrepresentation by seller as ground for avoiding sale; 2 Mechem, Sales, 732, 733, on seller's knowledge of falsity of representation or lack of belief in its truth as essential to purchaser's right to avoid contract; 1 Page, Contr. 181, on effect of knowledge of falsity of representations by other party to contract; Pomeroy, Spec. Perf. 2d ed. 296, on knowledge or belief of party making false statements which will prevent specific enforcement of contract; Tiffany, Ag. 296, on effect of principal's knowledge on his liability for fraud of agent not for benefit of former.

— Affirmations of fact without knowledge.

Cited in Cunningham v. C. R. Pease House Furnishing Co. 74 N. H. 435, 20 L.R.A.(N.S.) 236, 124 Am. St. Rep. 979, 69 Atl. 120, holding an action for deceit may be maintained where the seller makes representations as to the quality of the thing sold without knowing whether such representations are true or not; White v. Sage, 19 Ont. App. Rep. 135, holding an action for deceit was not maintainable where it was found that the representations were not made fraudulently although made without knowing whether they were true or false; McCullough v. Defehr, 2 Sask. L. R. 303, holding that if it is shown that representations on sale of goods made by agent was untrue and that agent had no ground for believing them to be true court may infer that it was fraudulently made; Easton v. Sinclair, 3 D. L. R. 652, holding that representations as to property which are untrue and made recklessly may be sufficient to entitle party acting upon them to relief.

Distinguished in Farrel v. National Shoe & Leather Bank, 43 Fed. 123, holding an action of deceit would not lie where the misrepresentation was a mistake of law upon a state of facts imperfectly understood.

— Particular kinds of misstatements.

Cited in Cahill v. Applegarth, 98 Md. 493, 56 Atl. 794, holding a false statement as to a fact ascertainable upon inquiry does not constitute such fraud as will support an action of deceit; Beare v. Wright, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632, 8 Ann. Cas. 1057, holding misrepresentations as to the price paid for property, in the absence of fiduciary relations or contract does not constitute actionable deceit; Browning v. National Capital Bank, 13 App. D. C. 1, holding that one who writes to bank stating that intending borrower is worth stated amount in real property, but does not mention that such borrower is indebted largely to writer, is liable to bank in action for deceit.

Cited in notes in 34 L.R.A.(N.S.) 534, on liability of one assuming without authority to contract as agent; 35 L.R.A.(N.S.) 263, on effect of sale with particular description of kind or quality; 35 L.R.A. 431, on expression of opinion as fraud.

The decision of the Court of Appeal was cited in Chatham Furnace Co. v. Mof-

fatt, 147 Mass. 403, 9 Am. St. Rep. 727, 18 N. E. 168, 16 Mor. Min. Rep. 103, holding that one who represents richness of mine to induce another to purchase it, may be found liable for false representations although he believed his statement true.

False corporation statements.

Cited in Hunnewell v. Duxbury, 154 Mass. 286, 13 L.R.A. 733, 28 N. E. 267, holding a person induced by misstatements contained in a certificate filed with the commissioner of corporations, to take promissory notes of the corporation cannot maintain an action of deceit against its officers.

Cited in notes in 7 E. R. C. 521, on necessity, on formation of corporation, of disclosure of all contracts to which a promoter, director, or trustee is a party; 7 E. R. C. 560, 561, on right of purchaser of shares from original allottee to maintain action for misrepresentations in prospectus of corporation.

The decision of the Court of Appeals was cited in Prescott v. Haughey, 65 Fed. 653, holding that directors of national bank who use official station to make false representations are personally liable to one deceived in action for deceit; Cox v. National Coal & Oil Invest. Co. 61 W. Va. 291, 56 S. E. 494, holding that prospectus, falsely stating condition of company, will, if seen and acted upon by subscriber, afford ground for avoiding contract of subscription; Gould v. Gillies, 42 N. S. 28, holding that representation that shares were treasury stock was material and sufficient to avoid transaction, where stock was in fact property of one making representations; Temperance Colonization Co. v. Fairfield, 16 Ont. Rep. 544, holding that false advertisement inducing person to purchase land entitles him to have contract rescinded.

"False" actions or representations.

Cited in Ratterman v. Ingalls, 48 Ohio St. 468, 28 N. E. 168, holding in order to make a return by a tax payer a "false return" it must appear that there was at least culpable negligence if not a design to mislead or deceive.

Measure of damages in action for fraud or deceit.

Cited in Sigafus v. Porter, 179 U. S. 116, 45 L. ed. 113, 21 Sup. Ct. Rep. 34, holding that measure of damages in action for deceit in sale of property is actual loss and not expected fruits of unrealized speculation; George v. Hesse, 100 Tex. 44, 8 L.R.A.(N.S.) 804, 123 Am. St. Rep. 772, 93 S. W. 107, 15 Ann. Cas. 456, holding the measure of damages in an action for fraudulent representations as to the value of property received in exchange for other property was the difference between the value of the property received and that given in exchange; Wolley v. Lowenberg, 3 B. C. 416, holding the measure of damages in an action for deceit where misrepresentations induced plaintiff to make a loan was the loss occurring on the loan; Rosen v. Lindsay, 17 Manitoba L. Rep. 251, holding the measure of damages recoverable in an action of deceit for false representations is the difference between the price paid for the thing purchased and its real value.

The decision of the Court of Appeal was cited in McHose v. Earnshaw, 5 C. C. A. 210, 3 U. S. App. 545, 55 Fed. 584, holding that measure of damages for fraud in inducing sale of ore was difference between contract price of ore and its value at time in market, unaffected by false representations; Walker v. Walbridge, 68 C. C. A. 569, 136 Fed. 19 (dissenting opinion), on measure of damages upon exchange of property where party is induced by false representations to make exchange; Redding v. Godwin, 44 Minn. 355, 46 N. W. 563, holding that in action for deceit as to condition of corporation, measure of damages because of purchase of its stock is difference between value of stock and price

paid for it; Wallace v. Hallowell, 56 Minn. 501, 58 N. W. 292, holding that measure of damages for inducing, by false representations, exchange of notes is difference between face value of plaintiff's notes and value of defendant's notes at date of exchange; Johnstone v. Hall, 10 Manitoba L. Rep. 161, holding that measure of damages in action based on false representations whereby plaintiff was induced to lease farm, is difference between price paid and actual value to plaintiff at time of contract: Weatherbe v. Whitney, 30 N. S. 49, holding that measure of damages is difference between amount paid for stock and its real value at time purchase was made where purchase is induced by fraud; Syndicate Lyonnais Du Klondyke v. McGrade, 36 Can. S. C. 279, holding that measure of damages in an actual loss sustained by relying upon misrepresentations in respect to mining location purchased; Lamont v. Wenger, 22 Ont. L. Rep. 642, holding that measure of damages in action where plaintiff was induced by fraud to purchase creamery, is difference between purchase price and actual value of creamery at time purchased.

— Subsequent facts as evidence.

Cited in Whiting v. Price, 172 Mass. 240, 70 Am. St. Rep. 262, 51 N. E. 1084, as not affecting the decision of the Court of Appeal that subsequent events might be taken into account in arriving at the value of property at the time of purchase.

The decision of the Court of Appeals was cited in San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571, holding that board of supervisors when regulating water rates may take into consideration, price at which plant sold at foreclosure sale, in fixing value, on which company is entitled to fair return; Rivinus v. Langford, 33 L.R.A. 250, 21 C. C. A. 581, 45 U. S. App. 79, 75 Fed. 959, holding that actual value of chattel at time of conversion may be shown by evidence of its value prior or subsequent to conversion when such chattels have no market value.

Distinction between action for deceit and right of action for rescission of contract for fraudulent representations.

Cited in Budd v. McLaughlin, 10 Manitoba L. Rep. 75; Provident Sav. Life Assur. Soc. v. Hadley, 43 C. C. A. 25, 102 Fed. 856,— as pointing out a distinction between the right to maintain an action for deceit for fraud and an action for the rescission of a contract for false representations.

Rescission of contract for fraud.

Cited in Joslyn v. Cadillac Automobile Co. 101 C. C. A. 77, 177 Fed. 863, holding that material misrepresentations, though without knowledge of their falsity on part of vendor, may give right to rescission of contract of sale: Robinson v. Welty, 40 W. Va. 385, 22 S. E. 73, holding a contract induced by misrepresentations might be rescinded for fraud although honestly made; Pope v. Cole, 6 B. C. 205, holding a vendee may recover the purchase price of land where the vendor who stated he was the owner of a mineral claim had no title and although the representation was made in good faith: Fromer v. Stanley, 95 Wis. 56, 69 N. W. 820; Adams v. Reed, 11 Utah, 480, 40 Pac. 720,—on false representations when grounds for the rescission of a contract for fraud: Northrup Min. Co. v. Dimock, 27 N. S. 112, holding that where misrepresentation has been proved party deceived is entitled to rescission of contract, or to be reimbursed money so obtained; Wolfe v. McArthur, 18 Manitoba L. Rep. 30, holding that misrepresentation by vendor's agent, without knowledge of vendor, as to locality of land sold, although innocently made, is ground for rescission.

Cited in note in 6 Eng. Rul. Cas. 754, on misrepresentation as ground for rescission of contract.

Cited in 1 Beach, Contr. 990, on rescission of contract for fraudulent representations; Benjamin, Sales, 5th ed. 438, 442, on misrepresentation as ground for avoiding contract of sale; Benjamin, Sales, 5th ed. 446–448, on fraud as ground for rescinding contract of sale; 2 Mechem, Sales, 791, on misrepresentations concerning quality authorizing purchaser to avoid sale.

The decision of the Court of Appeals was cited in Watson Mfg. Co. v. Stock, 6 Manitoba L. Rep. 146, holding that if representation was untrue, and made recklessly, and without reasonable ground for belief in its truth, contract might be rescinded.

Right of jury to try question of reasonableness of belief.

Distinguished in Towles v. United States, 19 App. D. C. 471, holding in a prosecution for forgery it is a question for the jury whether the defendant had reasonable grounds for believing that he might alter the instrument.

Estoppel.

Cited in notes in 11 E. R. C. 93, 95, on estoppel by conduct; 12 Eng. Rul. Cas. 314, on estoppel to claim title by fraudulent failure to disclose same.

12 E. R. C. 298. BARWICK v. ENGLISH JOINT STOCK BANK, 36 L. J. Exch. N. S. 147, L. R. 2 Exch. 259, 16 L. T. N. S. 461, 15 Week. Rep. 877.

Fraud of agent as imputable to principal.

Cited in Wilson v. Hotchkiss, 2 Ont. L. Rep. 261; Hornblower v. Grandall, 7 Mo. App. 220,—holding persons engaging in a joint undertaking are liable for fraudulent representations by the managers of the business to induce subscriptions to stock; Davies v. Lyon, 36 Minn. 427, 31 N. W. 688, holding a principal was liable for the fraud of an agent in the sale of a lot on showing the purchaser a different lot than the one purchased; Indianapolis, P. & C. R. Co. v. Tyng, 63 N. Y. 653, holding a principal was liable for the fraudulent representations by which his agent induced another to purchase property; Friedlander v. Texas & P. R. Co. 130 U. S. 416, 32 L. ed. 991, 9 Sup. Ct. Rep. 570, holding a railroad company was not liable to the purchaser of a bill of lading fraudulently issued by a station agent without receiving the goods named in it for transportation; Oliver v. Great Western R. Co. 28 U. C. C. P. 143; Erb v. Great Western R. Co. 3 Ont. App. Rep. 446 (affirming 42 U. C. Q. B. 90),—holding the defendant corporation was not liable for the acts of its agent in giving receipts for goods never received; Robertson v. Furness, 43 U. C. Q. B. 143, holding a wife was bound by the fraud of her husband while acting as her agent in procuring a note to be made to her; Molsons' Bank v. Brockville, 31 U. C. C. P. 174, holding a municipal corporation might be held liable for the fraudulent act of one of its officers acting within the scope of his authority; Sheppard Pub. Co. v. Press Pub. Co. 10 Ont. L. Rep. 243, holding an employer was liable for the false representations made by an employee while obtaining orders; Ruben v. Great Fingall Consolidated [1904] 2 K. B. 712, 73 L. J. K. B. N. S. 872, 53 Week. Rep. 100, 91 L. T. N. S. 619, 20 Times L. R. 720, holding a corporation was not estopped from disputing the validity of certificates fraudulently issued by the secretary, nothing appearing that he was acting within the scope of his employment; Swift v. Jewsbury, L. R. 9 Q. B. 301, 43 L. J. Q. B. N. S. 56, 38 L. T. N. S. 31, 22 Week. Rep. 319 (reversing in part L. R. 8 Q. B. 244), holding a corporation was liable for false information given by its manager in the course of his employment; Swire v. Francis, L. R. 3 App. Cas. 106, 47 L. J. P. C. N. S.

18, 37 L. T. N. S. 554, holding a corporation was liable for the fraudulent acts of agent in the course of business by which he obtains money from plaintiffs which he converted to his own use; British Mut. Bkg. Co. v. Charnwood Forest R. Co. L. R. 18 Q. B. Div. 714, 56 L. J. Q. B. N. S. 449, 57 L. T. N. S. 833, 35 Week. Rep. 590, 52 J. P. 150, holding a corporation was not liable for representations made by the secretary for his own benefit; Keen v. James, 39 N. J. Eq. 527, 51 Am. Rep. 29; Trankla v. McLean, 18 Misc. 221, 41 N. Y. Supp. 385; History Co. v. Flint, 4 Tex. App. Civ. Cas. (Willson) 364, 15 S. W. 912; Benson v. Ottawa Agri. Ins. Co. 42 U. C. Q. B. 282 (dissenting opinion); Moore v. Ontario Invest. Asso. 16 Ont. Rep. 269; McKay v. Commercial Bank, 14 N. B. 1; Gould v. Gillies, 42 N. S. 28; Cameron v. Maclennan, Hodg. Ont. Elect. 671; Weir v. Bell, L. R. 3 Exch. Div. 238, 26 Week. Rep. 746, 47 L. J. Exch. N. S. 704, 38 L. T. N. S. 929; Ex parte Adamson, L. R. 8 Ch. Div. 817, 48 L. J. Bankr. N. S. 106, 38 L. T. N. S. 920, 26 Week. Rep. 892; Houldsworth v. City of Glasgow Bank, L. R. 5 App. Cas. 317, 42 L. T. N. S. 194, 28 Week. Rep. 677; Cooley v. Perrine, 41 N. J. L. 322, 32 Am. Rep. 210,—on fraud of agent in the course of his employment as being imputable to principal; Dun v. City Nat. Bank, 23 L.R.A. 687, 7 C. C. A. 152, 14 U. S. App. 695, 58 Fed. 174 (reversing 51 Fed. 160), holding mercantile agency not liable for loss to subscriber by wilful and fraudulent act of subagent in furnishing false information; Shaw v. Mutual L. Ins. Co. 23 Ont. L. Rep. 559, on right of principal to retain forfeit made by fraud of agent; Whitechurch v. Cavanagh, 71 L. J. K. B. N. S. 400 [1902] A. C. 117, 85 L. T. N. S. 349, 50 Week. Rep. 218, 17 Times L. R. 746, holding a corporation was not estopped from setting up the true facts where secretary issued receipt for certificates which had not been lodged.

Cited in Benjamin, Sales, 5th ed. 477, on liability of seller for innocent misrepresentations by agent; Benjamin, Sales, 5th ed. 481, on remedy of buyer who has been defrauded by seller's agent; Tiffany, Ag. 283, 284, 286, on liability of principal for deceit of agent.

— Unknown or unauthorized fraud.

Cited in Nichols v. Bruns, 5 Dak. 28, 37 N. W. 752, holding a principal could not be held liable for the fraud of an unauthorized agent by accepting the benefits without knowledge of the fraud; Keast v. Elder, 7 Luzerne Leg. Reg. 229, holding principal liable for unknown fraud of agent.

Cited in Tiffany, Ag. 296, on effect of principal's knowledge on his liability for fraud of agent not for benefit of former.

— Of bank officer to bank.

Cited in Binghampton Trust Co. v. Auten, 68 Ark. 299, 82 Am. St. Rep. 295, 57 S. W. 1105, holding a bank liable for the fraud of its president committed in the course of business although the directors were unaware of the fraud; Richards v. Bank of Nova Scotia, 26 Can. S. C. 381, holding a bank was not liable for the acts of its manager in inducing the drawer of a draft to accept by representing that certain goods of his own were held by the bank as security for the draft; McKay v. Commercial Bank, 14 N. B. 1 (dissenting opinion), on liability of principal for false representations made by agent; Mackay v. Commercial Bank, L. R. 5 P. C. 394, 43 L. J. P. C. N. S. 31, 30 L. T. N. S. 180, 22 Week. Rep. 473, holding a bank was liable for fraudulent representations by an officer of the bank whereby he induced plaintiff to accept a bill of the banks.

Cited in 1 Bolles, Banking, 341, on modes in which bank officer may exceed his authority; 1 Bolles, Banking, 349, on binding effect on bank of declarations or

information of officers; 1 Bolles, Banking, 377, on liability of bank for officer's torts.

Distinguished in Moores v. Citizens' Nat. Bank, 111 U. S. 156, 28 L. ed. 385, 4 Sup. Ct. Rep. 345, holding a bank was not liable for a fraudulent transfer of stock of bank by its cashier as security for a loan to himself where the bank received no benefit from the transaction.

Principal as bound by acts of agent.

Cited in Ray v. Bank of Kentucky, 10 Bush, 344; Pittsburgh, C. C. & St. L. R. Co. v. Adams, 25 Ind. App. 164, 56 N. E. 101,—holding that when master has put agent in his place to do certain class of acts, he is answerable for manner in which agent has conducted himself in doing business which was act of master to place him in; Penas v. Chicago, M. & St. P. R. Co. 112 Minn. 203, 30 L.R.A.(N.S.) 627, 140 Am. St. Rep. 470, 127 N. W. 926, to the point that master is sometimes properly regarded as causa causans of mischief of servant; Huttig Sash & Door Co. v. Gitchell, 69 Mo. App. 115, holding a principal receiving the benefits of a transaction made by their agent were estopped to deny his authority to make it; Och v. Missouri, K. & T. R. Co. 130 Mo. 27, 36 L.R.A. 442, 31 S. W. 962, on principal seeking to take advantage of acts of agent as also being bound by such acts; Ploof v. Putnam, 83 Vt. 252, 26 L.R.A. (N.S.) 251, 138 Am. St. Rep. 1085, 75 Atl. 277, holding that master is liable for tort of servant committed while in performance of his duties; Erb v. Great Western R. Co. 42 U. C. Q. B. 90, holding that defendant was not liable to one advancing money on bill of lading issued by agent of defendant without having received goods; Taff Vale R. Co. v. Amalgamated Soc. [1901] A. C. 426, 1 B. R. C. 832, 70 L. J. K. B. N. S. 905, 65 J. P. 596, 50 Week. Rep. 44, 85 L. T. N. S. 147, 17 Times L. R. 698, on liability of principal for acts of agent in doing business intrusted to him by principal; Tattersall v. People's L. Ins. Co. 9 Ont. L. Rep. 611, on acts of agents as when binding upon principal; New South Wales Country Press Co-op. Co. v. Stewart, 12 C. L. R. (Austr.) 481, holding principal not liable for slander by agent without scope of his authority.

Cited in note in 2 E. R. C. 364, on presumption of agent's authority to act.

Cited in Tiffany, Ag. 269, on liability of master for tort of servant.

—Bank by officer's representations as to persons credit.

Cited in Taylor v. Commercial Bank, 174 N. Y. 181, 62 L.R.A. 783, 95 Am. St. Rep. 564, 66 N. E. 726, holding a bank was not bound by representations of its cashier as to the solvency of customers.

Liability of principal for wrongful or malicious act of agent.

Cited in Merchants Nat. Bank v. Guilmartin, 88 Ga. 797, 17 L.R.A. 322, 15 S. E. 831, holding a bank was not liable where the cashier fraudulently appropriates a deposit placed with the bank for gratuitous safekeeping, where no lack of diligence in his selection was shown; Savannah Electric Co. v. Wheeler, 128 Ga. 550, 10 L.R.A.(N.S.) 1176, 58 S. E. 38, holding a street railway company was liable for damages where a passer by on the street was killed by a bullet fired by a conductor at a passenger while he was in a drunken state of which the company was aware; Reed v. Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468, holding an action for a malicious prosecution would lie against a savings bank; Evans v. Davidson, 53 Md. 245, 36 Am. Rep. 400, holding defendant was liable where his servant in driving plaintiff's cow from the fields negligently killed her; The State of Missouri, 22 C. C. A. 239, 46 U. S. Ap. 245, 76 Fed. 376, holding owners of a ship were liable for the wrongful act of the master of the vessel in detaining plaintiffs to remain on board and ren-

der services after the expiration of his contract of employment; Wallace v. Casey Co. 132 App. Div. 35, 116 N. Y. Supp. 394, holding that mother's negligence in allowing three-year-old child to wander unattended six blocks from home, may be imputed to child; Harris v. Brunette Saw Mill Co. 3 B. C. 172, holding defendants were liable where their employees in the course of their employment trespassed on plaintiff's land cutting and appropriating his timber knowingly; Owen v. Dingwald, 3 Sask. L. R. 328, holding that master is liable for negligence of servant in permitting fire to escape from stable land to plaintiff's property; Vulcan Iron Works v. Winnipeg Lodge, 21 Manitoba L. Rep. 473, holding that to create liability against lodge for acts of members it must be shown that illegal acts were performed by individuals while acting under orders of lodge; Bolingbroke v. Swindon New Town Local Board, L. R. 9 C. P. 575, 43 L. J. C. P. N. S. 287, 30 L. T. N. S. 723, 23 Week. Rep. 47; Adams v. National Electric Tramway & Lighting Co. 3 B. C. 199,—holding a corporation liable for a trespass committed by its servant while engaged in its business; Cranstoun v. Bird, 4 B. C. 569, holding the owner of a boat was liable for the unlawful detaining and carrying away of a person where his agent sold a ticket for that purpose; Hamlyn v. Houston & Co. [1903] 1 K. B. 81, 87 L. T. N. S. 500, 51 Week. Rep. 99, 72 L. J. K. B. N. S. 72, 19 Times L. R. 66, holding the members of a firm were liable for the act of one of the partners in bribing the clerk of another firm to disclose business secrets; Giblam v. National Amalgamated Labourers' Union, 72 L. J. K. B. N. S. 907 [1903] 2 K. B. 600, 1 B. R. C. 528, 89 L. T. N. S. 386, 19 Times L. R. 708, holding a trade union was liable for the wrongful acts of its officers in combining to prevent a former member of the union from obtaining employment; Citizen's Life Assur. Co. v. Brown [1904] A. C. 423, 73 L. J. P. C. N. S. 102, 90 L. T. N. S. 739, 20 Times L. R. 497, 53 Week. Rep. 176, holding a corporation liable for a malicious libel published by its servant in the course of his employment; The Thetis, L. R. 2 Adm. & Eccl. 365, 38 L. J. Prob. N. S. 42, 22 L. T. N. S. 276, holding the owners of a ship were liable for the negligence of the master which caused the sinking of a disabled ship he was towing into port; Chapleo v. Brunswick Ben. Bldg. Soc. L. R. 5 C. P. Div. 331, 6 Q. B. Div. 696, 50 L. J. Q. B. N. S. 372, 44 L. T. N. S. 449, 29 Week. Rep. 529, 2 Eng. Rul. Cas. 366, holding a corporation was liable where the agent borrowed in excess of the prescribed limit and appropriated to his own use; Bowler v. O'Connell, 162 Mass. 319, 27 L.R.A. 173, 44 Am. St. Rep. 359, 38 N. E. 498; Hartman v. Muehlebach, 64 Mo. App. 565; Ephland v. Missouri P. R. Co. 71 Mo. App. 597 (dissenting opinion); Brokaw v. New Jersey R. & Transp. Co. 32 N. J. L. 328, 90 Am. Dec. 659; Fishkill Sav. Inst. v. National Bank, 80 N. Y. 162, 36 Am. Rep. 595; Gilpin v. Royal Canadian Bank, 26 U. C. Q. B. 445; Emerson v. Niagara Nav. Co. 2 Ont. Rep. 528 (dissenting opinion); Gibbons v. Wilson, 17 Ont. Rep. 290; Bank of Nova Scotia v. Fish, 32 N. B. 434; Courtnay v. Canadian Development Co. 8 B. C. 53; Burmah Trading Corp. v. Mirza Mahomed Alley Sherazee, L. R. 5 Ind. App. 135,—on liability for act of agent; Hindman v. First Nat. Bank, 57 L.R.A. 108, 50 C. C. A. 623, 112 Fed. 931, on master as liable for the acts of agent done in the course of his employment.

Liability of corporation for its torts.

Cited in Hindman v. First Nat. Bank, 48 L.R.A. 210, 39 C. C. A. 1, 98 Fed. 562, holding a corporation may be held liable for false statements concerning the financial condition of one of its customers; Powers v. Massachusetts Homœopathic Hospital, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294, on the liability of

corporation for the torts of its servants; Peebles v. Patapsco Guano Co. 77 N. C. 233, 24 Am. Rep. 447, holding that corporation is liable for false and fraudulent representations made by its agents; Petrie v. Guelp Lumber Co. 11 Ont. App. Rep. 336, holding that action for deceit does not lie against director of company for representations made by him as to condition of corporation, when he believed such representations to be true.

Cited in 1 Cooley, Torts, 3d ed. 206, on liability of corporation for torts; Hollingsworth, Contr. 85, on incapacity of corporation to act except through an agent.

False guaranty as fraud.

Cited in McMaster v. King, 42 U. C. Q. B. 409, on concealment by guarantor of facts which would make it improbable that the guarantee would be said as rendering him liable in an action for fraud.

12 E. R. C. 309, SAVAGE v. FOSTER, 9 Mod. 35.

Deceit by married woman or infant.

Cited in Bright v. Boyd, 1 Story, 478, Fed. Cas. No. 1,875, to the point that infant is responsible for their fraudulent concealments and misrepresentations; Drake v. Glover, 30 Ala. 382, holding that if married woman is present at unauthorized sale of her separate personal property, by one professing to act as her trustee, her failure to object to sale will estop her from afterwards questioning its validity; Lowell v. Daniels, 2 Gray, 161, 61 Am. Dec. 448, holding that married woman, who executes warranty deed, bearing date previously to her marriage by her maiden name, with fraudulent purpose, does not estop herself to set up title against her grantee or purchaser from him; Ferguson v. Bobo, 54 Miss. 121, holding that female infant, nineteen years of age, who, knowing her rights, conveyed land to her father for purpose of enabling him to borrow money upon it, was estopped from claiming title to land as against one who advanced money to father; Cadwallader v. McClay, 37 Neb. 359, 40 Am. St. Rep. 496, 55 N. W. 1054, holding that infants are responsible for frauds committed by him as well as for torts; Spencer v. Carr, 45 N. Y. 406, 6 Am. Rep. 112, holding that infant who contrives and carries out fraud must answer for it; Smiley v. Wright, 2 Ohio, 506, holding that widow who is present at sale of land and assents that it may be sold free of dower and by reason of which price is increased, is estopped from claiming dower; Huey's Appeal, 1 Grant, Cas. 51, holding that where infant cognizant of her rights, stands by and permits innocent purchaser to buy her estate from another, is bound by sale; Kilgore v. Jordan, 17 Tex. 341, holding that fraudulent representations made by infant, are binding upon him; Engle v. Burns, 5 Call (Va.) 463, 2 Am. Dec. 593, holding that if widow does not renounce her husband's will, within one year after his death, she loses her distributive share of personal estate and is confined to provisions of will; Rose v. Anger, 22 Grant, Ch. (U. C.) 525, as to when married woman liable for; Re Shaver, 3 Ch. Chamb. Rep. (Can.) 379, holding one who urged a purchaser concealing his nonage and the fact of an inextinguishable entail was estopped.

Cited in note in 57 L.R.A. 685, on infant's liability for torts.

Cited in 1 Beach, Trusts, 27, on infants as trustees.

Distinguished in Morley v. Davison, 20 Grant, Ch. (U. C.) 94, holding promise by married woman to hold property in trust not such a misrepresentation as would bind her.

Estoppel by silence or nonclaim.

Cited in United States v. Baltimore & O. R. Co. 1 Hughes, 138, Fed. Cas. No.

14,510, holding that grantor of license to use land coupled with interest, is estopped from preventing use; Neslin v. Wells, F. & Co. 104 U. S. 428, 26 L. ed. 802, holding that under laws of Utah junior mortgage taken without notice of prior mortgage, and first recorded, is to be preferred to prior unrecorded mortgage; Barnes v. Starr, 64 Conn. 136, 28 Atl. 980, holding that parties to contract will not be permitted to act in bad faith towards other person who stands in such relation to either as to be affected by contract or its consequences; Ringgold's Case, 1 Bland, Ch. 5, holding that application for appeal must not be unreasonably delayed; Fay v. Valentine, 12 Pick. 40, 22 Am. Dec. 397, holding that where owner of equity of redemption encouraged defendant to purchase mortgage saying that he would not redeem, is estopped from claiming right to redeem where expensive improvements were made; Quirk v. Thomas, 6 Mich. 76, holding that rule of equitable estoppel by representation, is not confined to such as are made directly to parties acting upon them; Beatty v. Sweeney, 26 Mich. 217, holding that where one disclaims title to land and represents another to be owner, and encourages purchase from such other, is estopped from afterwards claiming to contrary as against purchaser from such person; Wilie v. Brooks, 45 Miss. 542, holding that if adult heir receives, by distribution, purchase money of land of ancestor, sold under void decree, he is estopped from asserting title; L'Amoureux v. Vandenburgh, 7 Paige, 316, 32 Am. Dec. 635, holding that one who has claim on land and induces another to buy land without disclosing lien is estopped from asserting claim as against purchaser; McGovern v. Knox, 21 Ohio St. 547, 8 Am. Rep. 80, holding that cestui que trust is not estopped from claiming title as against one, who attempts to subject it to lien for loan made to trustee for his personal benefit; Reily v. Miami Exporting Co. 5 Ohio, 333, holding that where several judgment creditors agree to contest priority of judgments as to proceeds of sale of land, and agree upon sale, no party to such agreement can proceed on his judgment after sale of land; Smith v. Brown, 1 Yeates, 513, holding that as between claimants of land under state of Virginia, certificate of commissioners is conclusive; Moon v. Hawks, 2 Aik. (Vt.) 390, 16 Am. Dec. 725, to the point that one who stands by and conceals his title, while another is making improvements upon it, will not be permitted to resume possession but on terms; Anderson v. South Vancouver, 45 Can. S. C. 425, Ann. Cas. 1912B, 632, holding that silence of landowner, while aware of fact that his land was sold for taxes, did not estop him from contesting validity of procedure.

Cited in 1 Beach, Contr. 223, on representations by one party for purpose of influencing the other as entitling to assistance of equity.

Distinguished in Gibson v. McArthur, 7 B. C. 59, holding mere silence not part of a line of conduct did not work an estoppel.

Partial execution of agreement within statute of frauds.

Cited in Jennings v. Robertson, 3 Grant, Ch. (U. C.) 513, holding where a person already in possession of property entered into a contract with the agent of the proprietor for the purchase of the property, and was the intention of both parties that the purchaser should go on making improvements, and did so with the knowledge of the agent, without objection on his part, the improvements are such an acting on the contract as will take the case out of the statute of frauds; Ham v. Goodrich, 33 N. H. 32, holding that possession of land is not such part performance, as will take verbal sale of land out of statute; Smith v. Finch, 8 Wis. 245, holding that purchaser by verbal contract, who is let into possession, may have specific performance of contract.

Cited in Browne, Stat. Frauds, 5th ed. 570, on effect of part performance of oral agreement; Browne, Stat. Frauds, 5th ed. 608, on expenditure of money in improving land as part performance of oral contract within statute of frauds.

12 E. R. C. 317, COCKSHOTT v. BENNETT, 1 Revised Rep. 617, 2 T. R. 763.

Agreements to discharge debt for less than due.

Cited in Pearson v. Thomason, 15 Ala. 700, 50 Am. Dec. 159, holding if a creditor agrees, with his debtor, to accept in discharge of the debt a less sum in money, than the debtor owes on an overdue note, and the latter pays the sum of money so agreed, but the note is not delivered up, it is a nudum pactum; Pope v. Tunstall, 2 Ark. 209, holding a plea alleging the payment of a less sum than due by a third person and acceptance of it by creditor in satisfaction, good; Blanchard v. Noyes, 3 N. H. 518, holding a plea simply alleging the payment and acceptance of a less sum of money in satisfaction of a larger sum is bad; Colburn v. Gould, 1 N. H. 279, holding if a creditor agree with his insolvent or embarrassed debtor that if he will procure the security of a friend for a certain part of the debt he will release the residue and the debtor performs the agreement, it constitutes a valid contract.

Composition agreement.

Cited in Moore v. Chesley, 17 N. H. 151, as to validity of such agreements; Williams v. Carrington, 1 Hilt. 515; Daniels v. Hatch, 21 N. J. L. 391, 47 Am. Dec. 169,—holding parol agreement by creditor to accept amount less than debt in satisfaction thereof where creditor has received security, as by an assignment, made on the faith of such agreement or other creditors had been induced to sign composition deed thereby, is binding.

Cited in notes in 20 L.R.A. 802, on composition arrangements; 16 E. R. C. 141, on waiver of lien by taking security.

— Collateral promise as fraud on agreement.

Cited in Clement's Appeal, 52 Conn. 464; Gillfillan v. Farrington, 12 Ill. App. 101; McFarland v. Garber, 10 Ind. 151; Cutter v. Reynolds, 8 B. Mon. 596; Frost v. Gage, 3 Allen, 560; Case v. Gerrish, 15 Pick. 49; Downs v. Lewis, 11 Cush. 76; Rice v. Maxwell, 13 Smedes & M. 289, 53 Am. Dec. 85; O'Shea v. Collier White Lead & Oil Co. 42 Mo. 397, 97 Am. Dec. 332; Trumball v. Tilton, 21 N. H. 128; Crossley v. Moore, 40 N. J. L. 27; Sharp v. Teese, 9 N. J. L. 352, 17 Am. Dec. 479; Browne v. Stackpole, 9 N. H. 478; Solinger v. Earle, 60 How. Pr. 116; Pinneo v. Higgins, 12 Abb. Pr. 334; Berry v. Yates, 24 Barb. 199; Weed v. Bentley, 6 Hill, 56; Breck v. Cole, 4 Sandf. 79; Russell v. Rogers, 15 Wend. 351; Russell v. Rogers, 10 Wend. 473, 25 Am. Dec. 574; Solinger v. Earle, 82 N. Y. 393; Gunn v. McAden, 37 N. C. (2 Ired. Eq.) 79; Hagen's Appeal, 11 W. N. C. 86; Patterson v. Boehm, 4 Pa. 507; Batchelder & L. Co. v. Whitmore, 58 C. C. A. 517, 122 Fed. 355; Re Chaplin, 115 Fed. 162; Bean v. Brookmire, 2 Dill. 108, Fed. Cas. No. 1,170; Fenner v. Dickey, 1 Flipp. 34, Fed. Cas. No. 4,729; Brigham v. La Banque Jacques-Cartier, 30 Can. S. C. 4291; M'Calmont v. Baillie, 6 N. B. 573; Gillard v. Pitts, Newfoundl. Rep. (1897–1903) 471; Ex parte Milner, L. R. 15 Q. B. Div. 605, 54 L. J. Q. B. N. S. 425, 53 L. T. N. S. 652, 33 Week. Rep. 867, 2 Morrell, 190,—holding secret agreement between insolvent debtor and creditor whereby latter was to receive unfair advantage over other creditors, invalid; Redford v. Weller, 27 S. D. 334, 131 N. W. 296, holding that creditor, who exacts security as condition of signing composition deed, is guilty of coercion; Tinker v. Hurst, 70 Mich. 159, 14 Am. St. Rep. 482, 38 N. W. 16, holding a note given by a discharged bankrupt to a

creditor for the balance of his claim not satisfied by composition proceedings, to which the creditor assented upon the agreement that such should not be executed which constituted the sole consideration, is fraudulent and void; Wiggin v. Bush, 12 Johns. 306, 7 Am. Dec. 324, holding a note executed by a debtor to a creditor to induce him to withdraw his opposition to the debtors obtaining his discharge under an insolvent law is void; Bank v. Fordyce, 9 Pa. 275, 49 Am. Dec. 561, as to court taking of a promissory note from compounding creditor being allowed to be set up by maker as fraud on other creditors; Fidelity & D. Co. v. Moshier, 151 Fed. 806; Howell v. Edgar, 4 Ill. 417; Cheveront v. Textor, 53 Md. 295; White Mountains R. Co. v. Eastman, 34 N. H. 124; Smith v. Dittrich, 8 U. C. Q. B. 589; Toussaint v. Thompson, 3 Manitoba L. Rep. 504; Samuel v. Fairgrieve, 21 Ont. App. Rep. 418,—as to composition giving secret preference to certain creditors being void; Brigham v. La Banque Jacques-Cartier, 30 Can. S. C. 429, 2 B. R. C. 449, holding that note given to secure preference payable under secret agreement as condition of signing composition agreement is void; Garneau v. Lariviere, Rap. Jud. Quebec, 1 C. S. 491, holding void, agreement by insolvent to pay one creditor, to obtain his consent to composition, more than the fixed dividend.

Cited in notes in 27 L.R.A. 37, on effect of giving creditor secret advantage in composition; 12 E. R. C. 326–329, on invalidity of bargain by which creditor on composition is to obtain larger payment than other creditors.

Cited in Benjamin, Sales, 5th ed. 495, on invalidity of secret agreements giving one creditor the advantage over others as inducement to sign composition in insolvency; Benjamin, Sales, 5th ed. 497, on invalidity of sale for purpose of disturbing equality among creditors.

Distinguished in Bank of Montreal v. Audette, 4 Quebec L. R. 254, holding that all creditors need not be in same condition, to extent of invalidating security given to one; Langley v. Van Allen, 32 Can. S. C. 174, holding where debtor was not insolvent composition giving certain creditors preference, valid.

— Effect of fraud.

Cited in Page v. Carter, 16 N. H. 254, 41 Am. Dec. 726, holding if a debtor, in order to secure the concurrence of a creditor to a composition, pay or secure to him a sum of money, he does not thereby vacate such composition nor forfeit the benefits which it purports to provide for him, in releasing him from claims of the several parties to the arrangement; Langley v. Van Allen, 3 Ont. L. Rep. 5, holding debtor may recover money paid in fraud of.

Fraudulent compositions or releases of creditors.

Cited in Clayton v. Johnson, 36 Ark. 406, 38 Am. Rep. 40; Skipwith v. Cunningham, 8 Leigh, 271, 31 Am. Dec. 642,—holding deed of trust for creditors valid although it provided for release.

Proof of fraud under general issue.

Cited in Huston v. Williams, 3 Blackf. 170, 25 Am. Dec. 84, holding to an action of debt on bond, the defendant may plead generally that the bond was obtained by fraud; Bierly v. Williams, 5 Leigh, 700, holding where fraud is intended to be set up as a defense it may be given in evidence under the general issue in assumpsit.

Fraud.

Cited in Barnett v. Spencer, 4 Blackf. 206, as example of contract invalid for being fraud upon third persons; Lapish v. Wells, 6 Me. 175, as to what constitutes.

Fraud as remediable in law or equity.

Cited in Mason v. Evans, 1 N. J. L. 182; Phillips v. Potter, 7 R. I. 289, 82 Am. Dec. 598,—as to the jurisdiction to suppress being concurrent.

Distinguished in Morrison v. Eaton, Tappan (Ohio) 173, holding fraud is not a defense at law to an action brought on a specialty.

Defense by party in fraud.

Cited in Smith v. Hubbs, 10 Me. 71, as to right of defendant to avoid contract by reason of fraud although a party to same.

Illegality of consideration as a defense.

Cited in McConaughy v. Farney, 2 Neb. (Unof.) 638, 89 N. W. 812, as to it being a good defense to action on contract.

Contracts of infants.

Cited in Terry v. McClintock, 41 Mich. 492, 2 N. W. 787, as to infants being morally bound to discharge their debts.

Ratification of contracts of infants after majority.

Cited in Stout v. Humphrey, 69 N. J. L. 436, 55 Atl. 281; Bell v. Shields, 19 N. J. L. 93; Goulding v. Davidson, 26 N. Y. 604; Harris v. Bledsoe, Peck (Tenn.) 234,—as to void act not being subject of confirmation; Fetrow v. Wiseman, 40 Ind. 148, as to what contracts may be ratified by infant; Conn v. Coburn, 7 N. H. 368, 26 Am. Dec. 746; Wright v. Steele, 2 N. H. 51,—holding a negotiable note, executed by an infant is not void so as to be incapable of ratification when infant becomes of age: Porterfield v. Butler, 47 Miss. 165, 12 Am. Rep. 329, holding the promise of a married woman when sole and unmarried to pay for a steamboat bought on credit by her while married does not create any obligation on her part; Kent v. Rand, 64 N. H. 45, 5 Atl. 760, holding the promise of a married woman, made when the common-law disability of coverture existed, does not furnish a consideration upon which her promise to pay the same debt, made after the disability is removed can be sustained; Fisher v. Jewett, 2 N. B. 69, as to repromise by infant after coming of age.

"Void" and "voidable."

Cited in Breckenridge v. Ormsby, 1 J. J. Marsh. 236, 19 Am. Dec. 71, as to security given by an infant being merely voidable.

Consideration for promise.

Cited in notes in 53 L.R.A. 365, 371, on moral obligation as consideration for promise; 6 Eng. Rul. Cas. 38, on expense already incurred as consideration for subsequent promise for reimbursement.

12 E. R. C. 321, JACKMAN v. MITCHELL, 9 Revised Rep. 229, 13 Ves. Jr. 581.

Invalidation of composition by reason of unfair agreement by one creditor.

Cited in Clement's Appeal, 52 Conn. 464; Poe v. Justices of Peace, Dudley (Ga.) 249; O'Shea v. Collier White Lead & Oil Co. 42 Mo. 397, 97 Am. Dec. 332; Pinneo v. Higgins, 12 Abb. Pr. 334; Gilmour v. Thompson, 49 How. Pr. 198; Lawrence v. Clark, 36 N. Y. 128; Re Chaplin, 115 Fed. 162; Bean v. Amsinck, 10 Blatchf. 361, Fed. Cas. No. 1,167; Bean v. Brookmire, 2 Dill. 108, Fed. Cas. No. 1,170; Brigham v. La Banque Jacques-Cartier, 30 Can. S. C. 429, 2 B. R. C. 449; Smith v. Dittrich, 8 U. C. Q. B. 589; Langley v. Van Allen, 3 Ont. L. Rep. 5; Cote v. La Banque De St. Hyacinthe, Rap Jud. Quebec, 38 C. S. 481; Wood v. Barker, L. R. 1 Eq. 139, 35 L. J. Ch. N. S. 276, 11 Jur. N. S.

905, 13 L. T. N. S. 318, 14 Week. Rep. 47; McKewan, v. Sanderson, L. R. 20 Eq. 65, 44 L. J. Ch. N. S. 447, 32 L. T. N. S. 385, 23 Week. Rep. 607; McKewan v. Sanderson, L. R. 15 Eq. 229, 42 L. J. Ch. N. S. 296, 28 L. T. N. S. 159; Re McHenry [1894] 2 Ch. 428, [1894] 3 Ch. 365, 64 L. J. Ch. N. S. 13, 7 Reports, 532, 71 L. T. N. S. 502,—holding secret agreement between bankrupt and creditor whereby latter was to receive unfair advantage over other creditors, invalid; Cheveront v. Textor, 53 Md. 295; Hagen's Appeal, 11 W. N. C. 86,—as to agreement of creditor to receive more than his share of insolvent's estate being invalid; Dickinson v. Carroll, 21 N. D. 271, 37 L.R.A.(N.S.) 286, 130 N. W. 829, holding that one who voluntarily gives his note to another cannot compel latter to refund what maker is compelled to pay thereon to bona fide holder; Willis v. Morris, 63 Tex. 458, 51 Am. Rep. 655, holding that note secretly received by creditor as inducement to sign composition agreement cannot be enforced against debtor.

Cited in notes in 27 L.R.A. 39, on effect of giving creditor secret advantage in composition; 2 Brit. Rul. Cas. 460, on composition with creditors: preference created by act of undertaking of third party; 12 Eng. Rul. Cas. 326, on invalidity of bargain by which creditor on composition is to obtain larger payment than other creditors.

Relief granted at suit of particeps criminis.

Cited in Cox v. Donnelly, 34 Ark. 762, holding although in general courts of equity will not grant relief to persons who are parties to an agreement or transaction against public policy, there are cases where public interest requires that they should for the promotion of public policy, interpose; and in such cases the relief is granted to the public through the party; State ex rel. Moore v. New Orleans, 32 La. Ann. 726 (dissenting opinion), as to when relief should be granted; Solinger v. Earle, 82 N. Y. 393, 60 How. Pr. 116, as to when granted; Union Bridge Co. v. Troy & L. R. Co. 7 Lans. 240; Curtis v. Leavitt, 15 N. Y. 9,—holding when transaction containing public policy has taken place relief may be granted.

Power of court of equity to cancel instruments.

Cited in Pierpont v. Fowle, 2 Woodb. & M. 23, Fed. Cas. No. 11,152; Tufts v. Tufts, 3 Woodb. & M. 456, Fed. Cas. No. 14,233; Peirsoll v. Elliott, 6 Pet. 95, 8 L. ed. 332; Arnold v. Sheppard, 6 Ala. 299,—as to power of court of Chancery to cancel instruments obtained by fraud; Munson v. Munson, 28 Conn. 582, 73 Am. Dec. 693, as to whether equity will exercise its jurisdiction where instrument creating cloud on title is void on its face; Field v. Holbrook, 6 Duer, 597, 14 How. Pr. 103; Brooklyn v. Meserole, 26 Wend. 132,—as to the power to cancel deed casting cloud on title.

— Obligations vulnerable to legal defense.

Cited in Sessions v. Jones, 6 How. (Miss.) 123, holding chancery has jurisdiction to decree that a blank bond shall be canceled, although the party may have had his remedy at law; Metler v. Metler, 18 N. J. Eq. 270, holding where note is negotiable and valid on its face and the maker has a good defense in equity, the note will be canceled; Hamilton v. Cummings, 1 Johns. Ch. 517, holding where a bond conditioned to pay a certain sum, and good on its face, and on which a suit was pending and the obligor had a good defense in equity, the bond will be cancelled; Richardson v. Hamilton, 7 Grant, Ch. (U. C.) 281, holding plaintiff would not be relegated to a law court to defend against void notes.

Distinguished in Lewis v. Tobias, 10 Cal. 574, holding a Court of Equity

will not exercise jurisdiction to compel the surrender and cancelation of a promissory note, where the party has a clear remedy at law.

12 E. R. C. 330, MATHEWS v. FEAVER, 1 Cox. Ch. Cas. 278, 1 Revised Rep. 39.

Fraudulent conveyances.

Cited in Drake v. Rice, 130 Mass. 410, holding that choses in action which cannot be taken on execution cannot be subject of fraudulent conveyance; Smith v. Rumsey, 33 Mich. 183, holding that conveyance by debtor of property exempt as homestead, cannot be set aside as in fraud of creditors; Greene v. Keene, 14 R. I. 388, 51 Am. Rep. 400, holding that agreement with third parties to do business under letters patent owned by him and to give profits to his wife cannot be set aside as fraud on creditors; Nichol v. Davidson County, 3 Tenn Ch. 547, holding in order to make a conveyance void as to creditors the property transferred thereby should be liable to be taken in execution for the payment of debts; Crawford v. Meldrum, 3 U. C. Err. & App. 101, holding that conveyance of all his property by insolvent to relative for inadequate consideration, may be set aside by creditors; Sims v. Thomas, 12 E. R. C. 332, 9 L. J. Q. B. N. S. 399, 12 Ad. & El. 536, L. R. 4 Prob. & Div. 233, holding a bond for securing an annuity is not "goods and chattels" within statute in regard to fraudulent conveyances.

Cited in note in 5 Eng. Rul. Cas. 27, on necessity of change of possession on sale of chattels.

Equitable remedy to subject choses in action to judgment.

Cited in note in 63 L.R.A. 677, on equitable remedy to subject choses in action to judgment after return of no property found.

12 E. R. C. 332, SIMS v. THOMAS, 12 Ad. & El. 536, 9 L. J. Q. B. N. S. 399, 4 Perry & D. 233, 4 Jur. 1181.

Fraudulent conveyances of choses in action.

Cited in Drake v. Rice, 130 Mass. 410, holding an assignment of a chose in action, made in fraud of creditors, is void as against them; R. v. Smith, L. R. 1 C. C. 266, 39 L. J. Mag. Cas. N. S. 112, 22 L. T. N. S. 554, 18 Week. Rep. 932, 11 Cox, C. C. 511; People v. Kriesel, 136 Mich. 80, 98 N. W. 850, 4 Ann. Cas. 5,—as to choses in action not originally being within statute against; Beckwith v. Burrough, 14 R. I. 366, 51 Am. Rep. 392, holding term "goods and chattels" in statute against includes shares of corporate stock; Rennie v. Quebec Bank, 3 Ont. L. Rep. 541, holding term "goods and chattels" in statute against does not include debts; Black v. Moore, 2 N. B. Eq. Rep. 98; Lodor v. Creighton, 9 U. C. C. P. 295,—holding statute against only extends to assignment of such things as are liable to be taken on execution; R. v. Potter, 10 U. C. C. P. 39 (dissenting opinion); Warnock v. Klœpfer, 15 Ont. App. Rep. 324 (dissenting opinion); Day v. Day, 17 Ont. App. Rep. 157; Western Canada Loan & Sav. Co. v. Snow, 6 Manitoba L. Rep. 606; Davidson v. McGuire, 27 Grant, Ch. (U. C.) 483,—as to nothing not subject to execution being embraced by statute against fraudulent conveyances; Wallace's Appeal, 14 Pittsb. L. J. N. S. 363, on bill of sale of interest in partnership as fraudulent conveyance; Macdonald v. McCall, 12 Ont. App. Rep. 593, on right to have gift of money set aside under statute as in fraud of creditors.

Interest on annuity.

Cited in Airey v. Mitchell, 21 Grant, Ch. (U. C.) 510; Allan v. McTavish, 2 Ont. App. Rep. 278; Crone v. Crone, 27 Grant, Ch. (U. C.) 425,—as to when interest on arrears in annuity allowable.

Action upon covenant in mortgage.

Cited in Bailie v. Irwin [1897] 2 Ir. Q. B. 614, as to it being action in respect to sum of money charged upon real estate.

Equitable remedy to subject choses in action to judgment.

Cited in note in 63 L.R.A. 677, on equitable remedy to subject choses in action to judgment after return of no property found.

12 E. R. C. 343, PRICE v. JENKINS, L. R. 5 Ch. Div. 619, 46 L. J. Ch. N. S. 805, 37 L. T. N. S. 51, reversing in part the decision of the Vice Chancellor, reported in, L. R. 4 Ch. Div. 483, 25 Week. Rep. 427.

"Voluntary" settlement.

Cited in Sunter v. Sunter, 190 Mass. 449, 77 N. E. 497, holding conveyance made by mother to son out of gratitude for his kindness to and care of her in the past and his promise to care for her in the future where son was willing to but did not care for her in the future, voluntarily; Landon v. Hutton, 50 N. J. Eq. 500, 25 Atl. 953, as to marriage being sufficient consideration for ante-nuptial agreement; Mellick v. Mellick, 47 N. J. Eq. 86, 19 Atl. 870, holding marriage is such a consideration for assignment of mortgage as will make the assignee a purchaser for full value; Ottawa Wine Vaults Co. v. McGuire, 24 Ont. L. Rep. 591, holding that under 13 Eliz. a mere insignificant consideration is insufficient to support settlement; Re Briggs & Spicer [1891] 2 Ch. 127, 60 L. J. Ch. N. S. 514, 64 L. T. N. S. 187, 39 Week. Rep. 377, 55 J. P. 278, as to consideration being sufficient to prevent settlor from availing himself of statute as to fraudulent conveyances and insufficient to prevent application of bankruptcy act; Trowell v. Shenton, L. R. 8 Ch. Div. 318, 38 L. T. N. S. 27, 47 L. J. Ch. N. S. 738, 26 Week. Rep. 837, as to what constitutes voluntary settlement.

Cited in Underhill, Am. Ed. Trusts, 132, as to when declared trust is void as against subsequent purchaser.

Distinguished in Crossman v. R. L. R. 18 Q. B. Div. 256, 56 L. J. Q. B. N. S. 241, 55 L. T. N. S. 848, 35 Week. Rep. 303, holding transfer to sons of shares in partnership business with reservation of annuity therefrom at 4 per cent during life of settlor a voluntary settlement under Customs and Inland Revenue act.

— Leaseholds.

Cited in Demorest v. Miller, 42 U. C. Q. B. 56; Synge v. Synge [1894] 1 Q. B. 466, 63 L. J. Q. B. N. S. 202, 9 Reports, 265, 70 L. T. N. S. 221, 42 Week. Rep. 309, 58 J. P. 396; Re Marsh & Granville, L. R. 24 Ch. Div. 11, 53 L. J. Ch. N. S. 81, 48 L. T. N. S. 947, 31 Week. Rep. 845,—as to settlement of leasehold not being voluntary conveyance; Harris v. Tubb, L. R. 42 Ch. Div. 79, 58 L. J. Ch. N. S. 434, 60 L. T. N. S. 699, 38 Week. Rep. 75, holding an assignment of leaseholds in consideration of natural love and affection not voluntary; Re Lulham, 53 L. J. Ch. N. S. 928, 32 Week. Rep. 1013; Ex parte Doble, 38 L. T. N. S. 183, 26 Week. Rep. 407, holding a settlement of leasehold property, to which liability is attached is a settlement for a valuable consideration.

Distinguished in Ex parte Hillman, L. R. 10 Ch. Div. 622, 48 L. J. Bankr.

N. S. 77, 40 L. T. N. S. 177, 27 Week. Rep. 567, holding trustee of a post-nuptial settlement of a leasehold for benefit of settlor's wife and children is not a purchaser of the property within meaning of bankruptcy act; Re Ridler, L. R. 22 Ch. Div. 74, 52 L. J. Ch. N. S. 343, 48 L. T. N. S. 396, 31 Week. Rep. 93, 47 J. P. 279, holding settlement of leasehold fraudulent as to creditors under bankruptcy act; Shurmur v. Sedgwick, L. R. 24 Ch. Div. 597, 53 L. J. Ch. N. S. 87, 49 L. T. N. S. 156, 31 Week. Rep. 884, holding settlement of leasehold when person upon whom it was settled assumed no liability, voluntary.

—As to children.

Cited in Gale v. Gale, L. R. 6 Ch. Div. 144, 46 L. J. Ch. N. S. 809, 36 L. T. N. S. 690, 25 Week. Rep. 772, holding the performance of a covenant by a widow on her second marriage to convey property for the benefit of her children by a former marriage, if made in pursuance of an agreement between her and her intended husband will be enforced at suit of those children.

Distinguished in Green v. Paterson, L. R. 32 Ch. Div. 95, 56 L. J. Ch. N. S. 181, 54 L. T. N. S. 738, 34 Week. Rep. 724, holding when there has been in a settlement a relinquishment by the husband of an estate which he had in his wife's property the deed is considered voluntary as in favor of the children.

The decision of Vice Chancellor was cited in Atty. Gen. v. Jacobs-Smith [1895] 2 Q. B. 341, 64 L. J. Q. B. N. S. 605, 14 Reports, 531, 72 L. T. N. S. 714, 43 Week. Rep. 657, 59 J. P. 468; Re Cameron & Wells, L. R. 37 Ch. Div. 32, 57 L. J. Ch. N. S. 69, 57 L. T. N. S. 645, 36 Week. Rep. 5,—as to when settlement is voluntary as in favor of children.

Consideration.

Cited in Horrocks v. Rigby, L. R. 9 Ch. Div. 180, 47 L. J. Ch. N. S. 800, 38 L. T. N. S. 782, 26 Week. Rep. 714, as to certain covenants entered into by promisor being a valuable consideration.

Cited in note in 21 E. R. C. 717, on rights of purchaser for value without notice.

12 E. R. C. 356, LUKE v. LYDE, 2 Burr. 882, 1 W. Bl. 190.

Right of carrier to freight pro rata.

Cited in The Saratoga, 2 Gall. 164, Fed. Cas. No. 12,355; The Nathaniel Hooper, 3 Sumn. 542, Fed. Cas. No. 10,032; Bork v. Norton, 2 McLean, 422, Fed. Cas. No. 1,659; Guay v. Hunters, Pyke (Can.) 36; Escopiniche v. Stewart, 2 Conn. 262,—holding where shipper accepts goods at intermediate port, carrier entitled to freight pro rata; Harris v. Rand, 4 N. H. 259, 17 Am. Dec. 421, holding to raise an implied promise to pay a pro rata freight the goods must be actually delivered and actually received at intermediate point; Smyth v. Wright, 15 Barb. 51, holding a sale by the owner of a cargo, at an intermediate port is an acceptance of the cargo at that port, subjecting him to pro rata freight; Western Transp. Co. v. Hoyt, 69 N. Y. 230, 25 Am. Rep. 175; Caze v. Baltimore Ins. Co. 7 Cranch, 359, 3 L. ed. 370,—holding that freight pro rata itineris is not due, unless owner of cargo voluntarily agrees to receive it at place short of the ultimate destination; Sturgis v. Gardner, 2 Brev. 233, holding a covenant on the charter party freight pro rata not claimable, if the stipulated freight be payable on delivery of the cargo, otherwise, if the action be assumpsit unless there has been some fault in the owners or masters of the ship; McGilvery v. Capen, 7 Gray, 525; Palmer v. Lorillard, 16 Johns. 348; Robinson v. Marine Ins. Co. 2 Johns. 323; Herbert v. Hallett, 3 Johns. Cas. 93; United Ins. Co. v. Lenox, 1 Johns. Cas. 377; The Eliza Lines, 102 Fed. 184;

Earnmoor S. S. Co. v. New Zealand Ins. Co. 73 Fed. 867; Lewis v. The Elizabeth, 1 Ware, 33, Fed. Cas. No. 8,321; Metcalfe v. Britannia Ironworks Co. L. R. 1 Q. B. Div. 613, L. R. 2 Q. B. Div. 423, 46 L. J. Q. B. N. S. 443, 36 L. T. N. S. 451, 25 Week. Rep. 720, 3 Asp. Mar. L. Cas. 407,—as to right of carrier to freight pro rata.

Cited in note in 12 E. R. C. 364, 365, 367, 368, on right to proportional freight in case of accident at sea preventing continuance of voyage.

Cited in 2 Hutchinson, Car. 3d ed. 906, on necessity that acceptance be voluntary to entitle carrier to freight pro rata itineris; 2 Hutchinson, Car. 3d ed. 912, on rule of adjusting freight pro rata where journey is not completed; Keener, Quasi-Contr. 253, on lack of right of party in default to recover unless a benefit has been conferred.

Disapproved in Heard v. Marine Ins. Co. 1 Has. & War. (Pr. Edw. Isl.) 428, holding to justify the claim of freight pro rata there must be a voluntary acceptance of the goods at an intermediate port in such a mode as to raise a fair inference that the further carriage of the goods was intentionally disposed with.

— Termination of voyage at port of necessity.

Cited in Coffin v. Storer, 5 Mass. 252, 4 Am. Dec. 54; M'Gaw v. Ocean Ins. Co. 23 Pick. 405; Adams & Co. v. Haught, 14 Tex. 243; Rossiter v. Chester, 1 Dougl. (Mich.) 154,—holding freight pro rata itineris is due, when the ship, by inevitable necessity is forced into a port short of her destination, and is unable to prosecute the voyage, and the goods are there voluntarily accepted by owner; Nelson v. Stephenson, 5 Duer, 538, as to right to abandon for freight; Armroyd v. Union Ins. Co. 3 Binn. 437; Callender v. Insurance Co. of N. A. 5 Binn. 525; Richardson v. Young, 38 Pa. 169,—holding when delivery according to consignment is prevented by perils of the sea, carrier can recover from shipper neither full freight nor freight pro rata itineris unless the cargo was received by, or on part of the shippers at an intermediate port, when partial freight is due on an implied new contract; Armroyd v. Union Ins. Co. 3 Binn. 437, holding that pro rata freight could not be deducted as against underwriter where ship was abandoned and goods sold and proceeds paid to super cargo; Van Norden v. Littlejohn, 4 N. C. (Tenn. Rep. 16), holding a pro rata freight may be recovered from the shipper, if he abandons the goods to the underwriter after the voyage is broken up by the stranding of the vessel; Lorent v. Kentring, 1 Nott. & M'C. 132, holding the owner of goods on freight may authorize their delivery at an intermediate port, and if supervenient causes render the landing of the goods necessary, and he accepts them at such places of landing, the carrier is entitled to freight pro rata.

Distinguished in Sampayo v. Salter, 1 Mason, 43, Fed. Cas. No. 12,277, holding where a vessel has been captured on her voyage and condemned at an intermediate port, and part of the cargo has been restored and sold at the same port, no freight is due for cargo so restored.

Right to complete carriage and claim freight though vessel totally disabled.

Cited in Lyon v. Alvord, 18 Conn. 66; Hugg v. Baltimore & C. Smelting & Min. Co. 35 Md. 414, 6 Am. Rep. 425,—holding if ship be disabled from completing voyage the freight may be earned by forwarding cargo by another vessel; Worth v. Munford, 1 Hilt, 1, as to when freight may be recovered.

Cited in 2 Hutchinson, Car. 3d ed. 886, on carrier's right to full freight when prevented by owner from completing journey.

Right of shipowners on refitting ship to insist on taking on cargo.

Cited in Griswold v. New York Ins. Co. 1 Johns. 205, as to their right to insist on taking on cargo or to be paid their full freight.

Right of carrier to earn freight according to shipment.

Cited in Braithwaite v. Aikin, 1 N. D. 455, 48 N. W. 354, holding carrier has the right to earn freight so long as he is not in default.

Cited in 2 Hutchinson, Car. 3d ed. 891, on carrier's right to freight where goods are delivered though they have become worthless.

Pro rata rights in broken voyage.

Cited in Reed v. Hussey, 1 Blatchf. & H. 525, Fed. Cas. No. 11,646, holding under shipping articles providing that seamen shall have certain shares of proceeds of voyage the seamen's wages depend upon the successful termination of the voyage.

Damages for failure of carrier to deliver goods.

Cited in Edminson v. Baxter, 4 Hayw. (Tenn.) 112, 9 Am. Dec. 751, holding rule for the assessment of damages is the value of the goods at the port of reception, unless for some fault, neglect or misconduct of the carrier, justice should require the application of different rule.

Internationality of maritime law.

Cited in Miller v. Bartlet, 15 Serg. & R. 137, as to it belonging to no particular country.

— Of law merchant.

Cited in Williams v. Gold Hill Min. Co. 96 Fed. 454; Phipps v. Harding (Hudson Furniture Co. v. Harding) 30 L.R.A. 513, 17 C. C. A. 203, 34 U. S. App. 148, 70 Fed. 468; Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865; Jewett v. Hone, 1 Woods, 530, Fed. Cas. No. 7,311; Bond v. Central Bank, 2 Ga. 92; Franklin v. Twogood, 25 Iowa, 520, 96 Am. Dec. 73,—as to it not being law of a single country but of the commercial world; Brooklyn City & N. R. Co. v. National Bank, 102 U. S. 14, 26 L. ed. 61, holding general commercial law is not local to any jurisdiction and Federal courts are not bound by state decisions.

Cited in 2 Willoughby, Const. 1036, on law respecting negotiable instruments as the law of the commercial world.

Laws of other countries as rule of decisions.

Cited in Union Invest. Co. v. Wells, C. R. [1906] A. C. 497, 39 Can. S. C. 625, 11 Ann. Cas. 33, as an example of court having recourse to law of another county to help decide question.

12 E. R. C. 369, ANDREW v. MOORHOUSE, 1 Marsh. 122, 15 Revised Rep. 544, 5 Taunt. 435.

Right of carrier to freight earned.

Cited in Pitman v. Hooper, 3 Sumn. 50, Fed. Cas. No. 11,185, as to shipowner's right to recover if voyage is not performed; Waring v. Morse, 7 Ala. 343, holding general rule is that conveyance and delivery of the goods is necessary to entitle carrier to freight; Kinsman v. New York Mut. Ins. Co. 5 Bosw. 460; Cope v. Dodd, 13 Pa. 33,—as to when payable; Griggs v. Austin, 3 Pick. 20, 15 Am. Dec. 175; Allison v. Bristol M. Ins. Co. L. R. 1 App. Cas. 209, 34 L. T. N. S. 809, 24 Week. Rep. 1039,—as to construction of contract for freight.

Cited in 2 Hutchinson, Car. 3d ed. 919, on carrier's right to sue for freight

before goods are delivered; 2 Hutchinson, Car. 3d ed. 921, on parties' right to agree for prepayment of freight.

Distinguished in Phelps v. Williamson, 5 Sandf. 578, holding under a bill of lading in the usual form, the conveyance and delivery of the goods is a condition precedent to the right of the master or shipowner to the payment of freight.

Meaning of "freight."

Cited in Edmonstone v. Young, 12 U. C. C. P. 437, holding use of term "freight" does not always necessarily import that goods must be carried before freight can be demanded.

Cited in note in 12 E. R. C. 372, on meaning of term "freight."

12 E. R. C. 377, DA COSTA v. JONES, Cowp. pt. 2, p. 729.

Validity of wagering contracts.

Cited in Harding v. Walker, Hempst. 53, Fed. Cas. No. 6,050a, holding all wagers are not void but all gaming contracts are; Grant v. Hamilton, 3 McLean, 100, Fed. Cas. No. 5,695, holding under statute money lost on horse-race may be recovered; Fleming v. Foy, 4 Cranch, C. C. 423, Fed. Cas. No. 4,862, holding a wager may be recovered at common law although the parties have no interest in the subject of the wager other than that which is created by the wager itself; Morga v. Pettit, 4 Ill. 529, holding wager on an election outside the state valid contract; Perkins v. Eaton, 3 N. H. 152, holding a wager on a subject in which the parties have no interest is not a valid contract; Cassard v. Hinmann, 14 How. Pr. 84, holding margin contracts where it is intention of parties that goods shall not be delivered, void under statute; Flagg v. Baldwin, 38 N. J. Eq. 219, 48 Am. Rep. 308, holding margin contracts valid at common law; Specht v. Beindorf, 56 Neb. 553, 42 L.R.A. 429, 76 N. W. 1059, holding wager on election void; Shepherd v. Sawyer, 6 N. C. (2 Murph.) 26, 5 Am. Dec. 517, holding innocent wagers recoverable; Harris v. White, 81 N. Y. 532; Misner v. Knapp, 13 Or. 135, 57 Am. Rep. 6, 9 Pac. 65,—holding a purse or prize offered for a horse that will trot in the best time less a given speed is not a wager and a promise to pay it may be enforced; Dunman v. Strother, 1 Tex. 89, 46 Am. Dec. 97; Porter v. Day, 71 Wis. 296, 37 N. W. 259,—holding betting on horserace not illegal at common law; Mitchell v. Smith, 4 Yeates, 84; Bank of Toronto v. McDougall, 28 U. C. C. P. 345,—as to what wagers are valid by common law of England; Marcotte v. Perras, Rap. Jud. Quebec, 6 B. R. 400 (dissenting opinion), on recovery against stakeholder by winner of bet as to whether horse had trotted race on certain course; Good v. Elliott, 12 E. R. C. 389, 3 T. R. 693, 1 Revised Rep. 803, holding a wager that A has purchased a wagon of B is not void and an action may be maintained thereon.

Cited in notes in 18 L.R.A. 860, on legality of wagers; betting; 12 E. R. C. 407, on enforceability of wagering contracts.

Cited in 2 Beach, Contr. 1914, on invalidity of gambling contracts; 2 Beach, Contr. 1944, on invalidity of racing for premiums or purses; 1 Page, Contr. 705, on history of the law of wager contracts.

— Wagers offensive to public policy.

Cited in Morgan v. Groff, 4 Barb. 524, as to wager against public policy being void at common law; Bunn v. Riker, 4 Johns. 426, 4 Am. Dec. 292, hold-

ing at common law an action for a wager is maintainable but a wager which is against the principles of sound policy is void and cannot be recovered.

Disapproved in Laval v. Myers, 1 Bail. L. 486, holding a wager upon the result of the election for President of the United States laid before the college of electors has been chosen by the legislature, although the members of the legislature had already been elected by the people, is contrary to public policy, and no action can be maintained for its recovery: Bernard v. Taylor, 23 Or. 416, 18 L.R.A. 859, 37 Am. St. Rep. 693, 31 Pac. 968, holding all wagers void on ground of public policy.

— Wagers involving scandal and indecency.

Cited in Wood v. McCann, 6 Dana, 366; Lavis v. Baker, 13 U. C. C. P. 506; Egerton v. Brownlow, 24 E. R. C. 118, 23 L. J. Ch. N. S. 348, 4 H. L. Cas. 1, 18 Jur. 71,—as to wagers the decision of which would affect feelings or outrage decency of third persons being void.

Suits affecting third persons.

Cited in Melvin v. Melvin, 58 N. H. 569, 42 Am. Rep. 605; State v. Cox, 4 N. C. (Term Rep.) 165,—holding wherever a question arises upon a real matter of right, though the interest or feelings of third persons, not parties, may be affected, it shall be tried; Cook v. Neaff, 3 Yeates, 259; McWhirter v. Douglas, 1 Coldw. 591; McLaren v. Ryan, 36 U. C. Q. B. 307,—as an example of such a suit; Longhead v. Bartholomew, Wright (Ohio) 90, holding that where question at issue is one of mere speculation, injuriously affecting one not party to suit, court will dismiss action.

Indecency as reason for not sustaining an action.

Cited in Smith v. Minor, 1 N. J. L. 16, as to it sometimes being a reason.

Litigation of moot cases.

Cited in Brewington v. Lowe, 1 Ind. 21, 48 Am. Dec. 349, Smith (Ind.) 79, holding that courts will not take cognizance of suit which appears by statements of both parties to be fictitious.

12 E. R. C. 385, ALLEN v. HEARN, 1 Revised Rep. 149, 1 T. R. 56.

Wagering contracts.

Cited in Bunn v. Ricker, 4 Johns. 426, 4 Am. Dec. 292, holding wager against public policy void at common law; Adlin v. Insurance Co. of Pennsylvania, 2 Wash. C. C. Fed. Cas. No. 10,433; Wood v. McCann, 6 Dana, 366; Shepherd v. Sawyer, 6 N. C. (2 Murph.) 26, 5 Am. Dec. 517; Morgan v. Groff, 4 Barb. 524,—as to wagers against public policy being void at common law; Perkins v. Eaton, 3 N. H. 152, holding wager on a subject in which parties have no interest not a valid contract; Dunman v. Strother, 1 Tex. 89, 46 Am. Dec. 97, holding wagers on horse race not illegal.

Cited in notes in 18 L.R.A. 862, on legality of wagers; betting; 12 E. R. C. 407, on enforceability of wagering contracts.

— Election bets.

Cited in Horn v. Foster, 19 Ark. 346; Jeffrey v. Ficklin, 3 Ark. 227, 36 Am. Dec. 456; Motlow v. Johnson, 145 Ala. 373, 39 So. 710, 8 Ann. Cas. 188; Ball v. Gilbert, 12 Met. 397; Hickerson v. Benson, 8 Mo. 8, 40 Am. Dec. 115,—holding wagers on election void; Henderson v. Guillet, 10 Can. S. C. 635, as to bet on election being void; Walsh v. Trebilcock, 23 Can. S. C. 695 (allowing appeal from 21 Ont. App. Rep. 55), holding wager on election of member of parliament void; Thompson v. Harrison, Dallan Dec. (Tex.) 466, holding bet

on election for Congress of Texas was void as against public policy; Bettis v. Reynolds, 12 Ired. L. 344, 55 Am. Dec. 417, holding that bond, given for money lost upon wager on result of election is void.

— Election bets which may not influence vote.

Cited in Denney v. Elkins, 4 Cranch, C. C. 161, Fed. Cas. No. 3,790, holding wager on election void although parties thereto were not qualified to vote: Gregory v. King, 58 Ill. 169, 11 Am. Rep. 56, holding wager as to result of presidential election in another state, void; Clark v. Gibson, 12 N. H. 386, as to whether wager on the event of an election to presidency of United States is legal; Laval v. Myers, 1 Bail. L. 486, holding wager upon presidential election invalid; Morga v. Pettit, 4 Ill. 529, holding wager on an election outside state a valid contract; Bettis v. Reynolds, 34 N. C. (12 Ired. L.) 344, 55 Am. Dec. 417, holding a bond, given for money lost upon a wager on the result of a public election, though neither of the parties be a voter, is void as against public policy; Wheeler v. Spencer, 15 Conn. 28; Cooper v. Rowley, 29 Ohio St. 547,—holding wager on future election in which parties are entitled to participate void at common law; Russell v. Pyland, 2 Humph. 131, 36 Am. Dec. 307, holding it is a good defense to action on a note that it was won in a wager on the election of the governor of the state.

Attempt to bribe member of parliament.

Cited in R. v. Bunting, 7 Ont. Rep. 524, as to it being indictable.

Cognizance of courts of fictitious suits.

Cited in Longhead v. Bartholomew, Wright (Ohio) 90; Brewington v. Lowe, 1 Ind. 21, Smith (Ind.) 79, 48 Am. Dec. 349,—holding courts will not take cognizance of fictitious suits instituted merely to obtain judicial opinions upon points of law.

12 E. R. C. 389, GOOD v. ELLIOTT, 1 Revised Rep. 803, 3 T. R. 693.

Wagering contracts.

Cited in Harding v. Walker, Hempst. 53, Fed. Cas. No. 6,050a, holding all wagers not void; but all gaming contracts are; Fleming v. Foy, 4 Cranch, C. C. 423, Fed. Cas. No. 4,862, holding wager valid at common law although parties had no interest in subject thereof; Grant v. Hamilton, 3 McLean, 100, Fed. Cas. No. 5,695, holding under statute money bet on horserace may be recovered: Himmelman v. Pecaut, 133 Iowa, 503, 110 N. W. 919, as to wagers on indifferent matters being valid at common law; Morgan v. Pettit, 4 Ill. 529, holding wager on election outside state a valid contract; Bunn v. Riker, 4 Johns. 426, 4 Am. Dec. 292, holding action for wager maintainable at common law unless wager against public policy; Shepherd v. Sawyer, 6 N. C. (2 Murph.) 26, 5 Am. Dec. 517, holding innocent wagers recoverable; Harris v. White, 81 N. Y. 532; Misner v. Knapp, 13 Or. 135, 57 Am. Rep. 6, 9 Pac. 65,—holding purse offered for speed of horse not a wager and a promise to pay it may be enforced; Dunman v. Strother, 1 Tex. 89, 46 Am. Dec. 97; Porter v. Day, 71 Wis. 296, 37 N. W. 259,—holding betting on horse race not illegal at common law; Oakley v. Boorman, 21 Wend. 588, as to sustaining an action brought on a wager; Kelly v. Bartley, 1 Sandf. 15, holding a statute enacted when wagers, not against morals or sound policy were lawful, which forbade the local court from entertaining jurisdiction in respect of any demand for any money or thing lost or won by means of a wager, does not, after all wagers are made illegal by statute, preclude such court from entertaining an action for money had and received against a stakeholder to recover money deposited upon a wager; Lavis

v. Baker, 13 U. C. C. P. 506; Bank of Toronto v. McDougall, 28 U. C. C. P. 345,—as to what wagers are valid at common law; Hasket v. Wootan, 1 Nott. & M'C. 180; Sheldon v. Law, 3 U. C. Q. B. O. S. 85,—holding as against a stakeholder paying over the deposit upon an illegal wager after notice assumpsit will lie.

Cited in notes in 18 L.R.A. 859, on legality of wagers; betting; 12 E. R. C. 407, on enforceability of wagering contracts.

Cited in 2 Beach, Contr. 1913, on invalidity of gambling contracts; 2 Beach, Contr. 1944, on invalidity of racing for premiums or purses; 1 Page, Contr. 705, on history of the law of wager contracts.

Distinguished in Denney v. Elkins, 4 Cranch, C. C. 161, Fed. Cas. No. 3,790; Ball v. Gilbert, 12 Met. 397, holding a wager upon the event of an election is illegal and void; Monroe v. Smelly, 25 Tex. 586, 78 Am. Dec. 541, holding court will not enforce the collection of money won at game of ten pins.

Doubted in Laval v. Myers, 1 Bail. L. 486, holding wager upon election of President of United States void.

Disapproved in Wilkinson v. Tousley, 16 Minn. 299, Gil. 263, 10 Am. Rep. 139, holding wager upon result of a horse race illegal and void; Perkins v. Eaton, 3 N. H. 152, holding a wager upon a subject in which the parties have no interest is not a valid contract; Bernard v. Taylor, 23 Or. 416, 18 L.R.A. 859, 37 Am. St. Rep. 693, 31 Pac. 968, holding all wagers void on ground of public policy.

Cognizance of courts of fictitious suits.

Cited in Brewington v. Lowe, 1 Ind. 21, 48 Am. Dec. 349, Smith (Ind.) 79; Longhead v. Bartholomew, Wright (Ohio) 90,—holding courts will not take cognizance of fictitious suits, instituted merely to obtain judicial opinions upon points of law.

12 E. R. C. 403, JOHNSON v. BANN, 2 Revised Rep. 309, 4 T. R. 1.

Recovery of wager on horse race.

Cited in Sheldon v. Law, 3 U. C. Q. B. (O. S.) 85, holding that stakeholder was liable to one who deposited money with him as bet upon horse race, where he notified stakeholder not to pay money over to winner.

12 E. R. C. 408, IRONS v. SMALLPIECE, 2 Barn. & Ald. 551, 21 Revised Rep. 395.

Necessity for delivery in gift of chattel inter vivos.

Cited in Sewall v. Glidden, 1 Ala. 52; Connor v. Trawick, 37 Ala. 289, 79 Am. Dec. 58,—holding actual delivery necessary in parol gift; Hynson v. Terry, 1 Ark. 83, holding that delivery is essential both at law and in equity, to validity of gift; Cranz v. Kroger, 22 Ill. 74, holding that verbal gift without delivery may be resumed; Adams v. Hayes, 24 N. C. (2 Ired. L.) 361, holding that delivery of thing subject of gift is essential to completion of gift; Carpenter v. Dodge, 20 Vt. 595, holding gift ineffectual to pass title unless there be an actual delivery; Huntington v. Gilmore, 14 Barb. 243, holding delivery essential to parol gift; Ewing v. Ewing, 2 Leigh, 337; Marston v. Marston, 21 N. H. 491,—holding property does not pass by verbal gift unless there be delivery; Copp v. Sawyer, 6 N. H. 386, holding promise to give without delivery invalid; Lee v. Luther, 3 Woodb. & M. 519, Fed. Cas. No. 8,196, holding no title created by mere promise to make gift; Bean v. Bean, 71 N. H. 538, 53 Atl. 907, holding actual delivery at time of gift or as part of same transaction is essential;

Hardy v. Atkinson, 18 Mantioba L. Rep. 351, holding that actual delivery of thing is necessary to effect completed gift; Huggard v. Bennetto, 1 D. L. R. 305, holding that verbal gift to wife by husband of automobile, without actual delivery of automobile, is void as against husband's creditors; La Banque D'Hochelaga v. Merchants' Bank, 10 Manitoba L. Rep. 361; Rupert v. Johnston, 40 U. C. Q. B. 11; McFarlane v. Flinn, 8 N. S. 141; Scott v. McAlpine, 6 U. C. C. P. 302; Clarke v. Fullerton, 8 N. S. 348; Brown v. Davy, 18 Ont. Rep. 559; Travis v. Travis, 12 Ont. App. Rep. 438,—holding actual delivery essential in gift inter vivos; Re Hartman, 3 N. S. 63, on necessity for actual delivery to give validity to gift; Douglas v. Douglas, 22 L. T. N. S. 127; Cochrane v. Moore, 12 E. R. C. 410, 59 L. J. Q. B. N. S. 377, L. R. 25 Q. B. Div. 57, 63 L. T. N. S. 153, 38 Week. Rep. 587, 54 J. P. 804,—holding delivery essential; Ex parte Ridgway, L. R. 15 Q. B. Div. 447, 54 L. J. Q. B. N. S. 570, 34 Week. Rep. 80, 2 Morrell, 248, holding gift invalid where chattel is retained by donor and there are no circumstances to raise inference that donor intended to make immediate gift; Kilpin v. Ratley [1892] 1 Q. B. 582, 66 L. T. N. S. 797, 40 Week. Rep 479, 56 J. P. 565, holding where father at place where furniture is gives same to son by words of present gift, manual delivery unnecessary; Reeves v. Capper, 6 Scott, 877, 5 Bing. N. C. 136, 2 Jur. 1067, 1 Arnold, 427, holding gift valid if there be delivery; Ward v. Audland, 16 Mees. & W. 862, on validity of gift without delivery of possession.

Cited in notes in 21 L.R.A. 693, 694, 696, on undelivered written transfer or assignment of property as gift; 5 Eng. Rul. Cas. 28, on necessity of change of possession on sale of chattels; 5 Eng. Rul. Cas. 71, on what constitutes a bill of sale.

Cited in Benjamin, Sales, 5th ed. 7, 8, on necessity for delivery in case of gift by parol; Gray, Perpet. 2d ed. 62, on invalidity of parol gift of chattel to begin in futuro; Underhill, Am. Ed. Trusts, 55, on how far valuable consideration is necessary to bind settler or his representatives.

Criticized in R. v. Carter, 13 U. C. C. P. 611, holding actual delivery not essential if conduct of parties shows ownership has changed; Winter v. Winter, 4 L. T. N. S. 639, 9 Week. Rep. 747, holding where donee is in possession at time of verbal gift, actual manual delivery unnecessary.

Disapproved in Re Harcourt, 31 Week. Rep. 578, holding actual delivery not necessary where there has been clear intention by donor to give acted on by donee.

Of gift by deed.

Cited in Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471, holding gift of personal property by deed valid though possession does not change; Tarbox v. Grant, 56 N. J. Eq. 199, 39 Atl. 378, holding delivery unnecessary to make gift valid; Matson v. Abbey, 70 Hun, 475, 24 N. Y. Supp. 284, holding gift valid where by instrument under seal, though there be no actual delivery; Wyche v. Greene, 11 Ga. 159; Gordon v. Wilson, 49 N. C. (4 Jones, L.) 64; M'Coy v. Herbert, 9 Leigh, 548, 33 Am. Dec. 256; Cowen v. First Nat. Bank, 94 Tex. 547, 63 S. W. 532; McEwen v. Troost, 1 Sneed, 186,—holding gift by deed valid without delivery of thing itself; Jaggers v. Estes, 2 Strobh. Eq. 343, 49 Am. Dec. 674, holding gift valid without actual delivery of thing if there be delivery of deed; Hogue v. Bierne, 4 W. Va. 658, holding delivery of thing itself unnecessary to make gift valid if there be a delivery of deed; Horn v. Gartman, 1 Fla. 63, holding transfer by gift valid if by deed, although there be no delivery.

Disapproved in McWillie v. Van Vacter, 35 Miss. 428, 72 Am. Dec. 127, holding gift invalid unless there be delivery.

— Of gift causa mortis.

Cited in McKinnon v. McKinnon, 28 N. S. 189, holding delivery essential; Delmotte v. Taylor, 1 Redf. 417, holding gift invalid unless there be actual delivery; Seabright v. Seabright, 28 W. Va. 412, holding that though note be delivered to person and donor signs endorsement on its conveying title to donee, yet such gift may be shown by circumstances to have been gift causa mortis and not gift inter vivos; Schwent v. Roetter, 21 Ont. L. Rep. 112, holding that deposit of money in bank in joint name of depositor and person to whom he wishes to make gift, is sufficient to constitute such person owner of money as survivor of depositor; Duffield v. Elwes, 9 E. R. C. 827, 1 Bligh, N. R. 497–544, holding delivery essential.

— Burden of proof.

Cited in Smith v. Burnet, 35 N. J. Eq. 314, holding burden on one claiming as donee where there is no delivery.

—Sufficiency of delivery.

Cited in Fulton v. Fulton, 48 Barb. 581, holding delivery of note with intention to vest portion of estate in donee, good delivery of money represented by note; Camp's Appeal, 36 Conn. 88, 4 Am. Rep. 39, holding delivery to donee of savings bank book, with intention to give deposits represented by book, good delivery of deposits; Watson v. Bradshaw, 6 Ont. App. Rep. 666, holding delivery of promissory note to order of donor, valid gift of money represented; Payne v. Marshall, 18 Ont. Rep. 488, holding delivery valid where money has been given wife but is deposited in bank in name of husband and wife subject to withdrawal by either, but no withdrawal is made by husband; Tellier v. Dujardin, 16 Manitoba L. Rep. 423, holding delivery good where father gives piano to daughter living in same house with him, the piano being therein.

12 E. R. C. 410, COCHRANE v. MOORE, 54 J. P. 804, 59 L. J. Q. B. N. S. 377, 63 L. T. N. S. 153, L. R. 25 Q. B. Div. 57, 38 Week. Rep. 588.

Delivery in verbal gift inter vivos.

Cited in Kilpin v. Ratley [1892] 1 Q. B. 582, 66 L. T. N. S. 797, 40 Week. Rep. 479, 56 J. P. 565, holding verbal gift valid where there has been a change of possession though there be no manual delivery by donor; Slade v. Mutrie, 156 Mass. 19, 30 N. E. 168, holding that delivery of promissory note by holder to maker, with intention of transferring to him title to note, is extinguishment of note; Fowler v. Fowler, 135 Fed. 405, holding where gift is executed it will not be set aside in equity also citing annotation on this point; Huggard v. Bennetto, 1 D. L. R. 305, holding that verbal gift to wife by husband of automobile is void unless there is actual delivery, as against husband's creditors; Kent v. Kent, 20 Ont. Rep. 445, holding that gift from husband to wife is not incomplete gift by reason of incapacity of wife at law to take gift from husband; Tellier v. Dujardin, 16 Manitoba L. Rep. 423, holding that gift by father to daughter of piano in house in which both lived, was complete as against person claiming under alleged subsequent sale; Bean v. Bean, 71 N. H. 538, 53 Atl. 907; Hardy v. Atkinson, 18 Manitoba L. Rep. 351, holding that actual delivery of thing is necessary to effect completed gift; McDonald v. McDonald, 33 Can. S. C. 145 (dissenting opinion), on necessity of delivery of thing that is subject of gift in order to make gift valid.

Cited in notes in 5 E. R. C. 28, on necessity of change of possession on sale of chattels; 5 E. R. C. 71, on what constitutes a bill of sale.

Cited in Benjamin, Sales, 5th ed. 5, 7, on necessity of delivery to pass title; 2 Bolles, Banking, 662, on necessity for delivery of gift where property is all in donee's possession; Gray, Perpet. 2d ed. 62, on invalidity of parol gift of chattel to begin in futuro; Underhill Am. Ed. Trusts, 55, on how far valuable consideration is necessary to bind settlor or his representatives.

— Through third person.

Cited in Rawlinson v. Mort, 93 L. T. N. S. 555, 21 Times L. R. 774, on validity of gift of property in possession of third person, the donation being by words of present gift.

— Gift causa mortis.

Cited in Scott v. Union & Planters' Bank & T. Co. 123 Tenn. 258, 130 S. W. 757, holding that question of what will amount to legal delivery, essential to constitute gift causa mortis, depends on intention of parties; McKinnon v. McKinnon, 28 N. S. 189, holding that delivery is an essential requisite to donatio mortis causa; Schwent v. Roetter, 21 Ont. L. Rep. 112, holding that deposit of money in bank in joint name of depositor and person to whom he wishes to make gift, is sufficient to constitute such person owner of money as survivor of depositor.

Essentials to valid gift.

Cited in Re Fitzgerald, Newfoundl. Rep. (1884–96) 714, holding there must be clear and unequivocal terms of present donation accompanied by change of ownership, manifested by conduct of parties.

Description of present value of debt in bill of sale under registration laws.

Cited in Darlow v. Bland [1897] 1 Q. B. 125, 66 L. J. Q. B. N. S. 157, 75 L. T. N. S. 537, 45 Week. Rep. 177, holding bill of sale void which untruly stated the future and not the present value of the debt; Hogaboom v. Graydon, 26 Ont. Rep. 298, holding that sale of household goods by husband to wife, while living together, without registered bill of sale, is invalid as against husband's creditors.

12 E. R. C. 442, TREGO v. HUNT [1896] A. C. 7, 65 L. J. Ch. N. S. 1, 73 L. T. N. S. 514, 44 Week. Rep. 225, reversing the decision of the Court of Appeal reported in (1895) 1 Ch. 462.

Restrictions on seller of goodwill.

Cited in Stephen Merritt Burial & Cremation v. Stephen Merritt Co. 155 App. Div. 565, 140 N. Y. Supp. 895, holding that one may not incorporate business under his own name, invite public to invest in it, because it bears his name, and then sell use of his name to competing concern; Sabiston v. Montreal Lithographing Co. Rap. Jud. Quebec 6 B. R. 510, holding that purchaser of good will of company from liquidator cannot restrain shareholder from doing business under similar name.

Cited in note in 19 L.R.A.(N.S.) 763, 767, on sale of business and good will as limitation upon right of vendor to compete.

Cited in Benjamin, Sales, 5th ed. 527, on restrictions on seller implied by sale of good will; Hopkins, Trademarks, 2d ed. 197, 206, on right of vendor of good will of business to engage in competitive business.

— Solicitation of customers.

Cited in Ranft v. Reimers, 200 Ill. 386, 60 L.R.A. 291, 65 N. E. 270, holding vendor cannot solicit old customers; Newark Coal Co. v. Spangler, 54 N. J. Eq. 354, 34 Atl. 932, holding where seller of goodwill has been connected after sale with purchaser for four years, he can on dissolution of connection and engaging in rival business advertise his connection with purchaser; Snyder Pasteurized Milk Co. v. Burton, 80 N. J. Eq. 185, 83 Atl. 907, holding that one who has sold good will of business, may set up rival business, unless he has covenanted to contrary but he may not solicit custom of those who have previously dealt with him; Von Bremen v. MacMonnies, 200 N. Y. 41, 32 L.R.A. (N.S.) 293, 93 N. E. 186, 21 Ann. Cas. 423 (modifying 138 App. Div. 319, 12 N. Y. Supp. 1087), holding that partner who voluntarily sells good will of business, cannot, upon establishing competing business, solicit trade from old customers of firm; Kates v. Bok, 141 App. Div. 925, 126 N. Y. Supp. 606; Kates v. Bok, 139 App. Div. 640, 124 N. Y. Supp. 297,—to the point that retiring partner may not solicit customers of old firm; Snider v. McKelvey, 27 Ont. App. Rep. 339, holding there is implied obligation on seller not to hold out in any way that he was carrying on business in continuation of or in succession to former business; Fleckenstein Bros. Co. v. Fleckenstein, 66 N. J. Eq. 252, 57 Atl. 1025, holding agreement on sale of business and goodwill not to engage in same business does not bind wife of seller not to engage in similar business in her own name; Curl Bros. v. Webster [1904] 1 Ch. 685, 73 L. J. Ch. N. S. 540, 52 Week. Rep. 413, 90 L. T. N. S. 479, holding vendor cannot solicit business of customers of old firm who, although continuing such, also deal with vendor in his new business; West London Syndicate v. Inland Revenue Comrs. [1898] 2 Q. B. 507, 67 L. J. Q. B. N. S. 956, 79 L. T. N. S. 289, 47 Week. Rep. 125, 14 Times L. R. 569, on right of vendor to engage in competing business.

Disapproved in Gordon v. Knott, 199 Mass. 173, 19 L.R.A.(N.S.) 762, 85 N. E. 84, holding he cannot engage in competing business.

Rights acquired on purchase of goodwill.

Cited in Foss v. Roby, 195 Mass. 292, 10 L.R.A.(N.S.) 1200, 81 N. E. 199, 11 Ann. Cas. 571, holding in commercial business purchaser acquires chance of being able to retain trade connected with business where it has been conducted; Bank of Tomah v. Warren, 94 Wis. 151, 68 N. W. 549, on right of vendee of assignee to use of good will; Kradwell v. Thiesen, 131 Wis. 97, 111 N. W. 233, on rights acquired on purchase of goodwill.

Right of partner on dissolution to carry on competing business.

Cited in Webster v. Webster, 180 Mass. 310, 62 N. E. 383, on right of retiring partner to engage in same business; Hutchinson v. Nay, 183 Mass. 355, 67 N. E. 601, on right of surviving partner to solicit business of firm; Hutchinson v. Nay, 187 Mass. 262, 68 L.R.A. 186, 105 Am. St. Rep. 390, 72 N. E. 974, holding surviving partner upon whom goodwill has been forced by administrator of deceased partner may set up competing business and solicit old customers as sole trader; McDonald v. Miller, 37 N. S. 46, holding he can carry on business but cannot solicit old customers; Gillingham v. Beddow [1900] 2 Ch. 242, 69 L. J. Ch. N. S. 527, 82 L. T. N. S. 791, 64 J. P. 617, holding on sale by partner of business to copartner with privilege to carry on same business, vendor could not solicit old customers; Jennings v. Jennings [1898] 1 Ch. 378, 67 L. J. Ch. N. S. 190, 77 L. T. N. S. 786, 46 Week. Rep. 344, 14 Times L. R. 198, holding selling partner cannot solicit customers of firm; Re David & Matthews [1899] 1 Ch. 378, 68 L. J. Ch. N. S. 185, 80 L. T. N. S. 75, 47 Week. Rep. 313, on right

of surviving partner to carry on business and solicit old customers; Bevan v. Webb [1901] 2 Ch. 59, 2 B. R. C. 953, 70 L. J. Ch. N. S. 536, 84 L. T. N. S. 609, 49 Week. Rep. 548, 17 Times L. R. 440, on right of partner on dissolution of firm to inspect firm accounts.

Cited in note in 19 L.R.A.(N.S.) 770, on effect on right of individual partners, of sale by firm of good will of business.

Status of goodwill as property.

Cited in People ex rel. A. J. Johnson Co. v. Roberts, 159 N. Y. 70, 45 L.R.A. 126, 53 N. E. 685, on goodwill as constituting part of capital; Hart v. Smith, 159 Ind. 182, 58 L.R.A. 949, 95 Am. St. Rep. 280, 64 N. E. 661, holding it is not property of itself within constitutional provision as to taxation; West London Syndicate v. Inland Revenue Comrs. [1898] 2 Q. B. 507, 67 L. J. Q. B. N. S. 956, 79 L. T. N. S. 289, 47 Week. Rep. 125, 14 Times L. R. 569, holding it property; Hill v. Travis [1905] 1 Ch. 466, 74 L. J. Ch. N. S. 237, 53 Week. Rep. 457, 21 Times L. R. 187, holding it an asset which on dissolution of partnership by death of partner must be accounted for.

Cited in note in 19 E. R. C. 663, on partnership goodwill as partnership assets.

Doctrine of stare decisis.

Cited in Re Peiser, 79 Misc. 668, 140 N. Y. Supp. 844, holding that doctrine of "stare decisis" is not equivalent of "res judicata."

12 E. R. C. 464, HOLMES v. MITCHELL, 7 C. B. N. S. 361, 6 Jur. N. S. 73, 28 L. J. C. P. N. S. 301.

Sufficiency of memorandum to take agreement out of statute of frauds.

Cited in Lightbound v. Warnock, 4 Ont. Rep. 187, on sufficiency of memorandum to take agreement out of statute; Campbell v. McIsaac, 9 N. S. 287, holding that in action upon special guaranty, complaint must allege consideration.

Cited in 1 Brandt, Suretyship, 3d ed. 193, on necessity that whole promise in contract of suretyship appear from writing; Smith, Pers. Prop. 162, on time and manner of making written memorandum of sale.

Parol to aid memorandum in writing under statute of frauds.

Cited in Strong v. Bent, 31 N. S. 1, holding it inadmissible.

Cited in Benjamin, Sales, 5th ed. 235, on admissibility of parol evidence to supplement an imperfect note.

What amounts to guaranty.

Cited in Grasett v. Hutchinson, 10 U. C. C. P. 265, holding that order "Please let the bearer, Thos. Billings, what goods he may require, and charge yours M. Hutchinson" did not amount to guaranty for goods furnished Billings, on authority of it.

12 E. R. C. 470, BARCLAY v. LUCAS, 3 Dougl. K. B. 321, 1 T. R. 291, note, 1 Revised Rep. 202, note.

Liability of guarantor on continuing guarantee.

Cited in Boston Hat Manufactory v. Messinger, 2 Pick. 223; W. B. Saunders Co. v. Ducker, 116 Md. 482, 82 Atl. 154, Ann. Cas. 1913C, 817,—holding that in order to arrive at intention of parties to contract of guaranty, contract must be read in light of surrounding circumstances; Grafton Bank v. Kent, 4 N. H.

221, 17 Am. Dec. 414, on liability of indorser of promissory note who endorses as surety.

Release of guarantor of firm by change therein.

Cited in Schoonover v. Osborne Bros. 108 Iowa, 453, 79 N. W. 263, holding guarantor of firm, where intention is to limit guaranty to members thereof, released by succession of one member to business of firm; Burch v. De Rivera, 53 Hun, 367, 6 N. Y. Supp. 206, holding liability continues where continuing quality of guarantee refers to duration of credit and not to succession of firm; Erie R. Co. v. Wanaque Lumber Co. 75 N. J. L. 878, 69 Atl. 168, holding that guaranty to firm of customers running account is not operative as to credit extended after admission into such firm of new member; Starrs v. Cosgrave Brewing & Malting Co. 12 Can. S. C. 571, holding that death of member of firm puts end to contract of suretyship by which firm was secured against loss by selling to certain person on credit; Cosgrave Brewing & Malting Co. v. Starrs, 5 Ont. Rep. 189, holding death of partner terminates liability of guarantor although guarantee is of firm or members for time being composing firm.

Cited in note in 12 E. R. C. 482, on continuance of guaranty to fluctuating body after change in membership.

Cited in 1 Bolles, Banking, 327, on preservation of identity of banking firm or corporation; 1 Brandt, Suretyship, 3d ed. 292, as to when obligation given by surety to firm binds him after change in firm; Parsons, Partn. 4th ed. 314, as to how guaranty is affected by change in firm.

Criticized in Cosgrave Brewing & Malting Co. v. Starrs, 11 Ont. App. Rep. 156, holding guarantee to partnership or members for time being constituting firm not terminated by death of partner.

Effect of change of parties to bond on obligation of obligor.

Cited in Smith v. Wainwright, 24 Vt. 97, holding obligor not relieved by change of original parties to bond where it is given to them jointly and is given for the benefit of enterprise for which it is given; Read v. Bowman, 2 Wall. 591, 17 L. ed. 812, holding obligors bound where at time of giving obligation they contemplated change by other party of subject matter; Burns v. Pillsbury, 17 N. H. 66, on effect of extension of credit to one member after dissolution of firm.

Disapproved in Bank of New Brunswick v. Wiggins, 4 N. B. 478, holding where bond is given as security for employee of bank which is a corporation, surety discharged by subsequent incorporation with another bank.

Change in condition of bond, sufficient to terminate liability of surety.

Cited in Thompson v. McLean, 17 U. C. Q. B. 495, holding surety on bond of officer of two counties discharged where union of such counties is dissolved.

Criticized in Bank of Upper Canada v. Covert, 5 U. C. Q. B. O. S. 541, holding surety discharged where nature of duty of one for whom bond is given is changed.

12 E. R. C. 475, BACKHOUSE v. HALL, 6 Best & S. 507, 11 Jur. N. S. 562, 34 L. J. Q. B. N. S. 141, 12 L. T. N. S. 375, 13 Week. Rep. 654.

Effect of change in firm on obligation of surety of firm.

Cited in Dupee v. Blake, 148 Ill. 453, 35 N. E. 867, holding surety of firm released by admission of new member into firm; Standard Oil Co. v. Arnestad, 6 N. D. 255, 34 L.R.A 861, 66 Am. St. Rep. 604, 69 N. W. 197, holding surety of firm as agents discharged where firm is dissolved and one member continues

to act as agent; Markland Min. & Mfg. Co. v. Kimmel, 87 Ind. 560, holding where guaranty is for several persons composing firm guarantor not liable for default of firm of same name but composed of less number of such persons; Starrs v. Cosgrave Brewing & Malting Co. 12 Can. S. C. 571, holding surety released by death of partner where bond is to firm or members for time being of firm; Cosgrave Brewing & Malting Co. v. Starrs, 5 Ont. Rep. 189, holding death of partner terminates liability where intention is to secure only present members of firm and not business of firm; Cosgrave Brewing & Malting Co. v. Starrs, 11 Ont. App. Rep. 156, holding death of partner does not relieve surety where intention is that obligation shall secure firm or successors.

Cited in note in 12 E. R. C. 482, on continuance of guaranty to fluctuating body after change in membership.

12 E. R. C. 483, HOBHOUSE'S CASE, 3 Barn. & Ald. 420, 22 Revised Rep. 443, 2 Chitty, 207.

Occasion for habeas corpus.

Cited in Ex parte Ross, 21 N. B. 257, holding it will not issue where return is sufficient and shows conviction by competent court on indictment for criminal offense; Re McDonald, Fed. Cas. No. 8,751, on history of habeas corpus.

Cited in note in 12 E. R. C. 492, 495, 500, 501, on power to issue of habeas corpus.

Showing on petition for habeas corpus.

Cited in Sim's Case, 7 Cush. 285, holding it will not be issued where it appears from petition that petitioner if brought before court would not be entitled to discharge; Williamson's Case, 26 Pa. 9, 67 Am. Dec. 374, holding it will not be issued where it appears from petitioners own showing that he is legally confined; United States v. Lawrence, 4 Cranch, C. C. 518, Fed. Cas. No. 15,577, holding it will not be granted of course in first instance on application merely; Ex parte Croom, 19 Ala. 561, holding it not grantable of course; Re Brooks, 41 U. C. Q. B. 381, holding it is not a writ of right; Miskimmins v. Shaver, 8 Wyo. 392, 49 L.R.A. 831, 58 Pac. 411 (dissenting opinion), on issuance of writ when petitioner's own showing negatives right.

— In commitment and contempt cases.

Cited in State ex rel. Welsh v. Towle, 42 N. H. 540, holding it will not issue to examine sentence of court for contempt where such court had jurisdiction; Ex parte Nugent, 4 Clark (Pa.) 220, holding it will not issue to revise punishment for contempt if court has jurisdiction of subject matter; Ex parte Nugent, Brunner, Col. Cas. 296, Fed. Cas. No. 10,375, holding propriety of commitment for contempt by senate of the United States cannot be inquired into on petition for writ of habeas corpus.

Cited in note in 15 Eng. Rul. Cas. 37, on power of court to punish for contempt.

Review of judgment for contempt of court.

Cited in Ex parte Summers, 27 N. C. (5 Ired. L.) 149, holding where court in order states contempt in general terms order conclusive; Ex parte Maulsby, 13 Md. 625, Appx., holding summary judgment for contempt conclusive where court has jurisdiction; Easton v. State, 39 Ala. 551, 87 Am. Dec. 49, on appeal from judgment of trial court for contempt.

12 E. R. C. 487, EX PARTE BESSET, 9 Jur. 66, 14 L. J. Mag. Cas. N. S. 17, 1 New. Sess. Cas. 337, 6 Q. B. 481.

Habeas corpus as comon law writ.

Cited in Ex parte Stephens, Montreal L. Rep. 7 Q. B. 349, holding it a writ at common law.

Habeas corpus to review extradition proceedings.

Cited in Chesapeake, Stockton Adm. (N. B.) 208, on power of court to issue writ of habeas corpus on extradition from foreign state; Re Hall, 8 Ont. App. Rep. 135; Re Harsha, 11 Ont. L. Rep. 457, 6 Ann. Cas. 496,—holding that Habeas Corpus Act, 31 Charles II., Ch. 2, sec. 6, does not apply to extradition proceedings; Re Parker, 19 Ont. Rep. 612, holding that magistrate has no power, under extradition act, to remand prisoner for purpose of opening case to receive further evidence; Rex v. Frejd, 22 Ont. L. Rep. 566 (dissenting opinion), on power of court to remand prisoner to be dealt with upon charge originally made against him, upon finding in habeas corpus proceedings that committing court was without jurisdiction; Re Hall, 32 U. C. C. P. 498, to the point that writ of habeas corpus could not issue where only claim of prisoner was that his act was not forgery and court of appeal had decided that his act was forgery.

Cited in note in 12 E. R. C. 491, 494, on power to issue writ of habeas corpus.

Sufficiency of warrant for commitment remanding prisoner for extradition.

Cited in Re Williams, 7 Ont. Pr. Rep. 275, holding warrant insufficient where it refers to act not in force as its authority for detention; Re Anderson, 11 U. C. C. P. 1, holding warrant insufficient where not issued in conformity to statute.

Cited in note in 8 Eng. Rul. Cas. 110, on sufficiency of warrant of commitment.

Distinguished in Re Collins, 11 B. C. 436, holding under statute warrant sufficient if it states offense for which accused is committed.

Sufficiency of evidence for extradition.

Cited in Re Metzger, 5 N. Y. Leg. Obs. 83, Fed. Cas. No. 9,511, holding it will be effectuated where there is sufficient evidence to justify putting accused upon trial.

Power to deliver up prisoner on requisition from foreign state.

Cited in Re Metzger, 1 Barb. 248, holding president of United States has no authority merely by virtue of treaty stipulation.

12 E. R. C. 501, GREGG v. SMITH, 42 L. J. Mag. Cas. N. S. 121, L. R. 8 Q. B. 302, 28 L. T. N. S. 555, 21 Week. Rep. 737.

Peddler, who is.

Cited in Graffty v. Rushville, 107 Ind. 502, 57 Am. Rep. 128, 8 N. E. 609, holding one who goes from house to house with samples of merchandise soliciting orders from consumers for future delivery, a peddler; Fallis v. Gas City, 169 Ind. 508, 82 N. E. 1056, holding one who goes from house to house for purpose of taking orders for commodities for future delivery a peddler.

12 E. R. C. 505, REG. v. EAST MARK, 12 Jur. 332; 17 L. J. Q. B. N. S. 177, 11 Q. B. 877, 3 Cox. Cr. Cas. 60.

Dedication presumable from long user.

Cited in Scrantom v. Griffin, 5 Luzerne Leg. Reg. 26, holding that all that is required to constitute a valid dedication is assent of owner for such length of time that public would be affected by interruption of enjoyment; R. v. Moss, 26 Can. S. C. 322, holding user by public of bridge over navigable water for over thirty-five years sufficient evidence of intention; Macoomb v. Welland, 12 Ont. L. Rep. 362, holding uninterrupted user by public of way for more than thirty years sufficient to show intention to dedicate; Fraser v. Diamond, 10 Ont. L. Rep. 90, holding long continued user of way by public of Crown land raises presumption of dedication; Frank v. Harwich Twp. 18 Ont. Rep. 344, holding uninterrupted user by public for seventy years of roadway along lake, although course of highway was slightly varied from time to time by action of water sufficient evidence of dedication; R. v. Gordon, 6 U. C. C. P. 213, holding intention manifest where owner of tract makes plat of same with road marked off and road is fenced off and used as such for about nineteen years; Winslow v. Dalling, 1 N. B. Eq. 608, holding that right to use of land dedicated to public cannot be lost by nonuser; Guelph v. Canada Co. 4 Grant, Ch. (U. C.) 632, holding where owner lays out town into lots and public square is provided, around which lots are laid off and sold, and user continues for period of over twenty-five years, dedication established; Saugeen v. Church Soc. 6 Grant, Ch. (U. C.) 538, to the point that officers in filing map showing roads, cannot be heard to say that they retained in their own minds intention at variance with that act; Rae v. Trim, 27 Grant, Ch. (U. C.) 374, holding that by-law passed by municipality cannot have effect of taking any lands of Crown in addition to those appropriated by Crown for purpose of highway; Vernon v. St. James, L. R. 16 Ch. Div. 449, 50 L. J. Ch. N. S. 81, 44 L. T. N. S. 229, 29 Week. Rep. 222, holding where court, although not a thoroughfare, has been open to public at all hours for over seventy years and had been paved and lighted and cleaned, evidence sufficient to show dedication; Turner v. Walsh, L. R. 6 App. Cas. 636, 50 L. J. P. C. N. S. 55, 45 L. T. N. S. 50, holding continuous user of Crown lands by public as a highway for twenty-one years sufficient to raise presumption of dedication; Dawes v. Hawkins, 12 E. R. C. 618, 18 L. J. C. P. N. S. 343, 8 C. B. N. S. 858, holding long continued user by public sufficient.

Cited in note in 12 E. R. C. 580, on right to limit use of path dedicated to public.

Cited in 3 Dillon, Mun. Corp. 5th ed. 1793, on road or bridge originating in convenience or for protection of individuals becoming a public road or bridge.

Presumptive intention to dedicate.

Cited in R. v. Spence, 11 U. C. Q. B. 31, holding intention of dedication for jury; Hamilton v. Morrison, 18 U. C. C. P. 228, holding it is to be gathered from intention of owner; R. v. Donaldson, 24 U. C. C. P. 148, holding obstruction by person who knew he was obstructing laid out street cannot afford evidence to disprove intention of dedication by owner.

Period of adverse user to acquire right of way or easement.

Cited in R. v. Meyers, 3 U. C. C. P 305, holding twenty years' uninterrupted enjoyment as of right necessary.

Persons against whom adverse public user will operate.

Cited in Prudden v. Lindsley, 29 N. J. Eq. 615, holding it will operate against cestuis que trust and trustee.

12 E. R. C. 511, WINTERBOTTOM v. DERBY, 36 L. J. Exch. N. S. 194, L. R. 2 Exch. 316, 16 L. T. N. S. 771, 16 Week. Rep. 15.

Who may sue for interference with public right.

Cited in Hart v. MacIlreith, 41 N. S. 351, holding that rate payers could sue in interest of city and without joining attorney general, to prevent waste of public funds, where city refused to bring suit; Martin v. London County Council, 79 L. T. N. S. 170, holding individual cannot maintain action unless he be injured specially, directly and substantially; Boyce v. Paddington [1903] 1 Ch. 109, 72 L. J. Ch. N. S. 28, 87 L. T. N. S. 564, 51 Week. Rep. 109, 67 J. P. 23, holding individual may maintain action where he suffers special damage peculiar to himself.

Cited in note in 1 E. R. C. 596, on nonliability to individual for injury suffered in common with public generally.

Distinguished in Campbell Davys v. Lloyd [1901] 2 Ch. 518, 70 L. J. Ch. N. S. 714, 85 L. T. N. S. 59, 49 Week. Rep. 710, 17 Times L. R. 678, holding individual although suffering special damage cannot maintain action to compel repair of bridge.

— Public nuisance.

Cited in Kerfoot v. People, 51 Ill. App. 409; Tibbetts v. West & South Town Street R. Co. 54 Ill. App. 180; Stewart v. Chicago General Street R. Co. 58 Ill. App. 446; Powell v. Bunger, 91 Ind. 64; Houck v. Wachter, 34 Md. 265, 6 Am. Rep. 332; Walls v. Smith, 167 Ala. 138, 140 Am. St. Rep. 24, 52 So. 320,— holding that unless individual has suffered injury peculiar to himself and different from that suffered by public he cannot maintain private action for damages for obstructing highway; Jacksonville, T. & K. W. R. Co. v. Thompson, 34 Fla. 346, 26 L.R.A. 410, 16 So. 282, holding that in order to maintain private suit for obstruction of highway special damage differing in kind from that suffered by public must be shown; Smart v. Aroostook Lumber Co. 103 Me. 37, 14 L.R.A.(N.S.) 1083, 68 Atl. 527, holding that special damages are suffered by one whose means of access to his cottage is cut off by obstruction of stream by logs, there being no other highway leading thereto; Shero v. Carey, 35 Minn. 423, 29 N. W. 58, holding that inconvenience is being obliged to go longer route to market, is not sufficient grounds for action for obstruction of highway; Swanson v. Minneapolis & R. River Boom Co. 42 Minn. 532, 7 L.R.A. 673, 44 N. W. 986, holding that to entitle owner of land on navigable stream to sue for its obstruction, he must show special injury differing from that which public suffers; Ryerson v. Morris Canal & Bkg. Co. 69 N. J. L. 505, 55 Atl. 98, holding that obstruction of road connecting plaintiff's three farms located at different places thereon may constitute special damage where only other means of going from one farm to another is over almost impracticable way; Brown v. Toronto & N. R. Co. 26 U. C. C. P. 206; Reg. v. Barry, 2 Can. Exch. 333,— holding that construction of railway siding along sidewalk contiguous to lands where by access is cut off, is such injury as will entitle owner to compensation; Baird v. Wilson, 22 U. C. C. P. 491; Hislop v. McGillivray, 12 Ont. Rep. 749,— holding that private action can be maintained for obstructing highway only where person suffers special damage different from public; Crandell v. Mooney, 23 U. C. C. P. 212, holding that steamboat owner is entitled to damages from per-

son obstructing navigable stream with logs, so that boat cannot pass; Burton v. Dougherty, 19 N. B. 51; Soule v. Grand Trunk R. Co. 21 U. C. C. P. 308,—holding that for ordinary obstruction on highway, creating common injury, only remedy is by indictment; Payne v. Caughell, 24 Ont. App. Rep. 556, on right of private person to maintain action concerning questions affecting land used for highway; Hodgins v. Toronto, 19 Ont. App. Rep. 537, holding that city or telephone company had no right to cut from trees growing on private land, limbs overhanging street, where they in no way interfered with use of street; Noble v. Turtle Mountain, 15 Manitoba L. Rep. 514, holding that under Municipal Act, one suffering special damage because of neglect of city council to replace bridge may recover against city; Liverpool v. Liverpool etc. R. Co. 35 N. S. 233, holding that town council could bring action in name of town to enforce ordinance as to laying tracks across street without joining attorney general; Castor v. Uxbridge, 39 U. C. Q. B. 113, holding that person injured by reason of obstruction negligently left in highway by municipality is entitled to recover against municipality if he, himself is without fault; Drake v. Sault Ste. Marie Pulp & Paper Co. 25 Ont. App. Rep. 251, holding that one who uses navigable stream to go from house to lake in said road, and also used boats for fishing, is entitled to recover damages resulting from obstruction of stream by logs; Benjamin v. Starr, 19 E. R. C. 263, 43 L. J. C. P. N. S. 162, L. R. 9 C. P. 400, 30 L. T. N. S. 362, 22 Week. Rep. 631, holding individual cannot maintain action for public nuisance unless he suffers particular, direct and substantial injury; Smith v. Wilson [1903] 2 Ir. K. B. 45 (dissenting opinion), on right of individual to maintain action for obstruction of road; McCarthy v. Metropolitan Bd. of Works, L. R. 8 C. P. 191, 42 L. J. C. P. N. S. 81, 28 L. T. N. S. 417 (dissenting opinion), on right to maintain action by individual for obstruction of highway, where no special damage results.

Cited in note in 28 L.R.A.(N.S.) 1054, on right of one prevented by unlawful obstruction from using highway to maintain action.

Cited in 1 Thompson, Neg. 1132, 1133, on tests by which to determine what is special damage in respect to obstructing public way.

Sufficiency of user to create presumption of dedication.

Cited in Woodstock Woollen Mills Co. v. Moore, 34 N. B. 475, holding that use to show dedication must be such as to show that the way is needed for public accommodation, and that owner intended to dedicate; Roberts v. James, 18 Times L. R. 777, on sufficiency of user to create presumption of dedication.

Cited in 5 Thompson, Neg. 406, on highways by public user and prescription.

Inference from long user or practice.

Cited in O'Keeffe v. Walsh [1903] 2 Ir. K. B. 681, on inference of previous facts from long continued course of similar doings.

Right to new trial.

Cited in Hughes v. Canada Permanent Loan & Sav. Soc. 39 U. C. Q. B. 221, holding that new trial must be granted where verdict is against evidence; Wills v. Carman, 14 Ont. App. Rep. 656 (dissenting opinion), on right of court on appeal to award new trial.

When entry of nonsuit proper.

Distinguished in Smith v. Isolated Risk and Farmers' Fire Ins. Co. 18 N. B. 31, holding that where there are several issues and plaintiff entirely fails upon one, but there is evidence for jury upon other issues, he is entitled to go to jury, but if he does not resist motion for nonsuit he cannot afterwards complain.

12 E. R. C. 527, YOUNG v. CUTHBERTSON, 1 Macq. Sc. App. Cas. 455, 1 Paterson Sc. App. Cas. 309.

Public termini as requisite to public way.

Cited in Chisolm v. Caines, 67 Fed. 285, holding that public highway must have public terminus at each end; Manigault v. Ward, 123 Fed. 707, holding that stream, which has no public terminus except at its outlet, is not public highway under South Carolina Constitution; Ogilvie v. Crowell, 40 N. S. 501, holding that strong evidence is necessary to show dedication of cul de sac as highway; Atty.-Gen. v. Antrobus [1905] 2 Ch. 188, 69 J. P. 141, 92 L. T. N. S. 790, 21 Times L. R. 471, holding to constitute public highway it must prima facie lead from public place to another.

Cited in note in 12 Eng. Rul. Cas. 558, on public highway in cul de sac.

— Prescriptive ways.

Cited in Bourke v. Davis, L. R. 44 Ch. Div. 110, 62 L. T. N. S. 34, 38 Week. Rep. 167, holding way could not be established over private land from point on river below a dam to point above dam.

Cited in note in 12 E. R. C. 549, on necessity of termini of way by prescription.

Sufficiency of user to establish highway.

Cited in Mann v. Brodie, L. R. 10 App. Cas. 378, on evidence to establish constitution of public right of way from user.

12 E. R. C. 541, DUNCAN v. LEES, 9 Macph. Sc. Sess. Cas. 855.

12 E. R. C. 551, RUGBY CHARITY v. MERRYWEATHER, 11 East, 375, note, 10 Revised Rep. 528.

Presumption of dedication from user.

Cited in State v. Marble, 26 N. C. (4 Ired. L.) 318, holding where road has been used by public as highway for twenty years, presumption arises that it was legally laid off and established; Pritchard v. Atkinson, 4 N. H. 9, holding user of private lands as highway by public for seventeen years with knowledge and without objection by owner, raises presumption of dedication; Prichard v. Atkinson, 3 N. H. 335, holding it may be established by long user; Livingston v. New York, 8 Wend. 85, 22 Am. Dec. 622, holding that where owner sells building lots bounding them by streets as laid down on map, but actually opened purchasers acquire as against grantor to have streets kept open; Scanlin v. Burgess, 19 Montg. Co. L. Rep. 31, holding that where land is used by public as street for time corresponding to statutory period of limitation of real actions, it may be said to have become street by prescription; Sellick v. Starr, 5 Vt. 255, on length of time necessary to raise presumption of dedication; Rex v. Allan, 2 U. C. Q. B. O. S. 90, on occupation of land originally laid out as highway, for more than thirty years as rebuttal of presumption of right to use as highway; Post v. Pearsall, 22 Wend. 425 (dissenting opinion), on presumption of dedication from adverse user for twenty years.

Cited in note in 12 Eng. Rul. Cas. 520, on long use of public road as evidence of dedication.

Right to use way as highway.

Cited in Scott v. State, 1 Sneed, 629, holding that way may be acquired where one lays out street over his land for general public and it is accepted and used by public as such; Anderson v. Turbeville, 6 Coldw. 150, holding right may be ac-

quired by prescription; Pearsall v. Post, 20 Wend. 111, holding highway may be derived from dedication shown by express assent of owner or inferred from adverse user by public; People v. Beaubien, 2 Dougl. (Mich.) 256, holding right may be acquired by dedication by acts in pais, where such acts tend to show design to dedicate; Oswald v. Grenet, 22 Tex. 94; Wiggins v. Tallmadge, 11 Barb. 457; Hobbs v. Lowell, 19 Pick. 405, 31 Am. Dec. 145,—holding right may be acquired in private grounds by long continued user by public; Noyes v. Ward, 19 Conn. 250, holding right to use private land as highway may be acquired by dedication from owner; Cohoes v. Delaware & H. Canal Co. 134 N. Y. 397, 31 N. E. 887, holding right may be acquired by dedication and implied acceptance; Phipps v. State, 7 Blackf. 512, on acquisition of right to use private land as highway by long continued user; R. v. Sanderson, 3 U. C. Q. B. O. S. 103, on proper procedure in laying out public road; Rae v. Trim, 27 Grant, Ch. (U. C.) 374, on rights in highway by dedication.

— Length of user.

Cited in Patton v. State, 50 Ark. 53, 6 S. W. 227, holding open and notorious use of road by public for longer than period limited by statute for recovery of real estate establishes right; Macon v. Franklin, 12 Ga. 239, holding right to use common may be acquired by user, where it is for such time that public accommodation and private rights might be materially affected by interruption of enjoyment; State v. New-Boston, 11 N. H. 407, holding user for two years by public not sufficient to establish dedication by owner; Turrentine v. Faucett, 33 N. C. (11 Ired. L.) 652 (dissenting opinion), on intention of owner rather than length of time of use, which must determine fact of dedication; Porter v. Attica, 33 Hun, 605, holding right may be acquired by continuous and uninterrupted use for more than twenty years; Pittsburg, Ft. W. & C. R. Co. v. Dunn, 56 Pa. 280, holding user for eight years sufficient to create presumption of dedication; Waters v. Philadelphia, 208 Pa. 189, 57 Atl. 523, holding user for thirty-five years raises presumption of dedication; Johnson City v. Wolfe, 103 Tenn. 277, 52 S. W. 991, holding that manner of use of property by public as street is more material than length of time, in order to create easement; State v. Wilkinson, 2 Vt. 480, 21 Am. Dec. 560, holding it may be acquired by dedication and user for fifteen years; Abbott v. Mills, 3 Vt. 521, 23 Am. Dec. 222, holding enjoyment of public common for period less than fifteen years may afford conclusive evidence of right to continue such enjoyment; Woodyer v. Hadden, 5 Taunt. 125, 14 Revised Rep. 706, holding user of private way for two years insufficient to establish right.

Cul de sac as highway.

Cited in Bartlett v. Bangor, 67 Me. 460, holding cul de sac may be acquired as highway by location or dedication; City Cemetery Asso. v. Meninger, 14 Kan. 312, holding road without outlet at one end may be dedicated as highway; Peckham v. Lebanon, 39 Conn. 231, holding road which is not a thoroughfare may be laid out as public way; State, Atkinson, Prosecutor, v. Bishop, 39 N. J. L. 226; Stone v. Brooks, 35 Cal. 489; Greene v. O'Connor, 18 R. I. 56, 19 L.R.A. 262, 25 Atl. 692,—holding cul de sac may be dedicated and used as highway; Hickok v. Plattsburgh, 41 Barb. 130, on right to use cul de sac as highway; People ex rel. Williams v. Kingman, 24 N. Y. 559, holding public authority may lay out road as highway though one end is closed and abuts on private ground; R. v. Spence, 11 U. C. Q. B. 31, holding road not a thoroughfare may become highway by dedication; Bateman v. Bluck, 12 E. R. C. 552, L. R. 18 Q. B. 870, 21 L. J. Q. B. N. S. 406, 17 Jur. 386, holding highway may be

acquired in place that is no thoroughfare; Wood v. Veal, 5 Barn. & Ald. 454, 1 Dowl. & R. 20, 24 Revised Rep. 454, on right to use of way as highway which is not thoroughfare; Rourke v. Davis, L. R. 44 Ch. Div. 110, 62 L. T. N. S. 34, 38 Week. Rep. 167, on right to use cul de sac as highway in open country.

Cited in notes in 12 Eng. Rul. Cas. 549, on necessity of termini of way of prescription; 12 E. R. C. 558, on public highway in cul de sac.

—By prescription or presumed dedication.

Cited in Gowen v. Philadelphia Exch. Co. 5 Watts & S. 141, 40 Am. Dec. 489, holding public cannot acquire right to open space in private property adjoining highway which is left so by owner for his own accommodation and not that of public; Holdane v. Cold Spring, 23 Barb. 103, on acquisition by user of right to use cul de sac as public highway; Vernon v. St. James, L. R. 16 Ch. Div. 449, 49 L. J. Ch. N. S. 130, 42 L. T. N. S. 82, on right to use court which although not a thoroughfare had been open for public use for more than seventy years and use as way.

Distinguished in People v. Jackson, 7 Mich. 432, 74 Am. Dec. 729, holding alley in center of city block, for access to rear of lots in block, never intended to be dedicated as highway, nor laid out nor worked as such, not a highway by user.

12 E. R. C. 552, BATEMAN v. BLUCK, 17 Jur. 386, 21 L. J. Q. B. N. S. 406, 18 Q. B. 870.

Obstruction to highway warranting abatement by individual.

Cited in Griffith v. McCullum, 46 Barb. 561, holding encroachment by fence which does not incommode anyone using highway, not a nuisance; Harrower v. Ritson, 37 Barb. 301, holding mere encroachment by fence where it does not hinder, impede or obstruct use of road by public not public nuisance; Hodgins v. Toronto, 19 Ont. App. Rep. 537, holding that city or telephone company had no right to cut from trees growing on private land, limbs overhanging street, where they in no way interfere with use of street.

Private right to remove nuisance.

Cited in Bowden v. Lewis, 13 R. I. 189, 43 Am. Rep. 21, holding party cannot destroy property of another because its situation is common nuisance, unless he is specially damaged.

Cited in 1 Cooley, Torts, 3d ed. 58, on abatement of nuisance; Joyce, Nuis. 533, on necessity of special injury to individual to authorize him to abate nuisance.

Private action for public nuisance.

Cited in Hamilton v. Goding, 55 Me. 419, on right of action for nuisance not specially injurious to a given person; Brown v. DeGroff, 50 N. J. L. 409, 7 Am. St. Rep. 794, 14 Atl. 219; State v. Keeran, 5 R. I. 497,—holding private individual cannot maintain action unless he is specially damaged; Goldsmith v. Jones, 43 How. Pr. 415, holding private individual cannot maintain action for obstruction to public street except when he is especially inconvenienced; Meloche v. Davidson, Rap. Jud. Quebec 11 B. R. 302, holding one who has been specially damaged may maintain action to remove obstruction in highway; Little v. Ince, 3 U. C. C. P. 528; Ward v. Caledon, 19 Ont. App. Rep. 69,—holding individual not specially damaged cannot maintain action.

Cul de sac as highway.

Cited in Stone v. Brooks, 35 Cal. 489; Gilfillan v. Shattuck, 142 Cal. 27,

75 Pac. 646,—holding that cul de sac laid out by owner of fifty vara lot as private way is not a thoroughfare, and very clear and satisfactory evidence is required to prove it public highway; Sheaff v. People, 87 Ill. 189, 29 Am. Rep. 49, holding that road laid out by commissioners under statute, is public highway, even though one end of same terminates against private land, with no outlet; Armstrong v. St. Louis, 3 Mo. App. 151, to the point that way terminating in what would be nuisance, cannot be made public highway; State, Atkinson, Prosecutor, v. Bishop, 39 N. J. L. 226, holding cul de sac may become public highway by user: People ex rel. Van Rensselaer v. Van Alstyne, 3 Keyes, 35, 3 Abb. App. Dec. 575, holding that road may be lawfully laid out or dedicated to use of public as highway, though it may be mere cul de sac; People ex rel. Wiliams v. Kingman, 24 N. Y. 559; Greene v. O'Connor, 18 R. I. 56, 19 L.R.A. 262, 25 Atl. 692; City Cemetery Asso. v. Meninger, 14 Kan. 312,—holding cul de sac may be dedicated as highway: Bartlett v. Bangor, 67 Me. 460, holding cul de sac may become public highway by dedication or location: Peckham v. Lebanon, 39 Conn. 231, holding road not thoroughfare may be laid out as public way; Adams v. East Whitby Twp. 2 Ont. Rep. 473; Hawkins v. Baker, 5 N. S. 419; R. v. Spence, 11 U. C. Q. B. 31,—holding highway may exist over way not a thoroughfare; Deerfield v. Connecticut River R. Co. 144 Mass. 325, 11 N. E. 105, on right of town to acquire private right of way by prescription as appurtenant to public burial ground; Hickok v. Plattsburgh, 41 Barb. 130, on right to use cul de sac as public highway; Union Co. v. Peckham, 16 R. I. 64, 12 Atl. 130, to the point that cul de sac may be dedicated as public highway; Vernon v. St. James, L. R. 16 Ch. Div. 449, 49 L. J. Ch. N. S. 130, 42 L. T. N. S. 82, on right to use court as highway which, although not a thoroughfare has been open to public for seventy years.

Cited in notes in 12 Eng. Rul. Cas. 549, on necessity of termini of way by prescription; 12 E. R. C. 558, on public highway in cul de sac.

Distinguished in People v. Jackson, 7 Mich. 432, 74 Am. Dec. 729, holding alley in center of city blocks, forming cul de sac, for access to rear of lots in block, never intended to be dedicated as highway, nor laid out nor worked as such, not a highway by user.

Dedication, when complete.

Cited in Union Co. v. Peckham, 16 R. I. 64, 12 Atl. 130, holding where way is laid out with intention to be used by public as highway and is so used, and repaired at public expense, dedication complete.

Necessity of notice before termination of license to use of property of another.

Cited in Kay v. Pennsylvania R. Co. 65 Pa. 269, 3 Am. Rep. 628, holding where owner permits use of his property by public so as to induce confident belief use will not be objected to, he must give proper warning of intention to recall permission.

12 E. R. C. 560, REX v. WRIGHT, 3 Barn. & Ad. 681, 1 L. J. Mag. Cas. N. S. 74.

Highway by dedication and use.

Cited in Oswald v. Grenet, 22 Tex. 94, holding highway established where owner exhibits map of streets and sell lots in reference thereto and use by public of such streets; Scott v. State, 1 Sneed, 629, holding where one lays out way for general public over his land, dedication complete if public accept and use it as way.

Cited in note in 12 E. R. C. 601, on abutting owner's title to soil in highway.

—Necessity for assent by public.

Cited in State v. Atherton, 16 N. H. 203, holding where there has been dedication by owner, there must be acceptance or recognition of way by public authority; State v. New-Boston, 11 N. H. 407, on necessity of assent by town to dedication of way as highway.

Width of highway and usable area.

Cited in State v. Morse, 50 N. H. 9, holding where road has been fenced out for many years public entitled to use of entire space, though road originally was defectively laid out; Harvey v. Truro Rural Dist. Council [1903] 2 Ch. 638, 72 L. J. Ch. N. S. 705, 89 L. T. N. S. 90, 1 L. G. R. 758, holding use of entire space is in public; Offin v. Rochford Rural Dist. Council [1906] 1 Ch. 342, 75 L. J. Ch. N. S. 348, 70 J. P. 97, 54 Week. Rep. 244, 94 L. T. N. S. 669, holding prima facie public entitled to entire space; R. v. United Kingdom Electric Teleg. Co. 12 E. R. C. 564, 31 L. J. Mag. Cas. N. S. 166, 9 Cox, C. C. 174, 8 L. T. N. S. 378, 10 Week. Rep. 538, 3 Fost. & F. 732, 8 Jur. N. S. 1153, 2 Best & S. 647, note, holding public has right to use entire space.

Cited in notes in 12 E. R. C. 571, on right to use highway for entire width; 12 E. R. C. 580, on right to limit use of path dedicated to public.

Encroachment on street, amounting to nuisance.

Cited in Hibbard v. Chicago, 59 Ill. App. 470, holding erection of permanent structure is a permanent encroachment amounting to nuisance; State v. Kean, 69 N. H. 122, 48 L.R.A. 102, 45 Atl. 256, holding erection of building in highway a nuisance although public travel not obstructed thereby; Sautter v. Utica City Nat. Bank, 45 Misc. 15, 90 N. Y. Supp. 838, holding erection of columns in building beyond building line where such projection is authorized by charter and does not impede travel, not a nuisance; Lowrey v. Brooklyn City & N. R. Co. 4 Abb. N. C. 32, on impairment of street as constituting nuisance; Opdycke v. Public Service R. Co. 78 N. J. L. 576, 29 L.R.A.(N.S.) 71, 76 Atl. 1032, holding that one who places unauthorized obstruction in street is liable at suit of any person who is specially injured thereby.

Abatement of nuisance.

Cited in note in 36 L.R.A. 595, on municipality's power to define, prevent and abate nuisance.

12 E. R. C. 562, REG. v. UNITED KINGDOM ELECTRIC TELEG. CO. 2 Best & S. 647, note, 9 Cox, C. C. 174, 8 Jur. N. S. 1153, 31 L. J. Mag. Cas. N. S. 166, 6 L. T. N. S. 378, 10 Week. Rep. 538, affirming the verdict directed in 3 Fost. & F. 73, 9 Cox, C. C. 137.

Obstruction in highway, when amounts to nuisance.

Cited in State v. Kean, 69 N. H. 122, 48 L.R.A. 102, 45 Atl. 256, holding erection of public building which extends over part of highway a nuisance, whether travel is obstructed or not; Opdycke v. Public Service R. Co. 78 N. J. L. 576, 29 L.R.A.(N.S.) 71, 76 Atl. 1032, holding that one who places unauthorized obstruction in street is liable at suit of any person who is specially injured thereby; Harvey v. Lackawana & B. R. Co. 47 Pa. 428, 21 Phila. Leg. Int. 292, holding that placing of tramways across road is nuisance; Soule v. Grand Trunk R. Co. 21 U. C. C. P. 308, holding placing of signboard required by law in highway not a nuisance, though travel partially obstructed; Rex v. Taylor,

14 B. C. 235, holding that city council may pass by laws, for preventing and creating public nuisances, such as obstruction of streets by congregating thereon in crowds; Nicol v. Beaumont, 53 L. J. Ch. N. S. 853, 50 L. T. N. S. 112, holding digging of ditches in road to prevent access to adjoining land a nuisance.

Cited in notes in 39 L.R.A. 619, on municipal control over railroads and electrical companies as nuisances on streets; 39 L.R.A. 655, on municipal power over nuisances affecting highways and waters.

— Telegraph or other wire poles.

Cited in Com. v. Boston, 97 Mass. 555, on right of corporation to erect telegraph posts in highway; Keystone State Teleph. & Teleg. Co. v. Ridley Park, 28 Pa. Super. Ct. 635, holding maintenance of telephone posts in street a nuisance where company has failed to comply with condition precedent in contract with city; Bonn v. Bell Teleph. Co. 30 Ont. Rep. 702, holding erection of telephone posts in streets without legislative sanction unlawful; Atkinson v. Chatham, 26 Ont. App. Rep. 521, holding that city is liable for injury to person caused by its negligence in permitting telephone pole to remain in dangerous place in street; Regina v. Mohr, 7 Quebec L. R. 183, holding that illegal erection of telegraph poles in street is common nuisance.

Cited in 3 Dillon, Mun. Corp. 5th ed. 1922, on effect of legislative sanction to erection of telegraph and telephone poles in streets and highways; Joyce, Nuis. 319, on telephone poles as a public nuisance; 5 Thompson, Neg. 515, on liability of municipality for obstructions in highways consisting of telegraph, telephone, electric light, and other poles.

Effect of consent to obstruction.

Cited in Winnipeg v. Winnipeg Electric R. Co. 20 Manitoba L. Rep. 337, to the point that if city permits street railway company to obstruct streets by ordinance, it is liable to person specially injured thereby; Harvey v. Truro Rural District Council [1903] 2 Ch. 638, 72 L. J. Ch. N. S. 705, 89 L. T. N. S. 90, holding mere consent of highway authority to obstruction does not render it legal; Turner v. Ringwood Highway Board, L. R. 9 Eq. 418, 21 L. T. N. S. 745, 18 Week. Rep. 424, holding where trees had been allowed to grow in part of highway for period of twenty-five years, highway board not estopped to remove them; Cubitt v. Maxse, L. R. 8 C. P. 704, 42 L. J. C. P. N. S. 278, 29 L. T. N. S. 244, 21 Week. Rep. 789, on acquisition of title by adverse possession of enclosed road abandoned by public.

Liability for maintenance of dangerous condition in street.

Cited in Davenport v. Ruckman, 10 Bosw. 20, 16 Abb. Pr. 341, on liability for negligent maintenance of dangerous excavation in street; Lowrey v. Brooklyn City R. Co. 4 Abb. N. C. 32, on liability of street car company for negligent maintenance of switch.

Usable width of highway.

Cited in Offin v. Rochford Rural Dist. Council [1906] 1 Ch. 342, 75 L. J. Ch. N. S. 348, 76 J. P. 97, 54 Week. Rep. 244, 94 L. T. N. S. 669, holding when highway runs between fences prima facie public entitled to use entire space; Sheringham Urban Dist. Council v. Holsey [1904] W. N. 83, on right of public to use footpath for all purposes.

The opinion on the trial was cited in Geldert v. Pictou, 23 N. S. 483, on extent of use of highway in public; Reg. v. Davis, 24 U. C. C. P. 575, on right of public to use all space of road, although street railway has franchise to

operate its cars thereon; Luers v. Moore Twp. 43 U. C. Q. B. 334, on right to use full width of way; Sibbald v. Grand Trunk R. Co. 18 Ont. App. Rep. 184, on right of public to use full width of highway.

Photographs as evidence.

Cited in note in 35 L.R.A. 809, on photographs as evidence.

12 E. R. C. 573, MERCER v. WOODGATE, 10 Best & S. 833, 39 L. J. Mag. Cas. N. S. 21, L. R. 5 Q. B. 26, 21 L. T. N. S. 458, 18 Week. Rep. 116.

Limited or partial dedication.

Cited in Trenton Water Power Co. v. Walker, 77 N. J. L. 659, 73 Atl. 597, holding that dedication of way be for limited public use; Harrison v. Harrison, 16 N. S. 338, holding that dedication to public of easement may be inferred from like circumstances as warrant inference of grant in case of private person enjoying such easement; Palmer v. Jones, 2 Ont. L. Rep. 632, holding owner of private way may grant right of egress and ingress to adjoining owner subject to payment of toll; R. v. McDonald, 12 Ont. Rep. 381, on right of owner to put swing gate across highway.

Cited in 3 Dillon, Mun. Corp. 5th ed. 1696, on dedications subject to condition or reservation.

— Ways subject to plowing and tilling.

Cited in Arnold v. Balker, L. R. 6 Q. B. 433, 40 L. J. Q. B. N. S. 185, 19 Week. Rep. 1090, holding footpath across arable field may be dedicated by owner, subject to right to plow it up periodically.

Effect of acceptance of partial dedication.

Cited in Cohoes v. Delaware & H. Canal Co. 134 N. Y. 397, 31 N. E. 887, holding owner has no other rights than those reserved and no general power of revocation.

Acquisition of public footpath.

Cited in Tyler v. Sturdy, 108 Mass. 196, holding they may be created by dedication; Rundle v. Hearle [1898] 2 Q. B. 83, 67 L. J. Q. B. N. S. 741, 78 L. T. N. S. 561, 46 Week. Rep. 619, 14 Times L. R. 440, holding footpath between two adjoining fields may be dedicated to public.

Existing condition as adhering to dedication.

Cited in State v. Society for Establishing Useful Mfrs. 44 N. J. L. 502, holding if highway is accepted with dangerous excavation at side existing at time of dedication burden on public authorities to erect suitable barrier.

Cited in 3 Washburn, Real Prop. 6th ed. 93, on estoppel by dedication to public and charitable uses.

12 E. R. C. 582, HARRISON v. RUTLAND, 57 J. P. 278, 62 L. J. Q. B. N. S. 117, 68 L. T. N. S. 35 [1893] 1 Q. B. 142, 4 Reports, 155, 41 Week. Rep. 322, 9 Times L. R. 115.

Improper use of highway, or public place amounting to trespass on underlying fee.

Cited in Whittaker v. Stangwick, 100 Minn. 386, 10 L.R.A.(N.S.) 921, 117 Am. St. Rep. 703, 111 N. W. 295, 10 Ann. Cas. 528, to the point that trespass lies for abuse of highway by owner of soil; Rhode Island Hospital Trust Co. v. Hayden, 20 R. I. 544, 42 L.R.A. 107, 40 Atl. 421, to the point that owner of soil may bring trespass against person who deposits rubbish in street in manner not in use as highway; Ricketts v. Markdale, 31 Ont. Rep. 180, holding

that child using highway merely for play cannot recover for injuries received while so using it due to obstructions on highway; Ricketts v. Markdale, 31 Ont. Rep. 610 (reversing 31 Ont. Rep. 180), holding that child using highway for play may recover for injuries received while so using it, due to obstructions on highway; Siple v. Blow, 8 Ont. L. Rep. 547 (dissenting opinion), on right of adjoining owner to soil of street except as to use by public as highway; McDonald v. Lake Simcoe Ice & Cold Storage Co. 26 Ont. App. Rep. 411, holding that solid ice which forms upon party's freehold is his property as much as soil beneath; Hickman v. Maisey [1900] 1 Q. B. 752, 69 L. J. Q. B. N. S. 511, 82 L. T. N. S. 321, 48 Week. Rep. 385, 16 Times L. R. 274, holding one who walks backwards and forwards on portion of highway about fifteen yards in length for period of an hour and a half to watch training of race horses, makes unreasonable use thereof and is trespasser; Fitzhardinge v. Purcell [1908] 2 Ch. 139, 77 L. J. Ch. N. S. 529, 72 J. P. 276, 99 L. T. N. S. 154, 24 Times L. R. 564, holding person has no right to go upon foreshore parcel of manor and shoot and carry away wild ducks; Luscombe v. Great Western R. Co. [1899] 2 Q. B. 313, 68 L. J. Q. B. N. S. 711, 81 L. T. N. S. 183, holding cattle straying upon highway to graze trespassers; Petrie v. The Rostrevor [1898] 2 Ir. Q. B. 556, holding captain of stranded vessel not liable for damage to oyster bed, of which he is ignorant, if he use reasonable necessary means to get vessel afloat.

Cited in notes in 12 Eng. Rul. Cas. 567, on right to use highway for entire width; 16 Eng. Rul. Cas. 485, on who is abutting owner liable for local street improvements.

Wrong in abuse of lawful right.

Cited in Hubert v. Payson, 36 N. S. 211, on right of spectator to invade House of Assembly contrary to orders of speakers; Barnett v. Grand Trunk R. Co. 22 Ont. L. Rep. 84 (dissenting opinion), on liability of person for injury to trespasser on land caused by dangerous condition of premises; Allen v. Flood [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 17 Eng. Rul. Cas. 285, on liability for maliciously inducing discharge of servant.

Prevalence of principles of equity over those of law.

Cited in Morris v. Cairncross, 14 Ont. L. Rep. 544, to the point intention of Judicature Acts was that, where principles of law and equity differed, principles of equity should prevail.

12 E. R. C. 603, FISHER v. PROWSE, 8 Jur. N. S. 1208, 2 Best & S. 770, 31 L. J. Q. B. N. S. 212, 6 L. T. N. S. 711.

Dedication of highway subject to condition of land or other burdens.

Cited in Stevens v. Nichols, 155 Mass. 472, 15 L.R.A. 459, 29 N. E. 1150, on absence of obligation of person who dedicates footway to keep it in repair; State v. Society for Establishing Useful Mfrs. 44 N. J. L. 502 (making absolute a rule for new trial in 42 N. J. L. 502, 36 Am. Rep. 542), holding dedication made and accepted is subject to condition in which land was at time thereof; Cohoes v. Morrison, 42 Hun, 216, holding city accepted dedication of street subject to burden of tramway; Cohes v. Delaware & H. Canal Co. 134 N. Y. 397, 31 N. E. 887, holding offer to dedicate land for highway may be qualified or made subject to certain burden and, if accepted cum onere, burden continues, but land becomes highway notwithstanding; Hagarty v. Pryor, 8 N. S. 532, holding that though street have its origin by dedication, non constat but that obstruction was there at the time, and dedication was subject to it; Palmer v. Jones,

2 Ont. L. Rep. 632, holding dedication of road to public might lawfully be made subject to conditions as to ingress and egress; Payne v. Caughell, 24 Ont. App. Rep. 556, holding highway may be dedicated with reservation of soil and freehold in landowner and subject to payment of tolls; Caldwell v. Galt, 27 Ont. App. Rep. 162, holding right of abutting property owner to maintain veranda over street dependent upon proof that dedication was subject to existing obstruction of such veranda; Mercer v. Woodgate, 12 E. R. C. 573, L. R. 5 Q. B. 26, 10 Best & S. 833, 39 L. J. Mag. Cas. N. S. 21, holding pathway may be dedicated subject to right of plowing it up periodically.

Cited in notes in 12 E. R. C. 568, on right to use highway for entire width; 12 E. R. C. 580, on right to limit use of path dedicated to public.

Distinguished in Brown v. Edmonton, 28 Can. S. C. 510, where right to maintain obstruction in street, as against the Crown was not pretended.

Dedication and acceptance of highway.

Cited in Booream v. North Hudson County R. Co. 39 N. J. Eq. 465, holding public are no more compelled to accept land dedicated for highway, than landowners are obliged to dedicate their land for that purpose; Gooderham v. Toronto, 21 Ont. Rep. 120, on absence of obligation of owner of land to dedicate use thereof to public as highway; Cubitt v. Maxse, L. R. 8 C. P. 704, 42 L. J. C. P. N. S. 278, 29 L. T. N. S. 244, 21 Week. Rep. 789, holding mere dedication by owner of soil will not create highway.

Liability for injury due to opening in or near highway.

Cited in Condon v. Sprigg, 78 Md. 330, 28 Atl. 395, on liability of owner of house for injury due to failure to keep area secure; McIntire v. Roberts, 149 Mass. 450, 4 L.R.A. 519, 14 Am. St. Rep. 432, 22 N. E. 13, on liability of one creating nuisance consisting of hole outside of highway, yet so near it as to make highway unsafe for travelers; State v. Society for Establishing Useful Manufactures, 42 N. J. L. 504, holding that excavation adjoining highway or so near there to that person, using highway, might, by accident, fall into it, is per se a nuisance, unless properly guarded; Davis v. Commercial Bank, 32 N. S. 366, holding that if duty exists to guard area so as to make it safe for foot passengers, it exists equally as to persons lawfully using street with horses and wagons; Ewing v. Hewitt, 27 Ont. App. Rep. 296 (dissenting opinion), on liability of persons as to areas on highway.

Cited in note in 26 L.R.A. 693, on liability for dangerous condition of private grounds lying open beside highway or frequented path.

— Previously existing nuisance.

Cited in Sibbald v. Grand Trunk R. Co. 18 Ont. App. Rep. 184, on liability for continuance of previously existing nuisance.

Cited in 1 Thompson, Neg. 1070, on obligation of one dedicating land for highway as to removal of existing obstructions.

12 E. R. C. 618, DAWES v. HAWKINS, 8 C. B. N. S. 848, 7 Jur. N. S. 262, 29 L. J. C. P. N. S. 343, 4 L. T. N. S. 288.

Inextinguishableness of public right in highway.

Cited in Winslow v. Dalling, 1 N. B. Eq. Rep. 608, holding public right cannot be extinguished without some formal proceeding under statute or perhaps resort to writ of ad quod damnum; also discussing question of abandonment by non-user; R. ex rel. Portland v. McGowan, 17 N. B. 191, holding public can-

not by non-user release their rights over highway; Jennison v. East Hants, 18 N. S. 71 (dissenting opinion), on impossibility of nuisance consisting of drain or ditch in highway being converted into a right by length of time; Nash v. Glover, 24 Grant, Ch. (U. C.) 219, holding only means of extinguishing highway is by modes pointed out by statute; Hamilton v. Morrison, 18 U. C. C. P. 228, holding public property specifically appropriated for market cannot be dedicated as highway as it would be impossible to exercise market rights over dedicated portion if extended market accommodation became necessary; Moore v. Esquesing, 21 U. C. C. P. 277, holding that where road was laid out over land by owner thereof and was so used by public for 40 years, it could not be estopped up by by-law of municipal council; Cubitt v. Maxse, L. R. 8 C. P. 704, 42 L. J. C. P. N. S. 278, 29 L. T. N. S. 244, 21 Week. Rep. 789, on creation and continuance of highway.

Cited in note in 12 E. R. C. 570, on right to use highway for entire width; 12 E. R. C. 580, on right to limit use of path dedicated to public.

Cited in 3 Dillon Mun. Corp. 5th ed. 1699, on estate or interest of public under common law dedication.

Abandonment of right by non-user.

Cited in Fairweather v. Lloyd, 36 N. B. 548, holding mere non-user is no evidence of abandonment or extinguishment unless something is done which shows party using or in possession meant to abandon.

Establishment of highway.

Cited in Kocher v. Wilkes-Barre, 8 Luzerne Leg. Reg. 191, holding that dedication of highway must be in perpetuity; R. v. Ouellette, 15 U. C. C. P. 260, as to dedication of land for highway; Piggott v. Goldstraw, 84 L. T. N. S. 94, 65 J. P. 259, 19 Cox, C. C. 621, holding where evidence of user by public does not preponderate either way, there is no balance of probability for or against dedication.

Substitution of new for old way.

Cited in Neill v. Byrne, Ir. L. R. 2 C. L. 287, holding user of way in substitution of old way not evidence of dedication of new way, where user was recent, place was unsafe, and public user was encountered by acts of landowner negativing intention to dedicate.

Distinguished in Smith v. Wilson [1903] 2 Ir. K. B. 45, holding that when original highway is closed public have right to use substituted way whether it is provided in unqualified manner by owner of soil, or subject to qualification by owner of lesser interest.

12 E. R. C. 630, WANDSWORTH BD. OF WORKS v. UNITED TELEPH. CO. 48 J. P. 676, 53 L. J. Q. B. N. S. 449, 51 L. T. N. S. 148, L. R. 13 Q. B. Div. 904, 32 Week. Rep. 776.

Nature and extent of interest of local authorities in highways.

Cited in Franklin Twp. v. Nutley Water Co. 53 N. J. Eq. 601, 32 Atl. 381, holding that where right of previous consent to use of streets is conferred by statute upon city, it is entitled to injunction to prevent laying of water pipes by water company, without consent; Winnipeg Street R. Co. v. Winnipeg Electric Street R. Co. 9 Manitoba L. Rep. 219, holding that city did not have power to grant exclusive franchise to street railway company; O'Connor v. Nova Scotia Teleph. Co. 23 N. S. 509, holding that adjoining owner had no right to plant trees in street; O'Connor v. Nova Scotia Teleph. Co. 22 Can. S. C. 276 (dissent-

ing opinion), on title to soil of street as vested in Crown; Atty. Gen. ex rel. Brownhills Dist. v. Conduit Colliery Co. [1895] 1 Q. B. 301, 64 L. J. Q. B. N. S. 207, 15 Reports, 267, 71 L. T. N. S. 777, 43 Week. Rep. 366, 59 J. P. 70, on maintenance of action by local authority for subsidence of highway caused by mining thereunder; Finchley Electric Light Co. v. Finchley Urban Dist. Council [1902] 1 Ch. 866, 71 L. J. Ch. N. S. 450, 66 J. P. 502, 50 Week. Rep. 470, 86 L. T. N. S. 286, 18 Times L. R. 449, [1903] 1 Ch. 437, 72 L. J. Ch. N. S. 297, 67 J. P. 97, 51 Week. Rep. 375, 88 L. T. N. S. 215, 19 Times L. R. 238, holding all of stratum of air above road which in any reasonable sense could be required for user of street as street and all of stratum of soil below surface which could be required for purposes of street as street, vest in and belong to local authority; Fareham Local Board v. Smith [1891] W. N. 76, holding what is comprised in term "street" is not merely surface of road but "area of user" therein; Tunbridge Wells v. Baird [1896] A. C. 434, 65 L. J. Q. B. N. S. 451, 74 L. T. N. S. 385, 60 J. P. 788 (affirming [1894] 2 Q. B. 867, 64 L. J. Q. B. N. S. 145, 9 Reports, 479, 71 L. T. N. S. 211, 59 J. P. 36), as to extent of interest of local authority in street.

Cited in notes in 44 L.R.A. 578, on injunctions by municipalities against nuisances by railroads and electrical companies; 11 L.R.A.(N.S.) 920, on ejectment to remove wires; 12 Eng. Rul. Cas. 600, on abutting owner's title to soil in highway; 16 E. R. C. 447, on meaning of terms "ancient highway," "street," and "new street."

Estate of public in public places.

Cited in Westminster v. Johnson [1904] 2 K. B. 737, 73 L. J. K. B. N. S. 774, 68 J. P. 549, 53 Week. Rep. 4, 91 L. T. N. S. 334, 20 Times L. R. 701, holding sanitary authorities held interest in land where they erected building in pursuance of power.

Construction of statutes.

Cited in Sunset Teleph. & Teleg Co. v. Pomona, 97 C. C. A. 251, 172 Fed. 829 (dissenting opinion), on duty of court to give words used in statute popular meaning existing at time when statute was passed.

Cited in 2 Sutherland, Stat. Const. 2d ed. 1045, on strict construction of statutes granting powers.

12 E. R. C. 655, REX v. WEST RIDING OF YORKSHIRE, 2 East, 342, 6 Revised Rep. 439.

Public bridges.

Cited in Union P. R. Co. v. Colfax County, 4 Neb. 450, holding public bridges are defined to be such bridges as form part of the highway common—according to their character as foot, horse or carriage bridge; Billman v. Carroll Twp. 1 Pa. Co. Ct. 129, to same effect; Highway Comrs. v. Highway Comrs. 60 Ill. 58, holding continuous travel over bridge by public with other acts was evidence of acceptance; State ex rel. Roundtree v. Gibson County, 80 Ind. 478, 41 Am. Rep. 821, holding county may, by adoption, make public a bridge constructed by private individuals, and when it is thus made public becomes bound to keep it in repair; R. ex rel. National Liberal Land Co. v. Southampton County, L. R. 19 Q. B. Div. 590, 56 L. J. Mag. Cas. N. S. 112, 57 L. T. N. S. 261 16 Cox, C. C. 271, 52 J. P. 52, holding public utility and user of private bridge are evidence upon which jury may find adoption by county and consequent liability to repair.

Cited in note in 12 E. R. C. 518, on long use of public road as evidence of dedication.

Right or duty to construct or repair bridge.

Cited in People ex rel. Corey v. Highway Comrs. 158 Ill. 197, 41 N. E. 1105, holding duty to jointly repair followed from joint agreement of two towns to build bridge, joint construction, and use made of road and bridge for public travel; State ex rel. Winterburg v. Demaree, 80 Ind. 519, holding county commissioners are charged, as public duty, with keeping public bridges in repair, and performance of this duty may be compelled; State v. Gorham, 37 Me. 451, holding neither common law nor statute of Henry VIII. imposed upon counties unqualified liability to repair public bridges; McHardy v. Ellice Twp. 37 U. C. Q. B. 580, holding by common law counties were chargeable with repair of public bridges unless it were shown others were liable for to make and repair them; Morris Canal & Bkg. Co. v. State, 24 N. J. L. 62, holding same both by common law, and by statute 22 Hen. 8 Ch. 45; State v. Hudson County, 30 N. J. L. 137, holding that by common law inhabitants of counties were liable to repair public bridges; Washer v. Bullitt County, 110 U. S. 558, 28 L. ed. 249, 4 Sup. Ct. Rep. 249, holding that at common law bridge was common highway, and county was bound to repair it.

Cited in note in 31 L.R.A.(N.S.) 244, on duty to maintain bridge over race intersecting highway.

— As between county and minor divisions or officers.

Cited in Sussex County v. Strader, 18 N. J. L. 108, 35 Am. Dec. 530, holding burden of repairing abutment was upon board of free holders acting for county and not upon overseers of highways, who acted for township.

Cited in note in 12 E. R. C. 682, on liability of county, township, etc., for repairs in highways and bridges.

— Bridges privately constructed.

Cited in State v. Campton, 2 N. H. 513, holding bridge, though not erected by public, may still become public charge in respect to its repairs; Pritchard v. Atkinson, 4 N. H. 9, holding that individuals cannot impose burden of repair upon towns by building slight bridges over streams in any place they may choose; Dygert v. Schenck, 23 Wend. 446, 35 Am. Dec. 575, holding town under no presumptive obligation to repair bridge constructed by defendant over race-way for his own benefit; Follett v. People, 12 N. Y. 268, holding that by law of England sufficient bridge erected by individuals, used and adopted by public, becomes prima facie public bridge, but that presumption is rebuttable; Bisher v. Richards, 9 Ohio St. 495, holding by common law owner of water power under certain circumstances may erect bridge over it and offer it to public.

Distinguished in Heacock v. Sherman, 14 Wend. 58, where bridge was not of convenience to public.

Private duty in respect to bridges and repair thereof.

Cited in Merrill v. Kalamazoo, 35 Mich. 211, holding it is duty of mill-owners to bridge their races where they cross highways, independent of any statute; Towle v. Eastern R. Co. 18 N. H. 547, 47 Am. Dec. 153, holding semble that railroad company is not bound to keep bridge and embankment in repair in absence of express provision of statute.

Repair by public of private property used by and of utility to it.

Cited in Lostutter v. Aurora, 126 Ind. 436, 12 L.R.A. 259, 26 N. E. 184, holding well originally dug by lot owner may become public convenience, and as such be maintained by municipal corporation

Cited in note in 16 E. R. C. 468, on power of local authorities to require street to be sewered.

Dedication of onerous public way or bridge as nuisance.

Cited in State v. Atherton, 16 N. H. 203, on liability to indictment of individual who throws open his land to public use without authority, on ground that if public use passage repair of it will become public charge.

Cited in Joyce, Nuis. 352, on bridges as public nuisances.

New trial in criminal case after verdict of acquittal.

Cited in R. v. Port Perry & Port W. R. Co. 38 U. C. Q. B. 431, denying new trial after verdict of acquittal and referring to cited case as passing question without objection.

12 E. R. C. 666, REX v. ST. GILES, 5 Maule & S. 260, 17 Revised Rep. 320.

Liability of town to repair highway within limits of another.

Cited in Georgetown v. United States, 2 Hayw. & H. 302, Fed. Cas. No. 18,281, holding corporation of town not bound to keep road outside its limits in repair, though corporate officers had stipulated to do so.

Cited in note in 16 E. R. C. 468, on power of local authorities to require street to be sewered.

Cited in 5 Thompson, Neg. 826, on remedy by indictment against municipality for nonrepair of highways and bridges.

Distinguished in R. v. Ecclesfield, 12 E. R. C. 671, 1 Barn. & Ald. 348, 19 Revised Rep. 335, where highway in question lay within parish.

— Necessity of consideration.

Cited in R. v. Rollitt, L. R. 10 Q. B. 469, 44 L. J. Mag. Cas. N. S. 190, 24 Week. Rep. 26 (dissenting opinion), on distinction between liability of parish, township, or hamlet to repair its own roads and liability to repair roads in foreign township, parish, or hamlet, as respects necessity of consideration.

Distinguished in R. v. Ashby Folville, L. R. 1 Q. B. 213, 35 L. J. Mag. Cas. N S. 154, 12 Jur. N. S. 520, holding prescriptive liability of parish to repair highway outside its limits cannot arise except upon sufficient consideration.

12 E. R. C. 671, REX v. ECCLESFIELD, 1 Barn. & Ald. 348, 19 Revised Rep. 335, affirming the verdict directed in 1 Starkie, 393.

Obligation of local district to repair its roads.

Cited in R. v. Rollitt, L. R. 10 Q. B. 469, 44 L. J. Mag. Cas. N. S. 190, 24 Week. Rep. 26, on existence of custom of district in parish to maintain its own highways separately from rest of parish.

Cited in note in 16 Eng. Rul. Cas. 468, on power of local authorities to require street to be sewered.

Cited in 4 Dillon, Mun. Corp. 5th ed. 2945, on civil liability of municipality for injuries caused by defective and unsafe streets and sidewalks; 5 Thompson, Neg. 826, on remedy by indictment against municipality for nonrepair of highways and bridges.

Distinguished in R. v. Ashby Folville, L. R. 1 Q. B. 213, 35 L. J. Mag. Cas. N. S. 154, 12 Jur. N. S. 520, holding alleged consideration insufficient to establish liability of one parish to repair roads in another.

Impossibility of custom in one place giving right in another.

Cited in Brocklebank v. Thompson [1903] 2 Ch. 344, 72 L. J. Ch. N. S. 626, 89 L. T. N. S. 209, 19 Times L. R. 285, holding custom claimed on behalf of in-

habitants of one manor to have right of way to church within another would not be good manorial custom of either manor.

12 E. R. C. 694, RUSSELL v. DEVON, 1 Revised Rep. 585, 2 T. R. 667.

Liability of public officers or local divisions in respect to condition of highways.

Referred to as leading case in Wilson v. Ulysses Twp. 72 Neb. 807, 101 N. W. 986, 9 Ann. Cas. 1153, holding township not liable for injuries caused by defects in public highways.

Cited in Waltham v. Kemper, 55 Ill. 346, 8 Am. Rep. 652, holding town not liable to action for injury due to failure to repair highway; Nagle v. Wakey, 59 Ill. App. 198, holding that commissioners of highways are not liable at suit of individual for failure to keep bridge in repair; Highway Comrs. v. Martin, 4 Mich. 557, 69 Am. Dec. 333, holding towns not liable, either by common law or statute in action directly against them for damages sustained in consequence of nonrepair of bridges and highways; Farnum v. Concord, 2 N. H. 392, holding no action lies at common law against town for damages sustained through defects in highways; Bartlett v. Crozier, 17 Johns. 439, 8 Am. Dec. 428 (reversing 15 Johns. 250), holding action not maintainable against overseer of highways for injury suffered by reason of his neglect to repair bridges; Weet v. Brockport, 16 N. Y. 161, holding town commissioners of highways not liable to civil suit for omission to keep highways in repair; Garlinghouse v. Jacobs, 29 N. Y. 297, holding that commissioners of highways are not liable to private action for mere neglect to keep highways in repair; Dunlap v. Knapp, 14 Ohio St. 64, 82 Am. Dec. 468, holding civil action for damages not maintainable by individual against supervisor of roads and highways for neglect to repair bridge; McKenzie v. Chovin, 1 M'Mull. L. 222; Young v. Road Comrs. 2 Nott. & M'C. 537,—holding commissioners of roads not liable to action on case by individual who sustained injury by reason of defective bridge; Baxter v. Winooski Turnp. Co. 22 Vt. 114, 52 Am. Dec. 84, holding action not maintainable by individual against town for neglect to repair roads unless such action is given by statute; Hull v. Richmond, 2 Woodb. & M. 337, Fed. Cas. No. 6,861, on absence of remedy at common law against town for injury due to its neglect to keep public highway in repair; Wheeler v. Public Works Comrs. [1903] 2 Ir. K. B. 202 (dissenting opinion), on nonliability of public body to individual who sustains damage by reason of nonperformance of common law or statutable duty to maintain; Whyler v. Bingham Rural Dist. Council [1901] 1 K. B. 45, 70 L. J. K. B. N. S. 207, 83 L. T. N. S. 652, 64 J. P. 77, 17 Times L. R. 23, holding rural district council not liable for nonfeasance of duty to keep highway safe; Cowley v. Newmarket Local Board, 12 E. R. C. 705, [1892] A. C. 345, 62 L. J. Q. B. N. S. 65, 67 L. T. N. S. 486, 56 J. P. 805, 1 Reports, 45, holding public authorities, in whom highways are vested by statute cannot be held liable in action for default in construction of highway whereby accident happens to passenger; Thompson v. Brighton [1894] 1 Q. B. 332, holding that where person, though lawfully using highway, is damaged, either as regards himself, his horse, or his carriage, merely by reason of nonrepair of highway, he has no action at law for damages against any one; Maguire v. Liverpool Corp. [1905] 1 K. B. 767, 74 L. J. K. B. N. S. 369, 92 L. T. N. S. 374, 53 Week. Rep. 449, 69 J. P. 153, 3 L. G. R. 485, 21 Times L. R. 278, holding where inhabitants of parish would not have been liable to action for nonrepair of highway, that commissioners appointed by statute were not thereby made liable to such action.

Distinguished in Wheeler v. Troy, 20 N. H. 77, holding maxim that he who is especially damaged by breach of duty on part of another shall have his remedy by action, is applicable to one injured by neglect of town to repair its roads; Morey v. Newfane, 8 Barb. 645, holding action will not lie against town for injury due to failure to repair highway; Dean v. New Milford Twp. 5 Watts & S. 545, holding action on case maintainable against township for injury caused by failure to repair road.

Explained in Gibson v. Preston, L. R. 5 Q. B. 218, 39 L. J. Q. B. N. S. 131, 10 Best & S. 942, 22 L. T. N. S. 293, 18 Week. Rep. 689, holding that at common law, no action could be maintained by one of public in respect of injury sustained through highway being out of repair; Kent v. Worthing Local Board L. R. 10 Q. B. Div. 118, 52 L. J. Q. B. N. S. 77, 48 L. T. N. S. 362, 31 Week. Rep. 583, 47 J. P. 23, holding authorities uniting in themselves double character of highway and water authorities under duty to prevent works under their care becoming nuisance to highway.

— Incorporated municipalities.

Cited in Moore v. Shreveport, 3 La. Ann. 645, on liability of corporation of town to action by individual for injury due to unsafe condition of street; Shartle v. Minneapolis, 17 Minn. 308, Gil. 284, holding municipal corporation having exclusive control of streets and bridges within its limits, if means for performing the duty are provided or placed at its disposal, is obliged to keep them in safe condition and liable to person damaged by its unreasonable neglect of this duty; Madden v. Lancaster County, 12 C. C. A. 566, 27 U. S. App. 528, 65 Fed. 188, holding general rule is that while cities and municipal bodies that voluntarily accept charters from the state to govern themselves, and manage their own local affairs, are municipal corporations proper, and liable for negligence in care of streets and bridges and discharge of like public duties, counties, townships, school districts, and road districts are not municipal corporations proper, and not liable for such negligence; Eriesson v. Manchester, 3 Hughes, 191, Fed. Cas. No. 4,511, holding municipal corporation is liable for defective or bad conditions of its streets, to individuals sustaining actual injury therefrom; Vancouver v. McPhalen, 45 Can. S. C. 194, holding that under statute municipality is liable for injury to person caused by defective sidewalk, although statute does not expressly provide for such action; McQuarrie v. St. Mary's, 17 N. S. 493, holding that city was liable for injuries caused to person by its negligence in permitting bridge to remain in defective condition; Consolidated R. Co. v. Victoria, 5 B. C. 266, on absence of right of action against corporation for nonrepair of broken bridges; Cooksley v. New Westminster, 14 B. C. 330, holding that city which is guilty of misfeasance in allowing bridge to become nuisance is liable to person injured because of condition; Boswell v. Yarmouth Twp. 4 Ont. App. Rep. 353, holding liability of municipality with respect to injury suffered because of choosing new route on account of defective highway is wholly creation of legislation; Picton Municipality v. Geldert [1893] A. C. 524, 63 L. J. P. C. N. S. 37, 1 Reports, 447, 69 L. T. N. S. 510, 42 Week. Rep. 114, on right of person injured by nonrepair of road to sue municipality for damages in respect thereof.

Cited in notes in 13 L.R.A.(N.S.) 1221, on liability of townships for defects in highway; 20 L.R.A.(N.S.) 517, on liability of municipality for defects or obstructions in streets.

Cited in 2 Cooley, Torts, 3d ed. 1310, on noliability of municipality for injury by defective highway; 4 Dillon, Mun. Corp. 5th ed. 2854, on nonliability

of town for personal injury due to defect in highway; 4 Dillon, Mun. Corp. 5th ed. 2992, on municipal liability for injury by defective street where power to maintain streets is conferred on municipality; 5 Thompson, Neg. 388, on jurisdictions in which municipality is not liable for injuries in highway.

Distinguished in Denver v. Dunsmore, 7 Colo. 328, 3 Pac. 705, where question was as to liability of municipal corporation proper to keep streets and bridges in repair; Weightman v. Washington, 1 Black, 39, 17 L. ed. 52, holding action will be against municipal corporation for injury due to defective bridge; Walker v. Halifax, 16 N. S. 371, discussing interpretations of cited case and holding it is not authority on question of liability or nonliability, except as to technical difficulty of suing unincorporated body of inhabitants; Crilley v. St. John, 32 N. B. 579, where those incorporated as municipality were not inhabitants but rate payers and maintenance of streets in parish was under control of parish and not of county board.

Explained in Browning v. Springfield, 17 Ill. 143, 63 Am. Dec. 345, holding action maintainable against city for injury due to failure to repair streets.

— County liability or immunity.

Referred to as leading case in Templeton v. Linn County, 22 Or. 313, 15 L.R.A. 730, 29 Pac. 795 (dissenting opinion), as to exemption of counties from liability for injury due to failure to repair roads and bridges.

Cited in Reardon v. St. Louis County, 36 Mo. 555, holding county not liable in damages to wife whose husband was killed by falling off unguarded bridge; Rainey v. Hinds County, 78 Miss. 308, 28 So. 875, holding that, under constitution of 1890, county is liable to owner for damages to land which it wrongfully causes to be covered with water by improper construction of causeway; Sussex County v. Strader, 18 N. J. L. 108, 35 Am. Dec. 530, holding board of chosen freeholders of county not responsible for damages in civil suit for failure to repair bridge; Bailey v. Lawrence County, 5 S. D. 393, 49 Am. St. Rep. 881, 59 N. W. 219, holding county not liable in action for injury due to defective bridge; Harrold v. Simcoe County, 18 U. C. C. P. 9 (dissenting opinion), on liability of county for damages sustained in consequence of nonrepair or insufficient construction of road or bridge.

Cited in note in 12 E. R. C. 716, on liability of counties and municipalities for injury due to defect in highway.

Distinguished in Shelby County v. Deprez, 87 Ind. 509, holding county liable to action for injury resulting from failure to properly construct bridge; Howard County v. Legg, 93 Ind. 523, 47 Am. Rep. 390, on ground that in United States counties are regularly organized and invested with power and means to maintain bridges; Eastman v. Clackamas County, 32 Fed. 24, holding county liable for injury sustained in consequence of its failure to keep bridge in repair.

— As dependent on imposed duty.

Cited in Dwyer v. Portland, 20 N. B. 423, on nonliability of surveyors or other persons given power to repair without duty being imposed upon them to do so; Leprohon v. R. 4 (Can.) Exch. 100, holding crown as owner of walk or way leading to public building is under no duty or obligation to keep same in repair.

Referred to as leading case and distinguished in Kirtley v. Spokane County, 20 Wash. 111, 54 Pac. 936, holding county liable under statutes for injury due to its neglect to repair bridge.

Explained in Wallis v. Assiniboia, 4 Manitoba L. Rep. 89, holding municipality is not civilly responsible unless made so by statute, and that statute placing

roads under jurisdiction of municipality did not impose liability for injury due to nonrepair.

— Impolicy of multiplied litigation.

Cited in Halifax v. Walker, Cameron (Can.) 569, on inconvenience and difficulty of fixing personal responsibility as reason for rule in cited case; Bathurst v. Macpherson, L. R. 4 App. Cas. 256, 48 L. J. P. C. N. S. 61, holding inconvenience resulting from increase of litigation if every individual aggrieved by nonrepair of public road might sue county or parish or individual members thereof is no reason why such action should not be maintainable.

Liability of public officer or corporation to suit.

Referred to as leading case in Welsh v. Rutland, 56 Vt. 228, 48 Am. Rep. 762, holding that at common law individual cannot sustain action against political subdivision of state based upon misconduct or nonfeasance of public officers.

Cited in Haygood v. Inferior Ct. Justices, 20 Ga. 845, holding corporation instituted for purposes of government not liable to action for nonfeasance; Clark County Justices v. Haygood, 15 Ga. 309, holding quasi corporations not liable to private action at common law; Dennis v. Larkin, 19 Iowa, 434, on liability of public officers or corporations for neglect of or refusal to perform duty imposed by law in action by individual injured thereby; Adams v. Wiscasset Bank, 1 Me. 361, 10 Am. Dec. 88, holding no private action, unless given by statute, lies against quasi corporations for breach of corporate duty; Fowler v. Rome Dispensary 5 Ga App. 36, 62 S. E. 660, holding that officers of dispensary created by law, are not suable as public officers, except by express provision of law; White v. Road Dist. No. 1, 9 Iowa, 202, holding road district cannot become party in court of justice, as corporation, quasi or otherwise; State use of Weddle v. Frederick County, 94 Md. 334, 51 Atl. 289, holding county school commissioners not liable in action of tort in absence of statutory authority; Williams v. Adams, 3 Allen, 171, holding person suffering injury while in house of correction by reason of master's negligence in not providing for him properly while in solitary confinement could not maintain action against master; Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332, holding child could not maintain action against city for injury due to unsafe condition of staircase in school building; Moynihan v. Todd, 188 Mass. 301, 108 Am. St. Rep. 473, 74 N. E. 367, holding rule that public officers and other agencies of government are not liable for negligence in performance of public duties goes no further than to relieve them from liability for nonfeasance and for misfeasances of their servants or agents; Johnson v. Somerville, 195 Mass. 370, 10 L.R.A.(N.S.) 715, 81 N. E. 268, holding that for nonperformance of public duty resulting in damage to individual no action lies against municipal body or against person upon whom public duty in question is put; Claussen v. Luverne, 103 Minn. 491, 15 L.R.A.(N.S.) 698, 115 N. W. 643, 14 Ann. Cas. 673, holding neither state nor any of its subdivisions, like a municipality, through which it operates is liable for torts committed by public officers, save indefinitely excepted class of cases; Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302, holding town is not liable to action of citizen of town who has suffered special damage from neglect of town to provide safe place for holding annual town meeting; Rhobidas v. Concord, 70 N. H. 90, 51 L.R.A. 381, 85 Am. St. Rep. 604, 47 Atl. 82, holding mere fact town is engaged in performance of public duty is not enough to free it from all common law liability for its acts taking word "public" in sense which includes every enterprise which may be supported by taxation; Reynolds v. Mynard, How. App. Cas. 620, holding no private action.

unless given by statute, lies against quasi corporation for breach of public duty. Clarissey v. Metropolitan Fire Dept. 1 Sweeny, 224, on test of whether body of men discharging public duties under special law can be sued by corporate title; Alamango v. Albany County, 25 Hun, 551, holding county and city officers authorized by statute to establish penitentiary not liable in action by prisoner whose hand was cut off by circular saw owing to alleged illegal and negligent acts of defendants in compelling him to work and approach saw; Bartlett v. Crozier, 15 Johns. 250, holding that where damage is suffered by act or omission of officer, contrary to his duty, party injured may maintain action on case against officer; Weet v. Brockport, 16 N. Y. 161, holding true doctrine is that whenever individual or corporation, for consideration received from sovereign power, has become bound by covenant or agreement, express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform such covenant, not only to indictment, but to private action by person injured by such neglect; Moody v. State Prison, 128 N. C. 12, 53 L.R.A. 855, 38 S. E. 131, holding state's prison not liable to action for damages sustained by prison guard who used defective ladder which broke under him; Dunlap v. Knapp, 14 Ohio St. 64, 82 Am. Dec. 468, on nonliability to private action of quasi public corporations for breach of public duties; Fire Ins. Patrol v. Boyd, 120 Pa. 624, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553, 22 W. N. C. 248, 45 Phila. Leg. Int. 444, holding doctrine of respondeat superior inapplicable to fire insurance patrol, on ground it is public charity; Somerall v. Gibbes, 4 M'Cord, L. 33, holding master in equity liable in action on case to person injured by his neglect in performing his duty; Noble v. Richmond, 31 Gratt. 271, 31 Am. Rep. 726, on action for breach of public duty, or neglect of what party is bound to perform, working wrong or loss to another; Fry v. Albemarle Co. 86 Va. 195, 19 Am. St. Rep. 879, 9 S. E. 1004, holding action not maintainable against county for alleged negligence of state convict working on public road; Hyde v. Jamaica, 27 Vt. 443, holding no private action will lie against towns at common law for neglect of duty, though individual suffers damage; Redfield v. School Dist. No. 3, 48 Wash. 85, 92 Pac. 770, holding pupil scalded by bucket of hot water negligently kept on heat register in school might maintain action for injury against school district under statute.

Cited in notes in 19 L.R.A. 452, on distinction between public and private functions of municipal corporations in respect to liability for negligence; 16 E. R. C. 621, on liability of officers for permitting or failing to abate nuisance.

Cited in 4 Dillon, Mun. Corp. 5th ed. 2905, 2908, on ground of implied liability of municipality for tort.

Referred to as leading case and distinguished in Brown v. South Kenebec Agri. Soc. 47 Me. 275, 74 Am. Dec. 484, where defendant was corporation aggregate as distinguished from quasi corporation; Winslow v. Perquimans, 64 N. C. 218, holding corporation, municipal quasi, or other may be sued in any form appropriate to cause of action, and to nature of relief demanded.

Distinguished in McLoud v. Selby, 10 Conn. 390, 27 Am. Dec. 689, holding school district liable to be sued; Tallahassee v. Fortune, 3 Fla. 19, 52 Am. Dec. 358, holding trespass on case maintainable against city for special damage due to its permitting nuisance; Riddle v. Locks & Canals, 7 Mass. 169, 5 Am. Dec. 35, drawing distinction between proper aggregate corporations and quasi corporations as to liability in private action; Ball v. Winchester, 32 N. H. 435, on ground of inapplicability of reasons assigned for decision in cited case to town corporation under local laws; White v. Charleston, 2 Hill, L. 571,

holding city council not liable to action by owner of house which was blown up to prevent spread of fire; Fowle v. Alexandria, 3 Cranch, C. C. 70, Fed. Cas. No. 4,993, where common council of city was held to be regular corporation, having or supposed to have corporate fund.

— Of counties and county boards.

Referred to as leading case in Markey v. Queens County, 154 N. Y. 675, 39 L.R.A. 46, 49 N. E. 71, holding that by common law of England county could not be subjected to civil action for breach of its corporate duty, unless such action was expressly given by statute; Hamilton County v. Mighels, 7 Ohio St. 110, holding county commissioners not liable to action for damages by person injured by fall into cellar under stairway in court house.

Cited in Barbour County v. Horn, 48 Ala. 649, holding authority and principle are opposed to subjecting counties to any common law liabilities; Graham v. Parham, 32 Ark. 676, holding that by common law county cannot be sued; Ward v. Hartford County, 12 Conn. 404, holding suit not maintainable against county; Governor ex rel. Haygood v. Inferior Ct. Justices, 19 Ga. 97, holding county not liable in suit for loss due to prisoner's escape on account of insufficiency of jail; Millwood v. De Kalb County, 106 Ga. 743, 32 S. E. 577, holding county not liable to suit unless made so by statute; Nagle v. Wakey, 161 Ill. 387, 43 N. E. 1079 (affirming 59 Ill. App. 198), holding that although duties are specifically enjoined upon towns by law, and they have power to levy taxes and raise money for their performance, they are not liable, in common law action, for damages sustained by individual on account of such action being neglected or inadequately performed; Yalabusha County v. Carbry, 3 Smedes & M. 529, questioning right to maintain action against counties, unless action is given by statute; Wehn v. Gage County, 5 Neb. 494, 25 Am. Rep. 497, holding county not liable for damages sustained by reason of erection of county jail and permitting it to become nuisance, in absence of statute; Lyell v. St. Clair County, 3 McLean, 580, Fed. Cas. No. 8,621, holding county could not be sued at common law.

Cited in note in 39 L.R.A. 34, on liabilities of counties for torts and negligence.

Cited in 4 Dillon, Mun. Corp. 5th ed. 2855, 2857, on liability of counties for neglect of officials.

Referred to as leading case and distinguished in House v. Montgomery County, 60 Ind. 580, 28 Am. Rep. 657, where provision was made for satisfaction of judgments rendered against county commissioners in their corporate capacity.

Distinguished in Vail v. Amenia, 4 N. D. 239, 59 N. W. 1092, on ground counties in United States are incorporated and have corporate purse.

— The "trustee for the public" doctrine of nonliability.

Cited in Powers v. Massachusetts Homœopathic Hospital, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294, as being the probable historical origin of doctrine limiting liability of political or municipal body for torts of its servants by reference to application of trust fund.

Distinguished in Parks v. Northwestern University, 121 Ill. App. 512, holding principle upon which public charities are held exempt from doctrine of respondeat superior is that public charity is trustee; Boyd v. Insurance Patrol, 113 Pa. 269, 6 Atl. 536, 17 Pittsb. L. J. N. S. 136, 18 W. N. C. 209, 43 Phila. Leg. Int. 427, where insurance patrol was held neither municipal corporation nor public officer, and its being either public agent or public charitable institution was questioned.

Individual liability of member of public or private corporation.

Referred to as leading case in Hopkins v. Elmore, 49 Vt. 176, on propriety of suing town in name of its inhabitants, instead of by name of town.

Cited in Emeric v. Gilman, 10 Cal. 404, 70 Am. Dec. 742, holding private property of inhabitant of county is not liable to seizure and sale on execution for satisfaction of judgment recovered against county; Lane v. Harris, 16 Ga. 217, on want of remedy where it would be necessary to sue each individual of corporation; Campbellsville Lumber Co. v. Hubbert, 50 C. C. A. 435, 112 Fed. 718, to dictum scheme of making inhabitants of organizations of feebly corporate life individually liable for corporate debts is crude and has not been favorably regarded; Jordan v. Cass County, 3 Dill. 185, Fed. Cas. No. 7,517, on maintenance of action against taxpayers and residents of township to enforce debts in analogy to principle of cited case; Dinyer v. Portland, 20 N. B. 423, on nonliability of inhabitants of parish to suit on account of nonrepair of highways.

Cited in 1 Dillon, Mun. Corp. 5th ed. 467, on personal liability of officers for nonfeasance of public duty.

— Judgments against public.

Cited in Eames v. Savage, 77 Me. 212, 52 Am. Rep. 751, sustaining constitutionality of statute authorizing levy upon goods and chattels of inhabitants of town of executions issued upon judgments against town; Rees v. Watertown, 19 Wall. 107, 22 L. ed. 72, 6 Legal Gaz. 273, holding it is not the law of the United States generally, or of England that individual inhabitants of town are bound by judgment against it and their property subject to be taken to satisfy it.

Taking person's property to pay another's debt.

Cited in Sears v. Cottrell, 5 Mich. 251, sustaining constitutionality of statute authorizing seizure and sale of property in person's possession to pay his taxes, regardless of who is owner thereof.

Lack of precedent as ground for nonmaintenance of action.

Cited in Altnow v. Sibley, 30 Minn. 186, 44 Am. Rep. 191, 14 N. W. 877, holding statutory town not liable in civil action for damages resulting from disrepair of public highway, where there was no previous instance of attempt to support such action; New York L. Ins. Co. v. English, 96 Tex. 268, 72 S. W. 58, holding it is strong presumption that that which has never been done cannot by law be done at all, hence suit upon entire policy of insurance on ground, first installment of amount secured thereby unpaid, being without precedent, is not maintainable; Austin & N. W. R. Co. v. Cluck, 97 Tex. 172, 64 L.R.A. 494, 104 Am. St. Rep. 863, 77 S. W. 403, 1 Ann. Cas. 261, holding fact that examination of individual's person was never authorized by court at common law is conclusive that courts had no authority at common law to make such order.

Creation of corporation by implication.

Cited in Bow v. Allenstown, 34 N. H. 351, 69 Am. Dec. 489, holding that wherever it is apparent intention of legislature will be defeated if certain parties are not found to possess corporate powers, they will be held to be created a corporation; Stebbins v. Jennings, 10 Pick. 172, holding that if corporate powers are not necessary to enjoyment of rights and powers conferred, they are not given by implication; Blair v. West Point Precinct, 2 McCrary, 459, 5 Fed. 265, holding it is only in cases where bona fide contract cannot be

otherwise enforced that courts will hold corporation has been created by implication.

Nature and powers of local governmental organ.

Cited in Beach v. Leahy, 11 Kan. 23, holding school district is only quasi corporation and not covered by constitutional prohibition against special acts conferring corporate powers.

Concurrence of right and remedy.

Cited in Campbell v. Rogers, 2 Handy (Ohio) 110, holding where there is no clearly defined legal right there can be no remedy, and where right not before existing is created by statute, and remedy given, right can alone be asserted in mode authorized by statute.

When action will lie for nonrepair.

Cited in Fellows v. Gilhuber, 82 Wis. 639, 17 L.R.A. 577, 52 N. W. 307, holding lessor of hotel not liable for injury sustained by guest because of unsafe awning where lessee was under duty to repair; Kinney v. Morley, 2 U. C. C. P. 226, holding defendant liable for death of person lawfully adjoining land, killed by falling of defective wall standing on defendant's ground.

— Of road or place for public.

Cited in Goshen & S. Turnp. Co. v. Sears, 7 Conn. 86, on liability of turnpike company to repair road; Navasota v. Pearce, 46 Tex. 525, 26 Am. Rep. 279, denying that, with reference to corporations and individuals who hold franchises on conditions, an action on the case will lie for nonrepair at suit of party sustained peculiar damage whenever indictment will lie.

12 E. R. C. 700, PENDLEBURY v. GREENHALGH, 45 L. J. Q. B. N. S. 3, 33 L. T. N. S. 372, L. R. 1 Q. B. Div. 36, 34 Week. Rep. 98.

Liability for neglect to remove nuisance from highway.

Cited in Castor v. Uxbridge Twp. 39 U. C. Q. B. 113, holding municipal corporation liable to suit by individual for injury caused by obstruction in highway placed there by telegraph company.

Liabilty of officer or municipality for injury due to misfeasance as distinguished from nonfeasance.

Cited in Patterson v. Victoria, 5 B. C. 628, holding municipal corporation liable as for misfeasance in boring hole in beam of bridge whereby it became more likely to rot and broke; Steves v. South Vancouver, 6 B. C. 17, holding excavation around and under tree and subsequent omission to cut it down, together gave one cause of action for misfeasance, where tree fell and killed person driving on road; Dwyer v. Portland, 20 N. B. 423, holding town liable to individuals for particular damage resulting from misfeasance or wrongful act, independent of statutory duty to repair street; Griffiths v. Portland, 23 N. B. 559, holding that where what is complained of consists partly in doing thing lawful in itself and partly in negligently omitting to do something else respecting it, it is not bare nonfeasance, but act coupled with omission raises liability as for misfeasance; McDonald v. Dickenson, 24 Ont. App. Rep. 31 (dissenting opinion), on distinction between nonfeasance and misfeasance.

Cited in 4 Dillon Mun. Corp. 5th ed. 3012, on municipal liability for injury from defect of street where city is directly in fault.

Liability of employer for acts of contractor.

Cited in McMillan v. Walker, 21 N. B. 31 (equally divided court), on liability of employer for injury due to work being improperly done by contractor;

Grassick v. Toronto, 39 U. C. Q. B. 306, holding city liable for damage due to penning back of water during construction of sewer, where work was being done under supervision of city by contractors; Nichol v. Canada Southern R. Co. 40 U. C. Q. B. 583, on liability of railway company for acts of contractors in construction of road whereby plaintiff's land was overflowed.

Cited in notes in 66 L.R.A. 128, on liability of employer for acts of independent contractor where injuries result from nonperformance of absolute duties of employer; 66 L.R.A. 945, on liability for injuries proximately caused by employer's own act during work by independent contractor.

Nonliability of public officer or corporation in respect to discharge of public duty.

Cited in Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332, holding child could not maintain action against city for injury due to dangerous condition of staircase in school building wherein child was attending school.

12 E. R. C. 705, COWLEY v. NEWMARKET LOCAL BOARD [1892] A. C. 345, 56 J. P. 805, 62 L. J. Q. B. N. S. 65, 67 L. T. N. S. 486, 1 Reports, 45, 8 Times L. R. 788.

Civil liability of public officer or agency for misfeasance or nonfeasance.

Cited in Moynihan v. Todd, 188 Mass. 301, 108 Am. St. Rep. 473, 74 N. E. 367, holding rule that public officers and other agencies of government are not liable for negligence in performance of public duties goes no further than to relieve them from liability for nonfeasance and misfeasance of their servants or agents; Logan Twp. v. Hurlburt, 23 Ont. App. Rep. 628; Steves v. South Vancouver, 6 B. C. 17 (dissenting opinion),—on distinction between acts of nonfeasance and misfeasance; Gordon v. Victoria, 5 B. C. 553, holding city not liable in damages for death of person due to nonfeasance consisting of acts of negligence in maintenance of bridge; Fuller v. Bonis, 6 D. L. R. 901, holding that in determining whether nonperformance of duty imposed by by-law enacted under statutory power gives right of action to one injured thereby depends upon purview of enacting body and language employed; McCrea v. St. John, 36 N. B. 144, holding municipality not liable at suit of private individual for mere nonfeasance such as failure to remove snow from streets; Curless v. Grand Falls, 37 N. B. 227 (dissenting opinion), on nonliability of town for failure to repair sewer; Crockett v. Campbellton, 39 N. B. 573, holding that municipality is not liable for nonfeasance; Graham v. Queen Victoria Niagara Falls Park, 28 Ont. Rep. 1, holding park commissioners not liable to person who was precipitated down river bank and injured by giving away of fence at top of bank when person placed hands and arms thereon in viewing scenery; Scottish Ontario & M. Land Co. v. Toronto, 29 Ont. Rep. 459, holding no action lies against municipality by consumer for failure to supply pure water, even though municipality be under statutory duty to supply pure and wholesome water; Tompkins v. Brockville Rink Co. 31 Ont. Rep. 124, holding that where statute provides for performance of particular duty, and some one of class of persons for whose benefit duty is imposed, is injured by failure to perform duty, an action lies in his favor against delinquent; Thomas v. Annapolis, 28 N. S. 551, granting new trial in action against town for injury due to defective grating in sidewalk on ground trial judge did not decide whether accident was result of nonfeasance or misfeasance; Saunders v. Holborn Dist. Bd. of Works [1895] 1 Q. B. 64, 64 L. J. Q. B. N. S. 101, 15 Reports, 25, 71 L. T. N. S. 519, 43 Week. Rep. 26, 59 J. P. 453, holding that with reference to obligations imposed by Act of

Parliament upon such bodies as sanitary board, unless intention of legislature that there shall be liability to action for default in performance of statutory duty is clearly expressed no action will lie; Campbell Davys v. Lloyd [1901] 2 Ch. 518, 70 L. J. Ch. N. S. 714, 85 L. T. N. S. 59, 49 Week. Rep. 710, 17 Times L. R. 678, holding that for special damage to individual caused by public nuisance arising from omission no action is maintainable; Sydney v. Bourke [1895] A. C. 433, 64 L. J. P. C. N. S. 140, 11 Reports, 482, 72 L. T. N. S. 605, 59 J. P. 659, holding that whilst in case of misfeasance in causing nuisance in highway action can be maintained, no action will lie where only charge is one of nonfeasance in failing to repair; Harrington v. Derby Corp. [1905] 1 Ch. 205, 69 J. P. 62, 92 L. T. N. S. 153, 21 Times L. R. 98, holding corporation of borough liable in damages for acts of misfeasance but not for those of nonfeasance in polluting river; Robinson v. Workington Corp. [1897] 1 Q. B. 619, 66 L. J. Q. B. N. S. 388, 75 L. T. N. S. 674, 45 Week. Rep. 453, 61 J. P. 164, holding action would not lie against urban sanitary authority for injury caused to plaintiff's premises by reason of insufficiency of sewer vested in them by statute where insufficiency of sewer was due to nonfeasance.

Cited in notes in 16 Eng. Rul. Cas. 621, on liability of officers for permitting or failing to abate nuisance; 19 Eng. Rul. Cas. 52, on liability for injury due to neglect of statutory precautions.

Cited in 4 Dillon, Mun. Corp. 5th ed. 2855, on liability of counties for neglect of officials; 5 Thompson, Neg. 518, on duty of municipality with respect to dangerous excavations.

Distinguished in Barry v. Smith, 191 Mass. 78, 5 L.R.A.(N.S.) 1028, 77 N. E. 1099, 6 Ann. Cas. 817, holding plaintiff could not make out case in tort against members of board of health by showing hospital was nuisance and under their control, without proving misfeasance; Bligh v. Rathangan River Dist. Board [1898] 2 Ir. Q. B. 205, where common law right was infringed by drainage board in increasing volume of water flowing down river and changing its natural flow.

— Care of highways.

Cited in Cooksley v. New Westminster, 14 B. C. 330, holding that city which is guilty of misfeasance in allowing bridge to become nuisance, is liable to person injured as result of condition; Vancouver v. McPhalen, 45 Can. S. C. 194 (affirming 15 B. C. 367), holding that under statute municipality is liable for injury to person caused by defective sidewalk, although statute does not expressly provide for such liability; Webb v. Barton Stoney Creek Consol. Road Co. 26 Ont. Rep. 343, holding that at common law no action for injuries caused by nonrepair of public highway would lie, and will not now in many cases unless such remedy is given by statute; Hiles v. Ellice, 20 Ont. App. Rep. 225 (dissenting opinion), on liability of city for negligence in care of streets, whereby person is injured; Fitzgerald v. Ottawa, 22 Ont. App. Rep. 297 (dissenting opinion), on absence of right of action for injury due to nonrepair of highway or bridge, though duty to repair be imposed, where there is no express enactment giving such right; O'Connor v. Hamilton, 8 Ont. L. Rep. 391 (dissenting opinion), on necessity of statute to give right of action to individual against municipality for injury due to unsafe condition of street; Wheeler v. Public Works Comrs. [1903] 2 Ir. K. B. 202 (dissenting opinion), on nonliability of public body to individual who sustains damage by reason of nonperformance of common law or statutable duty to maintain; Thompson v. Brighton [1894] 1 Q. B. 332, holding combined highway and sewer authority not liable

to action by individual suffering injury by reason of dangerous state of sewer gratings and highway in combination; Oliver v. Horsham Local Board, 63 L. J. Q. B. N. S. 181, [1894] 1 Q. B. 332, 9 Reports, 111, 70 L. T. N. S. 106, 42 Week. Rep. 161, 58 J. P. 297, holding local authority in which highways and sewers were vested not civilly liable for injury due to disrepair of highway alone.

Cited in notes in 47 L.R.A. 298, on bicycle law; 12 Eng. Rul. Cas. 715, on liability of counties and municipalities for injury due to defect in highway.

Cited in 5 Thompson, Neg. 389, on jurisdictions in which municipality is not liable for injuries in highway.

Distinguished in Consolidated R. Co. v. Victoria, 5 B. C. 266, holding city is not liable for nonrepair of bridge though it constitutes a nuisance.

Inconvenience of civil suits against public bodies.

Cited in Smith v. Chorley [1897] 1 Q. B. 532, on inexpediency of actions in matters affecting public bodies.

Object of statute as affecting liability for breach thereof.

Cited in Marsh v. Koons, 78 Ohio St. 68, 16 L.R.A.(N.S.) 647, 125 Am. St. Rep. 688, 84 N. E. 599, 14 Ann. Cas. 621, holding where object of statute prohibiting owners of stock to allow them to be at large upon highways was not safety of travelers, traveler thrown out of buggy by horse taking fright at cow in act of rising to its feet where it had been lying down could not recover for injury from cow's owner; McIntosh v. Firstbrook Box Co. 8 Ont. L. Rep. 419 (dissenting opinion), on liability of employer for injury to boy employed in factory contrary to statute.

Transfer of official obligation to repair highways as affecting liability for nonrepair.

Cited in Pictou Municipality v. Geldert [1893] A. C. 524, 63 L. J. P. C. N. S. 37, 1 Reports, 447, 69 L. T. N. S. 510, 42 Week. Rep. 114, holding transfer to public corporation of obligation to repair does not of itself render such corporation liable to action in respect of mere misfeasance; Maguire v. Liverpool Corp. [1905] 1 K. B. 767, 74 L. J. K. B. N. S. 369, 69 J. P. 153, 53 Week. Rep. 449, 3 L. G. R. 485, 21 Times L. R. 278, 92 L. T. N. S. 374, holding liability of municipal corporation to repair highways imposed by statute was not different or larger than that incurred by inhabitants of parish in respect to such repair.

Distinguished in Sydney v. Bourke [1895] A. C. 433, 64 L. J. P. C. N. S. 140, 11 Reports, 482, 72 L. T. N. S. 605, 59 J. P. 659, where there was no transfer of duty in relation to repair of roads.

12 E. R. C. 717, REG. v. BLAKEMORE, 2 Den. C. C. 410, 16 Jur. 154, 21 L. J. Mag. Cas. N. S. 60.

Liability to repair highway by ratione tenuræ.

Cited in note in 12 E. R. C. 681, on liability of county, township, etc., for repairs on highways and bridges.

Distinguished in Rundle v. Hearle [1898] 2 Q. B. 83, 67 L. J. Q. B. N. S. 741, 78 L. T. N. S. 56, 46 Week. Rep. 619, 14 Times L. R. 440, holding fact person has done repairs to a way may be some evidence of liability to repair, but distinguishing between carriage and horse road and footpath through fields and over stiles.

Estoppel by judgment.

Cited in State v. Buzzell, 59 N. H. 65, 4 Am. Crim. Rep. 410, holding that if defendant has been convicted as principal on former indictment, judgment is conclusive evidence, for state and against him, in any other case between same parties, that he was principal; Secor v. Singleton, 41 Fed. 725, holding decree that property be exempt from taxation and enjoining collection or assessment of tax thereon reached beyond record and bound privies in estate; Justice v. Com. 81 Va. 209, holding that party must show that he is identical party who was prosecuted once before for the identical offense, in order to avail himself of defense of former jeopardy.

Cited in notes in 3 E. R. C. 425, on necessity that award decide all matters submitted and be certain and final; 11 Eng. Rul. Cas. 13, on estoppel by record.

12 E. R. C. 729, LATOUR v. TEESDALE, 2 March. 243, 17 Revised Rep. 518, 8 Taunt. 830.

Conflict of laws relative to marriage.

Cited in Corrie's Case, 2 Bland, Ch. 488, holding that contract of marriage, if valid where made, is valid everywhere; Re Marriage Laws, 6 D. L. R. 588, to the point that British settlers in British colonies are entitled to benefit of their own marriage laws; Harris v. Cooper, 31 U. C. Q. B. 182, holding British law inapplicable to alleged husband and wife born and brought up in Virginia, and attempting to marry according to law of that state with no view to or claim upon laws of any other country whatever.

Cited in notes in 57 L.R.A. 158 and 5 Eng. Rul. Cas. 827, on law governing validity of marriage.

Validity of marriage.

Cited in Delpit v. Cote, Rap. Jud. Quebec 20 C. S. 338, holding legal marriage upon license of two Roman Catholics, by Protestant minister; R. v. Millis, 17 E. R. C. 66, 10 Clark & F. 534, 8 Jur. 717, as to whether contract per verba de praesenti, without more construed valid marriage before Marriage Act.

Cited in note in 17 E. R. C. 160, on what constitutes a valid marriage.

Dower right of widow where marriage is voidable.

Cited in Phipps v. Moore, 5 U. C. Q. B. 16, on right of widow to dower where voidable marriage has not been avoided in lifetime of husband.

Common law as to marriage.

Cited in Delpit v. Coté, Rap. Jud. Quebec, 20 C. S. 338, on inclusion of matrimonial laws in expression "common law."

12 E. R. C. 738, REG. v. BRIGHTON, 30 L. J. Mag. Cas. N. S. 197, 1 Best & S. 447, 5 L. T. N. S. 56, 9 Week. Rep. 831.

Prohibited marriages between relatives.

Cited in Campbell v. Crampton, 8 Abb. N. C. 363, 18 Blatchf. 150, 2 Fed. 417, holding that relatives of half-blood are, equally with those of whole blood, included in degrees of consanguinity within which marriages are prohibited.

Limitation of "issue" to legitimate issue.

Cited in Hargraft v. Keegan, 10 Ont. Rep. 272, holding that words "child or other issue," in R. O. S. Chapter 106, means legitimate child or other legitimate issue.

12 E. R. C. 745, MIDGLEY v. WOOD, 30 L. J. Prob. N. S. 57, 4 Swabey & T. 267.

Invalidity of marriage because of mispublication of banns.

Cited in note in 12 E. R. C. 756, on invalidity of marriage because of mispublication of banns.

Collusion for obtaining divorce.

Cited in Churchward v. Churchward [1895] P. 7, 64 L. J. Prob. N. S. 18, 11 Reports, 626, 71 L. T. N. S. 782, 43 Week. Rep. 380, holding that if initiation of suit be procured, and its conduct provided for by agreement, it constitutes collusion though no fact appears to be falsely dealt with or withheld.

12 E. R. C. 752, TEMPLETON v. TYREE, 41 L. J. Prob. N. S. 86, L. R. 2 Prob. & Div. 420, 27 L. T. N. S. 429, 21 Week. Rep. 81.

Annulment of fraudulent marriage by legislature.

Cited in Moss v. Moss [1897] P. 263, 66 L. J. Prob. N. S. 154, 77 L. T. N. S. 220, 45 Week. Rep. 635, on annulment by Parliament of marriage brought about by fraud.

12 E. R. C. 757, STRATHMORE v. BOWES, 6 Bro. P. C. 427, affirming the decision of the Court of Chancery, reported in 1 Ves. Jr. 22, 2 Bro. Ch. 345, 2 Cox, Ch. Cas. 28, 1 Revised Rep. 76.

Implied fraud in conveyance by prospective husband or wife.

Cited in Jenkins v. Rhodes, 106 Va. 564, 56 S. E. 332; Hamilton v. Smith, 57 Iowa, 15, 42 Am. Rep. 39, 10 N. W. 276, on test of cases of this kind by question whether evidence is sufficient to show fraud; Butler v. Butler, 21 Kan. 521, 30 Am. Rep. 441, holding it was not absolute rule that antenuptial voluntary conveyance was fraudulent and void.

Cited in note in 9 L.R.A.(N.S.) 956, on conveyance in contemplation of marriage, but before negotiations begun, as fraud on subsequent husband and wife.

Cited in 1 Beach, Trusts, 101, on executory trusts in marriage contracts; 1 Beach, Trusts, 548, 553, on constructive trust from conveyance of property on eve of marriage; 2 Cooley, Torts, 3d ed. 978, on fraud between parties engaged to marry.

— By woman pending treaty of marriage.

Referred to as leading case in Hall v. Carmichael, 8 Baxt. 211, 35 Am. Rep. 696, holding conveyance by woman pending treaty of marriage, though prima facie good, must be judged by its own particular surroundings, and purposed concealment is evidence of purposed fraud.

Cited in Kelly v. McGrath, 70 Ala. 75, 45 Am. Rep. 75, holding weight of authority holds woman to duty of disclosure; Caldwell v. Gillis, 2 Port. (Ala.) 526, holding that to constitute fraud upon intended husband, something more must appear than mere release of right without his knowledge and consent; Chandler v. Hollingsworth, 3 Del. Ch. 99, holding court will protect husband against voluntary conveyance or settlement by wife of all her estate, to exclusion of her husband, made pending engagement of marriage, without his knowledge prior to marriage, even in absence of express misrepresentation or deceit and whether husband knew of existence of property or not; Freeman v. Hartman, 45 Ill. 57, 92 Am. Dec. 193, holding voluntary conveyance by woman, on eve of her marriage, of property which her intended husband knew her to

own, made without his knowledge, is void as against him, because in derogation of his marital rights and just expectations; Wilson v. Daniel, 13 B. Mon. 348, holding that where widow being about to marry C., by his consent, conveyed slaves to her separate use, such conveyance cannot be attacked by W., person whom she afterwards married instead of C.; Gregory v. Winston, 23 Gratt. 102, holding that woman about to be married, may dispose of her fortune as she pleases, provided it is done with proper motives, and without intention to deceive her intended husband; Cole v. O'Neill, 3 Md. Ch. 174, holding it is necessary to impeachment of settlement that husband be kept in ignorance of it up to moment of marriage, and even if he is so kept in ignorance it will depend upon circumstances whether it be valid or not; Tucker v. Andrews, 13 Me. 124, holding that secret voluntary conveyance of her property made by woman after marriage contract and before marriage, is void as against husband; Williams v. Carle, 10 N. J. Eq. 543, holding law affords husband ample redress if wife during engagement, without his consent or knowledge, and to deprive him of benefit of her property, and in fraud of his marital rights, places money in hands of her sister; Wright v. Miller, 1 Sandf. Ch. 103, holding conveyance by woman made before her husband became her suitor is binding in absence of any positive deception practised upon him; Logan v. Simmons, 38 N. C. (3 Ired. Eq.) 487, holding conveyance by woman previous to marriage in fraud of her intended husband's marital rights is voidable, if at all, upon ground of fraud and discussing question whether mere concealment by wife is per se fraud; Jordan v. Black, Meigs, 142, holding general rule is that disposition by wife of her property after contract of marriage and before it has been solemnized, will be fraudulent as against husband who has been kept ignorant of the transaction; Gregory v. Winston, 23 Gratt. 102, holding equity arising depends upon circumstances of case as bearing upon question whether facts show fraud upon husband; Thayer v. Thayer, 14 Vt. 107, 39 Am. Dec. 211, recognizing it to be settled law that if woman during treaty for marriage, without knowledge of her intended husband, makes voluntary disposition of her property, it is a fraud upon his marital rights, though done prior to its celebration.

—By husband on eve of marriage.

Cited in Alkire v. Alkire, 134 Ind. 350, 32 N. E. 571, holding husband may provide for children by first wife during contract of marriage with second by conveyances of his property; Fennessey v. Fennessey, 84 Ky. 519, 4 Am. St. Rep. 210, 2 S. W. 158, holding rule that while conveyance secretly made by wife on treaty of marriage is prima facie fraudulent, it might not, under similar circumstances, be held fraudulent if made by husband is based on ground marriage burdens husband with wife's support and makes him liable for her deeds; Collins v. Collins, 98 Md. 473, 103 Am. St. Rep. 408, 57 Atl. 597, 1 Ann. Cas. 856, holding that equity will relieve widow against voluntary conveyance by husband of all his estate, pending engagement of marriage, without any disclosure to intended wife, or knowledge on her part of his purpose, though without any express misrepresentation on his part; Arnegaard v. Arnegaard, 7 N. D. 475, 41 L.R.A. 258, 75 N. W. 797, holding deed of husband to son by former wife upon eve of his marriage with second wife fraudulent and void as to wife's homestead right; Tate v. Tate, 21 N. C. (1 Dev. & B. Eq.) 22, holding that advancement to children of first marriage, made before second was contemplated, is not fraud upon second wife's right of dower; Dudley v. Dudley, 76 Wis 567, 8 L.R.A. 814, 45 N. W. 602, holding that conveyance made

just before marriage in fraud of wife's rights can be set aside only to extent of her dower.

Separate estate of married woman.

Cited in Robert v. West, 15 Ga. 122, holding court of equity may restrain marital rights from attaching to estate settled for use of feme sole, upon her marrying at full age; and may also restrain common law rights of second husband from attaching to property thus settled on feme covert where terms of instrument creating estate so provide; Torbert v. Twining, 1 Yeates (Pa.) 432, holding that under devise in trust, income to go to feme covert for life, husband is entitled to income, unless will shows that testator intended it for her separate use; Tullett v. Armstrong, 3 E. R. C. 215, 1 Beav. 1, 4 Myl. & C. 390, 8 L. J. Ch. N. S. 19, 9 L. J. Ch. N. S. 41, holding property given to woman for her separate use, independent of any husband may be enjoyed 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 discovered.

Rights upon which fraud may be committed.

Cited in Maguire v. State Sav. Asso. 62 Mo. 344, to the point that court of equity will interfere where undue advantage has been oppressively obtained, although under circumstances not constituting legal fraud; Crain v. Crain, 17 Tex. 80, holding it is not necessary that an heir be regarded as quasi purchaser or creditor in order to hold fraud may be committed against him.

Duress in equity.

Cited in Central Bank v. Copeland, 18 Md. 305, 81 Am. Dec. 597, holding equity will refuse its aid against one who, although apparently acting voluntarily, yet, in fact, appears to have executed contract with mind so subdued by harshness, cruelty, extreme distress, or apprehensions short of legal duress, as to overpower and control the will; Boddy v. Finley, 9 Grant, Ch. (U. C.) 162, holding that where party while under arrest agreed before magistrate to give mortgage and was discharged, and then gave mortgage, he could not have it set aside as given under duress.

12 E. R. C. 767, ELIBANK v. MONTOLIEU, 5 Revised Rep. 151, 5 Ves. Jr. 737.

Wife's equity to a settlement.

Cited in Guild v. Guild, 16 Ala. 121, holding equity may restrain husband in exercise of marital rights over property inherited by his wife, unless he make suitable provision for her; Sayre v. Flournoy, 3 Ga. 541, holding wife is entitled to her equity upon new accession of fortune; also that naked right to sue for wife's property vests no certain legal or equitable title thereto in husband; Barron v. Barron, 24 Vt. 375, holding that property of married woman will be protected in equity against husband, in any proceeding which may be adopted at law or otherwise for purpose of reducing it to her possession.

Cited in note in 12 E. R. C. 781, on compelling husband to make provision for wife out of property coming to him jure mariti.

Cited in 1 Beach, Trusts, 674, on married woman's equity to a settlement: 1 Beach, Trusts, 678, on amount of wife's settlement; 1 Beach, Trusts, 679, on property subject to wife's settlement; 1 Beach, Trusts, 683, on rights of children under married woman's settlement.

— Right of husband's creditors or third person's.

Cited in Savage v. Benham, 17 Ala. 119, holding where husband has never reduced legacy of wife to possession, wife's equity to suitable settlement out of her share of estate is unaffected by his indebtedness to executor; Helms v. Franciscus, 2 Bland, Ch. 544, 20 Am. Dec. 402, holding settlements upon wife are deemed valid even against creditors of husband; Kenny v. Udall, 5 Johns. Ch. 464, holding wife's equity attaches upon her personal property, when it is subject to jurisdiction of court, and is object of suit, into whosoever hands it may come, or in whatever manner transferred, and same rule applies, whether application be by husband or his representatives or assignees to obtain possession of the property, or by wife or her trustee praying for provision out of that property; Hill v. Hill, 1 Strobh. Eq. 1, holding agreement between husband and administrators not enforceable where claims of wife interposed; Jacobs v. Perryclear, Rileys Eq. 47, 2 Hill Eq. 504, on superiority to persons claiming through husband; Roper v. Shannon, 8 N. S. 146, holding that wife was entitled to protection in equity as against husband's creditors in respect to funds that came to husband through power of attorney executed to him by wife.

Distinguished in Windgate v. Parsons, 4 Del. Ch. 117, where husband and wife joined in suit for legacy bequeathed to wife during coverture, and executors sought to retain legacy against debt due from husband to testator; Smith v. Kearney, 2 Barb. Ch. 533, holding executor or administrator has right to retain whole or part of legacy or distributive share, in discharge or satisfaction of debt due from legatee or distributee to the estate.

— Party to sue.

Cited in Re Hill, 190 Fed. 390, holding that wife cannot maintain suit at law against husband for money loaned to him, even under statute; Bell v. Bell, 1 Ga 637, holding wife entitled to equity may assert it as plaintiff, by bringing bill by her next friend; Barron v. Barron, 24 Vt. 375; Jaycox v. Caldwell, 37 How. Pr. 240.—holding wife may assert her equity as plaintiff; Brown v. Wadsworth, 168 N. Y. 225, 61 N. E. 250, on grant of wife's equity whether applicant to court is wife, her trustee or her husband; Re Abrahims, 19 W. N. C. 450, holding that wife may actively assert her right to her equitable choses in action; Lindsay v. Lindsay, Rich. Eq. Cas. 439, holding wife may sue by next friend; Poindexter v. Jeffries, 15 Gratt. 363, holding equity of wife will generally be administered to her in suit brought by her or her trustee for purpose of asserting it.

Distinguished in Myers v. Myers, Bail. Eq. 23, holding court will not order settlement for benefit of wife, upon application of stranger without consent of husband, neither will it order property transferred to husband until wife has been consulted.

Rights in wife's property before reduction to husband's possession.

Cited in Perryclear v. Jacobs, 2 Hill. Eq. 504, holding creditors of husband have no interest in wife's expectancy, not yet reduced into possession, and credit him on faith of it at their peril; Miller v. Blackburn, 14 Ind. 62 (dissenting opinion), on separate property of wife in her legacy or distributive share until it is reduced to possession by her husband.

Acquisition of title by next of kin.

Cited in Hagthorp v. Hook, 1 Gill & J. 270 (dismissing appeal in 3 Bland Ch. 551), on absence of right of any one as next of kin of intestate to make

title or obtain possession of his distributive share except through and from administrator.

Maxim "he who asks equity must do equity."

Cited in Hanson v. Keating, 4 Hare 1, holding plaintiff will not be compelled to give defendant anything but what defendant might, as plaintiff, enforce, provided cause of suit arose; Botsford v. Crane, 17 N. B. 154, to same effect.

12 E. R. C. 774, MURRAY v. ELIBANK, 10 Ves. Jr. 84, 7 Revised Rep. 346, opinions by the Master of the Rolls after putting in answer reported in 13 Ves. Jr. 1, and 14 Ves. Jr. 496.

Wife's equity to a settlement.

Cited in Carleton v. Banks, 7 Ala. 32 (dissenting opinion), on origin of wife's equity; Helms v. Franciscus, 2 Bland. Ch. 544, 20 Am. Dec. 402, holding such settlements are valid against creditors of husband; Coppledge v. Threadgill, 3 Sneed, 577, holding equitable right of married woman to provision out of her own property or fortune, before husband or his assignee has reduced it to possession, is mere creature of, and rests alone upon peculiar doctrine of, court of equity; Myers v. Myers, Bail. Eq. 23, holding wife entitled to settlement before husband is given aid of court to get possession of wife's property, also that settlement will not be ordered against wishes of wife; Prewitt v. Bunch, 101 Tenn. 723, 50 S. W. 748, holding that amount which court will set apart for benefit of wife and children out of estate before its reduction to possession by husband will be limited over to husband upon contingency of her death without issue; Poindexter v. Jeffries, 15 Gratt. 363, holding that real, as well as personal estate is subject to wife's equity; Frary v. Booth, 37 Vt. 78, holding that statutes in regard to conveyance of married women's estates, do not affect jurisdiction of courts of equity over subject of separate estates.

Cited in note in 24 E. R. C. 184, on enforceability of contract to make settlement.

The decision of the Master of Rolls was cited in Howard v. Moffatt, 2 Johns. Ch. 206, holding general rule is that where husband requires aid of court to get possession of wife's property, he must make suitable provision out of it for her maintenance and that of her children, and without that, aid of court will not be afforded him; also semble that wife may, at her option, waive any settlement; Kenny v. Udall, 5 Johns. Ch. 464, holding wife's equity stands upon peculiar doctrine of the court; Hurdt v. Courtenay, 4 Met. (Ky.) 139, holding that where husband reduces to possession, without resort to equity interest in estate descended to wife, he acquires complete legal right to it, and wife has no equity to settlement against his creditors; Bouknight v. Epting, 11 S. C. 71, holding that where complete legal estate in wife's land had become vested in husband prior to adoption of constitution of 1868, such constitution did not operate as settlement of such lands upon wife; Barron v. Barron, 24 Vt. 375, holding that husband may be restrained from enforcing his legal remedies to obtain wife's property, for purpose of enforcing her equity to settlement; Allen v. Furness, 20 Ont. App. Rep. 34, to the point that wife is entitled, in equity to settlement out of her separate property.

Loss by payments to husband before suit.

Cited in Carleton v. Banks, 7 Ala. 32, holding that if trustee, in case of equitable chose in action, chooses, without suit, to put husband in possession, wife's equity to settlement is gone; Cochran v. McBeath, 1 Del. Ch. 187, holding wife's acquiescence makes previous acts done valid, but it is not abandonment,

for she may resume her right, and by her bill stop further payments to husband; Lindsay v. Lindsay, Rich. Eq. Cas. 439, on right of wife when trustee has paid wife's share over to husband before bill is filed.

— Rights of children by succession to wife.

Cited in Bell v. Bell, 1 Ga. 637, holding that if wife die, pending proceedings, without waiving settlement, children may, by supplemental bill enforce their claim, also that better opinion seems to be that where mother dies without having obtained settlement or decree for one, children have no original substantive right to provision; Hobgood v. Martin, 31 Ga. 62, holding right of children attaches upon filing of bill by wife in her lifetime; and her subsequent death will not defeat claims of children; Helms v. Franciscus, 2 Bland, Ch. 544, 20 Am. Dec. 402, holding that although wife may relinquish her share at any time after it has been ascertained, yet subject to her release, her children acquire vested interest in the provision directed to be made, from date of order; Barker v. Woods, 1 Sandf. Ch. 129, holding that when mother has taken no step to enforce her equity for settlement, and has no contract for it, her children surviving her have no claim upon the estate as against her husband; Sherrard v. Carlisle, 1 Patton & H. (Va.) 12, holding child may assert right by supplemental bill.

Cited in 1 Beach, Trusts, 683, on rights of children under married woman's settlement.

The decision of the Master of Rolls was cited in Mercier v. West Kansas City Land Co. 72 Mo. 473, on inclusion of children in settlement of wife's property upon her to exclusion of husband; Hill v. Hill, 3 Strobh. Eq. 994, on inseparability of wife and children in any settlement made by court and survival of children's right when mother's debt occurs after decree of reference to master for settlement has been obtained.

12 E. R. C. 783, BERNSTEIN v. BERNSTEIN, 63 L. J. Prob. N. S. 3, 69 L. T. N. S. 513 [1893] P. 292, 6 Reports, 609.

Loss of right to damages in divorce case by condonation.

Cited in Goeger v. Goeger, 59 N. J. Eq. 15, 45 Atl. 349, holding that proof by wife of her husband's forgiveness in words, his promise to receive her back to his home, and conveyance of property to her, were not sufficient to show condonation of adultery; Hyman v. Hyman [1904] P. 403, 73 L. J. Prob. N. S. 106, 91 L. T. N. S. 361, 20 Times L. R. 696, rescinding decree nisi including damages on ground of condonation.

Cited in note in 8 E. R. C. 370, on award of damages by way of compensation.

Actionable criminal conversation and alienation of affections.

Cited in Nolin v. Pearson, 191 Mass. 283, 4 L.R.A.(N.S.) 643, 114 Am. St. Rep. 605, 77 N. E. 890, 6 Ann. Cas. 658, holding wife may maintain action against woman committing adultery with her husband and causing him to abandon her, without joining her husband as party plaintiff; Bailey v. King, 27 Ont. App. Rep. 703, holding that husband may recover damages he has sustained within period of six years in action for criminal conversation.

12 E. R. C. 811, DURANT v. TITLEY, 7 Price, 577, 21 Revised Rep. 773.

Invalidity of agreement for future separation of husband and wife.

Cited in Chapman v. Gray, 8 Ga. 341, holding deed containing covenant for

future separation cannot be enforced; King v. Mollohan, 61 Kan. 683, 60 Pac. 731, holding public policy forbids agreement which encourages or facilitates dissolution of married relation or which provides for future separation; Randall v. Randall, 37 Mich. 563, holding it impolitic of law to encourage separations or favor them by supporting arrangements calculated to bring them about; Squires v. Squires, 53 Vt. 208, 38 Am. Rep. 668, to same effect; Sayles v. Sayles, 21 N. H. 312, 53 Am. Dec. 208, holding no contract having for its object dissolution of marriage relations or calculated to disturb them can be sustained; Wilde v. Wilde, 37 Neb. 891, 56 N. W. 724, holding agreement for purpose of facilitating procuring of divorce at suit of one or other of parties is contrary to settled policy of law and void; Brun v. Brun, 64 Neb. 782, 90 N. W. 860, holding contract is bad which gives wife option of receiving husband as such into home or excluding him upon payment of an annuity; Gould v. Gould, 29 How. Pr. 441, holding instrument not contemplating immediate separation void as against policy of law; Bennett v. Jones, 9 N. B. 397, holding that though law allows provision for separation already determined on, it will not sanction any agreement, effect of which is to provide for contingency of future separation at pleasure of the parties.

12 E. R. C. 816, ANTROBUS v. DAVIDSON, 3 Meriv. 569, 17 Revised Rep. 130.

Surety's remedy in equity to enforce exoneration.

Cited in Hayden v. Thrasher, 18 Fla. 795, holding indorser on bills standing as surety may in equity require principal obligor to pay bills and relieve him; Clagett v. Salmon, 5 Gill & J. 314, holding that if surety pays whole debt, he has right to be put into place of creditor as to all remedies for recovery of debt; Pride v. Boyce, Rice, Eq. 275, 33 Am. Dec. 78, holding surety need not first pay the debt but may compel the principal to pay it in relief of the surety or may have securities applied to discharge it; Cory v. Long, 2 Sweeny, 491 (dissenting opinion), on right of surety in equity to compel payment by principal when surety has been brought under liability by debt falling due; Scribner v. Hickok, 4 Johns. Ch. 530, holding that on bill to redeem from mortgage after decree, where defendants were required to recount for rents and profits, one of such defendants who paid more than his share was entitled to use decree for his protection; Williams v. Helme, 16 N. C. (1 Dev. Eq.) 151, 18 Am. Dec. 580, holding that the surety having in his hands money to credit of the principal may retain it as counter security for his suretyship; Bank of Manchester v. Bartlett, 13 Vt. 315, 37 Am. Dec. 594; Bank of State v. Gourdin, Speers, Eq. 439,—on surety's right in equity to file a bill for exoneration.

Cited in notes in 6 L.R.A.(N.S.) 593, on specific performance of contract to give security; 12 E. R. C. 840, on right of person whose liability is ascertained to judgment for indemnity or contribution.

Distinguished in Marsh v. Pike, 1 Sandf. Ch. 210, holding that a mortgagor does not become a surety by conveying the land so as to entitle himself to force the creditor to resort to the land instead of to the debtor; Coffin v. Lockhart, 60 Hun, 178, 14 N. Y. Supp. 719, holding that mortgagor cannot sue the assuming assignee of the property to compel him to pay off the mortgage without bringing in the mortgagee.

— Remedy before actual loss or payment but after liability accrues.

Cited in Donelson v. Posey, 13 Ala. 752, holding that a retiring partner who gave his credit to the firm was entitled to be exonerated out of the new firm's

assets as soon as the debt became due and in default; West v. Chasten, 12 Fla. 315, holding retiring partner's right to be exonerated accrues as soon as the debt becomes due; Hammond v. Hammond, 2 Bland, Ch. 306, permitting surety on bond, on judgment being obtained, to sue estate of principal to cause lands to be sold to satisfy debts; Hayes v. Ward, 4 Johns. Ch. 123, 8 Am. Dec. 554, allowing injunction against action at law on mortgage debt, pending foreign foreclosure suit where the circumstances were peculiar and there was danger to rights of debtor; Beaver v. Beaver, 23 Pa. 167, applying principle of exoneration by entering conditional verdict for creditor providing that debtor retain a sum sufficient to discharge secondary liability on plaintiff's debt if the same should not be paid when due; Norton v. Reid, 11 S. C. 593 appx., holding in case of threatened injury by delay surety may resort to equity before maturity the debt being ascertained; Jones v. Central Trust Co. 19 C. C. A. 569, 43 U. S. App. 224, 73 Fed. 568, holding surety on replevin bond to return the property or pay its value may require principal to exonerate them as soon as the court decides against the replevin and before they have paid the penalty; Findlay v. Bank of United States, 2 McLean, 44, Fed. Cas. No. 4,791, holding that judgment merged the suretyship and the only remaining remedy was to pay the judgment and sue the principal for exoneration and to enforce the subrogated rights; Caston v. Dunlap, Rich. Eq. Cas. 77, 23 Am. Dec. 194, on the equity of surety to compel payment of debt when already due; Leeming v. Smith, 25 Grant, Ch. (U. C.) 256, refusing relief to an indemnitor before damage; Federal Bank v. Harrison, 10 Ont. Pr. Rep. 271, refusing to implead debtor in suit against surety by creditor; Wolmershausen v. Gullick, 12 E. R. C. 823, 21 E. R. C. 634, 62 L. J. Ch. N. S. 773 [1893] 2 Ch. 514, 68 L. T. N. S. 753, holding cosurety may have declaratory decree for future contribution and if the creditor is made party may have a prospective order on cosurety for payment of his share.

Distinguished in Gibbs v. Mermaud, 2 Edw. Ch. 482, denying ne exeat at instance of surety for act to be done outside jurisdiction.

— Quia timet bill.

Cited in Salmon v. Clagett, 3 Bland, Ch. 125, holding that a bill in the nature of one quia timet would be entertained to protect the securities given by a principal obligor to indemnify a surety.

— Distinction from indemnity.

Cited in Hoffman v. Johnson, 1 Bland, Ch. 103, on distinction between surety and indemnitor in respect to time when right to sue is mature; Bank of Upper Canada v. Brough, 2 U. C. Err. & App. 95, on technical suretyship.

Right of action on indemnity contract.

Cited in Hoy v. Hansborough, Freem. Ch. (Miss.) 533, holding that equity will not require an indemnitor to do any thing not covenanted for in the bond, unless to avoid irreparable injury; Central Trust Co. v. Louisville Trust Co. 40 C. C. A. 530, 100 Fed. 545, holding that equity will not compel indemnitors to pay a debt, the obligation being of law and not mature till payment and damnification.

Release of surety from obligation.

Cited in Cameron v. Boulton, 9 U. C. C. P. 537, on discharge by extension of time of payment.

12 E. R. C. 823, WOLMERSHAUSEN v. GULLICK [1893] 2 Ch. 514, 62 L. J. Ch. N. S. 773, 68 L. T. N. S. 753, 9 Times L. R. 437.

Suit by surety or indemnitor before payment.

Cited in Baker v. Dalby, 3 B. C. 289, holding that no action lies on covenant to indemnify until claim is paid or plaintiff is called upon to pay it; Milne v. Yorkshire Guarantee & Securities Corp. 37 Can. S. C. 331, holding surety can at all times appeal to equitable jurisdiction of court to have his principal as soon as debt becomes due, and without payment thereof, ordered to pay debt and relieve surety; Palmer v. Jones, 1 Ont. L. Rep. 382, holding covenanter in covenant of indemnity liable for sum for which covenantee incurred liability, though only part thereof had been paid by covenantee; Sutherland v. Webster, 21 Ont. App. Rep. 228, on nonenforcement of covenant of indemnity when claim is for unliquidated damages; Boultbee v. Gzowski, 28 Ont. Rep. 285, holding that existence of liability to indemnify gives no right of action until debt is payable; Ellis v. Pond [1898] 1 Q. B. 426, 67 L. J. Q. B. N. S. 345, 78 L. T. N. S. 125, 14 Times L. R. 152, holding that stock broker, buying stock for principal upon stock exchange for next settling day and selling it without authority before that day at a loss, cannot claim indemnity from principal.

Cited in note in 21 E. R. C. 660, on discharge of surety by alteration of contract between creditor and principal.

Cited in Stearns, Suretyship, 524, on right of a surety to call upon cosurety for exoneration before payment.

Distinguished in Central Trust Co. v. Louisville Trust Co. 100 Fed. 545, drawing distinction between relation of principal and surety and that of indemnitor and indemnitee.

Disapproved in Ladd v. Chamber of Commerce, 37 Or. 49, 62 Pac. 208, holding there is no contractual relation between sureties enabling one to discharge common obligation at his own pleasure and in his own way, and thereby bind the other.

— Costs and expenses.

Cited in Central Trust Co. v. Louisville Trust Co. 87 Fed. 23, holding equity has jurisdiction to enforce against indemnitors payment of attorney's fees and costs incurred in litigation carried on by indemnitee at instance of indemnitors, although fees and costs are not yet paid.

— Decree for indemnification.

Cited in Sanders v. Frankfort M. Acci. & Plate Glass Ins. Co. 72 N. H. 485, 101 Am. St. Rep. 688, 57 Atl. 655, on power in equity to compel specific performance of contract to indemnify before there has been such breach of contract as would sustain action at law; Gore v. Gore [1901] 2 Ir. Q. B. 269, on the alternative right of surety to indemnification against principal or relief by way of damages.

Cited in note in 6 L.R.A.(N.S.) 591, on specific performance of contract to give security.

Distinguished in O'Connell v. New York, N. H. & H. R. Co. 187 Mass. 272, 72 N. E. 979, holding bill to enforce specifically contract of indemnity not maintainable where plaintiff has not performed covenant which by terms of contract is condition precedent to liability of defendant.

Quia timet bill to enforce exoneration.

Cited in Smith v. Wilson, 79 N. J. Eq. 310, 81 Atl. 851, on parties to bill quia timet by heirs against administrator to compel exoneration of their land from mortgage made by deceased.

Contribution between sureties.

Cited in Malone v. Stewart, 235 Pa. 99, 83 Atl. 607 (affirming 18 Pa. Dist. R. 905), holding that where several persons are sureties on separate bonds and for varying amounts, for completion of building, and are compelled to complete building, each is required to contribute in proportion to amount of their respective bonds.

Cited in Stearns, Suretyship, 538, on contribution between parties to bills and notes.

Provable debts in bankruptcy.

Cited in Re Blackpool Motor Car Co. [1901] 1 Ch. 77, 70 L. J. Ch. N. S. 61, 49 Week. Rep. 124, 8 Manson, 193, holding that a contingent liability as surety was susceptible of proof, and was therefore provable in bankruptcy.

Limitation of action for contribution.

Cited in Patterson v. Campbell, 44 N. S. 214, holding that surety cannot by making payment waive in his own favor defence of statute of limitation, and establish claim against cosurety for contribution; Robinson v. Harkin [1896] 2 Ch. 415, 65 L. J. Ch. N. S. 773, 74 L. T. N. S. 777, 44 Week. Rep. 702, holding as between cotrustees the statute runs only from the establishment of the beneficiaries' rights; Shepheard v. Bray [1906] 2 Ch. 285, 75 L. J. Ch. N. S. 633, 54 Week. Rep. 556, 95 L. T. N. S. 414, 22 Times L. R. 625, 13 Manson, 279, holding the statutory liability of directors of a corporation to contribute when they have done wrong runs from the time one has paid or is in imminent liability of being charged above his share; Gardner v. Brooke [1897] 2 Ir. Q. B. 6, holding contribution runs between co-debtors from time one is damnified with respect to the other; Fitzgerald v. M'Cowan [1898] 2 Ir. Q. B. 1, on accrual of right of contribution.

Cited in notes in 18 L.R.A.(N.S.) 586, as to when statute commences to run to bar action by surety against cosurety for contribution; 16 E. R. C. 159, as to when limitations begin to run on note or check; 21 E. R. C. 635, as to when right of action for contribution between cosureties attaches.

12 E. R. C. 841, HOWARD v. LOVEGROVE, 40 L. J. Exch. N. S. 13, L. R. 6 Exch. 43, 23 L. T. N. S. 396, 19 Week. Rep. 188.

Expense of suit as damages for breach of indemnity.

Cited in Lindsay v. Parker, 142 Mass. 582, 8 N. E. 745, holding that bond given to attaching officer includes counsel fees reasonably incurred in defense of action; Hutton v. Wanzer, 11 Ont. Pr. Rep. 302, holding that where W. sold land to H. and covenanted to indemnify him against mortgage, H. was not entitled to solicitor and client costs in action on covenant; Carman v. Dunn, 23 N. B. 335 (dissenting opinion), on right of plaintiff in action on indemnity bond to costs of action relating to subject matter of undertaking; Wallace v. Gilchrist, 24 U. C. C. P. 40, holding that in action on indemnity bond, plaintiff is entitled to costs incurred by him in defense of action in relation to subject matter of bond; Trust & Loan Co. v. Covert, 39 U. C. Q. B. 327, holding that in suit on covenant for quiet enjoyment, plaintiff was entitled to all costs incurred by him in defending title in suit in chancery.

Doubted in Williams v. Crow, 10 Ont. App. Rep. 301, holding one who has given bond for payment of damages sustained by issuance of writ of replevin if he should fail in the action of replevin is not liable to pay costs paid to solicitor in addition to costs taxed between party and party when he does so fail.