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Hilo, Hawaii

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

CONTINUED BY

British Ruling Cases
CITED "B. R. C."

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

English Ruling Cases

ARRANGED, ANNOTATED AND EDITED

BY

ROBERT CAMPBELL, M. A.

OF LINCOLN'S INN

ASSISTED BY OTHER MEMBERS OF THE BAR

WITH AMERICAN NOTES

BY

IRVING BROWNE

VOL II.

ACTION—AMENDMENT

EXTRA ANNOTATED EDITION
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PREFACE TO VOLUME II.

In this volume, particularly under the titles "Administration" and "Agency," the Editor has had great assistance from Mr. A. E. Randall, of the Equity Bar.

It has been suggested as an improvement that the original paging of the Ruling Cases should be indicated. This will be done in future volumes.

An Annual *Addendum* will be issued at the end of each year, containing under the appropriate title and rule notes of cases published since the issue of Volume I.; thus bringing all the volumes then published up to date. Should there be any occasion for *Corrigenda*, these will also be added; and for this purpose any suggestions that may be sent to the publishers will be carefully considered.

It has been asked why we do not include American cases in those selected as ruling cases. The answer is that, for American purposes, a selection is already made in "American Decisions," "American Reports," and "American State Reports." From the point of view of the English lawyer, there is this further answer: We may say of our legal, as The Athenian of their political, system: "Χρώμεθα γὰρ πολιτείᾳ οὐ ζηλούσῃ τοὺς τῶν πέλας νόμους, παράδειγμα δὲ μᾶλλον αὐτοὶ ὄντες τινὶ ἢ μιμούμενοι ἑτέρους."

R. CAMPBELL.

September, 1894.

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RULING CASES.

ACTION (RIGHT OF. — *continued*).

SECTION VI. — *When the Right survives. Actio personalis moritur cum personâ.*

No. 20. — HAMBLY *v.* TROTT.

(K. B. 1776.)

RULE.

AN action for a mere tort, such as assault, &c., dies with the wrongdoer, and cannot be maintained against his representatives.

But where, besides the commission of the wrong, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executors.

Hambly v. Trott.

1 Cowper, 371.

In trover against an administrator *cum testamento annexo*, the declaration laid the conversion by the testator in his lifetime. Plea, that the testator was not guilty. Verdict for the plaintiff.

Mr. Kerby had moved in arrest of judgment upon the ground of this being a personal tort, which dies with the person, upon the authority of *Collins* v. *Fennerell*, Trin. 22, 23, Geo. II. B. R., and had a rule to show cause.

Mr. Buller last term showed cause. The objection made to the plaintiff's title to recover in this case is founded upon the old maxim of law which says, *actio personalis moritur cum personâ*. But that objection does not hold here, nor is the maxim applicable to all personal actions; if it were, neither debt or assumpsit would lie against an executor or administrator. If it is not applicable to all personal actions, there must be some restriction; and the true dis-

tinction is this: Where the action is founded merely upon an injury done to the person, and no property is in question, there the action dies with the person, as in assault and battery, and the like. But where property is concerned, as in this case, the action remains notwithstanding the death of the party.

Trover is not like trespass, but lies in a variety of cases where a party gets the possession of goods lawfully. It is founded solely in property; and the value of the goods can only be recovered. Therefore, the damages are as certain as in any action of assumpsit. As to the case of *Collins* v. *Fennerell, supra*, it is a single authority, and was not argued; therefore, most probably was determined simply on the old maxim. But Savile, 40, case 90, is directly the other way.

Where the damages are merely vindictive and uncertain, an action will not lie against an executor; but where the action is to recover property, there the damages are certain, and the rule does not hold. This is an action for sheep, goats, pigs, oats, and cider converted by injustice to the use of the person deceased. Therefore, this action does not die with the person.

Mr. Kerby, *contrâ*, for the defendant, cited Palm. 330, where JONES, Justice, said, "that when the act of the testator includes a tort, it does not extend to the executor, but, being personal, dies with him, as trover and conversion does not lie against an executor for trover *fait par luy*." *Collins v. Fennerell, supra.*

Here the goods came to the hands of the testator, and he converted them to his own use. Trover is an action of tort, and conversion is the gist of the action. No one is answerable for a tort but he who commits it; consequently, this action can only be maintained against the person guilty of such conversion. But here the conversion is laid to be by the testator. Therefore the judgment must be arrested. The distinction that has been taken in the books is, that the action may be maintained *by* an executor, but not *against* him. *Hughes* v. *Robotham*, Popham 31; *Le Mason* v. *Dixon*, Popham, 139.

Lord MANSFIELD. If this case depends upon the rule *actio personalis moritur cum personâ*, at present only a *dictum* has been cited in support of the argument. Trover is in form a tort, but in substance an action to try property.

Mr. Kerby. The executor is answerable for all contracts of the testator, but not for torts.

No. 20. — Hambly v. Trott.

Lord MANSFIELD. The fundamental point to be considered in this case is, whether, if a man gets the property of another into his hands, it may be recovered against his executors in the form of an action of trover, where there is an action against the executors in another form. It is merely a distinction whether the relief shall be in this form or that. Suppose the testator had sold the sheep, &c., in question. In that case an action for money had and received would lie. Suppose the testator had left them in specie to the executors, the conversion must have been laid against the executors. There is no difficulty as to the administration of the assets, because they are not the testator's own property. Suppose the testator had consumed them, and had eaten the sheep; what action would have lain then? Is the executor to get off altogether? I shall be very sorry to decide that trover will not lie, if there is no other remedy for the right.

ASTON, Justice. Suppose the executor had had a counter demand against the plaintiff, he could not have set it off in trover; but in an action for money had and received, he might. If these things had been left by the testator in specie, the conversion must have been laid to be by the executor. There seems to be but little difference between actions of trover and actions for money had and received. As at present advised, I incline to think trover maintainable in this case.

ASHHURST, Justice. The maxim does not hold as a universal proposition, because assumpsit lies. As to the case of *Collins* v. *Fennerell*, *supra*, all the court considered it as unargued, and given up rather prematurely by Mr. Henley.

Lord MANSFIELD. The criterion I go upon is this: Can justice possibly be done in any other form of action? Trover is merely a substitute of the old action of detinue. 2 Keb. 502; Ventr. 30; Sir T. Raym. 95. The court ordered it to stand over.

Upon a second argument this day, Mr. Dunning cited Cro. Car. 540; 1 Sid. 88.

Lord MANSFIELD. Many difficulties arise worth consideration. An action of trover is not now an action *ex maleficio*, though it is so in form; but it is founded in property. If the goods of one person come to another, the person who converts them is answerable. In substance, trover is an action of property. If a man receives the property of another, his fortune ought to answer it. Suppose he dies, are the assets to be in no respect liable? It will

require a good deal of consideration before we decide that there is no remedy.

Aston, Justice. The rule is, *quod oritur ex delicto, non ex contractu*, shall not charge an executor. 2 Bac. Abr. 444, 445, tit. Executors and Administrators; 5 Bac. Abr. 280, tit. Trover. Where goods come to the hands of the executor in specie, trover will lie; where in value, an action for money had and received. But the difficulty with me is, that here it does not appear whether the goods came to the hands of the defendant in specie or in value.

Cur. advisare vult.

Afterwards, on Monday, February 12, in this term, Lord Mansfield delivered the unanimous opinion of the court, as follows:

This was an action of trover against an administrator, with the will annexed. The trover and conversion were both charged to have been committed by the testator in his lifetime. The plea pleaded was that the testator was not guilty. A verdict was found for the plaintiffs, and a motion has been made in arrest of judgment, because this is a tort for which an executor or administrator is not liable to answer.

The maxim *actio personalis moritur cum personâ*, upon which the objection is founded, not being generally true, and much less universally so, leaves the law undefined as to the kind of personal actions which die with the person or survive against the executor.

An action of trover being in form a fiction, and in substance founded on property, for the equitable purpose of recovering the value of the plaintiff's specific property, used and enjoyed by the defendant, if no other action could be brought against the executor, it seems unjust and inconvenient that the testator's assets should not be liable for the value of what belonged to another man which the testator had reaped the benefit of.

We therefore thought the matter well deserved consideration: we have carefully looked into all the cases upon the subject. To state and go through them all would be tedious, and tend rather to confound than elucidate. Upon the whole, I think these conclusions may be drawn from them.

First, as to actions which survive against an executor or die with the person on account of the cause of action. Secondly, as to actions which survive against an executor or die with the person on account of the form of action.

As to the first: where the cause of action is money due or a contract to be performed, gain or acquisition of the testator, by the work and labour or property of another, or a promise of the testator express or implied, — where these are the causes of action, the action survives against the executor. But where the cause of action is a tort, or arises *ex delicto* (as is said in *Hole* v. *Blandford*, Sir T. Raym. 57), supposed to be by force and against the King's peace, there the action dies, — as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a watercourse, escape against the sheriff, and many other cases of the like kind.

Secondly, as to those which survive or die, in respect of the form of action. In some actions the defendant could have waged his law; and, therefore, no action in that form lies against an executor. But now, other actions are substituted in their room upon the very same cause, which do survive and lie against the executor. No action where in form the declaration must be *quare vi et armis, et contra pacem*, or where the plea must be, as in this case, that the testator was not guilty, can lie against the executor. Upon the face of the record the cause of action arises *ex delicto*; and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender.

But in most, if not in all the cases where trover lies against the testator, another action might be brought against the executor which would answer the purpose. An action on the custom of the realm against a common carrier is for a tort and supposed crime. The plea is not guilty; therefore it will not lie against an executor. But assumpsit, which is another action for the same cause, will lie. So if a man take a horse from another, and bring him back again, an action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor.

There is a case in Sir Thomas Raymond, 71, *Baily* v. *Birtles*, executors of Richard Baily, which sets this matter in a clear light. There, in an action upon the case, the plaintiff declared, "that he was possessed of a cow, which he delivered to the testator, Richard Baily, in his lifetime, to keep the same for the use of him, the plaintiff; which cow the said Richard afterwards sold, and did convert and dispose of the money to his own use; and that neither the said Richard, in his life, nor the defendant after his death, ever paid the said money." Upon this state of the case, no one can

doubt but the executor was liable for the value. But the special injury charged obliged him to plead that the testator was not guilty. The jury found him guilty. It was moved in arrest of judgment, because this is a tort for which the executor is not liable to answer, but *moritur cum personâ*. For the plaintiff it was insisted, that, though an executor is not chargeable for a misfeasance, yet for a non-feasance he is, — as for non-payment of money levied upon a *fieri facias*, and cited Cro. Car. 539; 9 Co. 50 *b*, where this very difference was agreed; for non-feasance shall never be *vi et armis*, nor *contra pacem*. But, notwithstanding this, the court held "it was a tort, and that the executor ought not to be chargeable." Sir Thomas Raymond adds, "*vide* Savile, 40, a difference taken." That was the case of *Sir Henry Sherrington*, who had cut down trees upon the Queen's land, and converted them to his own use in his lifetime. Upon an information against his widow, after his decease, MANWOOD, Justice, said, "In every case where any price or value is set upon the thing in which the offence is committed, if the defendant dies, his executor shall be chargeable; but where the action is for damages only, in satisfaction of the injury done, there his executor shall not be liable." These are the words Sir Thomas Raymond refers to.

Here, therefore, is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, &c., there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall.

So far as the tort itself goes, an executor shall not be liable; and therefore it is that all public and all private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor therefore shall be charged.

There are express authorities that trover and conversion does not lie against the executor: I mean, where the conversion is by the testator. Sir William Jones, 173–174; Palmer, 330. There is no saying that it does.

The form of the plea is decisive, — viz., that the testator was not guilty; and the issue is to try the guilt of the testator. And no mischief is done; for, so far as the cause of action does not arise *ex delicto*, or *ex maleficio* of the testator, but is founded in a duty which the testator owes the plaintiff, upon principles of civil obligation another form of action may be brought, as an action for money had and received. Therefore we are all of opinion that the judgment must be arrested.

Per Cur. *Judgment arrested.*

ENGLISH NOTES.

The distinction between actions which survived or died according to the form, is exemplified by the case, so late as 1805, of *Barry* v. *Robinson*, 1 Bos. & P. (N. R.) 293. An action of debt did not lie against an executor or administrator upon a simple contract; because if the action had been brought against the testator or intestate he could have waged his law. *Pinchon's Case* (1612), 9 Co. Rep. 86; *Barry* v. *Robinson*, *ut supra*. But an action of *assumpsit* on the case, for the payment of a debt, lay against the executors. *Pinchon's Case*, *ut supra*. In 1833, by 3 & 4 Will. IV. c. 42 § 13, the wager of law was abolished; and by the same Act, § 14, "an action of debt on simple contract shall be maintainable in any court of common law against any executor or administrator." The cases above cited are doubtless among those which are impliedly referred to in Lord Mansfield's judgment in the principal case, p. 4, *supra*.

As is pointed out by Lord Mansfield in the principal case, the maxim *actio personalis moritur cum personâ* leaves much to be defined as to what kind of personal action is within the rule.

The common law has been modified by the Act 3 & 4 Will. IV. c. 42 (passed in 1833), which enacted by § 2 that an action of trespass, or trespass on the case, as the case might be, may be maintained against the executors, &c., for any wrong committed by the deceased in his lifetime to another in respect of his property, real or personal, provided that the injury should have been committed within six months before the death, and the action commenced within six months of taking up the administration.

In *Kirk* v. *Todd* (C. A. 1882), 21 Ch. D. 484; 52 L. J. Ch. 224, the plaintiff brought an action for an injunction and damages against the defendant (a manufacturer) for fouling a stream. The defendant having died, the action was carried on against his representatives. The Court of Appeal (affirming the judgment of V. C. Hall) held that the action could not be maintained. The Master of the Rolls (Jessel) said: "It was an action on a simple tort. It did not appear that the defendant

had got any benefit by fouling the plaintiff's stream; he had only injured the plaintiff. As I understand the rule at common law, it was this: you could not sue executors for a wrong committed by their testator for which you could only recover unliquidated damages. That rule has never been altered except by the Statute 3 & 4 Will. IV. c. 42 § 2, which allowed the executors to be sued in certain cases, but with the limitation that the injury must have been committed not more than six months before the death of the testator. That was not so here."

An action for a pure tort having been referred to arbitration is at an end by death of one of the parties after the hearing and before award; although the order of reference contained a clause that the arbitrator should publish his award ready to be delivered to the parties or their respective personal representatives, if either should die before the making of the award. *Bowker* v. *Evans* (C. A. 1885), 15 Q. B. D. 565; 54 L. J. Q. B. 421.

A suit for divorce is at an end by the death of one of the parties; and, even after a decree *nisi*, cannot be revived in order to make the decree absolute. *Stanhope* v. *Stanhope* (C. A. 1886), 11 P. D. 103; 55 L. J. P. D. & A. 36.

There are numerous cases deciding that an action for breach of promise of marriage does not survive unless special damage to the personal estate is shown. The first of these was a decision by the King's Bench, in 1814, *Chamberlain* v. *Williamson*, 2 M. & S. 408. In *Finlay* v. *Chirney* (C. A. 1888), 20 Q. B. D. 494; 57 L. J. Q. B. 247, there is a considered judgment of the Court of Appeal to the same effect. With regard to special damage, the Court of Appeal considered that if there can be a survivance to any such limited effect, it must be special damage to the property of the promisee. It seems difficult to suggest an instance likely to occur; but Lord Esher suggests the possible case of the giving up of a remunerative situation in pursuance of an agreement by which such a step was to be taken as part of the consideration for the marriage.

A crucial case for testing the meaning and limits of the rule is furnished by *Phillips* v. *Homfray* (C. A. 1883), 24 Ch. D. 439; 52 L. J. Ch. 833; but the result is a division of judicial opinion so evenly balanced and sustained in argument as to make it difficult to lay down — except for courts bound by the opinion of a majority of the Court of Appeal — a certain rule.

The question in *Phillips* v. *Homfray* was as to the liability of the executor for trespass committed by his testator, in secretly carrying away minerals across the property of the plaintiff, without obtaining any way-leave. The claim against the executor was for damage, to be measured by the amount which the testator would have had to pay for the way-leave if it had been openly used. Pearson, J., in reliance on

No. 20. — Hambly v. Trott. — Notes.

Lord MANSFIELD's judgment in the principal case, decided that, as the wrongdoer had received benefit from the act, his executors might be charged in the action upon an implied contract by the testator to pay for the way-leave. On appeal from this judgment, the majority of the Court of Appeal (COTTON and BOWEN, L. JJ.) were of opinion that the case was not one of contract express or implied, and that the only cases where a remedy for any other wrong could survive against the executor of the person who did the wrong were "those in which property or the proceeds or value of property belonging to another have been appropriated by the deceased person and added to his own estate or moneys." In effect they held the question to be one of following the property; and there being no property to follow, they reversed the judgment of Mr. Justice PEARSON. BAGGALLAY, L. J., was of a contrary opinion. He considered the criterion to be,— using the language of Sir T. Plumer in the suit for equitable waste between the Marquis and Marchioness Dowager of Lansdowne, 1 Madd. 116, at p. 139,— "did the wrongdoer derive any benefit from the wrong done by him, or was it a naked injury by which his estate was in no way benefited." He therefore was in favour of affirming the judgment of PEARSON, J.

The difference recalls the old controversies between the Sabinians and Proculians. I shall not, in this note, go back to the cases at law before Lord MANSFIELD's judgment in the principal case. For these I must refer to the arguments and judgment in *Phillips* v. *Homfray*, and the cases there cited. But of the cases in equity cited by Lord Justice BAGGALLAY it seems necessary to give a brief note of *Garth* v. *Cotton* (1753),— a decision of Lord HARDWICKE,— as well as of the case of Lord Lansdowne and Lady Lansdowne above referred to.

Garth v. *Cotton* (1753), 1 Dickens, 183, is reported from Lord HARDWICKE's written argument. The bill was for an account for money received by a fall of timber. The timber had been felled by R. Garth, Esq., under an agreement with Sir J. H. Cotton, the original defendant. R. Garth was tenant for a term of years determinable on his death, and Sir J. H. Cotton was entitled to the ultimate remainder in fee. They had agreed to fell the timber, and Sir J. H. Cotton had received £1,000 out of the proceeds. The plaintiff was born long subsequently to the date of the transaction, and became entitled to the estate under the limitations prior to the estate of Sir J. H. Cotton. Sir J. H. Cotton having died, the suit was carried on by bill of revivor against his representative. The question whether the liability survived had therefore to be dealt with. Lord HARDWICKE, on the authority of cases showing that equity would grant relief where the estate of the deceased had been augmented, held that the liability survived. And he further gave his opinion (p. 217) as follows: "But I go further, and

hold that in all cases of fraud the remedy doth not die with the person; but the same relief shall be had against the executor out of the assets of his testator as ought to have been given against the testator himself. For, as equity disclaims the maxim that a personal remedy dies with the person, wherever the demand is proper for that jurisdiction, this Court will follow the estate of the party liable to that demand, and, out of that, decree satisfaction. Now, collusion between two persons to the prejudice and loss of a third, is, in the eye of the Court, the same as a fraud; and you have observed that our principal ground of the judgment of the Court in this case is collusion appearing upon the face of the articles set forth in the answer."

The Marquis of Lansdowne v. *Marchioness Dowager of Lansdowne* (1855), 1 Madd. 116 (cited by Baggallay, L. J., in *Phillips* v. *Homfray* (1883), 24 Ch. D. 439, at p. 474, see p. 9, *supra*), was a question of equitable waste, argued on demurrer. The Vice-Chancellor, Sir T. Plumer, after citing at length the statement of the law as laid down by Lord Mansfield in the principal case, said: "This I take to be a just exposition of the qualifications under which the maxim *actio personalis moritur cum personâ* is received at law, and if equity is to decide in analogy to a court of law, the question in the present case will be, 'Whether, by the equitable waste committed by the late Marquis, he derived any benefit, or whether it was a naked injury, by which his estate was not benefited.' It is clear it was benefited; and as at law, if legal waste be committed, and the party dies, an action for money had and received lies against his representatives; so upon the same principle, in cases of equitable waste, the party must through his representatives refund in respect of the wrong he has done."

In *Sawyer* v. *Goodwin* (1867), 36 L. J. Ch. 578, one of a firm of solicitors employed by a mortgagee had fraudulently suppressed a defect of title known to him. It was held that, the act having been done by this solicitor within the scope of the partnership business, his estate was, after his death, liable to the claim of the mortgagees to have the matter made good. So where a firm of solicitors had recommended the investment by trustees on insufficient security. *Blythe* v. *Fladgate, &c.* (1890), 1891, 1 Ch. 337; 60 L. J. Ch. 66. The ground was that the liability was incurred *ex contractu* (see p. 366).

Peek v. *Gurney* (H. L. 1873), L. R., 6 H. L. 377; 43 L. J. Ch. 19, was a suit in the nature of an action of deceit, against directors of a company, for alleged misrepresentation by which the plaintiff was induced to buy shares. The executors of a deceased director (Gibb), who, it was alleged, had been one of the actors in the fraud, were joined as defendants. The question as to their liability was dealt with in the House of Lords by the judgment of Lord Chelmsford, who

said (p. 393): "The learned counsel for the appellant was asked whether there was any case in which equity had made personal representatives liable for damages for a personal wrong which might have been obtained against their testator. To which no satisfactory answer was given. The cases mentioned in argument, where executors were made answerable for the acts of their testator out of his estate, were, none of them, simple questions of damages. . . . [And at p. 395.] No case has been produced, and I assume that none can be found in which, upon a claim against the testator, *ex delicto*, executors have been held liable in equity to answer for it in damages. And it appears to me that it would be contrary to principle to hold that an action, which in a court of law would be held to die with a testator, should be maintainable against executors in a Court of Equity of concurrent jurisdiction. In my opinion, whatever might be the case as to the other respondents, the executors of Mr. Gibb could not have been made liable in the present suit."

The suit, however, was dismissed against all the defendants, on the ground that the plaintiff, not being one of those who applied for shares on the faith of the prospectus, but having bought them in the market after they had been fully allotted, was not entitled to treat the misrepresentation as made to him. And, weighty as the expression of Lord Chelmsford's opinion on the point now under discussion undoubtedly is, it cannot be considered as entering into the *ratio decidendi* of the House.

It should be mentioned that, in the Court below, Lord Romilly, M. R., had expressed his opinion that, as regards Mr. Gibb's estate, the case stood in the same position as the others (L. R., 13 Eq. 79, at p. 121).

It does not appear that Lord Hardwicke's judgment in *Garth* v. *Cotton* (p. 9, *supra*) was cited either before Lord Romilly or in the House of Lords. And I cannot omit to note here, as bearing upon the question of principle, the Scotch case of *Davidson* v. *Tulloch* (1860), 3 Macq. p. 795. That was an action by a purchaser of bank stock against the executors of a managing director of the bank on the ground of fraud on the part of the deceased in having systematically employed his position for the advantage of himself and his friends by making advances out of the bank's funds on insufficient security, and by issuing false reports as to the bank's affairs. It appeared that, according to high authorities upon Scotch law, an action lies against the executor for fraudulent representation, if the executor is *lucratus*. And it was agreed by all the Lords who heard the appeal (Lord Campbell, Chancellor, and Lords Brougham and Cranworth) that it was clearly shown to be the meaning of these authorities that the criterion was not

whether a benefit had come to the estate by the fraud, but merely whether the executor was *lucratus* in the sense of having assets of the deceased. Lord CAMPBELL, Chancellor, said (p. 790): "The law on this subject by which we must be governed is the law of Scotland; and I must say that it has been proved to demonstration that this is the law of Scotland,— that if by a delict there is a pecuniary loss occasioned, and the party dies who was guilty of that fraudulent misrepresentation, an action lies against his executor, if the executor is *lucratus*,— that is, if he have assets." And Lord CRANWORTH (p. 795): "I am glad to be able to find on the authorities to which we have been referred in this case, which are not numerous, that we are warranted in saying that, unquestionably, it is the law of Scotland that if a wrongful act is fraudulently perpetrated to the injury of my property, and if the person who has perpetrated that wrongful act dies, I have the right to go against his representatives for redress." Lord CRANWORTH further observed that the decision at which the House was arriving was not only in conformity with the law of Scotland, but in conformity with what good sense and justice requires; and agreed with the argument of Mr. Rolt (the counsel for the appellant) that if the principle of transmission was not adopted in the English system of law, the circumstance is much to be regretted.

The following cases show that liability for breach of trust, or otherwise arising out of a fiduciary relation, survives against the representatives of the trustee by whose act or default the liability was incurred.

In *New Sombrero Phosphate Co.* v. *Erlanger* (C. A. 1876), 5 Ch. D. 73; 46 L. J. Ch. 425, the defendants, a syndicate, who purchased property and sold it to a company of which they were promoters, concealing the fact that they were the real vendors, were, by the judgment of the Court of Appeal, fixed with a fiduciary relation towards the company, and were accordingly made liable to refund. This liability was held to have survived against the estate of one who had died. So where a director of a company had sanctioned the advance of the company's money upon unauthorised security, the liability to contribute towards making good this investment to the company was held to survive against his estate. *Ramskell* v. *Edwards* (1885), 30 Ch. D. 100; 55 L. J. Ch. 81.

In *Batthyany* v. *Walford* (C. A. 1887), 36 Ch. D. 269; 56 L. J. Ch. 881, the survival of a claim upon an implied contract was allowed by the Court of Appeal. The tenant for life under an *Austrian* settlement of land died domiciled in England. His successor brought a creditor's action in England against the English executrix for a claim in the nature of dilapidations or waste. It appeared that the Austrian

law regarded a possessor of estates in the position of the deceased as under a *fidei-commissum*, or trust to maintain the property against deterioration. The Court held that the possession under this law raised an implied contract, upon which the estate of the deceased was liable.

In *Concha* v. *Murrieta*, *De Mora* v. *Concha* (C. A. 1889), 40 Ch. D. 543, the father of the plaintiff, who, according to the law of Peru, was entitled to administer the estate of his infant child and to receive for his own benefit the income during minority, was alleged to have made an improvident sale of the estate. It was held that, in respect of the fiduciary relation, the maxim *actio personalis moritur cum personâ* did not apply.

The case is much simpler as to the application of the maxim *actio personalis moritur cum personâ* to the transmission of a *right of action* on the death of the *plaintiff*. The principle is clearly laid down in the judgments of the Court of Appeal in *Twycross* v. *Grant* (1878), 4 C. P. D. 40; 48 L. J. Q. B. &c. D. 1. Lord Justice Bramwell (4 C. P. D., p. 45) says: "The rule *actio personalis moritur cum personâ* was greatly altered at an early stage of our legal history by 4 Edw. III. c. 7, and this statute, being remedial in its nature, and also those amending it, have been construed very liberally. They have been held to extend to all torts except those relating to the testator's freehold, and those where the injury done is of a personal nature." And Lord Justice Brett (p. 46): "Wherever a breach of contract or a tort has been committed in the lifetime of a testator, his executor is entitled to maintain an action, if it is shown upon the face of the proceedings that an injury has accrued to the personal estate." These judgments are cited and the law as there laid down adopted by Mr. Justice Wills as the basis of his judgment in *Hatchard* v. *Mège* (1887), 18 Q. B. D. 771; 56 L. J. Q. B. 397, — a case before a Divisional Court, consisting of Day, J., and Wills, J., where it was held that an action for slander of a private character would not survive; but an action for a false and malicious statement causing damage to the plaintiff's personal estate — such as a slander against a trade-mark causing depreciation in its value — would survive.

The old law as to the transmissibility of the right of action on the part of the plaintiff was extended to a trespass or trespass, on the case, for injury to the plaintiff's real estate, by the statute of 3 & 4 Will. IV. c. 42 § 2 already referred to, — subject to a similar limitation of time to that in respect of the defendant's liability. And by Lord Campbell's Act (1846), 9 & 10 Vict. c. 93, wherever the death of a person is caused by a wrongful act, neglect, or default, such that if death had not ensued the person injured would have been entitled to maintain an action and recover damages, the person guilty of the wrong is liable to an action.

To discuss Lord Campbell's Act at length, would be beyond the scope of this note, which relates primarily to the transmission of the *liability*. The leading authority on the law intended to be altered by this Act, was the ruling of Lord ELLENBOROUGH in *Baker* v. *Bolton* (1808), 1 Camp. 493; 10 R. R. 734, that, "in a civil court, the death of a human being could not be complained of as an injury." This ruling has been, in modern times, followed in a case outside the scope of the Act, where a master sued for damage resulting from the death of a servant. *Osborn* v. *Gillett* (1873), L. R., 8 Ex. 88; 42 L. J. Ex. 53. In this case the question of the liability independently of the Act is fully discussed. But if the principle of Lord ELLENBOROUGH's ruling should have to be discussed in a court not bound by this last-mentioned decision, it will be necessary to deal with the reasons of the dissentient judgment of Baron (since Lord) BRAMWELL, which throw considerable doubt on the question whether the theory upon which Lord Campbell's Act was framed, had any sound foundation in law. See also Pollock on Torts, 2nd ed. pp. 57, 58; and preface to Revised Reports. Vol. 10, p. vii.

AMERICAN NOTES.

The rule derivable from the American cases may be expressed as follows: 1. Bare causes of action *ex delicto* do not survive. 2. If a tort results in a pecuniary benefit to the wrongdoer, the cause of action survives. 3. A cause of action *ex contractu* does not survive where the damages are purely personal in their nature, and do not affect property rights or interests—as pain of body, anguish of mind, injury to character, or deprivation of liberty. 4. Where an injury to property forms the chief item of damage and the substantial object of the suit, the cause of action survives to the extent of such damages, although connected with a personal injury. These are substantially the conclusions of Chief Justice CORLISS (of North Dakota), in 33 Albany Law Journal, 184, 204; 53 Am. Rep. 525, note. He also says: "But whether an action for breach of contract survives, so far as damages to property are concerned, where such damages are only incidental to the personal injury which the violation of the contract causes, is involved in uncertainty. There are *dicta* on both sides of the question, but not much authority."

In many States there are statutory provisions for the survival of actions, which affect the consideration of the question. Thus in New York and Missouri, actions "for wrongs done to the property rights or interests of another," survive; and so in Massachusetts in respect to injuries to "real or personal estate;" and so in New Jersey in respect to "trespass to the person or property;" and in Virginia in respect to "damage to any estate of or by his decedent;" and in Pennsylvania as to all actions except "for slander, libel, and wrongs done to the person;" and in Texas and Tennessee as to all actions except "for wrongs affecting the character of the plaintiff;" and in Maryland as to "injury done to the person."

In *Baker* v. *Crandell*, 78 Missouri, 584; 47 Am. Rep. 127, the court observed

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that at common law prior to 4 Edw. III. and 31 Edw. III., the right of action in cases of tort and in actions *ex delicto* did not survive; that by those statutes the rule was altered in relation to personal property and in favour of the personal representative of the party injured, citing the principal case. The court then observed: "Under the old system of pleading, also, where there were different forms of action, it was held that while certain actions survived or died on account of the cause of action, certain others died or survived on account of the form of the action. *Hambly* v. *Trott*, 1 Cowp. 375; 2 Add. Tort, 537, 538, note 1. Under our system of pleading, however, no such result can follow. With us there is but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, and consequently actions can only survive or die by reason of the cause of action itself, and therefore many of the old adjudications on this point are no longer of value."

In *Lee's Adm'r* v. *Hill*, 87 Virginia, 497: 24 Am. St. Rep. 666,— an action against an administrator for wrongful discharge from personal service by his intestate,— the court said: "The declaration, it is true, is in form *ex delicto*, but that *assumpsit* would lie for the injury complained of is undeniable. In such a case *assumpsit* and case are concurrent remedies; an action *ex contractu* for the breach of the contract, or an action *ex delicto* for the breach of the duty, would lie. Nor is it disputed that if the plaintiff in the present case had declared in *assumpsit* the action would survive. The appellant however contends that the action died with his decedent; because, he says, in an action of tort the rule *actio personalis moritur cum personâ* applies. He contends that this is so at common law, and that the case is not within the statute," which gives an action "for waste or destruction of or damage to any estate of or by his decedent." "But this position we think is untenable. It has sometimes been said that at common law all causes of action *ex contractu* survive, whereas all torts die with the person. But neither of these propositions is strictly accurate. The general rule is that rights of the former class do survive, but the rule is not universal. Thus, for instance, a breach of promise to marry, or a breach of the implied contract of a medical practitioner, or of an attorney, to exercise skill in his profession, and other injuries of a personal nature that might be mentioned, although arising *ex contractu*, constitute exceptions to the rule, unless indeed some special damage to the personal estate can be stated on the record," citing *Chamberlain* v. *Williamson*, 2 Maule & S. 408. "Nor do all actions of tort, at common law, die with the person. The true test is not so much the form of the action as the nature of the action. Where the latter is a tort unconnected with contract, and which affects the person only, such as assault, libel, slander, and the like, then the rule *actio personalis*, &c., applies. But where, as in the present case, the action is founded on a contract, it is virtually *ex contractu*, although nominally in tort, and survives," citing *Powell* v. *Layton*, 5 Bos. & P. 365, and overruling *Boyles' Adm'r* v. *Overby*, 11 Grattan (Virginia), 202. The court then quoting Lord MANSFIELD'S language in the principal case, "No action, where in form the declaration must be *quare vi et armis et contra pacem*, or where the plea must be not guilty, can lie against the executor. Upon the face of the record, the cause of action arises *ex delicto*," continue: "But by this was evidently meant torts com-

mitted with force, or, at all events, injuries other than those connected with contract, and for which case and *assumpsit* are convenient remedies; for it was immediately added, that 'all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender.'" And the court in conclusion held that the breach of the contract was a damage to property.

In *Warren* v. *Furstenheim*, 35 Federal Reporter, 691; 1 Lawyers' Rep. Annotated 40, Hammond, J., observed: "At common law every suit, whether founded on contract or tort, abated by the death of either party, and could proceed no further. It absolutely perished. One class of English statutes having the force of common law with us abrogated this rule, and allowed the executor or administrator to come in voluntarily or be brought in by *scire facias*. 17 Car. II., c. 8; 8 & 9 Will. III. *c.* 11; Fost. Sci. Fa. 174, 186-200. It was a condition of these statutes that the revival could take place only 'if such action might be originally prosecuted, or maintained by or against the executors or administrators of the party dying' (Id. 187); that is to say, provided the 'cause of action' should be unaffected by the deadly force of the above-mentioned maxim. Now, where or when it was so unaffected was and is to this day one of the most perplexing subjects with which the courts have had to deal, because another class of English statutes modified the maxim; and it was under their influence still more restricted by judicial decision or opinion, the decision and *dicta* of Lord Mansfield in *Hambly* v. *Trott*, 1 Cowp. 371, being perhaps the basis or starting point of most of the modern decisions upon the subject, as well as of most of the legislation in relation thereto. But one has only to read such judgments as *Twycross* v. *Grant*, 4 C. P. D. 40; *Phillips* v. *Homfray*, 24 Ch. D. 439; and *Finlay* v. *Chirney*, 20 Q. B. D. 494; 37 Alb. L. J. 392, to see how unsettled the law is, and how obscure the distinctions upon which depend the survivability of causes of action remain even to this day in those courts where the common law and the statutes of England are best understood. And then one has only to turn to the statutes, which are numerous, of any one or more of the American States, and read the series of judicial decisions upon the subject, to see how little success has attended its legislative regulation, the legislatures seemingly being helpless almost in their attempts to get away from the influence of that old maxim upon the judicial thought of this country, because, no doubt, in its main elemental promulgation it states a principle that accords with the universal sense of justice, or is thought to do so by most judges, — that the wrongs which are personal only should die with the wrongdoer, or with the physical sufferer from them. But when it comes to deciding whether any given wrong be only of that character, it seems quite useless to seek for any given standard of correct judgment that shall be satisfactory to everybody. 22 Am. L. Reg. 353, 425; 2 Alb. L. J. 187; 33 Alb. L. J. 184, 204; 1 Chitty Pr. 137.

"But this is a property-right growing out of the absolute dominion of the legislature over the property or estates of dead men, and over their affairs in their relations to the living."

The following recent examples of the application of the first branch of the rule derived from the principal case will be sufficient: —

Causes of action that absolutely cease with the death of the wrongdoer,

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whether before or after action brought: against a surgeon for mal-practice, *Boor* v. *Lowrey*, 103 Indiana, 468; 53 Am. Rep. 519; *Hess* v. *Lowrey*, 122 Indiana, 225; 17 Am. St. Rep. 355; *Vittum* v. *Gilman*, 18 New Hampshire, 416; *Best* v. *Vedder*, 58 Howard Practice (New York), 187; trespass for a direct and immediate injury to a chattel, *Petts* v. *Ison*, 11 Georgia, 151; 56 Am. Dec. 419; action upon a penal statute, as to enforce a stockholder's individual liability, *Diversey* v. *Smith*, 103 Illinois, 378; 42 Am. Rep. 14, citing the principal case; *Mitchell* v. *Hotchkiss*, 48 Connecticut, 9; 40 Am. Rep. 146; malicious prosecution, *Clark* v. *Carroll*, Maryland (to appear); libel, *Akers* v. *Akers*, 16 Lea (Tennessee), 7; 57 Am. Rep. 207; slander, *Roberts* v. *Lisenbee*, 85 No. Carolina, 436; 41 Am. Rep. 450; *Spooner* v. *Keeler*, 51 New York, 527; wrongfully causing death, *Russell* v. *Sunbury*, 37 Ohio St. 372; 41 Am. Rep. 523; *Hegerich* v. *Keddie*, 99 New York, 258; 52 Am. Rep. 25, citing the principal case: fraudulently inducing plaintiff to marry defendant, *Price* v. *Price*, 75 New York, 244; 31 Am. Rep. 463; breach of promise of marriage, *Grubb* v. *Sult*, 32 Grattan (Virginia), 203; 34 Am. Rep. 765, citing the principal case; *Hayden* v. *Vreeland*, 8 Vroom (New Jersey), 372; 8 Am. Rep. 723, citing the principal case; *Wade* v. *Kalbfleisch*, 58 New York, 282; 17 Am. Rep. 250; *Harris* v. *Tyson*, 63 Georgia, 629; 31 Am. Rep. 126; *Hovey* v. *Page*, 55 Maine, 142; *Weeks* v. *Russell*, (Tennessee), 3 Lawyers' Rep. Annotated, 212. *Lattimore* v. *Simmons*, 13 Sergeant & Rawle (Penn.), 183; *Stebbins* v. *Palmer*, 1 Pickering (Mass.), 71; 11 Am. Dec. 146, citing the principal case; false recommendation to credit, *Zabriskie* v. *Smith*, 13 New York, 322; 64 Am. Dec. 551; *Read* v. *Hatch*, 19 Pickering (Mass.), 47; *Henshaw* v. *Miller*, 17 Howard (U. S. Sup. Ct.), 212; *Holliday* v. *Parker*, 23 Hun (New York Supr. Ct.), 71; seduction, *People* v. *Tioga Com. Pleas*, 19 Wendell (New York), 73; loss of support by wife, under Civil Damage Act, *Moriorty* v. *Bartlett*, 99 New York, 651; unlawfully killing a man, *Moe* v. *Smiley*, 125 Penn. St. 136; 3 Lawyers' Rep. Annotated, 341; trustees' failure to file annual report, *Brackett* v. *Griswold*, 103 New York, 425; negligently killing a man, *Cox* v. *N. Y. Cent. R. Co.*, 63 New York, 414.

Zabriskie v. *Smith*, *supra*, is pronounced unsound by Ch. J. Corliss (53 Am. Rep. 531, 532), and to have been overruled by *Haight* v. *Hayt*, 19 New York, 464; and, in *Fried* v. *N. Y., &c. R. Co.*, 25 Howard Practice (New York), 285, is said to have been incorrectly decided, in forgetfulness of the statute: and Ch. J. Corliss, speaking of *Baker* v. *Crandall*, *supra*, says "its soundness cannot be assailed."

In respect to cases coming under the second branch of the rule, it has been held that the following causes of action do not so abate: trespass *quare clausum fregit*, *Haven* v. *Brown*, 7 Greenleaf, 421; 22 Am. Dec. 208; deceit in sale of personal property, *Baker* v. *Crandall*, 78 Missouri, 584; 47 Am. Rep. 126, citing the principal case; negligence and deceit of an attorney-at-law in the investigation of a title, *Tichenor* v. *Hayes*, 12 Vroom, 193; 32 Am. Rep. 186, citing *Knights* v. *Quarles*, 2 Brod. & Bing. 102; *Bradshaw* v. *Railway Co.*, L. R., 10 C. P. 189; *Wheatley* v. *Lane*, 1 Saund. 216; *Erskine* v. *Adeane*, L. R., 8 Ch. App. 756; false recommendation to credit, *Warren* v. *Furstenheim*, 35 Federal Reporter, 691; 1 Lawyers' Rep. Annotated, 40; fraudulent representation

as to incumbrance upon land, *Haight* v. *Hayt*, 19 New York, 464; loss of wife's services to husband by personal injury by carrier's negligence, *Cregin* v. *Brooklyn C. R. Co.*, 75 New York, 192; 31 Am. Rep. 459; leasing an infected house, causing the death of the tenant, *Cutter* v. *Hamlen*, 147 Massachusetts, 471; 1 Lawyers' Rep. Annotated, 129.

See further, as supporting the second branch of the rule, *Wolf* v. *Wall*, 40 Ohio St. 111; *Nettles* v. *D'Oyley*, 2 Brevard (So. Carolina), 27; *Coleman* v. *Woodworth*, 28 California, 567; *Aldrich* v. *Howard*, 8 Rhode Island, 125; *Green* v. *Hudson R. R. Co.*, 28 Barbour (New York Supreme Ct.), 9; 2 Keyes (New York Ct. App.), 294; *Arnold* v. *Lanir*, 4 North Carolina Law, 529; *Winnegar* v. *Cent., &c. Ry. Co.*, 85 Kentucky, 547, *Clark* v. *Manchester*, 62 New Hampshire, 578.

In *McKinnie* v. *Oliphant's Ex'rs*, 1 Haywood (No. Carolina), (4), [1791], it was held that "trover, trespass, deceit, or other actions of the like nature, will lie against executors where the thing itself has been used so as to go into and increase the testator's estate, so that the benefit thereof comes to the possession of the executor; otherwise, where the thing is destroyed, as if a man take my bullock and eat him. The case of *Hambly* v. *Trott*, in Cowper, is not law; and further, I never knew a case in Cowper to be received as law in our courts." (Mr. Battle, the editor, states in a note to this report, that he has it from good authority that the Judge did not use the last expression; and Mr. Wallace (Reporters, p. 453) says that if the remark was ever made it would "betray palpable ignorance." See *contra*: *Avery* v. *Moore's Ex'rs*, *ibid.* 362.

ADEMPTION.

No. 1. — ASHBURNER *v.* MACGUIRE.

(CHANCERY, 1786.)

RULE.

A LEGACY of "my £1000 E. I. Stock" — the testator having at the date of his will that amount of E. I. stock, and no more — is specific, and is adeemed by the testator subsequently selling the stock.

Ashburner v. Macguire.

2 Bro C. C. 108.

William Macguire, by his will dated 27th September, 1778, bequeathed (*inter alia*) as follows: *Item*, I bequeath to my sister

Jane Ashburner the interest arising from her husband William Ashburner's bond to me for principal £3500 sterling, during her life, independent of her present or any future husband, amounting to £175 sterling per annum. *Item*, I bequeath the principal of the said bond, on the decease of my said sister Jane Ashburner, to her four daughters Elizabeth, Anne, Sarah, and Sophia, to be equally divided among them, or the survivors of them. *Item*, I bequeath to Mr. William Beawes, now at school with the Reverend Mr. Everett at Felstead, in Essex, my capital stock of £1000 in the India Company's stock with the dividends thereon arising, which dividend is to pay for his education and maintenance till he is qualified for holy orders, and then the capital to be laid out in the purchase of a living for him in the Church. This stock is to be continued or disposed of at the discretion of my executors.

William Ashburner the debtor became a bankrupt in February, 1780. In March the testator proved this debt under the commission, and 16th May, 1781, received a dividend thereon of 4*s.* 3*d.* in the pound.

The testator died 12th July, 1781. Since his death another dividend of 20*s.* 9*d.* has been made to the bankrupt's creditors.

The testator, at the time of making his will, was possessed of £1000 East-India stock, and no more; but sold out the whole of it before his death. Beawes, the legatee of this stock, was a natural child of the testator.

The bill was brought by Mrs. Ashburner, her four daughters, and Beawes, to have the whole sum of £3500 secured for Mrs. Ashburner and her daughters, and to have such part of it as is due out of the estate of Ashburner, the bankrupt, paid by his assignee, and the residue paid by the personal estate of the testator out of his general effects; and that the personal representative of the testator might also purchase, with the testator's personal estate £1000 East-India stock, and transfer the same for the use of the plaintiff Beawes, as directed by the will. The defendants, the administratrix, and residuary legatees insisted that the plaintiffs, the Ashburners, were entitled only to what remained due to the testator at the time of his death out of the estate of the bankrupt; and that the legacy of East-India stock to Beawes was adeemed by testator's disposing of it in his lifetime.

The cause was heard before the Lord Chancellor in 1784, and on the 18th July, 1786, he gave judgment.

After stating the case, he said the claim of Mrs. Ashburner and her daughters depended on two questions: —

1. Whether the bond was given as a specific legacy; which depends on this, whether the manner in which the sum is mentioned turns it to a pecuniary legacy, or, as the civilians call it, a demonstrative legacy, — that is, a legacy in its nature a general legacy, but where a particular fund is pointed out to satisfy it; or whether it be what they call a *legatum nominis* or *legatum debiti*.

The 2nd question is, whether the legacy, supposing it to be specific, is adeemed, so far as the testator has received dividends in respect of the debt (or, as the bankrupt's estate may be insufficient to pay the residue). I will take the 2nd point first; for this is clearly a specific legacy, according to all the definitions. Wherever a debt, or a part of a debt, is the subject bequeathed, it is *legatum nominis* or *legatum debiti*. I shall not stand long upon that point.

With respect to the 2nd point, as to the ademption, one maxim has gained so much ground as to have been a governing rule, and has been recognized by Lord Talbot and Lord Hardwicke. It is, that where a debt is bequeathed, and is afterwards extinguished by the act or concurrence of the testator, as by demand or suit, the legacy is adeemed; but if paid in without suit or demand, there is no intention to adeem; and there are innumerable authorities that a legacy of a debt is not adeemed by a voluntary payment. Lord Camden, in the *Attorney-General* v. *Parkyn*, Ambler, 566, expressly exploded this distinction, so did Lord Macclesfield. I am inclined to adopt their opinions, because I can find no ground for the distinction but a passage in Swinb. § 20, p. 7 (p. 548, 6th ed.). But I doubt if the authors cited by him support him. Godolphin (Orphan's Leg. 4th ed. 434), referring to the same books, states the rule differently; and so do other writers. By the civil law, it was competent for a man, after he had changed the subject-matter of a specific legacy, to declare by his conduct that such a change was no ademption. The case put is of a gold chain, which the testator, after having bequeathed it by his will, converts into a cup; the legacy is not adeemed, because the cup might be restored to its former shape.

This has not been adopted by our law. There is no ground to say that, after a legacy is extinguished, a man by his conduct may revive it. It is contrary to common sense, as appears by the

instance put. The gold chain may have been given as a legacy because it had been long in the testator's family. If it be afterwards converted into a gold cup, the reason for giving it ceased.

There is an exception or limitation to this rule, where the testator alters the form, so as to alter the specification of the subject; as by making wool into cloth, or a piece of cloth into a garment: there the legacy is adeemed, because the subject-matter cannot be restored to its former state.

This distinction is intelligible, in an action where the thing sued for cannot be recovered in specie; but it is not intelligible when applied to a legacy, and, what is more material, never was adopted by our law. As to legacies of debts, according to the civil law where the testator had sued for, but had not recovered, or had got judgment, but not execution, or had actually recovered the debt, but had set the money apart for the legatee, or by words declared he did not intend to revoke the legacy, —in none of these cases was the legacy adeemed. But there is no authority in the civil law for the distinction between a debt being paid without demand and in consequence of a demand; besides, although it can be ascertained where a suit was commenced for a debt, it may be extremely difficult to ascertain whether any demand has been made. If the testator receives payment of the debt, the legacy is gone, unless it appears from the manner of his disposing of the money afterwards that he means to preserve it for the legatees. Lord CAMDEN, in the *Attorney-General* v. *Parkyn*, Ambler, 566, held there was no distinction between voluntary payment and payment on a demand, and that in both cases the legacy was extinguished; he added that where the sum is specified in the bequest, it is a general legacy, as I shall mention on the other point. But the distinction between, I bequeath the £500 due on a bond from A. B. and I bequeath the bond from A. B. is very slender: and so admitted to be by his Lordship. In the civil law there is a distinction taken between a demonstrative legacy, where the testator gives a general legacy, but points out the fund to satisfy it, and a taxative legacy, where he bequeaths a particular thing.

On the first point, I am clear that this is a specific legacy. If the fortune of the testator had failed, so as not to satisfy all the pecuniary legacies, and the question had been whether this legacy should have been contributive to the pecuniary legacies, I believe no man in the profession would have doubted.

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When the testator made his will £3500 was due to him from William Ashburner by bond; he meant to relinquish that bond for the benefit of the family, not by way of release to the husband, but by way of settlement; and that this debt, whether it turned out well or ill, should go to the family, — the interest to his sister for her life, the principal among her daughters. In this case the bequest must be considered as specific although the sum be mentioned: for I cannot agree to Lord CAMDEN'S distinction.

As to the legacy of East-India stock to the plaintiff Beawes, there is no case to countenance his claim. The testator says, "I give my capital stock to," &c. The pronoun *my* has been relied on, in many cases, in deciding the legacy to be specific.

The testator, after making this will, sold his stock, which made it as if it had never existed; the legacy is adeemed according to all the cases.

In questions upon legacies of debts, the cases have crept beyond the original principle, which was the distinction between demonstrative and taxative legacies, and recourse had been had to the *animus ademendi*, which has nothing in common with the other principle.

In *Pettiward* v. *Pettiward*, Finch. 152, the court was of opinion from all the circumstances that the testator intended to give a legacy of £2000, although the debts pointed out for the payment of it amounted only to £1700, and therefore decreed the deficiency to be made good out of the general assets. In *Pawlet's Case*, Sir T. Raym. 335, the legacy was held to be a pure legacy, or a legacy *in numeratis*, and not *legatum nominis*; and although the debt was paid to the testator, the legacy was decreed. In *Lord Castleton* v. *Lord Fanshaw*, 1 Eq. Abr. 298, a legacy of a debt was held to be specific, although the sum was named.

In *Orme* v. *Smith*, 1 Eq. Abr. 302, Gilb. 82, and Vern. 681, the payment was voluntarily, and from thence was inferred an argument that there was no *animus ademendi*.

In *Lord Thomond* v. *Earl of Suffolk*, 1 Wms. 461, Lord MACCLESFIELD disapproved of the distinction between a debt recovered by suit or paid in voluntarily. A definition of a specific legacy is given by Lord MACCLESFIELD in *Hinton* v. *Pinke*, 1 P. Wms. 539, and the advantages and disadvantages as between a specific and pecuniary legacy are mentioned; and among other instances, that the legatee of a debt which is lost by the insolvency of the debtor shall have no contribution from the other legatees.

No. 1 — Ashburner v. Macguire.

In *Crockat* v. *Crockat*, 2 P. Wms. 164, the testator bequeathed the sum of £550 which was then in Mr. Ellis's hands; the testator, before making his will, had placed that sum in the hands of Mr. Ellis, and had got his note for it. He had also, before making his will, drawn several bills on Ellis, which had reduced the sum to £430. It was held by the MASTER OF THE ROLLS, that, as the drafts were all made before the will, and as the note for the full sum was still standing out, the testator should be considered as renouncing the payments, and that he meant to give the whole £550 as a legacy. I take it to be clear, if a testator gives a cup which is in pawn, it is a full gift, and the executors must redeem. In *Ford* v. *Fleming*, 2 P. Wms. and 1 Eq. Abr. 302, Lord KING held that calling in the debt was no ademption, supposing himself bound by the passage in *Swinburne and Pawlet's Case*. How he could be bound by these cases I cannot conceive. This case determines nothing. *Lawson* v. *Stitch*, 1 Atk. 507, was also cited; the question arose on a deficiency. The case at the Rolls, cited 1 Atk. 508, is nonsense, and has often been denied. The question upon the legacy of the stock has been determined uniformly. *Ashton* v. *Ashton*, C. T. Talbot, 152, and 3 P. Wms. 384; *Partridge* v. *Partridge*, C. T. Talbot, 226. *Purse* v. *Snapling*, 1 Atk. 414, does not tell at all to the purpose. *Arelyn* v. *Ward*, 1 Ves. 420, is contrary to many cases determined before, and to one by Lord HARDWICKE himself, — viz., *Purse* v. *Snapling*.

Lord CAMDEN, in the *Attorney-General* v. *Parkyn*, Ambler, 566, decided one point, and left the other open.

Parkyn, in his will, recites that he had certain mortgages to the amount of £ and bonds to the amount of £ . He gives all these, by such enumeration, to Pembroke College, Cambridge. To his sisters, who were next of kin, he gave annuities, and declared they should have nothing more under his will. Several sums were afterwards called in or paid before testator's death.

Lord CAMDEN determined that the sisters were not disappointed by the declaration that they should have nothing but the annuities: he held the legacy to the college was not adeemed as to the sums paid in, upon the ground that the sum was named, which he at the same time admitted to be slight.

The testator certainly meant to give everything to the college except the annuities: but the bequest is in the strictest form of a

specific legacy. In *Cartwright* v. *Cartwright*, 18th July, 1775, before Lord BATHURST, the bequest was, "I give £1400, for which I have sold my estate this day," &c. The testator afterwards received the whole money, paid it to his banker, and drew out of his hands £1100 of that money. Lord BATHURST held this to be a legacy of quantity, and that the receiving was no ademption, on the authority of the *Attorney-General* v. *Parkyn*; but it is questionable whether that case supports that determination.

In the case before me, the testator plainly intended that his sister, Sarah Ashburner, and her children, should have the debt, owing to him by her husband, secured as a provision for them.

My decree will be, that the bond be delivered up to the wife and children, that they may receive the dividends not received by the testator and whatsoever may hereafter be payable out of the bankrupt's estate in respect of that debt.

The legacy to Beawes is gone, and the bill must be wholly dismissed as to that claim.

ENGLISH NOTES.

In any question as to the subject-matter of a specific bequest by a will made or republished since 1837, regard must be had to the 24th section of the Wills Act, 1 Vict. c. 26, by which the will is to be construed "with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." The cases seem to show that the Act does not alter the effect of an ademption within the rule of the principal case, even though stock of a similar description has been subsequently purchased.

In re Gibson, Mathews v. *Foulsham* (1866), L. R., 2 Eq. 669; 35 L. J. Ch. 596, a testator, having at the date of his will £1000 North British Railway No. 1 guaranteed stock, and no other North British Railway stock or shares, gave a legacy to his son J. of "my one thousand North British Preference shares." He subsequently sold this stock, but at the time of his death was possessed of other North British Railway stocks. The Vice Chancellor (Sir W. P. WOOD) held that the gift was a specific gift of the stock; that the gift of a specific thing excluded the operation of the statutory rule; and that the subsequent purchase of other stock to which the words of the gift might have applied if there had been no property to which they were properly applicable at the date of the will did not do away with the effect of the ademption.

A similar principle was applied by the Master of the Rolls (Sir G. Jessel) to the construction and effect of a gift in a will, whereby the testator, after reciting that there was due to him from his eldest son "£1440, or thereabouts, secured by bills or notes or otherwise," released his said son "from payment of any interest up to the time of my death." Subsequently to the date of the will the son had paid the debts then due, amounting to about £1440, and had incurred fresh debts. The Master of the Rolls held that the gift was specific, and that it had been adeemed; and that no benefit accrued to the son in respect of the debts due at the time of the death. *Sidney* v. *Sidney* (Nov. 1873), L. R., 17 Eq. 65; 43 L. J. Ch. 15.

As to the operation of the Wills Act, it is said by the Master of the Rolls (Sir G. Jessel) in *Bothamley* v. *Sherson* (1875), L. R., 20 Eq. 304; 44 L. J. Ch. 589, 592: "I cannot find anywhere that any Judge has laid down that the new law, which makes a will speak from the time of the death, has altered the law of specific legacies; that it has made that which was a specific legacy before, not specific now. The exact contrary is now conclusively settled as regards devises of real estate; and when we consider that there was no substantial distinction between the law of devises of real estate, that is, specific devises, and the law of specific legacies, it would be a surprise to find that the law has been altered. Why should the law be altered? All that the Act says is that the will shall speak from the death. That always was the case as regards general bequests of personal estate; but the same rule did not apply to real estate. The alteration of the law was wanted, not for personal estate, but for real estate. Why, therefore, should an alteration of the law, certainly not pointed to personal estate, alter the nature of specific bequests." He proceeds to point out that there is one kind of specific bequest which is affected by the Act; namely, where a certain class of objects is given by the testator by a description which is not apparently referable to the date of the instrument. For instance, "the new law makes a specific bequest of 'my furniture' to mean not 'the furniture which belongs to me at the time of making this my will,' but 'the furniture which shall belong to me at the time of my death.' Such a legacy is still a specific legacy, though it is clearly not one to which ademption can apply."

In *Manton* v. *Tabois* (1885), 30 Ch. D. 92; 54 L. J. Ch. 1008, a testator bequeathed, after his wife's death, to M. "all my interest in the C. estate." At the time of making his will the testator had, under a marriage settlement and an appointment which had been made by his wife by will, a prospect of an interest in the C. property, — the property itself having been taken by the Metropolitan Board of Works and being represented by a sum of money paid into Court under their Act. The

testator had subsequently got payment of the money and placed it to his general banking account. V. C. Bacon held that this was an ademption of the legacy.

AMERICAN NOTES.

The doctrine of the principal case prevails in the United States. It is universally held that the sale of the subject of a specific legacy by the testator is an ademption. *Singleton* v. *Bremar*, 4 McCord (So. Carolina). 12; 17 Am. Dec. 699; *Langdon* v. *Astor's Ex'rs*, 16 New York, 9, 40; *Bissell* v. *Heyward*, 96 United States, 580; *Carter* v. *Thomas*, 4 Maine, 341; *Balliet's Appeal*, 14 Penn. St. 451; *Starbuck* v. *Starbuck*, 93 North Carolina, 183; *Hawes* v. *Humphrey*, 9 Pickering (Massachusetts), 350; *Cowles* v. *Cowles*, 56 Connecticut, 240; *Roquet* v. *Eldridge*, 118 Indiana, 147; *Hood* v. *Haden*, 82 Virginia, 588. See 2 Beach Eq. Jur. § 1052, citing the principal case.

The bequest of the testator's right and interest in thirty shares of the stock of the United States Bank is specific; by Chancellor Kent, *Walton* v. *Walton*, 7 Johnson Chancery (New York), 258; 11 Am. Dec. 456, citing the principal case; see note 11 Am. Dec. 470. A legacy of "all my 250 shares of capital stock which I hold in the Union Bank of Pennsylvania," is specific, and is adeemed by a sale of the stock in the testator's lifetime; by Gibson, C. J., *Blackstone* v. *Blackstone*, 3 Watts (Pennsylvania), 335; 27 Am. Dec. 359. The court say that the doctrine of Swinburne, who puts the question of ademption exclusively on the fact of intention, can be reconciled with the modern decisions only by understanding him to speak exclusively with reference to pecuniary legacies, and that the intention is immaterial. The doctrine in question is also adjudicated in *Hood* v. *Haden*, 82 Virginia, 588, citing the principal case. See note, 37 Am. Dec. 667, citing the principal case. A specific legacy of stock is adeemed by a subsequent sale thereof by the testator, although afterward the will was republished by a codicil. *Trustees* v. *Tufts*, 151 Massachusetts, 76; 7 Lawyers' Reports Annotated, 390, with notes.

So any material change in the article, by act of the testator, renders the legacy null. *Beck* v. *McGillis*, 9 Barbour (New York Sup. Ct.), 35. The court observed: "All cases unite in asserting the rule that if a specific legacy do not exist at the death of the testator, it is adeemed. It is a rule which prevails without regard to the intention of the testator or the hardship of the case. . . . The thing given is gone, and no court is at liberty to substitute a different thing for that which the testator had himself given." Chancellor Kent says, in *Walton* v. *Walton*, *supra*, "If the specific thing is disposed of or extinguished, the legacy is gone."

But if a legacy is payable out of a particular fund, which does not exist at the testator's death, this is not an ademption; *Giddings* v. *Seward*, 16 New York, 365; *Armstrong's Appeal*, 63 Penn. St. 312; *Byrne* v. *Hume*, 86 Michigan, 546.

The leaning of some of the American courts however is against a construction in favour of specific legacies, unless the case is clear. *Bradford* v. *Haynes*, 20 Maine, 105; *Boardman* v. *Boardman*, 4 Allen (Massachusetts), 179; *Norris* v. *Thomson*, 1 C. E. Green (New Jersey), 221; *Cogdell's Ex'rs* v. *Devisees*

of Testator, 3 Desaussure (So. Carolina), 373; *Lake* v. *Copeland*, 82 Texas, 464.

A valuable note on the subject of specific legacies is in 3 Pomeroy Equity Jurisprudence, pp. 1691, 1692, citing the principal case, and on ademption, at p. 1696, Mr. Pomeroy says: "There appears to be some slight tendency in some of the American cases not to press the doctrine of ademption, and to favour the claims of the legatee, although the *doctrine* of the English courts is avowedly adopted. In a few cases, following some early Massachusetts decisions, it has been held that ademption is a matter of actual intention, and the result might be defeated by extrinsic evidence of the testator's real intention. The more recent cases are against this departure from the true doctrine."

No. 2. — TRIMMER *v.* BAYNE.

(CHANCERY, 1802.)

RULE.

WHERE a parent, or a person in *loco parentis*, gives a legacy as a portion, and afterwards, upon marriage or any other occasion calling for it, makes an advance in the nature of a portion to the same child, a Court of Equity will presume the testator meant to satisfy the one by the other.

Trimmer v. Bayne.

7 Ves. 508, 6 R. R. 173.

John Bayne by his will, dated at Calcutta, the 11th of January, 1790, gave, devised, and bequeathed to Alexander Bayne, and four other persons, all his estate, real and personal, that he should die possessed of or entitled unto, subject to the following trusts and payment of all his just debts and the legacies in that his will mentioned; out of which estate he gave, devised, and bequeathed the sum of £5000 upon trust for his natural daughter Jean Read, — the interest whereof to be paid yearly to the said Jean Read, as long as the said Jean Read shall continue sole, on her own receipt or order in writing; and he directed that, upon the marriage of the said Jean, or if she shall be married at the time of his decease, his said trustees do pay to the said Jean Read the said sum of £5000 for her own sole use and benefit forever on her own receipt for the same, notwithstanding her coverture; and he did thereby

charge his said estate with the payment of the said interest and sum of £5000, as aforesaid.

The testator then, after giving several other legacies and annuities, charged in the same manner upon his said estate, declared his will, that in case his said natural daughter, the said Jean Read, should die unmarried, the said sum of £5000, so bequeathed as aforesaid, shall revert to his said estate, as also the annuity granted to his sister Cecilia, on the death of his said sister; and that, after the payment of all and every the respective legacies so bequeathed and particularly expressed, as aforesaid, he gave, devised, and bequeathed the rest and residue of his fortune and estate, both real and personal, to be equally divided between his nephew and three nieces.

The testator, after making his will, came to England, and purchased and contracted to purchase freehold estates. By indentures, dated the 3rd of December, 1794, reciting the intended marriage of William Kirby Trimmer and Jane Read, the testator's natural daughter, and that the testator agreed to advance to Trimmer £2000 immediately on the marriage in part of the portion of Jane Read, and also to secure by his bond the further sum of £5000 to Trimmer, to be paid him within twelve months after the decease of Bayne, with interest from the day of his death, to be applied upon the trusts in the said indenture mentioned; and that Trimmer agreed to secure by his bond the payment of £5000 within twelve months after his decease, with interest from his death, upon the trusts therein also mentioned, and that bonds were executed accordingly. It was witnessed that the said bonds were in trust, in the first place, in case the marriage should take effect; that the trustees should receive the said sums of £5000 and £5000, when respectively payable, and invest the same in Government or real securities, and stand possessed of such funds upon the following trusts; in case the £5000 secured by the bond of John Bayne should become payable during the joint lives of William Kirby Trimmer and Jane his wife, then that the trustees should pay to or authorise the said Jane or her assigns, to receive the interest, dividends, &c., during her life, for such intents and purposes as she should from time to time notwithstanding her coverture direct or appoint by any writing under her hand; and in default thereof to pay the same into the proper hands of the said Jane for her own sole use; and that her receipt should be a sufficient discharge for

No. 2. — Trimmer v. Bayne.

the same; and not to be subject to the debts, control, &c., of her said intended husband; and, after her decease, upon trust from time to time to pay to or empower William Kirby Trimmer and his assigns to receive the interest, &c., during his natural life, for his and their own use; and as to the sum of £5000 secured by the bond of Trimmer, in case Jane should survive him, upon a similar trust for her benefit; and after the decease of the survivor of them to assign and transfer the capital of the said sums of £5000 and £5000 or the securities to and between all and every or any child or children of the marriage in such shares and proportions, and at such ages or times, and subject to such conditions, &c., as therein mentioned; and in case there should not be any child, or all should die before the age of twenty-one or the marriage of daughters, to assign, &c., the sum secured by the bond of Trimmer according to his appointment, in default thereof to his executors, &c.; and the sum secured by the bond of John Bayne, according to his appointment, &c., in the same manner; and John Bayne covenanted for payment of the sum of £2000 to Trimmer immediately upon the marriage.

The marriage took place, and the testator paid Trimmer £500 in part of the £2000; but the remainder of that sum and the £5000 upon the bond of the testator continued due, the former to Trimmer, the latter to the trustees, at the death of the testator.

Upon the bill of Mr. and Mrs. Trimmer, on behalf of themselves and all other the specialty creditors and legatees of the testator, the accounts were taken and the real estates sold. The Master's report stated the instruments and circumstances above mentioned, and the result of the accounts and produce of the sales, and the contracts entered into by the testator for the purchase of freehold and leasehold estates, after the date of his will.

The cause coming on for farther directions, the question was whether the legacy of £5000 to Mrs. Trimmer was adeemed by the portion provided by the testator upon her marriage.

The plaintiffs went into parol evidence, to rebut the presumption: the material part consisting of the depositions of a Mrs. Brown, stating conversations with the testator in the month of August preceding the date of the settlement; the effect of which was, that the witness, being informed by him of the intended marriage of his daughter, asked him what fortune he intended to give her. He told her £5000, and, being pressed to give more, said,

"She is in my will," intimating, when pressed to give the whole immediately, that he was worth but £10,000.

Argued for the plaintiffs: —

The presumption of intention to satisfy a legacy by the advancement of a portion is now a positive rule laid down by the court to govern them as to the acts of the party. It is equally clear that evidence must be admitted to show that the testator did not intend to satisfy the legacy by the portion. This subject was very fully considered in *Ellison* v. *Cookson*, 2 Bro. C. C. 307; 3 Bro. C. C. 61. 1 Ves. Jun. 100.

Argued for the defendants: —

There is no evidence in this case that can defeat the general rule of presumption, perhaps unfortunately laid down as a rule. Lord THURLOW considers (1 Ves. Jun. 108) these presumptions as presumptions of law, and therefore not to be sent to a jury; and yet they are to be met by evidence. It is unfortunate, but this court has laid down these general rules, calling them presumptions of law; and it is impossible to refuse evidence certainly, as no presumption can stand longer than till the contrary is shown. The parol evidence can amount to nothing, unless it satisfies the court that he intended £7000 by the settlement and £5000 by the will.

Counsel for the plaintiffs having been heard in reply.

The LORD CHANCELLOR. I do not hesitate, upon this particular species of case, to say I give my opinion without a hope that any decision will afford satisfaction to every one who looks at the circumstances; and in a case of parol evidence, upon which it is not possible to hope that the minds of all should concur. It appears that different Judges have formed very different opinions upon the nature of the rule in this court. It is obvious that Lord THURLOW, if it had been *res integra*, would have disapproved the establishment of it; and Lord KENYON, in *Ellison* v. *Cookson*, thought it a very wholesome rule. Many observations occur upon similar presumptions in the case of executor and next of kin; and Mr. Justice BULLER went the length of intimating, in *Nourse* v. *Finch* (1 Ves. Jun. 357), that, if he had sat here longer, he would have driven parol evidence out. I say nothing of the nature of any of these rules. It is clearly decided that there is such a presumption. It is also clearly established that parol evidence is admissible to rebut the presumption; and my business is drily to determine, whether the parol evidence in this case has sufficient weight and power to over-

throw the presumption, which, it is admitted, must *primâ facie* be applied. It is not the habit of this court to direct an issue either upon a case of this kind or such as *Nourse* v. *Finch*, 1 Ves. Jun. 344; but the rule is settled, that where a parent, or a person in *loco parentis*, gives a legacy as a portion, and afterwards upon marriage or any other occasion calling for it advances in the nature of a portion to that child, that will amount to an ademption of the gift by the will, and this court will presume he meant to satisfy the one by the other. It differs from the performance or satisfaction of a covenant in this, that the court overlooks small differences in the circumstances of that which is proposed to be given and that in satisfaction of which it is contended to be given. The court does not inquire whether the portion by the will is entirely and absolutely to the child, or what is afterwards advanced in this form; a settlement upon marriage, which not being a performance of a covenant or satisfaction of a debt, yet is a presumed satisfaction of the intended portion.

Under the circumstances of this case I do not conceive that the fact of the limitations of this property upon the marriage can be such a difference with regard to what was intended by the will and advancement under the marriage contract that upon that it can be said there is no ademption. In ordinary cases, without examining whether it would be satisfactory to say this court should adopt this rule, if it were *res integra*, I think, if you came to the resolution not to adopt it, you would not say so in the particular case; and it is well worthy of discussion whether it should not prevail in this particular case, even if it was not to be stated as a general rule; for the legacy is given by the will with express and peculiar reference to the marriage of the daughter, looking to the fact or the event of marriage, — being given as a provision for her sole and separate use to trustees to be paid upon her marriage, or if she should be married at his decease. Upon the treaty of marriage she had an inchoate title to the portion or fortune, to be paid upon her marriage under the will. It cannot be disputed that if there was nothing more than the will and the settlement, the latter would be an ademption. The execution of it is a fact to be looked at as a fact of evidence. The settlement itself is very material evidence of the intention of the parties, and of the testator as one party, for it is written evidence; and also it is final evidence of his intention. But it is said, though upon the gifts

provided by the settlement, and still more upon the recitals, what is given is to be taken as an advancement of portion, and therefore in ordinary cases an ademption; yet the evidence is so applied to the act done by the testator upon the 3rd of December, 1794, — the final act done by him, — that under the circumstances the declarations are sufficient to control the admitted effect of the settlement in this court.

In the case of *Ellison* v. *Cookson* I had a large share. I knew some of the parties very intimately, and am perfectly sure the case was rightly decided; but it was decided upon grounds of imputation as to what the testator thought, meant, and knew as to the rules of law, which he could not understand, even as to the terms in which they are expressed. It was impossible to talk to the family upon the subject in terms which they could understand. *Debeze* v. *Mann*, 1 Cox, 346, 1 R. R. 57, was a much more simple case: upon this ground, that the father of one of the parties, talking to the father of the other upon the subject of the marriage, used an expression from which Lord THURLOW concluded, and it is clear he acted upon the idea, that that person using it stated to the other in that conversation that what he then meant to advance would not be all; and, connecting the future advance with his death, by the expression used about his life, as an advance at that time, the principle of that decision appears that the advancement of the £600, together with the other sum advanced upon the marriage, would not within the meaning of that conversation satisfy what was given by the will, — viz., the £1365, which therefore was not adeemed.

The case of *Ellison* v. *Cookson* turned entirely upon this; and it shows the danger of this sort of parol evidence. Buck, a lawyer, and a very accurate man, clearly misunderstood old Cookson; and if that letter had not been written, Ellison would have got both. But Cookson, being alarmed at hearing the import of the conversation, writes to show that was not his meaning. I knew every branch of the family; and it was his determined purpose that, if his wife survived, the younger children should depend upon her, and not upon him. Therefore, he said, he meant it should fail, if his wife should survive him, and should not think proper to continue it. Lord THURLOW, under those circumstances, thought it altogether in the power of the widow. The principle is the same as that in *Debeze* v. *Mann* with regard to parol declarations. To take it in the case where the executor is a trustee for the next of

kin: I fear there is no possibility of saying parol declarations, both previous and subsequent, are not admissible; though Lord COKE would hardly have been brought to let them in as well as declarations at the time. But there is a very great difference, as also upon these marriage treaties, upon the point whether they are all alike weighty and efficacious. A declaration at the time of making the will is of more consequence than one afterwards; and a declaration after the will as to what he had done (I am speaking as to the time merely) is entitled to more credit than one before the will as to what he intended to do; for that intention may very well be altered: but he knows what he has done, and is much more likely to speak correctly as to that than as to what he proposes to do; though these parol declarations are all alike admissible, whether consisting of conversation with people who have nothing to do with it, people making impertinent inquiries, and drawing from him angry answers, or in whatever form, they are all evidence. But they are entitled to very different credit and weight according to the time and circumstances. In *Debeze* v. *Mann* the conversation between the two fathers upon the subject of the very contract, between two persons under a parental obligation to provide rationally for the interests of their children, upon every ground is entitled to much more weight than some others. So in *Ellison* v. *Cookson*, when old Ellison took the trouble to send a brother-in-law to the country to talk upon the subject, — an authorised agent in the treaty; speaking of declarations between him and the principal, to settle the terms of the contract of marriage. That evidence has a character that does not belong to such as occurs in this case.

It does not appear from the evidence of any man of business, of any person having an interest of affection, piety, or of any other kind, what hope was held out to Trimmer, other than by the instrument, as to what was to be the fortune. It does not appear that Trimmer ever heard this conversation with Mrs. Brown had passed. It was not, therefore, had among parties having any sort of interest. I do not say, by any means, that therefore it is not evidence. It does not appear by any declaration of the testator that he was anxious Mrs. Brown should know anything more than that a marriage was intended; or that, unless she had provoked the conversation about the fortune, she would have heard a word about it. His answer to her question was neither true according to the will nor according to the settlement in the sense in

which she understood it. It is clear from the conversation the testator must have been satisfied that he misled her, and that he meant to delude her; and this shows the danger from declarations made, perhaps, with that view, and sometimes necessary to keep peace in families with persons having expectations. He gives very large bequests by his will; and yet there he insinuates that £10,000 is his whole fortune. So he again endeavours to baffle this curiosity. That she understood it is very clear from her answer. It is clear he must have known he was baffling the inquiry. To keep her quiet he says, "She is in my will," — that is, for part or the whole of that £10,000. He intimates at the end that he meant to keep part of the £10,000 in his power. What had passed in the treaty in the mean time between any of the parties, principal, agent, or interested as husband and wife, does not at all appear. She attacks him again upon it at Teddington, and he makes the same sort of answer. It is clear, upon her evidence, she had no idea he was to advance more than £5000 at that time. She does not intimate beyond that. Taking it at the highest as to his intention then, her understanding was, that he was to advance £5000 upon the marriage, and she was in his will; and that declaration would be evidence, provided you believe from the whole character of the conversation that he was serious in talking to her, — which, for the purpose of this cause, I will believe; and if the settlement had been £5000, and with this will, upon the authorities she might have had a farther demand. According to the conversation, Mrs. Trimmer was to have £5000 immediately, and £5000 more at her father's death. If under the contract, infusing the effect of the will and the conversation into the case, £2000 was advanced, there was £5000 at his death under the settlement, and if there was no satisfaction, £5000 under the will; or, as it has been put for the plaintiff, £3000. I am clearly of opinion it must be the £5000, if anything; and it is not a *pro tanto* ademption. That there was this variation there is no direct evidence. First, how does it stand with the written contract? The legacy is in a more strict sense given as a marriage portion than legacies usually are. Then, not merely to try the parol evidence against a mere advance and a covenant, but as against a declaration under the hand and seal of the testator himself, and an agreement upon marriage, which is a representation and act by him, denoting his purpose subsequent to the conversation with

Mrs. Brown, she presses him to an advance of some ready money; and he makes up his mind to do so. The settlement is a declaration, under his own hand, that by the portion he meant the £2000 and the £5000. It may be said, it is not inconsistent to add to it by this legacy; but it would be very extraordinary, and is not the natural meaning, that £2000 should then be advanced, and £5000 after his death upon these trusts; and another sum of £5000 or £3000 should be paid to her upon his death for her separate use. That must necessarily be done upon Mrs. Brown's evidence.

It is said for the plaintiff, it is clear that at the time of the conversation he was not aware of this rule of law; or, if he was, he did not intend it should operate. Then you must take the conversation to be a *bonâ fide* declaration of his real intention, which is a great deal. But, beyond that, it does not necessarily follow, by any means, that if he meant to advance £5000 in August, and leave a demand under the will, therefore in December he meant to advance £2000 in money, and agree to advance £5000, and then leave her her chance under the will. To get rid of the settlement, as adeeming the legacy, there must be some declaration as to the effect of the settlement; and I cannot infer that because in August he did not understand the rule, or did not intend it should have its natural effect, therefore having afterwards substituted a different provision he was uninformed of the rule, or meant it should not apply to the legacy. I must suppose, unless the contrary is proved, that, when he did this act, he did understand the legal effect of it; and then proof that at a prior time he did not know it, or meant that a different provision was not to have such effect, will not avoid the legal effect of it. That satisfies me that it is impossible the plaintiffs can have more than the £5000; for if the ademption depends upon the circumstance that he knew the rule, and meant it should take place, the argument for the £3000 must be upon this: that he knew the £2000 would adeem £2000 of the legacy; and, knowing that, he left it to adeem so much. But he could not know that at that time without also knowing that the advance of £5000 would adeem the whole. I must take him to be ignorant of the rule altogether, or to know it throughout.

Upon the whole, this evidence is not so connected with the Act in December, 1794, as to destroy the effect of that Act, operating

to an ademption of this legacy ; and it would be extremely dangerous, however the evidence must be allowed as admissible, to say, such evidence is sufficient to prevent the operation of a clear settled rule of law, if it is not clear and satisfactory to that point, to which it must be, to rebut the presumption according to the clear settled rule arising out of the effect of the settlement.

ENGLISH NOTES.

After some fluctuating opinions upon the point, it was settled that, although the sum subsequently settled on the child falls short of the provision given by the will, the latter is adeemed *pro tanto*, *Pym* v. *Lockyer* (1840), 5 My. & Cr. 29.

And a gift by will of residue (or a share of residue) may likewise be adeemed *pro tanto*, *Montefiore* v. *Guedalla* (1859), 1 De G. F. & G. 93.

In the case last mentioned the testator by his will left to each of two sons H. and M. and a daughter a legacy of £3000, and after mentioning certain advances which he had made to the two sons, including an advance which had been made by way of marriage settlement to M., and directing that these should be brought into hotchpot in calculating the residue, he left the residue in thirds, one third to be strictly settled on each of the sons and their issue, and the remaining third upon similar trusts in favour of his daughter and her issue. He afterwards, upon the marriage of his son H., settled £2000 new three and a half per cent. annuities upon trust for the wife for her separate use for life; after her decease, for H. for life; and, after the death of the survivor, in trust for the issue of the marriage. It was admitted by all parties that either the legacy of £3000 to H. or the share of residue given to him and his issue was adeemed *pro tanto* by the gift on marriage; and the question was whether the ademption applied to the legacy of £3000 or to the share of residue. The question was submitted by the Master of the Rolls to a full Appellate Court, consisting of the Lord Chancellor (Lord Campbell) and the Lords Justices Turner and Knight-Bruce, and they decided, with some expression of doubt on the part of the Lord Justice Knight-Bruce, that the principle of abatement applied as well to a share of residue as to a pecuniary legacy, and also that, the intention of the will appearing to be that a child (as was clearly the case in regard to M.) should take the legacy of £3000 absolutely, and that his settled portion should come out of the residue, this intention may be presumed to have continued and to have been the intention of the subsequent gift by way of settlement in favour of H., so

that H.'s share of residue and not his legacy of £3000 was *pro tanto* adeemed.

The principal case is cited and followed by Lord SELBORNE in *Cooper* v. *Macdonald* (1873), L. R., 16 Eq. 258, 268; 42 L. J. Ch. 533.

In *Meinertzhagen* v. *Walters* (1872), L. R., 7 Ch. 670; 41 L. J. Ch. 801, the doctrine of *Montefiore* v. *Guedalla* as to ademption of a share of residue was explained so as to limit its operation to equalising the shares of the children amongst themselves, and not so as to increase the interest in a share of residue given to a stranger,— *e. g.*, the widow of the testator. This decision is again referred to, and an inference from the principle of it adopted, in *Fowkes* v. *Pascoe* (1875), L. R., 10 Ch. 343, 351; 44 L. J. Ch. 367, and by the MASTER OF THE ROLLS (Sir George JESSEL) in *Stewart* v. *Stewart* (1880), 15 Ch. D. 539, 547; 49 L. J. Ch. 763.

By a parallel rule to that in the principal case, "if a father has made a provision by way of covenant in favour of his child before the date of the will, then, unless it appears upon the will or by parol testimony (which in such cases is admitted in rather an anomalous way in order to rebut the presumption) that he intends to give the benefit conferred by will in addition to that which is already secured to the child by covenant, the child will not take both. In other words, the benefit given by will is presumed to be given on an implied condition that if the son takes it, he must give up and surrender that which has been already secured to him by the covenant." Per COTTON, L. J., in *Montague* v. *Earl of Sandwich* (C. A. 1886), 32 Ch. D. 525, 534; 55 L. J. Ch. 925. See the case further referred to under No. 2, *infra*.

AMERICAN NOTES.

The principal case is cited and followed in *Hansbrough's Executors* v. *Hooe*, 12 Leigh (Virginia), 316; 37 Am. Dec. 659. That was the case of a legacy of negroes and personalty to a granddaughter. The court say the doctrine "was very concisely, but lucidly, laid down by Lord ELDON," in the principal case. The same doctrine in *Jones* v. *Mason*, 5 Randolph (Virginia), 577; 16 Am. Dec. 761, citing the principal case, but observing that "some of the Judges seem disposed to quarrel with the rule."

Commenting on the English doctrine that no mere relationship, except that of parent, not even that of grandparent, will be considered as *in loco parentis*, Mr. Pomeroy says (1 Eq. Jur. § 556, note 4), that there seems to be some discrepancy between the English and the American authorities. Judge Story couples grandchildren with children in this regard (Eq. Jur. 1111, 1112), and this has been followed *obiter* in some cases; but Mr. Pomeroy disapproves this doctrine, and concludes that "it may well be doubted whether any rule has been established by the American decisions different from that settled in

England." Citing *Langdon* v. *Astor's Ex'rs*, 16 New York, 9, 36; *Clendening* v. *Clymer*, 17 Indiana, 155. See also *Allen* v. *Allen*, 13 So. Carolina, 512; 36 Am. Rep. 716. Mr. Pomeroy learnedly reviews this doctrine, citing the principal case, at p. 772, note. The principal case is cited in the leading case of *Langdon* v. *Astor's Ex'rs*, *supra*, in which the English authorities are attentively reviewed by Chief Judge Dexio, and is also cited and followed in *Hine* v. *Hine*, 39 Barbour (New York Sup. Ct.), 507.

The doctrine of the principal case is also found in *Kreider* v. *Boyer*, 10 Watts (Pennsylvania), 54; *Sims* v. *Sims*, 2 Stockton (New Jersey), 158; *Clark* v. *Jetton*, 5 Sneed (Tennessee), 229; *Roberts* v. *Weatherford*, 10 Alabama, N. S., 72. In the last case it is said that the subsequent portion or provision "will be presumed to be in lieu of the legacy, although it be not so expressed, whenever it is equal to or exceeds the amount of the legacy, is certain and not contingent, and is of the same nature."

No. 3. — DURHAM (EARL OF) *v.* WHARTON.

(H. L. 1836.)

RULE.

The rule as to presumption of ademption of legacy by advance in the nature of a portion, applies in the case of a daughter, although the portion is advanced to the husband upon an agreement that he should make a settlement, and although the settlement so made contains limitations differing from the provisions of the will.

Durham (Earl of) v. Wharton.

3 Cl. & Fin. 146 (6 L. J. N. S. Ch. 15).

This was an appeal from a decree of the Court of Chancery, whereby the respondent, Mrs. Wharton, was found entitled to a legacy of £10,000 under her father's will, with a large arrear of interest, notwithstanding the benefit she had received by a marriage portion given by her father on her marriage.

This marriage portion of £15,000 had been paid to the husband, Mr. Wharton, as the consideration for benefits secured by him to Mrs. Wharton under their marriage settlement. These benefits consisted of £500 a year pin-money, a jointure of £1200 a year, and certain portions to the children of the marriage. It had been expressly declared in the settlement that the £15,000 was in full

No. 3. — Durham v. Wharton.

satisfaction and discharge of the sums to which Mrs. Wharton was entitled under the will of her uncle William Lambton.

The points which were made in the arguments before the House sufficiently appear from the following judgment, which was delivered after taking time for consideration : —

Lord LYNDHURST. The facts of this case are very particularly stated in the fifth volume of Mr. Simon's Reports ; it is unnecessary, therefore, that I should enter into any minute details of them. William Lambton, by his will, bequeathed to his niece, Susan Lambton now Mrs. Wharton, a legacy of £5000, and he charged this with other legacies upon his real estate, which he devised to his brother, General John Lambton. General John Lambton, by his will, bequeathed £10,000 to Susan Lambton, and afterwards, upon the occasion of her marriage with Mr. Wharton, he gave her a portion of £15,000 ; and it was stated, in the articles of agreement upon the marriage, that such portion was in satisfaction of all sums that she was entitled to under the will of the testator's brother, William Lambton. The question in the cause is, whether that marriage portion is to be taken as a satisfaction, not only of the sum to which she was entitled under the will of William Lambton, but also as a satisfaction or ademption of the portion bequeathed to her by the will of her father : whether she is entitled, in addition to the £15,000 given on her marriage, to the £10,000 under her father's will.

There are some circumstances in this case which strike me as singular. General John Lambton died in the year 1794 ; no claim to this legacy was made till 1826, a period of 32 years. It is stated, on the part of Mr. and Mrs. Wharton, that they were wholly unacquainted with the circumstance of any legacy having been bequeathed to her by her father. Now, it appears that immediately after the death of General John Lambton, his will was read at Lambton Hall, in the presence of Mrs. Wharton's brother, William Henry Lambton, the sole executor of General Lambton, in the presence also of Ralph John Lambton, her brother, who was one of the trustees of her marriage settlement, and of Dorothy Lambton, her sister, who took a legacy of £10,000 under the will. It is very extraordinary, therefore, that Mrs. Wharton should have had no knowledge of any legacy having been bequeathed to her by her father's will. It is the more extraordinary, as upon a recent occasion she stated that she had considered herself the favourite child

of her father, and thought it extremely probable that she should have a legacy under his will. This would naturally have led to inquiry. It appears to me, under these circumstances, very difficult to believe (the parties living on good terms together, and Dorothy Lambton herself taking a legacy of £10,000) that it should never have come to the knowledge of Mrs. Wharton, her sister, that she also had been mentioned in the will, and that a legacy of £10,000 had been bequeathed to her.

But there is some evidence which has been insisted on for the purpose of leading to the conclusion that, in truth, she had no knowledge of this legacy. It seems that Lord Durham was desirous of selling a part of the property on which the legacy was charged, and he entered into a treaty for that purpose with Lord Eldon. Lord Eldon required an indemnity against this legacy, in consequence of which Mr. Ward (who was the solicitor of Lord Durham) waited upon Mr. and Mrs. Wharton, and had a conversation with them on the subject of the legacy, and in the course of that conversation Mrs. Wharton stated that she had never heard that she was entitled to a legacy under her father's will. But nothing stated by Mrs. Wharton, who is a claimant and party in the cause, can be made use of as evidence in her favour, although addressed to the agent of Lord Durham. All the presumptions, then, are strongly in favour of the conclusion that it must have been known at or soon after the death of General Lambton that Mrs. Wharton had been mentioned in his will, and that a legacy of £10,000 had been bequeathed to her. Whatever inference, therefore, can be properly raised from this circumstance ought to be raised against the claim of Mr. and Mrs. Wharton.

Another point urged in the course of the argument was, that the amount of the two sums in the wills did not correspond with that in the settlement. It is true that the legacy left by William Lambton amounted to £5000, and the legacy bequeathed by General Lambton to £10,000, those two sums together making £15,000. On the other hand, the marriage portion amounted to £15,000. But then it is said there was an arrear of interest due on the legacy of £5000 at the time of the marriage, amounting to upwards of £2000, so that the sum on the one side would, on that calculation, have been in the whole £17,000 or upwards, and the sum on the other side only £15,000. Now, assuming these facts to be as I have stated them, still it does not appear to me that they at all

affect this case. It is not necessary, in order to raise the question of ademption, that the sums should exactly correspond. There are many cases (and many were cited in the course of the argument at the bar) in which the proportional difference was much greater than is supposed to have existed in the present instance. But, in truth, there is no evidence in this cause to show that any arrear of interest was due; and after a lapse of 32 years we cannot, under the circumstances of this case, assume that any such arrear existed.

It was also argued that the limitations under the will are widely different from the limitations under the settlement, and that such difference would prevent the principle of ademption from being applicable to this case; and, indeed, the point was alluded to in the judgment of the Vice Chancellor; but I apprehend that this will not prevent the application of the principle of ademption, and that the authorities are all the other way. In the case of *Trimmer* v. *Bayne*, 7 Ves. 508–516, 6 R. R. 173, *ante* p. 27, which was cited in the course of the argument, Lord ELDON expresses himself in these words; "The court does not inquire whether the portion by the will is entirely and absolutely to the child, or what is afterwards advanced in this form, a settlement upon marriage, which not being a performance of a covenant or satisfaction of a debt, yet is a presumed satisfaction of the intended portion," and, in another case, *Baugh* v. *Read*, 3 Bro. C. C. 191; 1 Ves. Jun. 257–263, which was referred to for another purpose, and in which this point had been insisted on in the argument, Lord THURLOW thus expressed himself: "Upon the marriage of his daughter he transfers part of that specific sum so mentioned, I agree, to different uses; yet I doubt whether, though not to the same uses, it will not operate as an ademption, if not a satisfaction, being given as an advancement upon marriage." But there is a case of *Monck* v. *Lord Monck*, 1 Ball & Beat. 298, decided by Lord REDESDALE, which is directly in point. Lord REDESDALE says, "It was pressed upon me by the counsel for the plaintiff, that the variance in the provision by the settlement and the will distinguished this case. That is a circumstance which may avail to prove it not to be in satisfaction of a debt or covenant, but never of a legacy given as a provision. This distinction was taken by Lord HARDWICKE in the case of *Clarke* v. *Sewell*, 3 Atk. 98, and in *Trimmer* v. *Bayne* this doctrine is recognised by Lord ELDON, wherein he states the question to be, whether, on the limitations being different, it was an ademption; and he lays down

this rule, that where a parent, or person in *loco parentis*, gives, a legacy as a portion, and afterwards, upon marriage or any other occasion calling for it, advances money in the nature of a portion to that child, that will amount to an ademption of the gift by will, and it will be presumed he meant to satisfy the one by the other." The same point was also decided in *Platt* v. *Platt*, 3 Sim. 503, by the present VICE CHANCELLOR. "Although there is a material difference," he observed, "between the provision made by the will and the provision under the settlement, still the one is a satisfaction of the other." The question was thus raised and presented to the mind of the VICE CHANCELLOR, and his honour in that case decided in favour of the ademption. I conceive, therefore, that the circumstance of the limitations being different does not at all affect the question.

Another point raised was this, that by the terms of the settlement the £15,000 were to be in satisfaction of all that Mrs. Wharton was entitled to under the will of her uncle, William Lambton; and it was therefore contended that as this provision was stated to be in satisfaction of a debt due by General John Lambton, it could not also be taken to be in satisfaction or ademption of what she otherwise would be entitled to under his will. I have never felt the force of that argument. It was necessary, as far as related to the debt, that the provision in satisfaction of it should be in terms expressed; but as far as related to the provision by the will, it was not necessary, because that effect is produced by operation of law

The case of *Baugh* v. *Read*, to which I before referred, was cited as an authority upon this point. That case is reported both in Brown and in Vesey, Junior; the best report is in Vesey. It does not appear to me, after carefully considering that case, that it supports the position for which it was cited. By the terms of the will the legacy there given was in satisfaction of a debt due under the settlement made on the marriage of the testator. As far as related to the portion — a portion of £5000 — in the instrument by which it was created, there was a covenant on the part of the daughter that she would, when she came to the age of twenty-three, assign the sum that she was entitled to under the will of her grandfather. These circumstances are widely different from those of the present case; but still it was not with reference to them, as I collect from the different parts of the report, that Lord

THURLOW decided the case: he decided it with reference to the nature of the fund out of which the legacy was to be paid. That appears from many passages in the report, and it is also confirmed by the concluding passage, in which Lord THURLOW says, "It is impossible to say this is either a satisfaction or an ademption. It is not express enough. I think the father intended to give this right to a sum, expected to accumulate before his death by the addition of all these sums at least, if not of others; therefore it does not come up to that point which I should have thought it reached" (that was, with respect to the ademption), "and perhaps have been wrong in so thinking, if it had been a certain sum distributed in certain proportions," 1 Ves. Jun. 265. Such are the grounds on which that case was decided, and which, in truth, have no application to the present question.

I have now stated to your Lordships the various objections which were urged at the bar, for the purpose of leading your Lordships to the conclusion that the general rule of ademption could not be applied to the present case; it appears to me that none of them are sufficient for that purpose, and that the general rule of law ought in this instance to prevail. I am therefore of opinion that the judgment should be reversed.

I wish to add that the parties on both sides deprecate further delay, and are anxious for the judgment of your Lordships.

The LORD CHANCELLOR put the question, and the decrees and order appealed from were reversed without costs.

ENGLISH NOTES.

The same principle has been applied where the settlement preceded the will, and although the benefit given by the will was a gift of residue. *Thynne* (*Lady E.*) v. *Glengall* (*Earl of*) (1848), 2 H. L. C. 131. In that case, a father, upon the marriage of his daughter, agreed to give her a portion of £100,000. He transferred one-third part of this sum in stock to the four trustees of the marriage settlement, and gave them his bond for transfer, upon his death, of the remainder in like stock, to be held by the trustees on trust for the daughter's separate use for life, and after her death for the children of the marriage, as the husband and she should jointly appoint. The father afterwards, by his will, gave to two of the trustees a moiety of the residue of his personal estate in trust for the daughter's separate use for life, remainder for her children (generally) as she should by deed or will appoint. The House of Lords, affirming the decree of Lord LANGDALE, M. R., held

that the moiety of the residue given by the will was in satisfaction of the sum of stock secured by the bond, notwithstanding the difference of the trusts; and it being found that it was for the benefit of the daughter and her children, if she should have any, to take under the will, she was bound to elect so to take.

The principal case was one of ademption in the strict sense of the word. That of *Lady E. Thynne* v. *Earl of Glengall* was one of satisfaction. The distinction is well explained by Lord Romilly in the case of *Lord Chichester* v. *Coventry* or *Coventry* v. *Chichester* (1867), L. R., 2 H. L. 71, 90; 36 L. J. Ch. 673, "The distinction," he says, "is well marked, and is recognised in all the decided cases on the subject. It appears to me to be accurately expressed by the legal terms *ademption* and *satisfaction*. . . . The distinction between ademption and satisfaction lies in this: in ademption, the former benefit is given by a will, which is a revocable instrument, and which the testator can alter as he pleases, and consequently when he gives benefits by a deed subsequently to the will, he may, either by express words or by implication of law, substitute a second gift for the former, which he has the power of altering at his pleasure. The bequest or devise contained in the will is thereby adeemed,— that is, taken out of the will. But when a father, on the marriage of a child, enters into a covenant to settle either land or money, he is unable to adeem or alter that covenant; and if he gives benefits by his will to the same objects, and states that this is to be in satisfaction of the covenant, he necessarily gives the objects of the covenant the right to elect whether they will take under the covenant or under the will. Therefore this distinction is manifest: in cases of satisfaction the persons intended to be benefited by the covenant, who, for shortness, may be called the objects of the covenant, and the persons intended to be benefited by the bequest or the devise, in other words, the objects of the bequest, must be the same. In cases of ademption they may be, and frequently are, different."

In this case of *Coventry* v. *Chichester* or *Lord Chichester* v. *Coventry* (H. L. 1867), L. R., 2 H. L. 71; 36 L. J. Ch. 673, a father, on the marriage of a daughter (Lady John Chichester), covenanted to pay the trustees of the settlement, three months after demand, £10,000, with interest till payment. He also covenanted to pay annually to the trustees of the settlement £1700, so as, with the interest on the £10,000, to make a sum of £2000 a year. The trusts were during the joint lives to pay Lady Chichester £200 a year pin-money, and the residue of income to the husband, after the decease of either to pay the income to the survivor, and, after the decease of the survivor, for the children of the marriage. The principal sum of £10,000 was not demanded in the settlor's

lifetime, but the interest was paid. The settlor afterwards made a will giving his property to trustees upon trust, in the first place, to pay his debts and legacies, &c., and then to divide the residue into equal moieties, and to transfer the same to his daughters. It was held, reversing the judgment of Sir W. Page Wood (which had been nominally affirmed by the Lords Justices who differed in opinion), that the gift by the will was not a satisfaction of the covenant in the settlement, and that the £10,000 must be deducted from the testator's assets before the residue was divided into moieties.

Important principles for guidance in forming an opinion on such a case are enunciated in the judgment of the Lord Chancellor (Lord Chelmsford) and Lord Cranworth.

Lord Chelmsford (L. R., 2 H. L. 82) says: "The question whether a gift in a will is to be considered as a satisfaction of a portion given by a settlement, or a portion given by settlement is to be taken as an ademption of a gift by will, is one of intention. It is certainly easier to arrive at a conclusion as to the intention where the will precedes the settlement, than where the settlement is first and the will follows. In the case where the revocable instrument is first, and a portion is given by it, if the event of marriage, or any other occasion for advancing a child, should afterwards occur, it may very reasonably be supposed that the parent has anticipated the benefit provided by the will, and has intended to substitute for it the new provision, either entirely or *pro tanto*. But where an irrevocable settlement is followed by a will, it is not so easy to infer that an additional benefit was not intended by the testator, except where he expressly declares his intention to be otherwise, or where the gift in the will and the portion in the settlement so closely resemble one another as to lead to a reasonable intendment that the one was meant to be substituted for the other."

And Lord Cranworth (p. 86) says: "Neither party in the argument of this case disputed the rule acted on in Courts of Equity, that there is a presumption against double portions. I have more than once had occasion to express my opinion that this is a useful rule, carrying generally into effect the intention of parents and others making provision for those for whom they are bound to provide. It is, however, but a presumption, and is therefore liable to be met by counter-presumptions, showing that in any particular case it ought not to prevail.

"It is a rule of much easier application where the first provision is made by will and the second by deed, than where, as in this case, the first provision is by settlement, and the will follows. In the former case the provision by will is under the absolute control of the person making it up to the time of his death; and when, therefore, after the

date of the will, he makes a settlement for the benefit of the person provided for by the will, the only question is, whether he intends the latter to supersede the former provision. If that is his intention, he has unlimited power to carry it into effect; he is under no obligation to obtain the consent of the person for whom he intended to provide by his will. But where a parent provides for a daughter by settlement on her marriage, binding himself to secure at his death a stipulated sum for the benefit either of her absolutely, or of her and her husband and their issue, and afterwards makes provision for her or them by his will, it is obvious that without the consent of those entitled under the settlement he cannot substitute the benefit he may have chosen to confer by his will for those which he had already secured by deed. In such a case he can only make the testamentary gift a substitute for what he was by deed bound to provide, in case those entitled under the settlement see fit so to accept it. The application of the rule is thus made more difficult; still, there is no doubt the rule itself is held to be applicable in the latter as well as in the former case.

"But the rule, as I have already noticed, is but a rule of presumption, and there is much less difficulty in supposing that it was not intended to prevail where the person, to whose dispositions it is to be applied, had not the power to enforce it without the consent of others, than in a case where the whole was under his absolute control. When the will precedes the settlement, it is only necessary to read the settlement as if the person making the provision had said, 'I mean this to be in lieu of what I have given by my will.' But if the settlement precedes the will, the testator must be understood as saying, 'I give this in lieu of what I am already bound to give, if those to whom I am so bound will accept it.' It requires much less to rebut the latter than the former presumption. Add to which, the necessity for making such a declaration in express terms would be much more obvious to a testator making a will whereby he desired to affect rights already acquired than to a settlor making an absolute provision by deed for one who had acquired no previous rights whatever.

"It has been very truly said, that no positive rule has been or can be laid down as to what is sufficient to rebut the *primâ facie* presumption against double portions. That is a matter which, from the nature of things, must be left in each particular case to the judgment of the tribunal which has to decide it. But one great question always has been, whether that which is given by the latter is given to be enjoyed in the same, or nearly the same, manner as that which is given by the former instrument. When a parent has by his will given a portion to his daughter absolutely, and has, by a settlement on her marriage after

the date of his will, secured a sum of like amount for the benefit of her and of her husband and issue, the mere circumstance that she would have taken, under the will, an absolute interest, whereas under the deed she takes only a life interest, raises no difficulty. The parent may reasonably suppose the two gifts to be the same. If the daughter had received the sum under the will, she would probably have settled it in the way in which, by the hypothesis, it was settled in her parent's lifetime. It would not occur to the parent to think that the interest taken by her was substantially different in the one case and in the other. But there must be some limit in such cases, and more especially where, as in the case now before the House, the settlement precedes the will; and, looking to the two instruments now before us, I have come to the same conclusion as my noble and learned friend on the woolsack,— namely, that the differences between the gift by the will and the benefits secured by the covenant are so great as to prevent the application of the general rule.

"In the first place, what is here given is a moiety of the residue of the testator's real and personal estate, after payment of debts and legacies. I do not doubt that a share of residue may be treated as a portion within the rule against double portions; but the residue cannot be ascertained till after the debts are paid. Here the testator was a man of great wealth, and does not seem to have had any debt except that arising on the covenant on his daughter's marriage. It is natural to suppose that if he meant the residue to be ascertained as if no such covenant had been entered into, he would have adverted to that in his will. He would have naturally expressed what we are called on to presume, that the share of residue given to his daughter Caroline Mary was to be accepted by her in lieu of what she was entitled to under his covenant.

"But even if that difficulty could be overcome, the enjoyment of the residue was to be in a mode so entirely different from that secured by the covenant as to exclude, without express declaration, the notion that the one could have been intended as a substitute for the other. Under the covenant, Lord John has a life interest in the £10,000, subject to his wife's pin-money; he has no interest whatever in the residue under the will. Under the covenant, the children of the marriage, if there had been any, would have been entitled. There is no mention of children in the will. In default of children, Lady John, if she should die in her husband's lifetime, has by the covenant an absolute power of appointment by will over the £10,000; but by the testator's will she is precluded from giving anything to her husband. There are other minor differences, but those which I have pointed out are suffi-

cient to show, not only that the limitations in the two instruments are substantially different, but that the testator was anxious to make them so."

In *Dawson* v. *Dawson* (1867), L. R., 4 Eq. 504, the principal case was followed in these circumstances: The testator, having made a will dividing residue equally among children, subsequently, on the marriage of one of his sons, agreed to settle an annuity of £350, to be paid to the son for life and afterwards to the trustees of the settlement. It was held that the residuary gift was adeemed *pro tanto* by the settlement of the perpetual annuity.

In *Re Tussaud's Estate, Tussaud* v. *Tussaud* (C. A. 1878), 9 Ch. D. 363; 47 L. J. Ch. 849, the testator, on the marriage of his daughter, had covenanted with the trustees of her settlement that his executors, &c., would, within six months of his death, if he survived his wife, but, if she survived him, within six months after her death, transfer to the trustees £2000 consols, to be held upon trust for such persons as his daughter, with consent of the trustees of the settlement, should appoint; and, in default of appointment, in trust for his daughter for her separate use, then to her husband for life; and after the decease of the survivor, for the children of the marriage attaining 21, &c. The testator subsequently satisfied this covenant to the extent of a moiety. He afterwards made his will, bequeathing £2800 to trustees, in trust for his daughter for life for her separate use, without power of anticipation, and, after her decease, for such of her children as should attain 21, in equal shares. Held by the Court of Appeal, reversing the decision of the Master of the Rolls, that there were such substantial differences between the provisions made by the settlement and by the will as to rebut the presumption against double portions.

In the case of *Montague* v. *Earl of Sandwich* (C. A. 1886), 32 Ch. D. 525; 55 L. J. Ch. 927, a father, on the marriage of his second son, had covenanted to pay him £1000 a year for life, and covenanted that he or his heirs or devisees would charge this annuity on a sufficient part of his real estate. Subsequently, by his will, he devised his real estate "subject to the charges thereon" to his first and other sons in strict settlement, and gave the second son legacies, the income of which produced more than £1000 a year. The Court of Appeal, reversing the judgment of Pearson, J., held (by a majority) that the expression "subject to the charges" was too general to rebut the presumption against double portions. And consequently that the second son was not entitled to the benefit under the will without giving up that under the covenant. It must be admitted that so far as the direction to pay debts entered into the *ratio decidendi* of the House in *Chichester* v. *Coventry*

as a reason for rebutting the presumption, the distinction is very fine. But, as will be seen from the judgment of Lord Cranworth in that case, above cited at length, other indications of intention were there relied on as well.

AMERICAN NOTES.

The principal case is cited on the general doctrine of ademption, in *Roberts v. Weatherford*, 10 Alabama, N. S. 75.

No. 4. — In re POLLOCK. POLLOCK *v.* WORRALL.

(C. A. 1885.)

RULE.

Where a legacy appears on the face of the will to be bequeathed (though to a stranger) for a particular purpose, and a subsequent gift is made by the testator for the same purpose, a presumption is raised in favour of ademption.

To constitute a particular purpose within the meaning of the rule, it is not necessary that some special application of the money should be in the testator's view. It is equally a purpose, if the bequest is expressed to be made in fulfilment of some moral obligation recognised by the testator. The presumption, in the ordinary case where the testator is a parent, may be regarded as a particular application of the principle.

In re Pollock. Pollock v. Worrall.

54 L. J. Ch. 489 (s. c. 28 Ch. D. 552).

The nature of the question in the case sufficiently appears from the judgment of Lord Selborne, which was as follows: —

The Lord Chancellor (Earl of Selborne). By will dated the 24th of October, 1874, Frances Pollock bequeathed to the appellant, Julia Louisa Pollock, a niece of her deceased husband John H. Pollock, the sum of £500, adding to the terms of the gift these words, "according to the wish of my late beloved husband."

In July, 1881, she sold out some stock to which she was entitled, and out of the proceeds thereof paid to the appellant the sum of

£300, making contemporaneous entries relative to such payment in a diary which she kept, in one of which it was described as "the legacy," and in another as "being a legacy from" her (the appellant's) "uncle John." There is also evidence of some conversations of the testatrix bearing on this subject with her two brothers (whom she appointed her executors) in June 1880 and afterwards, the import and weight of which, if admissible, I will afterwards consider. I prefer, in the first instance, to consider the case as it would have stood if there had been no such conversations.

The question is, whether the legacy of £500 was adeemed or satisfied, wholly or in part, by the donation of £300. Mr. Justice Pearson, by the order appealed from, has declared that it was adeemed by the gift and acceptance by the plaintiff of that sum. The question whether it was adeemed *pro tanto* only does not appear to have been argued before him; it seems rather to have been assumed that, if adeemed at all, it must have been adeemed altogether.

When a testator gives a legacy to a child, or to any other person towards whom he has taken on himself parental obligations, and afterwards makes a gift or enters into a binding contract in his lifetime in favour of the same legatee, then (unless there be distinctions between the nature and conditions of the two gifts, of a kind not in this case material) there is a presumption *primâ facie* that both gifts were made to fulfil the same natural or moral obligation of providing for the legatee; and, consequently, that the gift *inter vivos* is, either wholly or in part, a substitution for, or an ademption of, the legacy. This presumption has, in some cases of that class (see particularly *Hopwood* v. *Hopwood*, 7 H. L. Cas. 728; 29 L. J. Chanc. 747), been carried to a great length. It was at one time thought that the ademption, in such a case, would be (*primâ facie*) total, although the amount of the subsequent advancement might be less than that of the legacy. But in *Pym* v. *Lockyer*, 5 Myl. & Cr. 29; 10 L. J. Chanc. 153, in which the whole doctrine was carefully examined and explained by Lord Cottenham, that learned Judge corrected this error; and the rule established by *Pym* v. *Lockyer*, *supra*, is, that when the donor is a parent, or *in loco parentis*, and when the amount of the subsequent gift is less than that of the legacy, the mere presumption does not go beyond an ademption *pro tanto*.

The presumptions arising out of the parental relation do not, of course, extend to any case in which the legatee is a stranger to that relation. But numerous authorities have determined that if a legacy appears on the face of the will to be bequeathed (though to a stranger) for a particular purpose, and a subsequent gift appears by proper evidence to have been made for the same purpose, a similar presumption is raised *primâ facie* in favour of ademption. And it is clear from the authorities that evidence of the circumstances under which the subsequent gift was made, including contemporaneous (or substantially contemporaneous) declarations of the donor (whether communicated to the donee or not), may be admissible in such a case.

To constitute a particular purpose within the meaning of that doctrine, it is not, in my opinion, necessary that some special use or application of the money, by or on behalf of the legatee (*e.g.*, for binding him an apprentice, purchasing for him a house, advancing him upon marriage, &c.), should be in the testator's view. It is not less a purpose, as distinguished from a mere motive of spontaneous bounty, if the bequest is expressed to be made in fulfilment of some moral obligation, recognised by the testator, and originating in a definite external cause, though not of a kind which, unless expressed, the law would have recognised or would have presumed to exist. And it appears to me that a case of this kind comes very near, in principle, to the first class of cases in which ademption by a subsequent gift is inferred from the parental relation. The reasonable presumption is the same, — namely, that, as the purpose of both gifts was to fulfil one and the same antecedent obligation or duty, a double fulfilment was (presumably) not intended.

In the present case the purpose of fulfilling the moral obligation recognised by the testatrix as imposed upon her by the communication of the wishes of her late husband (who had left her his whole property) appears clearly enough on the face of the will; and the evidence proves that the subsequent gift was for the same purpose; for she calls it, in the contemporaneous entries in her diary, "a legacy from" the appellant's "uncle John," — that is, from her husband. By this she could not mean anything different; because her husband had not, in fact, given the appellant any legacy, except by expressing the wish to which the will refers.

I agree with Mr. Justice PEARSON that this is a case of ademp-

tion: whether of total ademption, or *pro tanto* only, remains to be considered.

The case being like those in which the parental relation exists, so far as the purpose of both gifts is the fulfilment of an antecedent moral obligation without reference to any special use or application of the money, the principle of Lord COTTENHAM'S decision in *Pym* v. *Lockyer, supra*, seems to me to be *primâ facie* applicable; and, if so, the burden of proof is on those who contend for total ademption. The testatrix has by her will shown that when she made it, she thought that a gift of £500 was not more than enough for the due fulfilment of her acknowledged moral obligation. That measure of her purpose is not *primâ facie* displaced by the mere subsequent advancement of £300; nor by her calling it a "legacy" from her husband, — which expression might be substantially appropriate, in the sense in which she used it, though the £300 might not exhaust the whole bounty intended to come from the same source to the legatee.

There are, however, those conversations which the testatrix had with her brothers in June, 1880, and afterwards, and which (though not contemporaneous with the gift) are so connected with the whole matter as to make them, in my judgment, admissible in evidence to show what, at the time of the conversations, was the intention of the testatrix; though, as against the appellant, not evidence that the communications stated to have passed between her and the testatrix in fact took place.

It appears that in June, 1880, the testatrix told her two brothers that she had asked the appellant (referring to her husband's express wish that she should give her something) whether she would rather "receive £300 down" (or "at once") than a larger sum after her (the testatrix's) death, and that the appellant wrote to say she would prefer it at once. To one of her brothers the testatrix afterwards, at times not definitely fixed, said more to the same effect.

It is not without some degree of doubt that I have come to the conclusion that, although the sum given in July, 1881, is the same which in June, 1880, the testatrix contemplated giving in lieu of the £500 (which would, of course, then have been total ademption), the lapse of more than a year, without the fulfilment of that intention, is enough to prevent any satisfactory inference that the gift made in July, 1881, was intended to be a total ademption of the

legacy of £500. The idea of the testatrix in June, 1880, was to pay down the lesser sum at once; and to do this, not without, but with, the appellant's consent to take it in lieu of the larger amount. It cannot be said to have been the same thing to the appellant whether the £300 was paid in June, 1880, or more than a year afterwards, when the testatrix (a lady whom I suppose to have been advanced in years) would be so much nearer to the end of her life. The interval between the gift and her death exceeded, in point of fact, but by six months only that between the conversations in June, 1880, and the gift. There is no trace of any further communications between the testatrix and the legatee before July, 1881; and the entries in the diary which were actually contemporaneous with the gift do not refer to any such intention as that the lesser sum was to be paid and accepted in lieu of the greater; unless, indeed, this ought to be inferred from the mere use of the words, "the legacy" and "being a legacy from her uncle John," — which I do not think.

My conclusion is, that the presumption in favour of an ademption *pro tanto* only is not sufficiently displaced by this evidence; and therefore that the order of Mr. Justice PEARSON ought to be varied by declaring that the legacy of £500 was adeemed by the gift to the extent of £300 only; and by ordering payment of the difference (£200) to the appellant, with interest from the expiration of one year after the testatrix's death.

As the appellant will, in that view, partially succeed and partially fail, I think there should be no costs of the appeal, but that the costs of the application to Mr. Justice PEARSON should be paid out of the estate.

Lord Justice COTTON concurs in this judgment.

BRETT, M. R. I agree with the inferences of fact drawn in this case.

Order varied.

ENGLISH NOTES.

As a somewhat parallel case, may be cited that of a legacy given of the exact amount of a debt owing to the testator. In such a case the legacy is presumed to be intended to satisfy the debt, and has been held to be adeemed by payment of the debt in the testator's lifetime. *Re Fletcher, Gillings* v. *Fletcher* (1888), 38 Ch. D. 373; 57 L. J. Ch. 1032.

In the case last mentioned, NORTH, J., recognises and distinguishes

the case of *Parkhurst* v. *Howell* (1870), L. R., 6 Ch. 136, where the testator had given his wife a legacy of £200 to be paid within ten days of his decease. During the testator's last illness, at the request of his wife, who did not know the contents of the will, he had given her £200, in order that she might have a sum of money which she could control immediately on his death without the interference of his executors. There (as NORTH, J., observes) it was held that the act of providing the wife with money immediately after the testator's decease was not a satisfaction of the particular purpose of the legacy; but Lord Justice JAMES lays down the rule in these terms: "The rule on this subject, as stated by Mr. Justice WILLIAMS, is, that where the testator stands neither in the natural nor assumed relation of a parent to the legatee, the legacy will be considered as a bounty, and will not be adeemed by a subsequent advancement, unless the legacy is given for a particular purpose, and the testator advances money for the same purpose, or unless the intention otherwise legally appear of making the advancement with a view to ademption. I think this refers to a legacy given for a particular specific purpose, — as, for instance, a legacy given to purchase an advowson for a son, which would be adeemed, or perhaps it would be more correct to say satisfied, by the father afterwards purchasing the advowson for him. Here the legacy does not appear to me to have been given for a particular purpose within the meaning of the rule."

AMERICAN NOTES.

In *Allen* v. *Allen*, 13 South Carolina, 512; 36 Am. Rep. 716, the Court distinguished between the case of a legacy from parent, or one *in loco parentis*, to a child, and one to a stranger or grandchild, holding that ademption is presumed in the former but not in the latter, although the intention to adeem may be established by extrinsic evidence in the latter. The Court said: "The general rule upon the subject of the ademption of legacies is that where a father, or one who has placed himself *in loco parentis*, gives a legacy to a child, or one towards whom he has assumed such a relationship, he is understood to give a portion; and in consequence of the leaning of the Courts against double portions, if the parent afterwards advances a portion to such child, the presumption is that it was intended as a satisfaction of the legacy, either in whole or in part, as the case may be, and the legacy is adeemed *pro tanto*. But in case of a legacy to a stranger (and in this respect even grandchildren are regarded as strangers), no such presumption arises, and unless there is proof that the subsequent advance is intended as a satisfaction of the legacy, there will be no ademption, and the legatee will be entitled to both. *Ex parte Pye*, 18 Ves. 140; *Richardson* v. *Richardson*, Dud. Eq. 184. The question of ademption is a question of intention; as is well said in one of the cases, 'intention is of the very essence of ademption.' Thus where the legacy is from a parent to a child, or from one

who has assumed that relationship to the legatee, the intention to adeem is presumed merely from the relationship: and in the absence of any evidence to the contrary, such presumption is conclusive of the intention. But where no such relationship exists, then no such presumption arises, and the intention becomes a matter of proof, for which purpose extrinsic evidence may be resorted to, not for the purpose of showing an intention to revoke or alter any portion of the will, but as is fully shown in the cases, for the purpose of showing what was the intention of the testator in making the subsequent advance or payment. whether he intended it to operate as a satisfaction of the legacy or as an additional bounty to the legatee. *Shudal* v. *Jekyll*, 2 Atk. 516; *Rosewell* v. *Bennett*, 3 id. 77; *Kirk* v. *Eddowes*, 3 Hare, 509; *Richards* v. *Humphreys*, 15 Pick. 133; *Gilliam* v. *Chancellor*, 43 Miss. 437; 5 Am. Rep. 498. The case of *Richardson* v. *Humphreys* was in some of its aspects very much like the case now under consideration, and will be found full and instructive. In that case a brother, by his will, gave a legacy of $500 to his sister, who was a married woman, and afterwards, at her request, advanced her something over $100 to aid her in the purchase of land, taking her receipt therefor, in which it was stated 'that the money was given in part payment of the dowry given her in his will.' The Court held that this showed that the payment was made on account of the legacy, and that it was therefore adeemed to the extent of the amount paid. In that case the Court used this language: 'Ademption takes effect, not from the act of the legatee in releasing or receiving satisfaction of the legacy, but solely from the will and act of the testator in making such payment or satisfaction or substituting a different act of bounty, which is shown by competent proof to be intended as such payment, satisfaction, or substitute.'"

In *Richardson* v. *Eveland*, 126 Illinois, 37; 1 Lawyers' Annotated Reports, 203, with notes, it was laid down that "in case the legacy is to a stranger, the intention of the testator to satisfy the legacy by a subsequent gift, unless the legacy and gift be given for the same specific purpose, must be expressed. The question there arises upon the express words of the donor, unaided by any presumption in favour of the satisfaction of the prior legacy."

This distinction is clearly adopted by Mr. Pomeroy (1 Eq. Jur. § 562), citing the principal case, and *Sims* v. *Sims*, 10 New Jersey Equity, 158; *Langdon* v. *Astor's Ex'rs*, 16 New York, 9; *Williams' Appeal*, 73 Penn. St. 249; *Roberts* v. *Weatherford*, 10 Alabama, n. s. 72; *Jones* v. *Mason*, 5 Randolph (Virginia), 577; 16 Am. Dec. 761.

Mr. Pomeroy also cites the principal case with special attention (1 Eq. Jur. p. 741), on the point of moral obligation other than parental, but cites no American authorities in line with it on that point.

In *Gilliam* v. *Chancellor*, 43 Mississippi, 137; 5 Am. Rep. 498, a husband died, leaving an unsatisfied nuptial contract in favour of his wife, and a will declaring it to be his wish that his executors should "see that his contracts are fulfilled, and that his wife have a dowry" of a specified amount. It was held that parol evidence was admissible to show the situation of the testator and of his property, in order to ascertain his intention to adeem, the will not being explicit, and whether ademption should be in full or *pro tanto*. The

Court said: "The general presumption is against double portions. Where the chief object appears to be to make a provision, and that object has been effected in one instrument, it should not be suspected that a like provision in a second instrument was intended as a repetition of the first. If the benefit to the donee be different in species, the presumption of satisfaction will not arise." Examining many English authorities, and concluding that their doctrine has "been fully sanctioned by the American courts."

In *Taylor* v. *Tolen*, 38 New Jersey Equity, 91, a legacy of $2500 to pay a debt on a chapel, which amounted to $2100, and which was afterwards paid by the testator, was held thus adeemed. The same doctrine is declared by the New York Supreme Court, in *Hine* v. *Hine*, 39 Barbour, 510.

ADMINISTRATION.

SECTION I. — *Jurisdiction and Practice of the Courts.*

No. 1. — ENOHIN *v.* WYLIE.

(H. L. 1862.)

RULE

THE person entitled to the grant of the personal estate of a deceased person is determined by the law, and ought, as a general rule, primarily to be determined by the Courts of the country where the deceased was domiciled at the time of his death. Where such determination has been made by the Court of the domicil, it is the duty of the Court in any other country where the deceased left per-

sonal effects, to make a grant ancillary to, and in conformity with, that made by the Court of the domicil.

The copy of a foreign will contained in the ancillary probate granted in this country is (in a Court of construction) the only admissible evidence of the contents of the will.

Enohin v. Wylie.

10 H. L. C. 1 (s. c. 31 L. J. Ch. 402).

In 1854, Sir J. Wylie, born in Scotland, but who had for many years been domiciled in Russia, was one of the court physicians there, and had been created by the Prince Regent, at the desire of the Emperor Alexander, an English baronet, made his will in the Russian form and in the Russian language, in which were to be found the following passages: "I dispose of all my moveable and immoveable property, honestly acquired by myself, in the following manner." He then described house property in St. Petersburg, his household furniture, &c., there, and farms and country-houses in the neighbourhood, all which with the peasants, "excepting only those of my serfs who, for their faithful and zealous services to my person, shall be set free," he desired to be sold. "The money proceeds of all the above, as also the whole of my capital which shall remain with me after my death in ready money, and in bank billets belonging to me, shall be divided into ten equal parts; two of these I destine to be employed in arranging a decent funeral and erecting a monument to me, and also in acts of charity in my commemoration, at the discretion of the executors. Of the remaining eight parts, I intend afterwards making a detailed disposal; but should I, from any cause whatever, not dispose of all the capital assigned for these eight parts, or of any parts or fractions thereof, the sum that would remain then undistributed I humbly lay at the feet of His Imperial Majesty," to be employed in commemoration of the Emperors Paul and Alexander, and the Grand Duke Michael, "for some establishment of public or charitable benefit which should bear my name." He then went on to say, "As executors of this my testament, and of the will which shall hereafter follow as a supplement to this testament, I name" the appellants, "with the condition that my property shall remain until its final sale under the administration of the titular counsellor

Ewfanôff" (one of the three executors named), "to whom I grant full power to set free those of my peasants who are now, and who shall remain faithfully and zealously in my service at the time of my death; . . . for which purpose, I have given to Ewfanôff my separate instructions. Therefore, any other disposal made previous to this one concerning my moveable and immoveable property shall be considered as null and void. . . . And as all my moveable and immoveable property is mine own, and honestly acquired by myself, so nobody has a right to interfere with my dispositions and contest the same under any pretence whatever, and likewise no one has a right to interfere with or contest the dispositions and proceedings of my executors."

The testator died a bachelor at St. Petersburg, on the 22nd February, 1854, possessed of a considerable estate in Russia, and also entitled to £67,864 three per cent. consolidated bank annuities.

Executors were duly appointed in Russia. In February, 1855, Walter Wylie, a brother of the testator, obtained from the Prerogative Court at Canterbury, letters of administration to the estate and effects of the deceased. On the 15 March, 1855, Anne Wylie (a daughter of another brother, but who was then dead) filed a bill in Chancery against Walter Wylie, alleging herself to be entitled, under the law of Scotland, or England, or Russia, as one of the next of kin of the deceased, to a share of his effects, but that Walter Wylie alleged there were difficulties as to the mode in which the estate ought to be distributed, and that he desired the direction of the Court of Chancery thereon, and she prayed for an account. On the 9th June, 1855, Vice Chancellor Wood made an order directing inquiries as to the domicile of the testator, and ordering accounts and payment into the Bank to the credit of the Accountant-General in the cause. In the course of making these inquiries it was discovered that the testator had made a will, and that executors had been appointed. The Chief Clerk made his certificate, and, on a hearing before the Vice Chancellor, notice of the suit was ordered to be given to the appellants as executors. On the 3rd November, 1856, the appellants instituted proceedings in the Prerogative Court of Canterbury for revoking the letters of administration granted to Walter Wylie.[1] By a decree of the 20th

[1] Evidence was taken as to the translation of the will, and as to the law of Russia. It was proved that the words "bank billets" described securities given by Russian banks, when money was deposited with them, to return such moneys.

No. 1. — Enohin v. Wylie.

April, 1858, the letters of administration granted to W. Wylie were revoked, and probate of the will was granted to the appellants, the Judge of the Probate Court intimating his opinion that, on the true construction of the will, all the testator's property in England, as well as in Russia, had been made the subject of disposition, and passed to the executors. On the 15th June, 1858, Anne Wylie filed a bill against the appellants and Walter Wylie, alleging that the testator died intestate as to all his property not within the Empire of Russia, and that the expression "bank billets," in his will, referred exclusively to money deposited in the Russian banks; and praying for an account and administration of his English property, and for general relief. This construction was disputed by the executors, affidavits were filed on both sides, and there was much contest whether the words in the English translation of the will, "capital in ready money," ought not to be "ready capital" or "capital in readiness." The cause was heard before Vice Chancellor Wood; and his Honor, by a decree, dated 17th December, 1859, declared that the testator died intestate as to his property in the public funds of Great Britain, and accounts were directed. On appeal to the Lord Justices, this decree was, on the 17th February, 1860, affirmed.[1] These decrees were the subjects of appeal.

Sir H. Cairns and Mr. Karslake, for the appellants.

interest thereon becoming due after six months deposit. The word "capital" was stated to have as large a meaning in Russia as in England. The words "ready money" were a proper translation of the original, and had the same meaning as in English. As to the law, it was stated on affidavit by Russian advocates, that "executors appointed by wills are bound to fulfil the contents of the same exactly, and the laws of Russia do not confer on them any other powers than in regard to the property mentioned in the disposing part of the will. Consequently, any residue of property not disposed of by the will must be regulated according to the law regulating intestate succession."

"That the law of the Russian Empire authorises the carrying of wills into execution, either by the executors or heirs according to the wish of the testator. The testator having expressed his wish by the appointment of executors, they are, according to the Russian law, perfectly justified in claiming and assuming administration of all the testator's property whatsoever in nature, and wheresoever situated at the time of the testator's death, whether in Russia, England, or any other countries, in administering such property, and requiring the delivery thereof to them for their management and administration conformably to the dispositions of the testator." Some of the Russian witnesses expressed an opinion that the general bequest in the will would pass all property whatever, including the stock in the English funds, while others stated that "as he had specified parts of his property and declared what was to be done with those parts, he must be taken to have died absolutely intestate as regards the parts not specified, particularly as to the money invested in British funds."

[1] 1 De G. F. & Jo. 410. See the case in the Probate Court. 1 Swa. & Tr. 118.

The whole property of the testator here passed to the appellants on the trusts of the will. A recital by the testator that he has disposed of all his moveable and immoveable property in a particular way, is as effective for such a purpose as the use of particular words of disposition. The appellants here have received the grant of probate, and that is decisive of their rights as executors in this country. It is especially so since the point raised in the Probate Court was that the will only affected property in Russia. That contention was answered by the grant of probate, as well as by the declared opinion of the Judge. It was, therefore, *res judicata*, and that by the Court, which alone had jurisdiction in the matter, before the case reached the Court of Chancery, and ought there to have been so treated. Then, as executors, the appellants were entitled to take the whole property wherever situate, and the will expressly gave it to them free from contest or control by anybody else. The case of *Ellcock* v. *Mapp*, 3 H. L. Cas. 492, does not impeach the claim of the appellants. There it was decided that the devise of all the estates, real and personal, to the executor, did not vest in him a beneficial interest in the residue, but that was because the devise was expressly made "to and for the following uses," &c. The executor, therefore, only took the property as a trustee, and had no absolute power of disposal over it as he has here. The mode of construing a will like the present is stated in *Waite* v. *Combes*, 5 De G. & Sm. 676, when the general context of the will gave to the word "moneys" a meaning equivalent to that of the whole personal estate. The expression here, "all my property, moveable and immoveable," is much stronger, and includes everything. Even an inaccurate recital is sufficient to create a gift. *Jordan* v. *Fortescue*, 10 Beav. 259. In *Bridges* v. *Bridges*, Vin. Abr. Devise, O. *b.* 295 pl. 13; Roper on Legacies, 4 edit. 288, a description of what stocks the residue consisted of was not allowed to restrict the gift of the residue to the three stocks specially described, but passed the whole residuary personal estate; and in *Chalmers* v. *Storil*, 2 Ves. & B 222, the MASTER OF THE ROLLS adopted and acted on this decision. In *Cambridge* v. *Rous*, 8 Ves. 12, a gift of residuary property was held to pass all property not specifically disposed of, and in *Boys* v. *Morgan*, 3 Myl. & Cr. 661, the testator merely said, "I guess there will be found sufficient in my banker's hands to defray debts and expenses, which I hereby desire E. M. to do, and to keep the residue for her own use and

pleasure;" and this was held to be a gift, not merely of the residue of what was in the banker's hands, but for the general residue of the personal estate. Here the case is stronger, for the will contains words sufficient to pass all the personal estate, including this very English stock. "The whole of my capital" are words sufficient for that purpose, and are not cut down by the words which follow. The words "ready money" have been held to pass a balance at a banker's, *Parker* v. *Marchant*, 1 Yo. & Co. Ch. Cas. 290; affirmed 1 Phill. 356; and also money in a savings' bank, *Re Powell's trusts*, John. 49; and the principle of construction in these cases applies, not merely to the terms of the will, but to the surrounding circumstances, and the state of the parties. *Pasmore* v. *Huggins*, 21 Beav. 103.

The Russian law is not different in this respect from the English. Indeed, it is even more favourable for the appellants, for it does not recognise some of our distinctions as to different sorts of property. Now, it is clear that this will, made in Russia, which was the place of domicil of the testator at the time of his death, ought to be construed by the Russian law.

Mr. Rolt and Mr. W. M. James (Mr. Daniel, Mr. T. H. Hall, and Mr. Neish were with them) for the various respondents: —

As to the property in the English funds, there is an intestacy.

It may be admitted that the appellants are rightfully entitled to probate as the executors of the deceased. And there is no doubt that as to the matters over which the will gave them authority it was the desire of the testator that their conduct should not be questioned. But the last clause in the will did not enlarge the previous bequests, and neither by implication nor by express terms was any authority given to them over the English funds.

[The Lord Chancellor. A man makes a will according to the law of the country in which he is domiciled; he has some personal property in a foreign country; that foreign country has the duty of granting an ancillary administration, which ought to be granted to those entitled by the law of the country of the domicil. Can the court of this foreign country constitute itself into a court of construction? When it has granted the ancillary administration, is it not *functus officio?*] Not necessarily, and certainly not in this case; for these executors having thought fit to rest their case on the simple question whether the whole of the property was disposed of by the will away from next of kin, are not entitled now to raise any

other question. Then, supposing that the question of construction may be discussed, it is clear that the decision of the Vice Chancellor was right. The judgment of the Court of Probate on the construction was in itself erroneous, and, at all events, it had no authority to bind the Court of Chancery. The Court of Probate merely determines (though that itself may afterwards be disputed in the Court of Chancery) that a paper is a will, and that certain gentlemen named in it are executors; but it cannot decide on the construction of the instrument. [The Lord Chancellor mentioned *Barrs* v. *Jackson*, 1 Phill. 582.] The Court of Probate grants administration to the next of kin, if there is no executor; if there is an executor, it is not bound to do so, but may act according to its judgment and discretion in the particular case, and one consideration to influence its decision is, who is entitled to the residue. [The Lord Chancellor. The spiritual court has authority to distribute without granting administration. Does not the finality of its decision rest on that ground?] The mere grant of administration by no means concludes the question of construction; the Court of Chancery still has the right to determine that. Now, on the construction it is clear that there are no words of gift of residue to the executors; there are merely words appointing them to their office. They have thus the right to get the property into their hands, but that is merely for the purpose of administering it according to the intentions of the testator. That is the limit of their authority, and the decision in the Court of Probate is not binding on the Court of Chancery. *Hughes* v. *Turner*, 4 Hagg. Ec. Rep. 30; 3 My. & K. 666, is an instance of that. [Lord Chelmsford. In that case it was necessary for the Court of Chancery to decide whether the will was in due execution of a power.] And by the 23rd section of the Probate Act, 20 & 21 Vict. c. 77, it is clear that the Probate Court can only determine who may receive grants of probate, but not what are the rights of the parties under the will. The decision in this case made in the Probate Court cannot affect the rights of those parties who have since become parties to the suit in Chancery, but were not before the Probate Court at all.

Then as to the translation of the will: that does not bind the respondents.

[The Lord Chancellor. We think the copy of the will contained in the Probate is the only admissible evidence of the will.]

Then as to the construction. Give the largest meaning to the word "capital," still it is restricted by the remaining words "the whole of my property in ready money." But the word "capital" in itself would not carry everything: it would not carry a library or diamonds. Then, of course, with the words "ready money" following it, it cannot be made to include British funds. The words "billets in the bank" are appropriate enough in Russia, and have a particular meaning there, but they are utterly inapplicable to property in the funds here. Nay, more, "Capital with me" would not here carry property in the funds, though the testator had at the time the transfer ticket in his own pocket. It is true that ready money has been held to carry a balance at a banker's (*Parker* v. *Marchant*, 1 Yo. & Ch. c. 290; 1 Phill. 356), but that is because the banker only holds the money on condition of paying it on demand. In *Sadler* v. *Turner*, 8 Ves. 617, there was a declaration of an intention to dispose of "my temporal estate;" but even after that, the bequest of the residue of my "fortune in India" was held not to convey the testator's property in England, though part of it had been remitted here between the time of making the will and of the death. The case of *Cambridge* v. *Rous, supra*, does not affect the present, for there the enumeration of particulars was defective, and the Court merely supplied the deficiency, for it was clear that the testator there supposed he had disposed of everything. Here, on the contrary, the testator distinctly speaks of an intention to supplement this testamentary paper by a formal will. He never executed that will, and thus he left no declaration of his will with respect to the property in England. What he has disposed of is mentioned in a clear and specific manner; what is not so mentioned is undisposed of, and whether present or not to his mind when he made the will, cannot by implication be introduced into the will, for that would be to make a will for the testator. [The Lord Chancellor. The testator gives his executors unlimited power; he has expressed his intention to deal with all his "moveable and immoveable property," and the Probate Court has found that the executors take all his property of whatever kind. What is the effect of all this in the present state of the law?] In *Juler* v. *Juler*, 29 Beav. 34; see also *Saltmarsh* v. *Barrett*, Id. 474, the words were: "I make H. my whole and sole executor of all the various properties I may be in possession of at my death;" and under the 11 Geo. IV. and 1 Will. IV. c. 40, he was held to be a trustee of the residue for the

next of kin. The executor is bound to prove from the testamentary instrument a distinct intention that he is to take beneficially. [The Lord Chancellor. Is not the declaration that no one shall contest the decision of the executors as to the disposal of the property equivalent to giving them an absolute power of disposing of it, and do not these words in this will affect the whole of the property?] No, it is the disposition by the executors *quâ* executors, — that is, the mere management of it. [The Lord Chancellor. He uses the same words as to not contesting the dispositions of the executors. It cannot mean mere management in his own case, and therefore not in theirs.] But he uses the word "proceedings" with regard to the executors: and all that he meant to say was, that he had the fullest confidence in their rightful discharge of the duties of their fiduciary office; still, their discharge of those duties may be questioned. *Gibbons* v. *Dawley*, 2 Cas. in Ch. 198. The very vagueness of the words is itself a reason in favour of the claim of the next of kin. *Fowler* v. *Garlike*, 1 Russ. & Myl. 232.

Sir H. Cairns replied.

April 3. The Lord Chancellor (Lord Westbury). In this case the question that has been argued at the bar of your Lordships' House is as to the true interpretation and construction of the will of Sir James Wylie. Sir James Wylie was a gentleman resident in St. Petersburg for more than fifty years, down to and at the time of his decease. He was the court physician there, and was beyond all question domiciled in Russia at the time of his death. His will was made in the Russian language, and duly authenticated by the executors who were named in it, in the proper court in Russia. He left considerable property in Russia, and also property in the £3 per cent. consolidated funds in England.

It is necessary, therefore, to ascertain, and to define with accuracy, how it happens that a question of this nature, namely, that the construction of the will of a testator dying domiciled abroad upon a matter relating to personal estate, comes to be discussed in the Courts of this country. I am the more desirous of doing so, because, at first sight, this case appears to be of an anomalous character; and I think it important to define very accurately the grounds upon which I shall submit to your Lordships that your decision ought to be founded, in order to prevent the possibility of its being supposed that there has been in the proceedings in the Courts of this country any departure from acknowledged and established rules.

I hold it to be now put, beyond all possibility of question, that the administration of the personal estate of a deceased person belongs to the court of the country where the deceased was domiciled at his death. All questions of testacy or intestacy belong to the Judge of the domicil. It is the right and duty of that Judge to constitute the personal representative of the deceased. To the Court of the domicil belongs the interpretation and construction of the will of the testator. To determine who are the next of kin or heirs of the personal estate of the testator is the prerogative of the Judge of the domicil. In short, the Court of the domicil is the *forum concursus* to which the legatees under the will of a testator, or the parties entitled to the distribution of the estate of an intestate, are required to resort.

To these general rules must be added a remark on the great danger and inexpediency of the Court of a foreign country taking upon itself the task of interpreting the will of a testator, which is written, not in the language of that country, but in the language of the country of the domicil. I entirely adopt upon this point the opinion of Lord LYNDHURST in the case of *Trotter* v. *Trotter*, 4 Bligh. N. S. 502; 3 Wils. & Sh. 407.

From these general rules I should have derived, but for the conduct of the parties, the following conclusions, as applicable to the present case: first, that when the Court of Probate was satisfied that the testator died domiciled in Russia, and that his will containing a general appointment of executors had been (as it was) duly authenticated by those executors in the proper Court in Russia, it was the duty of the Probate Court in this country at once to revoke the former letters of administration which had been granted, and to clothe the Russian executors with ancillary letters of probate to enable them to get possession of that personal estate, which (in fact, though not in law) was locally situate in England.

In my opinion the Probate Court, as to those purposes, had nothing to do with the construction of the will. That Court, however, assumed an original jurisdiction, and having put a construction upon the will that it included and passed the English funded property of the testator, on that ground decreed probate of the will to be granted to the Russian executors. The appellants, the executors, being thus fully constituted the representatives of the testator, it was, in my opinion, the duty of the Court of Chancery to

transfer to them the funded property of the testator which the Probate Court had taken out of the hands of the former administrators. The Court of Chancery had no more right than the Court of Probate to exercise its jurisdiction in putting a construction on the will of the testator, and making a partial administration of his estate in this country. It, however, did so, and arrived at a conclusion as to the true construction of the will which was the very opposite of that which had been determined by the Court of Probate to be the true construction.

Now, the utmost confusion must arise, if, when a testator dies domiciled in one country, the Courts of every other country in which he has personal property should assume the right, first, of declaring who is the personal representative, and next, of interpreting the will and distributing the personal estate situate within its jurisdiction according to that interpretation. An Englishman dying domiciled in London may have personal property in France, Spain, New York, Belgium, and Russia, and if the course pursued by the Court of Probate and the Court of Chancery in the present case should be adopted by the Courts of those several countries, there might be as many different personal representatives of the deceased, and as many varying interpretations of his will, as there are countries in which he was possessed of personal property.

It is unnecessary to dwell upon the evils which would result from this conflict of jurisdictions. It was to prevent them that the law of the domicil was introduced and adopted by civilized nations. I am therefore of opinion that the executors might have excepted to the jurisdiction of the Court of Chancery as a Court of construction and administration. They might have insisted that it was the duty of the Court to hand over to the executors the clear English personal estate, and to remit the next of kin to the Court of the domicil of the testator. But the executors did not do so — *cuique competit renunciare juri pro se introducto.* They made no objection to the jurisdiction of the Court of Chancery. On the contrary, they condescended with the next of kin on the question of construction, and, without objection, entered with them into the arena of the Court of Chancery, for the purpose of contesting the true interpretation and effect of the will. Both sides agreed that the will must be construed according to Russian law, and both sides adduced evidence of what that law was, for the purpose of assisting the Court in the work of interpretation.

When the Vice Chancellor, Wood, had arrived at a construction adverse to the executors, they presented a petition of rehearing to the Court of Appeal in Chancery, and raised no other question than that of construction. And they have now come with a final appeal to your Lordships, and by their petition of appeal and printed case they complain of the decree of the Court below, "Because, upon the true and just construction of the will of the said Sir James Wylie, Bart., the beneficial interest in his property in the public funds of Great Britain was not undisposed of, but on the contrary passed to the appellants upon the trusts of the will." I am therefore of opinion that the appellants have, by their conduct and assent, clothed the Court of Chancery with full authority and jurisdiction to construe and declare the true interpretation of this will, and that the only question for your Lordships to determine is the accuracy of that interpretation.

Now the question remains as to the effect of the appointment of an executor by the Court in Russia, and whether undisposed-of personal property vests in the executor beneficially, or is held by him upon trusts for the next of kin of the testator.

Upon that point both sides have entered into evidence, and I think that, upon an examination of that evidence, your Lordships will agree with me in the conclusion, that there is, in reality, no material difference or discrepancy in the views of the advocates and the professional gentlemen who have been examined on either side. The result which I deduce from the testimony which they have given is this: that although a general appointment of executors comprehends the universal personal estate of a testator, yet that the estate vests in the executor for the purposes only of the disposition made by the will, and that if any part of the personal estate is undisposed of by the will, the executor holds that property in trust for the next of kin of the testator.

There is no doubt here who are the next of kin according to the law of Russia. That has been ascertained and proved by the evidence. [His Lordship referred to the evidence. See *ante*, p. 59 n.]

The question, therefore, is reduced to the interpretation of the will of the testator. That is a point which has been argued with great zeal and ability at the bar of your Lordships' House. I must confess that for some time my mind fluctuated, principally with regard to the interpretation that ought to be put upon the concluding portion of the passage where he says "as all my moveable and

immoveable property is mine own, and honestly acquired by myself, so nobody has a right to interfere with my dispositions and contest the same under any pretence whatever; and likewise no one has a right to interfere with or contest the dispositions and proceedings of my executors." But upon full consideration of that particular part in connection with the other portions of the will, I think the words that I have read must be regarded as amounting to no more than an emphatic expression and declaration of the plenary power which he considered and desired should exist in the person holding the fiduciary office of executor. I do not consider that these words involve any disposition of that part of the personal estate of the testator consisting of the English property, unless the English property is found to be comprehended within the words of the description contained in the prior part of the will.

Now, my Lords, upon an examination of the words of the disposition in the prior part of the will, I entirely accede to the view that has been taken in the courts below, that that description, for the purposes of disposition, does not extend beyond the real and personal property locally situated in Russia. I am compelled, therefore, to adopt the conclusion which has been arrived at by the Vice Chancellor, and also by the Lords Justices, concurring, as I do entirely, in the observation made by Lord Justice TURNER, that the property of the testator which he possessed in the English funds is not described in any part of this will for the purposes of disposition; and that, in fact, the testator died intestate with regard to that portion of his property.

My Lords, being particularly anxious that it should be known in what manner a question of this kind has come within the jurisdiction of the courts below, and ultimately within the jurisdiction of this House, I have entered into an explanation of the facts and history of this case, and I have now no hesitation in advising your Lordships to affirm the decision which has been given.

LORD CRANWORTH. My Lords, the question in this case is, as to the mode in which the Court of Chancery ought to deal with a large sum of consols, which was standing in the name of Sir James Wylie at his death, and to which he was absolutely entitled for his own sole use and benefit. He was a British subject; but he had long been domiciled in Russia, where he died, a bachelor, in 1854. The rules of law applicable to such a case are, as I conceive, well established; personal property in this country, belonging to a for-

eigner, or to a British subject domiciled abroad, can only be obtained, in the event of his death, through the medium of a representative in this country. If he has died intestate, then administration will be granted here, limited to the personal estate in this country. If he has left a will, valid by the law of his domicil, and has thereby appointed executors, then probate of that will must be obtained here. There may be cases of a more special nature, but for our present purpose they may be disregarded. In every case the succession to the property will be regulated, not according to the law of this country, but to that of the domicil.

Where there is such a will, and probate of it has been obtained here, the duty of the Court in administering the property, supposing a suit to be instituted for its administration, is to ascertain who, by the law of the domicil, are entitled under the will, and, that being ascertained, to distribute the property accordingly. The duty of administration is to be discharged by the courts of this country; though in the performance of that duty they will be guided by the law of the domicil. This was the mode in which the law was laid down by Lord COTTENHAM in this House, in the case of *Preston* v *Lord Melville*, 8 Cl. & F. 1.

Applying these well-established rules to the present case, we have to deal with a will, valid by the law of the domicil, appointing executors generally, and proved by them in our Court of Probate. By virtue of the probate, they, as a matter of course, obtained possession of the consols in question. The duty of the Court is to take care that they distribute this large fund according to the provisions of the will; all debts having been paid.

In the first place, therefore, it is necessary to construe the will, to ascertain whether by its terms fairly interpreted, according to the construction that would be put upon them in Russia, any specific disposition is made of this sum of consols. I see nothing in this case which suggests the conclusion that there is anything in the laws of Russia leading to an interpretation different from that which the will would receive in this country.

It was argued that this sum of consols might fairly be understood as included in the description of "the whole of my capital which shall remain with me after my death in ready money and in bank billets belonging to me." But I cannot accede to that argument. It may be, that if the testator had given the whole of his capital which should remain with him after his death,

that word "capital" would have been wide enough to include his property in the British funds. But what he gives is, not the whole of his capital, but the whole of his capital "in ready money and in bank billets." Now, a sum of consols cannot be described as ready money, and the evidence shows clearly that bank billets are a sort of bank notes well known in Russia, which circulate as cash, but which carry interest after a lapse of six months. It is impossible to hold that they could have been understood as including a sum of consols in this country.

But it was contended that whatever might have been the meaning of the words "capital in ready money and in bank billets," if they had stood alone, yet here the context shows that the testator used them in a wider sense, — in a sense which would comprehend all his moveable property. He begins his will by saying, "I make this will, by which, in case of my death, I dispose of all my moveable and immoveable property." This, it was argued, shows that he must have understood everything to be included under the word "capital;" and so that the mention of ready money and bank billets could not have been intended to qualify the generality of the word "capital," but merely to express, by way of enumeration, some of the matters of which the capital consisted. I do not feel the force of this argument. The words relied on show, indeed, an intention to dispose of everything; but if there are no words to be found in the will, which, reasonably interpreted, include a particular species of property, the prefatory words can only be considered as indicating an intention which the testator has not fulfilled. This remark applies with peculiar force to the present will, to which the testator expressly states he intended to make a further will by way of supplement. I cannot, therefore, attribute to these prefatory words the effect contended for. It was then further argued that our Court of Probate, by admitting the executors to a general probate of the whole will, has established conclusively that the whole personal estate, including, of course, the consols, became vested in the executors. And then it was contended that the testator, by the concluding passage of his will, has implicitly given to them a beneficial interest in the whole, by forbidding any one to question their disposition of it. But, in the first place, I do not read the passage in question in the latter part of the will as meaning more than an expression of the testator's opinion and feeling that no one had any right to complain of the

dispositions he had made, or of his executors for carrying them into execution, — to complain, that is, of his moral right. But further, I think it clear from the evidence of the Russian advocates on both sides that there is no principle of the Russian law which gives any beneficial interest to executors. The advocates consulted by the respondents state expressly that executors are bound to fulfil the directions of the will exactly, and that they have no other powers than in regard to the property mentioned in the disposing part of the will, and, consequently, that any residue not disposed of must be regulated by the laws relating to intestacy. The advocates consulted by the appellants do not express any opinion at variance with this; for though they consider that the consols ought to be delivered to the executors equally with the testator's other property, that opinion is expressly founded on the assumption that they were included in the bequest of the "capital." There is nothing in the opinion at variance with the doctrine that executors take the property put under their control merely for the purpose of executing the testator's directions concerning it, and so that if there are no such directions it must be distributed as on an intestacy.

If this had been the will of an English subject domiciled in England, I should, without hesitation, have come to the conclusion that the testator had died intestate as to the fund in dispute; and the evidence to which I have referred satisfies me that on this point there is no difference between the law of Russia and that of England.

It follows that the property goes to those who are entitled to it by the laws of Russia as on intestacy. I think that the decree rightly declared that the testator died intestate as to his beneficial interest in all his property in the public funds of Great Britain, and properly directed the inquiries consequent on that declaration, and therefore that the decree below was right, and that the appeal ought to be dismissed.

Lord CHELMSFORD. The appellants in their argument addressed to your Lordships, contended, in the first place, that the decree appealed from is erroneous, because the question has been determined in their favour by the Court of Probate having granted probate to them. They say that the respondents, in that Court, put their case on the ground that there was no gift of the stock in the English funds to the executors, but an intestacy as to this

property, and that the Judge, by granting probate, must have decided that there was a gift of the stock to the executors. There can be no doubt that the respondents founded their opposition to the grant of probate upon what they alleged to be the law of Russia, that executors have nothing to do with property undisposed of by the will, which must be regulated according to the law of intestate succession without their interference. The appellants, on their part, insisted that the stock was comprised in the will, and ought to be delivered equally with other property to the executors "for employment conformably with the destination at the wish of the testator." The Judge was, therefore, invited by both parties to assume the office of a court of construction, but they could not confer upon him a jurisdiction which did not belong to him. His sole duty was to ascertain whether the persons seeking to revoke the letters of administration granted to Walter Wylie and to obtain probate of the will were universal or limited executors. That point being settled, determined the right to probate. The appellants further insisted that, the probate having given the executors the right to receive the stock in the English funds, the Court of Chancery ought to have ordered it to be transferred to them to be disposed of according to the directions of the Russian tribunals. But the fund is within the jurisdiction of the Court; the rights of the parties according to the law of the domicil (assuming an intestacy) have been ascertained; the next of kin are for the most part in this country; and why, under these circumstances, the property should be remitted to the forum of the domicil in order that it should be sent back again to be distributed, and why the Court should be incompetent to act effectively and finally in the suit which has been instituted, by decreeing a distribution amongst the several persons entitled, and transmitting to Russia the shares of the next of kin resident there, I am unable to comprehend.

The only real question in the case is, whether there is an intestacy as to the stock, or whether it passed by the will. This question must be decided by the intention of the testator, to be gathered from the language he has employed to express it. From the introductory words in the will there seems to be little reason to doubt that the testator had made up his mind to dispose of all his property, moveable and immoveable. In order to effectuate this object, a court of construction would be warranted in giving an extended

meaning to his words, so as to make them embrace property which ordinarily would not pass under the specific description used. But unless we can arrive, with something like moral certainty, at the conclusion that the testator meant to employ his words in a sense different from that which they commonly import, we are not at liberty to attribute to them another meaning, merely for the purpose of satisfying a general intention expressed at the outset of his will, and which he might afterwards have omitted to carry out in the subsequent dispositions. It does not appear to me that much stress ought to be laid upon the passages in the latter part of the will, in one of which the testator speaks of "any other disposal made previously concerning his moveable and immoveable property," which is merely a clause of revocation of any former dispositions, of which we know nothing; and in the other, beginning, "As all my moveable and immoveable property is my own and honestly acquired," where he protests against the right of any one to interfere with the disposal of his property at his own free will and pleasure. Nor do I think that the words, "No one has a right to interfere with or contest the dispositions and proceedings of my executors," in this clause which begins with a reference to *all* his moveable and immoveable property, can (as has been suggested) be construed as a gift of the whole property to the executors, without at the same time assuming that the whole property previously passed. The executors have duties to perform with respect to the property which is unquestionably contained in the will, and the words, their "dispositions and proceedings" would be satisfied, whether the whole or not the whole of the property is disposed of.

We come, then, to the few words in the will upon which the question arises. We must, of course, bring to their interpretation the persuasion that the testator had begun his will with an intention of disposing of everything which he possessed. If, then, we had found in the will a description of a portion of his property as "ready money," without more, we might, in deference to the evident intention of the testator to make a general disposition of all his property, have followed the decision of Vice Chancellor PARKER in *Waite* v. *Combes*, and given a latitude of meaning to the words, to make them comprehend stock in the English funds. But when we find a bequest expressed in these terms: "The whole of my capital which shall remain with me after my death in ready money," I do not see how it is possible, without doing the greatest

violence to language, to give them the enlarged meaning which has been contended for. Admitting to the fullest extent the duty of a court of construction to find out the intention of a testator, and to give effect to it when discovered, and not doubting that in this case the testator had the general intention attributed to him, I am compelled to say that his object has been frustrated by his use of language of so specific a character as to be incapable of any other meaning than that which the words themselves convey.

For these reasons I think the decree appealed from ought to be affirmed.

Decrees affirmed, and appeal dismissed, with costs.

ENGLISH NOTES.

The principle that the beneficial right to the personal estate follows the law of the domicil, was recognized as to England before the middle of the 18th century in *Pipon* v. *Pipon* (1744), Amb. 25; and, as to Scotland, in the case of *Balfour* v. *Scott* (1793), by a decision of the House of Lords, to which Lord Loughborough, L. C., Lord Mansfield, L. C. J., and Lord Thurlow were parties. The Lords in that case, by the order of the House, expressly declared that "Henrietta Scott is entitled to claim her distributive share in the whole personal estate of her said uncle, David Scott of Scotstarvet in Scotland, without collating his heritable estate, to which she succeeded as heir in so much as she claims the said share of the said personal estate by the law of England whereof the said David had his domicil at the time of his death" (Journals of House of Lords, Vol. 39 for 11th April, 1793). And as an indirect consequence of the rule, and in broad contrast to the rule of descent of English land, an elastic meaning has been attached to the word *next of kin* in the English statute of distributions, so that the Court of Appeal by a majority, *In re Goodman's Trust* (1881), 17 Ch. D. 266; 50 L. J. Ch. 425, allowed the claim of a child legitimated *per subsequens matrimonium* according to the law of domicil of the parents, through whom she traced title to a share of personal estate under the statute.

In certain questions other than those of beneficial succession, personal estate is looked upon as having a locality. For example, for the purposes of succession, duty upon a fund invested and held in England under the trusts of a will of a person who died domiciled elsewhere. *Att.-Gen.* v. *Campbell* (1872), L. R., 5 H. L. 524; 41 L. J. Ch. 611. So, as to income tax, *Colquhoun* v. *Brooks* (1889), 14 App. Cas. 493; 59 L. J. Q. B. 53, and as to probate duty, *Commissioners of Stamps* v.

Hope (1891), App. Cas. 476; 60 L. J. P. C. 44 (P. C. on appeal from New South Wales). So, too, when the representative according to the *lex domicilii* of the deceased seeks to recover a debt due to the deceased in a different country from that in which the deceased was domiciled, he will have to clothe himself with the character of representative according to the law of the country in which the debtor resides. *Pipon* v. *Pipon* (1743), Amb. 25, 27; *Swift* v. *Swift* (1810), 1 Ball & B. 326. This principle is recognised and confirmed by the Statute 47 & 48 Vict. c. 62, § 11 (as amended by 52 & 53 Vict. c. 42, § 19), except as regards moneys receivable on a policy effected here on the life a person domiciled abroad.

A testator may expressly or by implication fix a locality upon assets so that probate may be granted in each country, limited to the assets situate there. *In the goods of Smart* (1884), 9 P. D. 64; 53 L. J. P. D. & A. 57. *In the goods of Calloway* (1890), 15 P. D. 147; 59 L. J. P. D. & A. 73. And the English Court will make a grant limited to the assets in England on its being shown that the Court of the country (*e. g.*, in Switzerland) where the other goods are situated claims the exclusive right to administer them by an official, and will not allow interference by the administrator appointed by the English Court. *In the goods of De la Rue* (1890), 15 P. D. 185.

The person entitled to representation according to the *lex domicilii* of the deceased, or, if there be none such, the person beneficially entitled to the succession, is in this country entitled to have the grant of representation made to himself or to his nominee. *In the goods of Luis Bianchi* (1859), 1 S. & T. 511; 28 L. J. P. & M. 139. *In the goods of O'Brien* (1862), 2 S. & T. 604; 31 L. J. P. M. & A. 194. *In the goods of Earl* (1867), L. R., 1 P. & D. 450; 36 L. J. P. & M. 127. *In the goods of Dost Aly Khan* (1880), L. R., 6 P. D. 6; 49 L. J. P. D. & A. 78.

The principle of making the grant conform to that made by the courts of the country of domicil is followed in *In the goods of Earl* (1867), L. R., 1 P. & D. 450; 36 L. J. P. & M. 127.

Where a competent Court of the country of domicil has given a decision on the validity of a will, or upon the rights to the personal estate, such decision is regarded in the Courts of this country as conclusive. *Miller* v. *James* (1872), L. R., 3 P. & D. 4; 42 L. J. P. & M. 21; *In re Trufort; Trafford* v. *Blanc* (1888), L. R., 36 Ch. D. 600; 57 L. J. Ch. 135.

A grant of administration is as a rule only made by the English Court where there are assets in this country to be included in the grant. *Evans* v. *Burrell* (1859), 28 L. J. P. & M. 82; *In the goods of Tucker* (1864), 3 S. & T. 585; 34 L. J. P. M. & A. 29; *In the goods of Coode*

(1867), L. R., 1 P. & D. 449; 36 L. J. P. & M. 129. Where there are such assets, the Court will make the grant of the whole personal estate. *Spratt* v. *Harris* (1833), 4 Hagg. 405. *In the goods of Winter* (1861), 30 L. J. P. & M. 56.

It is accepted as law everywhere that a will is valid, as to personal property, if it is made according to the law of the place where the deceased had his domicil at the time of making the will *and at death*. The law of England, apart from statute, required that the will should be executed according to the law of the place where the testator was domiciled at death. The law of Scotland, more liberally, permitted a will to be made either according to the law of the place of domicil at the time of death or according to the law of the place of execution.

By the Act of 1861, 24 & 25 Vict. c. 114, commonly called Lord Kingsdown's Act, alternatives were permitted in the case of a British subject who died after the passing of the Act (6th August, 1861), as follows: 1. A will made out of the United Kingdom is valid if made according to the law of the place where made, or of the domicil at the time of making, or of the domicil of origin. 2. A will made in the United Kingdom is valid if made according to the forms required in the part of the United Kingdom where executed [thus introducing into England the more liberal provision of the law of Scotland]. 3. A will is not altered or revoked by any subsequent change of domicil. 4. A will which would be valid by the previous law, remains unaffected by the Act.

The principle that a will is valid if made according to the place of domicil at the time of death remains untouched. And, apparently, the alternative of the law of the place of domicil at the time of making holds good for a will made in as well as out of the United Kingdom, by reason of the 3rd section. *In the goods of Reid* (1866), L. R., 1 P. & M. 74; 35 L. J. P. & M. 43.

The Act applies to a naturalised as well as to a native born British subject, so that the will of such a person made in England according to English law was good under the second section, although he died domiciled in Italy. *In the goods of Gally* (1876), L. R., 1 P. D. 438; 45 L. J. P. D. & A. 107.

In order to take advantage of Lord Kingsdown's Act the will cannot be supported by law of one country in part, and of another in part, but must be supported wholly by the law of one country. *Pechell* v. *Hilderley* (1869), L. R., 1 P. & D. 673; 38 L. J. P. & M. 66. It appears to be laid down by Kay, J., in *In re Kirwan's Trusts* (1883), 25 Ch. D. 373, 381; 52 L. J. Ch. 952, that inasmuch as Lord Kingsdown's Act does not repeal the 10th section of the Wills Act of 1 Vict. c. 26, which directs that no appointment made by will in exercise of a power shall

be valid unless the same be executed "in manner hereinbefore required," the admission of a will to probate under Lord Kingsdown's Act is not conclusive of the will being a good exercise of a power to appoint by will. Such a proposition, however, was not necessary to the decision of the case in point, nor would it be consistent with the authority of *D'Huart* v. *Harkness* decided by Lord Romilly in (1865), 34 Beav. 324; 34 L. J. Ch. 311. In that case (which does not appear to have been cited to Mr. Justice Kay) Sir J. Romilly, M. R., expressly says (34 Beav. p. 328): "A power to appoint by will simply may be executed by any will, which, according to the law of this country is valid, though it does not follow the forms of the statute." This proposition appears to apply just as much to a will valid under Lord Kingsdown's Act, as to one valid according to the former law by reason of the foreign domicil, which was the case decided by Lord Romilly.

Lord Kingsdown's Act applies only to the wills of British subjects, and so the will of an alien, though made according to English law, but not according to the law of Germany, where the deceased was domiciled, was not admitted to probate. *Bloxam* v. *Favre* (1883), L. R., 8 P. D. 101; 52 L. J. P. D. & A. 42.

Where the English Court is a court of construction, it can only proceed on the materials before it, but any error or slip in the grant will be corrected by the Probate Division, which has exclusive jurisdiction for that purpose. *Priestman* v. *Thomas* (1884), L. R., 9 P. D. 70; 53 L. J. P. D. & A. 58; S. C. C. A., L. R., 9 P. D. 210 at p. 214; 53 L. J. P. D. & A. 109, per Cotton, L. J.

AMERICAN NOTES.

Letters of administration granted by one State or nation can have no operation *per se* within the jurisdiction of another nation or State, but *ex comitate* the administrator of the domicil will generally be preferred in the granting of letters of local administration in a foreign country. *Fletcher's Adm'r* v. *Sanders*, 7 Dana (Kentucky), 345; 32 Am. Dec. 96.

Grant of administration cannot extend as matter of right beyond the territory of the State in which it is granted, but payments voluntarily made to a foreign administrator are held effectual on principles of national comity. *Vroom* v. *Van Horne*, 10 Paige (New York Ch.), 549; 42 Am. Dec. 94.

A foreign will is recognised by international comity so far as it regards personal property. *Parsons* v. *Lyman*, 20 New York, 103; *White* v. *Howard*, 46 New York, 144; *Vaughan* v. *Northup*, 15 Peters (U. S. Sup. Ct.), 1.

See Schouler on Executors and Administrators, § 164.

No. 2. — PRESTON *v.* MELVILLE.

(H. L. 1841.)

RULE.

It is the right and duty of the person obtaining the grant of the personal estate from the court of the country where it is situate, to administer that estate free from interference by any person claiming right under the law of the country of domicil; but, having collected the assets and paid the debts in a due course of administration according to the *lex loci*, he holds the residue in trust for the persons entitled to the succession according to the law of the country of domicil.

Or, briefly, the domicil regulates the succession, but the administration must be in the country in which possession is taken and held, under lawful authority, of the property of the deceased.

Preston v. Melville.

8 Cl. & Fin 1.

Sir Robert Preston, Baronet, a domiciled Scotchman, died at his place of residence in Scotland, in May, 1834, leaving a trust disposition, deed of settlement, and will, by which he granted, disponed, and made over to and in favour of Sir Coutts Trotter, Baronet, Edward Majoribanks, Esq., and Sir Edmund Antrobus, Baronet, bankers in London, and to the survivors and survivor of them and their assigns, and the assigns of the survivor in trust for the uses, ends, and purposes therein particularly declared, all his lands, heritages, tiends, fishings, tenements, and other heritable or real estate of whatever description; and all property and estate whatsoever or of whatever denomination, then belonging, or that might belong to him at the time of his death, wherever situated, in Scotland, England, or elsewhere; and also all debts and sums of money due or belonging to him at his death, heritable or moveable, real or personal, wherever and in whatever way secured; and also all personal estate and effects of whatever nature, quality, or denomination, with the title deeds of the heritable subjects, and the

vouchers of the debts: surrogating and by the trust disposition, &c., substituting the said trustees in his full right and place of the premises, with power to them to do whatever he could have done before granting thereof, and binding himself and his heirs to make up complete titles to the lands, heritages, and heritable debts thereby disponed, if necessary, and to convey the same in all form to the said trustees, for the purposes therein mentioned. And he appointed the said Sir Coutts Trotter, E. Marjoribanks, and Sir E. Antrobus, and the survivors and survivor of them to be sole and only executors or executor of his said will and intromitters and intromitter with his estate and effects falling under executory, thereby empowering them to expede confirmations and letters of administration in due form, secluding from the said office all others his nearest of kin; declaring that if an inventory of the debts due and personal estate belonging to him should be made up and signed by him as relative thereto, the same should supersede confirmation in Scotland or administration in England, being thus to be held as a special conveyance, and to be valid to every intent and purpose; but always under the conditions, and for the ends, uses, trusts, and purposes therein underwritten.

The trust deed contained various directions to the trustees and executors relative to the management and disposition of Sir Robert's large heritable estates and personal property. The former was situated in Scotland; the personal property, which also was of large amount, was partly vested in Scotland, and partly in England, in government securities and Bank of England stock. The immediate objects of the trust were his three nieces, — viz., the appellant; her sister, Miss Catherine Preston; and Dame Anne Hay, wife of Sir John Hay, Baronet, — to whom the trustees were to pay annually, in equal shares, the surplus yearly rents and proceeds of the whole property (after payment of debts and certain legacies and annuities), with benefit of survivorship between them; and Sir John Hay was to be entitled to the interest of his wife, in the event of his surviving her.

All the persons named in the deed as trustees and executors having declined to accept the trust, letters of administrator, with the deed and will annexed, were on the 18th of July, 1834, granted by the Prerogative Court of Canterbury, as to the personal property in England, to the appellant, as one of the next of kin of the testator, the other two nieces and next of kin, and Sir John Hay,

consenting and becoming sureties for her. Confirmation was also expede in the proper commissary court in Scotland, on the 21st of November following, in favour of the appellant as to the personal estate and effects there situated; and about the same time she completed feudal titles, as heiress of entail, to certain portions of the heritable estates, — Sir Robert Preston having made entails of these portions after executing the trust deed, by virtue of powers therein reserved. The letters of administration and confirmation were obtained for the purpose of interim administration, without any intention of superseding the trust disposition and will. Accordingly, proceedings were soon afterwards taken for the appointment, by the Court of Session in Scotland, of new trustees in the place of the testator's nominees; and, after some correspondence between the agents of three ladies, and of Mr. Dashwood Bruce, the Honorable James Bruce, and Lord Meadowbank, who were also interested in the testator's succession, under the trust disposition, and who, as well as Lady Hay and her husband, severally petitioned the Court for the appointment of proper persons to be trustees, the three respondents were, with the consent of all the parties, judicially appointed on the 19th of May, 1835, to be "trustees for executing and carrying into effect the powers and provisions in the said trust disposition, deed of settlement, and will, in the place of the trustees named therein who had declined to act, with all the powers and faculties conferred on the said original trustees by the said trust deed." To the respondents so appointed, the appellant, by deed dated the 16th of November, 1835, assigned all the personal estate and effects which belonged to Sir Robert Preston in Scotland, and to which she had, as aforesaid, expede confirmation in the consistorial courts there.

Differences subsequently arose between the appellant and respondents respecting the title to the entailed estates in Scotland, to which the appellant had completed titles as heiress of entail. The result was, that she not only intimated to the respondents her intention to resist their completing their feudal titles to those estates, but also refused to transfer to them the personal property vested in the English funds and securities, until she should obtain a judicial discharge from her administration by means of a suit in the Court of Chancery. She had then entered upon the administration of that part of the testator's estate, and paid thereout several legacies bequeathed by him.

No. 2. — Preston v. Melville.

The respondents filed a bill against the appellant in the Court of Exchequer in England, in January, 1836, for the purpose of getting her accounts as administratrix passed and of getting her discharged from her intromissions with the English personal estate, in order that the residue of that estate might be transferred to them; whereupon the appellant filed a bill against the respondents and others in the Court of Chancery in England, praying that the English property might be administered under the direction of that court, and might, for that purpose, be transferred to the Accountant-General.

In March, 1836, after the filing of the latter bill, the respondents brought two actions in the Court of Session, in Scotland, against the appellant. The summons in the first of them, out of which this appeal arose,[1] after narrating the trust deed, and the proceedings that were taken by the parties, to the effect before stated, concluded for a declarator "that all property and estate, whatsoever, which belonged to the deceased Sir Robert Preston at the time of his death, wherever situated, in England, Scotland, or elsewhere; and also all debts and sums of money due or belonging to him at the time of his death, heritable or movable, real or personal, wherever and in whatever way secured; as also all personal estate and effects of whatever nature, quality, or denomination, with the whole writs and title deeds of the said heritable subjects, and the vouchers and instructions of the said debts, and in particular the whole funds and effects of the said deceased held by Dame Anne Campbell Baird Preston under the foresaid letters of administration granted to her by the Prerogative Court of the Archbishop of Canterbury; now pertain and belong, and be vested in and transferred to the pursuers, as trustees nominated for executing the settlements of the said deceased Sir Robert Preston in place of Sir Coutts Trotter, E. Marjoribanks, and Sir E. Antrobus, but in trust always for the uses, ends, and purposes specified in the foresaid trust disposition, deed of settlement, and will; and that the whole rights, powers, &c., thereby vested in and bestowed upon the persons therein named, are now vested in and bestowed upon the pursuers, as trustees so nominated; and, in particular, that their receipts or discharges are good and effectual to all concerned, transacting with the pursuers as trustees; so that the receipts and dis-

[1] The object of the second action and the appeal therein are stated at 8 Cl. & Fin. p. 16.

charges to be granted by them to the defender, on her paying and transferring the foresaid funds and effects, will be a valid and sufficient discharge and exoneration to her of her whole intromissions with the same; and it being so found and declared, the said Dame Anne Campbell Baird Preston ought and should be decerned and ordained forthwith to pay, transfer, and make over to the pursuers, as trustees aforesaid, the funded and other property before mentioned (viz., £32,000 three per cent. consols; £59,869 three-and-a-half per cent.; £28,350 three per cents.; £11,620 stock of the Bank of England, &c.) and all other property which the said defender holds as administratrix of Sir Robert Preston's will."

The appellant, on receiving notice of this action, amended her bill in Chancery by adding a statement thereof, and praying an injunction to restrain the pursuers from proceeding therewith. The respondents at the same time dropped their bill in the Exchequer, and filed one with the same object in the Court of Chancery. No proceedings were taken in any of these equity suits.

The appellant put in a defence to the action in the Court of Session, denying that court's jurisdiction to control her intromissions with the funds situated in England, and vested in her under a title derived to her from a competent court there; to which alone she, in the character of administratrix was accountable. She also pleaded the suits pending in the Court of Chancery, and insisted that they would determine all the questions between her and the other parties to those suits; that the Court of Session had appointed the respondents to be trustees of the testator's property situated in Scotland, but could not, and in fact did not, constitute them executors or administrators of the property in England, which had been put in the course of due administration by the proper ecclesiastical authority there, before the appointment of the respondents by the Court of Session.

After the usual course of proceedings by condescendence and answers, and revised cases, the Lords of the First Division of the Court of Session, by an interlocutor pronounced on the 10th of February, 1838, found and declared in the terms of the first conclusion of the libel,[1] and decerned; and to that extent allowed an interim extract to go out, superseding the consideration of the other conclusions of the libel and of the question of costs.[2]

[1] *Vide supra*, pp. 80, 81, 82.

[2] 16 Shaw & Dunlop, 472. The only reason given by the Court for the interlocutor were the following observations by

That interlocutor is the subject of this appeal.

Mr. Pemberton and Sir William Follett (Mr. J. Stuart was with them), for the appellants: The judgment of the Court of Session is, in any view of it, erroneous; because finding and declaring in the terms of the first conclusion of the summons, it in effect, therefore, finds and declares that "the whole rights, powers, faculties and privileges vested in and bestowed upon the original trustees, are now vested in and bestowed upon the respondents." Now, that is impossible, inasmuch as the respondents were obliged by the terms of their appointment to find judicial caution, and were laid under judicial responsibilities which did not attach to the original trustees.

The question raised by this action of declarator and payment, is substantially a question as to the title to administer the personal property of the testator in England, and belongs to the exclusive jurisdiction of the courts in England. This property is now legally vested in the appellant, as administratrix, with the will annexed, by a decree of the proper Ecclesiastical Court in England. The validity of that decree, or of the appellant's title under it, cannot be appealed from and tried in the Scotch courts; nor can her duties and liabilities, in her character of administratrix, be determined or released by any decree of a Scotch court. She is responsible only to the Ecclesiastical Court in England, to which she gave sureties for her intromissions with this property.

This action, at the instance of the respondents, in the Court of Session, was rendered wholly unnecessary, if not incompetent, by the dependence of the suits in the Court of Chancery, by which the appellant would be compelled to account for her administration of the English personal property, and all questions touching the rights of parties interested in this part of the testator's estate would be determined. *Eyerton* v. *Forbes*, Nov. 27, 1812, F. C.;

Lord GILLIES, set out in the appellant's printed case: —

"I think, with regard to the succession in England, that payment of it to those trustees should have been ordered: for the trust gives just as great powers of disposing of the personal properties of the trustees as of his heritable estates; and it makes no difference whether that personal property be situated in France or in Turkey, for it is just as if it were in Scotland. I have no wish to interfere with the Court of Chancery, though I am quite certain that they would have ordered payment in similar circumstances. Perhaps our best plan would be to adopt some course which may secure all the rights of parties without interfering with that court and superseding until we see what arrangement can be made with it. I think a decerniture in terms of the declaratory conclusion will be enough at present, superseding a further personal decerniture until another period."

Craigie v. *Gairdner*, July 12, 1817, F. C.; *Royal Bank of Scotland* v. *Cuthbert*, 1 Rose, 462; *Selkrig* v. *Davies*, 2 Dow, 231; 2 Rose, 291; 14 R. R. 146; *Kennedy* v. *Earl of Cassilis*, 2 Swanst. 313.

Mr. Knight Bruce and Mr. Graham Bell, for the respondents: It is not competent for the appellant to object to the title of the respondents to the office, to which they were appointed by a decree of Court. There is no reduction, or attempt at reduction, of that decree. The appellant herself was a party consenting to the appointment; she not only consented to it, but confirmed her consent and approbation by assigning to the respondents the testator's personal estate in Scotland. She now refuses to transfer the English funds, the subject of this action. What difference is there between the Scotch and the English personal estates? The testator being a domiciled Scotchman, his whole moveable estate, wherever situated, must be brought to Scotland, and administered according to Scotch law under the trusts of the deed of settlement; *Ex parte Geddes*, 1 Glyn & J. 414; *Pottinger* v. *Wightman*, 3 Meriv. 67; *Anstruther* v. *Chalmer*, 2 Sim. 1; *Anstruther* v. *Adair*, 2 Myl. & K. 513; *Warrender* v. *Warrender*, 2 Clark & Fin. 488; *Yates* v. *Thomson*, 3 Clark & Fin. 544.

March 29, 1841. The Lord Chancellor. By the interlocutor appealed from in this case, the Court of Session found and declared in terms of the first conclusion of the libel. Some question was made as to what came within the description of the first conclusion of the libel, but it is clear that it embraces so much as prayed "that it might be found and declared that all property and estate, whatsoever, which belonged to Sir Robert Preston in Scotland, England, or elsewhere; all debts, sums of money due and belonging to him at his death; and all personal estate and effects of whatsoever nature, and in particular the whole funds and effects held by the appellant under the letters of administration, — pertain and belong to, and are vested in the pursuers, in trust for the purposes of Sir Robert Preston's settlement; and that his whole right, powers, faculties, privileges, and immunities vested in and bestowed by his trust disposition and settlement upon the trustees therein named, are vested in and bestowed upon the pursuers."

The appellant is the administratrix of Sir Robert Preston in England, by virtue of letters of administration from the Prerogative Court of Canterbury. The pursuers have been appointed trustees by the Court of Session, in the place of certain persons

who were named as trustees and executors by Sir Robert Preston, but who declined to act. This appointment took place with the consent of the appellant. The act of appointment is dated the 19th of May 1835, and is expressed to be by such consent; and it nominates and appoints the pursuers to be trustees for executing the different powers and carrying into effect the provisions contained in the trust disposition, deed of settlement, and will of Sir Robert Preston, and that in the room and place of the trustees named by him, who had declined to accept, and with all the powers and faculties conferred upon the said original trustees by the said trust deed.

In January, 1836, the respondents filed a bill in the Court of Exchequer in England, praying that the whole of the personal estate in the hands of the administratrix might be paid to them, they undertaking to pay the debts; or if the Court should be of opinion that such personal estate ought to be administered in this country, then that such estate might be administered accordingly, and the residue paid to the plaintiffs upon the trusts of the settlement. In February, 1836, the appellant, the administratrix, filed a bill in the Court of Chancery in England praying the usual decree for accounts and the administration of the personal estate, and that the residue might be secured for the benefit of the parties interested, and that the respondents, the trustees, might be restrained from proceeding in Scotland to compel the appellant, the administratrix, to pay over the personal estate to them. In March, 1836, the respondents, the trustees, abandoned their suit in the Court of Exchequer, and filed a bill in the Court of Chancery for the same purposes.

The effect of the interlocutor appealed from is to declare that all the funds and personal estate in the hands of the appellant or administratrix belong and ought to be transferred to the pursuers as trustees; that is to say, that the personal estate in this country at the time of the death of Sir Robert Preston, and now in the hands of his administratrix under letters of administration from the Prerogative Court, ought not to be administered in this country, but ought to be paid and transferred to the trustees in Scotland, appointed by the Court of Session, and who are not the personal representatives of the deceased. By the law of England, the person to whom administration is granted by the Ecclesiastical Court is by statute bound to administer the estate, and to pay the

debts of the deceased. The letters of administration, under which he acts, directs him so to do, and he takes an oath that he will well and truly administer all and every the goods of the deceased, and pay his debts so far as the goods will extend, and exhibit a full and true account of his administration. That such are the duties of an executor or administrator acting under a probate or letters of administration in this country, is certain, although the testator or intestate may have been domiciled elsewhere. The domicil regulates the right of succession, but the administration must be in the country in which possession is taken and held, under lawful authority, of the property of the deceased. The interlocutor appealed from assumes that this is not so, and that all the property in the hands of the administratrix, though unadministered, ought to be transferred to the trustees, leaving the creditors of the deceased in this country, if any such there be, and others having claims upon his property, to follow it to Scotland. It is true, that so long as the appellant remains in England, this declaration will be inoperative; but as the interlocutor stands, if she should happen to come within the jurisdiction of the Court of Session, she would be liable, upon the footing of such declaration, to transfer the property to the trustees, and, by so doing, to act in violation of the oath she has taken, and in dereliction of the duties of the office with which she has been invested in this country. It is not possible that this could have been intended. The pursuers, as trustees appointed by the Court of Session (assuming that to have been properly done), have no right to administer the estate in England as against the administratrix appointed for that purpose by the proper Ecclesiastical Court; and of this the courts in Scotland are bound to take notice. The confusion seems to have arisen from Sir Robert Preston having appointed the same persons trustees and executors; and if they had proved the will in England, and taken upon themselves the execution of the trusts, the duties of administering the property, and of carrying into effect the trusts declared, would have been united in the same persons. It may be assumed for the present purpose, that upon their refusal the Court of Session properly appointed the pursuers as trustees in their place; but that court had not any jurisdiction to appoint persons to exercise the duty of recovering or administering the property which happened to be in England; that power, by the law of England, is vested exclusively in the Ecclesiastical

Courts in this country, and can only be exercised by executors or administrators acting under their authority; and in that situation the appellant now is. Sir Robert Preston might have appointed whom he pleased to administer his property in England by naming them as executors, but he had no power to authorise or enable any persons to act in such administration otherwise than under the authority of the Ecclesiastical Courts in England. The pursuers, the trustees, have no such authority, nor has the Court of Session any jurisdiction or power to confer it. The administration of the personal estate in England rests therefore, and must remain, with the appellant.

If, after such administration shall have been completed, any surplus should remain, and it shall appear that there are trusts to be performed in Scotland to which it was devoted by Sir Robert Preston, it will be for the Court of Chancery to consider whether such surplus ought or ought not to be paid to the pursuers, for the purpose of being applied in the performance of such trusts; and in considering that question every attention ought to be paid to the authority under which the pursuers have been appointed trustees, and the consent which led to such appointment. It is premature to decide that point, it being at present unascertained whether there will be any surplus of the personal estate in this country, or what will be the amount of it; and no declaration of right by the Court of Session would be binding upon the Court of Chancery, under whose jurisdiction the property in England is placed by the suits which have been instituted.

But although the transfer of the surplus of the property in England, if any, must depend upon the judgment of the Court of Chancery, it may be very competent for the Court of Session, at the proper time, to declare the rights and duties of the trustees appointed under its authority. But if such trustees have not any right or title to the funds in England until the administration shall have been completed in England, and the surplus ascertained, it does not appear that any benefit can arise from any declaration of such rights and duties, before it has been ascertained that there will be any surplus to which such rights and duties will attach. This, however, may be left to the discretion of the Court of Session.

The interlocutor, proceeding upon the ground that the trustees are entitled to have transferred to them the property in England,

before the administration has been completed, must, I think, be reversed; but as the pursuers may be entitled to some declaration of right, and to some decree of the Court of Session, so far as the Court of Session has jurisdiction over the property, I think the better and safer course will be "to declare that the property of Sir Robert Preston in England ought to be administered by the appellant by virtue of the letters of administration granted by the Prerogative Court of Canterbury; and with this declaration to reverse the interlocutor appealed from, and remit it to the Court of Session, to consider and adjudicate upon the first conclusion of the libel, either separately or together with the other conclusions of the libel, as such court shall think fit, in conformity with the above declaration."

Ordered and declared accordingly.

ENGLISH NOTES.

The rule is, perhaps, only an application of the broader principle that where any one has to invoke the aid of the Courts of a country he is, as regards the remedy given, bound by the *lex loci*. Thus, a man suing in our Courts would be bound by our Statutes of Limitation. *Don* v. *Lippman* (1837), 5 Cl. & Fin. 1. *Sed aliter* in the case of an action here upon a promissory note statute barred abroad, but not statute barred by the laws of this country. *Huber* v. *Steiner* (1835), 2 Bing. N. C. 202; 2 Scott, 304. And in *Partington* v. *Att.-Gen.* (1869), L. R., 4 H. L. 100; 38 L. J. Ex. 205. it was held (*dissentiente* Lord Westbury) that representation here to two people (husband and wife) was necessary, though the property when obtained was to be distributed in a foreign state, where the law might not require that double authority. And in *Selkrig* v. *Davies* (H. L. from Scotland. 1813), 2 Dow. 230; 14 R. R. 146. a Scotch creditor, claiming to prove in an English Commission of Bankruptcy, was held to be bound to give up for the general creditors (as was then the rule in English Bankruptcy) the security which he had gained by the use of proceedings in Scotland. In applying this principle to cases of bankruptcy, it is observed that the law of England does not admit the efficiency of the bankruptcy laws of a foreign country to discharge obligations to be performed in this. *Smith* v. *Buchanan* (1800), 1 East, 6; 5 R. R. 499, and note there. *Ellis* v. *McHenry* (1871), L. R., 6 C. P. 228; 40 L. J. C. P. 109; *Tharsis Sulphur & Copper Co.* v. *Société des Métaux* (1889), 58 L. J. Q. B. 435, 439; *Gibbs* v. *Société Industrielle et Commerciale des Métaux* (C. A. 1890), 25 Q. B. D. 39; 59 L. J. Q. B. 510. Although a discharge under an Im-

perial Act of Parliament (such as the modern Acts relating to Bankruptcy) is effectual to discharge a debt throughout Her Majesty's dominions. *Royal Bank of Scotland* v. *Cuthbert, Stein's Case*, 1 Rose, 462, 468; *Ellis* v. *McHenry, supra*.

Where a creditor has obtained a priority according to the law of the place where the assets are, the rule in *Preston* v. *Melville* entitles him to the benefit of that priority so far as relates to those assets. *Cook* v. *Greyson* (1854), 2 Drewry, 286; 23 L. J. Ch. 734, — the case of an Irish judgment creditor as to the Irish assets. But it does not follow that creditors have any priority merely by reason of the debts being contracted or the creditor being domiciled in the country where the assets are. And, at all events, according to English law, in the administration of the English estate of a deceased domiciled abroad, foreign creditors are entitled *pari passu* with English creditors. *In re Kloebe, Kannreuther* v. *Geiselbrecht* (1884), 28 Ch. D. 175; 54 L. J. Ch. 297. When the debts are paid according to the rules of administration of the place, the administrator of the assets there holds the surplus (according to the rule of the principal case) in trust for the persons entitled according to the law of the domicil. But — at all events where the ultimate beneficiaries do not intervene — the personal representative duly constituted by the Court of the domicil is entitled to have this surplus paid over to him, and to give a valid discharge for it. *Eames* v. *Hacon* (1880 & C. A. 1881), 16 Ch. D. 407; 50 L. J. Ch. 182; 18 Ch. D. 347; 50 L. J. Ch. 740.

The practice and procedure of the old Court of Chancery, which, until a recent date (that of the procedure rules of 1883), was carried on in the Chancery Division of the High Court of Justice, was in certain respects out of accord with the principles of comity recognised in *Enohin* v. *Wylie*, p. 56, *ante*, and *Preston* v. *Melville*. It appears that, according to that practice, where a grant of probate or administration had been made by the Probate Court in England, by reason of there being assets there, any person interested in the residue might obtain from the Court of Chancery a decree for the *general administration* of the estate, — the cost of which, so far as the Court of Chancery had power, by reason of any of the executors or trustees being in England (*Penn* v. *Lord Baltimore* (1750), 1 Ves. 444), to enforce their decree, might be thrown upon the general estate. This monstrous procedure, which was held in the case of *Stirling-Maxwell* v. *Cartwright* (1878), 11 Ch. D. 522; 48 L. J. Ch. 562, to rest upon the established rules of the Court of Chancery, was carried to its *reductio ad absurdum* in the case of *Ewing* v. *Orr-Ewing* (1883), 9 App. Cas. 34; 53 L. J. Ch. 435, — the case of the estate of a testator who died domiciled in Scotland, and the majority

of whose testamentary trustees were resident in Scotland. The Scotch trustees had been served in Scotland under an order obtained from the English Court for that purpose, and (perhaps with some want of national caution) had unconditionally entered appearance in the action; but they afterwards (naturally enough) objected to the estate going into Chancery. The Court, nevertheless, made what was then the usual decree for the general administration of the estate and the execution of the trusts. And this decree was affirmed in the House of Lords, Lord Blackburn concluding with the observation that if such suits as these cast great additional costs on those administering trusts substantially Scotch, the remedy would seem to be in altering the rules under which the Chancery Division acts. That has been done by the above mentioned rule of 1883 now embodied in the rules of Court 1893 (Ord. 55, r. 10), and we are not likely to see a repetition of the inconvenience which a decree like that made in the *Orr-Ewing Case* must necessarily engender.

AMERICAN NOTES.

Succession to personal estate is governed by the law of the decedent's domicil, but, to recover it, administration must be granted where the estate is situated. *Embry* v. *Millar*, 1 A. K. Marshall (Kentucky), 300; 10 Am. Dec. 732; *Fenwick* v. *Sears*, 1 Cranch (U. S. Sup. Ct.), 259; *Desesbats* v. *Berquier*, 1 Binney (Penn.), 336; 2 Am. Dec. 448, reviewing many English cases; *Moultrie* v. *Hunt*, 23 New York, 394; *White* v. *Howard*, 46 New York, 144; *Parsons* v. *Lyman*, 20 New York, 112; *Packwood's Succession*, 12 Robinson (Louisiana), 334; 43 Am. Dec. 230; *Goodall* v. *Marshall*, 11 New Hampshire, 88; 35 Am. Dec. 472, with elaborate note on Ancillary Administration, 483, citing the principal case, and *Sheldon* v. *Rice*, 30 Michigan, 296; *Anderson* v. *Gregg*, 14 Mississippi, 170; *Hedenberg* v. *Hedenberg*, 46 Connecticut, 30; 33 Am. Rep. 10; *Swearingen* v. *Morris*, 14 Ohio St. 429; *Sayre* v. *Helme*, 61 Penn. St. 299; *Gilman* v. *Gilman*, 54 Maine, 453; *Pinney* v. *McGregory*, 102 Massachusetts, 192; *Lucas* v. *Byrne*, 35 Maryland, 493; and many other cases. "The universally recognised rule of law is that the succession to and distribution of personal estate is governed by the law of the place where the intestate was domiciled at the time of his death." *Moore* v. *Jordan*, 36 Kansas, 271; 59 Am. Rep. 550. See also *Dial* v. *Gary*, 14 South Carolina, 573; 37 Am. Rep. 737; *Leonard* v. *Putnam*, 51 New Hampshire, 247; 12 Am. Rep. 106; *Lines* v. *Lines*, 142 Penn. St. 149; 24 Am. St. Rep. 487; *Fugate* v. *Moore*, 86 Virginia, 1015; 19 Am. St. Rep. 926. See also Mr. Bigelow's note, 1 Jarman on Wills, 6th American edition, p. 3.

In a few States it is held that a foreign administrator may maintain an action in his own right, or be subject to action, without a grant of administration at the place of the suit; as for example, as indorsee. *Trecothick* v. *Austin*, 1 Mason (U. S. Circ.), 16; *Lucas* v. *Byrne*, 35 Maryland, 485; *Hunter* v. *Bryson*, 5 Gill & Johnson (Maryland), 483; 25 Am. Dec. 313; *Petersen* v. *Chemi-*

cal Bank, 32 New York, 21; *McNamara* v. *Dwyer*, 7 Paige (New York Chancery), 239; 32 Am. Dec. 627; *Barrett* v. *Barrett*, 8 Greenleaf (Maine), 353; *Morton* v. *Hatch*, 54 Missouri, 408; *Kilpatrick* v. *Bush*, 23 Mississippi, 199; *Evans* v. *Tatem*, 9 Sergeant & Rawle (Penn.), 252; 11 Am. Dec. 717; *Munion* v. *Titsworth*, 18 B. Monroe (Kentucky), 597; *Tunstall* v. *Pollard*, 11 Leigh (Virginia), 1. See Story's Conflict of Laws, § 514*b*, 7th ed., where it is said, "There is very great difficulty in supporting these decisions." Mr. Freeman says (note, 35 Am. Dec. 485), that this doctrine "is certainly opposed by the great weight of authority, both American and English."

An assignee of a foreign executor may maintain an action in another State, without administration there. *Campbell* v. *Brown*, 64 Iowa, 425; 52 Am. Rep. 446; *Wilkins* v. *Ellett*, 108 United States, 256; *Rand* v. *Hubbard*, 4 Metcalf (Mass.), 252; *Petersen* v. *Chemical Bank*, 32 New York, 21; *Owen* v. *Moody*, 29 Mississippi, 79. But the contrary is held in *Thompson* v. *Wilson*, 2 New Hampshire, 291; *Stearns* v. *Burnham*, 5 Maine, 261; *Dial* v. *Gary*, 14 South Carolina, 573; 37 Am. Rep. 737. The last case contains a learned review of the American decisions, and concludes that in case of a will, the will must be established, and "in cases of intestacy, there must be a grant of administration in such jurisdiction where property is found."

Kent says (2 Com. *432, note *c*): "The general rule in this country and in England is, that letters testamentary or of administration, granted abroad, give no authority to sue or be sued in another jurisdiction, though they may be sufficient ground for new probate authority."

But a foreign executor may sue on a judgment in his favour in another State, without administration there. *Johnson* v. *Wallis*, 112 New York, 230; 2 Lawyers' Reports Annotated, 828; *Lewis* v. *Adams*, 70 California, 403; 59 Am. Rep. 423; *Tittman* v. *Thornton*, 107 Missouri, 500; 16 Lawyers' Rep. Annotated, 410; *Rucks* v. *Taylor*, 49 Mississippi, 552; *Barton* v. *Higgins*, 41 Maryland, 539; *Talmage* v. *Chapel*, 16 Massachusetts, 71; Freeman on Judgments, § 217. To the contrary is *Buck* v. *Johnson*, 67 Georgia, 82.

No. 3. — IN THE GOODS OF W. T. NORRIS.

(1858.)

RULE.

LETTERS of administration may be issued where there is a presumption leaving no reasonable doubt of death; for instance, where the person in question sailed in a vessel of which no information has been received for more than a year after she was due, and which was supposed to have foundered during certain heavy gales in the locality of the voyage.

In the goods of W. T. Norris.

27 L. J. P. & M. 4 (s. c. 1 Sw. & Tr. 6).

W. T. Norris settled in New Zealand, in 1855. In December, 1855, he became entitled to £20,000. His father wrote to him from England, informing him of this, and received in answer a letter from New Zealand, dated the 13th of May, 1856, stating that he should return to England as soon as he could, and inclosing a power of attorney, authorising the father to receive £3000, and directing him to send it to him in New Zealand. In November, 1856, a letter of credit for £3000 and a letter of advice was sent to him, both which had since been sent back to England by his agent. On the 1st of July, 1856, he sailed from New Zealand for Sydney in the *Wyvern*, on his way to England, and in due course would have arrived at Sydney about the 1st of August, 1856. Neither ship nor crew having been heard of since she sailed from New Zealand, it was supposed she had been lost in a heavy gale that occurred in July, 1856, which other vessels on the same voyage had encountered. Inquiries had been made in Australia about him, and notices inserted in the Australian and New Zealand papers. The *Wyvern* belonged to Sydney, and was the property of a merchant at Melbourne, but it could not be ascertained that he had any agent here, or that the ship was insured at Lloyd's, where no information of her had been received in December, 1857.

The father of W. T. Norris, the London correspondent of his banker in New Zealand, and a solicitor, who had made inquiries at Lloyd's, deposed to the above facts.

Dr. Phillimore moved that a grant of letters of administration of the effects of W. T. Norris, as having died intestate on or since the 1st of July, 1856, should be decreed to his father. According to the practice of the Prerogative Court, before making such an application, it had been usual to require that advertisements for the person supposed to be dead should be inserted in the newspapers, but it was considered that the circumstances of this case rendered that course unnecessary.

Sir C. Cresswell. Advertisements are very well when nothing has been heard for a long time of the person supposed to be dead. But here, as you trace the history of the deceased up to a certain time, and then lose sight of him in the manner stated.

I think they may be dispensed with. There can be no reasonable doubt that he died at that time, and therefore administration may go. *Motion granted.*

ENGLISH NOTES.

The historical case of the proof of the will of Sir Charles Napier, left for dead on a battlefield in the Peninsula, will, no doubt, occur to some readers.

The usual presumption, which is conformable to the provisions of the Statute of Bigamy (1 Jac. I. c. 11), and to the Statute 19 Chas. II. c. 6, and relating to estates depending on death, is that a person who has not been heard of for seven years is dead; but the time at which he died during that period of seven years is a matter to be deduced from the evidence, and the burden of proof lies on the person who claims a title depending upon the time of death. *Nepean* v. *Doe d. Knight* (1837), 2 M. & W. 4; 2 Sm. L. C. 610; 7 L. J. (N. S.) Exch. 335; *Re Phene's Trust* (1870), L. R., 5 Ch. 139; 39 L. J. Ch. 316; *In re Rhodes, Rhodes* v. *Rhodes* (1887), 36 Ch. D. 586; 56 L. J. Ch. 825; *In the goods of Edward Connor* (1892), 29 L. R. Ir. 260. But in the case of a legacy due to a person who has merely gone away without being heard of, the Court has refused to pay over the legacy to representatives without advertisement. *Re Allin's Legacy* (1867), 15 W. R. 1164. And where an application was made five months after departure from port, although a storm had occurred shortly after the sailing of the ship, it was held premature. *In the goods of Bishop* (1859), 1 Sw. & Tr. 303; 28 L. J. P. & M. 93. The payment of policy by underwriters as on total loss of ship is, however, strong evidence. *In the goods of Main* (1858), 1 Sw. & Tr. 11; 27 L. J. P. & M. 5. But inquiries should be made *ultra* as to the fate of the crew. *In the goods of Smyth* (1858), 28 L. J. P. & M. 1. In 1831 the Court, on sureties justifying, granted to a residuary legatee administration (with a will of 1801 annexed) on affidavits that the party went to Demerara in 1802, and had not been heard of since 1804; that his mother, who died in 1826, believed him to have died many years before, a bachelor, and without a later will; that diligent inquiries had been lately made at Demerara, but without obtaining conclusive evidence of his death; *Dean* v. *Davidson* (1831), 3 Hagg. 554.

There is in English law no presumption, by reason of age or sex, amongst persons who perish by shipwreck or similar calamity in which they are involved together. *Wing* v. *Angrave* (1860), 8 H. L. C. 183; 30 L. J. Ch. 65. And where husband and wife perish by the same calamity, the practice of the Probate Court is to grant administration

of their personal estate to their respective next of kin. *In the goods of Wheeler* (1861), 31 L. J. P. M. & A. 40.

It is contrary to the practice of the Probate Division to presume the death of a person other than the person whose estate is in question. It is for the applicant who claims administration as next of kin to a widow to consider whether she is prepared to swear to the fact of the deceased being a widow. *In the goods of Clarke* (1890), 15 P. D. 10; 59 L. J. P. D. & A. 6.

AMERICAN NOTES.

"Any facts or circumstances relating to the character, habits, condition, affections, attachments, prosperity, and objects in life, which usually control the conduct of men and are the motives of their actions, are competent evidence from which may be inferred the death of one absent and unheard from, whatever has been the duration of such absence." *Tisdale* v. *Connecticut M. L. Ins. Co.*, 26 Iowa, 176. In this instance, letters of administration were granted in three months from an unexplained disappearance, and after great efforts to discover the decedent. This case was approved in *Hancock* v. *Am. L. Ins. Co*, 62 Missouri, 33, 34.

In *Eagle's Case*, 3 Abbott Pr. Rep. (New York) 218, it was held by Bradford, Surrogate, that death might be presumed within seven years from proof that at the last accounts the person was dangerously ill, or in weak health, or exposed to great perils of disease or accident, or had embarked on a vessel not afterwards heard from, although the usual length of the voyage had long elapsed. Here the absentee was grossly intemperate. To the same effect, *White* v *Mann*, 26 Maine, 370, where it was said that "One who has sailed in a vessel which has never been heard of for such length of time as would be sufficient to allow information to be received from any part of the world to which the vessel or persons on board might have been expected to be carried, and who has never been heard of since the vessel sailed, may be presumed to be dead." In that case the disappearance of others who sailed on the same vessel was allowed to be proved. The same doctrine is recognised in *Smith* v. *Knowlton*, 11 New Hampshire, 197. Also in *King* v. *Paddock*, 18 Johnson (New York), 143, where the presumption of death was founded on proof that the vessel on which the decedent sailed or any of her crew were never heard of.

Mr. Lawson says (Presumptive Ev. p. 222), that the presumption of death will arise within seven years, upon proof that the absentee was in a desperate state of health, or his vessel has not been heard from after due inquiry, or he has encountered some unusual or extraordinary danger, or that his habits, character, domestic relations or necessities rendered it certain that he would have returned or written home; citing many cases, including *Oppenheim* v. *Wolf*, 3 Sandford Chancery (New York), 571, — the case of the missing steamer *President*, which sailed for Liverpool from New York, March 11, 1841, and where the presumption was raised on May 1, 1841. So in *Merritt* v. *Thompson*, 1 Hilton (New York Com. Pl.), 550, the presumption was indulged at the end of seventeen months, in the case of a voyage ordinarily requiring four months.

No. 4. — IN THE GOODS OF CHARLES GOLDSBOROUGH.

(1859.)

RULE.

WHERE a person abroad has sent a power of attorney to his agent in England to take out administration for his use and benefit, the Court will only grant administration to the agent on the same terms as it would have been granted to the party himself.

In the goods of Charles Goldsborough.

1 Sw. & Tr. 295

Charles Goldsborough and eleven other persons, all deceased, and who were at the time of their respective deaths resident and domiciled in the United States, had been severally entitled for certain periods to a share of the dividends arising from a sum of Bank Stock standing in the name of the Accountant-General of the Court of Chancery, in a certain cause which since the year 1811 had been pending in that court. This cause having at length been brought to a close, it was now requisite to obtain a representation to the different parties, who, when alive, were entitled to the accumulated dividends. Mr. Tomlin, the solicitor in the suit in Chancery, by the direction of Vice Chancellor Kindersley, proceeded in September last to the United States, to make inquiries (amongst other things) as to who were the parties entitled to the accumulated dividends. He then ascertained the parties entitled, and that they were all resident in the United States, and obtained from each of them a power of attorney, duly executed, appointing him, Mr. Tomlin, respectively their attorney, to apply for and obtain letters of administration of the personal estate and effects of the person to whom such power of attorney related, to be granted to him on behalf of the party giving the power. Mr. Tomlin had applied in the registry for a grant of administration, but he objected to enter into administration bonds with sureties, and to make affidavits for the due performance of the office of administrator, in the usual forms, as there required.

In the cases where the deceased had left a will, the condition of the bond was to pay the debts of the deceased, and then the

No. 4. — In the Goods of Charles Goldsborough.

legacies contained in the said will annexed to the letters of administration to be granted, and afterwards to pay the residue to such person or persons as should be by law entitled thereto; and in the cases where the deceased had died intestate, to pay the debts, and then to pay over the residue to the persons entitled in distribution. He was also required in each case to make an affidavit in conformity with the condition of the bond.

Dr. Spinks, under the special circumstances of the case, applied to the Court "for a special order under the 81st section of the Probate Act, that the condition of the bond, instead of being in the usual form, should be for Mr. Tomlin, after collecting and converting the effects, &c., to pay the same to the person for whose use and benefit the letters of administration to the goods, chattels, and credits of the deceased had been granted to Mr. Tomlin; and also that the terms of the affidavit should be so altered as to conform with the condition of the bond as altered." Many of the persons originally entitled had been dead for several years, and it would be extremely difficult, if not impossible, for Mr. Tomlin to ascertain if all their debts had been paid, or, where they had left wills, if all the legacies bequeathed had been discharged; it would also be very difficult for him to undertake the distribution of the residue, which would be governed by the discordant laws of the States in which each of the parties deceased happened to have been domiciled at the time of his death. Mr. Tomlin objected to the bond being kept hanging over his head for an indefinite number of years.

Sir C. Cresswell. Where a person is authorised by a simple power of attorney to take out administration, the Court ought to decree to him such administration as it would have granted to the person who conferred the power, if he had applied for it himself. If I decree administration to Mr. Tomlin, in pursuance of the power, the grant must follow the terms of the power. The power is for a general grant; I cannot, therefore, make a special grant. Mr. Tomlin must also take the usual administrator's oath, which will follow the terms of the condition of the bond. If this course is, in any case, objected to, the party entitled can take out administration, and send a power of attorney to some one in this country authorising him to act for him.

Application rejected.

ENGLISH NOTES.

A power of attorney for general purposes is not of itself sufficient to authorise the attorney to obtain a grant of administration; but the Court, under the discretionary power of the 73rd section of the Probate Act (20 & 21 Vict. c. 77), has made the grant to the attorney for general purposes of a lady who was travelling abroad, and whose address was unknown, in order to enable him to give a discharge for a legacy of £160. *In the goods of Escott* (1858), 4 Sw. & Tr. 186; 28 L. J. P. & M. 17.

The Court will not make a grant to an attorney for the use and benefit of a person solely entitled to the grant, who is within the jurisdiction and is able, but unwilling, to take it himself. *In the goods of Burch* (1861), 2 Sw. & Tr. 139; 30 L. J. P. M. & A. 171. The power of attorney may limit the amount which the agent is to receive; and where this was done in accordance with the order of the Court of the domicil, the Court here made a grant limited accordingly. *Viesca* v. *D'Aramburn* (1839), 2 Curt. 277. See the grant actually made, 10 Sim. 629.

Where, in a (crown) colony, (British Guiana) possession had been taken of the goods of a deceased who died domiciled there, by an official, pursuant to an ordinance of the colony, but it did not clearly appear that such an official was clothed with the character of general personal representative; an application by his attorney appointed for the purpose of taking out administration in England was refused until the Queen's Proctor had been served and citations to the next of kin advertised: but on that being done, and the only person who appeared consenting, the grant was made. *In the goods of O'Brien* (1861), 2 Sw. & Tr. 605; 31 L. J. P. M. & A. 194.

The attorney obtaining the grant cannot dispute the title of his principal (*Eames* v. *Hacon* (1881), 18 Ch. D. 347; 50 L. J. Ch. 740), and may safely pay over to him the moneys which he has obtained as administrator, although he has been appointed only until the grant should be made to the principal, and that had not been done. *De La Viesca* v. *Lubbock* (1840), 10 Sim. 629. But, in the mean time, the person beneficially entitled may intervene by a suit for the administration of the estate; and it is competent for (and perhaps would formerly have been obligatory on) the Court, on such a suit being properly constituted, to make a decree in the nature of an administration decree. *Chambers* v. *Bicknell* (1843), 2 Hare, 536. See the observations as to the former practice of the Court of Chancery in such a case under *Preston* v. *Melville*, No. 2, p. 89, *ante*.

The Court has no power to dispense with the administration bond (*In the goods of Powis* (1864), 34 L. J. P. M. & A. 55), and will not, on account of the risk being small, lessen the nominal amount of the security to be given. *In the goods of Earle* (1885), L. R. 10 P. D. 196; 54 L. J. P. D. & A. 95.

As a rule, the sureties must be within the jurisdiction; but, the sureties being within the jurisdiction, the grant has been made to an attorney resident out of the jurisdiction, but within easy reach on the other side of the Channel. *In the goods of Leeson* (1859), 1 Sw. & Tr. 463; 29 L. J. P. & M. 19. And in making a grant to a person out of the jurisdiction the rule as to the sureties has been relaxed where they were in a place where service could be made of a writ of summons from the Court here, and no sureties could be found within the jurisdiction. *In the goods of Reed* (1864), 3 Sw. & Tr. 439.

Section II. — *Who is entitled to the Grant.*

No. 5. — SIR GEORGE SANDS' CASE.

(K. B. 1663.)

RULE.

The surviving husband is entitled, as of right, to the administration of the personal estate of his deceased wife; and the Court has no discretion to grant it to any one else.

But where the intestate leaves a widow, the Court has a discretion, under the Statute 21 Hen. VIII. c. 5, to make the grant to the widow or to the next of kin.

Sir George Sands' Case.

3 Salk. 22.

Sir George Sands administered to his sons, and afterwards a woman pretending to be his wife sued for a repeal; but a prohibition was granted, because the ordinary had an election to grant it either to the father or wife, and had executed his power by granting it to the father, *per* Holt, Chief Justice.

But where a feme covert died intestate, and the next of kin to

her obtained administration, and the husband sued for a repeal, a prohibition was denied, *per* HOLT, Chief Justice, because in this case the ordinary had no power or election to grant it to any person but to the husband; and this is not within the Statute of Hen. VIII. (21 Hen. VIII. c. 5), but within the Statute of Edw. III. (31 Edw. III. Stat. 1, c. 11).

ENGLISH NOTES.

By the Statute of Edward III. referred to in the principal case (31 Edw. III. Stat. 1, c. 11), passed in the year 1357, it was enacted as follows: —

"Qe en cas ou homme devie intestat les ordinairs facent deputer de plus prosheins et plus loialx amis pur administrer ses biens:"

And the rights and liabilities of executors were given to and imposed upon the persons so deputed to administer the goods.

By the Statute of Henry VIII. referred to in the principal case (21 Hen. VIII. c. 5), it is (by section 2) enacted as follows: "And in case any person dye intestate, or that the executours named in any such testamentes shall refuse to prove the said Testament, the said ordynary or other person or persons havying auctortitie to take probate of testamentes as is above said, shall graunt the administracion of the goodes of the testatour or person deceased to the widowe or to the next of his kyn or to both, as by the discrecion of the same ordynary shalbe thought good, taking suerty of hym or them to whom shalbe made suche commision for trew administracion of the goodes, cattels and dettes which he or they shalbe so auctorised to mynyster. And in case where dyvers persons clame the administracion as next of kyn, which be egall in degree of kyndred to the testatour or person deceased, and where any person onely desyreth the administracion as next of kynne where in dede dyvers persons be in equalitie of kyndred as is aforesaid, than in every such case the ordynary to be at his eleccion and libertie to accept any one or mo makyng request where dyvers do requyre the administracion or where but one, or more of them and not all beying in equalitie of degree to make request, than the ordynarye to admytt the wydowe and hym or them onely makyng request or any one of them at his pleasure."

The statute commonly called the Statute of Distributions, 22 & 23 Chas. II. c. 10 (made perpetual by 1 Jac. II. c. 17, § 5), contains nothing explicitly relating to administration, nor relating to the rights of husbands. But to avoid any question as to the intention, it is, by the Statute of Frauds (29 Car. II. c. 3, § 25) expressly enacted that

that Act should not be construed to extend to the shares of femes coverts that die intestate, "but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said Act."

The right of the husband to take out the administration to his wife is established as settled law by the principal case; but the statement of Lord Holt that this was within the Statute of Edward, so far as it implies that the right depended on that statute, has been a controverted point. Lord Holt's statement is in accordance with that of Sir W. Jones in the earlier case of *Jones* v. *Roe* (1629), Sir W. Jones Rep. fo. 175.

Humphrey v. *Bullen* (1737), 1 Atk. 458, was a case where a legacy had been left to a wife, and the husband had survived her, and died without reducing the property into possession in her lifetime or taking out administration to her. A person who had taken out administration *de bonis non* of the wife, claimed the legacy against the administrator of the husband. Lord Hardwicke observed that at common law no person at all had a right to administer, but it was in the breast of the ordinary to grant it to whom he pleased till the Statute of 21 Hen. VIII., which gave it to the next of kin. (He appears not to have had his attention called to the Statute of Edward, or to the statements of Sir Wm. Jones and Lord Holt in *Roe* v. *Jones*, and in the principal case.) He continued: "I think clearly it was a vested interest in the husband, and therefore his administrator, as his representative, is entitled to it, without being obliged to make distribution," and then he refers to the provision of the Statute of Frauds above mentioned, and continues: "Notwithstanding by the rules of the common law the administrator of the wife is entitled to it, being a chose in action, not received or got in by the husband in his lifetime, yet equity will consider such administrator as a trustee for the administrator of the husband, for, the husband having an absolute right to it by surviving his wife, his administrator ought to have the benefit of it; and therefore the plaintiff's bringing this bill is a breach of trust, and I dismiss it with costs."

This decision of Lord Hardwicke accords with a decision of Lord Parker in an earlier case of *Cart* v. *Rees* (1718), mentioned in the report of the case of *Squib* v. *Wyn* (1717), 1 P. Wms. 377, where Lord Parker considered the husband to be within the Statute of Distributions so as to take the wife's choses in action for his benefit, but not to be within the Statute to his prejudice.

In *Watt* v. *Watt* (1796), 3 Ves. 244, there is a judgment of Lord

Loughborough giving a different view of the husband's right to the administration. Lord Loughborough says (at p. 247): "He is entitled to the personal property of his wife *jure mariti;* her personal property vests in him by the marriage. At the death of the wife, if it is necessary for him to have an administration to enable him to get in her personal property, the administration granted to him is granted to him as husband; and when you look to the statutes, there is no law that gives the husband a right by force of the statute to administer to his wife. The husband's right is supposed in all the statutes."

The question whether the husband is within these statutes has been involved with the question whether he is within the description "next of kin" of the wife in a will or settlement. In this connection, Lord Eldon, in *Garrick* v. *Lord Camden* (1807), 14 Ves. 372, at p. 381; 9 R. R. 297 (at p. 301), expressly says that "whatever may have dropt from judges describing the husband as next of kin, or next legal friend of his wife, the tenor and bent of modern decision go to this, that, if a husband bequeaths to his next of kin, that *primâ facie* does not include the wife; and it is quite clear that, if a married woman, under a power by settlement, bequeaths to her "next of kin," it would be impossible to hold that, under the construction of such a will, without more, the husband would take as sole next of kin." This ruling is in accordance with *Watts* v. *Watts*, above cited, and is followed in *Bailey* v. *Wright* (1811), 18 Ves. 53; *King* v. *Cleaveland* (No. 2) (1858), 26 Beav. 166; 28 L. J. Ch. 835, 74, 76. It has been also decided that any reference to the Statute of Distributions *primâ facie* excludes the husband, — *Milne* v. *Gilbert* (1852 & 1854), 2 De G. M. & G. 715; 5 De G. M. & G. 510; 23 L. J. Ch. 828; and likewise the widows, — *Davies* v. *Bailey* (1747), 1 Ves. Sen. 84; *Worseley* v. *Johnson* (1753), 3 Atk. 758.

The decisions that the husband is not within the expression "next of kin" are quite consistent with the opinion of Lord Holt in the principal case, that he is within the expression "plus proschein et plus loialx amis" of the Statute of Edward III. Perhaps the true explanation is, that however arbitrary the practice of making these grants may have been before the Statute, they must usually have been made to the husband as having the property at common law; and that, after the Statute, the practice became settled in accordance with the right of property.

But whatever is the true origin of the rule, it had become the settled practice of the Court, before the recent changes in the law as to the property of married women, to make the grant of administration (in

accordance with the right of property as established by *Humphrey* v. *Bullen*) to the representative of the husband in preference to the wife's kindred. *In the goods of Harding* (1872), L. R., 2 P. & D. 394; 41 L. J. P. & M. 65. Representation to the husband, as well as to the wife, was necessary to complete the administrator's title. *Att.-Gen.* v. *Partington* (1869), L. R., 4 H. L. 100; 33 L. J. Ex. 281.

Since the Married Woman's Property Act of 1882, it has been important to consider the origin and reasons of the practice by which the husband takes the administration. By that Act (45 & 46 Vict. c. 75, § 1), a married woman is made capable of holding and disposing of property as her separate property "as if she were a feme sole."

It has long been settled by the Courts of Equity that where a married woman has property held for her separate use, although she can make a will of such property (*Fettiplace* v. *Gorges* (1789), 1 Ves. Jr. 46; 1 R. R. 79), yet, upon her death intestate, the separate use was exhausted and the property went to the husband *jure mariti*; *Cooper* v. *Macdonald* (1877), 7 Ch. D. at p. 296; 47 L. J. Ch. 373.

The effect of the decisions upon the Act of 1882 is to construe the words "as if she were a feme sole," as equivalent to "as if the property had been granted, assigned, devised, or bequeathed to her for her separate use." Thus, the husband is still entitled as administrator to her undisposed-of personalty; and if another takes out administration, the husband, and not the next of kin of the wife, is entitled, as he would have been before the Act. *Re Lambert's Estate, Stanton* v. *Lambert* (1888), 39 Ch. D. 626; 57 L. J. Ch. 927; *Smart* v. *Tranter* (1890), 43 Ch. D. 587; 59 L. J. Ch. 363; *Surnam* v. *Wharton* (1891), 1 Q. B. 491; *In re Scott, Scott* v. *Hanbury* (1891), 1 Ch. 299; 60 L. J. Ch. 461. And upon the same principle it has been decided that the husband's right as tenant by the courtesy is unaffected. *Hope* v. *Hope* (1892), 2 Ch. 336.

AMERICAN NOTES.

The doctrine of the principal case generally prevails in the United States, and in many of the States is expressly enacted by statute, so far as it regards the right of the husband. Schouler on Executors and Administrators, § 98; *Fairbanks* v. *Hill*, 3 Lea (Tennessee), 732; *Shumway* v. *Cooper*, 16 Barbour (New York Sup. Ct.), 556; *Clark* v. *Clark*, 6 Watts & Sergeant (Penn.), 85; *Weaver* v. *Chace*, 5 Rhode Island, 356.

The husband has not this preference in Alabama, Colorado, and Vermont. *Randall* v. *Shrader*, 17 Alabama, 333; *Holmes* v. *Holmes*, 28 Vermont, 765; *Goodrich* v. *Treat*, 3 Colorado, 408.

The widow's right is not co-extensive with that of the husband. In some States the widow is preferred by the Statute (as in New York, Mississippi,

New Jersey, and Alabama), but generally the appointment is discretionary. Schouler on Executors and Administrators, § 99. Illiteracy and poverty do not disqualify her. *Bowersox's Appeal*, 100 Penn. St. 434; 45 Am. Rep. 387. But her desertion of her husband does. *Odiorne's Appeal*, 54 Penn. St. 175; 93 Am. Dec. 683.

The right of either party may be defeated by agreement (as by settlement), and is forfeited by absolute divorce for the fault of either (*Ensign's Estate*, 103 N. Y. 284; 57 Am. Rep. 717), and possibly by desertion or misconduct (*Cooper* v. *Maddox*, 2 Sneed, 135). Schouler Ex. & Adm. §§ 98, 99; *Charles* v. *Charles*, 8 Grattan (Virginia), 486; 56 Am. Dec. 155.

The modern Married Women's Enabling Acts do not take away the husband's right to administer. *Johnson* v. *Cummins*, 16 New Jersey Equity, 97; 84 American Decisions, 142; *Ransom* v. *Nichols*, 22 New York, 110. In *Robins* v. *McClure*, 100 New York, 328; 53 Am. Rep. 184, it was said: "By the common law the husband became entitled to that portion of the wife's personal property of which she was actually possessed at the time of the marriage, or which came to her during coverture. In case of the wife's death prior to that of the husband, he was authorised to take out letters of administration upon her estate, and as administrator, after payment of her debts, if any there were, he retained and became the owner of the assets remaining in his hands as such administrator, under the practice then existing, by means of which, before the statute of distributions, the administrator converted and appropriated the assets in his hands to his own use. A contest arose between the ecclesiastical and temporal courts concerning the right of the administrator to thus appropriate the funds, which contest was finally settled by the passage of the statute of distributions (22 Car. II. chap. 10); and as doubts still existed in regard to the rights of the husband, an explanatory act (23 Car. II. chap. 3) was passed, by section 25 of which it was declared that this statute should not be construed to extend to the estates of *femes covert* dying intestate, but that the husband should have the same right to administer and enjoy such estate as before the passage of the said act." This case also reiterates the doctrine that the intestate wife's personalty goes to the husband at common law by virtue of his marital right, and that the modern Married Women's Enabling Acts have not changed this rule; citing *Barnes* v. *Underwood*, 47 New York, 351, and disapproving *Fleet* v. *Perrins*, L. R., 4 Q. B. 500.

No. 6. — FIELDER *v.* HANGER.

(1832.)

RULE.

WHERE the whole interest is vested in persons other than the next of kin, the grant of administration ought to be made so as to follow the interest, and not to the next of kin, under the Statute of Henry VIII.

Fielder v. Hanger.

3 Hagg. Eccl. Rep. 769.

This was a cause of granting administration to the executors of Philip Leader of certain effects of his late wife, left unadministered by him. An appearance having been given for, and administration prayed by, the niece and one of the wife's next of kin, the executors alleged in Act on petition, that in June, 1812, in contemplation of marriage, Leader and Mrs. Dawson signed an agreement, that her property should on the marriage pass to Leader, save as to "her monies in the funds, which shall be for her separate use to all intents and purposes as if she were sole and unmarried, and that the same shall be conveyed to trustees, and a proper settlement executed." That no settlement was made, but the marriage took place, and on her death, in June, 1828, she was possessed of personal estate consisting of £2475, in the four per cents., and some Long Annuities standing in her name of "Dawson."

The proctor for the niece having returned the Act unanswered, LUSHINGTON moved that the grant should pass to the husband's executors. It was true that the modern practice had been different, but as all the interest was in the representatives of the husband, they were the parties best entitled to the grant. All the cases were collected in Vol. I. Hagg. Ecc. Reports, 341–348, and Vol. II. Appendix, 158–170.

Per CURIAM. Those cases show that there have been contradictory decisions on the point. On the principle, however, that the grant ought to follow the interest, and that the whole interest is vested in the husband's representatives, I shall decree this grant. I should have done the same if the husband had not taken out administration, unless it could be shown that he had not the

interest, but that the property belonged to the wife's next of kin: and it will be understood in the Registry that this is to be the rule for the future, unless special cause to the contrary be shown.

Motion granted.

ENGLISH NOTES

The above-mentioned rule was allowed in *Isted* v. *Stanley* (1580), Dyer, 372, and for many years was followed without any deviation. Then came a period during which there occur cases in which the Ecclesiastical Courts disregarded the rule (*Hole* v. *Dolman*, 1736, and *Kinleside* v. *Cleaver*, 1745, 2 Hagg. Ecc. App. 165, 169), and from the reporter's note it appears that these cases were followed in preference to the earlier authorities; but the present practice has been settled, as stated in the rule. The application of the rule in the case of a transmission of a husband's right to a wife's property has been already referred to under No. 5 (p. 102, *supra*). *In the goods of Harding* (1872), L. R., 2 P. & D. 394; 41 L. J. P. & M. 65.

The origin of the rule may be conjectured from the statement of Lord Hale in *Thomas* v. *Butler* (1693), as decided two years after the Statute of Distributions, and reported, 2 Lev. 55, at p. 56: "The reason," he says, "why administration granted to the next of kin was not revocable after the statute of Henry VIII., is because it is intended that such administrator should have the whole of the residue for his own use; and upon this account the ordinary could not grant distribution, nor oblige the administrator to distribute till the law was altered by the late statute. But that has not altered the case yet, where there is a residuary legatee, for the residuary legatee is to have the whole surplusage by the appointment of the testator, and the administrator nothing." He therefore held that administration, though granted to the next of kin, may be revoked, and granted to the residuary legatee. And to the same effect is the judgment of Lord Holt in *Petit* v. *Smith* (1695), 1 P. Wms. 6, at p. 8.

In accordance with the principal case, the Court has made a grant to the next of kin entitled by settlement to property of a wife who had predeceased her husband. *In the goods of Pountney* (1832), 4 Hagg. 289. But it is apprehended that there must have been evidence that this was the only property of the wife, or the grant must have been limited to the property in settlement. See *R.* v. *Betteswortb* (1730), 2 Str. 1118; *Fawtry* v. *Fawtry* (1691), 1 Salk. 36. But where there clearly was no residue, a specific legatee was preferred to the residuary legatee. *In the goods of Wilde* (1887), 13 P. D. 1; 57 L. J. P. D. & A. 7. When administration had been granted to one of the next of kin of a testator, on the assumption that there was no disposition of the residue,

and the Court of Chancery subsequently decided that the residue had been disposed of, the grant was revoked, and administration *de bonis non* granted to the residuary legatee. *Warren* v. *Kilson* (1859), 1 Sw. & Tr. 290.

Where no interest appears in another, the grant must be made to the next of kin. *R.* v. *Hay* (1767), 1 W. Bl. 640. But in a subsequent case, where there was a contest in the Ecclesiastical Courts as to the persons entitled, a *mandamus* was refused. *R.* v. *Hay* (1769), 4 Burr. 2295. And it is conceived that now the Probate Division is the proper court to determine who is entitled. *Priestman* v. *Thomas* (1890), 15 P. D. 70; id. 210, at p. 214, per Cotton, L. J.

Following the principle of this rule that administration should follow interest, were decided these cases, which allowed a grant of administration to a creditor where it is clear that the estate is insolvent. *Anon.* (1725), 11 Vin. Abr. 87, pl. 24 This has been recognised and extended by the 73rd section of the Probate Act of 1857 (20 & 21 Vict. c. 77, § 73), upon which it has been decided that where special circumstances exist, a grant to a creditor of a deceased insolvent mortgagee may be revoked and a fresh grant made to the nominee of such creditor. *In the goods of Brown* (1888), 59 L. T. 523. It is not, of course, to make the grant to a stranger, and special circumstances must exist. *In the goods of Richardson* (1871), L. R., 2 P. & D. 244; 40 L. J. P. & M. 36. But the Court has in a proper case appointed a person who was neither of kin to the deceased nor a creditor. *In the goods of Bateman* (1871), L. R., 2 P. & D. 242; 40 L. J. P. & M. 24. And a creditor having been fully satisfied, and having absconded, a grant to him was revoked, and a new grant made without citing him. *In the goods of Bradshaw* (1887), 13 P. D. 18; 57 L. J. P. D. & A. 12. It has been said that the person to be appointed in one character must not be entitled to a grant in another character. *In the goods of Fairweather* (1862), 2 Sw. & Tr. 588. But the rule appears to have been disregarded in a later case. *In the goods of Dalton, dec'd* (1881), Tristram & Coote, Pro. Prac. 212, n.

There is no jurisdiction to compel a person to take administration, even where he has intermeddled. *Acherley* v. *Oldham* (1811), 1 Phillim. 248; *Ackerley* v. *Parkinson* (1815), 3 M. & S. 411; *In the goods of Fell* (1861), 2 Sw. & Tr. 126.

By the 73rd section of the Probate Act, 1857 (20 & 21 Vict. c. 77), a discretion is given to the Court in special circumstances to make the grant to a person other than the one who would have been legally entitled to it otherwise than by the Act. Cases in which this power has been acted on are: *In the goods of Samson* (1873), L. R., 2 P. & M. 48; 42 L. J. P. & M. 59; *In the goods of Hughes* (1873), L. R., 3 P. & M.

140; *In the goods of Shoosmith* (1893), 1894, P. 23. In the last mentioned case, where the deceased, whose husband had deserted her and had not been heard of for fifteen years, he was passed over without citation, and administration, with the will annexed, granted to her son, who by the will was nominated trustee and manager of a certain partnership interest which represented substantially the whole of her estate.

AMERICAN NOTES.

This case is cited by Schouler (Executors and Administrators, § 130), who says of it: "In fine, the more rational rule has been established, both in England and the United States, that administration on the wife's estate shall be granted, in case of the husband's death, pending its settlement, to the husband's representatives,— unless, indeed (as under a marriage settlement or some peculiar statute), the wife's next of kin are entitled to the beneficial interest; the grant in either case following the interest." Citing also *Hendren* v. *Colgin*, 4 Munford (Virginia), 231; *Whitaker* v. *Whitaker*, 6 Johnson (New York), 112; *Bryan* v. *Rooks*, 25 Georgia, 622; 71 Am. Dec. 194; *Patterson* v. *High*, 8 Iredell Equity (North Carolina), 52. This doctrine is very explicitly declared in *Whitaker* v. *Whitaker*, *supra*, where it is said "that the right of administration follows the right of the estate, and ought, in case of the husband's death, after the wife, to be granted to the next of kin of the husband; and if obtained by a third person, he is a trustee for the representative of the husband;" and "that there is not an authority to be met with contradicting these well and clearly established principles."

NO. 7. MERCER *v.* MORLAND.

(1758.)

RULE.

WHERE administration is contested by two persons of the whole blood in equal degree of relationship, the rule is to grant it to the one who has the concurrence of the majority of the interests.

But where the contest is between one of the whole blood and one of the half blood, the one of the whole blood is to be preferred.

Mercer v. Morland.

Eccl. Rep temp. Lee, Vol. 2, pp 499, 506.

Dr. Bettesworth, for Thomas Mercer. Edward Mercer died a widower, intestate, without children or parents; left William Mercer, a brother of the whole blood, and Thomas and John

Mercer, brothers of the half blood, his only next of kin. William Morland, a creditor, entered *caveat*, which was warned, and then Smart appeared for William Mercer, and alleged he was duly sworn administrator, and exhibited an inventory, and prayed administration to be granted to him. Smith asked for administration to be granted to Thomas Mercer, a brother to the deceased by the half blood. His application was supported by John, another brother of the half blood, and by Morland, a creditor for £80. The inventory amounts only to £230, or thereabouts. Thomas and John Mercer are entitled to two thirds of the clear effects.

Dr. Hay, for William Mercer. Deceased died on the 4th January, 1758; William was sworn administrator, and gave security in £500, but the administration had not been yet decreed; it has been usual to grant it *primo petenti* when the relationship is equal; the securities have justified.

Judgment: Sir GEORGE LEE. I declared that when the contest for an administration was between two persons in equal degree of the whole blood,[1] the general rule had been to grant it to that person in whom the majority of those entitled to distribution concurred; but that rule did not hold when the contest was between one of the whole blood and one of the half blood, for in that case the whole blood was preferable, in the grant of administration, to the half blood, though the majority of interest concurred in the latter, — unless material objections could be proved against him of the whole blood; and so it was held in the case of *Webb* and *Griffin*, Prerog. 7th March, 1727, and said there to have been often so determined; but, it being suggested that very material objections could be shown against granting administration to William Mercer, I gave time to exhibit affidavits for that purpose.

Subsequently, affidavits were exhibited to impeach the character of William Mercer, but there being, on the contrary, an affidavit of two persons who gave him a good character, administration was decreed to William Mercer, and Thomas Mercer was condemned in costs.

ENGLISH NOTES.

One of the earliest cases on the former branch of the rule is *Cartwright's Case* (1678), Freem. 257, where administration was granted

[1] Vide, *Earl of Warwick* v. *Greville*, 1 Phillim. 123.

to the mother and guardian of three infant grandchildren in preference to a grandchild who was of age. In *Elves* v. *Elves* (1728), 2 Lee, 573, it is stated to be a constant rule, although the rule is not inflexible. *Cardale* v. *Harvey* (1752), 1 Lee, 177, 179, 180; *In the goods of Stainton* (1871), L. R., 2 P. & D. 212, 40 L. J. P. & M. 25. The majority of interest (provided a joint grant is not required) has great influence upon the Court in exercising its discretion. *Iredale* v. *Ford & Bramworth* (1859), 1 Sw. & Tr. 305. *Ceteris paribus*, the Court prefers a sole to a joint grant (*Earl Warwick* v. *Greville* (1809), 1 Phillim. 123, at p. 126), and the parties themselves must agree who shall be nominee, in order that the rule preferring a sole grant to the person representing a majority of interests should take effect. *Dampier* v. *Colson* (1812), 2 Phillim. 54, at p. 55. A grant to a female next of kin and her husband is against the Statute, and is bad, because upon the husband surviving the office would survive to him who is not one of the next of kin. *Brown* v. *Wood* (1649), Alleyn, 36. Primogeniture gives no right to administration, and though it might incline the scale, if things were precisely equal, certainly must yield the preference to a younger brother supported by the majority of interests. *Warwick* v. *Greville* (1809), 1 Phillim. 123.

An early case in which the second branch of the rule was applied, is *Wingate* v. *Glascock* (1624), Bendloe, 133. Dr. Bettesworth says, in *Field* v. *Wratley*, 10 Dec., 1705: "The whole blood is always preferred to the half." Dr. Cottrell's M.S., cited in Tristram & Coote's Prob. Practice, 216, n.

It appears that before the Statute of Distributions the administration under the Statutes of Edward III. and Henry VIII. was generally granted to the whole blood in preference to the half. Roll. Abr. Tit. Prohibition, 303. *Brown's Case*, 8 Car. cited in *Smith* v. *Tracy*, 1 Vent. 307. But in the case of *Brown* v. *Wood* (1649), already cited, Alleyn, 36, the grant had been made to a sister of the half blood (along with her husband), and it does not appear that the Court thought the circumstance of the half blood would alone have been a sufficient ground for the recall of the grant on the application by the brother of the whole blood. It is to be remembered that before the Statute of Distributions the person to whom the grant was made was not bound to distribute. And a grant which had been made to a next of kin, being made for his own benefit, could not be recalled. See per Lord HALE in *Thompson* v. *Butler* (1673), 2 Levinz, 56. But the Statute of Distributions was construed as having given a share to the half blood as well as to the whole blood. This was decided on an appeal to the House of Lords in a case of *Watts* v. *Crooke*, 15 May, 1690, by the advice of the Chief Justices and others of the Judges, and after hearing the civilians on either side. Journals

of the House of Lords, Vol. XIV. fo. 499, 2 Ventr. 317. The practice, notwithstanding, of making the grant to the whole in preference to the half blood, continued to exist, where other things are equal, as appears by the principal case.

No. 8. — SAVAGE *v.* BLYTHE.

(1796)

RULE.

On the death of a sole or surviving administrator, leaving estate of the original deceased outstanding, the title to get it in is made by the appointment of an administrator *de bonis non*.

If the persons who were next of kin to the original deceased at the time of his death are all dead when the grant is applied for, there is no person entitled as of right under the Statute of Henry VIII., and the Ecclesiastical Court had a discretion.

The rule of the Ecclesiastical Courts was to prefer the person having the greater beneficial interest; and, accordingly, the Court preferred the executor of the administrator who was sole next of kin at the time of the death to the persons who were next of kin at the time of the application.

Savage v. Blythe.

2 Hagg. Rep. (Appendix) 150.

Abraham Cocker died intestate, leaving a brother and several nephews and nieces. Administration was granted to the brother; and at the end of the year he distributed, taking the deceased's securities upon himself. The administrator died, leaving the securities due to the original deceased outstanding; he made a will, and appointed an executor.

A decree was taken out against the nephew, to show cause why the administration *de bonis non* should not be granted to the executor of the brother administrator. The nephew appeared, and prayed administration.

Sir William Scott and Dr. Nicholl for the executor.

No. 8. — Savage v. Blythe.

The question is whether the executor of the administrator or the next of kin is entitled to the administration *de bonis non*. It was necessary to cite the next of kin, though they have received their shares, executed releases, and thus discharged their interests. The Court is inclined, in such grants, to follow the interest, and give the handle to the person who has the interest. It would not, unless compelled by law, give the grant to persons without any interest. The 21 Hen. VIII. c. 5, enacting that, on the death of an intestate, the administration is to be decreed to the next of kin, does not apply; it has been complied with; the administration was so granted in the first instance. The Court is not to go on *in infinitum*. Where a party has parted with all his interest in the effects, he has no right to the administration. *Young* v. *Pierce*, Freeman, 496. Great danger and inconvenience would ensue, if persons were permitted to come into the management of the estate who have no interest, and who would have only to pay over to those entitled. This is the principle of the ordinary practice of granting administration with will annexed to the residuary legatee, though against the words of the statute. *Isted* v. *Stanley*, Dyer, 372.

Dr. Swaley, *contrà*. Though the parties have released their interest, they have not renounced their right to the administration. In *Young* v. *Pierce* there was an agreement that the other party should take administration. In *Isted* v. *Stanley* the point decided was, that an executor of an executor, dying before probate, was not executor to the original testator, though entitled to administration if the residue was bequeathed to his testator. It is true, it was stated that though there were next of kin, it was the course of office to grant administration to the residuary legatee, which was (the reporter says) allowed to be law. The question is, whether the 31 Edw. III. and 21 Hen. VIII. are obligatory on the Court. The Court is only ministerial: the statutes leave it no discretionary power. The practice of the Court inclines to the person having the beneficial interest, as in the case of a residuary legatee, and where the option is left to the Court; but it has only such a discretionary power when the parties are in equal degree, or between a widow and next of kin who are equally entitled. It has no further discretion. The Statute is as obligatory on the second grant as on the first. In *Prior* v. *Moss* (Prerogative, 1772, April 10), "*Moss* died intestate. The mother of the intestate died without taking administration, and made Prior executor. The uncle of the deceased

took out administration. Prior, the executor, called it in as having all the interest under the will. The Court (Dr. Bettesworth) held it well granted to the next of kin to the intestate." In *Elliot* v. *Collier*, 3 Atk. 526; 1 Ves. Sen. 17; 1 Wils. 168, Lord HARDWICKE held the husband entitled to the interest without the administration.

Per CURIAM (Sir WILLIAM WYNNE). I understand the rule of the office to be to grant administration to those who are next of kin at the time of the death; but where a representation has been taken out and another is wanted, the course of the office is to make the grant to the interest, and not to persons who were not next of kin at the time of the death, but who have since become so. Such is laid down by Sir Edward Simpson to be the rule of office, *post*, p. 114. In the case of *Young* v. *Pierce*, an administration was granted by the Prerogative and Delegates to the interest, — viz., to the executor of one next of kin, in exclusion even of another who was also next of kin at the intestate's death, but who had released her interest. Here, the parties were not next of kin at the death, for they are nephews and nieces, and there was a brother. I conceive that, such being the case, they are not entitled to this administration; for the Statute looks to the next of kin at the time of the death, not to the next of kin when a second grant is wanted; and the Court will grant the administration to the representative of the original administrator in preference to a person who, by the death of intermediate persons, becomes the next of kin when the second administration is wanted. *Lovegrove* v. *Lewis*, before the Delegates, was a case of this kind.[1] The question is not whether the same rule applies to administrations *de bonis non* as to original adminis-

[1] *Lovegrove* v. *Lewis and Lewis* (Prerog. 1772, Trin. Term 2nd Session). John Bidleston died in November, 1761, a widower, intestate, leaving two sons, — the only persons entitled in distribution. John Bidleston, one of the sons, took out administration to his father in 1761. Thomas, the other son, died in 1762, intestate, leaving his brother John his only next of kin. John, the administrator, by his will, dated 13 September, 1763, appointed Lovegrove his sole executor. The validity of that will contested, it was pronounced for by the Prerogative Court and by the Delegates. Lovegrove was sworn administrator of Bidleston the father. John and Richard Lewis opposed the grant, on the ground that they were the cousins german, and then next of kin of John Bidleston, the father, and, as such, asserted their right to the administration *de bonis non*. It was alleged that they had no interest in the effects. Sir George Hay decreed letters of administration *de bonis non* of John Bidleston the father, to be granted to Lovegrove, the executor and residuary legatee of John Bidleston, the son and administrator. And this sentence was, on the 29th of April, 1773, affirmed with costs by the Court of Delegates. The Judges present were ASTON, J., BLACKSTONE, J., MACHAM, J., LOVEDAY, LL.D.

trations; but whether the Statute does not apply only to such as were next of kin at the death. But, in order to look more fully into the cases, let the matter stand over.

On the by-day the cause came on again.

Dr. Swaley cited *Hole* v. *Dolman*, 2 Hagg. (App.) 165; *Kinleside* v. *Cleaver*, id. 169; *Walton* v. *Jacobson*, 1 Hagg. 346; and *Whitehall* v. *Phelps*, Prerogative, 1711, E. T. 2 Sess. "Whitehall died intestate, leaving a widow and no children. The widow took administration, and made her son executor. He prayed administration *de bonis non* to the husband. This was opposed by the mother of the husband. Administration *de bonis non* was granted to her, though according to the custom of London the widow had the right of distribution. The case cited from Freeman the reporter thinks contrary to law. Unless *Lovegrove* v. *Lewis* (of which case I was not aware on the former day) had occurred, the cases to which I have referred would have been decisive. That case has established a distinct principle; the only distinction from the present case is that here the parties were originally in distribution, but they have released their interest.

Sir William Scott and Dr. Nicholls, *contrà*.

The question is whether the other party has a statutable right, and whether the Court is consequently bound. It turns on the construction of the statute — on the words "next of kin." We apprehend they mean the next of kin at the time of the death. Great inconvenience would result if the Court did not attend to this limitation, but extended the term to all the branches to whom it may be derived. To say that any one can *acquire* the relation of "next of kin" to a person, after that person is actually dead, would be absurd. The term must only mean those who are so at the time of the death. No person, therefore, having a statutable right, the Court will grant it, in its discretion, to the interest.

Per CURIAM. Abraham Cocker, the deceased, died intestate, a bachelor, without parents, leaving a brother and seven nephews and nieces; the brother took administration; he died, leaving goods unadministered, and having appointed Savage his executor. The representatives of the brother and administrator applies for administration *de bonis non;* this is opposed by the nephews and nieces, who claim it under the Statute. The brother, at the death of the intestate, was the sole next of kin, and solely entitled to the administration. The nephews and nieces were then entitled in distri-

bution, but not to the administration. The only question is, whether the nephew, who had no right to the administration at the death, is now entitled by devolution, on the death of the brother.

It is argued that it has been held that it ought to be granted to the next of kin at the time of the grant. This is founded on several cases, deciding that the administration to the wife is not grantable to the representative of the husband, but to the next of kin of the wife. By the ancient practice, on the death of the husband administrator, the Court granted the administration *prius petenti* to the kin of the husband or of the wife. *Hole* v. *Dolman* determined that it was grantable in preference to the wife's kin, and not to the representative of the husband; after which two other cases were cited, — viz., *Kinleside* v. *Cleaver* and *Walton* v. *Jacobson*. But this case does not fall within the principle there decided; for in those cases the kin were next at the death, the husband not being considered as kin, but having a claim in a distinct character; and therefore the Court held that the wife's next of kin in those cases had an absolute statutable right, on which they granted it. Such also is the case where the administration is granted to the widow; she does not take it as next of kin.

The question then is, whether the grant is to be made to the representative of the person who took as next of kin, or to those who have become next of kin at the time of asking for the grant. By the practice of the office the statutable right is confined only to the kin at the time of the death; afterwards to grant it to their representatives. So in a note of Sir Edward Simpson, in which, adverting to the case of *Hole* v. *Dolman*, that learned Judge says: "The rule there seems to mean only to the next of kin at the death of the deceased, not to whom may happen afterwards to be next of kin at the time a question arises upon the grant of administration; for a dead man can have no next of kin; he is not in a capacity to have next of kin at the time he becomes so. Therefore, by the course of office, it is granted to the interest, when the next of kin at the time of the death is not living at the grant of administration *de bonis non;* except in the case of next of kin of wife and representative of the husband, — then granted to the next of kin. Undoubtedly, by the Statute, the grant of administration to next of kin is good; but when the next of kin, who were so at death of deceased, are dead, then it is in the heart of the Court to grant it to the next of kin or the interest, and the grant

does not depend on the Statute, but the rules of the Court, — may grant it to next of kin, may grant it to interest, without regard to greater or less interest, according to the circumstances." In exact affirmance of that principle was the judgment of Sir GEORGE HAY, in *Lovegrove* v. *Lewis*, *supra*, p. 112 n., which was affirmed by the Delegates, with costs. There it could not be denied that the cousins were the next of kin at the time of the grant, yet Sir GEORGE HAY and the Delegates decreed it to the interest. In this case the nephews were not next of kin at the death, though in distribution; but the greater interest at the death was in the brother, and therefore his representatives have the greater interest. Not only so; it is stated that payment was made to the nephews and nieces in full satisfaction of their distributive shares, and that they gave releases; so that they have now no interest, as appears on the face of the releases. But it is said that they protest against the effect of their releases, and against any use to be made of them; and it is argued that they may apply to some court to determine on their validity; it is not, however, suggested that they were improperly obtained, nor that any proceedings are going on to invalidate them. Though the Court has no right to try the validity of these releases, yet it must take notice of them, as it does of marriage articles allowing a wife to make a will, which, being upon the face valid, and their validity not appearing to be contested, the Court grants probate. By the same plea that the effect of these releases is sought to be avoided, a husband might always avoid his wife's will. I am of opinion that the nephews have no statutable right, as they were not next of kin at the time of the death. The course of office in that case is to grant the administration to the superior interest, — viz., in this case, to the representative of the administrator, who would take half; and the interest of the others is released. Under the circumstances the interest is so clearly in the executor of the deceased administrator, that I shall grant the administration *de bonis non* to him.

ENGLISH NOTES.

The title given to the administrator differs materially from the title of an executor as regards devolution of representation; for an executor of an executor is executor to the first testator (25 Edw. III. Stat. 5, c. 5). But such devolution does not take place

unless the first executor has proved. *Isted* v. *Stanley* (1580), Dyer, 372; *In the goods of Gaynor* (1869), L. R., 1 P. & D. 723; 38 L. J. P. & M. 79. The renunciation of an executor, unless he was sole or surviving executor (*Arnold* v. *Blencoe* (1788); 1 Cox, 426), or unless all his co-executors joined in a renunciation (*Broker* v. *Charter* (1587), Cro. El. 92), was formerly a mere nullity. Notes to *Cubell* v. *Vaughan*, 1 Wms. Saunds. at p. 484, ed. 1871. But now upon this renunciation (20 & 21 Vict. c. 77, § 79) or failure to appear to a citation (21 & 22 Vict. c. 95, § 16) his rights in respect of executorship wholly cease, and the representation devolves as if that person had not been appointed executor.

That the title of administrator was not transmissible is enunciated as settled law so far back as the Year Book, 34 Hen. VI. fo. 14, pl. 26, in C. B., where it is stated that if an administrator die, his executors shall have no power to intermeddle with the goods, but the ordinary shall make a new grant to another at his election. A similar decision was given in *Powley & Siers Case* (1584), 1 Leon. 275. Again, in *Catherwood* v. *Chabaud* (1823), 1 B. & C. 150; 1 L. J. K. B. 66, the Court recognised that it was the proper procedure to make a grant *de bonis non*, although there might be cases in which, by reason of the form of the contract, there must be priority between a debtor and the administrator of a creditor, so as to enable the administrator of the administrator to sue. Of such an exceptional character is the case of *Drue* v. *Baylie* (1675), 1 Freeman, 392, 402, where an administrator made an underlease of a term of years of the deceased, reserving rent to himself, his executors, &c. His executors, and not the administrator *de bonis non*, were adjudged to be entitled to the rent on the express covenant; and per Lord Hale, L. C. J. (id. at p. 403), "and he shall be charged as an executor *de son tort*." It was held at the same time that the reversion was in the administrator *de bonis non*.

The second branch of the rule was followed in *Almes* v. *Almes* (1796), 2 Hagg. (Appx.) 155, where administration *de bonis non* was granted to a person entitled under a deed of gift from the administratrix of an intestate to the whole beneficial interest, in preference to one who was not next of kin at the time of the death, and consequently had no "statutable" right.

The interests given by the Statute of Distributions are vested from the death of the person to whose estate the Act applies, notwithstanding § 8, which gives a year before making distribution. *Earl of Winchelsea* v. *Norcliff* (1686), 1 Vern. 403; *Gudgeon* v. *Ramsden* (1692), 2 Vern. 274.

AMERICAN NOTES.

As a general rule in this country, administration *de bonis non* is granted in accordance with the rules governing the original grant of letters. In some States, however (as New York and Massachusetts), — it is differently provided by statute. Mr. Schouler says (Executors and Administrators, § 129): "The grant of administration *de bonis non* regards, according to the better reasoning, the interest of the original estate, rather than of those representing the original appointee, whose management, indeed, may require a close investigation after his death, removal, or resignation; and hence it seems better still that the Court should have power to appoint at discretion some third person committed to neither interest, but impartial between them."

SECTION III. — *Temporary and Limited Grants.*

No. 9. — R. *v.* BETTESWORTH (SMITH'S CASE).

(K. B. 1731.)

RULE.

THE Court has a discretion as to the person to whom a grant of administration *durante minore ætate* should be made, the case not being within the statutes.

R. v. Bettesworth (Smith's Case).

2 Str. 892.

Mr. Reeve moved for a *mandamus* to Dr. Bettesworth, commanding him to grant administration to Smith of the goods of his deceased son, *durante minore ætate* of his grandson.

Farzakerley, *contrà*, insisted that the father has not an equal right with the son; and that the spiritual court has always considered these administrators only as trustees for the infant, and have never kept to any rule in granting them, but according to the circumstances of the family; where there are several in equal degree, as children, they have always chosen which they pleased.

Et per CURIAM. When we grant a *mandamus*, it is to oblige the Judge to do right to the party who sues the writ; but, as there is no law which says to whom these administrations during minority shall be granted, there is no law to be put in execution. *Rex* v. *Bettesworth*, 2 Str. 956. In the case of the next of kin, he is entitled *de jure*, and therefore in his case we grant a *mandamus* of course. *Anon.* 1 Str. 552. We will grant no writ in this case.

No. 9. — R. v. Bettesworth (Smith's Case). — Notes.

ENGLISH NOTES.

We have already seen that prior to the Statute of Henry VIII. the ordinary was entitled to make a grant of administration to whom he pleased. There was no statutory provision as to a limited grant, and that the case was outside the statute was recognised in *Briers* v. *Goddard* (1618), Hob. 250; *Walker* v. *Woollaston* (1731), 2 P. Wms. 576.

Administration *durante minore ætate* was of two kinds: (a) In the event of testacy. (b) In the event of intestacy.

A grant of administration *durante minore ætate executoris* formerly lasted until the executor attained the age of seventeen; a grant *durante minore ætate administratoris*, until the general administrator attained the age of twenty-one. *Atkinson* v. *Cornish* (1699), 1 Ld. Raym. 338.

The reason of this difference was thus stated by Lord Holt in the case of *Freke* v. *Thomas* (1702), 1 Ld. Raym. 667, at p. 668. "For the authority that the administrator hath, is given to him by statute; and an infant hath not been adjudged a legal person to be intrusted with the management of an estate. But an executor, who comes in by the act of the party himself, hath been adjudged capable to administer at seventeen." But now by Statute 38 Geo. III. c. 87, §§ 6 & 7, administration *durante minore ætate executoris* is assimilated in all particulars to administration *durante minore ætate administratoris*.

When the limited grant was made, the temporary administrator had to show that his title to sue was undetermined by the happening of the conditions upon which his grant came to end. *Beal* v. *Simpson* (1699), 1 Ld. Raym. 408. But a plaintiff suing an administrator *durante minore ætate* had not this burden cast upon him. *Carver* v. *Haselrig* (1617), Hob. 251, and per Powell, J., and Treby, C. J., in *Beal* v. *Simpson* (1699), *supra cit.*

It is a material question to consider whether a payment made to the limited administrator is not made at the peril of the debtor. It is true that in *Clare* v. *Hodges* (1691), cited by Peere Williams from his own note (see 2 P. Wms. 579), it was decided that the payment to an administrator *pendente absentiâ* would be good if the person making the payment had no notice of the determination of the limited administrator's title.

But *non constat* that this applies to the case of an administration *durante minore ætate*; since the title is, in general, determinable at a fixed period, of which the creditor presumably has notice. The point was treated as doubtful in *Ford* v. *Glanville* (1598), Moore, 462.

In one case, where a man died leaving several infant children, the

grant was made to the guardian of the minors until one of the children should apply. *In the goods of Burgess* (1863), 4 Sw. & Tr. 188; 32 L. J. P. M. & A. 158.

AMERICAN NOTES.

In this country it is customary to pass over minors, and select a suitable person for permanent administrator, without reference to, or regard for, the minor's precedence. Schouler's Executors and Administrators, § 132, n. See also *Pitcher* v. *Armat*, 6 Mississippi, 288; *Ellmaker's Estate*, 4 Watts (Penn.), 34; *Taylor* v. *Barron*, 35 New Hampshire, 493.

No. 10. — EX PARTE EVELYN.

(CH. 1833.)

RULE.

IT is the practice of the Court, where the next of kin is of unsound mind, although not so found by inquisition, to grant administration for the use and benefit of the lunatic *durante animi vitio*; and such administrator is entitled to a transfer of any funds belonging to the estate of the deceased.

Ex parte Evelyn.

2 My. & K. 3.

In this case, administration had been taken out to the personal estate and effects of the lunatic so long as the lunatic's next of kin continued to be of unsound mind; and the administratrix had, in the usual form, given bail, which had justified in double the value of the estate. The petition of the administratrix prayed a transfer of the funds belonging to the lunatic's estate into the names of the administratrix and her two bail.

Mr. Ching, in support of the petition.

The LORD CHANCELLOR ordered the petition to stand over, that he might make inquiry as to the form of the administration which had been granted during the incapacity of the next of kin, against whom no commission had issued.

Nov. 19. The LORD CHANCELLOR this day read the following communication, which he had received from Dr. Lushington: —

"It is the practice of the Ecclesiastical Court to grant administration for the use and benefit of a lunatic, though the person

alleged to be so has not been found a lunatic by inquisition. When such a case occurs, the Ecclesiastical Court requires affidavits, stating the fact of lunacy, and that no inquisition has been had, and, of course, no committee appointed. The Court then grants administration to the next of kin of the lunatic, for the use and benefit of the lunatic pending the lunacy, and it requires sureties in double the amount of the property, and such sureties must justify.

"Such is the practice of the Court; and the reason I apprehend to be this, that, if such grants were not made, either the property might not be administered at all, or be administered by a creditor; or that parties might be compelled, in cases where it was neither necessary nor expedient, to apply for commissions of lunacy, in order to get a committee appointed, who might take the administration. I believe, too, that another reason might be assigned, — viz., that there are cases in which the Chancellor might not deem it necessary to grant a commission, though satisfied of the unsoundness of mind. These grants are called, by Oughton, administrations *durante corporis aut animi vitio*. Ord. Jud. 324, n. The power of the Ecclesiastical Court to grant them is recognised in many cases, particularly in *Hills* v. *Mills*, 1 Salk. 36, and the cases there quoted; and I believe that no exception has been made in cases where the person has not been previously found a lunatic by inquisition. Indeed, in poor cases, this would be impracticable.

"In *Re Crump*, 3 Phill. 497 (and see *Re Hinckley*, 1 Hagg. 477), such administration was granted during the incapacity of an executor. In *Re Handstone*, which was an application of mine, it was refused, because I asked for the grant without justifying security."

The Lord Chancellor, upon the result of the preceding communication, directed that the transfer of the fund should be made to the administratrix only, and not to her bail.

ENGLISH NOTES.

The principal case been selected as a ruling case by reason of its being based on the special report of Dr. Lushington.

The principle is, however, covered by the much earlier authority of *Hills* v. *Mills* (1692), 1 Salk. 35, which went even further, and laid down as law that such a grant could be made during the incapacity of an executor, and that rule was given effect to in *Re Crump*, 3 Philli-

more, 497. These cases really go beyond the principal case, and show that the power to grant this limited administration applied to cases where the ordinary would not originally have had power to grant full administration; as is laid down in the Year Book, 34 Hen. VI. fo. 14, pl. 26: "If there is a testament which is proved, in that case the ordinary cannot change that, nor make another executor or administrator, because that was the act of the testator." And this rule was applied in *Graybrook* v. *Fox* (1566), Plowd. 275.

AMERICAN NOTES.

Where the next of kin of a deceased is *non compos mentis*, the guardian of his person and estate is entitled to the administration. *Mowry* v. *Latham*, 17 Rhode Island, 480.

No 11. — CLARE AND HODGE'S CASE.

(K. B. 1691.)

RULE.

If the next of kin is beyond seas, a grant of administration may be made to another *pendente absentiâ*; and payment to such administrator, even after the return of the next of kin, without notice of his return, is good.

Clare and Hodge's Case.

Cited in 1 Lutw. 342.

In a *scire facias*, brought by an administrator *durante absentiâ* of another *Oyer* of the *Scire facias* the defendant demurred, and an exception was taken, that such administration was void and not allowable by law. But the exception was overruled, for it was held clearly by the Court that such administration was well grantable by the law, and there might be great convenience thereby; for if the next of kin in blood being beyond the seas, if such administration could not be granted, the intestate's debts could not be collected or recovered. And it was also held by the Court, that after the return of the next blood, payment of a debt to such administrator, before notice, is good. And it was also held by the Court, that although an action brought by such administrator, might abate by the return &c., yet actions against him are not abated, but shall continue against the rightful administrator.

ENGLISH NOTES.

This rule depends upon similar principles of convenience to the foregoing.

But the reason for extending the principle to a case where an executor had already proved, does not apply, and in such a case the rule of the Year Book, 34 Hen. VI. fo. 14, pl. 26, above referred to (p. 121, *supra*), would have applied until the Statute 38 Geo. III. c. 87. By that Statute the grant may be made where the executor who has proved resides out of the jurisdiction for twelve months; and according to the construction of the Statute in *Tugnton* v. *Hannay* (1802), 3 Bos. & P. 26; 6 R. R. 596, the grant so made *pendente absentiâ* does not become void, but is only voidable upon the death of the executor.

By the Court of Probate Act, 1857 (20 & 21 Vict. c. 77, § 74), the provisions of the Statute of Geo. III. have been extended to administrators, and since the Court of Probate Act, 1858 (21 & 22 Vict. c. 95, § 18), both in the case of executors and administrators, it is no longer necessary that there should be proceedings at law or in equity to enable a grant *durante absentiâ* to be made. The provisions of the Statute of Geo. III. have received a wide construction, and have been held to entitle the legal personal representative of a deceased legatee to a grant. *In the goods of Collier* (1862), 2 Sw. & Tr. 444; 31 L. J. P. M. & A. 63. And to apply to an executor of an executor resident out of the jurisdiction. *In the goods of Grant* (1876), 1 P. D. 435; 45 L. J. P. D. & A. 88.

AMERICAN NOTES.

In the earlier American practice this species of administration was recognised. *Willing* v. *Perot*, 5 Rawle (Penn.), 264. But the modern practice appears to be to appoint a general and permanent administrator. Schouler's Executors and Administrators, § 133. See also *Wilkinson* v. *Winne*, 15 Minnesota, 159. In South Carolina such administration may not be granted after letters testamentary. *Griffith* v. *Frazier*, 8 Cranch (U. S. Sup. Ct.), 9.

SECTION IV. — *Interposition of a Court of Equity for Protection of the Estate.*

No. 12. — RENDALL *v.* RENDALL.

(CH. 1841.)

RULE.

IF the representation is in contest, and no person has been appointed executor (or administrator), a Court of Equity has jurisdiction and will interfere, not because of the contest but because there is no proper person to receive the assets. And even where probate or administration has been granted, the Court of Chancery had jurisdiction in case of a contest to interfere; but in such a case special grounds had to be shown for its interference.

Rendall v. Rendall.

1 Hare, 152 (s. c. 11 L. J. (N. S.) Ch. 93).

By a will dated the 26th of September, 1829, alleged to have been made by the testator, Simon Rendall, amongst other bequests, a legacy of £150 was given to the plaintiff George Rendall and certain benefits to the plaintiff Simon Rendall, and the residue of the testator's property was bequeathed to and between the defendant William Rendall, the plaintiff Simon Rendall, and Herter Sherborn, share and share alike; and the defendant William Rendall, and the plaintiff Simon Rendall were appointed joint executors.

By another will, alleged to have been made the 3rd of July, 1841, the testator gave certain legacies (not including any legacy to George Rendall), and gave all the residue of his property to William Rendall, his executors, administrators, and assigns, absolutely, and appointed William Rendall sole executor.

The testator died on the 4th of July, 1841.

A suit was instituted in the Prerogative Court of the Archbishop of Canterbury, to establish and obtain probate of the will of the 3rd of July, 1841; and on the 6th of December, 1841, an allegation in defence, on behalf of the plaintiffs, and the other persons interested under the will of 1829, was admitted for the purpose of establishing that will, and setting aside the will of 1841.

No. 12. — Rendall v. Rendall.

On the 6th of December, 1841, the bill was filed, praying that a receiver might be appointed to collect, get in, and preserve the outstanding personal estate and effects of the testator, until the suit in the Ecclesiastical Court should be determined. A motion was now made for the receiver. The affidavits in support of the motion stated, amongst other things, that the property of the testator, at the time of his decease, consisted of money in the funds, debts (some of which were secured on mortgage), farming property, household furniture, and other effects. The affidavits in reply stated, that there was reason to believe that the suit in the Ecclesiastical Court would be determined in the ensuing Hilary Term.

Mr. Sharpe and Mr. Follett, in support of the motion.

The appointment of a receiver is, of course, where there is property unprotected, and the representation is in contest. *Watkins* v. *Brent*, 1 Myl. & Cr. 97, and the authorities there referred to; *Jones* v. *Goodrich*, 10 Sim. 327; *Wood* v. *Hitchings*, 2 Beav. 289; *Day* v. *Croft*, 2 Beav. 293 n. There is no case in which, under such circumstances, the receiver has been refused. See 2 Beav. 294.

Mr. Temple and Mr. Blunt, *contrà*.

A special case must be made out, as a ground for the appointment of a receiver. The party named in the will as executor is considered at law and in equity as the proper party to administer the estate. He may act as executor notwithstanding probate has not been obtained. *Wills* v. *Rich*, 2 Atk. 285. Unless the estate be endangered, there is no necessity for the interference of this Court; and in the absence of any necessity, the Court will not throw upon the estate the expense of the appointment. There is also this fact which distinguishes the present case: the defendant, William Rendall, is appointed executor in both of the alleged wills, and, therefore, whatever the result of the suit may be, he will be the party to administer the estate. They cited *Atkinson* v. *Henshaw*, 2 Ves. & B. 85; *Ball* v. *Oliver*, id. 96.

Mr. Sharpe replied.

Dec. 18. The Vice Chancellor. I deferred my judgment, not from any doubt I entertained, but because it was insisted that the appointment of a receiver in this case would impugn the judgment of Lord Cottenham in the cases of *Watkins* v. *Brent*, 1 Myl. & Cr. 97, and *Marr* v. *Littlewood*, 2 Myl. & Cr. 454; and if so, I should have hesitated, although that hesitation would have belied my own confident opinion.

Two rules may, I believe, be stated with perfect safety. First, where probate or administration has been granted, a receiver will not be appointed pending litigation in the Ecclesiastical Courts to recall probate, unless a special case be made for doing so. Secondly, where no probate or administration has been granted, it is of course to appoint a receiver pending a *bonâ fide* litigation in the Ecclesiastical Courts to determine the right to probate or administration, unless a special case can be made for not doing so.

I need not, in this case, cite authority to prove the former proposition. The defendant contends for that, and much more. He says, where an executor is named in a will, the Court will not interfere against him without a special case; and that this rule was founded upon the principle that the executor derived his title under the will and not under the probate, and might act before probate; and the case of *Wills* v. *Rich*, before Lord HARDWICKE was referred to. I will not stop to observe upon the fallacy upon which this argument, as it is applied to the case now before me, proceeds. The question here is, not what an executor *de jure*, may do before probate, but what this Court will do whilst it is in dispute whether the party claiming to be executor, is so *de jure*, or not. It is the latter of the two propositions which alone calls for observation, and which I certainly was surprised to hear questioned.

Lord Redesdale, Treatise on Pleading, pp. 135, 136, 4th ed., states without qualification the general rule to appoint a receiver for the mere preservation of the property of a deceased person, pending litigation in the Ecclesiatical Court, although that Court itself may provide for the collection of the effects *pendente lite*.

In *King* v. *King*, 6 Ves. 172, opposite claims were set up under different wills, and a decision had been made that one will had not been sufficiently proved. It was objected in opposition to the motion, that the property did not appear to be in danger, and that the Ecclesiastical Court would appoint a receiver *pendente lite*. Lord ELDON said, "This is almost a motion of course. . . . The Court goes upon this, that it will do its best to collect the effects. The property is in danger, in this sense, that it may get into the hands of persons who have nothing to do with it."

From this case, in which the rule of the Court is so clearly laid down, I pass to the late case of *Wood* v. *Hitchings*, 2 Beav. 289, in

which the same principle was acted upon, the chief cases upon the subject having been referred to. I omit the intermediate cases, with this single observation, which I believe will be found correct, that the proposition laid down by Lord ELDON in *King* v. *King* is unimpeached by a single decision or *dictum*. Special reasons have sometimes been relied upon for not appointing a receiver where there was no actual representative (as in *Jones* v. *Frost*, 3 Madd. 1); but those very reasons affirm the general proposition that, where there is no representative to collect the assets, and there is a *bonâ fide* litigation respecting the title to that representation, the appointment of a receiver, pending the litigation, is almost of course.

Then, has Lord COTTENHAM impugned the rule by anything he did or said in *Watkins* v. *Brent*, or in *Marr* v. *Littlewood*?

In *Watkins* v. *Brent* he supported the Vice Chancellor's order appointing the receiver, upon the express ground that Mr. Brent (by agreeing with his opponents that the question as to the validity of the supposed testamentary papers should be tried in an existing suit to recall probate) had "treated himself as not being complete executor;" and his Lordship added, "I consider that there was a sufficient case for the Vice Chancellor's appointing a receiver, on the ground that William Brent Brent had recognised such a proceeding." In *Marr* v. *Littlewood* the same learned Judge appointed a receiver upon the application of the actual executor, pending a suit to annul probate, upon the ground that the opposing party, by having given notice to the debtors to the estate not to pay to the plaintiff (the actual executor), had destroyed the effect of the probate, and produced, by her own act, an incapacity on the part of this executor to proceed under the probate in collecting and preserving the assets. His Lordship immediately adds, "This doctrine, laid down by Sir JOHN LEACH, in *Jones* v. *Frost*, does not in the least interfere with the ground upon which I proceed here. In that case it did not sufficiently appear that there was a litigation pending in the Ecclesiastical Court; whereas here, unquestionably, such a litigation is now depending."

These decisions are direct authorities for the latter of the two propositions I have stated, for Lord COTTENHAM reduces each case into the same two elements; first, no executor with right or power to act; secondly, *bonâ fide* litigation of the right to probate; and thereupon he appoints the receiver. If, upon the facts of either

of these cases, a right or power to act could be supposed to exist, the case would be the stronger in support of this view.

The only question then is, whether Lord COTTENHAM said anything in *Watkins* v. *Brent* opposed to what he decided. Now, in that case, there had been two executors named in the supposed will, — namely, Margaret Brent and William Brent Brent. Probate had been granted to Margaret Brent, who was dead, but the Lords' Commissioners were pressed with the argument that, probate having been actually granted to Margaret Brent, the will was thereby duly authenticated by an instrument which a court of law could take notice of, and that the probate granted to Margaret Brent enured to William Brent Brent, the other executor; and *Brooks* v. *Stroud*, 1 Salk. 3; 7 Mod. 39, was cited in support of the argument. In *Watkins* v. *Brent* it will be observed that William Brent Brent had been treated in the Ecclesiastical Court as executor by virtue of the probate granted to Margaret Brent; for in the original suit against her to recall the probate which had been granted to her, he became a defendant after her death, and in her stead. But, however that may be, it is clear that Lord COTTENHAM argued the case against William Brent Brent upon the footing of his being executor by force of the probate granted to Margaret Brent; for, after referring to cases in which this Court had refused to interfere against an executor in whose favour there had been an adjudication by the Ecclesiastical Court, he concludes with the statement that William Brent Brent had, in that case "treated himself as not being complete executor," — a statement which was untrue in the sense of his not being named executor in the will, and true only in the sense of his being named executor with a litigated title. I cannot well imagine a stronger case in the plaintiff's favour than the case of *Watkins* v. *Brent*. Nor can I better conclude these observations, than in the language of Lord COTTENHAM (*Watkins* v. *Brent*, 1 Myl. & Cr. 102): "There is no doubt that by the rule of this Court, if the representation is in contest, and no person has been constituted executor, the Court interferes, not because of the contest, but because there is no proper person to receive the assets." [1]

[1] His Honor, at the conclusion of the judgment, observed, that the question raised in *Watkins* v. *Brent* as to the extent to which probate granted to one of several persons named executors in a will, enured to the others, had been much argued in *Twogford* v. *Traill*, 7 Sim. 92, and that the Vice Chancellor of England had

ENGLISH NOTES.

It is only the first part of the rule which was actually applied in the principal case; but after the case of *Andrews* v. *Powys* (1723), 2 Bro. P. C. 504, the jurisdiction of the Court, even in those cases where there was an actual executor or administrator, could not be denied. There was formerly no jurisdiction to appoint an administrator, if there was an executor who proved. Year Book, 34 Hen. VI. 14, pl. 26 (cited p. 121, *ante*); *Graysbrook* v. *Fox* (1565), Plowd. 275. And in cases under the Statute of Henry VIII., although the ordinary had a discretion as to the persons to whom the grant should be made, the grant once made, the power was determined (3 Salk. 21). In such cases the ordinary had no power to appoint an administrator *pendente lite*, unless by reason of absence under the provisions of the Statute 38 Geo. III. This was the basis of the interference of the Court of Equity, per Lord HARDWICKE, *Knight* v. *Duplessis* (1749), 1 Ves. Sen. 324. But even where the provisions of the Statute 38 Geo. III. applied, the Court of Equity still continued to interfere. *Atkinson* v. *Henshaw* (1813), 2 V. & B. 85; *Ball* v. *Oliver* (1813), ib. 96. But where a limited administrator has been appointed under the provisions of 20 & 21 Vict. c. 77, the Court of Equity, there being no special circumstances, refused an application for a receiver. *Veret* v. *Duprez* (1868), L. R. 6 Eq. 329; 37 L. J. Ch. 552; *Hitchen* v. *Birks* (1870), L. R. 10 Eq. 471. There is now power in the Probate Division to appoint a receiver wherever it seems just or convenient, Judicature Act, 1873, § 25; *In the goods of Moore* (1888), 13 P. D. 36; 57 L. J. P. D. & A. 37. This power should be exercised upon the principles established by the Court of Chancery prior to the passing of that Act. *Holmes* v. *Millage* (1893), 1 Q. B. 551. And, although the application should preferentially be made to the Probate Division, *Re Parker* (1885), 54 L. J. Ch. 694, the Chancery Division has entertained an application for a receiver before administration. *Giddings* v. *Baker* (1882), 26 Sol. Jol. 682. And the Probate Division has made a grant of administration *pendente lite* to the receiver so appointed. *In the goods of Evans* (1890), 15 P. D. 215; 60 L. J. P. D. & A. 18, and also a general grant of administration. *In the goods of Moore* (1892), P. D. 145.

offered to send a case to a court of law upon the question; but counsel having declined that offer, his Honor had decided the case before him, upon his own experience of the practice of conveyancers.

The same question was argued on a plea in *Strickland* v. *Strickland*, before the Vice Chancellor of England, 10th and 15th June, 1841.

AMERICAN NOTES.

This species of administration is statutorily recognised in some of the United States. Schouler's Executors and Administrators, § 134; *Lamb* v. *Helm*, 56 Missouri, 420; *Crozier* v. *Goodwin*, 1 Lea (Tennessee), 368; *Wade* v. *Bridges*, 24 Arkansas, 569; *Munnikhuysen* v. *Magraw*, 57 Maryland, 172; *Brown* v. *Ryder*, 42 New Jersey Equity, 356; *Kaminer* v. *Hope*, 18 South Carolina, 561; *Walker* v. *Dougherty*, 14 Georgia, 653; *Crandall* v. *Shaw*, 2 Redfield (N. Y. Surrogate), 100; *Moore* v. *Alexander*, 81 Alabama, 509; *Elwell* v. *Universalist Church*, 63 Texas, 220.

SECTION V. — *Title of the Administrator as to Strangers.*

No. 13. — FOSTER *v.* BATES.

(EX. 1843.)

RULE.

THE title of an administrator, though it does not (like that of an executor) exist until the grant of the letters, relates back to the time of the death, to the effect of enabling the administrator to recover against a wrongdoer, and of enabling him to adopt or ratify an act done for the benefit of the estate.

Foster v. Bates.

13 L. J. Exch. 88 (s. c. 12 M. & W. 226).

Assumpsit by the plaintiff, as administrator of Edward Pollard, for goods sold and delivered, and on an account stated.

Plea, non assumpsit.

At the trial before ROLFE, B., at the London Sittings, after Trinity Term, 1843, the following facts were proved: The defendants were partners in a company trading to Africa, and one Oldfield was their agent at Fernando Po. Edward Pollard, having sent a quantity of goods from this country to Africa for sale, died intestate; after which the defendants' agent purchased the goods from an agent of the intestate, who sold them for the benefit of the intestate's estate. Subsequently to the sale, the plaintiff took out letters of administration to Pollard, and now sued the defendants for the price of the goods. Under these circumstances it was con-

tended by the defendants' counsel that the plaintiff ought to be nonsuited, as the letters of administration did not relate back to the time of the intestate's death, so as to vest in the plaintiff, as administrator, a right to sue on the contract made by the defendants' agent after the death of Pollard. The jury found a verdict for the plaintiff, the learned Judge reserving leave to the defendants to move to enter a nonsuit.

Kelly having obtained a rule accordingly,

Watson and Greenwood showed cause. Although the administrator does not, like an executor, represent the intestate from the time of his death, still, when letters of administration are granted, the title relates back to the time of the death. Although an administrator cannot begin an action before administration, still after the grant of letters of administration, all the intestate's property vests in him by relation. He resembles the assignees of a bankrupt, who, although they are not assignees until assignment, have a title to sue, commencing from the act of bankruptcy. The law is thus stated in Com. Dig. "Administration," B, 10: "So, though administration be not granted for a long time, yet when it is granted, it vests the property in the administrator, by relation, from the time of the death of the intestate." 36 Hen. VI. fol. 7, B, pl. 4.

[PARKE, B. There is a recent case in the Common Pleas, *Tharpe* v. *Stallwood*, 5 M. & G. 760, 12 L. J. C. P. 241, where it was held, that an administrator might maintain trespass for an injury done to the goods of his intestate after the death of the intestate, and before the grant of letters of administration. The principle in such a case is, that unless such a right existed, the goods might be lost. The question is, whether the same necessity exists in the case of a contract.]

If a party, for the benefit of the estate, disposes of the goods of the intestate, the administrator may disaffirm or recognise his act. In *Kenrick* v. *Burges*, Moore, 126, it was agreed by all the Judges that if a man enters as executor *de son tort*, and then sells goods, and afterwards takes out letters of administration, the sale is good by relation. The administrator may maintain the present action, on the ground that the money which he recovers will be assets. *Catherwood* v. *Chabaud*, 1 B. & C. 150; 1 L. J. K. B. 66. The question may be somewhat altered, if the case of *Whitehall* v. *Squire*, 1 Salk. 295, was rightly decided.

[PARKE, B. That may admit of a question.]

They also cited 1 Williams on Executors, 265, 2nd ed., *Patten* v. *Patten*, 1 Alcock & Napier's (Irish) Rep. 496; *Doe d. Hornby* v. *Glenn*, 1 Ad. & El. 49; 3 L. J. (N. S.) K. B. 162; 2 Roll. Abr. "Trespas per Relation," 554, T, pl. 1; Godolphin, Orph. Leg. part 2, ch. 8 § 5; *Woolley* v. *Clark*, 5 B. & Ald. 744. Secondly, the administrator may waive the tort, and bring an action of assumpsit for goods sold and delivered. *Foster* v. *Stewart*, 3 Mau. & Selw. 191; 15 R. R. 459; *Hambly* v. *Trott*, Cowp. 375; *Smith* v. *Hodson*, 4 T. R. 211; *Russell* v. *Bell*, 10 M. & W. 340; 10 L. J. Exch. 300. Thirdly, there is no weight in the objection that may be urged on the other side, that the sale was made by the agent in Africa on behalf of a person who was unknown to him at the time, since that person, who is the present plaintiff, afterwards ratified the sale. *Hull* v. *Pickersgill*, 1 Brod. & Bing. 282; *Routh* v. *Thompson*, 11 East, 428; 13 East, 274; 10 R. R. 539; *Hagedorn* v. *Oliverson*, 2 Mau. & Selw. 485; 15 R. R. 317; *Maclean* v. *Dunn*, 4 Bing. 722; 6 L. J. C. P. 184; 31 Edw. III. Stat. 1 c. 11; 3 & 4 Will. IV. c. 42 § 2.

Hoggins, *contrà*. An administrator derives title from the ordinary; and in that respect being unlike an executor, who takes his title from the will, cannot bring an action before letters of administration. The ground of the decision in *Whitehall* v. *Squire* is explained by Lord ELLENBOROUGH in *Mountford* v. *Gibson*, 4 East, 444; 7 R. R. 599. An administrator before administration can do nothing by which he is himself bound, or by which he can bind others. The case of *Doe d. Hornby* v. *Glenn* was decided on this ground. *Stewart* v. *Edmonds*, 1 Wms. on Exec. (3rd ed.) 313, is also in point. Where the property of the testator is taken wrongfully, he may bring trover, *ex necessitate*; and, on the same principle, he has been allowed to bring an action of trespass. But there is no ground for extending the rule to the case of a contract. An administrator cannot ratify what has been wrongfully done before the grant of administration. This remedy that he possesses has been allowed in extreme cases as a matter of necessity; but it was never supposed that an administrator could make a contract by relation. The attempt to assimilate this case to that of bankruptcy, fails, for there the property is, by the very act of bankruptcy, transferred to the assignees, although they are not appointed at the time: and that is the reason why they may waive the tort, and sue in assumpsit. *Cur. adv. vult.*

No. 13. — Foster v. Bates.

PARKE, B. In this case we delayed giving judgment, not in consequence of any doubt entertained on the question raised in the argument, but in order to have an opportunity of looking into the authorities which were cited in the course of it. On consideration, we think the rule ought to be discharged. The only question is, whether the plaintiff is entitled, under the circumstances, to sue the defendants for goods sold and delivered by him as administrator. It appears that the goods in question were sold to the agent of the defendants on the coast of Africa, after the death of the testator, of whom the plaintiff is the personal representative, and before the grant of the letters of administration; and that they were avowedly sold on account of the estate of the intestate. It is clear that letters of administration, although not executed until the actual grant of administration, relate back to the death of the intestate; so that the administrator may recover in trespass or trover against a wrongdoer who takes the goods of the intestate after his death, and before the grant of the letters of administration. All the authorities on this subject were considered by the Court of Common Pleas in the case of *Tharpe* v. *Stallwood;* and some are also to be found in 2 Roll. Abr. Tit. "Trespas per Relation." In that case, the Court determined that trespass was maintainable, under the circumstances, by the administrator; the reason for which relation is given by ROLLE, C. J., in *Long* v. *Hebb*, Styles, 341, that otherwise there would be no remedy for the wrong done. Now, if the relation is to be allowed in that case for the benefit of an intestate, we do not see why it should not be equally allowable for an administrator, who represents an intestate, to take the benefit of a *contract*, so as to sue upon it; and cases might be put where the giving of the administrator a right to sue on a contract would be more beneficial to the estate than a right to recover the value of the goods. It will not be necessary for us, at present, to have recourse to the doctrine that a party who has a right to bring trover may waive the tort, and sue in an action of contract; for here the sale was made by a person who intended to act as agent for the person, whoever he might be, who legally represented the intestate's estate; and it was ratified by the plaintiff after he became administrator. Now, when one party means to act as agent for another, and acts accordingly, a subsequent ratification by the other is equivalent to a prior command. Nor is it an objection that the intended principal was unknown at the time to the person

who intended to be the agent : the case of *Hull* v. *Pickersgill*, which was cited by Mr. Greenwood in the course of the argument, being an authority for that position. For these reasons, we think the plaintiff entitled to recover ; and that the rule to enter a nonsuit must, therefore, be discharged. *Rule discharged.*

ENGLISH NOTES.

The doctrine of the relation back of the title of the administrator is as old as the Year Books, 18 Hen. VI. 22 pl. 7, where an administrator was held entitled to maintain trespass for acts committed between the death and the grant of administration.

But this fiction will not divest any right legally vested in another. Thus, a rule to the sheriff to pay to an administratrix rent due to her intestate out of the proceeds of an execution levied before administration taken out, was refused (1731), Vin. Abr. Tit. "Ex'ors," p. 133, pl. 29. So, too, although an executor *de son tort* may support a plea of *plene administravit* by showing payment over of assets to the rightful executor or administrator, or may protect himself by taking out administration; yet this must be done before action brought. *Curtis* v. *Vernon*, *Vernon* v. *Curtis* (1792), 3 T. R. 587; 2 H. Bl. 18; 1 R. R. 774. Again, detainer by the defendant and not the original taking being the gist of the action of detinue, a grant of administration will not relate back so as to charge a defendant who has parted with possession before it was taken out. *Crossfield* v. *Such* (1853), 8 Exch. 825; 22 L. J. Exch. 325.

The cases which have been decided on the Statutes of Limitations may be divided into two classes. First, those where a complete right of action accrued in the lifetime of the deceased; in which case the Statute continues running notwithstanding the fact that no administrator is constituted. *Rhodes* v. *Smethurst* (1840), 6 M. & W. 351; 9 L. J. (N. S.) Exch. 330. Secondly, where there is no complete right of action in the lifetime of the deceased, in which case the time only begins to run from the date of administration taken out.

In Murray v. *East India Co.* (1821), 5 B. & Ald. 204, it was held that the title of an administrator did not relate back for the purpose of allowing the Statute to run, and so as to bar his right of action against the acceptor of a bill payable to the deceased, but accepted after his death. There was no cause of action until the granting of the letters. The same principle is adopted in *Pratt* v. *Swaine* (K. B. 1828), 8 B. & C. 285; 6 L. J. K. B. 6.

In Atkinson v. *The Bradford Third Equitable Building Society* (1890), 25 Q. B. D. 377; 59 L. J. Q. B. 360, it was said by Lord Esher,

M. R., and LINDLEY, L. J., that if a creditor dies on the day on which a debt becomes payable to him, and there is no evidence to show whether he died before or after the moment when the debt became payable, the Statute of Limitations does not run against his administrator until letters of administration have been taken out.

AMERICAN NOTES.

The doctrine of the principal case is law in this country. Schouler's Executors and Administrators, § 195; *Lawrence* v. *Wright*, 23 Pickering (Mass.), 128; *Babcock* v. *Booth*, 2 Hill (New York), 181; 38 Am. Dec. 578; *Wells* v. *Miller*, 45 Illinois, 382; *Goodwin* v. *Milton*, 25 New Hampshire, 458; *Hatch* v. *Proctor*, 102 Massachusetts, 351. So in *Babcock* v. *Booth*, *supra*, it was held that "the personal representative of a fraudulent vendor who remained in possession until the time of his death, can, for the benefit of creditors, set up the fraud, and thus avoid the sale." "The title of the plaintiff as administrator took effect, by relation, from the death of the intestate, and he has the same right to maintain this action as though the letters of administration had been granted before the defendant took the goods." In *Hatch* v. *Proctor*, *supra*, an executor in his own wrong, who had sold and delivered goods belonging to the estate of the deceased, by bill of sale with warranty of title to A., at the request and on the credit of B., who knew that he was acting in his own wrong, was appointed administrator of the estate, and subsequently notified B. that he ratified the sale. B. admitted that the sale was fair, and said the price should be paid. A. had always remained in possession of the goods. *Held*, that the administrator could maintain an action against B. for the price of the goods. The Court said: "The personal estate of a deceased intestate, when an administrator is appointed, vests in him by relation from the time of the death. Until then the title may be considered to be in abeyance. *Lawrence* v. *Wright*, 23 Pickering, 128. He may have an action of trespass or trover for goods of the intestate taken before letters granted. When the wrongdoer has sold the property taken, the administrator may waive the tort and recover in assumpsit for money had and received. And in a case very like the one at bar, it was held that where the sale was made avowedly on account of the estate, by one who had been agent of the intestate, the administrator afterwards appointed might recover from the vendee in assumpsit for goods sold and delivered. *Foster* v. *Bates*, 12 M. & W. 226, 233."

No. 14. — HUDSON *v.* HUDSON.

(CH. 1735.)

RULE

WHEN administration is granted to two, and one dies, the administration, like the office of executor, survives.

Hudson v. Hudson.

Forrester Cas. temp. Talbot, p. 127.

The plaintiff brought his bill as administrator against the defendant, who pleaded that administration had been granted to the plaintiff and to another who died before the bill brought; and upon that plea the question was, whether when an administration is granted to two, and one dies, the administration shall cease and be void, or whether it shall survive to the other who is still living?

The Court doubted at first, and would hear civilians, and accordingly it was now argued by Dr. Strahan for the plaintiff, and by Dr. Lee for the defendant; and he quoted the case of *Bowden* v. *Bowden*, the 30th or 31st of April, 1734, where it was adjudged in the Court of Arches that an administration does in such case determine and cease and does not survive; being but an authority, and no interest.

The Lord Chancellor. There are authorities both ways in the present case, — viz., that of *Adams and Buckland*, 2 Vern. 514, where it was held by the Lord Cowper that an administration [1] would survive; and that of *Bowden* v. *Bowden*, where the contrary was determined in the Ecclesiastical Court. As therefore the precedents are not uniform, we must consider this case according to the general rules of survivorship, which seem to be pretty much the same both by the common and civil law. If an estate for ninety-nine years be granted to two, if they shall so long live, when one dies the estate is determined; but if a grant be made to two for their lives, when one dies the survivor shall take the whole, according to *Brudenells' Case*, 5 Co. Rep. 9; but in *Auditor Curles' Case*, 11 Co. Rep. 1, it is held that if an office be granted to two, there shall be no survivorship of it without special words. We must now consider which of these cases resembles the present one most. It cannot properly be said that there was any such thing as an administrator before the Statute 31 Edw. III. c. 11. Before that Statute, where one died intestate, the King, as *pater patriæ*, was to take care of his estate; and this did, in process of time devolve from the King to the ordinary, and the Statute of Westm. 2

[1] Upon the ground that administration is not a bare authority, but an office; and therefore the office for administrators are enabled to bring actions in their own names, come in the place of executors, and therefore the office survives.

c. 19, which was made to compel the ordinary to pay the intestate's debts, looks as if they had not been very forward in it before. But by the 31 Edw. I., the ordinary is to grant administration; and therefore the administrator is the creature of that Statute, and is to be considered accordingly. The express words of the Statute enable him to sue and be sued as an executor; and since that time it has never been doubted but that the property of the goods was well vested in him, since he now represents the intestate in every thing. By the wording of the 21 Hen. VIII. c. 5, one would imagine that somewhat beneficial is intended to the administrator, by reason of the persons there mentioned to whom administration is to be granted, — viz., the most lawful friend; for, had no benefit been intended to him, why might not the administration be granted to any other as well as to the nearest of kin? The spiritual courts did indeed take bonds of the administrators, to oblige them to distribute the estate; but as often as they did so, they were prohibited by the temporal courts. Nor does the Statute of Distributions alter the nature of the office; it makes him only to be, as it were, a trustee for the persons entitled to a distribution, and usually for himself as one of them; and then if a joint estate at law will survive, why shall not an administration, when they both have a joint estate in it? A trust will survive though no way beneficial to the trustee; and the administrators being appointed by the Statute to come in lieu of executors, the Statute has therefore made a will for him who is dead intestate, and the office of administrator is every way to be compared to that of an executor. Bacon's Law Tracts, 82 ed. 1741; Burn's Eccles. Law, 233. It has been said, indeed, that one executor may do many acts which one administrator cannot do without the other administrator; but that is nothing to the survivorship, either for or against it. I have all due regard for the determinations in the Ecclesiastical Court, but have likewise a great deal for those of a noble person who sat here with as much honour as any man ever did; and he having determined this point in *Adams and Buckland's Case*, I think it safer for me to follow that authority than any other which may have passed in the Ecclesiastical Court *sub silentio*, especially when the question arises upon the construction of several Acts of Parliament, the construction of which belongs to the temporal courts.

And so overruled the plea.[1]

[1] Reg. lib. A. 1735, fol. 468.

ENGLISH NOTES

A count by a surviving executor will be found so early as 16 Hen. VII., Rastell's Entries, fo. 560.

The question as to the survivorship of administration does not seem to have been again raised in any reported case since the principal case. The point indeed rarely occurs; for the Court is opposed to joint grants of administration, *Earl Warwick* v. *Greville* (1809), 1 Phillim. 123, at p. 126. The Probate Act, 1857 (20 & 21 Vict. c. 77, § 73), recognises the power to make such grants, one of the latest cases in which such grant was made being *In the goods of Dalton* (1881), Tristram & Coote Prob. Prac. 212, n. But the Court requires special circumstances to be shown to induce it to depart from its usual practice. *In the goods of Richardson* (1871), L. R. 2 P. & D. 244; 40 L. J. P. & M. 36.

AMERICAN NOTES.

This doctrine prevails in the United States. Schouler's Executors and Administrators, §§ 404, 405. Mr. Schouler says: "Lord Hardwicke once attempted a distinction as between co-executors and co-administrators, the latter being appointed solely by the ordinary. *Hudson* v. *Hudson*, 1 Atk. 460. But the *dictum* was afterwards disapproved. *Jacomb* v. *Harwood*, 2 Ves. Sen. 268; *Smith* v. *Everett*, 27 Beav. 454; Williams Executors, 950. But see *Gordon* v. *Finlay*, 3 Hawks, 239." The case last cited simply decides that a purchase from one administrator where there is more than one, vests no title.

No. 15. — ANDREW *v.* WRIGLEY.

(CH. 1792.)

RULE.

An administrator (or executor) may, in order to pay debts, sell leasehold estate of the testator, even where it has been specifically devised: and, although a suspicion is raised by the circumstance that the estate has been disposed of unnecessarily, a Court of Equity will not, as against the purchaser after long possession, set aside the purchase.

Andrew v. Wrigley.

4 Bro. C. C. 124.

George Broadbent, being possessed of a term of years in the premises for 199 years, commencing the 19th of November, 1746,

at the rent of £13 13*s.* per annum, and having sold a part of the leasehold premises to Eneas Broadbent, subject to the payment of £5 per annum, payable to the original lessor, by which the rent of the premises remaining unsold was reduced to £8 13*s.*, made his will, bearing date the 6th of May, 1753, and thereby, after directing the payment of his debts and funeral expenses, gave to his wife some small specific legacies, and all the clear profits that did and might arise, of and from the messuage or tenement which he held under James Farrer, Esq. (being the premises in question), lying and being in Harrop, in the parish of Saddlesworth aforesaid, and to receive it as followeth during the term of her natural life: and first, said testator willed that she should receive 40*s.* a year, yearly, and every year until all his just debts were paid and discharged; and what was over and above 40*s.* to pay his debts, until all were discharged; and after all his debts were paid, he gave to his beloved wife all the profits and benefits that did or might arise from the aforesaid messuage or tenement, during the whole time of her natural life, and declared his will to be, that at the decease of his wife, his niece Sarah, the wife of John Andrew (meaning the plaintiff, Sarah Andrew, widow), should have and enjoy the aforesaid messuage and tenement, during all the time of her natural life, if she should then be living; and that if (plaintiff) Sarah, the wife of John Andrew, should have a child or children, at the entrance hereof, that she should pay or cause to be paid the sum of £40 which he charged upon the aforesaid tenement, unto his the said testator's sister Sarah's children (also plaintiff's), to be equally divided among them; and (plaintiff) Sarah Andrew, should have the aforesaid messuage or tenement, and her heirs, during the whole term; but if (plaintiff) Sarah should have no children at her decease, then he gave the aforesaid messuage or tenement to John Greaves and George Broadbent, to be divided between them in such shares and proportions as by the will expressed, and appointed John Whitehead, jun., and James Broadbent executors of the said will.

The testator died on the 9th of May, 1753, leaving Mary Broadbent his widow, and the executors never proved the will, and Mary Broadbent, the widow, procured letters of administration with the will annexed, from the proper Ecclesiastical Court, and about the 2d of June, 1755, she intermarried with Philip Bradbury; and afterwards, in August, 1755, Philip Bradbury being indebted to Benja-

min North, an attorney of Almonbury, Yorkshire, by indenture of mortgage dated the 11th of August, 1755, Bradbury and his wife, described to be administratrix with the will annexed, of the said George Broadbent, in consideration of £32 conveyed the said premises to Benjamin North, for the residue of the term, with a proviso for redemption on payment of the £32 with interest. By indenture dated the 9th of May, 1757, said North and Bradbury and his wife, described as administratrix in consideration of £80 (out of which the said debt to North of £32 was discharged), assigned the mortgage to Catherine Whitehead; and Philip Bradbury afterwards, without the concurrence of his wife, being indebted in £20 to the said Catherine Whitehead, by memorandum under his hand dated the 11th of May, 1758, indorsed on the said indenture of mortgage, charged the premises with the said further sum of £20 and interest.

In May, 1758, Philip Bradbury contracted with the said Catherine Whitehead, and John Antill, her partner, for the sale of the premises for £150 over and above the mortgage money due thereon; and by indenture of the 11th of that month, Bradbury and Mary his wife assigned to John Antill and Catherine Whitehead all the said leasehold premises, and the right and title of Bradbury and his wife, to Antill and Whitehead for the residue of the term; and Antill and Catherine Whitehead entered into possession of the leasehold premises.

John Antill afterwards died, having made his will and appointed William Antill his executor; and Catherine Whitehead, about August, 1779, contracted with the defendant Wrigley for the sale of the premises for £231. The purchase was not completed, or the purchase-money paid for two years; but by indenture dated 22d of October, 1781, William Antill and Catherine Whitehead assigned the leasehold premises to defendant Wrigley for the residue of the said term, and the defendant Wrigley entered into and has since continued in possession thereof.

John Andrew (the husband of the plaintiff) died in 1769, leaving the plaintiff, his widow, and nine children, who are all now living.

Mary, the widow of the testator, survived Philip Bradbury, and afterwards married John Broadbent, and died about March, 1788, when the plaintiff, Sarah Andrew, claimed to have become entitled, under the testator's will, to the possession of the premises, with

such contingent interests to others of the plaintiffs as are provided in the will.

The plaintiff, Sarah Andrew, filed the present bill against Wrigley, the purchaser, praying a discovery, and that he may be decreed to deliver up the possession of the premises and to pay intermediate rents and profits.

The bill charged that the testator was not indebted at the time of his death, or but to a very small amount, and that the same were discharged by the sale of his goods, or out of the rents and profits of the premises before the mortgage to North, and that this was known by the defendant, or might have been so, that the defendant bought the leasehold premises at a very great undervalue, and with full notice of the will of the testator, and the bequest therein to the plaintiff, and that he knew that the assignments were to secure the debts of Bradbury on his own account, and that it was on account of his knowledge that a good title could not be made, that the defendant declined completing the purchase for two years, and that he then took a bond of indemnity or some other collateral security.

The defendant, by his answer, swore to his belief that the other personal estate of the testator was insufficient for payment of his debts, and that, in the recitals of the indenture of the 11th of August, 1755, and 9th of May, 1777, it is mentioned that the testator's widow and Philip Bradbury (her second husband) had occasion for the sums of money in such indentures mentioned to have been paid to them for the purpose of paying or reimbursing themselves what they had paid on account of the testator's debts, and which recitals the defendant believed to be true, and from such recitals he believed the personal estate of the testator (exclusive of the leasehold estate) was insufficient to pay the testator's debts; that he believed the mortgage to North was not to secure any debt previously owing from Bradbury. He admitted the purchase by Catherine Whitehead, and that she caused the premises to be put up for sale by auction, and that he, the defendant, became the purchaser thereof, as the best bidder for the same at £231, which was the full value thereof, considering the title of Catherine Whitehead and William Antill to be a good title; and that he did not delay the completion of the purchase on any suspicion of the title; that at the time of the execution of the indenture of the 22d of October, 1781, a bond was executed by Catherine Whitehead for perform-

ance of the covenant therein contained, and that those covenants were only the usual covenants, but that he had no bond of indemnity; and that he had been in possession of the premises ever since the conveyance, and had laid out considerable sums in the improvement thereof.

The plaintiffs at the hearing read evidence to prove that Broadbent, the testator, was a poor man, and a working clothier, but never made a piece of cloth on his own account; that he had been a soldier, but discharged, and had kept a public house, and owed some debts; and to the marriage of the widow with Philip Bradbury, who was considered as a man in bad circumstances; that Mary, the widow, had, at the time of that marriage, no property but what she had as widow of the testator; that the tenement, about the year 1779, was worth about £201, to be sold; that it was publicly known at the time of the sale that the plaintiff had a claim on the premises under the will of the testator; and one witness swore that, on the day of the sale, the defendant said to Whitehead that Edward Greaves seemed to dispute the title, to which Whitehead answered, "Never mind Mr. Greaves, James Wrigley; I give you a bond to indemnify you."

The defendant read evidence to improvements during the time the leasehold estate was possessed by Catherine Whitehead, and of the defendant.

The case having been argued, the MASTER OF THE ROLLS (Sir R. P. ARDEN) gave judgment. After stating the case at large, he went on to the following effect.

If this had been a recent application, and the matter quarrelled with immediately, the circumstances are so suspicious that it might have been set aside. The testator here wished what no testator has a right to do, that the debts should be paid in the way charged by the will (out of rents and profits); but an executor is not bound to comply with such a desire in a will, as he may be compelled to pay the debts sooner than they can be paid according to the charge.

But would a *bonâ fide* purchaser be bound to inquire as to the necessity of raising the money? I think he ought, and that it was suspicious that the estate was given away without cause. I think, therefore, that if this had been quarrelled with during the life of Bradbury and his wife, there might have been relief. But from 1758 to 1779, Whitehead and Antill have been in possession

contrary to the intention of the will. What, were the persons interested to lie by all this while? Though their legacies were contingent, they had such an interest as entitled them to know what debts the testator owed, and what part of his estate had been applied to the payment of them. Then, what is the case in 1779? The defendant purchased the estate at a public auction, and then the parties interested give notice of their claims. Then, it is truly said, that notice could only affect Whitehead and Antill, for it has been repeatedly held, that where the vendor has no notice, notice to the vendee is immaterial, as otherwise the estate would be inalienable forever. The purchaser stayed two years, and then completed the purchase.

I should do a very violent thing if I was to relieve in such a case as this.

Then as to the cases on the subject.[1] It is said this is a sort of case where a Court of Equity will not give relief, and for this purpose, *Mead* v. *Lord Orrery*, 3 Atk. 235, and *Nugent* v. *Gifford*, 1 Atk. 463, are cited; it is stated that the power of the executor is such that he can make a title to a purchaser, even though for his own debt.

Nugent v. *Gifford* is very shortly stated in 1 Atkyns, 463, it appears from the Register's Book that it was not a specific devise of a term. It is nowhere decided that the executor can sell a term specifically devised for his own debt. In that case it was part of the general assets of the testator. It is in the Register's Book, 1738, B. 117. See also per Lord Eldon, C., upon this case, 17 Ves. 163. It was a term vested in trustees for Sir Richard Billings and his wife. Sir Richard Billings by his will gave several specific legacies, and made Mr. Arundell, his natural son, executor and residuary legatee. In 1718, two years after Sir Richard's death, the son had become indebted to Knight, one of the trustees of the term. He assigned to Knight the term, inasmuch as he could, as executor, and there was an account settled between them: there was no bill for an account against Arundell. It is not incumbent upon a purchaser from an executor and residuary legatee to inquire whether the debts were paid. That case may be rightly determined. In *Mead* v. *Lord Orrery* there were three executors; one of them had a share of the residue. He had occasion to give security in the Master's office,

[1] See them most ably commented upon with most of those subsequent to the principal case, per Lord Eldon, C., in *M'Leod* v. *Drummond*, 17 Ves. 160 *et seq.*

and for that purpose assigned to the Master a mortgage of his testator, reciting a sum due upon it, and that the same was his proper money; and the other executors joined in the conveyance. In both these cases, therefore, the vendees had reasonable grounds to believe the vendors had good titles. If the case stood merely on the executor making the security, it would be very suspicious; but Lord Hardwicke relied on his being entitled as residuary legatee. In *Savage* (*Bill*) v. *Humble*, 1 Br. P. C. 71, I should have hardly assented to the reversal; *Ewer* v. *Corbet*, 2 P. Wms. 148. The MASTER OF THE ROLLS seems to think that case has gone too far: it is not a very clear case, but it appears there had been bills filed in Chancery concerning it, and that there was a bill depending when Sir William Humble advanced his money; Garrat, the executor, had been decreed to transfer his trust, so that he was under a decree to transfer when he mortgaged to Brown and afterwards to Humble; Mr. Savage afterwards got another decree. If these were the grounds on which the House of Lords proceeded, I must dissent from their judgment. This was not the common case of an executor mortgaging the property of the testator, which might or might not be for the purposes of the will. There was no lawyer at that time in the House (unless perhaps Lord SOMERS), and the case was much embarrassed by circumstances. *Crane* v. *Drake*, 2 Vern. 616, was determined on the ground that the alienee was a party to the fraud, and was consenting to a *devastavit*. In *Ewer* v. *Corbet*, it was only held that the testator, having given property specifically, could not prevent the remedy of the creditor. In *Crane* v. *Drake*, there was another circumstance; it was to pay his own debt. Can there be a stronger case of a *devastavit* than an executor alienating the property of his testator to pay his own debts and the alienee there knew that the plaintiff's debt was due. In *Paget* v. *Hoskins*, Pre. Ch. 431; Gilb. Eq. Rep. 111, it is said Mr. Vernon was much dissatisfied with the decree. But in *Mead* v. *Lord Orrery*, Lord HARDWICKE said he saw no grounds for that dissatisfaction. There is a note in Gilbert that Mr. Talbot referred to a case (when Lord COWPER had the seal before) that where the party knew of other debts, he could not take the testator's property in satisfaction of his own debt. As to *Elliot* v. *Merriman*, Barnadiston, Ch. Rep. 78; s. c. 2 Atk. 41. Upon which see per Lord ELDON, C., 17 Ves. 162, it is not necessary to attend very particularly to the circumstances of that case: the dismission was in favour of the alienation; the bill was dis-

missed with costs. With respect to a trust for payment of debts, there is no pretence that such a trustee could alien in payment of his own debt. *Ithel* v. *Beane*, 1 Vesey, 215.[1]

Mortgaging is not the natural way of paying debts, though in some cases, it may be the most proper way; but it would lead to an inquiry as to the circumstance of the testator's estate.

Here Mr. Mitford acknowledged he could not impeach the first or second transactions.

Bonny v. *Ridgard*, 1 Cox, 145, is very much like this case; there the executor sold the term which came by mesne assignments to Van Mildert. Enough was disclosed in Sir Thomas Sewel's opinion to obtain a decree. Van Mildert, in his petition for a rehearing, stated that he was a purchaser from other purchasers, that he had no notice, and had been twenty years in possession. Lord KENYON proceeded merely on length of time; he said nothing was clearer than that an executor may sell the property of the testator, and that the purchaser need not see to the circumstances of the testator's estate; but if there is any fraud, then the purchaser must see to the circumstances. It is not necessary that a mortgage deed from the executor should recite that the money is borrowed for the payment of debts: but it must appear that it was *not* for payment of debts to vitiate it: that Barnard had notice the term was specifically given; but that he should decide it merely on the length of time; and then cited two cases as to the analogy to the Statutes of Limitation.

So I shall do in this case. If it had come recently before me, under so suspicious circumstances, there might have been a case for relief. As it is, I must dismiss the bill; but as the defendant had some notice, and I daresay had a beneficial bargain, I will give no costs.

ENGLISH NOTES.

That the title of a specific legatee is not complete without the assent of the executor seems to have been established as early as 11 Hen. IV. 84. And in *Edmunds* v. *Budkin* (1600), 1 Roll. Abr. 618, A. pl. 2, it was adjudged by the Exchequer Chamber that if a man, possessed of a term of years of land, devise that to another, the devisee cannot have it, or enter upon it, without the assent of the executor or administrator.

[1] Lord ELDON, also, was of the same note. See in *M'Leod* v. *Drummond*, 17 Ves. 165, 166.

opinion, contrary to that of Lord MANSFIELD in *Whale* v. *Booth*, 4 T. R. 625,

The decision of the House of Lords in *Savage* v. *Humble* (1703), 3 Bro. P. C. 5, reversing s. c. nom. *Humble* v. *Savage* (1702), 2 Vern. 444, appears to have been frequently cited as an authority for the proposition that a Court of Equity will postpone a *bonâ fide* purchaser for value from an executor to a person having merely an equitable title. The report in Brown seems to give some colour to this notion; but from the printed cases presented to the House of Lords, copies of which will be found in Lincoln's Inn Library, it appears that it was contended by the appellant that the purchaser from the executor had actual notice of a fraud; and this may have been the ground of the judgment of the House. In a subsequent case, *Ewer* v. *Corbet* (1734), 2 P. Wms. 148, Sir Joseph Jekyll, M. R., is reported at p. 149, after referring to *Savage* v. *Humble*, to have said, "But since that, I take it to have been resolved, and with great reason, that an executor, where there are debts, may sell a term, and the devisee of the term has no other remedy but against the executor, to recover the value thereof, if there be sufficient assets for the payment of debts." Since the decision in the principal case, it may be taken to be settled law that unless there is collusion or fraud on the part of a purchaser from an executor, the purchaser will be allowed to retain his purchase. *Tayler* v. *Hankins* (1803), 8 Ves. 209; 7 R. R. 27.

But the case is different where an executor has purported to give a title, not as executor, but in another character. In *Hill* v. *Simpson* (1802), 7 Ves. 152; 6 R. R. 105, an executor purported to pledge the assets of his testator to secure a debt due from himself, upon the representation that he was beneficially entitled: and in *Re Cooper; Cooper* v. *Vesey* (1882), 20 Ch. D. 611; 51 L. J. Ch. 862, an executor named Thomas Frederick Cooper, who was son of the testator, having the same Christian names, represented to a proposing mortgagee that he was the Thomas Frederick Cooper mentioned in the title deeds, and obtained a loan by executing a mortgage accordingly and suppressing the will. In both these cases it was held, that the persons who claimed under the executor could not set up a title from him in that character because that was not the title for which they had bargained.

It has been made a question whether it is safe to take an assignment of a specific legacy from an executor without the concurrence of the specific legatee, lest the executor should have assented to the bequest, 2 Sugd. V. & P. 56, 9th ed., citing *Tomlinson* v. *Smith* (1678), Finch. 378. And this suggestion is supported by the decision of Fry, J., in *Ballard* v. *Marsden* (1880), 14 Ch. D. 374; 49 L. J. Ch. 614. In this case the executors had set apart and appropriated a fund according to directions contained in a will, to meet a legacy given by way of life interest. They were held not entitled to retain or impound any part

of the appropriated assets to meet a debt from the legatee to the general estate of the testatrix. This seems in accordance with the cases in which it has been held that a legatee of leaseholds to which executors have assented may maintain ejectment against them. *Doe d. Lord Saye & Sele* v. *Guy* (1802), 3 East, 120; 6 R. R. 563, and in the case of chattels, trover, *Williams* v. *Lee* (1745), 3 Atk. 223, where Lord HARDWICKE refused to relieve against a judgment recovered in such an action.

It will be observed that the lapse of time is referred to in the judgment merely in aid of the title under the executor. At this time the doctrine had not been so well established as it was by later decisions that the Court of Chancery was bound to follow the analogy of the Statutes of Limitation. The decision of Lord ELDON in the somewhat analogous case of *McLeod* v. *Drummond* (1810), 17 Ves. 152; 11 R. R. 41, was based entirely upon the lapse of time; and that principle has been followed in numerous cases since that time.

AMERICAN NOTES.

The doctrine that a specifically devised chattel may be sold to pay debts is laid down in *Garnett* v. *Macon*, 6 Call (Virginia), 308. After all the personal estate not specifically bequeathed has been exhausted, specific legacies and devises abate *pro rata*. *Armstrong's Appeal*, 63 Penn. St. 312; *Dugan* v. *Hollins*, 11 Md. 41; *Brant's Will*, 40 Me. 280. In the first case, it is said: "It was settled in England, by *Long* v. *Short*, 1 P. Wms. 403, that specific devises of land and specific bequests of personalty must abate ratably in case of a deficiency of assets for the payment of the bond debts of the testator, because both lands and chattels were liable in law for those debts, and it was equally the intention of the testator that the legatee should have the chattel and the devisee the land. 1 Roper on Legacies, 254. In this State, where lands have always been assets for the payment of debts by simple contract as well as by specialty, the rule is general, that whereon there is a deficiency of assets to pay both debts and legacies, specific devises and specific legacies shall contribute proportionably."

In *Livingston* v. *Newkirk*, 3 Johnson Chancery (New York), 312, Chancellor KENT says that the general and natural order of marshalling assets for the payment of debts is: (1) Personal estate; (2) lands descended; (3) lands devised. See also *Hays* v. *Jackson*, 6 Massachusetts, 151; *Adams* v. *Brackett*, 5 Metcalf (Mass.), 280.

SECTION VI. — *Rights and duties of executors and administrators as to persons claiming under them.*

No. 16. — STAG *v.* PUNTER.

(CH. 1744.)

RULE.

THE executor (or administrator) is (in Equity) allowed, even against creditors, funeral expenses which are reasonable according to the apparent condition of the deceased.

Stag v. Punter.

3 Atk. 119.

Upon exceptions to a Master's report for not allowing £60 for the testator's funeral.

The LORD CHANCELLOR. At law, where a person dies insolvent, the rule is that no more shall be allowed for a funeral than is necessary; at first only 40*s.*, then £5, and at last £10. Vide *Hrerside* v. *Benson*, 3 Atk. 248.

I have often thought it a hard rule, even at law, as an executor is obliged to bury his testator before he can possibly know whether his assets are sufficient to pay his debts.

But this Court is not bound down by such strict rules, especially when a testator leaves great sums in legacies, which is a reasonable ground for an executor to believe the estate is solvent.

As this is the case here, I am of opinion that sixty pounds is not too much for the funeral expense, especially as the testator had directed his corpse should be buried at a church thirty miles from the place of his death; and, besides, there is still another estate to be sold, so that it is not clear that there will be any deficiency; and on these circumstances his Lordship allowed the exception to the Master's report. "As to the sum of £54." Reg. lib. B. 1743, fol. 559.

ENGLISH NOTES

The right to the custody and possession of the body until it is properly buried belongs to the executors or administrators. *Reg.* v. *Fox* (1841), 2 Q. B. 246. But if there are no representatives, the common

law casts upon the person in whose house the deceased died the duty of carrying the corpse decently covered to the place of burial. *Reg.* v. *Stewart* (1840), 12 A. & E. 773. But now, by Statute 7 & 8 Vict. c. 101, § 31, as amended by 18 & 19 Vict. c. 79, and 43 & 44 Vict. c. 41, § 2, the guardians or overseers of the poor are authorised to bury the body of any poor person which may be within their district.

It is now fully established that extravagant funeral expenses will not be allowed in an administration action. *Bridge* v. *Brown* (1843), 2 Y. & C. C. C. 181.

The executor (or administrator) is liable upon an implied promise to pay for a funeral suitable to the degree and circumstances of the deceased furnished by the directions of a third person, in those cases only where he has assets sufficient for that purpose. *Rogers* v. *Price* (1829), 2 Y. & J. 28; *Corner* v. *Shaw* (1838), 2 M. & W. 350, per PARKE, B. at p. 355; 7 L. J. (N. S.), Exch. 105. But an executor may by ratification render himself liable for the amount actually expended. *Brice* v. *Wilson* (1834), 8 A. & E. 349, n. (c.); 3 Nev. & M. 512; 3 L. J. (N. S.) K. B. 93. The husband has by English law the duty imposed upon him of burying his wife without reference to any title to property obtained through her; and this entitles any third person who has paid the expenses of her funeral to be reimbursed by the husband so much of his expenditure as represented a sum sufficient to defray a funeral suitable to the rank and fortune of the husband. *Jenkins* v. *Tucker* (1788), 1 H. Bl. 90. But where the wife was possessed of separate property, she could by her will entitle her husband to be relieved from this obligation. *Willeter* v. *Dobie* (1856), 2 K. & J. 647.

It has been held by Mr. Justice KAY that executors were not bound to another person who had obtained possession of the body and taken it abroad to be cremated pursuant to a direction in a codicil of the testator, to repay the expense of such a proceeding or any part of it. *Williams* v. *Williams* (1882), 20 Ch. D. 659; 51 L. J. Ch. 385.

AMERICAN NOTES.

This doctrine is universal in the United States. Schouler's Executors and Administrators, § 421; *Patterson* v. *Patterson*, 59 New York, 574; 17 Am. Rep. 384. The allowance may cover mourning garments, carriages, a burial lot, and a monument. But all must be in reasonable proportion to the station and fortune of the deceased. Mr. Schouler says: "In strictness, observed Lord HALE in an early case, no funeral expenses are allowable in an insolvent estate, except for the coffin, ringing the bell, and the fees of the clerk and bearers; pall and ornaments are not included. This statement, though inappropriate to our times, suggests that the line is drawn so as to include what is necessary in the sense of giving a Christian burial, excluding the ornamental

accompaniments, and provision for mourners and strangers which they might make for themselves. Thus, at the present day, the undertaker's and grave-digger's necessary services should be allowed in addition to those pertaining to the religious exercises; also the cost of a plain coffin or casket, the conveyance of the remains to the grave, and the grave itself, — all these being essential to giving the remains a decent funeral. On the other hand, mutes, weepers, pall-bearers in needless array; carriages for mourners, and especially carriages for casual strangers; floral decorations, refreshments, hired musical performances; and the processional accompaniments of a funeral, — all these, though appropriate often to the burial of those who are presumed to have left good estates, are inappropriate to the poor, the lowly, and those whose creditors must virtually pay or contribute to the cost. Public demonstrations which increase the outlay, the attendance of societies to which the deceased belonged, military and civic escorts, and the like, are always properly borne by such bodies or by the public thus gratified, rather than imposed as a charge upon a private estate which cannot readily bear the burden." Citing *Hewett* v. *Bronson*, 5 Daly (New York Com. Pl.), 1. So dinners and horse feed for the attendants at a funeral are not a proper charge on the estate. *Shaeffer* v. *Shaeffer*, 54 Maryland, 679; 39 Am. Rep. 406.

A monument may be allowed when the estate is solvent. *Moulton* v. *Smith*, 16 Rhode Island, 126; 27 Am. St. Rep. 728; *Bendall* v. *Bendall*, 24 Alabama, 295; 60 Am. Dec. 469; *Van Emon* v. *Superior Court*, 76 California, 589; 9 Am. St. Rep. 258; *Ferrin* v. *Myrick*, 41 New York, 325; *McGlinsey's Appeal*, 11 Sergeant & Rawle (Penn.), 64. But not otherwise. *Brackett* v. *Tillotson*, 4 New Hampshire, 208. But in *Fairman's Case*, 30 Connecticut, 205, it was held that under sanction of the Probate Court the cost of a gravestone at a cost of $15 might be allowed even though the estate was insolvent. Mr. Schouler says the rule "ought not to be inflexible, nor in any case to exclude the cost of a simple marker."

See generally *Patterson* v. *Patterson*, 59 New York, 582; *Parker* v. *Lewis*, 2 Devereux (No. Carolina), 21; *Porter's Estate*, 77 Penn. St. 43; *Lund* v. *Lund*, 41 New Hampshire, 355.

Pennsylvania seems less liberal than other States; thus, an allowance for mourning was denied in *Flintham's Appeal*, 11 Sergeant & Rawle, 26; and so in *Griswold* v. *Chandler*, 5 New Hampshire, 495.

No. 17. — WARNER v. WAINSFORD

(C. B. 1615.)

RULE.

An administrator (or executor) may, as against a creditor claiming in an action of debt, retain (as against a creditor of equal degree) his own debt out of assets come to his hands.

Warner v. Wainsford.

Hobart, fo. 127, pl. 160.

Sir Henry Warner brought an action of debt against Wainsford, administrator of Kirby, who pleaded that the intestate was indebted unto him by divers obligations (and recites them) to the sum of 80 pounds, and that goods to that value, and not above, came to his hands, which he detains for his debt, and that he had nothing *ultra*. The plaintiff demurred in law, because it amounted unto the general issue of pleinement administer. But the better opinion of the Court was, that this is no cause of demurrer, for the plea is sufficient; and, besides, it is some matter in law which hath been allowed always to be pleaded especially, and not left to a jury; and the reason of pressing a general issue is not for insufficiency of the plea, but not to make long records when there is no cause which is matter of discretion, and therefore it is to be moved to the Court and not to be demurred upon.

ENGLISH NOTES.

In the case of *Frier* v. *Gildridge* (1615), Hobart, fo. 10, pl. 20, the obligee in a bond (which was entered into jointly and severally by two persons as obligors), appointed as executrix of his will the wife of one of the obligors. The same lady was appointed executrix of her husband's will; and she survived both her husband and the obligee. After her death, the administrator *de bonis non* of the obligee brought an action on the bond against the other obligor. He was held barred upon the ground that when the obligor made the executrix of the obligee his executrix and left assets, the debt was presently satisfied by way of retainer, and consequently no new action could be had for that debt.

The right of retainer has been allowed to a person to whom a debt is due as a trustee, and also to a person having a beneficial interest under a trustee legally entitled to the debt. *Plumer* v. *Marchant* (1763), 3 Burr. 1380; *Cockroft* v. *Black* (1725), 2 P. Wms. 298; *Loane* v. *Casey* (1766), 2 W. Bl. 965.

An executor to whom a debt is due in respect of a trust estate is bound to exercise his right of retainer if required by the beneficiary. *Sander* v. *Heathfield* (1874), L. R. 19 Eq. 21; 44 L. J. Ch. 113.

The right may be exercised by a limited administrator. *Roskelly* v. *Godolphin* (1609), T. Raym. 483; *Franks* v. *Cooper* (1799), 4 Ves. 762, and by an administrator the grant to whom is subsequently

revoked. *Blackborough* v. *Davis* (1701), 1 P. Wms. 41. at p. 45; and by the executor of an executor. *Thomson* v. *Grant* (1823), 1 Russ. 540, n.

In the administration of estates the Chancery Division, as regards legal assets, follows the law and allows retainer notwithstanding a decree for administration or for an account (*Nunn* v. *Barlow* (1824), 1 Sim. & St. 588), nor is the right lost by payment into Court (*Chissum* v. *Dewes* (1828), 5 Russ. 29; *Tipping* v. *Power* (1842), 1 Ha. 405; 11 L. J. Ch. 257); but it is lost by the appointment of a receiver except as regards assets which have actually come to the hands of the executor, and which he would but for such appointment be entitled to retain. *Re Jones, Calver* v. *Laxton* (1885), 31 Ch. D. 440; 55 L. J. Ch. 350; *Re Harrison, Latimer* v. *Harrison* (1886), 32 Ch. D. 395; 55 L. J. Ch. 687. Equality is equity in the case of equitable assets and no retainer as to them is allowed. *Walters* v. *Walters* (1881), 18 Ch. D. 182; 50 L. J. Ch. 819.

The right of retainer is unaffected by the Act commonly called Hinde Palmers Act (32 & 33 Vict. c. 46), which abolishes the preference of the specialty creditor. *In re Stewart ; Crowder* v. *Stewart* (1880), 16 Ch. D. 368; 50 L. J. Ch. 136. It is also unaffected by the 10th section of the Judicature Act, 1875, which (to a certain extent) introduces bankruptcy rules into the administration of estates. *In re Neville : Lee* v. *Nuttall* (1879), 12 Ch. D. 61; 48 L. J. Ch. 616. *Re May : Crawford* v. *May* (1890), 45 Ch. D. 499. And under the 21st section of the Bankruptcy Act, 1890, which provides for the administration in bankruptcy of apparently insolvent estates, the Court has refused to make a transfer for the mere purpose of depriving an executor of his right of retainer. *Re Briggs ; Earp* v. *Briggs* (1891), 35 Sol. Jol. 544.

The right of retainer could not be exercised to the prejudice of a creditor in a higher degree to the executor or administrator. *Re Jones ; Calver* v. *Laxton* (1885), 31 Ch. D. 440; 55 L. J. Ch. 350.

AMERICAN NOTES.

In a few of the United States the English doctrine still prevails. *Harrison* v. *Henderson*, 7 Heiskell (Tennessee), 315; *Knight* v. *Godbolt*, 7 Alabama, (N. S.) 304; *Saunders* v. *Saunders*, 2 Littell (Kentucky), 314; *Evans* v. *Evans*, 1 Desaussure (So. Carolina), 515; *Dolman* v. *Cook*, 14 New Jersey Equity, 56; *Fort* v. *Battle*, 13 Smedes & Marshall (Mississippi), 133.

In New York, Missouri, and Massachusetts it has been abolished by statute.

In other States the system of classification and allowance of claims by the Probate Court necessarily excludes it by inference. *Wright* v. *Wright*, 72 Indiana, 149; *McLaughlin* v. *Newton*, 53 New Hampshire, 531; *Henderson* v. *Ayres*, 23 Texas, 96; *Sanderson* v. *Sanderson*, 17 Florida, 820; *Perkins* v. *Himself*, 11 Rhode Island, 270.

Equity will allow a retention of only a proportionate part with other creditors. *Carr* v. *Lowe*, 7 Heiskell (Tennessee), 81; *Evans* v. *Evans*, *supra*.

The executor may not retain any part of the testator's goods in satisfaction of a debt due to himself. *Glenn* v. *Smith*, 2 Gill & Johnson (Maryland), 493; 20 Am. Dec. 452, 461.

In *Harrison* v. *Henderson*, *supra*, it is said: "The whole doctrine of retainer is based on the principle of advantage or benefit to the executor or administrator, given him as compensation for the legal disability to sue for his own debt;" and it is held that his debt is not extinguished by his receipt of assets (slaves) sufficient to extinguish it, but which he fails to reduce to money and turns over to his successor. "He cannot sue himself, and therefore it is necessary for his protection that he should have the right of retainer." *Dolman* v. *Cook*, *supra*.

In *Knight* v. *Godbolt*, *supra*, and in *Payne* v. *Pusey*, 8 Bush (Kentucky), 561, it was held that the administrator may retain for his claim although barred by the Statute of Limitations. *Contra*, *Rogers* v. *Rogers*, 3 Wendell (New York), 503. "He can therefore not retain a debt which he could not recover if he stood as creditor simply, and not executor."

No. 18. — BURKE *v.* JONES.

(CH. 1813.)

RULE.

WHERE a testator by his will devises real estate in trust for payment of his debts, this does not revive a debt which was at the time of his death barred by the Statute (21 Jac. I. c. 16); although a debt which was not barred at the time of the death, is kept alive by reason of the trust.

Burke v. Jones.

2 Ves. & B. 275, 13 R. R. 33

Under a decree directing the usual accounts of the personal estate, debts, &c., of the testator, Andrew Robinson Bowes, the Master's report stated that the testator was on the 16th of June, 1787, committed to the King's Bench Prison on the prosecution of the King; and continued in such custody under the said commitment and subsequent detainers of creditors until his death, on the 16th of January, 1810: that by his will, dated the 12th of April, 1809, he gave to trustees, their executors, etc., all his ready money, etc., personal estate and effects; upon trust as soon as might be to convert the same into money, and thereout to pay, discharge

and satisfy, so far as the same would extend, all his just debts, funeral expenses, and legacies; and the residue (if any) he gave to his son, William Johnstone Bowes. The testator also devised all his messuages, lands, &c., to the use of the same trustees, their heirs, and assigns; upon trust by sale or mortgage to raise such sums as should be necessary to pay such of his debts, funeral and testamentary expenses and legacies, which the monies to arise from his personal estate should not be sufficient to pay; which sums the trustees were directed to apply and dispose of in payment and discharge of his said debts, etc., which his personal estate should not be sufficient to satisfy.

The Master farther stated, that no action or other proceeding was ever brought, on any of the debts in the schedule to his report; that no promise to pay the same was ever made by the testator after the Statute of 21 James I. c. 16, had barred them; and that all the said debts were barred by the Statute at the death of the testator: but, though it had been insisted before him, that, as the testator was a prisoner in the King's Bench during the time aforesaid, all proceedings against him would have been fruitless, and that as he had by his will created a trust for the payment of his debts, all the said debts were thereby revived and taken out of the Statute, he refused to permit the creditors contained in the schedule to prove.

To this report the creditors took an exception; contending. —

1st, That a devise in trust to pay debts will revive debts barred by the Statute of Limitations. *Anon.*, 1 Salk. 154; *Andrews* v. *Brown*, Prec. Ch. 385; 2 Eq. Ca. Ab. 579; Gilb. Eq. Rep. 41; *Blakeway* v. *Earl of Strafford*, 2 P. Wms. 373; 6 Bro. P. C. 630, Ed. 2; Sel. Ca. Ch. 57; see 29; *Staggers* v. *Welby*, cited 2 P. Wms. 374; *Jones* v. *Earl of Strafford*, 3 P. Wms. 79; *Lucon* v. *Briggs*, 3 Atk. 107; *Oughterloney* v. *Earl of Powis*, Amb. 231; *Executors of Fergus* v. *Gore*, 1 Sch. & Lef. 107; *Ex parte Dewdney*, *Ex parte Seaman*, 15 Ves. 477. See 497.

2ndly, That under the particular circumstances of this case these creditors ought to have been permitted to prove.

The exceptions having been argued, judgment was pronounced on a subsequent day, December 6, by —

The Vice-Chancellor (Plumer). The question upon this exception is, whether by this will, first giving the personal estate in trust for the payment of debts, and if that should be insufficient, cre-

ating an auxiliary fund by the real estate, revived a simple contract debt, upon which the Statute of Limitations had operated before the testator's death; which can be revived only by the effect of these clauses in the will, having never been revived by any promise during the testator's life; and this being a naked case, stripped of any circumstances, showing either that he had at any time recognised these debts, or affording a presumption of payment. The question therefore now comes for determination, generally, what in all cases shall be the effect of a devise of real estate subject to the payment of debts; that question arising upon debts completely barred before the testator's death; and the time in no instance unexpired, and running at the time of the testator's death: but the Statute having taken complete effect upon all these debts, and on some probably more than twenty years.

It is not necessary to consider the effect of a simple direction to pay the debts out of the personal property; and the argument was properly confined to the effect of the devise of the real estate; which is not liable to simple contract debts, otherwise than by the will.[1] It was contended that, if the testator creates a trust of real estate for the payment of his debts, without any particular reference to debts barred by the Statute, the rule is universal that all debts, standing in that predicament, are revived, whatever may be the amount, duration, or other circumstances; that the devise is to be considered either as a waiver of the Statute, or as an acknowledgment that such debts existed, and were unpaid.

This is certainly a case of very great importance; as it must establish a general rule, upon the effect of this very common clause in a will; and it is singular that this should still remain *res ata quæstio* as to the rule of this Court; and the inference of the intention in creating such a trust, upon which it must depend. The argument was properly founded entirely on authority; as it is difficult upon principle to conceive that the testator could intend to prescribe to his executors any rule either in admitting or rejecting debts; or to recognise any particular debt as one which had existed, and still remained unpaid: nor is it easy to infer that the creation of a fund for the payment of his just debts can have any operation upon the inquiry what are his debts, or the mode in which that inquiry is to be prosecuted; but this was

[1] The law on this point was not altered until 1807, when (by Statute 47 Geo. III. c. 74) the estates of traders were made assets for debts by simple contract.

represented as a fixed, invariable rule, not yielding to principle, and too firmly established to admit of exceptions.

No case has been cited within the period of half a century in which such a rule is stated as existing, except for the purpose of complaining of it. It was justly observed that these complaints are a recognition of the rule by very high authorities; and there is certainly considerable authority for concluding that such a rule has been understood as prevailing; that a devise of real estate for the payment of debts would let in debts barred by the Statutes of Limitations. It must, however, be remembered that the last time it appears in print, in the case of *Oughterloney* v. *Earl Powis*, Amb. 231, Lord HARDWICKE did not consider it so established, that it should be acted upon without consideration; expressing surprise, how such a rule could be established. It has received the decided disapprobation of Lord KENYON and Lord ALVANLEY; and it is impossible to read the judgment in *Ex parte Dewdney*, 15 Ves. 477; see p. 497, without perceiving the LORD CHANCELLOR'S disapprobation of such rule. To the floating notion, which has certainly prevailed for a great length of time, countenanced by high authorities, that there is such a rule, must be opposed those authorities I have mentioned; to which may be added the declaration of a Judge very conversant with the law and practice of this court, that there is no rule as to debts positively barred; distinguishing the case where, the time having commenced, the death occurs, before it has run out; and then the trust would keep it alive.

I have paused upon this case, not from any doubt of the principle, but that I might have an opportunity of communicating with Lord REDESDALE, and collecting all the information that could be obtained upon a question of such magnitude, involving a general rule of great importance, upon a subject that must very frequently occur; that it may be settled, and publicly known, if this clause is to have the effect that has been supposed: or, if not, that such a notion as to its operation may no longer remain afloat. With this view I have given the question all possible attention; I have spared no pains in collecting every case in print, or that I could hear of, bearing upon it; I have traced the history of this supposed rule to its foundation, and have examined to the bottom the authorities, on which it has been supported, many in number, and some not very correctly reported; which I have compared with the Register's Book. I shall go through those authorities. The result

is, that, though there are many *dicta*, there is not one case, the facts of which are distinctly stated, deciding, that a debt, actually barred by the Statute, is revived merely by virtue of this clause either as to personal or real estate; and as to the former, it has not been argued. In almost all the cases there was a recognition of the very debt, either express, or by fair inference; or the death occurred before the Statute had actually attached; and then, according to Lord REDESDALE'S opinion, a trust being created for creditors, the Statute cannot attach; and the lapse of time forms no bar.

One of the earliest cases upon this subject is *Gofton* v. *Mill*, Pr. Ch. 9; 2 Vern. 141; Gilb. Eq. Rep. 323; *Halsted* v. *Little*, Tot. 53, which is best reported in Precedents in Chancery. It does not appear that the Statute was pleaded; and the very debt was recognised by the will, with some difference as to the amount. That case therefore amounts to nothing, and was not much relied upon.

In *Salkeld* (1 Salk. 154), an *Anonymous* case is referred to, supposed to have been decided by Lord COWPER, stating very fully a principle that would justify the argument that has been urged, that if one by will or deed subjects his land to the payment of his debts, debts barred by the Statute of Limitations shall be paid, for they are debts in Equity; and the duty remains; the Statute has not extinguished that, though it hath taken away the remedy.

I have examined, but can find no trace of this case in the Register's Book. The note states no facts or circumstances, but mere general propositions; in one of which, as to interest beyond the penalty of a bond, it is certainly incorrect, being in opposition to repeated decisions. That case seems to be confounded, but does not correspond in date with *Staggers* v. *Welby*, decided by the MASTER OF THE ROLLS, and not in print, except as it is referred to in *Blakeway* v. *The Earl of Strafford*, 2 P. Wms. 373; and the circumstances, which I have taken from the Register's Book, so far from forming the foundation of this doctrine, do not in any manner warrant such a rule. Sir Richard EARLE, having in 1695 entered into a contract with the plaintiff, a builder, died in 1697, before the work had proceeded far; when the debt could not have been more than two years old; having by his will charged his real estate with the payment of his debts. That charge creating a trust for the creditors, when the time had commenced, but before the Statute

could operate, was clearly within Lord REDESDALE's principle. Besides that, the defendant Welby, who was an executor and devisee, is stated in the bill to have directed the work to proceed, and to have communicated with, and promised payment to, the plaintiff; and, when they differed, two surveyors were employed to ascertain the amount; and Welby complained of not having an allowance for timber furnished by the testator and by himself. The surveyors ascertained the amount at £752; and in 1713 Welby died, having by his will subjected the same estate to his own debt and Sir Richard Earle's. The bill praying an account, the executrix admitted the contract, and the circumstances I have stated; and the estimate of the surveyors was found; the complaint of Welby in his own hand-writing; and then the executor insisted upon the Statute, and upon an allowance in respect of those items which had not been allowed, as she contended they ought to have been, by the plaintiff; and she filed a cross bill for a discovery.

Under these circumstances could a plea of the Statute be allowed? The debt was not barred, and had it been barred, the conduct of the executrix would have revived it; yet this is the case represented in *Blakeway* v. *The Earl of Strafford* as laying the foundation of this doctrine.

There is a case (*Andrews* v. *Brown*, Pre. Ch. 358, in 1714) previous to *Staggers* v. *Welby*, containing *dicta* that go the full length of this argument, and farther; viz., that wherever personal property is given, or there is any written declaration that the debts shall be paid, independent of the will, it shall have this effect; but the facts by no means warrant that conclusion. Upon them, without straining to consider the party as advertising for, and expressly inviting, debts that were barred, there is a fair acknowledgment of those outstanding debts. The debtor was a fugitive bankrupt. It does not appear that the defendant insisted on the Statute; but if he had, the advertisement to all the creditors, all being in the same predicament, must be taken as an invitation and engagement to the creditors, to whom it was addressed; and, considering how little is sufficient to revive a debt barred by the Statute, that might have been deemed sufficient, as an express recognition of the debts that had been barred.

The case of *Blakeway* v. *The Earl of Strafford*, 2 P. Wms. 373, 6 Bro. P. C. 630, Sel. Ca. Ch. 2d ed. 57, which was carried to the House of Lords, is a very important authority, and the date is mate-

rial. Considering the facts of that case, it is extraordinary how such a decision as Lord KING'S could have been made. How could the Statute be pleaded, a trust having been created when the debt was clearly existing. The trustees were trustees for that creditor, upon trust to pay that debt. The decision of the House of Lords, reversing Lord KING'S decree, is extremely strong, saving the benefit of the plea to the hearing, which, if the mere circumstance of making the will would be an answer to the Statute, ought to have been overruled. The effect of the decree, with that variation, is, that if the party failed in making out the special acknowledgment, the will alone would not be an effectual answer to the Statute.

This is the fair inference from the decision of the House of Lords; but four years afterwards another case came under the consideration of Lord KING, who, aware, as he must have been, of the ground of that reversal, states the principle that governed the House of Lords, That a plea of the Statute is good, if there is nothing but a will, creating a trust for debts. This case, *Le Gastick* v. *Cowne*, Mos. 391, is a most material authority, the allowance of the plea being a direct decision of the point by Lord KING, who first decided *Blakeway* v. *The Earl of Strafford*, and knew the result of that case; stating his knowledge that the Lords were of a different opinion from Lord COWPER; and grounded upon that knowledge his own opinion, that, generally, a trust of real estate by will for the payment of debts will not itself operate as an answer to the Statute. It is, however, proper to observe that in the Register's Book, 11th July, 1737, Reg. Lib. B., an important fact appears, which might make a material difference. The debt was contracted in the beginning of 1707, and the testator died in May, 1712, before the six years had elapsed; consequently it is open to the observation that the devise was interposed before the six years elapsed. The defendant, pleading the Statute, negatives a demand within six years; and Lord KING, taking the question up generally, as upon the Statute and the will, decides, without adverting to those special circumstances. This case, which I consider as deriving very considerable authority from the circumstances I have stated, goes the full length of negativing the proposition that the will alone takes a simple contract debt out of the Statute.

Previous to that case, another had intervened (*Vaughan* v. *Guy*, Mos. 245), referring to this doctrine; but the facts did not call for a decision to that extent, sufficiently justifying the Court in over-

ruling the plea, the death having occurred before the Statute had operation, when therefore a trust was created upon a subsisting debt, not barred.

The next case is *Jones* v. *The Earl of Strafford*, 3 P. Wms. 79, also before Lord KING, assisted by Lord RAYMOND, who thought that ought to take the same course as *Blakeway* v. *The Earl of Strafford*, leaving untouched the weight and authority of that decision by the House of Lords.

The case of *Morse* v. *Langham*, at the Rolls, 1st July, 1737, is not in print, but I have been favoured with manuscript notes of it; the one I received from the LORD CHANCELLOR, the other from Lord REDESDALE. The former represents it as a bill against an executor upon a note, given by the testator in 1725, upon which an action was brought in 1736, to which the Statute was pleaded. The equity of the bill was, that, by a will made a year after the date of the note, the testator had devised his estate, charged with his debts. The answer, admitting the note, insisted upon the Statute. The MASTER OF THE ROLLS said, it was a plain case; that the debt, though at law barred by the Statute, being kept alive by the charge upon the real estate, and intended to be paid, was not barred when the will was made by which the estate was subjected to the debts; and the House of Lords had, with the advice of all the Judges, held, that a trust was not barred by the Statute. The decree was accordingly pronounced for the plaintiff.

I have compared this case with the Register's Book, and find that a material fact is omitted in that note, which might make a considerable difference, and proves that case to be no authority upon a debt by simple contract, actually barred before the testator's death. I do not rely upon the circumstance, brought forward by this note, that the will was made within six years. The time of the death is to be looked to, not that of making the will; and the time of the death is not stated in the note. But it appears by the Register's Book that the plaintiff lent the testator £20 upon his note in April, 1726, who, by his will made twelve days afterwards, subjected his real estate to his debts, directing the defendant, his son, who was his heir, devisee, and executor, to pay his debts and legacies out of his real and personal estates; and the answer admitted, that the death took place on the 28th of April, 1726, the note having been given on the 5th, and the will being made on the 18th. It was clear, therefore, that the Statute could not be

urged by the trustee against the *cestui que trust*, calling for an account. The creditor died in 1733. The answer contains an admission that might perhaps be considered as an acknowledgment, that would take it out of the Statute; but, independent of that, the circumstance of the death is quite sufficient. The decree accordingly directed an account of the principal and interest due, and payment.

The case of *Lacon* v. *Briggs*, 3 Atk. 105, as far as regards the facts and the decision, proves to be as little an authority upon this subject, though Lord HARDWICKE by what he is reported to have said, appears to give considerable countenance to the existence of such a rule; but this review of the antecedent cases shows that there is no authority applying directly to the point, where the Statute had actually attached. If the reference to *Lord Strafford's Case*, as establishing the rule, is to be considered as made by Lord HARDWICKE, it is extraordinary, when Lord KING had, on the authority of that case, decided against that rule; and ten years afterwards Lord HARDWICKE himself, so far from considering the rule so settled by *Lord Strafford's Case*, refers to it as having shaken the doctrine.

The next case is *Oughterloney* v. *Earl Powis*, Amb. 231; and there Lord HARDWICKE'S language is very different. He dismissed the bill, presuming satisfaction, which removes all the effect of the virtual acknowledgment; but, in addition to that, this case shows that Lord HARDWICKE certainly did not consider the doctrine established, referring expressly to *Lord Strafford's Case* as having considerably shaken the authority of former determinations.

The case of *Ketelby* v. *Ketelby*, 2 Dick. 512, cited 2 Anstr. 527, from the expression, where it is mentioned in Anstruther, might be supposed to involve this question, but upon examining the Register's Book I find that the only point was that upon the exceptions with reference to interest, and the distinction in that respect between creditors by bond and simple contract; and there is no trace of this point either decided or raised, nor, upon the circumstances, could it have risen.

There is a *dictum* of Lord MANSFIELD (Cowp. 548, *Trueman* v. *Fenton*) showing his conception of this doctrine of a Court of Equity, and that such an idea had been afloat upon this subject, which is abundantly proved; but the principle and authorities had not been then examined. In *The Executors of Fergus* v. *Gore*, 1 Sch.

& LeFroy, 109, Lord REDESDALE, when this point was drawn to his attention, expresses his doubt whether there ever was such a decision as that reported in *Blakeway* v. *The Earl of Strafford;* and lays down this clear rule: "That a devise in trust for payment of debts does not prevent setting up the Statute, if the time had run before the testator's death, — for, if it has run in the life of the testator, the debts are presumed to be paid; but where a provision is made by will for payment of debts, the Statute does not run after the death of the testator. It is an acknowledgment of the debt."

Though this is not the point decided, Lord REDESDALE'S declaration may be opposed to those of his predecessors.

The only case remaining to be noticed is *Ex parte Dewdney*, 15 Ves. 477. See also *Stackhouse* v. *Barnston*, 10 Ves. 453, — not a direct decision, but showing the LORD CHANCELLOR'S impression upon this point. I applied to the LORD CHANCELLOR for the case before Sir THOMAS SEWELL, to which his Lordship refers. The note states merely that Sir THOMAS SEWELL held that a bond debt, supposed to be satisfied, was revived by the trust; but that was afterwards reversed by the LORD CHANCELLOR, — a strong authority against this argument, — the judgment of the MASTER OF THE ROLLS, sustaining the debt against the presumption from length of time, being overruled by the LORD CHANCELLOR.

I have now gone through all the cases that are to be found in print or manuscript upon this important question; and the result is, that there is not one in which this doctrine has been established to the full extent that has been contended; that it rests simply upon *dicta* opposed by *dicta;* and has been disapproved by every judge from the time of Lord HARDWICKE; that it is contrary to the decision in *Le Gastick* v. *Cowne*, Mos. 391, and to the final decision in *Lord Strafford's Case*, followed by the ultimate decision of Lord KING, who first determined that case, and substantially contradicted by every subsequent authority.

If the question is to be considered still open upon the conflicting authorities, how does it stand upon principle? It must depend upon that which alone can subject a real estate to debts by simple contract, — the intention (in this instance an intention most absurd, rash, and destructive to the estate; declaring openly that his executor is not to set up the Statute against any demand incurred by simple contract during his whole life, — inviting stale demands). His meaning must be taken to be only what shall turn out to be

his just debts. There is no direction for any inquiry as to the amount, nature, reality, extent, or whether there had been any payment. The executor is not directed expressly to plead the Statute, nor is there any implication of such intention, but it is to take the ordinary course: his debts are to be discharged, but the investigation of them is left to the executor, under the direction of the courts of law and equity. If a devise of this kind can have the effect contended, the Statute would be a snare to those, who, relying on it, might after six years destroy their vouchers. The notion that these are comprehended under the description "just debts," as still subsisting *in foro conscientiæ*, is *petitio principii*. The Statute, which was made for the benefit of those who may have paid, but have not the means of proving it, upon general principles, for the quiet and peace of mankind, does not permit a demand of debt beyond its limits to be enforced upon the possibility that it may still be undischarged. The plain line is, that the testator intends the courts of law and equity to determine what are just debts, leaving his executor at liberty to use all means of resistance prescribed or allowed by the law, thus encouraging provisions for creditors by the assurance of a protection to the assets against demands which the testator himself could have resisted, who, relying on the Statute, may have destroyed his vouchers.

The conclusion is, that this doctrine, standing upon an unnatural conjecture as to the intention, pregnant with danger and injury, by inviting stale demands, and discouraging provisions for the payment of debts, ought not, unless established by authority, to stand as the rule; and I have endeavoured to show that there is no decision that a devise for the payment of debts has the effect of reviving debts barred by the Statute before the death of the devisor, but they are left open to examination by all the means which the rules of law and equity admit. *The exceptions were overruled.*

ENGLISH NOTES.

It appears from this judgment, and from the cases cited in it, that an opinion formerly prevailed that a charge of debts upon real estate revived debts that were statute-barred in the lifetime of the testator; and in the case of the *Earl of Strafford* v. *Blakeway* (1727), Select Cases in Chancery *tempore* Lord King, it was so ruled by Lord King, following the opinion of Lord Cowper. But the judgment of the Lord King was reversed by the House of Lords. And the *ratio decidendi* of the

House, which does not appear from contemporary reports, is at a later date (as it is observed in the above judgment) explained by Lord KING himself, who presided in the House of Lords when the order of reversal in the *Earl of Strafford's Case* was pronounced (see Lords' Journals, vol. 23, p. 179). The judgment by Lord KING in the case of *Le Gastick* v. *Cowne* (1730), referred to in the judgment in the principal case, was as follows: "I know that Lord COWPER was of opinion that where lands were devised in trust for the payment of debts, debts barred by the Statute should be paid; but to my knowledge the Lords were of another opinion in the case of the Earl of Strafford. I know no power a Court of Equity has to control an Act of Parliament, and if lands are given to executors for payment of debts, they are as much legal assets as the personal estate; but under the notion of a trust, you would have me subvert the Statute; and the debt has been due to the plaintiffs since 1707, and therefore I allow the plea." Mosely Rep. p. 301.

A direction that debts should be paid, in the introductory part of a will, amounts to a charge of debts. *Clifford* v. *Lewis* (1821), 6 Madd. 33.

Where there is no real estate on which the charge or trust can operate, the debt is not kept alive, either by a trust or by a direction to pay debts. *Scott* v. *Jones* (1838), 4 Cl. & F. 382. *Re Hepburn, Ex parte Smith* (1884), 14 Q. B. D. 394; 54 L. J. Q. B. 422.

It seems consistent with the judgment in the principal case, that a testator may, by express terms, revive a debt statute-barred in his lifetime; and to this effect the authority of *Gofton* v. *Mills* (1690), 2 Vern. 141, seems to be allowed. This would be in accordance with the cases showing that the Act of James I. bars the remedy and not the right. *Skeet* v. *Lindsay* (1877), L. R., 2 Ex. D. 314; 46 L. J. Ex. 249; *Curwen* v. *Milburn* (1889), 42 Ch. D. 424.

The Statute 37 & 38 Vict. c. 57 § 8, as construed by Mr. Justice KAY in *Re Stephens, Warburton* v. *Stephens* (1889), 43 Ch. D. 39, 43; 59 L. J. Ch. 109, puts a charge of debts and a trust for payment of debts on the same footing, so far as relates to any subsequent operation of the Statute. In either case the creditor has 12 years from the death of the testator within which to enforce his remedy. In the course of his judgment in this case KAY, J., intimated his opinion that where a testator makes a blended fund of the proceeds of sale of his real and personal estate, it is open to argument that the debts may be barred as to such a portion as is properly attributable to the personal property, although not as regards the remainder. But his *dicta* on this point are inconsistent with the actual decision (as appears by comparing the report with the Registrar's Book) in the case of *Hargreaves* v. *Michell* (1822), 6 Madd. 326. Reg. Lib. A. 1821, fo. 1703. In that case a debt which would have been barred if there had been no charge of debts was ordered to be

paid out of the moneys in the hands of the executor, who admitted assets, although the devisee and residuary legatee was before the Court.

An executor or administrator may, however, pay debts statute-barred in the testator's lifetime (*Stahlschmidt* v. *Lett* (1853), 1 Sim. & Giff. 415), and is not bound to plead the Statute (*In re Freers Estate, Hunter* v. *Baxter* (1861), 3 Giff. 214; 31 L. J. Ch. 432), even in an administration action (*Re Baker, Nicholls* v. *Baker* (C. A. 1890), 44 Ch. D. 262, 270; 59 L. J. Ch. 661).

Nor will the Court set up the Statute on behalf of absent parties, if the beneficiaries present and the administrator, at his own risk, choose to waive it. *Alston* v. *Trollope* (1866), L. R., 2 Eq. 205; 35 L. J. Ch. 846. But, after it has been declared by a court of competent jurisdiction that the debt is barred by Statute, the administrator cannot pay it without being guilty of a *devastavit*. *Medgley* v. *Medgley* (C. A. 1893), 1893, 3 Ch. 282. Where there is an administration decree, the plea of the Statute may be raised by a creditor (*Shewen* v. *Vanderhorst* (1831) 1 Russ. & My. 347; 1 L. J. (N. S.) Ch. 107; *Fuller* v. *Redman*, No. 2 (1859), 26 Beav. 614; 29 L. J. Ch. 324); or it may be raised by a person beneficially entitled (*Beeching* v. *Morphew* (1850), 8 Hare, 129; *Moodie* v. *Bannister* (1859), 4 Drew. 432; 28 L. J. Ch. 881). And a similar rule applies to proceeding by originating summons (without asking for administration of the estate) under Order LV., rules 3 & 4, *Re Wenham, Hunt* v. *Wenham*, 1892, 3 Ch. 59.

An acknowledgment by an administrator given after an administration decree, will not revive the debt as against the estate. *Phillips* v. *Beale* No. 2 (1862), 32 Beav. 26. But if the acknowledgment contains an express promise to pay, it may render the administrator personally liable (*Andrews* v. *Brown* (1714), Prec. Ch. 385); for although an administrator is not, as a general rule, liable for the debts of the deceased where there are no assets (*Pearson* v. *Henry* (1792), 5 T. R. 6; 2 R. R. 523), he may by contract render himself personally liable (*Barry* v. *Rush* (1887), 1 T. R. 691; 1 R. R. 360).

AMERICAN NOTES.

In this country the general rule is that the representative may pay the outlawed debt, although barred before the death. *Fairfax* v. *Fairfax*, 2 Cranch (U. S. Circ. Ct.), 25; *Scott* v. *Hancock*, 13 Massachusetts, 161; *Hodgdon* v. *White*, 11 New Hampshire, 208; *Ritter's Appeal*, 23 Penn. St. 95; *Pollard* v. *Sears*, 28 Alabama, 484; *Miller* v. *Dorsey*, 9 Maryland, 317; *Payne* v. *Pusey*, 8 Bush (Kentucky), 564; *Walter* v. *Radcliffe*, 2 Desaussure (So. Carolina), 577; and cases cited in Wood on Limitations, § 188, and 7 Am. & Eng. Ency. of Law, p. 282, and may have leave to sell the real estate therefor when necessary. *Hodgdon* v. *White, supra.*

Statutes however in some States forbid this discretion (*Peck* v. *Pottsford*, 7 Connecticut, 172; *Thompson* v. *Peters*, 12 Wheaton (U. S. Sup. Ct.), 565; *Wiggins* v. *Greene*, 9 Missouri, 262), even when the bar attached after the death of the decedent, *Rector* v. *Conway*, 20 Arkansas, 79.

In *Byrd* v. *Wells*, 10 Mississippi, 711, it was held that the representative may not pay a debt outlawed at the time of his qualification, but otherwise as to one not outlawed until after his qualification. This is put on the ground that the contrary rule would impel creditors to sue; and thus subject the estate to unnecessary costs, and sacrifice the interests of heirs.

In *Knight* v. *Godbolt*, 7 Alabama (N. S.), 304, and in *Payne* v. *Pusey*, 8 Bush (Kentucky), 564, the administrator was allowed to retain assets for his own claim although barred by the Statute of Limitations. But *contrà*, *Rogers* v. *Rogers*, 3 Wendell (New York), 503.

In the last case the Court observed: "This question has been long agitated in England, where there are *dicta* on both sides; and it seems so late as 1813 to have been a vexed question," and the Court adopt the rule of the principal case, citing it, and move that "a debt barred in the life of the testator is presumed to have been paid by him, and therefore is not a legal demand or a just debt," and may not be paid by the representative; "but where a provision is made in the will for the payment of debts, the Statute does not run after the death of the testator; it is an acknowledgment of the debt." So held also in *Patterson* v. *Cobb*, 4 Florida, 487.

Mr. Wood, in his treatise on the Statute of Limitations, cites the principal case, and observes, "In fact, it has been treated almost as a duty, in some cases, for an executor to satisfy in that way, in his representative character, the conscience of his testator."

No. 19. — JERVIS *v.* WOLFERSTAN.

(CH. 1874.)

RULE.

AN executor (or administrator) distributing the estate, notwithstanding the existence of liabilities which may possibly become debts, although there is no apparent likelihood of their becoming so, may, in the event of the liabilities becoming debts, have recourse against the estate in the hands of the beneficiaries.

Jervis v. Wolferstan.

L. R. 18 Eq. 18 (s. c. 43 L. J. Ch. 809).

The points decided in the case sufficiently appear from the judgment of the MASTER OF THE ROLLS, which was as follows: —

No. 19. — Jervis v. Wolferstan.

Sir G. Jessel, M. R. This case is one which is by no means common, and which I hope will not become common. It is a case where the executors and trustees of a will now claim as creditors against the estate which they have themselves distributed; and it is so peculiar that it is necessary to state it shortly.

By a deed of settlement of the 21st of August, 1866, a Mr. Swynfen Jervis, who was the owner of 625 fully paid up shares in the Albert Insurance Company (then a going concern, and supposed to be, not only solvent, but wealthy), made a settlement of the shares, which were then supposed to be of great value, on his wife for life, with remainders to his children and grandchildren. Mr. Swynfen Jervis made his will on the same day, and made the trustees of the settlement his executors. He died in January, 1867, and the will was duly proved.

By an indenture of settlement made in his lifetime, on the 31st of March, 1856, on the marriage of one of his daughters, now Mrs. Broughton, Mr. Swynfen Jervis had covenanted that he would bequeath by his will, or otherwise provide, that whatever residue of his personal estate should remain at his decease should be equally divided between Mrs. Broughton, Mrs. Brackenbury, and Walter Neil Jervis. By another indenture of the 22nd of April, 1867, which was a settlement of Mrs. Brackenbury's share, her one third share of the residue which she took under Mr. Jervis's will was settled, and got in to her trustees. The executors of Mr. Swynfen Jervis, of whom the plaintiff is one, advertised for creditors in the usual way. They found that they had paid all their debts, that they had got rid of all their liabilities except this, that there was a possible liability on the Albert shares, because, though it was a going concern, and believed to be solvent, it might fail; this failure might take place before the remaindermen had become entitled in possession; they would thus have an opportunity of disclaiming, and this would throw back the shares as regards beneficial interest or liability on the testator's estate, and in that way there was a possible liability of the testator's estate to the trustees of that settlement, — a remote, contingent, unexpected liability; and it is not contended that the plaintiff was not aware that there was such a possibility. There being no debt unpaid, and no present liability, the executors divided the residue, which then amounted to £2649 12*s.* 6*d.*, in shares: they paid one share of £883 4*s.* 2*d.* to the trustees of Mrs. Broughton's settlement, and another share of equal

amount to the trustees of Mrs. Brackenbury's settlement. Unfortunately, the payments having been made, the Insurance Company failed, and was wound up, and eventually the costs of the liquidation turned out to be exceedingly heavy, and very large calls, amounting to £6875, were made upon these trustees and executors. Of course, as trustees of the settlement and holders of the shares, they were legally liable to pay this large sum of money.

The beneficiaries under the settlement, with the exception of the widow (who had received some dividends, and was unable to disclaim), naturally disclaimed, and the result therefore was, that under our law there was a resulting trust for the testator's estate. Mrs. Jervis has paid, or is willing to pay, sufficient contribution; but the result therefore is that the testator's estate is liable for several thousands of pounds, and liable to indemnify these trustees. I take it to be the general rule that where persons accept a trust at the request of another, and that other is a beneficiary under the trust, the beneficiary is liable to indemnify the trustees personally for any loss accruing in the due execution of the trusts; under that doctrine I shall hold that the estate of the testator became liable to indemnify the trustees against the payment of this large sum of money.

That being so, the next question is, how are they to be recouped, if they are entitled to be recouped at all? The only sums remaining to recoup them are these two sums of £883 4*s*. 2*d*., paid to the trustees of the respective settlements. These sums were originally undoubtedly part of the testator's estate, and part of the estate which was liable to recoup them, and the question which I have now to try is whether what has happened has entitled these defendants to retain these moneys and to leave the trustees to bear the loss personally.

Now, first of all, as regards Mrs. Broughton and those claiming under her settlement, it is said that they are not in possession as legatees at all; that it is not a case in which an attempt is made by a creditor to make a residuary legatee refund, but that it is the case of one creditor attempting to make another creditor refund. The first question which I have to examine is, whether that is a true state of the case as regards the law; and I do not think that it is. The covenant by Mr. Swynfen Jervis was simply that he would bequeath by will, or otherwise provide, that this share of residue should come to Mrs. Broughton. He did bequeath it by will, and he therefore fulfilled his covenant. The effect of the bequest by the

will was to make the lady a residuary legatee, and nothing else; and, consequently, when the trustees of her settlement received it they were simply in the position of a residuary legatee receiving a share of the residue; and if, as residuary legatee, Mrs. Broughton was liable to refund, the liability, in my opinion, remains. That makes the case of Mrs. Broughton identical with that of Mrs. Brackenbury.

The next question is, are they liable to refund at all? I take it that no proposition is better settled than that residuary legatees are liable to refund at the suit of an unpaid creditor, and I have already held that the plaintiff and his co-trustee are unpaid creditors.

The only proposition that remains to be examined is this: It is said that, in addition to being creditors, the plaintiff and his co-trustee were also the executors of the debtor, and that, though creditors can obtain an order to refund against residuary legatees, executors cannot, if the executors have paid over the assets with notice of the debt. Now, that is undoubtedly good law, but it does not by any means follow that the creditor, as such, has lost his right to recover, because he could not recover in another character, assuming always that he could not recover in that character. It may be quite true that if the suit was brought in the character of executor only, it would be barred; for that reason I will examine in a moment whether it is so barred; but still I do not think that it is at all conclusive, on the question as to the creditor's right to recover, to say that he has done something which would debar him in another character from recovering, he not suing in that other character.

But, is it true that the executor would be barred in a case like this? I cannot find any authority. I have looked through many cases, and I have asked for the assistance of the bar, and I cannot find the rule stated in wider terms than these, that he cannot recover from a legatee a payment made with notice of a debt. Now, he certainly had not notice of a debt, for the debt did not exist. The utmost notice that he had, was notice of a possible liability, — a remote, unlikely liability, but a possible one; and the question therefore remains whether the notice of a possible, remote, contingent liability of this kind prevents the executor recovering back the assets if he had paid them away, when that which was formerly this possible remote liability becomes a debt. I am not willing to stretch the rule beyond what its terms require, because it appears to me that great inconvenience would arise from so straining

or stretching the rule. If it were true that an executor was disabled from recovering, merely because he had notice of such a possible liability, the result would be to throw the great bulk of the estates of testators who had any property into this Court, — a result certainly not desirable, because it would then be sufficient for an executor to allege, as an excuse for not paying any of the legatees, that at some remote period his testator had been a lessee of property, though the property might be of the greatest possible value, though it had been assigned many years before, and there was a good covenant of indemnity by a solvent purchaser. That is a very common case indeed. But not only would it be a sufficient ground for refusing to pay a legatee, it would be a sufficient ground for refusing to pay anybody anything. The mere fact that the executor had heard (for that is notice) that the testator had formerly been a lessee, would give him any delay he might wish, because he might say that he was prosecuting inquiries as to whether the testator had ever been a lessee of any leasehold property whatever of which he was formerly possessed.

This shews the extreme inconvenience of notice of such a kind of remote, contingent liability being held sufficient to make the executor guilty of negligence (for that is what it must come to) in distributing the assets, — guilty of wilful negligence, such as to deprive him of any remedy if he were afterwards made personally liable at the suit of the person entitled to enforce that liability. I think the mere statement of such a result shews how dangerous it would be to extend the doctrine to that length, and I am not prepared so to extend it; on the contrary, I would rather encourage executors to distribute the assets as soon as possible, instead of making them liable to such a responsibility if they did not take such superfluous and unusual precautions. I think, therefore, that it would not have been sufficient to prevent the plaintiff, even as executor, from recovering this amount if he had been compelled by a third person to pay it. That being so, I am of opinion that the plaintiff is entitled to recover.

There now remains the question, What is he entitled to recover? I take it that he is entitled to recover what he has paid. It was put to me that that would involve some hardship; but, on the other hand, everybody taking a residue must know that he takes it subject to the testator's liabilities, and takes the risk of its afterwards turning out that there are undiscovered liabilities. That has always been the law, and I think there is no unusual hardship in

that. On the other hand, it has been thought to be a hardship that a man may not spend the income of what he has been paid, and the doctrine is now established, that if an executor recovers back assets, he cannot recover any of the income, but he must take only the capital. Following that doctrine, I shall direct the trustees of Mrs. Brackenbury's settlement to pay £883 4*s.* 2*d.* into Court, and the trustees of Mrs. Broughton's settlement to pay the like sum into Court, by a day to be fixed for that purpose.

Then, as to the costs, I cannot help seeing that this is a case of very great hardship on all sides. I do not at all blame the trustees of these settlements for bringing this case into Court. Points of law of great nicety, and by no means free from difficulty, have been discussed, and I think that they were not wrong in not making the payments without the case being decided; and so far, therefore, from mulcting them in costs, I think they must have their costs. Therefore, when the sums are brought into Court, I think that the costs of all parties, as between solicitor and client, should be paid out of the fund, and that the residue should be paid to the plaintiff and his co-executor, Mr. Philip Octavius Jervis.

ENGLISH NOTES.

The rule in *Jervis* v. *Wolferstan* has been adopted by the Court of Appeal, in *Whittaker* v. *Kershaw* (1890), 45 Ch. D. 321; 60 L. J. Ch. 9.

Where the deceased was under liabilities in respect of rent or covenants, it was formerly the practice to set aside a fund out of the residue to meet the contingent liabilities to which the executor or administrator was liable; unless it was clear that there was no reasonable probability of such a claim arising. *Addams* v. *Ferick* (1859), 26 Beav. 384; 28 L. J. Ch. 594. But this right was personal to the executor or administrator (*King* v. *Mallcott* (1852), 9 Hare, 692; 22 L. J. Ch. 157), and was lost where an executor had unconditionally assented to a bequest of leaseholds. *Shadbolt* v. *Woodfall* (1845), 2 Coll. 33. An executor was, however, entitled, in the absence of a direction to the contrary in the will, to be indemnified against liabilities by the specific legatees, who, it was held should, as a general rule, take property *cum onere*. *Hickling* v. *Boyer* (1851), 3 McN. & G. 635; 21 L. J. Ch. 388. But now, by Lord St. Leonard's Act (1859), 22 & 23 Vict. c. 35 § 27, where executors or administrators liable in respect of leasehold property have satisfied all sums which have accrued and have been claimed up to the date of the assignment by them, and have set apart, where necessary, a sufficient sum to answer any covenant or agreement to lay

out money on the property demised, the lessor has no right of action against them, but must sue the person or persons to or amongst whom the assets may have been distributed. And section 28 of the same Act contains a similar provision as to executors or administrators who are liable as such to rent and covenants contained in a conveyance on chief rent or rent charge. Since the passing of the Statute, the Court no longer sets aside a fund in cases to which these sections apply. *Dodson* v. *Sammel* (1861), 1 Dr. & Sm. 575; 30 L. J. Ch. 799. And the Court has paid out to a residuary legatee a fund set aside before the passing of the Act. *Snowden* v. *Marriott* (1873), 21 W. R. 808.

By section 29 of the same (Lord St. Leonard's) Act, where an executor or administrator gives such notices as would have been given in an administration action for creditors and others to send in their claims, and duly distributes the estate after the expiration of the notice, a creditor who has failed to give notice is only entitled to sue the beneficiaries. The sufficiency of the notices depends upon the circumstances of each particular case. *Re Bracken*, *Doughty* v. *Townson* (C. A. 1889), 43 Ch. D. 1; 59 L. J. Ch. 18. But where the liability is merely contingent, this section (29) does not apply; and the executor has only the protection afforded by the rule of Equity in the principal case. *Taylor* v. *Taylor* (1870), L. R., 10 Eq. 477; 39 L. J. Ch. 676. The executor or administrator is not entitled to have refunded to him an amount expended in paying a debt of which he had notice when the assets were distributed. *Goodman* v. *Sayers* (1820), 2 Jac. & W. 249, at p. 263; *Whittaker* v. *Kershaw* (1890), 45 Ch. D. 321; 60 L. J. Ch. 9. But the creditor may, notwithstanding such distribution with notice of his debt, proceed against the beneficiaries, without making the executor a party. *Hunter* v. *Young* (1879), 4 Ex. D. 256; 48 L. J. Exch. 689.

AMERICAN NOTES.

The common practice in the United States is to allow the representative to demand a refunding bond in case of payment of a distributive share before final settlement. He may not be compelled to pay without such bond; but if he pays voluntarily without such bond, he cannot compel the receiver to refund, unless debts appear of which he had no previous notice, and the deficiency was not caused by his own mismanagement. *Montgomery's Appeal*, 92 Penn. St. 202; 37 Am. Rep. 670; *Adams* v. *Turner*, 12 So. Carolina, 594; *Gallego* v. *Attorney-General*, 3 Leigh (Virginia), 487; *Walker* v. *Hill*, 17 Massachusetts, 380; *Alexander* v. *Fox*, 2 Jones Equity (No. Carolina), 106; *Moore* v. *Lesueur*, 33 Alabama, 237.

The case of *Alexander* v. *Fisher*, 18 Alabama, 374, supports the principal case, and see *Davis* v. *Newman*, 2 Robinson (Virginia), 664, 671; Schouler's Executors and Administrators, § 491; *Gallego* v. *Attorney-General*, *supra*.

In *Alexander* v. *Fisher*, *supra*, it is said, "It must be conceded, as a general

rule, that if an executor or administrator, with a *knowledge* of the existence of demands against the estate, pay out legacies or make distribution of the assets, he cannot recover back from the legatees or distributees, to whom he has thus turned over the effects, anything for his own indemnity, unless he has obtained from them refunding bonds. If, with such knowledge, he submits to pay legacies or distribute the property, the persons receiving the same have the right to regard it and treat it as their own. It is given to them absolutely, and closes the transaction between them and the administrator, &c. So that whilst a creditor of the estate, or an unpaid legatee or distributee, in case of a deficiency of assets of the estate to pay the whole, might proceed against the person receiving the share thus turned over, the personal representative would be foreclosed by his own act from doing so, as the Court will not relieve him from the consequences of his own folly, which he knowingly and voluntarily superinduces. Story's Equity Jurisprudence, §§ 90-1-2, and notes. But to apply this harsh and stringent rule to cases where the personal representative in *good faith*, and influenced by a desire to aid the distributees, and without any motive personal to himself, has divided the property or submitted to a division, without a *full knowledge* of the condition of the estate with respect to the debts due from it, would in many cases work the greatest injustice and hardship." Citing *Bower's Ex'r* v. *Glendening*, 4 Munford (Virginia), 219, and *Gallego* v. *Attorney-General*, *supra*, and continuing, that in the last case the Court conclude "that in cases where the executor has divested himself of the assets without fraud or misconduct in the management of the estate, and has acted *bonâ fide*, with honest intentions, and without any apparent advantage to be derived to himself from his errors, the tendency of modern decisions went to relax the severity of the ancient adjudications upon the subject, and adds: 'I am therefore inclined to think that there is no inflexible rule which refuses to an executor, under all the circumstances, a right to recover back from a legatee an excess of advancement, which may have been made to him above his ratable proportion of his legacy.'"

No. 20. — LITTLEHALES *v.* GASCOYNE.

(CH. 1789.)

RULE.

WHERE an executor (or administrator) keeps considerable balances of the estate in his hands uninvested longer than the exigencies of the case require, he must account for interest.

Littlehales v. Gascoyne.

3 Bro C. C. 73.

The defendants, executors of the late Sir Crisp Gascoyne, having kept very large sums of money in their hands ever since his

decease in the year 1761, the LORD CHANCELLOR, on the 3rd of February last, ordered them to pay interest for the same (Reg. Lib. 1789, B, fol. 213), saying, that an executor's paying or not paying interest depended on its being necessary for him to keep the money to answer the exigencies of the testator's affairs or not; but that, where he held the money longer than was necessary he must answer interest. And the cause coming on again this day (28th April), and the balances appearing very large, and great delays, and the interest exceeding the principal, they were ordered to account for the same. Mr. Hardinge pressed that, one of them having become insolvent, the other executor might answer the sums come to his hands, charging him with being a partner in the delay; but the LORD CHANCELLOR refused this, as never done, except where executors joined in receipts or did other joint acts, *Vide Saddler* v. *Hobbs*, 2 Bro. C. C. 114, and note there, but ordered them both to be liable to the whole costs.

ENGLISH NOTES.

Courts of Equity have not at all times recognised the principle stated above; and even in the time of Lord HARDWICKE, there appears to have been no such fixed principle. *Adams* v. *Gale* (1740), 2 Atk. 106. The clew to the earlier decisions will be found in the judgment in *Tebbs* v. *Carpenter* (1816), 1 Madd. 290.

In the case of *Earl Powlett* v. *Herbert* (1791), 1 Ves. Jun. 207, a trustee, having mistaken his power, sold stock, and invested it in an unauthorised manner, he was ordered to replace the stock, paying the difference out of his own pocket; and, if the stock had fallen in price, to invest any surplus in the same stock, for the benefit of the beneficiaries.

Want of readiness to account has been held a sufficient ground for charging executors (or administrators) with interest. *Pearse* v. *Green* (1819), 1 Jac. & W. 135. But the established doctrine is that they are not so chargeable, and still less chargeable for the costs of taking an account, in the absence of misconduct, amounting, in effect, to a refusal to account. *Earl of Mansfield* v. *Ogle* (1859), 4 De G. & J. 38; 28 L. J. Ch. 422; *Blogg* v. *Johnson* (1867), L. R. 2 Ch. 225; 36 L. J. Ch. 859.

The rate of interest which will be charged in taking accounts depends in a great measure upon whether there is any dishonesty. Thus, trustees employing money in business or for their own profit are charged interest at 5 per cent. (*Moseley* v. *Ward* (1805), 11 Ves. 581; 8 R. R. 249); or, at the option of the beneficiaries, must account for the profit

actually made. *Docker* v. *Somes* (1834), 2 My. & K. 655; 3 L. J. (N. S.) Ch. 200. But in general the beneficiaries must elect between interest and profits, and cannot, as a general rule, take interest for a part, and profits for another part of a period. *Heathcote* v. *Hulme* (1819), 1 Jac. & W. 122. As the Court acts *in odium spoliatoris*, it has charged interest at 10 per cent. against a surviving partner who wilfully refused to produce books. This was done by SUGDEN (Lord St. Leonards), when Lord Chancellor of Ireland, in *Walmsley* v. *Walmsley* (1846), 3 Jo. & Lat. 556. In giving judgment, he said that, if the Master had charged the defendant with 20 per cent., he would have confirmed the report.

Although an administrator may have acted without dishonesty, he may yet be charged interest at a higher rate than 4 per cent. Thus, in *Hall* v. *Hallet* (1784), 1 Cox, 134; 1 R. R. 3, an executor who permitted debts carrying interest at 5 per cent. to run on when he had in his hands a fund to pay them, was charged with interest at the higher rate; and in *Crackell* v. *Bethune* (1820), 1 Jac. & W. 586, where an executor had sold stock and neither invested the money nor paid debts, interest was charged at the higher rate. But a special case must be made for charging the higher rate. *Hall* v. *Hallet* (1784), 1 Cox, 134, at p. 138; 1 R. R. 3, at p. 7, per Lord THURLOW; *Burdick* v. *Garrick* (1870), L. R., 5 Ch. App. 233; 39 L. J. Ch. 369.

The usual court rate, as established by many decisions, is 4 per cent. *Tebbs* v. *Carpenter* (1816), 1 Madd. 290; *Re Emmet's Estate*, *Emmet* v. *Emmet* (1881), 17 Ch. D. 142; 50 L. J. Ch. 341.

In one case, however, where there had been wilful default, entitling the beneficiary to have an account taken with half-yearly rests, FRY, J., fixed 3 per cent. as the rate (*Gilroy* v. *Stevens* (1882), 51 L. J. Ch. 834), proceeding on the ground that the Court will only charge an executor or trustee with interest which he has received, or which he ought to have received, or which it is fairly to be presumed that he did receive. *Att.-Gen.* v. *Alford* (1855), 4 De G. M. & G. 843. By a decision of the House of Lords in 1887 (*Learoyd* v. *Whitley*, 12 App. Cas. 725; 57 L. J. Ch. 390), a trustee who had made an improper investment was ordered to replace the money with 4 per cent. interest.

Compound interest has been allowed where executors neglected to accumulate under a trust for that purpose. *Raphael* v. *Boehm* (1805), 11 Ves. 92; 13 Ves. 591; 8 R. R. 95. And in a case brought on appeal from Ireland to the House of Lords,—*Stackpoole* v. *Stackpoole* (H. L. 1816),—where the administrator had for a period of over 40 years retained in his hands a large sum on unfounded pretences, and by his conduct protracted a suit for administration, the House (under the advice of Lord ELDON and Lord REDESDALE) ordered that "the full

legal rate of interest on the sum remaining undistributed should be charged against the administrator, making annual rests in the accounts, and charging interest on the annual balances." 4 Dow, 209; Lords' Journals, 26 June, 1816.

In *Wilson* v. *Peake* (1856), 3 Jur. N. S. 155, compound interest was charged for 21 years, and simple interest after; but this, it seems, upon the ground that by reason of the Thellusson Act the trust for accumulation was limited to that period. Where the Act does not apply, no limitation will be fixed upon the period during which the rests are to be made. *Re Emmet's Estate*, *Emmet* v. *Emmet* (1881), 17 Ch. D. 142; 50 L. J. Ch. 341.

AMERICAN NOTES.

The principal case states the doctrine prevalent in the United States. Schouler's Executors & Administrators, § 538; *Walls* v. *Walker*, 37 California, 424; 99 Am. Dec. 290, and note, 296; *Dunscomb* v. *Dunscomb*, 1 Johnson Ch. (New York), 508; 7 Am. Dec. 504; *Chase* v. *Lockerman*, 11 Gill & Johnson, 185; 35 Am. Dec. 277, 287, and note, 291. But negligence is not readily inferred from such conduct. See *Griswold* v. *Chandler*, 5 New Hampshire, 497; *Manning* v. *Manning*, 5 Johnson Chancery (New York), 527; *Stearns* v. *Brown*, 1 Pickering (Mass.), 531; *Knight* v. *Loomis*, 30 Maine, 204; *Hough* v. *Harvey*, 71 Illinois, 72; *Ogilvie* v. *Ogilvie*, 1 Bradford (New York Surrogate Ct.), 356. Greater leniency is shown than in the case of trustees, *Wyman* v. *Hubbard*, 13 Massachusetts, 233. A reasonable time is allowed, *Carter* v. *Cutting*, 5 Munford (Virginia), 223; *Ringgold* v. *Ringgold*, 1 Harris & Gill (Maryland), 11; as three months, *Barney* v. *Saunders*, 16 Howard (U. S. Sup. Ct.), 544.

No. 21. — WILKS *v.* GROOM.

(ch. 1856.)

RULE.

Where money of the estate is required to be kept in readiness for payments in connection with the estate, an administrator (or executor) may properly place it to a separate account in his own name in a bank of good repute, and, so doing, will not be held personally liable for loss occasioned by the failure of the bank.

Wilks v. Groom.

25 L. J. Ch. 724 (s. c. 3 Drewry, 584).

John Hooper, by his will, devised all his real and personal estate to trustees, in trust for sale, and to stand possessed of the pro-

ceeds of such sale upon certain trusts in his said will mentioned. The will contained a direction that a particular mortgage debt should be paid out of the proceeds arising from the sale of the estate subject to the mortgage, but it contained no direction as to the investment of the purchase moneys arising from the sale of the estates generally, and none as to the investment of the personal estate, either in the funds or otherwise. The testator died, having appointed the same persons to be his trustees and executors, but they did not act in either capacity; and administration, with the will annexed, was granted to Mrs. Wilks. This suit was instituted by her, against Mrs. Groom, a legatee under the will, and other persons, for the administration of the testator's estate. A decree was pronounced, by which an inquiry was directed as to what real and leasehold estates the testator died seized of or entitled to, which passed or were bequeathed by his will; and (*inter alia*) an inquiry whether a contract for a sale of a certain house which belonged to the testator was beneficial to the infants interested in the estate. This last-mentioned inquiry being answered in the affirmative, the plaintiff completed the sale of the house for £1400, and paid that sum, when received, into the private bank of Messrs. Strahan & Co., where it was carried to an account, to her credit as administratrix of the testator. This sum, and another sum of £250, paid into the same account, were lost by the failure of the bank. The circumstances under which the money was paid into the bank are further adverted to in the judgment. The question was argued upon an objection to the certificate of the chief clerk, by which the plaintiff had been found liable for the money.

The authorities cited in argument for the plaintiff were these, Williams on Executors, 4th ed. 1525; *Garrett* v. *Noble*, 6 Sim. 504; 3 L. J. Ch. 159; *Buxton* v. *Buxton*, 1 Myl. & Cr. 80.

Counsel, for the defendant, Mrs. Groom, insisted that the plaintiff ought to be held liable, first; for the £1400, because she should have applied it in a due course of administration, in paying off the mortgage debts, whereas the mortgagee would now have to apply to the Court for the payment of his debt; and, secondly, she ought to be held liable for the £250 also, for Mrs. Groom was not a consenting party to its being paid into a private bank.

Counsel appeared for the purchaser of the house, and for the residuary legatees and other parties.

The following authorities were also cited in the argument:

Massey v. *Banner*, 1 Jac. & W. 241 ; *Salway* v. *Salway*, 2 Russ. & M. 215 ; 9 L. J. Ch. 152 ; *Darke* v. *Martyn*, 1 Beav. 525 ; *Moyle* v. *Moyle*, 2 Russ. & M. 710.

KINDERSLEY, V. C., having referred to the terms of the decree, proceeded thus : It appears to me that Mrs. Wilks is not liable for this money. It is clear, to my mind, that the direction in the decree that the purchase money should be paid into the bank, applies to the purchase money of those estates that were directed to be sold generally, and has no application whatever to the proceeds of the sale under that contract, which was the subject of inquiry, and which, if found beneficial, was authorised to be carried into effect. Mrs. Wilks, it seems, was not an original trustee or executrix, but upon the renunciation or disclaimer of the trustees and executors, she took out administration, as I understand, with the will annexed, and undertook to act in that character. But, still, taking that character on herself, she would be liable in the same manner as if she had been herself appointed. There were several persons who had interests under the will, and, among others, Mrs. Groom had a certain interest. There were other persons interested, in the character of residuary legatees, or persons entitled to the *corpus* of the property. There were Messrs. Beaumont & Thompson, who had been, as I understand, the testator's solicitors, and who, in that character, were creditors upon his estate for a bill of costs stated to have amounted to about £600, and were creditors upon his estate in their character of solicitors, and each of those two gentlemen individually, as I understand, was a legatee named in the will. Moreover, the testator, having confidence in them, expressed either a direction or a wish that those gentlemen should be employed, or, at least, if employed, should be allowed their costs in the usual way. The exact terms of it are not material, but I refer to it merely for the purpose of showing that those two gentlemen, and I have no doubt very deservedly, were trusted by the testator. He reposed confidence in them, and he expressed his good will towards them, not only by giving that direction, but also by giving each of them a legacy, so that they stood in the character of having been the solicitors for the testator, being legatees under his will, being creditors against his estate, and being solicitors in whose management of his affairs the testator expressed his confidence ; and moreover, as I understand, they have in this suit, and in the administration of the testator's estate, acted

as the solicitors, not for all, but for a considerable number of the persons interested in the estate, and those persons, perhaps, the most substantially interested in the estate. When the contract, which was the subject of the inquiry as to the particular house, was approved of, Mrs. Wilks proceeded upon that approval to carry the contract into effect, and there being no direction that she should pay the money into Court, she received it, and then the question was, what was to be done with it? Her solicitors were Messrs. Gabriel & Newington (I will say, Mr. Gabriel, for convenience), and a communication took place between Mr. Gabriel as solicitor for Mrs. Wilks and these gentlemen, Messrs. Beaumont & Thompson, upon the subject of what would be the best thing to be done with the money; and one thing is perfectly clear, that Messrs. Beaumont & Thompson concurred at least in this, that it was expedient not to pay it into Court, and not to invest it in the funds, and they themselves seem to have made a suggestion that it might be a convenient course, as it was desirable to keep it uninvested, to pay it into a banker's hands, and that it should be placed in some joint-stock banking company, in the names of one of themselves and Mr. Gabriel, or, at all events, of two persons in the character of solicitors for some of the parties. That was the suggestion made, but it was not acceeded to, and I cannot say that the non-acquiescence in that was wrong. On the contrary, I confess that if I had been a trustee I should have been very much disposed to take the same view. But although there is some degree of doubt as to what actually took place between Mr. Gabriel and Messrs. Beaumont & Thompson, I have not the smallest doubt that, substantially, a communication took place between them on the subject of the money being placed in the hands of Messrs. Strahan & Co., — that is, of some bankers, at all events, not being a joint-stock banking company; and I must say that between a substantial private bank (if I may use that expression) and a joint-stock bank, though people differ as to the advantage of one or the other, and it is not for me to say which I should prefer, still I cannot find fault with a person who considers a private bank, — that is, the firm of an ordinary banking company, — a preferable place of deposit to a joint-stock bank. At all events, I am satisfied from the evidence of these matters, that it was with the entire concurrence of Messrs. Beaumont & Thompson that the money was not brought into Court, and that an application was not made to bring

it into Court, which would have been necessary, and without which it could not have been brought in; and that there was a communication with them upon the subject of its being placed in the hands of a private bank, and, as I believe, the firm of Messrs. Strahan was mentioned. But whether it was so or not, appears to me of secondary importance, because this, at all events, is clear, that the very day, or within a day or two after the money had been placed in the hands of Messrs. Strahan, that fact was communicated to Messrs. Beaumont & Thompson. Whatever passed in the chambers of Messrs. Beaumont & Thompson, or whatever feeling of surprise they had as to Mr. Gabriel having done this without its being finally arranged between them that it should be done, this is quite clear to my mind, that they acquiesced in it, and one of those gentlemen observed, "Well, Mrs. Wilks is the legal personal representative, and it seems not at all improper that it should be where it is," or something to that effect, and so they agreed to leave it, or at least, they acquiesced in its remaining; and not only so, but at a subsequent period (I think in the month of July following) they themselves having money which ought to be paid to Mrs. Wilks as the legal personal representative, very properly (I do not find fault with them) actually paid those moneys to the amount of £250 into the very same account with Messrs. Strahan, to the account of Mrs. Wilks. Now, Mr. Billing, the solicitor for Mrs. Groom, was no party to that at all, and if I were referring to what took place with Messrs. Beaumont & Thompson for the purpose of saying simply that their clients are bound by their solicitors' acquiescence, then, indeed, Mrs. Groom would have a right to say, "I do not come under that category; my solicitors never concurred in it, and therefore I am not affected by it;" but I referred to it for a different purpose, to show that this lady, Mrs. Wilks, or Mr. Gabriel, her solicitor acting for her, did what was perfectly proper with reference to the exigencies of the case. I do not mean to say that Mr. Gabriel might not have brought the money into Court; he might have moved the Court for leave to bring it in, without which application it could not have been brought in; but he considered, and that view is sanctioned by the concurrence of Messrs. Beaumont & Thompson, whose position I have already adverted to, that it had better not be brought into Court, but had better remain in cash in the hands of bankers. Therefore, I look at it in this view: I should certainly make Mrs. Wilks liable, if she

had been ordered to bring the money into Court and had not done so, or if Mrs. Wilks had been by the order of the Court, or by the direction of the will, under an obligation to invest it in the funds, and instead of performing that obligation, had kept it uninvested in the hands of bankers, as in that case of *Moyle* v. *Moyle*, which was referred to. But it was not so: she was authorised to carry the sale into effect of that particular house; the contract for that sale authorised her to receive the money; and not only did Messrs. Beaumont & Thompson perfectly know, as a matter of fact, that she had received the money, and had placed it in the hands of Messrs. Strahan, but that the order of the Court had authorised the contract to be carried into effect, — in other words, had authorised her to receive the money, — and had given no directions to her to bring it into Court; and I must treat them as being aware that it was not brought into Court, and that, therefore, if it was not in the hands of bankers, it was in the hands of Mrs. Wilks. Now, is an executrix or administratrix or trustee liable, independently of any particular indemnity clause in a will, by reason of the failure of a banker, where there was no improper motive in depositing the funds in the hands of that banker? Clearly not; and no case has been, or, as I believe, can be, cited which comes at all up to the case I have now before me. In those cases which were cited, there were circumstances which do not occur in this case. The money, it appears to me, was properly not brought into Court; I do not mean to say that it might not have been better for all parties, as it now turns out, that it should have been brought into Court, but that the contrary course was perfectly right, and was done *bonâ fide*, and with a sound discretion, and with the concurrence of those who most of all ought to have been consulted on the subject, — that is, Messrs. Beaumont & Thompson. It was with their concurrence that it was not brought into Court. Now, I need not say that no suggestion has been made, nor, indeed, could a suggestion have been made, that Mrs. Wilks or Mr. Gabriel were acting in the matter with reference to any personal interests or advantages of their own in any shape or form. The money was deposited in the hands of Messrs. Strahan: and why? Not that they were Mrs. Wilks's bankers; not that she kept any account there; not that they were mixed up with any moneys of hers, which is a very common case; not that they were mixed up with any moneys of Mr. Gabriel's, who did, I believe, bank with Messrs.

Strahan, — but it was carried to the credit of Mrs. Wilks, the administratrix, quite independently of and unconnected with any moneys belonging to herself or any other person; she herself, in fact, having no other moneys in the hands of those bankers. It was, therefore, in that sense ear-marked, — not ear-marked so that the bankers could not by their failure cause a loss of it, but ear-marked so as to distinguish it from the moneys of any other persons, arising from any other source. Then it is said that, at all events, — and this was very strongly put, and no doubt it deserved to be strongly put, — there was a sum of money to be paid to a mortgagee. Why did Mrs. Wilks, when she had this money in her hands, instead of paying the mortgagee with that money, put the estate to the expense of an application for the purpose of that mortgagee being paid out of the funds in Court? For the best of all reasons: the very terms of the decree directed that the mortgagee should be paid out of the moneys arising from the sale of the mortgaged property. I do not mean to say that it would have been impossible to do it, but it would have been irregular, and it would have required a proper application to have been allowed to pay the mortgage out of moneys other than those out of which it was directed by the decree to have been paid. I dare say, if application had been made, it would have been thought expedient to do so, although the decree directed the mortgagee to be paid out of the particular mortgage moneys, there being a sum of money which, though it would be departing from the decree to pay him out of, might ultimately be set right as might be required. I dare say such an application, if concurred in by all parties, would have been successful; still, it would have required that application to have done it with any regularity; and the complaint is, that it was not so applied without coming to the Court, and that the expense of coming to the Court to pay the mortgagee has been incurred. Why, you must have come to the Court for the purpose of getting him paid as directed by the decree, and *à fortiori* you must come to the Court for the purpose of getting him paid in a manner different from that which was directed by the decree. Therefore, it appears to me that what took place upon that does not in the smallest degree vary the case. If Mrs. Wilks was not liable by reason of having placed the money in the hands of bankers, she could not make herself liable by having made that application, if it was made by her, for the mortgagees to be paid

out of the purchase money. I believe that, in holding Mrs. Wilks not to be liable for this money, I am not at all relaxing what are unquestionably the very strict rules of the Court with regard to trustees, executors, and administrators. I should be very sorry to relax those rules, for although they operate extremely harshly in some particular cases, they are rules which are necessary for the protection of trust moneys, and for the protection of *cestuis que trust*. It appears to me that, consistently with those rules, this rule prevails: that where a trustee, executor, or administrator, having trust moneys in his hands, does not omit to invest them as required, and so commit a breach of trust, or does not deposit them with bankers mixed up with other moneys, or does not lend the moneys to bankers or to any person on private security, which was the case of *Darke* v. *Martyn*, he is not liable. In that case it was thus: the executor, administrator, or trustee was to place the money in the ordinary way in the hands of bankers; but, instead of placing it in that way, he placed a very considerable amount, besides the ordinary balances, together, and lent them to the bankers on their personal security at interest, and there the Court said, What was the purpose of this? There was no occasion to retain it; there was no suggestion that it was necessary to retain the cash balances, and it ought, therefore, according to the trust, to have been invested in stock; and as the party to whom you have lent it has failed, you are personally responsible, because you have been guilty of a breach of trust in not investing, as you ought to have invested, trust moneys, where there was no reason for keeping them otherwise. But the Court itself, by that view, in fact, tacitly admitted that if there had been reason for keeping the money in that state, it would have been perfectly justifiable to do so. Now, here, in this case, was it not reasonable and proper that the money should remain uninvested? Who were the best judges of that? To whom would you naturally refer for a judgment on the subject? Why, surely, to Messrs. Beaumont & Thompson, the persons trusted and respected and confided in by the testator, — persons who had in every way a stake in his estate, as creditors and as legatees, and persons who were acting as the solicitors for the parties mainly interested in the property. Who else could you ask for a judgment and to exercise their discretion more fitting than those persons? That is exactly what was done, and notwithstanding all that has been said about the graciousness or

ungraciousness of an application of this sort, notwithstanding the attempt to release those parties whose solicitors Messrs. Beaumont & Thompson are, I must say, anything more ungracious than the conduct of those parties in making this claim, I never heard of. At the same time, the question of graciousness or ungraciousness is not the point upon which I am to decide. Were it ever so ungracious, if Mrs. Wilks ought to be liable according to the strict rules, I should make her so; but I confess it was with no small surprise that I heard the main argument addressed to me, and in the strongest way, by the learned counsel instructed by those very gentlemen who concurred in all this, who knew it was all done, and not only knew it was all done, and concurred in it, but themselves paid in money to the same account. However, I have said I have nothing to do with the graciousness or ungraciousness of the attempt to make Mrs. Wilks liable, and it appears to me that, if I were to make her liable, I should in effect be creating a new rule against an executor, or trustee, or an administrator. My opinion, therefore, is, that she is not liable.

[His Honour, after making some observations as to the non-production of the proceedings in bankruptcy, continued:]

I may observe, though I believe I have already done so, when the matter was under discussion on the summons, that it appears to me that the effect of the evidence amounts to this, that what took place was in substance that, in the first instance, Mr. Gabriel wrote to Messrs. Strahan to know whether they would take this upon a deposit and allow interest, and on what terms, and what notice they would require. The answer was: We are not in the habit of doing this: it is not our course of business, but on the occasions we have done it, we have allowed Exchequer bill interest, and we have required a week's notice; however, if you will call on us, we will see you about it. Therefore, their answer amounts to this: not saying, This is our stipulation with you positively, but stating what we have done on a few occasions on which we have received deposits at interest, and saying, call on us. Therefore the answer appears to me to have invited discussion and suggestion on the subject, and, accordingly, Mr. Gabriel did call, and saw Sir John Dean Paul, one of the partners; and then what took place was this: there was no agreement at all made on the subject of notice, but there was an agreement on the part of Sir John Dean Paul to allow Exchequer bill interest. It is quite

clear what did then take place, and that seems to have been the only personal or written communication between them and the bankers, except, I believe, one letter, which has been mentioned, in April. I am not aware that there was any other which had any bearing on the question, and it is quite clear that, from those circumstances, Mr. Gabriel considered that it was on a deposit under an arrangement or understanding that it was to bear Exchequer bill interest, and it was not to be withdrawn, except on a week's notice. But when that communication had passed between Mr. Gabriel and Sir John Dean Paul, what took place as between the bankers and Mr. Gabriel, or between the bankers and Mrs. Wilks, was this: that Mr. Ward the cashier and clerk to Messrs. Strahan, knowing all that has taken place, gives, not a deposit note in its terms, not a deposit note saying this is to bear interest, not mentioning a word about interest, and not a word, on the other hand, about a week's notice, but a common account receipt. There is the evidence of that gentleman stating that, on such a transaction, the effect would have been that, if Mrs. Wilks had drawn a cheque for the amount, with her handwriting verified by Mr. Gabriel, or anybody who knew it, they would at once have paid over the counter the amount of that cheque. The effect, then, of the evidence appears to be this: it was, in fact, a deposit in the hands of Strahan & Co., under which Strahan & Co. considered themselves bound to pay it without a week's notice, and considered themselves bound to pay interest upon it. But Mr. Gabriel and Mrs. Wilks, no doubt, so far as she was informed of it personally by Mr. Gabriel, understood it otherwise. Supposing, however, it was even a deposit requiring a week's notice, according to Mr. Gabriel, it appears to me that there is nothing at all conclusive in that against Mrs. Wilks. If it was right not to be paid into Court, and not to be invested in the funds, or anything of that kind, it appears to me that there is nothing whatever to show that it might not be perfectly right, in order to get the benefit of interest for the parties, if it was to be in the hands of their bankers for one month, two months, six months, or twelve months, that there should be a stipulation not to withdraw it without a week's notice; at least, I have heard no case as yet cited to show that it would be improper. It appears to me, without deciding it, that the evidence goes to show that, in point of fact, it did not require a week's notice, although unquestionably Mr. Gabriel

understood that it did. Upon the whole, I am of opinion that Mrs. Wilks is not liable, under the circumstances, for these moneys; and the order will, in effect, be for allowing Mrs. Wilks, in her accounts, the moneys placed in the hands of Messrs. Strahan.

ENGLISH NOTES.

It is the duty of trustees, consistently with the due preservation of capital, to turn the estate into an income-earning fund, unless an immediate division is required, by reason of the nature of the trusts. But executors and administrators have the privilege of a year from the death within which to ascertain and pay debts, and inform themselves upon the state of the testator's estate. Administrators have this right by the Statute of Distributions (22 & 23 Car. II. c. 10 § 8), and executors, it seems, under the general law, per Wood, V. C. *Johnson* v. *Newton* (1853), 11 Hare, 160, at p. 168; 22 L. J. Ch. 1039.

"It seems to me," said the Master of the Rolls (Sir George Jessel), *In re Speight*, *Speight* v. *Gaunt* (1883), 22 Ch. D. 727 (at p. 739), 52 L. J. Ch. 505, "that on general principles a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own; and that beyond that there is no liability or obligation on the trustee. In other words, a trustee is not bound, because he is a trustee, to conduct business in other than the ordinary and usual way in which similar business is conducted by mankind in transactions of their own. It never could be reasonable to make a trustee adopt further and better precautions than an ordinary prudent man of business would adopt, or to conduct business in any other way."

Executors would seem not to be justified in paying money into a bank upon an account over which they would not have entire control, as was held in the case of a receiver by the House of Lords, affirming the decree of the Court of Chancery in *Salway* v. *Salway* (1831), 2 Russ. & My. 215, reported in H. L. s. n.; *White* v. *Baugh* (1835), 9 Bligh, 181; 3 Cl. & Fin. 44.

It was formerly customary to insert in trust instruments a clause to the effect that a trustee should not be answerable or accountable for any banker, broker, or other person with whom any trust moneys or securities might be deposited, — a protection which is now unnecessary, by reason of the provisions of Lord St. Leonard's Act (22 & 23 Vict. c. 35 § 31), now incorporated in the Trustee Act, 1893 (56 & 57 Vict. c. 53 § 24). With respect to this clause it was said by Lord Eldon that in effect the Court of Chancery infused such a clause into every will, though not directed. *Dawson* v. *Clarke* (1811), 18 Ves. 247, at

p. 254; 11 R. R. 188, at p. 191. But this clause only affords protection where the moneys are properly in the hands of bankers, &c. *In re Speight, Speight* v. *Gaunt* (1883), 9 App. Cas. 1, at p. 4; 53 L. J. Ch. 419, per Lord Selborne. Where an agent is properly employed, trustees are entitled to be indemnified against his acts, even where they have given rise to claims at the hands of persons who are not beneficiaries. *Benett* v. *Wyndam* (1862), 4 De G. F. & J. 259.

AMERICAN NOTES.

The doctrine of the principal case is familiar law in this country. *Norwood* v. *Harness*, 98 Indiana, 134; 49 Am. Rep. 739: *Twitty* v. *Houser*, 7 So. Carolina, 153; *Jacobus* v. *Jacobus*, 37 New Jersey Equity, 17; 2 Redfield on Wills, § 75; *Whitney* v. *Peddicord*, 63 Illinois, 252.

The main English authorities are well reviewed in *Norwood* v. *Harness*, *supra*, where the Court conclude: "The result of the foregoing authorities is that a trustee is not liable merely because instead of undertaking to keep the trust money safely in his own house, he deposits it in a private bank which fails, nor because the bank is weak, unless that fact was known to the trustee, or might have been known by the exercise of ordinary prudence and diligence. The question in all such cases is, was the trustee reasonably prudent and diligent in making or continuing the deposit? If so, he will not be liable, although the bank was and had been insolvent. Such insolvency will not affect him unless he knew it, or unless it was generally known, or unless there were general rumours, injuriously affecting the credit of the bank, which were known to the trustee, or might have been so known by reasonable diligence."

The rule is the equitable derivation from the duty which rests on the trustee to deposit the money in some bank instead of keeping it in his own house. Thus in *Cornwell* v. *Deck*, 8 Hun (New York Supreme Ct.), an administratrix was held liable for trust money stolen from her house, although the nearest bank was twelve miles distant.

The cases all recognise the necessity of making the deposit in the name of the trustee as such, or in such a manner as to indicate the trust character of the fund, and hold him liable for loss where the deposit is made to his individual credit. See Reporter's note, 37 New Jersey Equity, 17.

No. 22. — ATTORNEY-GENERAL *v.* KOHLER.

(H. L. 1861.)

RULE.

An administrator appointed after the death of a former administrator is only responsible for the effects which come into his own hands; and is not responsible for the *devastavit* of a former executor; nor for residue which the for-

mer executor has paid over to persons at the time assumed to be the persons beneficially entitled. But the administrator so appointed may, by the course adopted by him in an action, be barred from taking the objection, as if he had admitted assets in his hands to satisfy the claim.

Attorney-General v. Kohler.

9 H. L. Cas. 654.

This was an appeal against an order of Vice Chancellor KINDERSLEY, made under the following circumstances: —

On the 27th January, 1813, Mr. Mitford, who was then solicitor to the Treasury, obtained as nominee of the Crown, and "for the use and benefit of his Majesty" a grant of letters of administration to the estate and effects of George Frederick Kohler, an officer of artillery, who died in Syria in 1800, intestate, and whose property had not up to that time been administered.

In the year 1820, Christiane Baner, of Cromberg, in the dukedom of Nassau Ussingen, labourer, and Elizabeth, his wife, filed a bill (which was afterwards amended) in the Court of Exchequer in Equity, against Mr. Mitford and the then Attorney-General, claiming to be entitled to General Kohler's property, as his next of kin. The bill alleged that the intestate was the only son of George Kohler,[1] otherwise Keylor, otherwise Kaylor, who was born at Bingen on the Rhine, and who left that place very early in life, and became a soldier in the Royal Artillery, and was discharged at his own request in April, 1758, and entered the military service of the East India Company, where he died, or was killed in battle, leaving the intestate, by his marriage at Woolwich with Betty Dean, his only child. The bill then set forth the claims of the plaintiffs as next of kin of the intestate, and prayed the usual discovery and accounts.

Mr. Mitford put in his answer to the bill, denying all knowledge of the relationship of the plaintiffs to the intestate, and alleging generally that he had paid over the money to the King's proctor on warrant under the sign manual. Exceptions were taken to the answer, which were allowed; and Mr. Mitford then put in an amended answer, in which he set forth that he, as nominee of the Crown, entered into a bond to the King's proctor in a penal sum.

[1] This person was afterwards, generally, but not always, called Johann George.

which bond recited the death of General Kohler, intestate and without issue or any known relation, whereby his Majesty, in right of his Royal prerogative, became entitled to the personal estate and effects of the deceased; that this bond required the King's nominee, within three months after obtaining administration, or as soon as the case might permit, to pay to the King's proctor the clear surplus and produce of the estate. The answer then detail d the collection and payment of debts, and alleged that a warrant under the sign manual was issued to Mitford, requiring him to pay the balance to the King's proctor; that this balance, amounting to £7842 8*s.* 4*d.*, had been accordingly paid on the 25th May, 1814, by Mitford, and the answer set forth the receipt for the same.

Evidence was then gone into of the plaintiff's title, which depended on the indentification of the intestate's father with a certain Johann George Kohler, who had, in or about the year 1780, run away from Germany and enlisted in the English artillery.

Mr. Mitford died in 1824; Mr. Maule was then appointed Solicitor to the Treasury. In 1827, the original letters of administration to General Kohler having expired, Mr. Maule obtained letters of administration of the estate to be granted to himself, for the use of his Majesty, and the suit was duly revived against Mr. Maule, by an order of the Court of Exchequer, dated 11th November, 1830. The order recited the prayer of the bill of revivor, and the direction of the Court thereon, in the following terms: that the suit and proceedings which had become abated by the death of Mitford "might be revived, and be in the same plight and condition, against the said George Maule, as they were at the time of the death of the said William Mitford, and that the plaintiffs might have the same relief against the said George Maule, as they would have been entitled to and had against the said William Mitford had he been living: which is hereby ordered by the Court as prayed." On the 12th February, 1831, there was a decree of the Court of Exchequer in Equity, directing Master Spranger to inquire who were the next of kin, and farther directions were reserved.

In October, 1841, the cause was, under 5 Viet. c. 5, transferred to the Court of Chancery, and in 1844 there was a bill of revivor against Mr. Maule. On the 14th November, 1851, Mr. Maule died, and Mr. Henry Revell Reynolds was appointed Solicitor to the Treasury in his stead. By the Statute 15 Viet. c. 3, it was

enacted that all proceedings at law or in equity against Mr. Maule as administrator, as the nominee of the Crown, pending at the time of his decease, should not thereby abate, but should continue and take effect by, in favour of, and against the Solicitor for the time being of the Treasury. Mr. Reynolds being thus substituted for Mr. Maule, as to this suit, and it having been duly continued, and other parties having come before the Master, he, on the 26th February, 1859, made his report, by which he found that Jacob Kohler, Johann Michael Kohler, and Gertraudt Schmidt (formerly Kohler) were the paternal uncles and aunt, and sole next of kin, of the intestate living at the time of his death, and that Phillip Kohler, Hyronimus Kohler, and Johann Michael Schmidt, were respectively their personal representatives. Exceptions were taken to this report with reference to the insufficiency of the proof, but they were overruled, and the report confirmed by an order of Vice Chancellor KINDERSLEY 9th June, 1859. A supplemental bill was afterwards filed by Phillip Kohler (described as of Kirchbrombach, in Hesse Darmstadt), accounts were directed, and an order was made for paying what should be found due, with interest at four per cent. The chief clerk, on the 20th January, 1860, certified that £7842 8*s.* 4*d.* were due for principal, and £14,429 12*s.* 6*d.* for interest. On the 26th June, 1860, an order was made on Mr. Reynolds to pay into Court the sums thus found due for principal and interest and costs. These were the orders appealed against.

After argument, the learned Lords present (Lord CAMPBELL, Chancellor, Lords CRANWORTH, WENSLEYDALE, and CHELMSFORD) were all agreed that the title of the plaintiffs, as next of kin, had been satisfactorily proved. They took time for consideration of the remaining questions, and ultimately (Lord CAMPBELL, Chancellor, having died in the mean time) judgment was pronounced, affirming the orders appealed against. The *ratio decidendi* of the House upon the question of the liability of the successive administrators, is substantially that of the following judgment of

Lord CRANWORTH. My Lords, if this case is to be dealt with on the ordinary principles of equity, as administered between subject and subject, I have great difficulty in understanding how either the Crown or the appellant Reynolds can be held to be liable in respect of the demand of the respondents.

In 1813, letters of administration of the personal estate of the late General Kohler, who died in December, 1800, intestate, were

granted to William Mitford, for the use of the then King, George III., it being supposed that the General had died without leaving any next of kin. Mitford realised assets, which, according to his own statements, left in his hands after paying all debts of the intestate, a sum of £7842. This sum he, on the 25th of May, 1814, paid over to the King's proctor, for the use of the King, and it was afterwards received by the Prince Regent on behalf of King George III. The personal estate of an intestate who leaves no next of kin belongs absolutely to the sovereign for the time being, as part of the *droits* of the Crown. Assuming, therefore, the facts to have been such as they were supposed to be in 1814, the money was properly paid over to the Prince Regent, as representing for that purpose King George III.

Subsequent investigation has shown that the payment was made in ignorance of the true state of facts. It was a mistake to suppose that the General had left no next of kin. He left nephews and nieces, who were his next of kin, and in that character were entitled to the money. If the true state of things had been ascertained in the lifetime of King George III., the obvious justice of the case would have required that he, or the Prince Regent acting for him, should refund the money which had been paid to him on a mistaken view of the facts. But the truth was not discovered in the lifetime of George III., or either of his sons, George IV. or William IV. It was not finally established till the year 1859,—*i. e.*, nearly forty years after the death of King George III.; nearly thirty years after the death of King George IV.; and considerably more than forty years after Mitford had parted with the money. Who, in these circumstances, ought to be held responsible to the next of kin for the money which thus improperly came to the hands of the Prince Regent, acting for his father, King George III.?

It is very difficult to say on what ground her Majesty, or her Majesty's Treasury, can be considered as under any obligation to refund, or rather pay the money. It never came to her Majesty's hands. The Crown is a corporation sole, and has perpetual continuance. Can a succeeding sovereign, upon the principle that the King never dies, be held responsible for money paid over in error to and spent by a predecessor, which that predecessor might lawfully have disposed of for his own use, supposing it to have rightfully come to his hands? Does the successor, for such a

purpose, represent his predecessor? These are questions difficult of solution.

Let me put a case between subjects nearly analogous to the present, in which the sovereign is concerned. Suppose a bishop, lord of a manor; and that, on the death of the copyholder, he claims a heriot, alleging such to be the custom of his manor, and suppose that the heir of the copyholder, relying on the assurance of the bishop that the heriot was due by the custom of the manor, accordingly pays to the bishop a sum of money by way of composition for the heriot. The bishop dies, and then it is discovered that no heriot was payable to the bishop in respect to the copyhold held of him, but that it was in fact payable to the lord of an adjoining manor, who thereupon recovered it against the copyhold heir. It could not be pretended that the copyholder would have any right against the bishop's successor. His right would be against the executor of the bishop, to whom the payment had been made, or an erroneous allegation by him, that there was a custom in his manor entitling him to it.

On the same principle, reasoning by analogy from the case as it would have stood between subject and subject, the right of the present respondents would be a right against the executors either of King George III. or King George IV., it is immaterial to consider which, — certainly not against Queen Victoria.

Nor is the case altered by the arrangements made on the accession of her Majesty with reference to the civil list. On that occasion her Majesty, in consideration of a certain annual income secured to her by Parliament, gave up to the public, as King William IV. had previously done, *inter alia*, all *droits* of the Crown accruing during her reign, which therefore, when received, are now received by the Treasury, not on the private account of her Majesty, but on account of the public. This arrangement, though it secures to the public *droits* of the Crown accruing after the accession of her Majesty, obviously has no bearing on the question who is liable in respect of *droits* which came to the hands of a preceding sovereign. If an heir in tail, on succeeding to his lands, were to convey them for his life to a stranger, in consideration of an annuity secured to him for his life, it would be absurd to say that such a settlement could create in the heir in tail, or the person claiming from him, any liability to discharge the debts of the preceding tenant in tail.

On no analogy taken from disputes among subjects, can either

the present Queen or the Treasury be deemed liable to the respondents for the personal estate of the intestate received by King George III.

It is not, however, necessary to decide whether in a direct proceeding against the sovereign (by petition of right, for instance) these analogies would govern the decision to be pronounced. The party here made responsible is not the Crown, but Mr. Reynolds; and the true question is, whether he, as personal representative of the intestate, on the nomination of the Crown, can be held liable.

When a general grant of administration has been made, the administrator, whether entitled in his own right to the administration, or claiming only as the attorney of another, is fully competent to deal with the whole estate coming to his hands. He is bound duly to administer; and, therefore, when Mitford had paid all the debts of the intestate, he was bound to pay over the residue to the next of kin of the intestate, or, if there were no next of kin, to the Crown. He took on himself to act on the assumption that there were no next of kin, and paid over the balance in his hands to the Crown. The next of kin were entitled to treat this as a breach of trust; and if they had proceeded against him, they might have made him responsible. This is consistent with principle, and with the decision of Vice Chancellor KNIGHT-BRUCE in the case of *Turner* v. *Maule*, 3 De G. & Sm. 497. But this was not done. It is true that the persons claiming as next of kin instituted proceedings against Mitford in his lifetime, after he had paid over the money to the Crown; but before any decree was pronounced Mitford died.

Now, suppose this had been the case of persons claiming to be next of kin, and complaining of an improper payment by the administrator, not to the Crown, but to some persons who had represented himself as being next of kin, — a claim, for example, by a person claiming to be a brother, and complaining that the administrator had paid over the residue to a cousin of the intestate. If, in such a case, the claimant had filed a bill against the administrator, and the administrator had put in his answer, and thereby stated that he had paid over the residue to the cousin, believing him to be next of kin, and then had died before decree, the claimant must, as was done here, bring a new administrator before the Court to represent the intestate; but he could not make such new administrator responsible for the receipts of the first administrator.

In order to effect that object he must bring, by way of supplement, before the Court, the representative of the first administrator in addition to the new administrator, and must charge him, as on a *devastavit*, with having unduly paid over money of the intestate to a wrong person, and so having made himself liable as on a breach of trust.

This would certainly be the course pursued, where the dispute was one merely between subjects; and if that analogy is to govern us in the present case where the Crown is concerned, it follows that Maule, the new administrator (and the defendant Reynolds now, by statute, is put in the place of Maule), cannot be made responsible for any money which came to the hands of Mitford, and was by him improperly paid over to King George III. on the mistaken notion that the intestate left no next of kin at his decease.

The question therefore is, whether the same rules and principles which would certainly be applicable in a dispute between subjects, are also applicable where the Crown is the party to whose hands the money has come.

The ground on which the Court proceeded is, that Reynolds was responsible. But on what principle can it be contended that there is any difference, so far as relates to the duty to be performed by the administrator, between administration granted to a nominee of the Crown and administration granted to the next of kin, or to any other person entitle to the grant? It is true that in the case of administration granted to a nominee of the Crown, the grant is expressed to be made for the use and benefit of her Majesty, but that obviously means for the use and benefit of her Majesty according to the rights and interests in the property of the intestate. This is manifest, for the grant is not made until the administrator has sworn faithfully to administer the goods of the deceased according to law. And the Statute of Distributions, 22 & 23 Chas. II. c. 10 § 2, required every person obtaining administration to give bond to the ordinary, conditioned, among other things to pay over the residue to such persons as the Judge granting the letters of administration should appoint, pursuant to the true intent of that Act, — *i. e.*, to the next of kin, as thereinafter described; and though the late Act (15 & 16 Vict. c. 3) dispenses with such a bond in case of a grant to the Solicitor of the Treasury, as nominee of the Crown, yet it expressly provides that the Solicitor of the Treasury, obtaining such a grant of administration, shall be subject to all the liabilities

and duties imposed by the conditions of the bond required by the Statute. I cannot, therefore, entertain a doubt that such an administrator is bound, like any other administrator, to account for the clear residue to the next of kin, if any next of kin exist. This was the foundation of the judgment of the Court in the case of *Turner* v. *Maule*, to which I have already referred, and in which I entirely concur.

But the question then arises, What are the duties and liabilities of an administrator appointed after the death of the first administrator? There is neither principle nor authority for holding that he is responsible for assets possessed by his predecessor in the office of administrator, and which have never come to his hands. All which he is liable for under the Statute of Charles II., and the bond which he is thereby required to give, are the assets coming to his hands. What is there to extend his responsibility beyond that imposed on him by the Statute? I can discover nothing. I observe that in the grant of administration to Mr. Maule, made on the 17th of March 1827, after the death of Mitford, the assets were sworn under £100. This is hardly reconcilable with the hypothesis that he was to be answerable for all which Mitford had received.

The argument which would make Maule liable for the money paid over to the Crown by Mitford, if sound, cannot stop there. If liable for the money so paid over, he must be liable for all other misapplication of the assets by Mitford; so that, if in the result it should have turned out that Mitford had received, and dishonestly appropriated to his own use, assets beyond what he paid over to the Crown, the argument of the respondents must go the length of contending that for such misappropriation Maule was responsible. This seems to me to be *reductio ad absurdum*.

But then it was said, that this liability of Reynolds has actually been declared by the Court, and we were referred to the Order of the Court of Exchequer, made on the 11th of November, 1830, whereby it was ordered that the suit which had become abated by the death of Mitford should be revived, and be in the same plight and condition against Maule as it was in at the death of Mitford, "and that the plaintiffs might have the same relief against Maule as they would have been entitled to against Mitford had he been living." These latter words, it was argued expressly, made Maule liable for Mitford's receipts. I cannot so interpret them. I think

they meant no more than that the suit might proceed against Maule, as it might have done against Mitford, if living. I come to this conclusion because, on any other construction, the Court would have been making an order which it had no authority to make. The order was made on motion, *ex parte*, and without evidence. This was right, if it was a mere order to revive, but very wrong if it is to be construed as affecting the rights of the party against whom the revivor was prayed; and wrong, let me add, not merely as a matter of form, but of substance, because it would be declaring an absent party liable to certain obligations without giving him an opportunity of being heard on the subject. The bill of revivor gave no intimation to Maule that anything was sought against him beyond mere revivor of the suit. The prayer was simply in the ordinary form, that the suit might be put in the same plight and condition as it was at the time of the abatement. When Maule had appeared, and the time for his putting in an answer had expired, the Court was entitled, behind his back, to make an order to revive; but it could do no more, and I therefore think that nothing more was intended by the order.

Indeed, that this is the true construction of the order is manifest from the decree afterwards made on the hearing of the cause on the 12th of February, 1831. That decree is not printed *in extenso* in the joint appendix of the appellants and respondents, but I have been furnished with an office copy of it, whereby it appears that, after reciting fully all the proceedings from the filing of the original bill up to and including the bill of revivor against Maule, it then states the order of revivor in these words: "And whereas, by an order made in these causes on the 11th day of November, 1830, the said original cause and proceedings had therein were ordered to stand duly revived against the said George Maule, and that the said suit and proceedings should be in the same plight and condition as the same were in at the time of the decease of the said defendant, William Mitford," and there it stops, not adverting to the subsequent words of the order relied on as fixing Maule with responsibility on account of Mitford's receipts, evidently because they were considered to be superfluous, to be merely expressive of what had been sufficiently stated by the previous words, — that is, that the suit should be revived against Maule, and should be in the same plight and condition as at the death of Mitford. This is the construction put, and properly put, by the Court, on the order to

revive, — a construction which fully explains why no exception was ever taken by the appellants to that order.

The conclusion, therefore, at which I have arrived, is, that the Court has no authority to charge Reynolds with any money not actually received by him or by Maule, in whose place he is now substituted by statute.

In a case so unusual as the present, I have thought it right thus fully to state my view of the law, though, on grounds which I will now shortly explain, I think the appeal ought to be dismissed.

The appellants, in their printed case, rest their appeal on two grounds only: one, applicable to the whole fund in dispute; the other to a part of it only, — namely, the interest of the sum paid over by Mitford to the Crown.

The first ground, that which goes to the whole matter in dispute, is the alleged failure of the respondents to make out their title as next of kin. This ground, as we intimated early in the course of the discussion before us, wholly fails. The pedigree of the respondents is established beyond all reasonable doubt; and if this had been the only ground of appeal, the appellants must have failed entirely.

But then comes the other question, How are we to deal with the second reason of appeal? The appellants say that, even supposing the respondents to have made out that they are the next of kin, still, Reynolds is not on general principles of equity chargeable with interest; and the first question on this is, whether we are not entitled to take this as a submission to be charged with the principal sum? I think we are. It was admitted at the bar by the appellants, that no question was raised in the Court below on the subject of the liability for the principal sum paid over to King George III. The argument below, assuming the pedigree to be established, was confined to the question of liability for interest. That being so, and no question being raised by the appeal on that head, I think we ought not to attend to any argument which might have led us, if the point had been properly taken below, to consider that Reynolds was not liable for anything which did not actually come to the hands of Maule or himself.

But if we are prepared to say that Reynolds must (by implied submission on the part of the Attorney-General and himself), be held liable for the principal sum, how can we hold him not responsible for the interest. His liability as to the principal can only

exist because, by some arrangement with the Crown, it has been considered reasonable that he should be treated in all respects as if his, and not Mitford's, was the hand which received the assets, and paid over the balance to King George III.; and if that had been the true state of the facts, I can discover no ground for relieving him from the payment of interest more than from payment of principal. His liability would have arisen from his having improperly paid over to the Crown money belonging to the next of kin. Principle and authority both require that in such a case he should be dealt with as if he had improperly retained the money in his own hands, and his liability to pay interest as well as principal is clear.

On this ground, therefore, depending, not on the true legal or equitable rights of the parties, but on the mode in which the case has been dealt with here and below, I think the appeal ought to be dismissed. I feel the less sorry thus to dispose of the case on grounds independent of the merits, because, from the mode in which the Attorney-General, as well as Reynolds, were content to admit themselves responsible for the principal sum which came to the hands of the Crown, it is plain that the advisers of the Crown considered that, in fair dealing, the Treasury was bound to make good to the respondents, upon their establishing their pedigree, the whole sum actually paid over by Mitford, and the same feeling would no doubt lead them to give similar advice as to the interest, when satisfied by the decision of this House that if Reynolds had been all along the acting administrator, and not Mitford, he would have been liable for interest as well as principal.

When the decrees complained of were made, there was nothing to prevent the respondents from bringing Mitford's representatives before the Court, for the late Statute 23 & 24 Vict. c. 38, which, by section 13, imposes a limitation on suits by next of kin, had not then passed. And if such a suit had been instituted, and the liability of Mitford and his assets had been, as it must have been, established, the advisers of the Crown would probably have considered that, without reference to strict right, it would have been inconsistent with the honour and dignity of the Crown to allow a former public servant, or his estate, to be made answerable, as he must have been made answerable, for money which he had paid over to a former sovereign, and in respect of which payment he must of course have understood that he and his assets would be held harmless.

These are the grounds on which I presume the Crown has acted, and which, in my opinion, made it the duty of this House to dismiss the appeal.

ENGLISH NOTES.

Persons in a fiduciary capacity must take all reasonable measures to obtain the control of the property of which they are appointed trustees; and they must enforce their rights to the property by legal proceedings, if necessary, unless there exist reasonable grounds that any judgment recovered would be fruitless. But the burden of proving the grounds of such belief is on the trustees. *Re Brogden. Billing* v. *Brogden* (C. A. 1888), 38 Ch. D. 546. And this responsibility attaches, notwithstanding any liability of the original trustees or their estate to make good any loss which may have occurred by reason of a breach of trust on the part of such original trustees. S. C. And where one of the trustees was a member of a firm, and the act was one which was within the scope of the partnership authority, his partners were held liable; *Blyth* v. *Fladgate* (1890), 1891, 1 Ch. 337.

Where new trustees have taken over trust funds which represent improper investments, in ignorance of the circumstances attending the investment, the old trustees cannot resist proceedings at the suit of the new trustees, upon the ground of adoption and acquiescence. *Smethurst* v. *Hastings* (1885), 30 Ch. D. 490; 55 L. J. Ch. 173.

Where the new administrator is responsible for principal money of the estate, he is liable for interest. *Re Hulkes. Powell* v. *Hulkes* (1886), 33 Ch. D. 552; 55 L. J. Ch. 846. But he is not liable for interest on income. *Blogg* v. *Johnson* (1867), L. R. 2 Ch. 225; 36 L. J. Ch. 859; *Re Gosman* (C. A. 1881), 17 Ch. D. 771; 50 L. J. Ch. 624.

By the Trustee Act. 1893, 56 & 57 Vict. c. 53, sections 24, 50 (embodying the provisions of Lord St. Leonard's Act. 22 & 23 Vict. c. 35 § 31, which itself followed a form usually inserted in trust deeds and wills), a trustee, including a personal representative, is chargeable only for money and securities actually received, notwithstanding his signing any receipt for the sake of conformity. Under the usual clause before the Acts, it has been held that a trustee or executor is not exonerated from the consequences of a breach of trust in respect of money for which he has given a receipt, although only the other trustee and not he, actually received any money. *Brumridge* v. *Brumridge* (1858), 27 Beav. 5. But it has been also decided that a trustee may, by the express terms of the instrument creating the trust, be relieved from all liability except for personal misapplication of the trust funds. *Wilkins* v. *Hogg* (1861), 8 Jur. N. S. 25.

If the claim against the original administrator is statute-barred, then

the new administrator would not be justified in instituting proceedings which must be abortive. *Re Montgomery* (1828), 1 Moll. 419.

The claim of the beneficiaries against the new administrator or trustee is now subject to be barred by limitation under the Trustee Act, 1888, 51 & 52 Vict. c. 59 § 8.

AMERICAN NOTES.

If the administrator *de bonis non* faithfully performs his own trust, he cannot be made to suffer by reason of any predecessor's default. Schouler's Executors and Administrators, § 412; *Smithers* v. *Hooper*, 23 Maryland, 273; *Reyburn* v. *Ruggles*, 23 Missouri, 339; *Weeks* v. *Love*, 19 Alabama, 25; *Ross* v. *Sutton*, 1 Bailey, Law (So. Carolina), 136; 19 Am. Dec. 661; *Alsop* v. *Mather*, 8 Connecticut, 581; 21 Am. Dec. 703; *Rives* v. *Patty*, 43 Mississippi, 345; *Taylor* v. *Benham*, 5 Howard (U. S. Sup. Ct.), 261. "There is no privity between the executor and the administrator *de bonis non*. So totally unconnected are they, that at common law the administrator *de bonis non* could not have a *scire facias* on a judgment obtained by the executor." *Allen* v. *Irwin*, 1 Sergeant & Rawle (Penn.), 554; *Grout* v. *Chamberlin*, 4 Massachusetts, 611. An administrator who has paid money through mistake to the administrator *de bonis non* who succeeds him, cannot recover it in assumpsit from a successive administrator *de bonis non*. *Weeks* v. *Love*, *supra*. The administrator *de bonis non* cannot maintain an action against the administrator for moneys in his hands belonging to the estate. *Rives* v. *Patty*, *supra*.

Section VII. — *Creditors and their Priorities.*

No. 23. — In re WILLIAMS'S ESTATE. WILLIAMS *v.* WILLIAMS.

(Ch. 1872.)

No. 24. — In re STUBBS'S ESTATE. HANSON *v.* STUBBS.

(Ch. 1878.)

RULE.

A creditor who first obtains judgment against a legal personal representative is entitled to priority in the administration of assets over the debts of all other creditors of equal degree.

But where judgment for the administration of the estate has been obtained in an action by a creditor on behalf of himself and all other creditors, all claims for which no

judgment has been obtained against the legal personal representative are equalised, and no priority can be obtained by any subsequent judgment.

In re Williams's Estate. Williams v. Williams.

42 L. J. Ch. 158 (s. c. L. R., 15 Eq. 270).

James Williams died on the 2nd day of March, 1871, intestate, and indebted to one specialty and several simple contract creditors.

Elizabeth Williams, the widow of the intestate, took out letters of administration to his estate.

John Chambers, a simple contract creditor, brought an action against the administratrix to recover his debt. The action was not defended. While it was pending, the administratrix, in order to stop it, filed a plaint in the County Court of Conway, to administer the estate. That plaint was not returnable for two months from the filing of it; and inasmuch as Chambers would in the mean time sign judgment in the action, Mrs. Williams, immediately on filing the plaint, applied *ex parte*, and obtained an order restraining Chambers from proceeding with his action. That order, however, was subsequently discharged, on the ground that a creditor's rights at law could not be interfered with until a decree had been made to administer the estate. Immediately after that decision, — viz., on the 23rd June, 1871, — Chambers signed judgment in his action; but the judgment never was registered. An administration summons was subsequently taken out in this Court on the 27th June, 1871; an administration decree was pronounced thereon, and an injunction at once granted to restrain Chambers from further proceeding with his action at law, but giving him leave to go in and prove with the other creditors, under the administration decree.

The Chief Clerk, by his certificate, allowed, among other debts, that of Chambers, for the sum of £104 12*s*. The assets were insufficient to pay all the creditors in full; and Chambers claimed, by virtue of his judgment, priority over other creditors, both specialty and simple contract.

Mr. Osborne Morgan and Mr. Whitehorne, for the plaintiff in the suit. Before 4 & 5 W. & M. c. 20, an executor was liable for a *devastavit* in respect of judgments against his testator, even without notice. But that statute, passed for the protection of

heirs, executors, and administrators, enacted that no judgment not docketed and entered in books in the manner thereby provided, should (affect any lands or tenements as to purchasers or mortgagees, or) have any preference against heirs, executors, or administrators, in their administration of their ancestor's, testator's, or intestate's estates.

Mr. T. A. Roberts, for the judgment creditor. To save time, I may as well say that I draw a distinction between a judgment against a testator or intestate, and one against his legal personal representative. 2 Williams on Executors, 3rd ed. 800–804.

Mr. Morgan continued. By the 2 & 3 Vict. c. 11, the docketing of judgments under 4 & 5 W. & M. c. 20 was abolished. *Fuller* v. *Redman*, 26 Beav. 600–614; 29 L. J. Ch. 324. After the passing of the 2 & 3 Vict. c. 11, and before the 23 & 24 Vict. c. 38, an intestate's creditors would have had priority of payment, as follows: viz., first judgments against *the intestate*, equally; second, specialty creditors; third, creditors who have obtained judgments against the representatives of the intestate, in order of date; fourth, simple contract creditors.

By the 23 & 24 Vict. c. 38 § 3, it was enacted, that no unregistered judgment should have any preference against heirs, executors, or administrators, in the administration of deceased persons' estates.

Walter v. *Turner*, 33 L. J. Ch. 232, shows that that section is not restricted to the protection of representatives, but absolutely deprives unregistered judgment debts of all priority in administration; and the Act applies equally to judgments of County Courts, as other judgments.

In *Jennings* v. *Rigby*, 33 Beav. 198; 33 L. J. Ch. 149, no doubt the Master of the Rolls held that that section does not apply to simple contract debts for which the creditor has recovered judgment against the representative. But in that case the judgments were registered after the decree in the administration suit.

By the 32 & 33 Vict. c. 46 § 1, it was enacted that all specialty and simple contract debts of deceased persons should stand in equal degree, after the 1st of January, 1870.

That Act does not in terms mention judgment debts, and it is a question whether a judgment against the representative (as here) is not in the nature of a specialty debt within the meaning of the Act; and, if so, whether a judgment debt is not, therefore, placed on the same footing as a simple contract debt. If that is not

correct, the operation of the Act would be, in this case, to practically give a judgment creditor priority, without an express authority to that effect, over a specialty creditor, who previously held the priority. In other words, if this judgment creditor is successful in his contention for priority, there will ensue this very curious anomaly: that a simple contract creditor by dint of diligence can, by virtue of the 32 & 33 Vict. c. 46 (which is silent as to his rights, and gives him no express advantage), rank in priority to a specialty creditor, which he could not have done before that Act.

They also referred to *Gaunt* v. *Taylor*, 3 Man. & G. 886; 3 Scott, N. S. 700; 11 L. J. C. P. 68; *Landon* v. *Ferguson*, 3 Russ. 349; *Hickey* v. *Hayter*, 6 T. R. 384; 3 R. R. 213; *Steele* v. *Rourke*, 1 Bos. & P. 307.

Mr. T. A. Roberts, for the judgment creditor, was not called upon.

Mr. W. W. Byrne was for the defendant in the suit.

Wickens, V. C. It seems to me that the case of *Jennings* v. *Rigby* is an authority conclusive upon me, and one which binds me to hold that in the year 1863 (when that decision was pronounced) an unregistered judgment against the executor had priority in the administration of assets over the debts of all creditors having debts of equal rank with that for which the judgment was recovered. But it was argued that that has been altered by the Act (32 & 33 Vict. c. 46); and it was pointed out with some force that if that is not so, a judgment against the executor for a simple contract debt will obtain, indirectly, priority over specialty debts. That may be an unexpected and unintended consequence of the Act; but it appears to me an unavoidable one. The distinction between specialty and simple contract debts is abolished. It was abolished, and did not exist, when the intestate in this case died. But I can find nothing in the Act to take away the reward for diligence which the creditor was supposed to earn by first taking proceedings after the death, and which gave him priority, if his proceedings ripened into a judgment, over all creditors of an equal degree, even if they obtained judgment the next day. In other words, I do not think that the legal effect of proceedings taken after a testator's or intestate's death by the creditor was intended to be nullified or altered by this Act, which simply and for certain purposes, and to a certain extent, made the mode in which the debt was contracted by the testator immaterial.

No. 24. — In re Stubbs's Estate. Hanson v. Stubbs.

47 L. J. Ch. 671 (s. c. 8 Ch. D. 154).

Motion under Order LI. Rule 2 a, to transfer the action of *Anderson* v. *Stubbs*, pending in the Exchequer Division, to the Court of the Master of the Rolls.

That action was brought by certain creditors of Richard Stubbs, deceased, against his executrix, to recover £161 16*s.* 3*d.*, — the balance admitted to be due from her testator's estate in respect of moneys received on their behalf by Stubbs as their solicitor.

A summons was taken out by the plaintiffs in that action to sign judgment under Order XIV. This was opposed, on the ground that it was believed that the estate of Stubbs was insolvent, and also that he was entitled to set off a large sum against the plaintiffs for costs.

On the 15th of March, one of the Masters of the Exchequer Division made an order on the summons "that unless the amount claimed was paid into Court or to the plaintiffs' solicitors within five days, the plaintiffs should be at liberty to sign final judgment against the defendant. Costs of application to be the plaintiffs' in any event."

This order was subsequently affirmed by Field, J.

On the 20th of March, judgment was obtained in the Chancery Division in a creditor's action, *Hanson* v. *Stubbs*, for the administration of the estate of Stubbs. The plaintiffs in *Anderson* v. *Stubbs* had not signed judgment.

On the 21st of March, the defendant in the action of *Anderson* v. *Stubbs* paid the sum of £161 16*s.* 3*d.* into the Court of Exchequer.

The plaintiff and defendant in the administration action now moved to transfer the action of *Anderson* v. *Stubbs* to the Chancery Division.

Mr. W. W. Karslake for the motion.

Mr. Maidlow, for the plaintiffs in *Anderson* v. *Stubbs*, objected that they, as judgment creditors of the executrix of Stubbs, had priority over his other creditors; that the payment into Court was either bad or good, — if bad, they ought to be treated as if they had signed judgment on the day the order was made; if good, that the fund paid in should stand as a security. He cited *Parker* v. *Ringham*, 33 Beav. 535.

The MASTER OF THE ROLLS said that it was clear that the judgment creditor of an executor obtained a preference as against other creditors, notwithstanding the Act 32 & 33 Vict. c. 46, provided he obtained judgment before administration decree. That point had been so decided by WICKENS, V. C., in the case of *In re Williams*. See No. 23, p. 199, *ante*. Here the plaintiffs at law had not obtained judgment, but only an order enabling them to sign judgment if the amount claimed was not paid within five days. In the mean time they allowed another creditor to come in and obtain a judgment on behalf of all the creditors in an administration action, and the parties in that action were now asking the Court to transfer the action in the Exchequer Division to the Chancery Division, and to stay the proceedings in that action, there being a question of set-off. The original creditors, the plaintiffs at law, opposed the motion on the ground that they had a security on the fund in court, and so they would have had, had it not been for the intervening judgment in the administration action; but after the administration decree, the fund ought not properly to have been paid in. His Lordship ordered the action of *Anderson* v. *Stubbs* to be transferred to the Chancery Division, and, when so transferred, all further proceedings therein to be stayed; the money paid into court in that action to be transferred to the credit of the administration action, with liberty for the plaintiffs in the former action to prove in the administration action for their claim and costs in the original action, without prejudice to any application by the plaintiffs in the original action to have the conduct of the administration action.

ENGLISH NOTES.

The numbers at the commencement of the paragraph in the following notes represent the order in which debts (not being funeral or testamentary expenses) should be paid.

1. Crown debts by specialty or record. Whether or not this is a common-law right, is difficult at this date to determine; but, as regards deceased crown tenants, the right is expressly dealt with by the confirmation of the charter. 25 Ed. I. c. 18. At that time the King was entitled to the chattels of persons dying intestate. Subsequently, the right to administer to the intestate was granted to the ordinary; and he was bound to pay debts as an executor, by the Statute 13 Ed. I. Stat. 1 c. 19. When, however, by the Statute 31 Edw. III. Stat. 1 c. 11, the administration was to be deputed to administrators, it was

enacted by the same statute that they shall answer in the King's Court to the others to whom the deceased was held and bound, in the same manner as executors shall answer. By the Statute 33 Hen. VIII. c. 39 § 50, it is enacted that all obligations and specialties made to the King shall be of the nature of a statute staple.

2. Debts to which priority over judgment debts is given by particular statutes. But where the estate is being administered in bankruptcy, it will have to be considered how far the particular statute is overridden by the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52 § 40; *Re Williams, Jones* v. *Williams* (1887). 36 Ch. D. 573; 57 L. J. Ch. 264.

3. Judgments in Courts of Record, if duly registered under 23 & 24 Vict. c. 38. *Van Gheluice* v. *Nerincke* (1882), 21 Ch. D. 189; 51 L. J. Ch. 929. The law existing at the time of passing this Statute, and previously, will be found stated in *Fuller* v. *Redman* (1859), 26 Beav. 600.

Foreign judgments create only simple contract debts. *Wilson* v. *Lady Dunsany* (1854), 18 Beav. 293. By the Judgments Extension Act (1868), 31 & 32 Vict. c. 54, Decrees of the Courts of Session in Scotland or judgments of the Superior Courts of Ireland may be registered in England, and from the date of registration take effect in all respects as a judgment recovered in the High Court. And judgments or orders of inferior courts of Scotland or Ireland may be registered in an inferior court in England under the provisions of the Inferior Courts Judgments Extension Act, 1882 (45 & 46 Vict. c. 31). And, by section 151 of the County Court Act, 1889 (51 & 52 Vict. c. 43), the judgment of a county court may be removed so as to become a judgment of the High Court, if there are no goods on which it can be levied under the County Courts Act.

4. Judgments against the personal representative, whether they are registered or not, *Re Williams's Estate, Williams* v. *Williams* (No. 23, p. 199 *ante*), provided final judgment is signed against the representatives before a decree of administration, *Re Stubbs's Estate, Hanson* v. *Stubbs* (No. 24, p. 203 *ante*). These judgments have priority *inter se* according to their respective dates (*Dollond* v. *Johnson* (1854), 2 Sm. & G. 301), and their priority is unaffected by section 10 of the Judicature Act, 1875, 38 & 39 Vict. c. 77. *Re Maggi, Winehouse* v. *Winehouse* (1882), 20 Ch. D. 545; 51 L. J. Ch. 560.

5. Statutes and recognisances under certain old statutes which have been repealed by the Statute Law Revision Act, 1863. 26 & 27 Vict. c. 125.

6. Specialty and simple contract debts. The priority of specialty debts over simple contract debts was abolished by the Statute 32 & 33 Vict. c. 46, commonly called Hinde Palmer's Act.

Unregistered judgments fall within this division (*Van Gheluive* v. *Nerinckx* (1882), 21 Ch. D.; 51 L. J. Ch. 929), as do voluntary bonds assigned for value. *Payne* v. *Mortimer* (1859), 4 De G. & J. 447.

Debts due for dilapidations from the estate of the deceased incumbent of a rectory, &c., so far as they are payable out of equitable assets, are included under this division. *Bisset* v. *Burgess* (1856), 23 Beav. 278.

7. Debts due for dilapidations from the estate of such a deceased incumbent, so far as the same are payable out of legal assets. *Bryan* v. *Clay* (1852), 22 L. J. Q. B. 23.

8. Voluntary bonds. *Markwell* v. *Markwell* (1864), 34 Beav. 12, at p. 18.

Creditors alone are considered in determining questions of priority.

The assignment to the Crown, after the death of the obligor, of a debt due by him to a subject did not give the Crown any priority; *per curiam* in *Sir Edward Dimock's Case* (1610), Lane, 65.

To obtain priority as a judgment debt, the judgment must ascertain the amount, and order payment. *Perry* v. *Phelips* (1804), 10 Ves. 34; 7 R. R. 331; *Re Barrett, Whittaker* v. *Barrett* (1889), 43 Ch. D. 70; 59 L. J. Ch. 218. Although an administrator will not, in the account, be allowed for a payment made to a creditor after decree for account and pending the taking of the account, he will be entitled to stand in the shoes of a creditor whom he has so paid. *Jones* v. *Jukes* (1794), 2 Ves. Jun. 518; 2 R. R. 308.

AMERICAN NOTES.

"The American rule," says Mr. Schouler (Executors and Administrators, § 428), "appears to be to consider the rights of creditors as fixed at the debtor's death, according to their due rank; so that no one shall by superior diligence, or by preferential dealings with the executor or administrator, or by pushing his suit to judgment, get an advantage over the others." Citing *McClintock's Appeal*, 29 Penn. St. 360; *Allison* v. *Davidson*, 1 Devereux & Battle Equity (No. Carolina), 46; see also *Bosler* v. *Exchange Bank*, 4 Penn. St. 32; 45 Am. Dec. 665; *Boyce* v. *Escoffie*, 2 Louisiana Annual, 872.

In most of the States it is provided by statute that after the payment (1) of expenses of last sickness and funeral and probate, and (2) of public dues and taxes, all other debts shall be paid ratably, without regard to whether they are founded on judgment, specialty, or simple contract. 5 Am. & Eng. Enc. of Law, p. 245.

No. 25. — In Re HOPKINS. WILLIAMS *v.* HOPKINS.

(C. A. 1881.)

RULE.

The former practice of the Court of Chancery which allowed a secured creditor to realise his security, and also to prove as a creditor under a decree of administration in respect of his whole debt, is abolished by section 10 of the Judicature Act, 1875 (38 & 39 Vict. c. 77), so far as relates to estates which "may prove to be insufficient" for the payment in full of debts; and, in the administration of such an estate, the creditor may, as in bankruptcy, either have his security sold and prove for the deficiency, or set a value on his security and prove for the balance. He may alter his proof up to the time when the certificate of debts is made, but then becomes bound by his election.

In re Hopkins. Williams v. Hopkins.

18 Ch. D. 370.

This was an action by creditors for administration, the plaintiffs being bankers at Dorchester, and the defendant being sole executor and residuary devisee under the will of J. C. Hopkins, whose estate proved to be insufficient for payment of debts. The testator had a banking account with the plaintiffs, and in 1852 and subsequently had deposited deeds with them to secure his overdrawn account. He died on the 25th of November, 1876. On the 19th of November, 1878, the plaintiffs commenced an administration action, and obtained the ordinary decree for administration of the testator's real and personal estate on the 14th of December, 1878. Under this decree they sent in a claim for the whole sum due to them, and the executors admitted it, but the mistake having been discovered, the chief clerk, in conformity with the 10th section of the Judicature Act, 1875, and the 99th rule under the Bankruptcy Act, 1869 (the estate being considered by all parties to be insolvent), required them to set a value on their securities, which they did on the 20th of January, 1880, putting the value at £1800.

No. 25. — In re Hopkins. Williams v. Hopkins.

By the chief clerk's certificate, dated the 24th of February, 1880, the plaintiffs were found creditors for £28 2*s.* 3*d.*, being the excess of £1828 2*s.* 3*d.* over the estimated value of their securities. The plaintiffs, fearing that their securities might sell for less than the assessed value, took out a summons dated the 4th of May, 1880, asking that an account might be taken of what was due to the plaintiffs for principal, interest, and costs upon their security, and that upon the amount due to the plaintiffs for principal, interest, and costs being ascertained, the property comprised in the deeds and muniments of title deposited with the plaintiffs might be included in the sale of the testator's real and leasehold estates, and that the money to arise from the sale of that portion of the testator's real and leasehold estates which was comprised in the plaintiffs' security might be paid into court, and that in the event of the proceeds of sale of that portion of the testator's real and leasehold estates which was comprised in the plaintiffs' security being insufficient for the payment of what might be found due to the plaintiffs for principal, interest, and costs, they might be allowed to prove for the balance against the said testator's estate.

The hearing of the summons was adjourned into court, and the Vice Chancellor MALINS ordered the property to be sold, and directed the summons to stand over till after the sale. The property was accordingly sold, and realised only £1457. The summons was now brought again before Mr. Justice FRY who refused the summons with costs.

The plaintiffs subsequently took out a summons to vary the chief clerk's certificate on the ground that they had acted under pressure and mistake. The summons was dismissed by Mr. Justice FRY. The plaintiffs appealed from both orders. On the appeal, judgment was pronounced as follows:—

The MASTER OF THE ROLLS (Sir G. JESSEL). I am of opinion that there is no ground for this appeal, and I regret that there has been a mistake as to the law on the part of the appellant's advisers.

As regards section 10 of the Judicature Act, 1875, one object, and probably the principal object of that section, was to get rid of the rule established by *Mason* v. *Bogg*, 2 My. & Cr. 443, as to proof in Chancery by secured creditors. The legislature considered it to be absurd that if a trader died the day after being adjudicated a bank-

rupt his assets should be administered in one way, and if he died the day before the day on which, if he had lived, he would have been adjudicated bankrupt, they should be administered in another way. They had then to consider whether the rule in Chancery or the rule in bankruptcy ought to prevail, and decided in favour of the latter. If the section had plainly said that the assets of a deceased person should be distributed in the same way as in bankruptcy, there would have been no room for dispute, and I think that as regards the particular case with which we have now to deal, it has said so. It provides that, in the administration by the Court of the assets of a person who dies after the commencement of the act and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules shall prevail as to the rights of secured and unsecured creditors, and as to debts and liabilities provable, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt. "May prove to be insufficient" cannot mean, shall be proved to be insufficient, for the insufficiency cannot be fully established till afterwards. The words must mean only that there is sufficient reason to believe that the estate will turn out insolvent. If that is the case the rules in bankruptcy as to proof are to apply. Now in bankruptcy, under rules 78 & 80 of the General Orders of 1870, a secured creditor has a right, whether his security be legal or equitable, to apply to the court to have the property sold, to have the proceeds applied in payment of his debt, and to prove for the deficiency. He may take another course. He may, under rule 99, put a value on his security and prove for the balance of his debt after deducting the amount of the valuation; and to check his valuation it is provided by rules 100 & 101 that any amount which the security may realise in excess of the valuation shall be paid over to the trustee, that the trustee may redeem the property at the assessed value, and that if it realises less than the assessed value the proof shall not be increased. The creditor values for himself, and so he values at his own risk. The check is a very efficient one, for he can gain nothing by valuing too high or too low. In bankruptcy there is no doubt as to the time when the creditor's rights are fixed. He sells and proves for the deficiency, or he values and proves for the balance; in either case the time of sending in his proof is the time when his rights are ascertained. What is the time in administration by the

Court? Here also it must be the time of proof. Under the old practice that was when he filed his affidavit of debt. But a new practice has grown up with a view to saving expense. The creditors send in their claims, the executor examines them, and makes an affidavit specifying all which he thinks ought to be allowed. The sending in that claim is the time of proof; the creditor then makes his election. If he does not wish for an immediate sale he sends in a claim for his debt, less the amount of the value which he sets on his security. If he wishes an immediate sale he takes out a summons asking that the property may be sold, and that he may be allowed to prove for the deficiency. The chief clerk makes a certificate of debts, and at that time it generally is well known whether the estate is solvent or not. There are exceptional cases, but it is impossible either to legislate for them or lay down rules to govern them. The chief clerk must proceed on the footing that the estate is solvent, or that it is insolvent; for in one case interest is allowed on debts not carrying interest, and in the other it is not. Until the certificate of debts is made the creditor has a *locus pœnitentiæ*. Up to that time he may alter his proof, but after certificate he is bound, and every one else is bound, unless there are special grounds for setting aside the certificate. So far there is no difficulty — the rules in bankruptcy are followed. The present is a remarkable case, for the creditor, being plaintiff in an administration suit, had another remedy. He might have obtained at the hearing an order for sale, with liberty to prove for the deficiency. Not wishing I suppose, to have an immediate sale, he took a common administration decree, which was an assertion that his security was insufficient; for, if not, he had no right to such a decree. He had the conduct of the cause, and was bound to get a certificate not only of the debts of other creditors, but of his own. He sent in a claim for the total amount due, which it was irregular to do. Before the certificate was made the error was discovered, and the chief clerk required him to value his security, as he had not applied for a sale. He valued it, and, as it turns out, valued it too high, and his proof was admitted for £28, the excess of his debt above the valuation. It may be that his advisers were not aware of the effect of what was done, but the certificate cannot be excepted to merely because a party was ignorant of the effect of an Act of Parliament which had been in force for some years. The plaintiff took out a summons to have the property

sold, and for leave to prove for the balance if the proceeds were insufficient to pay him in full. This application came too late. A sale, however, was ordered and irregularly ordered, for the property ought to have been sold under the decree and the summons stood over. The sale took place, and the property realised much less than the value which the plaintiff had put upon it. The summons was then brought on again and was properly dismissed. It is the very case contemplated by the 101st rule, which provides that if the security realises less than the valuation the proof is not to be increased. The valuing the security too high arises from the plaintiff's own mistake, and he must take the consequences. The judgment of Mr. Justice FRY unfortunately suggested to the plaintiff that there might be a case for setting aside the certificate, for which I cannot see the slightest ground. As to pressure, there is no pressure by the chief clerk; he only called upon the plaintiff to do what the law required him to do.

BAGGALLAY, L. J. At the time when the Judicature Act of 1873 was passed the practice as to proof by secured creditors was different in bankruptcy from what it was in Chancery. The preamble to section 25 of that Act says that it is expedient to take occasion of the union of the several courts whose jurisdiction is transferred by the Act to the High Court of Justice to amend and declare the law to be thereafter administered as to the matters thereinafter mentioned. The section then lays down rules for various matters, generally adopting the rules prevailing in Chancery; but sub-section 1 is an exception, for it in some respects applies the rules in bankruptcy to administration by the court of the assets of deceased persons. The 10th section of the Judicature Act, 1875, re-enacted this sub-section with an addition extending it to the winding-up of companies. Now, the rules in bankruptcy as to secured creditors are clear. A secured creditor could under rule 78 apply for a sale and prove for the deficiency. Instead of doing this he could, if he thought fit, value his security under rule 99, and prove at once for the balance. Rules 100 and 101 make this a hazardous proceeding, and were perhaps inserted with a view to leading secured creditors to proceed under rule 78, and not under rule 99. Now, according to section 10 of the Act of 1875, the rules in bankruptcy are to be applied to proofs by secured creditors. The appellant was a secured creditor and plaintiff in the action. I doubt whether he could

sue except on the ground of having an insufficient security, he certainly could not have instituted bankruptcy proceedings without realising or valuing his security. He could have obtained a decree for sale with liberty to prove for the deficiency, or under the common decree he could have applied in the same way as a creditor in bankruptcy can apply under rule 78. He did neither, but let the proceedings go on to certificate, and by the certificate he was found a creditor for £28, the difference between his debt and the value set by him on his security, and by that he is bound. There was, in my opinion, nothing to entitle him to relief on the ground of pressure or mistake.

Lush, L. J. I am of the same opinion, and cannot account for the misapprehension under which the appellant has laboured. Section 10 of the Judicature Act, 1875, clearly makes this case subject to the rules in bankruptcy. The Bankruptcy Rules 78, 99, 100, and 101, are exceedingly plain, and they are to be applied to administration of the assets of a deceased person. Under rule 78 the appellant might have had his security sold and proved for the deficiency, but he did not choose to do so. He then might either keep his security and abandon his proof, or set a value on his security, and prove for the balance. He chose the latter course and was admitted as a creditor for the balance. When he came to sell he found he had made a mistake, and now wishes to increase his proof. What is to be done if a creditor under rule 99 values his security too high? Rule 101 is express that the proof is not to be increased. The plaintiff had sent in a claim for the whole amount. When the chief clerk had to make the certificate of debts, the mistake being pointed out, he said that the plaintiff must value his security and prove only for the difference. There was nothing in this to be called pressure; the chief clerk did no more than he was bound to do.

ENGLISH NOTES.

The 10th section of the Judicature Act, 1875 (38 & 39 Vict. c. 77), applies the rule in Bankruptcy to the proof of a secured creditor; but does not import into administrations the rules of Bankruptcy with respect to (*a*) Bills of Sale: *Re Count d'Epineuil* (No. 1), *Tadman* v. *d'Epineuil* (1882), 20 Ch. D. 217; 51 L. J. Ch. 491. (*b*) Priorities: *Re Maggi, Winehouse* v. *Winehouse* (1882), 20 Ch. D. 545; 51 L. J. Ch. 560; *Re Williams, Jones* v. *Williams* (1887), 36 Ch. D. 573; 57 L. J. Ch. 264. (*c*) The Landlord's right to distrain: *Re Fryman's*

Estate, Fryman v. *Fryman* (1888), 38 Ch. D. 468; 57 L. J. Ch. 862; or (*d*) Executor's right to retain his own debt or to abstain from setting up the Statute of Limitations: *Re Baker, Nichols* v. *Baker* (C. A. 1890), 44 Ch. D. 262; 59 L. J. Ch. 661.

With regard to the right of a secured creditor to appropriate moneys received from a sale of the security in the first place in the satisfaction of interest the Master of the Rolls (Sir G. Jessel) was of opinion that interest stopped from the date of the judgment in the administration action: *Re Summers, Boswell* v. *Gurney* (1879), 13 Ch. D. 136; in *Talbot King* v. *Chick* (1888), 39 Ch. D. 567; 58 L. J. Ch. 70, North, J., supported the right to interest up to the day of payment. But Stirling, J., in the case of an insolvent company (to which the section likewise applies), held that interest stopped from the commencement of the winding up: *Re London, Windsor, and Greenwich Hotels Company* (1892), 1892, 1 Ch. 639; 61 L. J. Ch. 273. Until the estate is shown to be insolvent the mutual credit clause will not be applied: *Re Smith, Green* v. *Smith* (1883), 22 Ch. D. 586; 52 L. J. Ch. 411.

Under section 125 of the Bankruptcy Act 1883 (46 & 47 Vict. c. 52) there is now power to transfer the administration of insolvent estates to the Bankruptcy Court. The power is discretionary: *Re Baker Nichols* v. *Baker* (C. A. 1890), 44 Ch. D. 262; 59 L. J. Ch. 661; and the difference between the rules of (so called) equity and of bankruptcy is not in itself a sufficient ground for making the transfer (S. C.); nor for refusing to make it: *Re York, Atkinson* v. *Powell* (1887), 36 Ch. D. 233; 56 L. J. Ch. 552.

There is now original jurisdiction in the Court of Bankruptcy to administer insolvent estates (46 & 47 Vict. c. 52, § 125). But all the bankruptcy rules do not apply in such a case: *Re Hewitt, Ex parte Hewitt* (1885), 15 Q. B. D. 159; 54 L. J. Q. B. 402; *Re Evans, Ex parte Evans* (C. A. 1890), 1891, 1 Q. B. 143; 60 L. J. Q. B. 143.

A creditor has been allowed even in bankruptcy to amend his proof and valuation where by an unexpected change of circumstances (namely the death of a person on whose life the creditor held a policy of assurance) the value of the security had increased; and this even after the trustee in bankruptcy had given notice of his intention to redeem the security upon the footing of the valuation: *Ex parte Norris, Re Sadler* (C. A. 1886), 17 Q. B. D. 728; 56 L. J. Q. B. 93.

No. 26. — FARR *v.* NEWMAN.

(K. B. 1792.)

RULE.

Goods of a testator (or intestate) in the hands of the executor (or administrator) cannot be seized in execution of a judgment against the executor (or administrator) in his own right.

Farr v. Newman.

4 T. R. 621; 2 R. R. 479.

This was an action upon the case, against the defendants, as sheriff of Middlesex, for making a false return to a writ of *fieri facias*. The declaration stated, that the plaintiffs in Easter, 30 Geo. III., recovered a judgment in this Court against T. Watts, and A. Reid, and Ann his wife; which said T. Watts and Ann Reid were the executor and executrix of W. Lewer, deceased, for £236 10*s*. to be levied of the goods and chattels which were of W. Lewer at the time of his death in the hands of Watts and Ann Reid, to be administered, if they had so much of the goods and chattels of W. Lewer to be administered; and if they had not, then the sum of £32 10*s*. parcel of the damages, being for the costs, &c., to be levied of the proper goods and chattels of A. Reid, and Ann his wife. That before the issuing of the writ after-mentioned the plaintiffs obtained satisfaction of a part of the damages so recovered; but at the time of issuing the writ, there remained £114 12*s*. due to them. That for the obtaining of the said £114 12*s*. the plaintiffs on the 17th of May, in the 30th year, &c., sued out a *fieri facias* directed to the sheriff, by which he was commanded to levy £114 12*s*. of the goods which were of the said W. Lewer at the time of his death in the hands of the said A. Reid and Ann his wife to be administered; and if she had not so much thereof in her hands, then to levy £32 12*s*. (being the costs, &c.) of the goods of the said A. Reid and Ann his wife. That that writ afterwards, and before the return of it, on the 28th of May, 1790, was delivered to the defendants to be executed; by virtue whereof the defendants on the day last-mentioned seized the goods which were of W. Lewer at the time of his death in the hands of A. Reid and Ann his wife to be administered, to the value

of the residue of the damages so recovered, &c., and then and there sold the same, and thereof levied the residue of the said damages so recovered; yet that the defendants falsely and deceitfully returned on the said writ that there were not any goods in their bailiwick which were of W. Lewer at the time of his death in the hands of A. Reid and Ann his wife to be administered, whereof they could cause to be levied the said damages, &c., and that A. Reid and Ann his wife had not any proper goods or chattels in the defendant's bailiwick, whereof they could cause to be levied the costs, &c.

The defendants pleaded the general issue. At the trial at Westminster before Lord KENYON, the jury found a special [1] verdict (in substance), as follows: —

That the plaintiffs in Easter Term 30 Geo. III. recovered a judgment against T. Watts and A. Reid and Ann his wife, as executors of W. Lewer, of £236 10*s.* as stated in the declaration. That part of it was afterwards paid to them; and that for the residue, £114 12*s.*, they sued out a *fieri facias*, as stated also in the declaration: which was delivered to the defendants, as sheriff, on the 28th of May, 1790, to be executed. That in Easter Term, 1790, one William Wilson recovered a judgment in this Court against Alexander Reid for £1047 debt, and also 63*s.* for his damages and costs; which judgment was signed on the 27th of May, 1790. That on the 28th of May, 1790, Wilson sued out of this Court a certain writ, bearing teste the 17th of May, 1790, upon the last-mentioned judgment, directed to the then sheriff of Middlesex; by which writ the sheriff was commanded to levy of the goods and chattels which were of the said Alexander Reid in his the said sheriff's bailiwick, £1047, which William Wilson lately recovered against Alexander Reid for a debt, and also 63*s.* for damages and costs, &c. That the last writ was also returnable on Friday next after the Morrow of the Holy Trinity, and was indorsed to levy £552 14*s.* 6*d.*, besides sheriff's poundage, officers' fees, and costs of levying. That the last-mentioned writ was afterwards on the same 28th of May, 1790 (being before the return thereof), and a few hours before the delivery of the said writ of the plaintiffs to the sheriff as aforesaid, delivered to the defendants, then sheriff of Middlesex, to be executed. "That the defendants, as sheriff on the day and year last mentioned (a few hours before the delivery of the said writ of the plaintiffs for

[1] At first only a special case was found; but a second trial was directed by the Court for the purpose of inquiring whether there were any fraud.

the purpose aforesaid), by virtue or under colour of the said writ, at the suit of William Wilson at Westminster aforesaid, in the said sheriff's bailiwick, seized certain goods and chattels, to the value of £200, then being in a certain house wherein Alexander Reid and Ann his wife then resided, and in which house W. Lewer before and at the time of his death resided; and which said goods and chattels were the goods and chattels of W. Lewer, deceased, at the time of his death, and were in the hands of the said Alexander Reid and Ann his wife." That on the said 28th day of May, 1790, at Westminster aforesaid, after the said sheriff had so seized the said goods and chattels, the within mentioned C. G. G., the plaintiff's attorney, gave notice in writing to Wilson's attorney, and to the defendants, "that the said goods and chattels so seized were the goods and chattels of W. Lewer, deceased, at the time of his death, and not the goods of Alexander Reid; and that Ann Reid, the wife of Alexander Reid, was executrix, and T. Watts, executor, of W. Lewer, and had proved his will; that Alexander Reid, and Ann his wife were in possession of the same, and that the same were assets in their hands for the payment of the debts of W. Lewer; that such assets were liable for the payment of the aforesaid sum of £114 12*s.* recovered by the plaintiffs; and also that such assets were liable to the payment of a sum of £116 10*s* 4*d.* recovered against the same parties as executors in the said Court of King's Bench of Easter Term then last, by F. Stedman; that such assets were not liable to the payment of any debts of Alexander Reid, the same not being sufficient to satisfy the said judgments, and other the just debts of W. Lewer; and further, that he C. G. G. as attorney for the respective plaintiffs meant to take out, and was about taking out, executions upon the judgments aforesaid, to levy the goods aforesaid, being such assets; and that unless they immediately quitted possession, one or more actions would be brought against them." That the said C. G. G. as attorney for the plaintiffs, soon afterwards, on the said 28th of May, 1790, procured a warrant from the defendants, dated the day and year last aforesaid, on the within mentioned writ of execution at the suit of the plaintiffs, which had been delivered to the sheriff to be executed, directed to P. Cawdron, an officer of the defendants, whereby the said sheriff commanded P. Cawdron to levy £114, &c., pursuant to the directions of the writ, &c. That P. Cawdron, the officer, went with the said warrant into the aforesaid house, where the goods and chattels

so seized as aforesaid were before the said goods and chattels, or any part thereof, were sold or removed out of the said house, and there saw the same, but did not levy thereon. "That the goods so seized were of the value of £200; and that the same had been, and were at the time of the death of W. Lewer, his property; and that his widow, Ann Lewer, took possession of the house and effects as executrix of his last will and testament; that whilst she was so possessed thereof, she intermarried with the said Alexander Reid; and that they, after such intermarriage, continued in possession of the said house, goods, and chattels, till the said sheriff so seized the said goods and chattels: That the said goods and chattels remained in the house aforesaid, possessed by the testator, W. Lewer, at the time of his death; and that under the said writ of execution, the same were seized for the proper debt of the said A. Reid;" That the defendants, being sheriff at the time of the return of the writ within mentioned, at the suit of the plaintiffs, did not cause to be levied the said £114 12*s.* or any part thereof, nor had they or either of them, at the return of the said writ, the said £114 12*s.* or any part thereof, &c.; nor have they, nor hath either of them, paid to the plaintiffs, or to any or either of them, the said residue of the said damages, &c.: and that the defendants, at the return of the writ, returned on the said writ in manner and form as by the plaintiffs is within in that behalf alleged. By means of which said premises, the plaintiffs are and have been greatly retarded and hindered from obtaining of the said residue of their damages, &c., recovered, &c. But whether upon the whole, &c.

This special verdict was twice argued; the first time in Trinity Term, 1791, by Morgan for the plaintiffs, and Wood for the defendants; the second in Michaelmas Term last, by Bearcroft for the plaintiffs, and Erskine for the defendants.

For the plaintiffs two points were made: 1st. That the testator's goods could not be taken under an execution for a debt of the executor's; to prove which were cited *Crane* v. *Drake*, 2 Vern. 616. 1 Eq. Cas. Abr. 240; Ellis's Case, 1 Atk. 101; 3 Burr. 1369; and 1 Com. Dig. 259; 2dly. That they could not be taken for the debt of the husband of the executrix; Bro. Abr. title "Baron and Feme," pl. 84, ib. title "Administrator," pl. 38; *Norton* v. *Sprigg*, 1 Vern. 309; *Bachelor* v. *Bean*, 2 Vern. 61; 1 Com. Dig. 169; Wentw. Off. Exec. 298; and 1 Com. Dig. 570.

In answer to the first, the following cases were relied on by the

defendants' counsel: *Hoyle* v. *Lundon*, 3 Keb. 839; *Elliot* v. *Merryman*, 3 Barnard, 81; *Nugent* v. *Gifford*, 1 Atk. 463; *Russel's Case*, 5 Co. Rep. 27; 2 Ves. Sen. 268; and *Whale* v. *Booth*.[1] And in answer to the second, these two: *Arnold* v. *Bidgood*, Cro. Jac. 318; *Thrustout* v. *Coppin*, 3 Wils. 277: and 2 Bl. Rep. 801.

[The Court took time to consider of their judgment; and ultimately it appeared that there was a difference of opinion on the Bench, Lord KENYON, C. J., ASHHURST, J., and GROSE, J., being in favour of the plaintiff and against the right of the executor's creditor, and BULLER, J., being of the contrary opinion. The opinion of the majority has now so long been considered and treated as settled law, that it seems unnecessary to set out all these judgments. That of GROSE, J., as the most carefully reasoned judgment, may be taken as fairly representing the opinion of the majority.]

GROSE, J. The question upon all these counts is, Whether the defendants as sheriffs have made a false return to the plaintiffs' writ? that is, Whether there were any goods of the testator in the hands of Reid and his wife to be administered at the time the sheriffs received the plaintiffs' writ of *fieri facias*? The material facts on which this question arises are few; William Lewer, the testator, died indebted to the plaintiffs in a sum which, with the costs of recovering that sum, amounted to £236 10*s.*; leaving Watts executor, and the widow of the testator executrix. Of this sum £114 12*s.* was due when the *fieri facias* issued. Goods to the value of £200 came into the hands of the executrix, who intermarried with Reid. After the marriage, on the 28th May, 1790, a writ of *fieri facias* against the goods of A. Reid at the suit of W. Wilson, commanding the sheriff to levy £552 14*s.* 6*d.* was delivered to the defendants. On the same day, and after the delivery of that writ, a writ of *fieri facias*, at the suit of the plaintiffs, was delivered to the defendants, commanding them to levy £114 12*s.* of the

[1] *Whale* v. *Sir Charles Booth*, Knight, M. 25 George III., B. R. A note of the case is furnished with the report of the principal case in 4 T. R. 621, 625. In *Whale* v. *Booth* the goods of the testator had been sold under a *fieri facias*, against the executor for his own debt, and the executor had joined in a bill of sale. Lord MANSFIELD held that the effects had been completely alienated; and this, although the purchaser as well as the executor's creditor had notice that the effects were assets of the testator. After the comments made on Lord MANSFIELD's judgment not only in the principal case above, but also by Lord ELDON, in *McLeod* v. *Drummond*, 17 Ves. 152, 154 *et seq.*, 168 *et seq.*, by Sir T. PLUMER in *Ray* v. *Ray*, 14 R. R. 255, G. Coop. 267, and by EYRE, C. J., in *Quick* v. *Staines*, 4 R. R. 801, 1 Bos. & Pul. 295, that judgment cannot now be regarded as an authority for any general proposition.

goods and chattels of W. Lewer, deceased, at the time of his death in the hands of Reid and his wife to be administered, if there were so much, if not £32 costs of the goods of the husband and wife as executrix. Whether there were any goods of Reid, which had not been the goods of the testator does not appear: but it does appear that on the 28th of May, 1790, when the first *fieri facias* was delivered to the sheriffs, there were in the hands of Reid and his wife goods which had been the goods of the testator. It is not stated that those goods had been in any way appropriated by Reid or his wife, or that either of them had paid debts of the testator, which they claimed to be reimbursed by the produce of these goods. If these goods were in law bound by the delivery to the defendants of the writ against the goods of Reid, the return is not false; but if they were not so bound, it was a false return.

Before I consider the law, I will say a word upon the justice of the case; and I think no man can pause a moment upon it. Goods are delivered by the law into the hands of a man for the purpose of dividing them amongst the creditors, legatees, and next of kin, of another, whose goods they were. Their value we will suppose £1000. The debts and legacies we will suppose £500. On the day those goods are delivered to the executor, before the testator's creditors can recover their debts, a *fieri facias* for £2000 against his goods is delivered to the sheriff. It is urged that these goods, the moment the writ is delivered, are bound to pay the debt of the executor, and that neither the creditors, nor legatees, nor next of kin shall receive one farthing. The injustice is obvious. It is to make the goods of A. pay the debts of B.; and possibly leave the creditors of A. without any redress but against the person of B. One case of intolerable hardship may be put: Suppose the executor indebted to the Crown more than the value of his own and the testator's personal estate; the moment the executor is invested with his authority an extent issues and sweeps away every shilling of the testator, in fraud of his creditors, legatees, and next of kin! — a more shameful act of injustice can hardly exist under the name of law. I hope I can show it to be no more law than it is justice. The ground on which it was and must be argued, is, That the *fieri facias* against the goods of the executor must be executed on the goods of the testator in the hands of the executor; and here I premise that (for argument's sake) I shall consider Reid, the husband of the executrix, as if he were the executor; and it is

argued that the moment a man becomes executor, the goods of the testator are so vested in him that they are liable to his debts as much and in the same way as his own proper goods are: in short, that in the hands of the executor they are to be considered in all respects as his goods, at least as far as concerns executions against him. In order to see whether that position be well founded, I will consider what in law an executor is, and what interest he has in the testator's goods. One definition (and I think a good definition it is) that I find of an executor is, that he is one to whom a testator has given his goods, chattels, and personal estate, for the purpose of paying all his debts: and in Wentworth's Office of Executors, p. 4, it is said, that "The naming of A. and B. executors is by implication a gift or donation unto them of all the goods and chattels, credits and personal estate of the testator; and the laying upon them an obligation to pay all his debts, and making them subject to every man's action for the same;" and this, that is, the payment of his debts, being the purpose for which the goods are given, his interest in the goods is not the same as in his own goods: the reason given is, that he hath them not in his own right, but in the right of another; and that "by law he is but the minister and dispenser and distributor of these goods." 9 Co. Rep. 88. b; Wentw. 88. That of this there can be no doubt, we need but look into the entries of judgments against executors, and the writs of execution upon those judgments, which are to levy so much of the goods of the testator in his hands to be administered. This shows that the law considers those goods differently from his own goods; it is not to levy so much of his goods, which it would have been, if upon their coming into his hands the law had considered them as his, — but it is to levy of the goods of the testator, considering them, in his hands, still as the testator's. If they are not so to be considered, but as the goods of the executor, it seems that the writ of *fieri facias*, &c. *de bonis testatoris* cannot be executed: but inasmuch as they are in law the testator's, he (the executor) cannot devise them. If he die intestate, the goods of the testator vest, not in his administrator, but in the administrator *de bonis non* of the testator; if he commit felony or treason, although he forfeit his own goods, yet those which he has as executor are not forfeited: for the law, and for the principle upon which the law is founded, I cannot do better than refer to Wentworth's Office of Executors, pp. 85, 86, 87, 88; and there we find (p. 86) a passage directly

applicable to the point now before us: "Whereas a man's goods stand liable to the payment of his debts, both in his lifetime and after, the goods which a man hath as executor are not to be taken in execution for his own debts, either upon a recognisance, statute, or judgment had against him; and if such an one die indebted, leaving to his executors much goods which he had as executor, these are not assets in his hands, liable to the payment of his debts, but only for the payment of the first testator's debts or legacies. Therefore a *quo minus* brought by an executor, showing that he was not able to pay the king's debt, because the defendant detained from him £100 which he owed him as executor to F. S., was overthrown; for that it could not be intended, saith the book, that the king's debt could be satisfied with that which the plaintiff should recover and receive as executor." And the reason of this difference is stated in page 88. The passage in page 86 is direct; and what the author states to be law appears to be founded on passages in the Year Books, in Plowden and in Lord Coke; and appears to have been adopted by Lord Chief Baron Comyns, in his Digest, 1 Vol. 259 (B. 10) Tit. Administrator. His words are, "Nor shall they be taken in execution for the proper debt of the executor or administrator." Upon the same principle we find in 3 Burr. 1369, that the commissioners of a bankrupt cannot seize the testator's goods in the hands of an executor-bankrupt: but a commission of bankrupt is considered as a statutable execution: and if in law the goods are his goods, they vest in the commissioners, and they are bound to take them. Such being the undoubted law, as to some of the points I have taken notice of, one may fairly be permitted to ask, Why may not the executor devise the testator's goods? Why may not his administrator take them? Why are they not forfeited to the Crown on the attainder? Why are they not liable to be seized under a commission of bankrupt against the executor? The answer and reason is, I think, obvious. It is because they are not his goods: he is only the distributor and dispenser of them for the benefit of the creditors, the legatees, and the next of kin of the testator. To permit him to devise them, to permit his administrator to take them, to permit the assignees, under a commission against the executor, to seize them, and to permit the sheriff, under an execution issued against his goods, to take them, would be to dispose of them for purposes for which he had them not, in a way in which it cannot by law be intended that those purposes will be

answered: and it seems very difficult to assign any reason why the goods of a testator in the hands of an executor, should be privileged from a seizure by the Crown in the case of an attainder of felony, and from a seizure by assignees under a commission, and yet not be privileged from being taken by the sheriff under a *fieri facias* against the executor's goods. On the part of the defendants it has been contended, That if in this case the goods are not considered as the goods of Reid, the husband of the executrix, the doctrine laid down in former cases, in which the executor has been considered as empowered to dispose of the goods of the testator, will be impeached; and it has been argued, That this case is analogous to those cases. There I conceive is the fallacy; and that in the two cases there exists a manifest and material difference: and that the determination in this case for the plaintiffs will not at all impeach the law upon which that line of cases is founded. The power of selling or disposing of the goods of the testator the executor must have: it is necessarily incident to his office: without that power his trust cannot be executed; nor can the purposes for which it is given be answered. Therefore, when he sells, the law intends that he sells the goods of the testator to answer the purposes for which the power of selling was given: and in so doing he does that which is necessary to his authority, and therefore lawful, just, and right. But in the case before us, it is the reverse: it is not necessary for the purpose of discharging the testator's debts, and executing the executor's authority, that the goods of the testator in the hands of the executor should be considered as the goods of the executor, and taken in execution under a judgment to recover a debt due from him. On the contrary, the moment they are taken under this judgment, the power of distributing them for the purposes for which they were given is taken away; and so far is it untrue, that it can be intended that thereby the testator's debts may be paid; that it is most evidently clear that, if suffered, it prevents the possibility of their being paid by the produce of those goods: and the power of distributing them in the way intended by the testator is taken away (and as it is said by law); and so, if it be true, a man is by law compelled to be unjust: for when they are taken in execution for the executor's debt, they are put into another channel: they are applied to a purpose for which they were not given; and the power of doing justice in this respect is taken from the executor.

even if he intend to do it. Surely, it cannot be the operation of law to work such absurdity and injustice under the plea of necessity which clearly does not exist. But cases have been cited, and it was argued for the defendants, That to this purpose is the case in 3 Keb. 839, *Hoyle* v. *London:* That was a "motion to stay execution of goods in the sheriff's hands, being the wife's, as executrix to her former husband, and taken for the present husband's debt; which RAINSFORD, C. J., and JONES, J., denied; because by payment of the debts of the former husband, these goods may be the wife's own; and this Court will not try this on affidavit. And by RAINSFORD, C. J., in *Norden's Case*, *supra*, last term, it was held, that execution against the goods of the executor for debt *in jure proprio* is a *devastavit nolens volens*." The observations upon this case are, first, That whatever was determined was on a summary motion, and by the opinion of two judges only; and, 2dly, That the ground was that the goods might be the wife's own, by having paid debts of the former husband. Therefore it may be fairly inferred, that, unless by something done by the executrix they become hers, they are to be considered as the goods of the testator. Here nothing appears to have been done: and no fact is stated to show that, by the payment of a debt, or anything else, they had become the wife's or her second husband's. But whether the wife's own or not, the Court would not in that case determine on affidavit. This, therefore, they considered as a matter of fact: and here they are not stated to be hers; nor anything done by her to give her a claim to them; and then the Chief Justice alluded to a case which, in the report, is said to be "*supra* last term;" but it is not to be found; and by which a man is guilty of a *devastavit nolens volens*. That the law will consider a man guilty of doing that which is unjust and unlawful as to third persons, and which the law says must be done, and that it is not in his power to prevent, seems most extraordinary, and appears to be the strongest of all reasons for saying that that case, if even there were such an one, cannot be law. I have looked in the preceding term for such a case: there is none there; nor is there in Levinz: but in Sir T. Jones, 88, there is reported, as of that term, a determination of a case of *Norden* v. *Levet;*[1] but in Levinz and Keble the determination is stated as of Trinity Term, 29 Car. II. That case was in error on a *scire*

[1] See this case also in 3 Keble, 778, reported as of Tr. 29 Car. II.: the term but one before *Hoyle* v. *London*.

facias against an administrator, suggesting a *devastavit*. In that case, the administrator having brought an action of trover in right of the intestate, compounded it by an agreement, that the administrator should discharge the defendant in the action of trover; and that the defendant should pay the administrator £650 at a future day. The question was, Whether this was a *devastavit?* and, Whether he should be liable upon this *de bonis propriis?* It came on several times; and at last it was determined, that this was a disposal and conversion to the use of the administrator; and judgment was given for the plaintiff. From the name, the subject, and the time of the determination, I rather think this was the case alluded to by the Chief Justice, and certainly misapplied by him. The motion in the case cited was the first day of Hilary Term, 1677; and only Rainsford, C. J., and Jones, J., were in Court. The case of *Nugent* v. *Gifford*, 1 Atk. 463, proves only that an executor may assign over a mortgage term of his testator; and if he do so, although in payment of his own debt, such assignment is good; and that is founded on the doctrine that an executor may alien the assets of the testator, and when aliened no creditor can follow them; which I admit and say it does not apply to this case; for although he may alien as the distributor of the goods, yet to every other purpose they are the goods of the testator, and so to be considered; and not his goods. The same observation and answer apply to *Jacomb* v. *Harwood*, 2 Ves. Sen. 265; and that case, as far as concerns this cause, proves only that where there are two executors, each may release, pay, transfer, or sell, without the other, any part of the testator's property; which I do not deny. In *Whale* v. *Booth*, Lord Mansfield said, "The general rule both of law and equity is now clear, that an executor may dispose of the assets; and they cannot be followed by the creditors of the testator. *Mead* v. *Ld. Orrery*, 2 Vern. 75; 2 Eq. Cas. Abr. 488. And it would be very inconvenient if the creditors could; for then no one would deal with an executor without examining the whole account of assets. Where the buyer is any way accessory to the contrivance of a *devastavit*, that is a different case; but here it is not suggested; there is no appearance of fraud. The executor might have disputed the first execution; but he consented to it: and I do not see how it then differs from any other alienation. An execution acquiesced under is equivalent to a conveyance." Then the ground of that determination was, that under all the circumstances of that case,

the execution was to be considered as a sale by the executor. If that were the ground, I have given it my answer, as not applicable to the present case: if it were upon the ground contended for in the present case, I say that this special verdict was made for the purpose of reconsidering that case; and reasonably too, when it is recollected that that ground is totally destructive of the purpose for which the power of the executor is given. But it is said, If this be not the law, no man can safely deal with an executor. That I deny; for a determination in this case for the plaintiffs will not decide that a man may not buy the testator's goods, if the executor choose to sell them. It will only decide that a judgment against the executor's goods does not necessarily bind the goods of another person, who gave them to the executor to discharge his (the testator's) debts, and not the debts of the executor. And if it be said that the executor may with this money pay his own debts, and so elude the testator's intention, my answer is, I admit it: It is so because (as I said before) the power of sale is necessarily incident to his office, and the law intends that he will do what is right; but in considering the goods of the testator as necessarily liable to the execution of a judgment against the executor, the law would compel injustice to be done, and consider the act as unjust, as it considers the execution which it compels, and which the executor cannot prevent, as a *devastavit* by him. A question may be put, How the sheriff is to distinguish between the goods of the executor and the goods of the testator? Here that question cannot be put; because the sheriffs were informed and had notice that these goods were the goods of the testator, and not the goods of the executor. But I will meet the objection in its full force. The sheriff in this, as in many other cases, must act at his peril: so say Dalton, 146, and Gilbert, in his Treatise on Execution, p. 21. Dalton, 146, in inquiring into the duty of a sheriff, where there is a doubt respecting the property of the goods, says, "But the safest and wisest course for the sheriff or officer is, to inquire by a jury in whom the property of the goods is; or else not to take in execution, or not to meddle at all with, any such goods as shall not plainly appear to them to be the proper goods of the defendant; for it seemeth that the officer is bound at his peril to take knowledge whose the goods be, or at least that they be the proper goods of the defendant: but being found by the jury, that excuseth the sheriff." Gilbert, 21, says, "The sheriff is bound, at his peril, to

take only the goods of the defendant; and if he doubt whether the goods shown him be the defendant's, he may summon a jury *de bene esse*, to satisfy himself whether the goods belong to the defendant or not. This will justify him in returning, that the defendant has no goods within his bailiwick; and mitigate damages in an action of trespass, if the goods seized should not happen to be the defendant's." If this would be a sufficient answer in the mouth of the sheriff, what are we to say to cases of a much severer line of justice, — cases, where a sheriff is considered as a tortfeasor by relation, — cases of bankruptcy? In the present case, upon information given to the sheriff that the goods were the goods of the testator, unappropriated by the executor, and on which he had no demand, he might have summoned a jury; and had the jury found them to be the goods of the testator, not of the executor, he would have been justified in returning *nulla bona*. Upon these grounds it seems to me that the goods of the testator, upon the facts stated in this special verdict, were not in law the goods of the executor liable to an execution against him; but at the time when the *fieri facias* against the goods of the testator was delivered to the sheriffs, continued and were the goods of the testator, liable to the execution against his goods; consequently that the execution delivered to the sheriffs against the goods of the executor, did not bind the goods in his hands that remained unadministered; but when they received the writ, to levy the debt of the goods of the testator, there were goods which they might have taken in execution of that writ.

In this way of considering the question there is no occasion for me to enter into a head of argument much discussed at the bar, how far these goods, being vested in the executrix, are, in consequence of the marriage, liable to be taken in execution for the debt of her husband; as, in my opinion, this action would have been maintainable had the husband been the executor, and not merely the husband of an executrix. Nor do I consider the difference in point of law, whatever it may be in point of justice, that is made by the notice given to the sheriffs, that the goods were the testator's; because if my opinion be right, the sheriffs must, at their peril, execute the writ, and make a true return. In this case they have not so done, as they have returned *nulla bona* to the *fieri facias* against the goods of the testator, when there were goods of the testator which they might have taken in execution of

the writ. Therefore I am of opinion that, such return being false, the action is well supported, and that the plaintiffs ought to have judgment.

ENGLISH NOTES.

Among the more recent authorities for the proposition that an execution creditor cannot take in execution goods in the possession of the judgment debtor in *autre droit* may be mentioned, *Re Morgan, Pillgrem* v. *Pillgrem* (C. A. 1881), 18 Ch. D. 93; 50 L. J. Ch. 834; *Hancock* v. *Smith* (C. A. 1889), 41 Ch. D. 456; 58 L. J. Ch. 725. To these cases may be added *Ex parte Butcher, Re Mellor* (C. A. 1880), 13 Ch. D. 465; where it was held, that the carrying on of a business, in which the testator had been a partner, by two of the three executors and trustees who were authorised by the will so to do, was not, under the circumstances, a conversion of certain trade machinery which was the sole property of the testator under the partnership articles; and also that such machinery was not within the reputed ownership clause.

There have, however, been cases in which it has been held that by reason of lapse of time creditors were entitled to assume, and to deal upon the footing, that executors were beneficially entitled to the assets of their testator, and to levy execution for the debts of the executor: *Ray* v. *Ray* (1815), 14 R. R. 255, G. Coop. 264 (cited in note p. 218 *supra*); and it has also been held as an *a fortiori* conclusion, that the assets of a testator in the hands of an executor have passed under the reputed ownership clause: *Kitchen* v. *Ibbetson* (1873), L. R., 17 Eq. 46; 43 L. J. Ch. 52.

Where an executrix had treated the goods of the testator as her own, and afterwards married, and then treated the goods as her husband's, she was not allowed as executrix to set up the rule of the principal case in an execution against the husband: *Quick* v. *Staines* (1798), 4 R. R. 801, 1 Bos. & P. 293.

AMERICAN NOTES.

The principal case is cited by Mr. Schouler (Executors & Administrators, § 352, note), and by Redfield (2 Wills, p. 210.) The doctrine of *Whale* v. *Booth*, 4 T. R. 625, *n.*, that the representative's sale of the decedent's assets for the payment of his own private debt is not invalid although the creditor knew the facts, is denied in this country. *Carter* v. *Manuf. Bank*, 71 Maine, 448; *Scott* v. *Searles*, 15 Mississippi, 498; *Smartt* v. *Watterhouse*, 6 Humphrey (Tennessee), 158.

Section VIII. — *Rights inter se of next of Kin, &c.*

No. 27. — In Re BLAKE. JONES *v.* BLAKE.

(C. A. 1885.)

RULE.

The practice of the old Court of Chancery, by which every person interested in the administration of the estate of a deceased person was entitled, as of course, to a decree for administration by and under the direction of the Court, is put an end to by the Rules of the Supreme Court of 1883; and the Court has now full discretion to refuse such a general decree, or to limit the decree in any way, and also to make the plaintiff pay the costs of any application for administration, or of any administration proceedings (limited or otherwise) which may have been ordered upon such application.

In re Blake. Jones v. Blake.

29 Ch. D. 913; s. c. 54 L. J. Ch. 880.

Appeal from a judgment of Kay, J.

The question in the case arose upon Ord. LV., Rule 10, of the Rules of the Supreme Court, 1883, which is as follows: "It shall not be obligatory on the Court or a Judge to pronounce or make a judgment or order, whether on summons or otherwise, for the administration of any trust, or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order."

Susanna Blake, by her will dated the 22nd of August, 1882, after giving certain pecuniary and specific legacies, gave and devised her residuary real and personal estate to trustees, upon trust for sale and conversion, with power, at their discretion, to postpone the sale, and out of the proceeds to pay to Henry Blake, in the events thereinafter mentioned, £3,000, and to divide the ultimate residue into six shares, to be paid to the persons therein named, and in the manner therein mentioned. Susanna Blake died in June, 1883.

No. 27. — In re Blake. Jones v. Blake.

Part of the testatrix's residuary real estate consisted of certain landed estate in Norfolk. The trustees advertised these estates for sale in lots by auction. Two of the persons (one of these being an infant appearing by her next friend), claiming to be entitled respectively to one-sixth in the residuary estate of the testatrix, took out an originating summons, by which they asked, — 1. That the defendants, the trustees, might be restrained from selling the real estate of the testatrix except under the direction of the Court; 2. An account of what the outstanding estate consisted, particularly in respect of what was due from the estate of her late husband, and for directions as to what steps should be taken to realise the same; 3. An account of the liabilities of the testatrix's estate in respect of her late husband's estate; 4. That the trustees should abstain from paying a conditional legatee except with the leave of the court; 5. If, and so far as should be necessary, for general administration.

Kay, J., declined to make any order, and dismissed parts 1 and 4 of the application with costs, and the rest of the summons without costs.

The plaintiffs appealed.

After argument, the following judgments were pronounced: —

Cotton, L. J. This is an appeal from a decision of Mr. Justice Kay, who, on an originating summons taken out by two of the parties interested in the residuary estate of Susanna Blake, declined to make any order at all. As regards one part of the order asked for, he made the applicants pay the costs, and as regards the rest of it refused to make any order, but made no order as to costs. Now, of course, in former days, if any one interested in a residuary estate had taken out a summons — if there could have been such a thing then — to administer the estate, or had filed a bill for that purpose, it would have been a matter of course to grant the full decree for the administration of the estate; and the Court was also hampered in this way, that not only had a party interested a right to require such a decree, but the Court, even if it thought the questions were really questions which required decision, but might be decided by some only of the accounts and inquiries which formed part of the administration decree, could not restrict the accounts and inquiries to that which was necessary in order to work out the question. But Rule 10 of Order LV. is this. [His Lordship read it, and continued:] Now, where there are questions which cannot properly be determined without some accounts and

inquiries or directions which would form part of an ordinary administration decree, then the right of the party to have that order is not taken away, but the Court may, if it sees that there is no question at all to be decided, refuse to make an order altogether; or it may, if it thinks there are questions which require adjudication, restrict the order simply to those points. That is the result of Order LV., Rule 10. Then we have Order LXV., Rule 1, which says. [His Lordship read it, and continued:] Now we must read those two rules together, and we find this, — that if a party comes and insists that there is a question to be determined, and, for the purposes of determining that question, asks for an administration decree, then the Court cannot refuse that, unless it sees that there is no question which requires the decision of the Court. But then Rule 1 of Order LXV. puts the party who applies for such an order and insists upon it in this position, — that if it is found out that what has been represented as the substantial question requiring adjudication, is one which was not substantial, or that the applicant was entirely wrong in his contention as to that particular matter, the Court can, and in my opinion ought, ordinarily to make the person who gets that decree which was not necessary pay the costs of all the proceedings which are consequent upon his unnecessary or vexatious application to the Court. Sometimes it would be vexatious; sometimes it would be merely unnecessary. In my opinion, if parties will come and wrongfully ask the Court for an administration decree or a part of it, then they ought, in the end, when it is found it is entirely unnecessary, — or unnecessary, I will not say "entirely," — to be made to pay the costs. The costs in each case will of course be within the discretion of the Court; but that, in my opinion, is the rule on which the Court ought to proceed so as to check unnecessary, and much more to check vexatious, litigation.

Now, in the present case, I am of opinion that Mr. Justice Kay was quite right in regard to the dismissal of the portions of the summons which he dismissed with costs, — that is, the portions which refer to staying the sale of the estate. There are landed estates in the county of Norfolk which are left to the trustees with what is really a trust for sale, because they were authorised and directed to sell, with a discretionary power of postponing that sale; and they are proceeding, having exercised their judgment, to sell at once, without any longer postponement. In my opinion, it would be contrary to principle to interfere with the discretion of

the trustees in the matter. They have considered the matter, and, having regard to the circumstances of the case, they say they consider that it would be proper to sell. In my opinion, it would be perfectly wrong to interfere with the discretion of the trustees; and I think the order was right dismissing the application with costs. And also I think, as regards the fourth claim, as to the legacy payable to Henry Blake, there is no ground shown for any restraint on the executors in paying the legacy when it becomes payable.

As regards the other matters raised by the summons, there seems to be a question. Whether the plaintiffs are right or not we cannot now say. [His Lordship then dealt in detail with the question raised, and continued:] I think we have no right to refuse to direct inquiries as to these questions; but it will be hereafter a question for the Court to decide, whether the plaintiffs reasonably asked for these inquiries, or whether they were wrong in this litigation, and whether they ought to pay the costs.

That being so, what we propose to do is to make a modified decree. Lord Justice FRY has prepared, and will read what the terms will be, and as regards the costs of this appeal they must be dealt with when the action is decided, — that is to say, they will be costs in the action.

LINDLEY, L. J. I take the same view. The decision of Mr. Justice PEARSON, which Mr. Robinson called our attention to (*In re Wilson, Alexander* v. *Calder*, 28 Ch. D. 457, 54 L. J. Ch. 487) appears to me to be substantially correct, subject to one qualification. Care must be taken not to give countenance to the notion that by taking out a summons in the name of an infant plaintiff, who may be residuary legatee, or interested perhaps in a very small portion of the estate, an administration decree may be got, as a matter of course, as it used to be. I hope that state of things is gone, and gone forever; it was one of the greatest scandals of the profession; it is struck at, and I hope it is struck at most effectually, by means of Order LV., and especially by Order LXV., as to costs; because, subject to the provisions of this rule with regard to executors and trustees, the costs of administration actions, whether instituted by next friends of infants or by any one else, are in the discretion of the Court, and the Court will deal with them in the proper manner, and if it finds (as, for anything I know, it may be found here) that these modified inquiries which we think ought to be made are really unnecessary, Mr. Justice KAY can make the plaintiff and next friend of the infant pay all

costs incurred, as well as the costs of the appeal. I think, having regard to the evidence which we have heard, and above all to the trusts and discretions vested by the will in these gentlemen, the trustees and executors, the view taken by Mr. Justice KAY as to that part of the summons which related to the sale of the estates was perfectly right. I think he would have been wrong to have taken any other view; and in dismissing that part of the summons with costs, I think he did that which was perfectly just and proper. I think he went a little too far in making no order at all, for it does appear that it may be important (I do not say that it is, but it may be important) that there should be for the protection of the infant, and everybody else, certain limited inquiries. That is possible. Those limited inquiries are or may be essential to the due administration of the estate, and there will be a modified inquiry at the risk of those who want it. It is at the risk of those who insist upon it. That need not be expressed in the order. Those inquiries ought to be made. If it turns out that they were necessary and beneficial and proper, then those who asked for them will get the costs. If the contrary turns out, they will have to pay the costs; and the costs of the appeal, being made costs in the action, will also be in the discretion of the Judge when the case comes on for his reconsideration. The actual form of the order will be mentioned by Lord Justice FRY. It is in substance what has been foreshadowed, the inquiry as to the outstanding estate.

FRY, L. J. I am entirely of the same opinion. In my view, the recent orders do not entitle the Court to refuse to determine questions which are really raised between persons interested in the estates of the deceased testators or intestates. The object of the orders is to prevent the general administration of the estate when the questions in controversy can otherwise be properly determined. If they can be more properly determined by an action brought against a third person, probably it would be right to direct them to be settled in that manner. If they can be more properly determined by a limited administration, — that is to say, by directing particular inquiries or accounts, — then it is the duty of the Court to determine them in that method. But it is not the duty of the Court, in my view, to try the questions under the view of ascertaining whether an administration decree ought to be pronounced; and I am a little apprehensive that in this case the evidence has approached the trial of the questions, rather than been directed to show whether the questions exist, which are the

only relevant questions before a decree or order is made. It must be borne in mind that all these applications are now at the risk of the persons who make them. The 65th Order has provided that the costs of the administration action shall be in the discretion of the Court, and I have no doubt that the Court will know how to exercise that discretion, and will inquire whether in this present instance the inquiries which we are now about to grant have been or have not been beneficial to the estate. If they have been, no doubt the Court will allow the costs out of the estate. If it thinks otherwise, it will know upon whom to saddle the costs of the inquiries. Like Lord Justice LINDLEY, I am not inclined to hold that the mere fact of one of the litigants being an infant requires the Court to pronounce a general administration decree. If that is the view expressed by Mr. Justice PEARSON, I respectfully dissent from it, and I feel no difficulty as to the point which appears to have created some difficulty in his mind. He says he does not know how he can satisfy himself whether it would be for the interest of the infant that the estate should be administered, or, rather, whether the estate requires administration. There is an old inquiry familiar to us under the old practice in administration decrees, — namely, whether the continuation of a particular suit was or was not for the interest of the infant; and such a question, therefore, it appears to me, may, if necessary, be answered before any administration decree is pronounced.

In the present case I think we shall do all that is needful if we direct the following inquiries. [His Lordship then read the inquiries.]

Appeal dismissed with costs as to parts 1 *and* 4 *of the summons; costs of the remaining part of the summons on appeal and in the Court below to be costs in action.*

ENGLISH NOTES.

Where the determination of a point of law would have governed the right of a creditor to succeed, it was held that the rule in the principal case applied; but that if the representatives did not admit assets, an administration order must be made: *Re Powers. Lindsell* v. *Phillips* (C. A. 1885), 30 Ch. D. 291.

A direction contained in a will to have the estate administered by the Court, although a material element for the consideration of the Court, does not take away the discretion: *Re Stocken. Jones* v. *Hawkins* (C. A. 1888), 38 Ch. D. 319; 57 L. J. Ch. 746.

No. 28. — ELLIOTT *v.* DEARSLEY.

(C. A. 1880.)

RULE.

LEGACIES are payable primarily out of personal estate; and where, by implication, real estate is also charged with the payment of the legacies, the presumption is that the real estate is intended to be charged in aid only of, and not so as to exonerate, the personalty.

The direction to pay mortgage debts out of a mixed fund does not lead to the inference of a "contrary intention," so as to prevent such debts from being, by the operation of Locke King's Act (17 & 18 Vict. c. 113, &c.), thrown primarily upon the mortgaged property.

Elliott v. Dearsley.

16 Ch. D. 322.

C. E. Elliott, by will dated the 10th of July, 1866, after specifically disposing of various parts of his property, and devising certain real estates to trustees upon trust to allow his wife to receive the rents during her widowhood, gave "the rest and residue" of his real and personal estate to trustees upon trust to sell, collect, or otherwise convert the same into money, and directed that they should stand possessed of the proceeds "upon trust thereout in the first place to pay my debts, including debts due upon mortgage of any of the lands, hereditaments, or other property the enjoyment whereof is hereinbefore secured to my wife during widowhood, also my funeral and testamentary expenses, and the costs and charges of proving and executing this my will, and upon trust to invest the residue of the same moneys" in manner therein mentioned. He then directed his trustees to pay the income of the residuary fund to his wife during her widowhood, and after her decease or second marriage he directed that such part of the fund as might by law be given to charitable purposes should be employed for the charitable purpose therein mentioned, and as to the residue of the fund he bequeathed it to his wife absolutely, subject to the payment of certain life annuities. In a subsequent part of his will he appointed

No. 28. — Elliott v. Dearsley.

his wife and three gentlemen his executors, and gave to each of the three the sum of £250 if he should accept the trusts.

The testator died in March, 1874. Some of the real estates comprised in the residuary devise were subject to mortgages, and among other questions the points now arose how those mortgage debts and the three legacies of £250 each ought to be borne as between the proceeds of the real estate and the personalty, which was all pure personalty.

The case was heard before Mr. Justice FRY on the 7th of April, 1879.

Glasse, Q. C., and S. Dickinson, for the plaintiff.

North, Q. C., and Laing, for the next of kin.

Bristowe, Q. C., and Cracknall, for other parties.

J. Pearson, Q. C., and Simmonds, for the husband of the testator's widow.

Rigby, for the Attorney-General : —

As to the mortgages, *Allen* v. *Allen*, 30 Beav. 395; *Created* v. *Created*, 26 Beav. 621; *Newmarch* v. *Storr*, 9 Ch. D. 12, were referred to; and as to the legacies, Roper on Legacies, Vol. i. p. 631; *Parker* v. *Fearnley*, 2 S. & S. 592; *Warren* v. *Davies*, 2 My. & K. 49; *Kightley* v. *Kightley*, 2 R. R. 224, 2 Ves. Jr. 328; *Roberts* v. *Walker*, 1 Russ. & My. 752; and *Greville* v. *Brown*, 7 H. L. C. 689.

FRY, J. The question I have now to decide arises under the statute usually known by the name of Locke King's Act. The testator directed his trustees to stand possessed of the proceeds of sale of two particular estates, and the moneys which should arise from the sale, conversion, and getting in of his residuary real and personal estate, upon trust thereout, in the first place, to pay any debts, including debts due upon mortgage of any of the lands, hereditaments, or other property the enjoyment whereof was thereinbefore secured to his wife during widowhood, and also his funeral and testamentary expenses and the costs of proving and executing his will. Then the trustees were to invest, and after the death or future marriage of the widow, the trusts of the pure personalty were separated from those of the impure personalty and the proceeds of real estate. The question then arises whether the persons who claim the proceeds of the real estate are exclusively liable to pay the mortgages which existed upon that residuary real estate, or whether, on the contrary, they are entitled to a contribution from the pure personal estate. That question subdivides itself into

two. In the first place, is this provision of the testator within the operation of Locke King's Act, and, in the second place, if it be, has he shown an intention to exclude the operation of that Act? The case appears to be one not covered by authority. No decision having been cited to me which really controls it, I am bound to say the Act appears to me, as it has appeared to other Judges, to be one not very easy of construction. But I find that after the enactment that the heir or devisee of real estate charged with a mortgage shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate, it is further enacted that the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged. In the present case there are two classes of persons, both claiming under the testator, — a class who claim the proceeds of the mortgaged real estate, and a class who claim the proceeds of the pure personal estate. I think that the words I have read apply, and that of the two classes of persons, who both claim through the testator, those who claim the proceeds of the real estate are liable to pay the mortgage on that real estate.

The next question is, Has the testator shown a contrary intention? What he has directed is this, that his debts, including mortgage debts on any of the real estates given to his wife during her widowhood, shall be paid out of the common fund. Now, in the first place, I think a direction to pay debts is not a sufficient indication of a contrary intention. It is quite true that this is not a case coming within the precise terms of the amending statute of the 30 & 31 Vict. c. 39, because that only applies to a direction to pay debts out of personal estate, whereas this is a direction to pay them out of a mixed fund. I think, however, that the principle of the Act applies, and that there is no sufficient indication of an intention that mortgage debts shall be paid out of the mixed fund.

Then it is said that in this case "debts" must include mortgage debts, because the testator says that debts are to include debts due on the mortgage of the property bequeathed to his wife. I am unable to follow that. The testator says that "debts" are to include mortgage debts of class A, saying nothing about class B. It does not seem to me that you can safely conclude from that that

"debts" include mortgages of class B. Therefore I think there is no sufficient indication of a contrary intention, and that Locke King's Act must apply. The mortgage debts on parts of the residuary real estate must therefore be paid out of the proceeds of those estates. I will mention the case again as to the legacies to the executors.

April 9, 1879. FRY, J. The question upon which I reserved my judgment was whether or no the legacies given by the testator to his executors are charged upon the real and personal estate. The testator, after making certain specific gifts, gave all the rest and residue of his real and personal estate upon trust to convert and to hold the proceeds upon trusts, which I need not specify beyond saying that they do not in terms apply to the payment of legacies. And in a subsequent part of his will he gave three legacies to his executors. It was argued that the legacies were not charged on the real estate, for that the reason why the gift of "rest and residue" has been held in many cases to charge them was, that "rest and residue" meant whatever remains after giving effect to the previous gifts, and that this reason did not apply where the gift of legacies followed the gift of the "rest and residue." It appears to me that the reason to which I have referred is not the sole ground on which the Court has proceeded in holding that a mixed fund is charged with legacies. In *Greville* v. *Browne*, 7 H. L. C. 689, the LORD CHANCELLOR says: "For nearly a century and a half this rule has been laid down, that if there is a general gift of legacies, and then the testator gives the rest and residue of his property real and personal, the legacies are to come out of the realty. It is considered that the whole is one mass; that part of that mass is represented by legacies, and that what is afterwards given is given minus what has been before given, and therefore given subject to the prior gift." In other words, the rule seems to be this, that that which in its nature is a charge on part has become a charge or a deduction from the entire mass, and that principle appears to apply whether the legacies are given before or after the gift of the residue. I hold, therefore, that the three legacies are charges on the real and personal estate *pro ratâ*.

The order on further consideration accordingly declared that, according to the true construction of the will, such parts of the testator's real estate as were subject to mortgages passed to the devisees thereof respectively, subject to the mortgages affecting

the same respectively, and that the said mortgages ought not to be paid off out of, nor the said real estates exonerated by, the testator's personal estate, and that the debts of the testator, other than mortgage debts, and his funeral and testamentary expenses, and the costs and charges of proving and executing his will, and the three legacies of £250 each, ought to be paid ratably out of the proceeds of sale of the residuary real and personal estate.

The husband of the widow appealed from the above declarations. The appeal was heard on the 16th of November, 1880.

Simmonds, for the appellant.

I submit that Locke King's Act does not apply where real and personal estate are directed to be converted and the proceeds are made a mixed fund. *Newman* v. *Wilson*, 31 Beav. 33, proceeds on this principle, as appears from comparing it with *Rowson* v. *Harrison*, 31 Beav. 207. If, however, the Court is against me on that, I say that the direction to pay debts out of the mixed fund takes the case out of the Act. It was held under the original Act that a direction to pay debts out of the personal estate took a case out of the Act, *Eno* v. *Tatham*, 3 D. J. & S. 443. Then came the amending statute 30 & 31 Vict. c. 69, which enacted that a direction to pay debts out of personalty should not be taken to indicate a contrary intention. This does not say anything as to the effect of a direction to pay debts out of a mixed fund, and the later statute, 40 & 41 Vict. c. 34, which provides that such a direction shall not indicate a contrary intention, amounts to a legislative declaration that the clause in 30 & 31 Vict. c. 69 did not apply to it. The present will comes under the first amending act, and I contend that the mortgage debts must be borne ratably by the different parts of the mixed fund. As to the legacies, Mr. Justice Fry relied on *Greville* v. *Browne*, 7 H. L. C. 689; but that case did not decide that because the gift of residue made the legacies chargeable on the real estate, they were therefore to be borne by the real and personal estate ratably, and *Blann* v. *Bell*, 5 De G. & Sm. 658, 665, shows that such is not the rule. Mr. Justice Fry appears to have combined the doctrine of *Greville* v. *Browne* with *Roberts* v. *Walker*, 1 Russ. & My. 752; but I submit that *Roberts* v. *Walker* has no application to anything not directed to be paid out of the mixed fund.

Rigby, for the Attorney-General.

Even before the Act 30 & 31 Vict. c. 69, there would be nothing

here to show a contrary intention, so as to exclude the case from Locke King's Act. No doubt there is a direction as to debts, and under the first Act "debts" was held to include mortgage debts; but here there is a direction to pay debts, including mortgage debts on certain specified estates; and the rule *Expressio unius est exclusio alterius* applies. Then as to the mode of paying the legacies, they were charged on the real estate, the word "residue" having that effect, though there are other devises of realty, *Francis* v. *Clemow*, Kay, 435; and the realty and personalty being made a mixed fund, the sums payable out of them ought to be paid ratably, *Allan* v. *Gott*, L. R. 7 Ch. 439.

Simmonds, in reply, as to the mortgages.

James, L. J. As regards the legacies, I cannot follow Mr. Rigby's argument that whenever real and personal estate are thrown together into a mixed fund, everything payable out of them is to be thrown upon them ratably. I remember that *Roberts* v. *Walker*, 1 Russ. & My. 752, was considered at the time to go beyond any case that had previously been decided; but that case went no further than this, that where a testator made a mixed fund, out of which he directed certain things to be paid, then to the extent of the things so mentioned the payment was to be made ratably out of the different parts of the fund. If the testator had only directed legacies to be paid out of the fund, they must be paid ratably, but that would not make debts be payable ratably out of the realty and personalty; the rule of ratable payment does not extend beyond the things which the testator has expressly directed to be paid out of the fund. Here the legacies are no doubt charged on the real estate by force of the word "residue," but there is no direction to pay them out of the mixed fund. There is, therefore, nothing to disturb the ordinary rule that they are primarily payable out of the personal estate. In this respect, therefore, the order appealed from must be varied.

As regards the mortgage debts, I am of opinion that the decision of Mr. Justice Fry was right. The meaning of the Act 17 & 18 Vict. c. 113, c 1, was, that, as between the persons interested in the real and personal estate of a testator, mortgage debts should be borne by the mortgaged estates, which is what a testator generally would say if he could be asked, and the Act provides that the mortgaged estates shall, as between the different persons claiming under the testator, be primarily liable to the payment of the mort-

gage debts unless the testator has signified a contrary intention. It was decided in *Eno* v. *Tatham*, 3 D. J. & S. 443, that a direction for payment of the testator's debts out of his personal estate indicated a contrary intention. But here the testator makes a mixed fund, and directs payment out of it of his debts, including mortgage debts on certain estates which were not to be immediately sold, but not mentioning the mortgages on the residuary estates which were to be sold at once. The reasonable view of his intention is that he considered that the mortgages on the estates which were to be immediately sold would be paid out of the proceeds of the sale of those estates, and that the net proceeds only would go into the mixed fund out of which the estates that were not to be sold at once would be exonerated. The will does not show any intention to exclude the operation of the Act as to the mortgage debts, with reference to which nothing is said.

Cotton and Lush, L. JJ., concurred.

ENGLISH NOTES.

The primary liability of the personal estate for the payment of debts and legacies has been recognised in many cases (*Tower* v. *Lord Rous* (1811), 11 R. R. 169, 18 Ves. 132); and real estates specifically devised are exonerated from a charge introduced by a subsequent clause in a will (*Conron* v. *Conron* (1858) 7 H. L. Cas. 168), unless upon the construction of the will, it appears to have been intended that the charge should have a wider application: *Re Emmerton's Estate, Maskell* v. *Farrington* (1862), 3 De G. J. & S. 338. But where a testator provided "My executors may realise such part of my estate as they may think right and in their judgment to pay the afore-named legacies," the clause was held not to operate as a charge of legacies on real estate: *Re Cameron, Nixon* v. *Cameron* (C. A. 1884), 26 Ch. D. 19; 53 L. J. Ch. 1139.

Before the passing of the series of Acts commonly referred to under the head of Locke King's Act, a direction to pay debts *primâ facie* operated to discharge (as between the devisee and the residue) the real estate specifically devised, where the charges had been created by the testator: — his personal estate having presumably been increased by that amount: *Davis* v. *Bush* (1830), 4 Bli. N. S. 305 and n. But where the personal estate was proved not to have been increased, the real estate remained charged in exoneration of the personal estate (*Loosemore* v. *Knapman* (1853), Kay, 123); unless the charge was created in aid of, and for better securing the payment of a sum secured

by a personal covenant: *Field* v. *Moore* (1855), 7 De G. M. & G. 691. Where however the charge was not created by the testator, the heir or devisee took the property *cum onere*, unless the testator had by adoption made the debt his own: *Scott* v. *Beecher* (1820), 5 Madd. 96; *Earl of Ilchester* v. *Earl of Carnarvon* (1839), 1 Beav. 209.

The correct short title of the Statutes, popularly referred to under the title of Locke King's Act, as provided by the Short-Titles Act, 1892, is "The Real Estate Charges Acts, 1854, 1867, 1877." (17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69, or 40 & 41 Vict. c. 34.)

The Act of 1854 applies to the succession to the real estate of a person dying after the 31st of December, 1855; but provides that "nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made, or to be made before the 1st day of January, 1855." This Statute enacts that, where the lands of which the testator dies seized are charged with any sum by way of mortgage, in the absence of a contrary intention, as between the heir or devisee and the personal representatives, the land, and not the personal estate, shall bear the charge. The republication, after the commencement of the Act, of a will properly executed before that date did not deprive the will of its character of a will "already made" (*Rolfe* v. *Perry* (1863), 3 De G. J. & S. 481); and the contrary intention is to be gathered from the document itself (*Eno* v. *Tatham* (1863), 3 De G. J. & S. 443), or from a series of documents: *Re Campbell*, *Campbell* v. *Campbell* (1893), 1893. 2 Ch. 206; 62 L. J. Ch. 594.

The Act of 1867, which applies to wills only, enacts that a mere direction to pay debts, or all debts, shall not be a sufficient declaration of a contrary intention, so as to exclude the earlier Act in the case of a person dying after the 31st day of December, 1867, and that the word "mortgage" shall extend to a lien for unpaid purchase money. It has been held that a bequest of residue subject . . . to the payment of my trade debts (which "I hereby declare shall be a charge upon my personal estate") entitled the devisee to have title-deeds to land, which had been deposited to secure an overdrawn trade account, redeemed out of the personal estate: *Re Fleck*, *Colston* v. *Roberts* (1888), 37 Ch. D. 677; 57 L. J. Ch. 943.

The Act of 1877 extends the provisions of the earlier Acts, as regards, not only mortgages, but any equitable charge to lands of whatever tenure of a testator or intestate dying after the 31st day of December, 1877, unless the testator shall have signified an intention to the contrary within the meaning of the earlier Acts; and that such contrary intention should not be deemed to be signified by a charge of or direction for payment of debts, upon or out of residuary real and

personal estate, or residuary real estate. A charge created by 1 & 2 Vict. c. 110 § 13 is an equitable charge within the meaning of the Act: *Re Anthony, Anthony* v. *Anthony* (1892), 1 Ch. 450: 61 L. J. Ch. 434.

AMERICAN NOTES.

The general doctrine is here recognised that the personalty is not exonerated from payment of legacies unless such clearly appears to be the testator's intention. Schouler's Executors and Administrators, § 512; *Van Vechten* v. *Keator*, 63 New York, 52; *Hanson* v. *Hanson*, 70 Maine, 511; *Chapin* v. *Waters*, 116 Massachusetts, 146; *Monroe* v. *Jones*, 8 Rhode Island, 526; *Hanna's Appeal*, 31 Penn. St. 57; *Whitehead* v. *Gibbons*, 2 Stockton (New Jersey), 230; *Robards* v. *Wortham*, 2 Devereux (No. Carolina), 179; 22 Am. Dec. 738; *Marsh* v. *Marsh*, 10 B. Monroe (Kentucky), 360; *Cooch* v. *Cooch*, 5 Houston (Delaware), 569; *Arnold* v. *Dean*, 61 Texas, 249; *Wyse* v. *Smith*, 4 Gill & Johnson (Maryland), 296.

The American doctrine is that mortgage debts are presumably payable out of personalty to the exoneration of the land. *Sutherland* v. *Harrison*, 86 Illinois, 363; *Towle* v. *Swasey*, 106 Massachusetts, 100; *Clarke* v. *Henshaw*, 30 Indiana, 144; *McLenahan* v. *McLenahan*, 3 C. E. Green (New Jersey Eq.), 101; *Scott* v. *Morrison*, 5 Indiana, 551; *McCampbell* v. *McCampbell*, 5 Littell (Kentucky), 92; 15 Am. Dec. 48; *Halsey* v. *Paulison*, 37 New Jersey, 205. It is otherwise by statute in New York. *Van Vechten* v. *Keator*, 63 New York, 52, "which seems the fairer doctrine on this subject," says Mr. Schouler (Executors and Administrators, § 512, n.).

This presumption may be defeated by the clear intention of the will that the devisee should take *cum onere*. *Gould* v. *Winthrop*, 5 Rhode Island, 319; *Keene* v. *Munn*, 16 New Jersey Equity, 398; *Lennig's Estate*, 52 Penn. St. 135; *Wisner's Estate*, 20 Michigan, 442.

No. 29. — COOPER *v.* JARMAN.

(CH. 1866.)

RULE.

WHERE an intestate has contracted with a builder for the erection of a house on his freehold land; — although the contract could not have been specifically enforced by the builder against the estate, and although the payment of damages would not have caused so much loss to the personal estate as the carrying out of the contract, — it is the duty of the administrator to carry out the contract, and to pay the contract price out of the personal estate, so that the heir gets the benefit.

Cooper v. Jarman.

36 L. J. Ch. 85 (s. c. L. R., 3 Eq. 98).

The points decided sufficiently appear from the judgment of

[Lord] ROMILLY, M. R. This is a suit for the administration of the estate of John Boykett Jarman, who died intestate in the year 1864. The question which arises on the present occasion is, whether the sum of £779 19*s.* should be allowed to the legal personal representative. The facts are as follows: The intestate had during his life entered into a contract with Messrs. James & Robert Lawrence for the erection of a house on a piece of freehold land belonging to him in Short Street, Windsor; the contract bore date the 12th of October, 1863; the house was in course of erection at the date of his death, and the £779 19*s.* had since been paid to Messrs. Lawrence for the completion of the contract by them. The heir-at-law of the testator took out administration to his estate, and paid the sum out of his personal estate. The next of kin contend that this sum ought not to be allowed, and that the heir-at-law must personally bear the expense of completing the house. The ground on which this is insisted on by the next of kin is, that the contract was of such a character that the specific performance of it could not have been enforced against the intestate if he had thought fit to resist it, and that if he had done so, and had stopped the further building of the house, the only remedy which the Messrs. Lawrence could have had against him would have been by an action for damages sustained by the breach of contract of the intestate. There cannot, however, be any question but that the administrator would have been liable in an action brought by the Messrs. Lawrence if he had refused to allow them to complete the contract. The case of *Wentworth* v. *Cock*, 10 Ad. & E. 42; 8 L. J. (N. S.) Q. B. 230, is distinct on this point, where, in an action against the administrator for refusing to receive slate ordered by the testator, the Court of Queen's Bench held, that the action would lie, and that the legal personal representative must receive and pay for goods ordered by the testator. I think that it cannot be law that an administrator is bound to do an injury and inflict damages upon a person with whom the intestate had entered into a contract, and to prevent that person from completing his contract; because, by so doing, he would increase the personal estate of the intestate. There is, as it appears to me, a wide distinction between a case of this descrip-

tion and the case of a contract for the purchase of a piece of land. In that case the estate of the intestate or testator is bound, provided a good title can be made; but if a good title cannot be made, then there is no contract, and no action would lie against the representative of the intestate, because the contract necessarily is inferred to have been to buy land with a good title, in the absence of any express stipulation. And if the deceased person had contracted to buy land with any particular title in a manner to bind him, the contract would bind the next of kin. But I have seen no case, and I am unable to believe that any case can be found, where a legal personal representative has been made answerable for performing a contract entered into by the deceased person, and at the time of his death intended to be performed by him, because, according to the peculiar rules of equity relating to the doctrine of specific performance, such a contract could not have been enforced by a suit in equity against the deceased person or against his representative. Here, unquestionably, the intestate had bound himself, as far as possible, during his lifetime. The house had been begun; the building was in progress when he died. If the Messrs. Lawrence had thereupon refused to go on with the building, an action would have lain against them at the suit of the administrator, and it cannot, in my opinion, be law that the next of kin should be entitled to call upon the heir-at-law to resist the Messrs Lawrence, and hinder them from coming on the land, and prevent them from completing the contract, because, in the opinion of the next of kin, the damage sustained by the contractors would possibly be less than the amount to be paid them for the fulfilment of the contract. Besides which, if I am so to hold, no rule could be adopted which would be certain. The administrator could not safely pay the amount of damages claimed by the contractors for the loss sustained by their breach of the contract. If he did, the next of kin might successfully say that he paid more than a jury would have allowed; and if he resisted, and went to trial at law, and thereupon the amount of damages found by the jury, together with the costs of the suit, should exceed the amount to be paid for the completion of the contract, could the legal personal representative be allowed to deduct this in taking the accounts? I apprehend, clearly not; the administrator, in my opinion, has a clear duty to perform. The moral duty is distinct. It is to prosecute the contract entered into by

the intestate. The legal duty in this instance, as I believe it is in all cases where it is fully understood and examined, is identical with the moral duty. I am therefore of opinion that the sum has been properly allowed in the accounts of the administrator.

ENGLISH NOTES.

Notwithstanding the *dicta* towards the end of this judgment, it is apprehended, although the point does not seem to have been yet actually decided, that there must be a contract binding upon the deceased. *Inskip's Case* (No. 2) (1861), 3 Giff. 359.

The liability of the executor in such a case does not appear to be affected by the Real Estates Charges Acts, 1854, 1867, 1877 (Locke King's Act, &c.).

AMERICAN NOTES.

The principal case is cited as authority in 3 Redfield on Wills, p. 396. The executor may complete a contract of the testator to purchase land, without waiting for suit to be brought. *Denton* v. *Sanford*, 103 New York, 607.

The question of contracts of the decedent which the representative is bound to carry out is learnedly discussed in *Dickinson* v. *Calahan's Adm'rs*, 19 Penn. St. 227, and the distinction is approved that the estate is not bound to complete such as involve a mere personal relation, and it was held that the administrator was not bound to complete the decedent's contract to deliver all the lumber sawed at his mill, for five years, not to be less than a stipulated amount in all, disapproving *Wentworth* v. *Cock*, 10 Ad. & Ell. 42; *Walker* v. *Hull*, 1 Lev. 177, and even *Quick* v. *Ludborrow*, 3 Bulst. 29.

The contrary view was taken of a contract to deliver coal, in *Smith* v. *Wil. Coal, &c. Co.*, 83 Illinois, 498, approving *Wentworth* v. *Cock*, *supra*.

No. 30. — DAVID *v.* FROWD.

(CH. 1833.)

RULE.

WHERE an intestate's estate has been distributed, under a decree in an administration action, among persons found by the report to be his next of kin; another person claiming to be next of kin, and who had not been aware of the proceedings, may sue the persons who have shared in the distribution for restitution; but will be bound by the accounts taken in the original suit.

David v. Frowd.

1 My. & K. 200 (s. c. 2 L. J. Ch. 68).

David Williams of Llanbletham, in the county of Glamorgan, died intestate in the month of January, 1828, being possessed of property to the amount of £4000 and upwards. On the 21st of February, 1828, the defendant, Edward Frowd, who was a solicitor, and Jane his wife, who claimed to be one of the intestate's next of kin, took out administration to the intestate's estate. On the 22nd of the same month a bill was filed in the name of Ella Church, a sister of Mrs. Frowd, and other parties also claiming to be next of kin of the intestate, against the defendant, Frowd and his wife, praying the usual accounts of the intestate's estate, and an inquiry as to his next of kin. The defendants immediately put in answers to the bill, and a decree in the cause was made by consent on the 29th of the same month of February. By that decree the usual accounts of the intestate's estate were directed to be taken, and it was ordered that the Master should inquire who were the next of kin of the intestate, and the decree contained the usual directions in that behalf.

On the 6th of May, 1829, the Master made his report, whereby he certified that he had caused the usual advertisements to be published, calling upon the next of kin of the intestate to come in and prove their claims before him by a peremptory day fixed for that purpose; that in pursuance of such advertisements Ella Church, Jane Frowd, and seven other persons named in his report, had made their claims before him, and he found that these nine persons were the only next of kin of the intestate living at the time of his death. The Master further found, that no creditors had come in; and he made his report as to the accounts of the intestate's estate.

This report was confirmed by an order dated the 22nd of May, 1829; and by an order on further directions, dated the 29th of May, 1829, an apportionment of the intestate's property was directed to be made between the persons found by the Master to be the next of kin. The Master having, in pursuance of this order, made the apportionment, which amounted to £474 16*s.* for each share, an order for payment was obtained on the 10th of August, 1829.

The present bill was filed in December, 1830, by the plaintiff, Mary David, a person ninety years of age, stated to be bed-ridden,

No. 30. David v. Frowd.

and in the receipt of parish relief, who claimed to be the sole next of kin of the intestate, against Frowd and his wife, and the other persons, among whom the intestate's estate had been distributed.

The bill, after stating the above-mentioned proceedings in the suit of *Church* v. *Frowd*, alleged that the plaintiff was the first cousin once removed, and sole next of kin of the intestate; that she had been long resident in the parish of Peterstone, in the county of Glamorgan, but that she was not aware of the death of the intestate until six months after that event took place; that being informed that no one could compel any distribution of the intestate's estate for twelve months after his decease, she took no steps to enforce her claims until February, 1828, when she laid a statement of her case before Messrs. Bassett, solicitors; and that Messrs. Bassett returned to her the papers and documents relating to her claims at the end of ten months, declining to take any steps in her behalf. The bill further stated that the plaintiff was an illiterate person, being unable to read; that she was ignorant, until very lately, of any proceedings having been instituted in this court; that she had never heard of any advertisements from the Master's office, and that no inhabitant of the parish of Peterstone ever took in a newspaper. The bill charged that the plaintiff was not bound by the proceedings in the suit under which the intestate's property had been distributed; and it prayed that the decree and decretal orders in that suit might be reversed; that the plaintiff might be declared to be entitled to the whole of the intestate's personal estate after payment of his debts and funeral expenses; and that the defendants might be decreed to pay to the plaintiff the several shares which had been allotted and paid to them respectively in respect of such estate.

The defendants, by their answers, put in issue the legitimacy of the plaintiff, and submitted that even if the plaintiff were the sole next of kin of the intestate, or one of his next of kin, the decree and decretal orders in the administration suit were a bar to her claims.

It was agreed at the bar that the plaintiff's title, as next of kin, should be admitted for the purpose of arguing the question, whether she was precluded by the decree in the administration suit from claiming the relief sought by the bill. This question having been argued,

Sir John Leach, M. R. It is a matter of surprise to me that this is treated as a case of the first impression. I consider that all the principles, which must govern this case, are well established,

and rest upon clear precedents. The personal property of an intestate is first to be applied in payment of his debts, and then distributed amongst his next of kin. The person who takes out administration to his estate in most cases cannot know who are his creditors, and may not know who are his next of kin, and the administration of his estate may be exposed to great delay and embarrassment. A Court of Equity exercises a most wholesome jurisdiction for the prevention of this delay and embarrassment, and for the assistance and protection of the administrator.

Upon the application of any person claiming to be interested, the Court refers it to the Master to inquire who are creditors, and who are the next of kin, and for that purpose to cause advertisements to be published in the quarters where creditors and next of kin are most likely to be found, calling upon such creditors and next of kin to come in and make their claims before the Master within a reasonable time stated; and when that time is expired, it is considered that the best possible means having been taken to ascertain the parties really entitled, the administrator may reasonably proceed to distribute the estate amongst those who have, before the Master, established an apparent title. Such proceedings having been taken, the Court will protect the administrator against any future claim. But it is obvious, that the notice given by advertisements, may, and must, in many cases, not reach the parties really entitled. They may be abroad, and in a different part of the kingdom from that where the advertisements are published, or from a multitude of circumstances, they may not see or hear of the advertisements, and it would be the height of injustice that the proceedings of the Court, wisely adopted with a view to general convenience, should have the absolute effect of conclusively transferring the property of the true owner to one who has no right to it.

It is for this reason that if a party who has not gone in before the Master applies to the Court after the Master has reported the claimants who have established before him an apparent title, and makes out that he has not been guilty of wilful default in not claiming before the Master, the Court will refer it to the Master to inquire into his claim, and if it be satisfactorily proved, will, in the administration of the estate, give him the same benefit of his title, as if he had originally claimed before the Master. This is every day's practice with respect to creditors. For the same

reason, if a creditor does not happen to discover the proceeding in the Court until after the distribution has been actually made by the order of the Court amongst the parties having by the Master's report an apparent title, although the Court will protect the administrator who has acted under the orders of the Court; yet, upon a bill filed by this creditor against the parties to whom the property has been distributed, the Court will, upon proof of no wilful default on the part of such creditor, and no want of reasonable diligence on his part, compel the parties defendants to restore to the creditor that which of right belongs to him. For this principle I need only refer to the case of *Gillespie* v. *Alexander* before Lord ELDON, 3 Russ. 130, which has been introduced in the argument. There the estate had been apportioned under the order of the Court amongst the legatees, and actually paid to them; except that, one legatee being an infant, his proportion could not be paid to him, but was carried to his account in the suit. After this distribution by the order of the Court, a creditor who had not claimed before the Master established his title, and Lord LYNDHURST, then Master of the Rolls, acting upon the principle which I have stated, directed payment of the creditor's demand out of the fund in court, which had been carried to the account of the infant. Lord ELDON considered most justly, that the share carried to the account of the infant was as much the property of the infant, as if it had been actually paid to him, and that the infant's share was liable to the creditor's demand only in the proportion that the other legatees were liable in respect of the sums which they had received, and to that extent reversed Lord LYNDHURST'S order; thus establishing the principle, that legatees who had received payment under the order of the Court, were bound to refund to a creditor who had never claimed before the Master.

It is argued that there is a distinction between a creditor and a person claiming as next of kin, because a creditor, it is said, has a legal title; the right being equal, there is no distinction in a Court of Equity between a legal and an equitable title. It is not, however, accurate to say that a creditor continues to have a legal title, after the fund has been administered in this court; he has, under such circumstances, lost that title by the administration of the Court, and his only remedy is in a Court of Equity.

It is argued, also, that the case is extremely hard upon the party

who is to refund, for that he has full right to consider the money as his own, and may have spent it, and that it would be against the policy of the law to recall money which a party has obtained by the effect of a judgment upon a litigated title. There is here no judgment upon a litigated title; the party, who now claims by a paramount title, was absent from the Court, and all that is adjudged is, that upon an inquiry, in its nature imperfect, parties are found to have a *primâ facie* claim, subject to be defeated upon better information. The apparent title under the Master's report is in its nature defeasible. A party claiming under such circumstances has no great reason to complain that he is called upon to replace what he has received against his right; complaints of hardship come with little force from the party who seeks to support a wrong.

It must be referred to the Master to inquire whether the plaintiff is the sole next of kin, or one of the next of kin, with liberty to state special circumstances.

Regularly speaking, this inquiry ought to have preceded the discussion upon the right of the next of kin; but for the convenience of the parties, I consented to the course which has been adopted; and I must now add to the inquiry a declaration, that if the plaintiff be established as the sole next of kin of the intestate, the defendants are bound to refund to the plaintiff the several sums which they have received under the order of the court in the suit of *Church* v. *Frowd*, and that if the plaintiff be established as one of the next of kin of the intestate, the defendants are bound to repay to the plaintiff the amount of the sum which the plaintiff in that case shall appear to be entitled to. The plaintiff, if next of kin, is bound by the accounts which have been taken in the suit of *Church* v. *Frowd*.

ENGLISH NOTES.

Where creditors or persons beneficially entitled fail to send in their claims within the time fixed by advertisement, they are excluded from the benefit of any judgment or order for an account. Rules of the Supreme Court, 1883, Order 55. Rule 44. So long, however, as there are assets undistributed, a creditor may come in (*Re Metcalfe, Hicks* v. *May* (C. A. 1879), 13 Ch. D. 236; 49 L. J. Ch. 192); but is only entitled to a proportionate share of the undistributed assets: *Gillespie* v. *Alexander* (1827), 3 Russ. 130. Where, however, the creditor, after notice, delays to make his claim, he may be excluded from the benefit of the order: *Cattell* v. *Simons* (1845), 8 Beav. 243.

No. 1. — Edwards v. Freeman. — Rule

Notwithstanding the above-mentioned rule of procedure, where creditors are known, but some do not make a claim, the claiming creditors will only be entitled to a proportionate part of the fund (*Ashley* v. *Ashley* (C. A. 1877), 4 Ch. D. 757; 46 L. J. Ch. 322); and the share of a non-claiming creditor will be carried over to a separate account: *Re Macdonald, McAlpin* v. *Macdonald* (1889), 58 L. J. Ch. 231. The rule of procedure does not affect the creditor's right to call upon legatees to refund: *March* v. *Russell* (1837), 3 My. & Cr. 31.

The principal case gave effect to the claim of a person having a title paramount to that of the persons among whom the fund was distributed; but the right is the same where the new claimant seeks to establish his right to a share only of the fund distributed: *Sawyer* v. *Birchmore* (1836), 2 My. & Cr. 611.

ADVANCEMENT.

No. 1. — EDWARDS *v.* FREEMAN.

(CH. 1727.)

RULE.

COVENANT by marriage settlement to settle land, out of which a portion for a child is to be raised, is an advancement by portion to such child within the meaning of the Statute of Distributions (22 Chas. II. c. 10 § 3), and to be taken account of accordingly in order to equalise the shares of the children.

The intestate, having by settlement upon his marriage with his former wife, covenanted to settle land so as to secure, in the event of there being but one daughter of the marriage, a portion of £5000 payable at eighteen or marriage, and having died leaving one daughter of that marriage about eleven years of age, and a son and daughter by a subsequent marriage: *held*, that the £5000, in the event of its becoming payable under the settlement, must be brought into account as an advancement of a portion within the Statute.

Edwards v. Freeman.

2 Peere Williams, 435.

The plaintiffs brought their bill to have a distributory share of the personal estate of Richard Freeman, Esq.; he dying intestate, and leaving a widow, the defendant Anne Freeman, and one daughter by his first wife, (viz.) the plaintiff Mary, and a son and a daughter by the second wife, (viz.) Richard and Anne.

The case was thus: Richard Freeman, the father, on his marriage with his first wife Elizabeth, one of the daughters of Sir Anthony Keck, by articles dated the 19th of February, 1693, in consideration of the marriage and of £4000 portion, covenanted for himself and his heirs, with Sir Anthony Keck, that he the said Richard Freeman or his heirs, would within six months after request by Sir Anthony, his heirs, executors or administrators, settle all his lands in Battsford, &c., in Gloucestershire, to the use of himself for life *sans* waste, remainder to trustees to preserve contingent remainders, remainder to Elizabeth his then intended wife for her jointure and in bar of dower, remainder to the first &c. sons of the marriage in tail male successively, remainder to trustees for five hundred years to raise portions for daughters, if but one daughter £5000, if more £6000, payable at eighteen or marriage, which should first happen, and to raise maintenance for such daughters till their portions should become payable, £80 per annum if but one daughter, and —— per annum if more than one.

Mr. Freeman covenanted, that these premises, which were but £366 per annum, were £500 per annum, excepting parliamentary taxes, and gave a bond in £8000 penalty for the performance of the articles.

The marriage took effect, of which there was issue only a daughter, the plaintiff Mary, and Elizabeth the wife died soon after the birth of the daughter, no settlement having been made pursuant to the articles.

About three years afterwards Mr. Freeman married the defendant Anne Marshal, and settled great part of the lands comprised in the articles, £230 per annum, without giving any notice of the articles, and had issue the defendants Richard and Anne.

The 20th of November, 1710, Mr. Freeman died in Ireland, intestate, and his widow the defendant Anne Freeman took out administration to him, the plaintiff Mary being then eleven years

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old; who having since intermarried with the plaintiff Walter Edwards, they brought their bill for their distributory part of the intestate Mr. Freeman's personal estate, but did not pray the £5000.

The defendants by answer set forth the articles and bond, and insisted, that thereby the plaintiff Mary had a portion of £5000 secured to her, and ought not to have any part of the personal estate of the intestate her father, unless she would bring that into hotchpot, to the intent the estate of all the children might be made equal.

This cause having been often argued, was at length decreed by the Lord Chancellor KING, with the assistance of the Lord Chief Justice RAYMOND, Master of the Rolls, and Mr. Justice PRICE, who all agreed that this £5000 should be brought into hotchpot.

Mr Justice PRICE, though not present at the resolution, did acquaint the LORD CHANCELLOR with his opinion.

Sir JOSEPH JEKYLL, Master of the Rolls: 1st, I do not take this £5000 to be a debt due from the intestate, or to be paid out of his personal estate; for though there is a bond for performance of covenants from him, yet there is no covenant for the payment of the portion; the covenant is to settle lands, and to raise a term of five hundred years out of them for securing the portion of £5000.

2dly. Though this settlement is only to be made on request, and none has been made, yet this cannot prejudice the party to whom the portion is due, for the covenantee is only a trustee, and the neglect of such shall not prejudice the *cestui que trust;* which here is the stronger, forasmuch as the *cestui que trust* was an infant.

3rdly. Supposing there was a covenant to settle absolutely within six months, and it were broken, so that damages might at law be recovered; nay, though there had been a covenant to pay the portion, yet the party to whom the portion is due, ought to come upon the land first, and in case of a deficiency there, then resort to the personal estate; for the articles to settle particular lands are in equity a settlement, and from the time of making these articles Mr. Freeman became a trustee of the lands, a trustee for the trusts in the articles.

It has been objected that had there been a covenant to pay the portion, this had been like a mortgage, and the personal estate should have exonerated the land.

Resp. This is not like a mortgage; in the case of a mortgage, the land is only a pledge for the money borrowed, but here the

original[1] agreement was that the portion should be raised out of that very land. And for this I would only cite the case of *Coventry* v. *Coventry*, 2 P. Wms. 222, where the late Earl of Coventry covenanted on his intermarriage with the Countess Dowager, that he would, according to the power given him by his family settlement, *or otherwise*, settle lands of £500 per annum on his then intended wife. And on a bill brought by the Countess Dowager, to have this jointure made good to her, it was contended, that the Countess ought to resort to the personal estate, for that here were no particular lands covenanted to be settled, and the covenant was to settle lands of £500 per annum pursuant to the powers, *or otherwise;* but decreed by the Lord Chancellor Macclesfield, with the assistance of the Judges, that this covenant did bind the land, and that the words *or otherwise* were intended in favour of the jointress for her further security, in case the power should fail or prove deficient; and if so, they were not to be made use of to her prejudice.

So that I do not think this is to be considered as a debt which by lessening the personal estate would diminish the distributive shares, for this £5000 ought to be made good out of the real estate contracted to be settled, supposing there is enough left unsettled; but it must be agreed that the land actually settled by Mr. Freeman on his second marriage without notice, though it be a breach of trust, yet such second settlement is good, and must take place against the articles, no more lands being liable to the articles than are omitted out of the settlement on the second marriage.[2]

As to the second point, whether the £5000 portion thus secured by the articles to the plaintiff Mary is to be brought into hotchpot, before she shall come for any part of the personal estate?

I am of opinion it ought; the end and intent of the Statute of Distributions being to make the provision for all the children of the intestate equal as near as could be estimated; and therefore this £5000 ought to be collated into the personal estate. The design of the Act was to do what a good and a just parent ought for all his children; nor is this equality to be confined to such estates as children claim by voluntary settlements only, for (generally) pro-

[1] *Vide Howel* v. *Price*, 1 P. Wms. 294; *Evelyn* v. *Evelyn*, 2 P. Wms. 664.

[2] But if the parties contracting for a second settlement have notice of the first, such notice will bind the issue of the second marriage when they come into esse. *Le Nere* v. *Le Nere*, 1 Ves. 64; 3 Atk. 646; *Toulmin* v. *Steere*, 3 Mer. 210.

visions for children are by settlements made on marriage, which alone is a consideration; and the Statute would be of little effect if it were to extend to make a child bring only that into hotchpot which such child took by a voluntary settlement; marriage settlements are most frequent and *ad ea quæ frequentius occurrunt*, &c.

I admit, that a provision for a child by will (for a case may happen, that as to *part* of the personal estate the testator may die intestate) is not an advancement to be brought into hotchpot (*Cowper* v. *Scott*, 3 P. Wms. 125); neither shall land given by a will to a younger child; for a provision to be brought into hotchpot must be such as is made by an act in the intestate's lifetime, and not by will (*Walton* v. *Walton*, 14 Ves. 324); any land provision to the heir-at-law of the intestate, however given, is privileged by the Statute of Distributions, and not to be brought into hotchpot;[1] thus there are great variety of provisions which may be made by parents for children; and it could not be expected the Statute of Distributions should enumerate all of them; but as a contingent provision, when the contingency has happened, is a provision, so is it within the Act; also as there are great variety of provisions, the times when they are to take effect may be various; but yet if such provisions be to take effect in a reasonable time, they shall be within the Act. A child may be provided for by land, freehold or copyhold, or by a charge upon either, or by money, goods, stocks in companies, and those in some companies pretty precarious.[2] Some provisions may be payable to the child when of age, or upon marriage, and these contingencies framed upon infinite variety, as the several circumstances of the parties may require, which rendered it impossible for the Act to mention all of them, and therefore it was proper for the legislature to make use of general words as they have done.

The Statute of Distributions does in the beginning take notice, that if a child (other than the heir) have a settlement of land made on him by the intestate, this shall be brought into hotchpot.

Now, to think the Statute did extend to land itself when settled on a younger child by the father, and not to a charge upon land for

[1] Whether he be heir general or special, as in borough English. *Lutwyche* v. *Lutwyche*, Ca. temp. Talb. 276. *Twisden* v. *Twisden*, 9 Ves. 425; 7 R. R. 251. Nor shall money laid out by the intestate in improving land, which he afterwards suffered to descend, be brought into hotchpot. *Smith* v. *Smith*, 5 Ves. 721.

[2] So, by a commission in the army, &c.: Note (o) to *Pusey* v. *Desbouverie*, 3 P. Wms. 317; an annuity, *Lord Kircudbright* v. *Lady Kircudbright*, 8 Ves. 51; 6 R. R. 216.

such child, is strange. Suppose it were a rent out of land, this would be an advancement, and why not when a charge upon land? But the present case comes nearer to land than if it had been a charge out of land; for the trust of the five hundred years term being only to raise this £5000 portion, and the plaintiff Mary Edwards being the person who is alone entitled to it, she as to this purpose is in effect the owner of the five hundred years term.

The occasion of making the Statute of Distributions was to put an end to the long contest which had been betwixt the temporal and spiritual courts, for when the spiritual courts ordered any distribution, or land to be given by the administrator for that purpose, the temporal courts sent a prohibition, being of opinion that the administrator had a right to all, and that the spiritual court could not break into that right; and so this statute was made in favour of the practice of the spiritual court, which proceeded to order distribution as often as the common law courts did not prohibit them, and the Act intended to make the children's provision equal, which was agreeable to the civil law, where goods moveable and immoveable (*i. e.* lands) are considered as the same, though our law would never let the civil law meddle with lands. In *Swinburne*, 165, it is said, that if a father by deed settle an annuity on his child, to commence after his death, this is an advancement *pro tanto;* and by the same reason, a reversion settled on a child, as it may be valued, is an advancement also. The provision within the Statute for a child need not take place in the father's lifetime; a future provision is a bar *pro tanto;* a portion assured or secured to a child, though *in futuro*, is a provision according to its value.

But it is objected, that this is a contingent provision, and therefore not an advancement within the Statute, and being in contingency, it cannot be collated; for instance, suppose it were a bare possibility, or what is not *debitum in præsenti.*

Resp. I do agree, this contingency did not vest until the plaintiff Mary came to eighteen, for though the term did arise before, yet no trust for her benefit could. But the Statute of Distributions does not appoint any time when the distribution shall be made, it mentions indeed when it shall not, — viz., not within a year; and according to the resolutions, the right to the distributory shares vests immediately on the intestate's death. The personal estate of the intestate may consist of moneys or debts payable at several future days, or upon contingencies, so that it may be impossible to

make a distribution thereof at any certain time; it may consist of debts arising upon the like contingency as is annexed to this portion, and since those debts, as they fall in, may be distributed and valued, why may not a contingent portion be estimated and brought into hotchpot? but all that difficulty is over, by the contingency's having happened in the present case, and all inequality, as to the provisions for children, is prevented, which is the intent of the Act.

Lord Chief Justice RAYMOND. I agree with the MASTER OF THE ROLLS, that this £5000 ought to be brought into hotchpot by the plaintiff Edwards and his wife; the Statute of Distributions does not break into any settlement that has been made by the father; it only meddles with what is left undisposed of by him, and of that only makes such a will for the intestate, as a father, free from the partiality of affections, would himself make; and this I may call a *parliamentary will.*

The intention of making the provisions of the children equal goes throughout the whole act; first, it gives the two thirds of the personal estate (the mother being allowed her third) equally among all the children. But then the Act takes it into consideration, that there may be some of the children who have received a portion or advancement before, but not so much as to make up their full share; in that case such child so advanced but in part, shall have so much more out of the intestate's personal estate as will suffice to make his share equal to that of the other children. The Statute takes nothing away that has been given to any of the children, however unequal that may have been, how much soever that may exceed the remainder of the personal estate left by the intestate at his death, the child may, if he pleases, keep it all; if he be not contented, but would have more, then he must bring into hotchpot what he has before received; this manifestly seems to be the intention of the Act, grounded upon the most just rule of equity, *equality.* There may be many cases, in the books, where, in regard to the beneficial and remedial laws, the Judges have gone beyond the words to make the intent of the Act take place, as in Plowden, 467, &c. Here the words will bear the construction which I put upon them, and which is intended by the Act, though not drawn with the greatest correctness.

As to the settlement made upon the children, it was objected, 1st, that this Statute extends only to voluntary settlements, and not to such as are made on marriage, wherein the issue are pur-

chasers; and this is said to be as if an estate had been sold to the child, which surely had not been within the Act.

Resp. If the child pays money for an estate, this is not a settlement upon, but a sale to the child; and it cannot be within the words or intent of the Act that such purchase should be brought into hotchpot. The words of the Act makes no diversity betwixt a voluntary settlement and a marriage settlement, they mention settlements in general. The estate thus settled (though on marriage) upon the children, may have been purchased by the father, and lessened that part of the personal estate, which would otherwise have gone amongst all the other younger children. Great hardships might follow from that construction which the other side labour for; as suppose the father who made this plentiful provision of £5000 for the only child by the first marriage (which in the present case exceeded the plaintiff's own mother's portion by £1000) should die leaving but £200, in such case it would be very hard the child, who has already had a portion of £5000 out of the estate, should yet take away somewhat out of the inconsiderable portion of £200 left for the other children; it cannot be intended, that if the intestate had made a will, he would thereby have ordered any such thing. Indeed, the Parliament intended, that if the intestate had married any of his children, given them a portion adequate to his then estate, and his circumstances in the world had afterwards improved, that the children before advanced should have the benefit of such increase.

Object. But this is not a portion advanced for the child in the father's lifetime.

Resp. That is not required by the Act; if it be secured to the child in the life of the father, it is sufficient; but it is no ways material in what manner the same is secured. Suppose the father had covenanted with trustees to pay his child £100 a week after his death, as the covenant would have been plainly good, so it had been a portion within the Act.

But it is objected, that this depends upon a contingency arising after the intestate's death.

Resp. Then I would put the case a little further: Suppose I covenant to leave a child £1000 if living a week after my death, would this contingency prevent its being a portion? prevent its being brought into hotchpot? Suppose the contingency were, that if the child had been living, one, two, or three years after the in-

testate's death ; surely this had been a portion, and to be brought into hotchpot: Suppose it had been a bond instead of a covenant, or a mortgage instead of a bond, this would have made no diversity ; I grant it could have been no provision, until the contingency happened ; but it cannot be denied that when the contingency has happened, it is a provision. Though I agree the contingency should be so limited, as to arise in a reasonable time ; and here it is so, at eighteen or marriage, which is providing the portion as soon as it can be wanted, with maintenance in the mean time. Can the parent of a child so provided for with such certainty intend that no regard should be had to this provision in the distribution of his estate among his other children ? .

I agree any legacy given to a child (supposing the testator dies intestate as to the surplus of his estate) shall not be brought into hotchpot, because this legacy is not a provision secured by the parent in his lifetime.

Object. Upon the death of the intestate the share of the personal estate vested in the children, and consequently the entire share of the eldest daughter vested in her, without regard to the portion secured by the settlement, which being contingent must be lost, if the daughter had died before her age of eighteen or marriage, at which time the portion was payable.

Resp. The distributive share does not in all events vest in the issue on the intestate's death, because if there be a posthumous child, such child shall be let in for its share, though not *in esse* at the intestate's death. *Wallis* v. *Hodson*, Barnard. 290, and 2 Atk. 115.

Object. If this contingency is not to be brought into hotchpot until it happens, what must become of the distribution in the mean while ?

Resp. In this case, as the plaintiffs have brought their bill for the daughter's distributory part, and the defendants by their answer have put this, which was on a contingent provision, before the Court and in issue, I do not see but that the Court may make a distribution, and order, that if this contingency should happen, then the money shall be so distributed as to make the other children by the second marriage equal in their portions with the plaintiff, the only daughter by the first marriage. If an executor pays a legacy, on supposition that there are assets to pay all the other legacies, and there happens a deficiency, the Court will make

the legatee who is paid his full legacy refund;[1] *à fortiori* will the Court in the principal case, when the contingent portion is not paid, order that only so much of it shall be paid to the first daughter, as will put her upon an equality with the rest of the children.

Object. There is no precedent of such a decree.

Resp. I believe that is owing to the equality intended by the Act of Parliament, which was understood to be so plain a case, that nobody ever thought it worth while to bring it as a question before the Court; so I am of opinion this £5000 ought to be brought into hotchpot by the plaintiff Mary, the only daughter by that marriage.

The Lord Chancellor (King). Mr. Justice Price, who is hindered by his indisposition from being present, has signified to me, that he is of the same opinion with the Master of the Rolls and my Lord Chief Justice, and as I myself am, that this £5000 thus secured to the plaintiff Mary, the only daughter of Mr. Freeman, by the first marriage, ought to be brought into hotchpot; and, secondly, that the lands not included in the settlement made on Mr. Freeman's second marriage must stand liable for the raising of this £5000. The Statute of Distributions says, one third shall belong to the wife, and the other two thirds to the intestate's children, except such children as shall have been advanced by the intestate in his lifetime.

The occasion of making this Statute was, to put an end to the controversy betwixt the temporal and spiritual courts. The ordinary before took bonds from the administrator to make distribution, and those bonds were at law adjudged void, and the administrator entitled to all the personal estate. *Hughes* v. *Hughes*, Carter's Rep. 125; 1 Levinz, 233. One died intestate, leaving a considerable personal estate, and a son and a daughter, the son administered, and the daughter contended for a share in the spiritual court, where it was thought an hardship that the son should have all, and yet the daughter was prohibited at law. However, this Statute of Distributions takes away the administrator's pretensions (which he before had made with success) of retaining the whole. It is true, that in case any child had been advanced by a freehold, the spiritual court would not meddle with that; but the Act of Parliament has therefore gone further than ever the spiritual court intended to go, to make this freehold settled upon a younger child by the father, be brought into hotchpot.

[1] Anon. 1 P. Wms. 495.

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It is material, that at the time of making the Statute of Distributions, it was usual to provide for children by settlements, and therefore with great reason such a provision may be taken to be an advancement *pro tanto*; so an annuity out of land, or a charge upon land is to be brought into hotchpot by the children for the very same reason.

As to the objection, that this is no voluntary settlement, I answer, this was voluntary in the parents, who might have applied all of it for the benefit of the eldest son. Indeed, if the child had been a purchaser, or creditor of the father, it could not be intended that what was the child's purchase or debt should be brought into hotchpot.

Object. This is a future and contingent provision, and to be taken as it was at the time of the father's death.

This I admit; but as future contingent debts due to the intestate are within the clause of the Statute, as to a distribution, so it is equally reasonable that future contingent provisions should be construed advancements *pro tanto*, as to the children; but this contingency must be limited to take effect within a reasonable time, as in the present case, where it is payable at eighteen or marriage, with a provision for maintenance in the mean time. If the father advances for a daughter in marriage so much for a portion, this is a portion given for a valuable consideration, marriage and a settlement, and for that very reason an advancement to the daughter within the Statute of Distributions.[1] This is an advancement *pro tanto* within the custom of London, upon which (*Holt* v. *Frederick*, 2 P. Wms. 356; *Elliott* v. *Collier*, 1 Ves. Sen. 17) custom the Statute of Distributions was in a good measure founded; and it can be no injustice to the child, because it is left to the election of the child thus advanced, whether she will collate or not; if the child be contented with what she has received, she may keep it. If the plaintiff, the daughter, in the present case had come before her age of eighteen demanding her distributory part, there had been some difficulty, whereas now there is none, the contingency being over: but as to the maintenance money, £80 a year, secured by the father to the plaintiff the daughter, we are of opinion, this is not to be brought into hotchpot, no more than what is allowed or secured by

[1] And the value of the provision for the wife and children of a child's marriage, as well as for the child himself, is to be brought into hotchpot. *Weyland* v. *Weyland*, 2 Atk 632.

the parent for the education of the child. See *Lord Kircudbright* v. *Lady Kircudbright,* 8 Ves. 51 ; 6 R. R. 216.

ENGLISH NOTES.

The case of *Edwards* v. *Freeman* has always been considered the ruling authority upon the meaning of this clause in the Statute of Distributions. There may remain a question whether a particular payment is an advance within the Statute, having regard (1) to the purpose, and (2) to the amount, of the payment. The better opinion seems to be that the amount laid out at one time is the more important criterion.

In *Boyd* v. *Boyd* (1867), L. R., 4 Eq. 305, 308; 36 L. J. Ch. 877. V. C. Wood, after referring to the principal case, says: "In short, wherever a sum is paid for a particular purpose, which is thought good and right by the father, and which the son himself desires, if it be money which is drawn out in considerable amount, and not a small sum, it must be treated as an advance. The payment of the money is the important thing — the Court does not look to the application." Accordingly, he held that the premium, stamp, and expenses, amounting to £540, upon the son being articled to a solicitor (although that profession was afterwards abandoned); £840 for the purchase of a cornetcy in Dragoons; and sums paid in seven items varying from £50 to £550, amounting in all to £2000 to pay debts of honour, — were advances.

On the other hand, the Master of the Rolls (Sir G. Jessel), in *Taylor* v. *Taylor* (1875), L. R., 20 Eq. 155; 44 L. J. Ch. 718, refused to allow the sum of £650, given by the intestate to pay his son's debts, in order, as it was represented, to keep his position in the army, to be treated as an advance. But this decision was dissented from in *Re Blockley, Blockley* v. *Blockley* (1885), 29 Ch. D. 250; 54 L. J. Ch. 722, by Pearson, J., citing as his authorities the judgment of Lord Raymond in the principal case, and the passage of V. C. Wood's judgment in *Boyd* v. *Boyd,* above cited.

Whether sums paid for a son on entering the army, consisting of £138 11*s.* for outfit, and £150 for horses, were advances within the Statute, was in *Boyd* v. *Boyd* left an open question. In *Taylor* v. *Taylor* the expenses of outfit and passage money of an officer and his wife going to India were held not to be advances; but that decision is perhaps open to question, as well as the decision in the same case that the payment of debts was not to be so considered. In the same case there was a question as to other sums, which the Master of the Rolls disposed of as follows (L. R., 20 Eq. 157; 44 L. J. Ch. 719): "I shall not be the first judge to hold that sums of money given by a father, without covenant, without agreement, not at any definite time, of various

amounts, sometimes amounting to £200, sometimes more and sometimes less, given to a curate to aid him in his maintenance, are advancements by way of portion or provision within the Statute." This seems quite consistent with all the authorities.

In *Hadfield* (or *Hatfield*) v. *Minet* (C. A. 1878), 8 Ch. D. 136; 47 L. J. Ch. 612, the intestate had covenanted under a deed of separation with his wife to pay an annuity of £200 each to his daughters during their respective lives. The Court held that the value of each annuity as at the death of the intestate, but not the payments made during his lifetime, must be taken into account as advancements.

AMERICAN NOTES.

Advancement is thus defined by a recent writer (Thornton on Gifts and Advancements, p. 510): "An advancement is a free and irrevocable gift by a parent in his lifetime to his child, or person standing in place of such child, on account of such child or person's share of the donor's estate which he will receive under the Statute of Descent if the parent or donor die intestate."

The matter is regulated by statute in many States. In Canada it is said that an advancement there differs from an advancement in England, by statute, being neither a loan, nor debt, nor gift, but a bestowal of property by parent on child on condition that if the donee claims to share in the intestate estate of the donor, he shall bring in this property for the purposes of equal distribution. *In re Hall*, 14 Ontario, 557. This "is quite applicable," says Mr. Thornton, "to an advancement in many of our States, where similar statutes have been enacted." (P. 511, note.) Similar judicial definitions are given in *Miller's Appeal*, 31 Penn. St. 337; *Nolan* v. *Bolton*, 25 Georgia, 352; *Osgood* v. *Breed*, 17 Massachusetts, 358; *Weatherhead* v. *Field*, 26 Vermont, 668; *Holliday* v. *White*, 33 Texas, 460; *Wallace* v. *Reddick*, 119 Illinois, 156.

A gift to a daughter and her child jointly may be an advancement to the daughter. *Kyle* v. *Conrad*, 25 West Virginia, 760, citing the principal case as "the leading case." And so of a conveyance by father to daughter's husband by way of advancement to daughter. *Barber* v. *Taylor's Heirs*, 9 Dana (Kentucky), 84; *Dilley* v. *Love*, 61 Maryland, 603; *Bridgers* v. *Hutchins*, 11 Iredell (No. Carolina), 68; *Wilson* v. *Wilson*, 18 Alabama, 176.

The tendency in this country is to consider any considerable transfer of property, or any considerable benefit bestowed in any manner, especially where any record is made of the transaction or any obligation is taken for it and is left outstanding, as an advancement. As rent of land on which a father has put a son. *Robinson* v. *Robinson*, 4 Humphrey (Tennessee), 392; *Shawhan* v. *Shawhan*, 10 Bush (Kentucky), 600. As so of premiums paid by father on insurance of his life for the benefit of son. *Rickenbacker* v. *Zimmerman*, 10 So. Carolina, 110; 30 Am. Rep. 37; *Cazassa* v. *Cazassa*, 92 Tennessee, 573.

Purchase of land by parent in name of child is *primâ facie* an advancement. *Hummel* v. *Hummel*, 80 Penn. St. 420; *Smith* v. *Strahan*, 16 Texas, 314; 67 Am. Dec. 622; but only to the amount paid therefor. *Phillips* v. *Gregg*, 10

Watts (Penn.), 158; 36 Am. Dec. 158. Deed from parent to child in consideration of love and affection is presumed an advancement. *Hatch* v. *Straight*, 3 Connecticut, 31; 8 Am. Dec. 152.

But land deeded or money given to a son-in-law is not presumed an advancement to the daughter. *Rains* v. *Hays*, 6 Lea (Tennessee), 303; 40 Am. Rep. 39.

In the absence of contrary statutory provision, nothing is reckoned as an advancement unless proved to have been so intended. *Osgood* v. *Breed's Heirs*, 17 Massachusetts, 356.

In this country the doctrine of advancement applies to mothers as well as fathers. *Murphy* v. *Nathans*, 46 Penn. St. 508; *Dares* v. *Haywood*, 1 Jones Equity (No. Carolina), 253.

The principal case is abundantly cited by Mr. Thornton.

No. 2. — KIRK *v.* EDDOWES.

(CH 1844.)

RULE.

WHERE a gift is made expressly in advancement, or in part satisfaction, of a legacy in the donor's will, parol evidence is admissible to prove the transaction, and the satisfaction (*pro tanto*) of the legacy.

Kirk v. Eddowes.

13 L. J. Ch 402 (s. c. 3 Hare, 509).

Henry Eddowes, by his will, dated the 22nd of June, 1827, after directing payment of his debts, &c., devised and bequeathed all and every his messuages and real estate whatsoever, with their appurtenances, and also all and singular his moneys, securities for moneys, and all other his personal estate and effects whatsoever, not thereinbefore by him disposed of, to his son, John Henry Eddowes, his heirs, executors, administrators, and assigns, subject nevertheless, and the testator did thereby charge the same estates respectively, with the payment of £3000, and the annuity of £100, thereinafter bequeathed; and the testator thereby bequeathed to his brother, Storer Eddowes, for his life, one annuity or yearly sum of £100, to be yearly issuing out of all and every the testator's real estates, to be paid half-yearly, and with powers of distress and entry for enforcing payment of the same; and the testator thereby

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gave and bequeathed unto J. H. Eddowes and S. Eddowes, their executors and administrators, the sum of £3000 of lawful money, to be paid into their hands, at the expiration of twelve months next after his decease, upon trust to invest the same, and with power to vary the securities, as occasion should require, and to stand possessed of the stocks, funds, and securities whereon the same sum of £3000, or any part thereof, should be invested, and the interest, dividends, and annual produce thereof, upon trust, to pay the interest, dividends, and produce thereof, from time to time, as the same should become due, unto his (the testator's) daughter, Elizabeth Kirk, and her assigns, during her life, for her separate use, and from and after her decease, upon trust, to stand possessed of the said sum of £3000, and the securities in which the same might be invested, and the interest, dividends, and annual produce thereof, in trust for such one or more of the child and children of his daughter, as she should by deed or will, direct or appoint, and in default of such direction or appointment, for all and every the child or children of his said daughter respectively, upon his, her, or their age of twenty-one years, etc., with the usual directions as to advancement, survivorship, etc. And in the event of his daughter dying without leaving issue who should have attained a vested interest in the said sum of £3000, the testator gave the same, with the interest then due thereon, unto J. H. Eddowes absolutely, and he thereby appointed J. H. Eddowes and S. Eddowes executors of his will.

The testator died shortly after the execution of the will, which was duly proved by both executors.

This was a bill by the infant children of the testator's daughter, Mrs. Kirk, by their next friend, against Mrs. Kirk, whose husband was then dead, and the executors of the testator, and it stated that Mrs. Kirk had not executed the power of appointment in favour of her children, and it prayed that the sum of £3000 might be raised and invested upon the trusts of the will, and that, if necessary, it might, in the mean time, be secured in court for the benefit of the plaintiffs, and that the usual accounts might be taken.

The defendant, J. H. Eddowes, by his answer, after stating that he was the sole acting executor, admitted assets for the payment of £3000 ; but he stated, that he had invested £2500 only upon the trusts in the will, for the benefit of Mrs. Kirk and her children ; and he submitted, that that sum was all that they were entitled

to have invested, inasmuch as the legacy of £3000, given by the will, had been adeemed, to the extent of £500, by an advance to that amount made by the testator to Mrs. Kirk's husband, subsequently to the date of the will.

In support of the case made by the answer, the defendant, J. H. Eddowes, went into parol evidence. By that evidence it appeared that at a meeting on the 22nd of June, 1827, at which the testator, S. Eddowes, J. H. Eddowes, and Mrs. Kirk only were present, the testator said he wished to explain to the executors and his daughter, Mrs. Kirk, the way in which he had left his property; and he then stated that he had left to S. Eddowes £100 a year, and to Mrs. Kirk £3000 for herself and her children; that thereupon Mrs. Kirk objected that there was no provision made for her husband, and that as he was involved in difficulties, she wished that something should be given to him. Upon this the testator said he had £500 in a Mr. Warner's hand, which he would give to her, upon condition that it should be considered as part of the legacy given by his will; that J. H. Eddowes then said he thought it necessary the will should be altered; that thereupon Mr. Cradock, the testator's solicitor, was sent for, and that on his arrival, the defendant J. H. Eddowes explained to him the conversation which had previously taken place, and asked him whether it would be necessary to alter the will; that Cradock replied, that as they were all present, and understood it, he thought it would not be necessary. It was in evidence also that Mr. Warner was, on the 22nd of June 1827, indebted to the testator on a promissory note for £500, which note, after the 22nd of June, 1827, was given up to Warner, who then gave another promissory note to Mr. and Mrs. Kirk in lieu of it; and that this was done by the direction of the testator, and for the purpose of satisfying Mrs. Kirk. It was not clear from the evidence whether the money was ever in fact paid upon this note. By consent, this evidence was read *de bene esse*.

Mr. Romilly and Mr. Rogers, for the plaintiffs. This evidence is inadmissible. The £3000 being settled by the will upon Mrs. Kirk, at that time a married woman, and her children, cannot be considered in the light of a portion; and the law would not raise a presumption that the subsequent advance to the husband of Mrs. Kirk was in satisfaction of that which had been previously settled on Mrs. Kirk and her family. The gifts are to different

parties, so that no presumption can be raised that the one was intended as an ademption *pro tanto* of the other. No such presumption being raised by the will, the evidence is inadmissible. Parol evidence cannot be used for the purpose of raising a presumption of intention, but only to assist the presumption where the law has raised it; and evidence has been adduced on the other side to rebut it, — *Bellasis* v. *Uthwatt*, 1 Atk. 426; *Shudal* v. *Jekyll*, 2 Atk. 518; *Freemantle* v. *Bankes*, 5 Ves. 79; *Ex parte Dubost*, 18 Ves. 140; *Booker* v. *Allen*, 2 Russ. & Myl. 270; 9 L. J. Ch. 130; *Lloyd* v. *Harvey*, 2 Russ. & Myl. 310; *Hartopp* v. *Hartopp*, 17 Ves. 184; 11 R. R. 48; *Alleyn* v. *Alleyn*, 2 Ves. Sen. 37; *Osborne* v. *Duke of Leeds*, 5 Ves. 369; 5 R. R. 74; *Trimmer* v. *Bayne*, 7 Ves. 508; 6 R. R. 173; *Holmes* v. *Holmes*, 1 Bro. C. C. 555; *Mackenzie* v. *Mackenzie*, 2 Russ. 262; *Wharton* v. *Lord Durham*, 5 Sim. 297; 2 L. J. (N. S.) Ch. 25; 3 Myl. & K. 427; 3 Cl. & Fin. 146; 6 L. J. (N. S.) Ch. 15.

Mr. Walker and Mr. Willcock, for the defendants. The provision for Mrs. Kirk by the will is settled, as daughters' portions usually are settled. — On the question of ademption, the Court will only consider whether the principal object of both provisions is, substantially, the same person. The payment of £500 to the husband at the request of the wife was in fact a payment to and for the benefit of the wife. Both gifts, therefore, being in the nature of portions, the presumption is raised, that the latter is an ademption, but *pro tanto* only, of the former. *Pym* v. *Lockyer*, 5 Myl. & Cr. 29; 10 L. J. Ch. 153 Further, the object of the evidence is, not to show what the testator meant by his will, or to alter, vary, or add to the will, but to show the intention with which a subsequent independent act was done. For this purpose it is plainly admissible upon all the authorities. *Monck* v. *Lord Monck*, 1 Ball & Beat. 298; *Thellusson* v. *Woodford*, 4 Mad. 420; *Rosewell* v. *Bennet*, 3 Atk. 77; *Biggleston* v. *Grubb*, 2 id. 48; *Chapman* v. *Salt*, 2 Vern. 646; *Weall* v. *Rice*, 2 Russ. & Myl. 251; 9 L. J. Ch. 116; *Sheffield* v. *Lord Coventry*, 2 Russ. & Myl. 317; *Powys* v. *Mansfield*, 6 Sim. 528; 5 L. J. (N. S.) Ch. 153; s. c. on appeal, 3 Myl. & Cr. 359; 7 L. J. (N. S.) Ch. 9; *Scotton* v. *Scotton*, 1 Stra. 236; *Hall* v. *Hill*, 1 Dr. & War. 94.

Mr. Romilly replied.

June 6. Wigram, V. C. [after stating the will, proceeded] — The plaintiffs, who are the children of Mrs. Kirk, have filed their bill

to recover the £3000 bequeathed to them in the will; and the defendant, J. H. Eddowes, the sole acting executor, admits their right to £2500, but contends that the remaining £500 was adeemed by an advance to the husband of Mrs. Kirk, made by the testator in his lifetime, and subsequently to the execution of the will. The defendant has not contended that the advance was an ademption for any greater amount; and admits that the principle laid down in *Pym* v. *Lockyer* applies to this case. Evidence, on the part of the defendant, was tendered and objected to; but, if it is admissible, it does, I think, establish the fact, that the testator did, subsequently to the date of the will, at the instance and request of Mrs. Kirk, give to her husband the sum of £500; and that he at the same time declared that it was given in part satisfaction of what had been given to Mrs. Kirk by his will. This may be subject to the question, whether the £500 was ever ultimately paid. The effect of the bequest by the will, separately considered, is clear; and the gift of the note for £500 subsequently to the will is clear. The gifts being upon separate and distinct transactions will, *primâ facie*, both take effect.

The questions in this case are two: first, what the second transaction really was? And, secondly, what was the effect, if any, of the second transaction upon the benefits given by the will? Where questions similar to the present have arisen as to gifts given by two distinct instruments, the law as to the admissibility of parol evidence has been long since settled. The rule in such cases is, that written instruments cannot be added to or explained by parol evidence; and unless the second instrument adeem the gift given by the first, either in express terms or by presumption of law, no evidence can be admitted to show that the second instrument had an effect, which neither the language of the instrument nor the law would give to it. If the second instrument does not in terms adeem the gift given by the first, but the circumstances of the case raise a presumption at law, that the benefit given by the second instrument was meant to operate as an ademption of the benefit given by the first, parol evidence may be gone into, not to show that such was not the intention, but to repel the presumption which the law has raised; and where parol evidence is admitted to rebut the presumption raised by the law, contrary evidence may be given in support of the presumption. In such cases the evidence is admitted, not for the purpose of

proving with what intention the instrument was made, but only to repel the presumption of law. *Hurst* v. *Beach*, 5 Madd. 351; *Hartopp* v. *Hartopp*; *Hall* v. *Hill*, and the cases there cited. In the present case the advance of the £500 was made after the date of the will, and the transaction was not evidenced by any writing; and the above-mentioned technical rule against admitting evidence to prove the intention does not apply. The question, therefore, is whether any other rule does apply to exclude the evidence. In order fully to try this question, I will assume, first, that the £3000 had been given absolutely to Mrs. Kirk, to her separate use.

The defendant's evidence is not objected to, nor could it successfully be objected to, so far as it goes, to show that the gift was of a different amount, or to show the other circumstances attending the transaction, with the single exception of the declarations of the testator, which accompanied the gift. The Court, which has to decide whether there is an ademption or not, ought to know what the transaction was. But the evidence of the declarations of the testator, which accompanied the transaction, has been objected to. Why are they not admissible? They are of the essence of the transaction, the true nature of which cannot be known without them. The rule which excludes the evidence of intention in the case of a gift by an instrument in writing does not apply. It could not have been contended, on the part of Mrs. Kirk, that payment to her husband of the amount of the legacy, at her request, would not have precluded her from claiming the legacy under her father's will, or, in other words, that the advance would not have adeemed the legacy. If that is not so, it must be contended, that an advance by the testator to a legatee, under an agreement in writing that he shall accept the advance in satisfaction of the legacy, will leave the legatee at liberty to claim the legacy, notwithstanding the advance; and if such an argument be not, in the case supposed, admissible, the declarations of the testator must be admissible, unless there be some rules of law that require that such a transaction should not be valid unless reduced into writing: that, however, cannot rightly be contended for. The evidence does not touch the will; it proves only that the gift did take place after the date of the will; and upon that the Court is called upon to decide whether there was not thereby an ademption of the legacy. There does not appear to be any ground for rejecting the evidence

upon this hypothesis. But how does the question stand upon authority? The cases of *Monck* v. *Lord Monck*, *Rosewell* v. *Bennet*, *Thellusson* v. *Woodford*, *Bell* v. *Coleman*, 5 Madd. 22; *Biggleston* v. *Grubb*, *Hoskins* v. *Hoskins*, Prec. Chanc. 263; *Chapman* v. *Salt*, *Powel* v. *Cleaver*, 2 Bro. C. C. 499; *Grave* v. *The Earl of Salisbury*, 1 id. 425, and *Ex parte Dubost*, are all authorities in favour of the admission of the evidence; and, of these, the cases of *Rosewell* v. *Bennet*, *Biggleston* v. *Grubb*, and *Monck* v. *Lord Monck*, are referred to with approbation by the Lord Chancellor of Ireland in *Hall* v. *Hill*. Admitting, then, that parol evidence is inadmissible to prove that a will or other instrument was intended not to have a particular effect, still, in the case supposed, I think I should be bound to receive it. This subject has been elaborately considered in 1 Rop. on Legacies, 341, but the writer has not, I think, sufficiently kept in view the distinction between ademption and revocation.

But it was said, that a distinction existed in the present case, because, in the cases cited, the advance was made to the legatee himself; whereas, in the case before me, it was made to the husband of the legatee. That circumstance can have no application to the rejection or admission of the evidence; and in more than one of the cases in which the evidence has been admitted the same circumstance occurred.

The preceding observation supposes that the bequest had been made to Mrs. Kirk absolutely; whereas, in fact, the gift by the will is to her for life, and then to the children. It remains to be seen whether those limitations alter the case. I do not mean to say that a legacy to A. would be adeemed by a gift to a stranger. Here the legacy, being given to Mrs. Kirk for life to her separate use, with remainder to her children, is clearly in the nature to a portion; that is, in effect, the common way of dealing with a lady's portion on her marriage. I find her, in fact, requesting her father to advance a part of the fund so settled upon her to her husband; that the father accordingly did so, declaring at the same time what his intentions were in making that advance. The case of *Carrer* v. *Bowles*, 2 Russ. & Myl. 301; 9 L. J. Ch 91, is an authority for that view of the case, and also *Trimmer* v. *Bayne*, which is the converse of this case.

Upon the whole, without admitting that extrinsic evidence can be admitted to alter, vary, or add to a written instrument, or to

show what the intention is in making the instrument, and not meaning to intimate an opinion that any other declaration of the testator would in those cases have been admissible, and distinguishing between revocation and ademption, I am of opinion, that in this case the evidence is admissible.

ENGLISH NOTES.

The rule admitting parol evidence in such a case is anomalous; for although it is said to aid the presumption of law, a gift *simpliciter* of a smaller sum than the legacy is not sufficient to raise the presumption of intention to advance a portion of the legacy. *Ravenscroft* v. *Jones* (1863), 32 Beav. 669.

The rule is, however, well established, and is assumed and applied in several of the cases already treated under the topic "Ademption," particularly those cited in the notes to No. 2, *Trimmer* v. *Bayne*, p. 36, *et seq. supra*. It only remains to note some cases specially relating to the evidence of intention in order that the transaction is to be construed as an advancement.

The admissibility of parol evidence does not extend to declarations which are not part of the *res gestæ* of the transaction. A testator by will, in 1864, after giving the residue to be divided amongst his six children, declared that all such sums of money as he had then already advanced, or should thereafter advance, to or for the benefit of his children as should appear in any account in his handwriting, etc., should be considered in part of his or her share. By letters dated in 1873 addressed to two of his sons, he enumerated the advances made to each, and stated that if they respectively would give him a promissory note for a certain sum he would write off the balance. It was held that these letters were not admissible to show that the balances were taken out of the category of "advances" referred to in the will. It was observed that the marginal note in *Whateley* v. *Spooner* (1857), 3 K. & J. 542, which appears to sanction a looser rule of evidence, is not borne out by the judgment in that case. *Smith* v. *Conder* (1878), 9 Ch. D. 170, 47 L. J. Ch. 878.

In *Re Turner*, *Turner* v. *Turner* (1885), 53 L. T. 379, the rule of the principal case was applied to a gift by a testator, after the date of the will, of farming stock to set up one of his sons in a farm, the tenancy of which the testator had obtained for that son. It was contended, on the authority of *Grave* v. *Earl of Salisbury*, 3 Bro. C. C. 425, that such a gift would not, in itself, have raised any presumption of the intention of advancement. But KAY, J., nevertheless held admissible, and gave effect to, parol evidence showing the intention to make the gift by way of advance.

AMERICAN NOTES.

Parol evidence is competent to show ademption of a legacy. Browne on Parol Evidence, p. 481; *Rogers* v. *French*, 19 Georgia, 316; *May's Heirs* v. *May's Adm'r*, 28 Alabama, 141; *Gilliam* v. *Chancellor*, 43 Mississippi, 437; *Allen* v. *Allen*, 13 South Carolina, 512; 36 Am. Rep. 716; *Richards* v *Humphreys*, 15 Pickering (Mass.), 133; *Jones* v. *Mason*, 5 Randolph (Virginia), 577; 16 Am. Dec. 761; *Van Houten* v. *Post*, 33 New Jersey Equity, 344; *Zeiter* v. *Zeiter*, 4 Watts (Penn.), 212; 28 Am. Dec. 698.

But this doctrine does not apply to devises of land. *Burnham* v. *Comfort*, 37 Hun (New York Supreme Ct.), 226.

The principal case is cited in 13 Am. & Eng. Enc. of Law, p. 106, n. 1, with other cases, including *Cowles* v. *Cowles*, 56 Connecticut, 240; *Tillotson* v. *Race*, 22 New York, 122; *Miner* v. *Atherton*, 35 Penn. St. 536; *Wallace* v. *Du Bois*, 65 Maryland, 153; *Howze* v. *Mallett*, 4 Jones Equity (No. Carolina), 194; *Duckworth* v. *Butler*, 31 Alabama, 164; *Thomas* v. *Capp*, 5 Bush (Kentucky), 276.

AFFREIGHTMENT. — See BILL OF LADING and CHARTER-PARTY.

AGENCY.

SECTION I. — *Constitution of Agency.*

No. 1. BERKELEY *v.* HARDY.

(K. B. 1826.)

No. 2 — IN RE WHITLEY PARTNERS, Limited.

(C. A. CH. 1886.)

RULE.

To maintain an action upon a deed executed by an agent, it must appear that the agent was authorised by deed.

But, unless in cases where a personal signature is necessary by reason of some statutory or other prescribed requirement, an agent authorised in any way may bind his principal by a written instrument not being a deed.

Berkeley v. Hardy.

5 Barn. & Cress. 355.

Covenant upon an indenture of lease. Plea, *non est factum*. The cause, and all matters in difference between the parties, were referred to a barrister, who, by his award as to the action, found that it was brought upon certain indentures which were, on the 24th of July, 1822, signed, sealed, and delivered by one J. S. for and on the behalf of the plaintiff, and by the said defendant respectively, the said J. S. having been theretofore authorised by the plaintiff, by writing under his hand, but not under seal, to execute the same for him, and on his behalf, the beginning of which said indentures was as follows: "Agreed the 24th of July, 1822, between James Simmonds, for and on behalf of W. F. Berkeley (the plaintiff), on the one part, and J. Hardy, of the other part, as follows: the said W. F. Berkeley agrees to let, and the said J. Hardy agrees to take, all those messuages, tenements, farms, and lands," &c. The *reddendum* was to the plaintiff, and the covenants were expressed to be made by Hardy to Berkeley, and by Berkeley to Hardy, the name of J. Simmonds never occurring in the lease after the commencement above set out, until the conclusion, which was as follows: "In witness whereof we have hereunto set our hands and seals the day and year above written. J. Simmonds (L. S.), J. Hardy (L. S.)." The arbitrator then found that J. Hardy had committed certain breaches of covenant, and assessed the damages at £280, and then proceeded: "But it having been objected on the part of the defendant, that the said W. F. Berkeley was not entitled in law to maintain any action of covenant in his own name upon the indentures; and it appearing to me that such objection to the form of the action is well founded, I do hereby order and adjudge that the said W. F. Berkeley is not entitled to recover his said damages in such action of covenant." The arbitrator then proceeded to dispose of other matters not material to this question. In Hilary Term a rule *nisi* was obtained for setting aside the award, in as far as it determined that the said action of covenant was not maintainable.

Tindal and Coleridge now showed cause. Upon the facts disclosed in the award, it is clear that the plaintiff could not maintain covenant on the deed in his own name. *First*, his agent, Simmonds, had not any sufficient authority to bind him by deed: the

authority should have been under seal, not under hand only. *White* v. *Cuyler*, 6 T. R. 176; 3 R. R. 147; *Horsley* v. *Rush*, cited in *Harrison* v. *Jackson*, 7 T. R. 209; *Williams* v. *Walsby*, 4 Esp. 220; *Steiglitz* v. *Eyginton*, Holt, N. P. C. 141. *Secondly*, supposing the authority to have been sufficient, still the execution was improper: the attorney should have executed in the name of his principal. *Combe's Case*, second resolution, 9 Co. Rep. 76; *Fronteri* v. *Small*, 2 Ld. Raym. 1418; *Barford* v. *Stucky*, 2 B. & B. 333. [LITTLEDALE, J. The same appears from *Wilks* v. *Back*, 2 East, 142; 6 R. R. 409.] *Thirdly*, it is a general rule of law, that where a deed is made *inter partes*, no person can maintain an action upon the deed who is not a party to it. *Scudamore* v. *Vandenstene*, 2 Inst. 673; 2 Roll. Abr. 22; Faits (F.) 1; *Storer* v. *Gordon*, 3 M. & S. 308; 15 R. R. 499.

TAUNTON and CAMPBELL, *contrà*. It may be admitted that where an attorney executes a deed for another, he must execute in the name of the principal. It may be admitted also, that there is the distinction between deeds poll and *inter partes*, which has been pointed out. Still, the plaintiff may support this action. The arbitrator appears to have proceeded upon the ground that Simmonds was not properly authorised to execute the deed. In most cases, it is true that an attorney, in order to bind by deed, must have an authority by deed; but there is a difference between the cases where the principal parts with an interest, and where he gives a mere authority. In Co. Litt. 52 *b* it is said that an attorney to deliver seizin must be by deed; but in *Moyle* v. *Ewer*, Noy, 49, Cro. Eliz. 905, where an indenture of bargain and sale between J. S. of the one part, and J. D. of the other part, and in the end thereof a letter of attorney to J. N. to make livery was produced in court, and it was urged that it should be void because the attorney was no party to the deed, the Court held it well enough. [ABBOTT, C. J. Livery of seizin is a matter *in pais*.] So is the execution of a deed. It is clear that, in order to bind by deed, a party need not in all cases be authorised by deed, for he may derive such an authority from a will. Then, as to the third point, there is a material distinction between this case and those which have been cited. All the covenants are in words between the plaintiff and defendant. The name of Simmonds is merely introduced at the beginning and the end, and as he is no party to any of the covenants, the execution by him is a mere nullity, and the deed may be considered as a deed poll executed by Hardy alone.

[Holroyd, J. Then there is no demise to lay the foundation of the defendant's covenant.] [Abbott, C. J. Treat the first clause of this indenture as an agreement between the plaintiff and defendant: can it be valid if the plaintiff did not execute it? The execution of a counterpart by a lessee may, as against him, be evidence of the execution of the original, but it is only evidence.] The Court may presume the deed before them to be in the nature of a counterpart, and that the original was properly executed by or for the plaintiff, and then all difficulty is avoided.

Abbott, C. J. I am not aware of any instance in which the Court, upon the production of an instrument insufficient to support an action founded upon it, has presumed the existence of another deed which would be sufficient. We are left, then, to decide upon those strict technical rules of law applicable to deeds under seal, which, I believe, are peculiar to the law of England. These rules have been laid down and recognised in so many cases, that I think we are bound to say no action can be maintained by W. F. Berkeley upon the deed in question. The rule for setting aside the award must therefore be discharged.

Holroyd[1] and Littledale, JJ., concurred.

Rule discharged.

In re Whitley Partners, Limited.

55 L. J. Ch. 540 (s. c. 32 Ch. D. 337).

This was an appeal from a decision of Bacon, V. C.

The above-named company was formed in 1873, and Callan was then advised by a friend, Oakley, to join it. He hesitated for some time, but eventually sent a telegram to Oakley authorising him to sign his name to the memorandum of association. Oakley did so for 100 shares. Callan was afterwards made a director of the company, but never acted nor attended any of the meetings of the directors or of the company, and he now denied that he had given Oakley authority to sign his name to the memorandum. The Court, however, held that he had given such authority.

In 1877 the company was ordered to be wound up, and Callan's name was placed on the list of contributories. Several calls were made in the course of the winding-up, and were served upon Callan; and in 1882 a balance order was served upon him for

[1] Bayley, J., was in the Bail Court.

payment of the amount due in respect of calls on the 16th of December, 1882.

Callan then took out a summons to have his name removed from the list of contributories. BACON, V. C., dismissed this summons. Callan appealed from this decision.

The only point raised on the appeal which requires a report was, whether the signing of Callan's name to the memorandum by Oakley was sufficient to make him liable.

After hearing argument for the appellant, the Court did not call upon counsel for the respondent.

COTTON, L. J. This appeal is brought by Mr. Callan from a decision of Vice Chancellor BACON, refusing to remove his name from the list of contributories of the company. I will first deal with the point of law which has been raised on his behalf. It is conceded that he did not sign his name himself to the memorandum of association of the company; but, assuming that his name was signed by some one else with his authority, the question is whether that is sufficient under the terms of the Statute to make him liable. There is nothing in the Act which expressly requires the signature to be by the man himself; but it is said that such is the proper inference to be drawn from section 6 of the Companies Act, 1862, having regard to a case which has been cited in support of this contention. That section speaks of "subscribing their names," and section 8 refers to the subscribers of the memorandum "writing" their names. And in other sections reference is made to "signature." And nothing is expressly said as to the signing being by a man or by his agent. The case of *Hyde* v. *Johnson*, 3 Scott, 289; 2 Bing. N. C. 776; 5 L. J. C. P. 291, which has been referred to, decided that under Lord Tenterden's Act, 9 Geo. IV. c. 14, in order to take a case out of the Statute of Limitations the signature must be by the person sought to be charged, and that signature by his wife as his agent was not sufficient. But that decision proceeded on the special ground that Lord Tenterden's Act was one of a series of enactments, and referred to the operation of Acts in which there was express mention made of signature being by a man or by his agent, and that as Lord Tenterden's Act contained no mention of signature by an agent, such signature was not sufficient under that statute. This decision on that statute was probably correct, but the Companies Act, 1862, is not one of a series of statutes containing reference to signature by an agent, and, in my opinion, it

would be wrong to hold that under that statute such signature was insufficient. For it would come to this, that if the seven signatories to a memorandum of association were in the room together, and one of them asked another to write his name for him, his signature would be bad. I cannot assent to this. If the agent is authorised to sign by the principal, the signature, in my opinion, is as valid as if he had signed it himself. It may be that in the present case the agent's mode of signing was not perfectly regular, and that Oakley should have signed his principal's name as an attorney; but this irregularity is not sufficient to invalidate the signature.

Next, it is said that Mr. Oakley had no sufficient authority to sign in Callan's name because the authority was given by telegram, and not, as it should have been, by deed, on the ground that the Companies Act, 1862, makes the memorandum of association equivalent to a deed; but it does not do so for all purposes. It is not a deed in the sense of requiring to be sealed as well as signed. In my opinion, this objection also cannot be sustained.

[His Lordship then reviewed the evidence, coming to the conclusion that Mr. Callan had in fact authorised Mr. Oakley to sign the memorandum of association in his name.]

Bowen, L. J. I am of the same opinion. Mr. Ribton contends that a memorandum of association must be signed, not by an agent, but by the principal himself. In every case where a statute requires a particular document to be signed by a particular person, it must be a pure question on the construction of the Statute whether the signature by an agent is sufficient. In some cases, having regard to the scope and object of the Statute in question, the Court has held that signature must be by the person himself In others, it has come to the conclusion that signature by an agent is sufficient. I think the whole question is summed up in the judgment of Mr. Justice Blackburn in *The Queen* v. *The Justices of Kent*, L. R., 8 Q. B. 305; 42 L. J. M. C. 112, where he says that "No doubt at common law, where a person authorises another to sign for him, the signature of the person so signing is the signature of the person authorising it; nevertheless, there may be cases in which a statute may require personal signature. It was so held in *Hyde* v. *Johnson*, 3 Scott, 289; 2 Bing. N. C. 776, on the ground that Lord Tenterden's Act must be read *in pari materia* with the Statutes of Frauds, and that upon the construction of those

statutes the legislature must be taken to have intended a personal signature." And Mr. Justice QUAIN and Mr. Justice ARCHIBALD, in the same case, agree that the general rule is that *Qui facit per alium, facit per se*, though there may be cases in which a particular statute requires a different construction. There is nothing in the statute now in question to show that the legislature wished to exact in the case of a memorandum of association anything in the nature of verification of genuineness of the signatures thereto, and consequently the principle upon which the case of *Hyde* v. *Johnson*, *supra*, was decided, cannot be invoked here, and the general principle of law applies, that an act which a man may lawfully do himself, he may do through another. I do not think there is anything in the suggestion that it is necessary that the agent's authority should have been by deed. On the facts, I agree with Lord Justice COTTON.

FRY, L. J. On neither of the points in this case do I think that I can usefully add anything, except to express my entire concurrence with the views expressed by my learned brethren.

Appeal dismissed with costs.

ENGLISH NOTES.

If an agent, acting on behalf of his principal, executes a deed in his own name for any purpose for which an instrument in writing merely would be sufficient, and the principal ratifies the agent's act, the instrument will operate as a writing to bind the principal, though it may also bind the agent as his deed. *Hunter* v. *Parker* (1840), 7 M. & W. 322, 344, 10 L. J. Ex. 281.

There being nothing in the Trade-Marks Act of 1883 to take away the common law right of the applicant for a trade-mark to appoint an agent for all the purposes of his application, the notices required by the Act may be sent to him through an agent so appointed by him. "I take it," says Mr. Justice STIRLING, "that, subject to certain well known exceptions, every person who is *sui juris* has a right to appoint an agent for any purpose whatever, and that he can do so when he is exercising a statutory right no less than when he is exercising any other right. If it is necessary to refer to any authority in support of that, I may refer to the very recent case of *In re Whitley*" (the principal case, No. 2, p. 276, *ante*). *Jackson & Co.* v. *Napper* (Ch. D. 1886), 35 Ch. D. 162, 172; 56 L. J. Ch. 406. This is cited and followed by CHARLES, J., in *Ex parte Trickett, Re Kensington Assessment Com-*

mittee (Jan. 13, 1891), 7 Times Rep. 186, in support of the right of a rate-payer to appear before the Assessment Committee by any agent he might appoint.

AMERICAN NOTES.

An agency to execute a deed can only be constituted by a sealed writing. *Jackson* v. *Murray*, 5 T. B. Monroe (Kentucky), 184; 17 Am. Dec. 53; *Graham* v. *Holt*, 3 Iredell Law (No. Carolina), 300; 40 Am. Dec. 408; *Worrall* v. *Munn*, 5 New York, 229; 55 Am. Dec. 330, and n., 343; *Turbeville* v. *Ryan*, 1 Humphreys (Tennessee), 113; 34 Am. Dec. 622; *Spafford* v. *Hobbs*, 29 Maine, 148; 48 Am. Dec. 521; *Williams* v. *Crutcher*, 5 Howard (Mississippi), 71; 35 Am. Dec. 422; *Shuetze* v. *Bailey*, 40 Missouri, 69; *Preston* v. *Hull*, 23 Grattan, 600; 14 Am. Rep. 153; *Humphreys* v. *Finch*, 97 North Carolina, 303; 2 Am. St. Rep. 293.

An agent may bind his principal to sell or buy lands, under the Statute of Frauds, by a writing not under seal, although not authorised in writing. *Blacknall* v. *Parish*, 6 Jones Equity (No. Carolina), 70; 78 Am. Dec. 239; *Jackson* v. *Murray, supra*; *Curtis* v. *Blair*, 26 Mississippi, 309; 59 Am. Dec. 257; *Worrall* v. *Munn, supra*; *Talbot* v. *Bowen*, 1 A. K. Marshall (Kentucky), 436; 10 Am. Dec. 747.

So of an assignment of an interest in an invention. *Reed* v. *Van Ostrand*, 1 Wendell (New York), 424; 19 Am. Dec. 529. And so of a note. *Rice* v. *Gore*, 22 Pickering (Mass.), 158; 33 Am. Dec. 724. And so generally, except in regard to deeds. *Long* v. *Colburn*, 11 Massachusetts, 97; 6 Am. Dec. 160.

If the instrument is unnecessarily sealed, the authority need not be in writing or sealed. *Worrall* v. *Munn, supra*; *Dickerman* v. *Ashton*, 21 Minnesota, 538; *Ingraham* v. *Edwards*, 64 Illinois, 526; *Love* v. *Sierra Nevada Co.*, 32 California, 639; 91 Am. Dec. 602; *Tapley* v. *Butterfield*, 1 Metcalf (Mass.), 515; 35 Am. Dec. 374; *Despatch Line* v. *Bellamy*, 12 New Hampshire, 205; 37 Am. Dec. 203; *Drumright* v. *Philpot*, 16 Georgia, 424; 60 Am. Dec. 738; *Wagoner* v. *Watts*, 44 New Jersey Law, 126.

A deed made by an agent under parol authority will in equity bind the principal to convey. *Groff* v. *Ramsay*, 19 Minnesota, 44; *Schuetze* v. *Bailey, supra*; *Newton* v. *Bronson*, 13 New York, 593; 67 Am. Dec. 89; *Jackson* v. *Murray, supra*; *Force* v. *Dutcher*, 18 New Jersey Equity, 101; *Dodge* v. *Hopkins*, 14 Wisconsin, 630.

If the deed is executed by the agent in presence of the principal, an oral or even an implied authority will answer. *Jansen* v. *McCahill*, 22 California, 563; 83 Am. Dec. 84; *Gardner* v. *Gardner*, 5 Cushing (Mass.), 483; *McMurtry* v. *Brown*, 6 Nebraska, 368.

Parol authority to fill blanks in a deed is good. *Nelson* v. *McDonald*, 80 Wisconsin, 605; 27 Am. St. Rep. 71. Even the grantee's name, *Cribben* v. *Deal*, 21 Oregon, 211; 28 Am. St. Rep. 746, and cases cited; *Wiley* v. *Moor*, 17 Sergeant & Rawle (Penn.), 438; 17 Am. Dec. 696; *Smith* v. *Crooker*, 5 Massachusetts, 538; *Gibbs* v. *Frost*, 4 Alabama, 720; *Wooley* v. *Constant*, 1 Johnson (New York), 54; 4 Am. Dec. 246; *Richmond Manuf. Co.* v. *Davis*, 7 Blackford (Indiana), 412; *Boardman* v. *Gore*, 28 New Jersey Equity, 517; 18 Am. Dec. 73; *Camden Bank* v. *Hall*, 14 New Jersey Law, 583; *Ragsdale* v.

Robinson, 48 Texas, 379. *Contrà: Upton* v. *Archer*, 41 California, 85; 10 Am. Rep. 266; *Preston* v. *Hull*, 23 Grattan (Virginia), 600; 14 Am. Rep. 153; *Ingram* v. *Little*, 14 Georgia, 173; 58 Am. Dec. 549; *Cross* v. *State Bank*, 5 Arkansas, 525; *Williams* v. *Crutcher*, 5 Howard (Mississippi), 71; 35 Am. Dec. 422; *Lamar* v. *Simpson*, 1 Richardson Equity (So. Carolina), 71; 42 Am. Dec. 345; *Gilbert* v. *Anthony*, 1 Yerger (Tennessee), 69; 24 Am. Dec. 439; *Byers* v. *McClanahan*, 6 Gill & Johnson (Maryland), 250; *Ayres* v. *Harness*, 1 Ohio, 368; 13 Am. Dec. 629; *Davenport* v. *Sleight*, 2 Devereux & Battle (No. Carolina), 381; 31 Am. Dec. 420.

Authority to act as agent may be implied from circumstances. *Van Etta* v. *Evenson*, 28 Wisconsin, 33; 9 Am. Rep. 486.

No. 3. — In re D'ANGIBAU. ANDREWS *v.* ANDREWS.

(C. A. 1880.)

RULE.

An infant may be authorised to act as agent, and may validly exercise a mandate committed to him.

In re D'Angibau. Andrews v. Andrews.

L. R., 15 Ch. D. 228 (s. c. 49 L. J. Ch. 756).

By marriage settlement, made in consideration of a marriage which took place in 1874 (before the Married Women's Property Act of 1882), the husband covenanted to assign to the trustees certain property, consisting of personal estate, in which the wife, who was an infant, acquired a vested interest upon marriage, upon trust to pay the income to the wife for her separate use during coverture; and after her decease to pay the income to the husband until bankruptcy or alienation, and subject to these trusts and to certain trusts (which failed) in favour of issue of the marriage upon trust for such person or persons and for such purposes as the wife should by deed [or will] appoint; and in default of such appointment (in the event, which happened, of the husband surviving), in trust for the next of kin under the Statute of Distribution of the wife.

The wife died while still an infant, having exercised her power of appointment in favour of the husband. The property was now claimed by the plaintiff as trustee in bankruptcy of the husband, and also as the legal personal representative of the wife, against the trustees of the settlement and others claiming to hold the

property in the interest of the next of kin of the wife, who were strangers to the marriage consideration.

The MASTER OF THE ROLLS (Sir G. JESSEL), held that the appointment was good, as being the exercise by an infant of a power over personalty in which, although she had a life interest, she had no interest in the reversion affected by the appointment.

This decision was brought before the Court of Appeal, consisting of COTTON, L. J., BRETT, L. J., and JAMES, L. J. Lord Justice COTTON differed with the opinion of the MASTER OF THE ROLLS, on the ground that the intentions of the instrument was to give the infant a power in the nature of property in the reversion; but he decided in favour of the plaintiff, on the ground that the claim of the trustees of the settlement and of the next of kin, though these, being rested on a merely equitable title in favour of volunteers, it could not be enforced against the legal title of the plaintiff. On the latter point, all the Lords Justices were agreed. And on the former question the Lords Justices BRETT and JAMES (against the view of Lord Justice COTTON) agreed with the MASTER OF THE ROLLS.

The judgments of the Lords Justices BRETT and JAMES are here set forth as containing an authoritative exposition of the general law of mandate.

BRETT, L. J. Upon the second point I entirely agree with the judgment of my brother Lord Justice COTTON, and that is of itself sufficient to determine the dispute in this case. But inasmuch as the other point was fully argued, and is a point of great importance, and may perhaps, upon appeal, be of importance in this case, he has thought it right to give a judgment upon that point. I entirely agree with him in the propriety of so doing, and I think it my duty, therefore, to state my opinion upon the first point. With some diffidence, in consequence of the opinion of my Brother COTTON, I have come to a contrary conclusion.

I have considered this point, and considered it often. It seems to me that the power given in this case was what I should prefer to call a pure mandate; that is to say, it was a power that did not deal with any property or interest of the infant, but did deal with the property and the interest in the property of the settlor. Even if it affects some interest of the infant, I think that the proper inference from the document is, that it was the intention of the settlor that the power should be exercised by the infant whilst an

infant. It seems to me that the considerations as to both points are very nearly the same.

The power given is a mandate; the moment that mandate is exercised, it seems to me that the mandator's intention takes legal effect, not from the exercise of the mandate, but from the gift of the person who delegated the power to exercise his will. It is said that, he having given that power to a person whom he knew at the time was an infant, the power of exercising that delegated authority is to be suspended till the infant comes to full age. Inasmuch as the power is given by a person who had full authority to give that power, who delegated that which he could have most effectively done himself if he had chosen, it seems to me that to say that that power is to be suspended till the infant comes to full age is, to say the least of it, a most artificial doctrine. If it were to be exercised with regard to real estate, I think we should be bound by authority to say that it could not be exercised till the infant was of full age, — an authority which at this time we are not at liberty to overrule; but I must confess that the same reasoning which leads me to the conclusion to which I now come, would, if it had not been for authority, have brought me to the same conclusion with regard to real estate.

That authority, which we are bound to obey with regard to real property, is founded, as I venture to say, in my opinion, upon one of those artificial rules applied to real property which have done more to bring the law into popular question or disgrace than any other part of its administration; but we are bound with regard to real property.

With regard to the exercise of this power by will, we are bound by Act of Parliament, but it seems to me the Act of Parliament goes a long way to show what was the opinion of the legislature, for they were not contented to say that no will can be made by an infant; but, foreseeing that these mandates might be treated, not as the will of the person who was exercising the mandates, but only as an exercise of the mandate with a peculiar solemnity, they thought it necessary to put into the Act of Parliament a particular clause to say, that even where it was the exercise of a power of appointment, it could not be done unless the person had arrived at a full age.

We are bound, therefore, in a case of real property, by authority; and with regard to the exercise of the power of appointment over

personal estate by will, by an Act of Parliament; but unless there is some principle which should carry it further, it seems to me that we are not bound to carry it one step further when we are dealing with personal estate. Therefore, this being a pure mandate, in my opinion, which does not deal with any property of the infant, there is no rule which prevents us from saying that that power might be exercised by deed during the infancy. As a general rule, an infant may exercise a mandate, and if this had been to appoint by writing or under her hand only, I can see no reason why it should not have been exercised at any time. Is there any rule, therefore, why it should not be exercised by deed? It is not a deed really taking effect as the deed of the infant; it is the exercise of the mandate by a peculiarly solemn form, and that is all.

The artificial character of this rule seems to me to be shown more clearly when the case arises under a marriage settlement of an infant female than in any other case. It does seem strange, upon any principle, that a person who is either the husband, as in this case, or a father, or a relation, who is allowing the female to marry, — who thereby makes her the head of a family, the head of a household, and, under certain circumstances, the guardian of her children, — should be supposed when he gives this particular power to come to this extraordinary conclusion, that, although she has all the other powers, yet if she has more than one child before she is twenty-one, and has a power given her to appoint as between those children, that power is to fail and become wholly ineffective if she happens to die before she is twenty-one, so that there will be no appointment as among her children.

But then there is the other point: what is the intention? Now, here is a person giving this power; he gives it in terms which have no reference to time. According to all the ordinary rules of construction, the time of its exercise would commence from the beginning. But it is said this power is to be postponed, although there are no words of postponement. It strikes my brother, Lord Justice COTTON, that because the power must be postponed in the case of the will, therefore the true inference is that the person intended to postpone it in the case of the deed. It is strange how differently things affect different minds on questions of construction. I should rather myself conclude that, having given the power to perform this by will, and also by deed, the contrary inference would be drawn, — that he meant to say, "By deed till

she is twenty-one, and by deed after she is twenty-one, if she so elects; by will, not till after twenty-one, because the law forbids me to give that power."

On both points, it seems to me, with great deference, that the view of the MASTER OF THE ROLLS was right, and that, as a general rule, in cases of personal property, unless there are words to postpone the exercise of the power, that power is intended to commence, and does commence by law, from the time when the power can first be exercised.

JAMES, L. J. I entirely concur in the reasoning by which Lord Justice COTTON arrived at the conclusion in support of the decision of the MASTER OF THE ROLLS as to the second point; that is to say, that the persons claiming adversely to the plaintiff are volunteers who have no right whatever to obtain specific performance of a mere covenant which has remained as a covenant and never been performed.

But I also concur with the MASTER OF THE ROLLS in the ground upon which he has based his judgment, and which has been expressed by Lord Justice BRETT. My view goes even further than that which the MASTER OF THE ROLLS thought it necessary to express as to those powers. According to my view, an infant may be an agent. An infant may be the donee of a power of attorney. It is difficult to understand why he may not be the donee of a power in a will or other settlement, as well as the donee of an ordinary power of attorney. *Hearle* v. *Greenbank*, 3 Atk. 695, which is the only decision on the subject, no doubt decided that an infant could not exercise a power over real estate; but the judgment was expressly and carefully limited to real estate, and is, if not an implication that it was otherwise as to personal estate, and probably otherwise as to gavelkind estates in Kent, at least, no authority to the contrary. As to personal estate, it has been considered by eminent text writers as an authority that an infant could exercise powers over personal estate, and it has, I think, been understood by conveyancers that there is this distinction; for while provision has always been carefully made for the exercise of powers over land during the minority of a tenant for life, no such provision, as far as I am aware, is ever introduced into settlements of personal estate; and I should be sorry to express any doubt that a *feme covert* infant cannot exercise the ordinary powers contained in a marriage settlement of personalty, unless there be something to raise the

presumption that it was not so intended; and I can see nothing in the settlement before me to raise such a presumption.

Of course, an infant could not, by settlement, or otherwise, give himself a power; the power in this case is given by the adult husband.

The judgment of the MASTER OF THE ROLLS was accordingly affirmed with costs.

AMERICAN NOTES.

An infant may be an agent. *Lyon* v. *Kent*, 45 Alabama, 656; Lawson on Contracts, § 167; *Brown* v. *Hartford Insurance Co.*, 117 Massachusetts, 479; *Talbot* v. *Bowen*, 1 A. K. Marshall (Kentucky), 463; 10 Am. Dec. 747. So may wife for husband. *Krebs* v. *O'Grady*, 23 Alabama, 726; 58 Am. Dec. 312; *Hopkins* v. *Mollineux*, 4 Wendell (New York), 465; *Felker* v. *Emerson*, 16 Vermont, 653; 42 Am. Dec. 532; *Stall* v. *Meek*, 70 Penn. St. 181; *Butts* v. *Newton*, 29 Wisconsin, 632.

"Any one, except a lunatic, imbecile, or child of tender years, may be an agent for another. It is said by an eminent author and jurist, that 'it is by no means necessary for a person to be *sui juris*, or capable of acting in his or her own right, in order to qualify himself or herself to act for others. Thus, for example, monks, infants, *femes covert*, persons attainted, outlawed, or excommunicated, villains, and aliens may be agents for others.'" Story's Agency, §§ 6, 7, 9. *Lyon* v. *Kent*, *supra*.

SECTION II. — *Delegation of Authority.*

No. 4. — HOWARD'S CASE.

(CH. 1866.)

No. 5. — DE BUSSCHE *v.* ALT.

(CH. 1877.)

RULE.

AN authority given to an agent to do an act in which he has to exercise a discretion, does not of itself raise a presumption that the agent is empowered to commit the doing of it to another, so as to render the principal responsible for the act of the agent.

But the power to employ a sub-agent may be inferred from the nature of the business, or from the usual practice in the like cases; and, where it is validly exercised, the

relation of principal and agent is established between the principal and the (so-called) sub-agent.

Howard's Case.

L. R. 1 Ch. 561.

This was an application for removing Mr. Howard's name from the list of contributories in respect of forty reserved shares in the Leeds Banking Company Limited.

Mr. Howard was originally the holder of two hundred shares in the Leeds Bank; and the directors having resolved to allot the reserved shares, the manager of the bank, in pursuance of a resolution passed by the directors on the 22nd of June, 1864, sent a circular to Mr. Howard, offering him forty of the reserved shares, being one for every five shares he then held, at £30 per share, and the circular concluded as follows: "If taken up, the amount must be paid to the bank on or before the 1st of October next; if paid before that time, interest at five per cent will be allowed, and the shares will then be entitled to one quarter's dividend at the end of the year."

On the 7th of July, 1864, Mr. Howard wrote to the manager of the bank a letter stating that he had been ill, but wanted to see him about the new shares, and added, "I should wish to take what falls to me, allowing me until February to pay for them."

It appeared from the affidavit of the manager, that a few days after the receipt of this letter he wrote against Mr. Howard's name in the allotment paper, after the forty shares, the words "accepted for February."

On the 14th of July, 1864, a board meeting of the directors was held, when the allotment paper was before them, at which they passed resolutions relating to the allotment of shares which had been accepted, but did not pass any resolution with regard to Mr. Howard's condition that he was to be allowed till February to pay for them. They, however, at that meeting, passed the following resolution: "That the allotment of the shares remaining undistributed shall be allotted according to the discretion of the manager and the two private directors."

On the 22nd of July, 1864, the manager wrote a letter to Mr. Howard, telling him, "the number of shares allotted to you are the forty accepted by you."

No. 4. — Howard's Case.

The banking company stopped payment in September, 1864, and no payment was ever made by Mr. Howard in respect of his new shares. The company was ordered to be wound up in October, 1864.

The deed of settlement of the company provided that the allotment or distribution of such of the shares as had not been subscribed for should belong to and be vested in the directors of the company for the time being, and should be disposed of by them in such manner as in their opinion would best promote and advance the credit and interest of the company. The deed also provided that three of the directors should constitute a board.

Mr. Howard owed the bank considerable sums for unpaid calls.

The case came before Vice Chancellor KINDERSLEY, who granted the application. In regard to the question of delegation, he stated the grounds of his judgment as follows: —

Then arises the question whether the board of directors had power to delegate the allotment of shares to the manager and two private directors. I think they had no such power, and that the rule *delegatus non potest delegare* applies. Mr. Howard could not have filed a bill for specific performance against the company in respect to these shares; for the answer to such a bill would have been that the company never authorised the manager and the two private directors to allot the shares, but only authorised the board of directors to do so.

The Official Liquidator moved before the Lords Justices by way of appeal from this decision; and after argument the Lords Justices gave judgment as follows: —

Sir G. J. TURNER, L. J. My opinion in this case agrees with that of the VICE CHANCELLOR for the following reasons. It was not denied, nor could it be denied, that the answer of Cooper Howard to the offer made to him by the directors, of a portion of the unissued shares, was conditional upon the acceptance by the directors of the new term introduced by him, that he should not be called upon for payment until the following February. An acceptance by the directors of this new term was, therefore, necessary to complete the contract. The question is whether there was any such acceptance on their part. It was not pretended that there was, unless the resolution of the 14th of July, 1864, amounted to such an acceptance; and I am of opinion that it did not. That resolution dealt with a wholly different sub-

ject, — the distribution of so many of the unissued shares as remained after the answers had been returned to the first offer made by the directors. It neither affirmed nor disaffirmed those answers, nor, except in this particular case, was there any need for such affirmance or disaffirmance; for, except in this particular case, the contract was either complete or was negatived by those answers. If, indeed, it could have been shown that this resolution could not take effect without the forty shares in question being reckoned as shares which had been accepted, it might, by necessary inference, have been held to operate as an acceptance of the conditional offer which Cooper Howard had made; but it is plain that this was not the case, for the resolution would apply to all the shares which were not reached by the first offer, including those which were declined. The true state of the case, therefore, is this: either that the resolution did not at all apply to these forty shares, or that if it at all applied to them, they fell within the class of undistributed shares to which the latter part of the resolution refers; and in either of these views the opinion of the VICE CHANCELLOR seems to me to be right, — in the one case, because there was no acceptance of the new terms; and in the other, because the delegation of authority was unwarranted. The case is more strong against the appellant, because the onus of proving the acceptance of the new term introduced by Cooper Howard's offer rested, as I apprehend, upon him. This appeal, therefore, must be dismissed. The official manager must take his costs out of the estate, and Cooper Howard's costs must be dealt with as the VICE CHANCELLOR dealt with his costs of the original hearing.

Sir J. L. KNIGHT-BRUCE, L. J. I do not dissent.

De Bussche v. Alt.

47 L. J. Ch. 381 (s. c. 8 Ch. D. 286).

This was an appeal from a decision of VICE CHANCELLOR HALL.

In 1868 the plaintiff, De Bussche, was the registered owner of two composite screw steamers called the *Nymph* and the *Columbine*. In pursuance of an arrangement between the plaintiff and Willis & Son, who were mortgagees, the steamers were consigned by Willis & Son to Gilman & Co., merchants carrying on business in China, at Hongkong and Shanghai, and in Japan

at Yokohama. The subsequent correspondence about the sale was for the most part carried on between the plaintiff and Gilman & Co., who, throughout the transaction, were aware that De Bussche was the owner, subject to the mortgage. At the time of the consignment, the defendant, Alt, was managing partner at Osaca and Hiogo, of an English firm in Japan called Alt & Co. Gilman & Co. had no branch in Japan except at Yokohama, but had on former occasions employed Alt as agent for the sale of merchandise. Alt heard that Gilman & Co. had the disposal of these ships, and offered to try and effect a sale of them in Japan. And De Bussche, also having heard that Alt had succeeded in selling other ships, wrote to Gilman & Co., and suggested that Alt & Co. should be employed by them as agents to sell the *Nymph* and *Columbine*.

In September, 1868, De Bussche wrote to Gilman & Co. and said he would not accept less than $90,000 cash net in London for either of the ships, and the *Columbine* was then put into the hands of Alt for sale upon the terms above mentioned.

For some time prior to the defendant's employment in connection with the two steamers, he had had business relations with a prince of a Japanese district called Gayshieu; and the Prince was indebted to him in certain sums of money, some of which were payable in 1868 and some in 1869.

In December, 1868, and January, 1869, several letters passed between Alt and Gilman & Co. with respect to the difficulty of getting cash for the vessels; Alt saying that he could effect a sale, but that no native was willing or able to pay cash down, and Gilman & Co. saying they could not go farther to meet this difficulty than by allowing one third of the price to remain unpaid on the security of a promissory note guaranteed by one of the banks. In one of these letters Alt, writing to Mr. Lavers, one of the partners in Gilman & Co., said, "I have already written to you that our commission on sale of steamers is invariably five per cent.; but I have been talking to Gilman on the subject and think that we shall probably buy the vessel from you, so that the question of commission will not arise. We shall have to give credit to the buyers we have in view here; so the simplest way will be for us to buy from you and resell on our own account." In another letter written on the 9th of January, 1869, Alt said, "I have been talking to Gilman on the

subject, and he thinks you would be glad to accept your limit from us as purchasers; and if we settle anything shortly it will be in this way, as I doubt whether we can get all cash from any of our buyers before transfer, and we shall therefore have to take all risks. Please inform me by return whether we can have the *Nymph* or *Columbine* on payment of your limit net to you, and state what sum that would be, as our commission would not have to be taken into account. I suppose it would be under $90,000."

In reply to this, Gilman & Co., in a private letter written on the 21st of January, 1869, said, "I note all you say about conditions and terms of sale of these steamers. You are aware already that our limit for either is $90,000 net cash. If you can pay this, of course your money is as good as other people's. We might divide commissions, — that is, our commission with you. Say you pay us $90,000, upon which we charge commission and return you a share of such charge. The steamers would be very cheap at this, and did they belong to us, I should advocate holding on to them. I think I have now stated plainly the terms of sale, and sincerely hope that business may result."

On the 24th of February, 1869, Alt entered into an agreement with certain officers of the Prince of Gayshieu for the sale of the *Columbine* to the Prince for $160,000, payable as to $75,000 in cash, and as to the balance in two instalments on the 4th and 8th months (Japanese) of the then year, which would be in May and September. The contract was subject to confirmation by the Prince's government, and complete possession of the vessel was not to be given until full payment was made. On the same day a further agreement was made between the same parties under which, in consideration of the purchase of the steamer, the Prince was to pay to the defendant in the 2nd month of the year 22,400 rios due in the 3rd month, in the 3rd month 23,000 rios due in the 4th month, and in the 8th month 30,723 rios due in the 10th and 11th months.

The defendant alleged that these agreements were mere inchoate arrangements which were afterwards cancelled; but on the 17th of March, 1869, two admittedly binding and final agreements were concluded, which were in substance to the same effect as the first agreements, with the exception that the vessel was to be handed over on payment of the $75,000, while the bill of sale was to be retained until payment of the whole purchase money.

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On the 12th of March, 1869, Alt, in a private letter to Lavers, said, "I am now at work raising the necessary amount to remit you for the cost of the steamer *Columbine*. I find it quite impossible to make a cash sale on account of the owner, and have therefore decided to take her over on our own account, and give a long credit to some people I can get to take her. I do not advise anything officially till I can hand a large remittance. . . . On referring to your letter of the 16th of December, you say that Mr. De Bussche would be satisfied with a clear return of $85,000 at 4*s*. 6*d*. I presume, therefore, if I hand your Yokohama firm bank bills for $85,000, at 4*s*. 6*d*. and pay your commission at 2½ per cent., that the transaction will be in order. Please advise me per return about this, and send me the transfer documents, so that we may settle the thing at once."

On the same day Alt & Co. wrote officially to Gilman & Co. and said, "We beg to advise, having settled a sale of the steamer *Columbine*, which will enable us to remit you the net limit given our Mr. Alt for the vessel by your Mr. Lavers."

On the 12th of March, 1869, De Bussche wrote from England, with the approval of Willis & Son, to Gilman & Co., and said, "As there seems difficulty in getting all cash, I now ask you to let Alt & Co. sell for part credit — say two thirds cash, and one third credit not exceeding nine months; the price will of course be higher — but if £25,000 can be had, it will be satisfactory."

On the 18th of March, Lavers replied to Alt's private letter of the 12th of March, and said, "I am much pleased to learn that there is at last some chance of selling the *Columbine*, although at the price you name, $85,000, it cannot be done. By my letters of the 20th of January to your firm, and the 21st of January to you, you will not fail to notice that the limit given on those dates was $90,000 free of commission. Our commission would be five per cent.; but we should be quite content to divide this with you — say give you 2½ per cent. The steamers would be dirt cheap at this price. We cannot accept $85,000 net, with an addition of 2½ per cent. as our commission."

In reply to this, Alt wrote to Lavers on the 28th of March, and said, "I note from it (the letter) that you cannot modify the limit given for the *Columbine* in yours of the 21st of January, say $90,000; and we shall therefore be ready to hand you this amount on receipt of your (or Yokohama firm's) reply to our

official herewith. I am glad to see you are willing to divide your commission with us, for which I am much obliged; we require all we can get out of this transaction to compensate for the responsibilities we take."

On the 25th of March a formal transfer of the ship to the Prince was executed by Alt.

During the period over which these transactions with the Prince extended, Gilman & Co. were in constant correspondence with the plaintiff; but they did not, nor did the manager of the firm of Alt & Co. at Nagasakai, who was also in correspondence with the plaintiff, suggest in any of their letters that Alt had assumed any other position than that of agent. Even on the 12th of April, when Gilman & Co. informed the plaintiff of the sale for $90,000 cash, they still did not inform him that the defendant was the purchaser. The first time they mentioned it was in a letter of the 3rd of June, 1869, when they said, "You are aware that the steamer was worked by Messrs. Alt & Co. in Japan, who afterwards took her over for your limit of $90,000." Messrs. Gilman do not indeed seem to have known for some time after the sale was made what were the exact terms upon which Alt had sold the ship; and a question in a letter from Lavers & Alt, inquiring what these terms were, was never answered. Even after the suit was commenced, Lavers did not know how large a part of the price had been received by Alt in cash.

Before the plaintiff heard from Gilman & Co. that Alt had taken over the ship, he seems to have been informed by other correspondents in Japan, particularly by a Mr. Pitman, that the *Columbine* had been sold by Alt to the Prince of Gayshieu for $175,000; and in one letter of Pitman's, written on the 29th of April, he said, "I find the *Columbine* price was $175,000 on long credit. I still trust that Alts have known their interest better than to do what report accuses them of, — namely, of only crediting you with $90,000." After the information so received, the plaintiff, in a letter from him to Gilman & Co., written on the 30th of July, 1869, after objecting to the deduction of a sum of £1100 for commission, said, "The Messrs. Alt & Co. have made a good bargain, and I think should not only pay you your commission, or divide, which I am told is the custom, but pay the above £1100. $90,000 for a vessel like the *Columbine* is as low a price as they could possibly give."

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The defendant received the agreed price for the *Columbine* from the Prince of Gayshieu in the following manner. He received $75,000 in various payments, as appeared from his accounts, between the 9th of February and the 13th of April, 1869; he received $4000 on the 18th of September, 1869, and he received the balance of principal and interest, amounting to $93,750, in December, 1869, in rice, which the Prince had entered into an agreement to transfer to him, but which agreement, as stated by the defendant, was only completed after the defendant, at considerable risk and expense to himself, had frightened the Prince into compliance by a visit to his capital in a large American steamer.

Not long after these transactions, the defendant retired from the firm of Alt & Co., and returned to England. Here he from time to time met the plaintiff, but no further information seems to have been given to the plaintiff as to the actual price at which the ship was sold, either through the defendant or through his agents in Japan, till after this suit was instituted on the 10th of April, 1873.

The cause came on for hearing in the month of June, 1877, and on the 27th of that month the Vice Chancellor, without calling for a reply from the counsel for the plaintiff, gave his judgment to the effect that the plaintiff's claim to receive any profits made by the defendant out of the transaction of the sale of the *Columbine* was well founded; and he decreed the necessary account for the purpose of ascertaining those profits.

From this decision the defendant appealed.

The points argued for the appellant were these: —

The defendant acted as the agent of Gilman & Co., and the relationship of principal and agent was never established between the plaintiff and the defendant.

But even if the relationship of principal and agent was at one time established, it ceased before the sale of the *Columbine* took place. Then we have a strong case of acquiescence.

Argued for the respondent: —

Alt was agent to the plaintiff, and therefore could not make a profit out of his position beyond the commission agreed upon. Gilman & Co. had express authority; and if they had not had that, they would certainly have had an implied authority to appoint a sub-agent. The law as to this point is well put in

Story on Agency, § 201, where, after speaking of the occasions in which an agent has authority to appoint a sub-agent or substitute, he says, "Wherever any such express or implied authority to appoint a sub-agent is allowed or given by the principal, a privity is created between them."

The law as to agents obtaining profits beyond reasonable compensation for services, even if sanctioned by usage, and as to their becoming purchasers, and the temptations involved in such a relationship, is also clearly laid down in Story on Agency, §§ 207, 210, and 217 *a*. There is nothing to prevent the plaintiff pursuing his rights against his agent, either on the ground that he had ratified the sale to Alt, or that he had acquiesced in that sale. *Duke of Leeds* v. *Earl of Amherst*, 2 Ph. 117; 16 L. J. Ch. 5; *Dunne* v. *English*, L. R., 18 Eq. 524.

The written judgment of the Court was now (on March 12, 1878) delivered by

Thesiger, L. J., who, after stating the facts and referring to the evidence as above set forth, continued their judgment as follows: —

In support of the appeal, it has been contended on the part of the defendant, first, that the relationship of principal and agent was not constituted between the plaintiff and defendant; second, that even if it were at one time constituted, the relationship ceased before the sale of the *Columbine* took place; and third, that assuming the defendant to have been at one time constituted, and to have continued throughout the transaction of sale, the agent of the plaintiff, the latter has lost by acquiescence any right to follow the profits made by the defendant out of it.

The first contention raises a question which, as it appears to us, does not present any difficulty. As a general rule, no doubt, the maxim *delegatus non potest delegare* applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but the maxim, when analysed, merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken to personally fulfil, and that inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident of the contract. But the exigencies of business do from time to time ren-

der necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose; and where that is the case, the reason of the thing requires that the rule should be relaxed, so as on the one hand to enable the agent to appoint what has been termed a "sub-agent" or "substitute" (the latter of which designations, although it does not exactly denote the legal relationship of the parties, we adopt for lack of a better and for the sake of brevity), and on the other hand to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such "substitute;" and we are of opinion that an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where in the course of the employment unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute; and that when such authority exists and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself. The law upon this point is accurately stated in Story on Agency, § 201. A case like the present, where a shipowner employs an agent for the purpose of effectuating a sale of a ship at any port where the ship may from time to time in the course of its employment under charter happen to be, is pre-eminently one where the appointment of substitutes at ports other than those where the agent himself carries on business is a necessity, and must reasonably be presumed to be in the contemplation of the parties; and in the present case we have, over and above that presumption, what cannot but be looked upon as express authority to appoint a substitute, and a complete ratification of the actual appointment of the defendant, in the letters which passed respectively between Willis & Sons and the plaintiff on the one side, and Gilman & Co. on the other. We are therefore of opinion that the relationship of principal and agent was in respect of the sale of the *Columbine*, for a time at least, constituted between the plaintiff and the defendant.

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Next arises the question whether that relationship ceased before the actual sale of the vessel; and upon this question also we are of opinion that the contention of the appellant must fail. In the first place, it is clear that down to the time of the sale the plaintiff was no party to any termination of the defendant's agency; and we think that Gilman & Co. could not, after having once appointed and allowed the defendant to act as agent for the plaintiff in connection with the proposed sale of his vessel, and without any authority from the plaintiff, change the defendant's position in the transaction from that of an agent to that of a purchaser from the plaintiff. All the reasons which would apply to prevent the original agent from changing his position without the assent of his principal would equally apply to the case of the substitute; and if such a transaction were held to be valid, so as to entitle the substitute to make a profit out of it, it would open the door in a variety of cases to agents who could not themselves directly become purchasers, indirectly doing the same thing through the intervention of substitutes, and to the commission of serious frauds upon principals. But in the present case we are also satisfied by the evidence to which attention has already been directed, that Gilman & Co. themselves never assented to the termination of the defendant's employment as agent for the sale of the *Columbine*, and never assented to the defendant's taking the vessel himself until after the agreement for her sale to the Prince of Gayshieu was complete. When that agreement was concluded, the defendant was still in fact and in law the plaintiff's agent; and on and from the conclusion of the agreement the plaintiff was entitled to have the benefit of it, and as a consequence has a right to maintain the present suit, unless in some way by his conduct he has deprived himself of that right. This brings us to the consideration of the contention of the defendant, founded upon what has been termed "acquiescence" on the part of the plaintiff. It has been urged that the plaintiff ought not to be allowed to impeach the validity of the transaction in question, or to follow the profits made out of it, after having, with knowledge that the defendant had become the purchaser of his vessel, assented to the transaction being completed on that footing, received by himself or his mortgagees, through the hands of Messrs. Gilman & Co., the purchase money, allowed the defendant to incur risk and expense, which as agent he could not have been

called upon to incur in obtaining payment from the Prince of Gayshieu, and finally to dissolve his connection with the firm of Alt & Co. upon (as is suggested but not proved) the footing of his freedom from all outstanding claims, and to return to England, and there reside for a considerable period without any intimation of proceedings being taken against him by the plaintiff.

It is necessary, however, to bring these circumstances to the test of legal principles. It is competent, no doubt, to a principal to ratify or adopt the act of his agent in purchasing that which such agent has been employed to sell, and to give up the right which he would otherwise be entitled to exercise, of either setting aside the transaction, or recovering from the agent the profits derived by him from it; and the non-repudiation for a considerable length of time of what has been done would at least be evidence of ratification or adoption, or might possibly, by analogy to the Statutes of Limitation, constitute a defence; but before the principal can properly be said to have ratified or adopted the act of his agent, or waived his right of complaint in respect of such act, it should be shown that he has had full knowledge of its nature and circumstances, — in other words, that he had presented to his mind proper materials upon which to exercise his power of election; and it by no means follows that, because in a case like the present he does not repudiate the whole transaction after it has been completed, he has lost a right (actually vested in him) to the profits derived by his agent from it. It appears to us also that, looking to the dangers which would arise from any relaxation of the rules by which in agency matters the interests of principals are protected, the evidence by which in a particular case it is sought to prove that the principal has waived the protection afforded by those rules should be clear and cogent. In the present case, so far from the plaintiff having had full knowledge of the nature and circumstances of the transaction relating to the sale of the *Columbine*, or the evidence of ratification or adoption being clear and cogent, it is apparent that he was kept in entire ignorance of the amount of the purchase money payable by, and the terms of the credit given to, the Prince of Gayshieu, and of the important fact that the defendant had abstained from binding himself as a purchaser of the vessel until he had obtained the contract for her re-sale. It is to be observed also that while the plaintiff did not in terms repudiate the transaction by which his

vessel was sold, and appears to have grumblingly submitted to it as something which he could not help, he at the same time made no statement, and did no act from which is to be inferred any condition or stipulation or promise that, upon becoming better acquainted with the circumstances of the transaction, he would not enforce his legal rights against the defendant by claiming from him any profits made out of the transaction. We are of opinion, therefore, that there is no such evidence of ratification or adoption on the part of the plaintiff of the acts of the defendant as is sufficient to show that he waived the protection given him by law, and dealt with the agent, *quoad* those acts, as a person discharged of his agency.

It still remains to be considered whether, short of such ratification or adoption, the plaintiff can be held to have by his conduct in any way precluded himself from taking the present proceedings.

The term "acquiescence," which has been applied to his conduct, is one which, as was said by Lord COTTENHAM in *The Duke of Leeds* v. *Earl of Amherst* (*ubi supra*), ought not to be used, — in other words, it does not accurately express any known legal defence, but if used at all, it must have attached to it a very different signification according to whether the acquiescence alleged occurs while the act acquiesced in is in progress, or only after it has been completed. If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, as Lord COTTENHAM said in the case already cited, is the proper sense of the term "acquiescence," and in that sense may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct. But when once the act is completed, without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him, which, at all events as a general rule, cannot be divested without accord and satisfaction, or a release under seal. Mere submission to the

injury for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, although under the name of *laches* it may afford a ground for refusing relief under some particular circumstances; and it is clear that even an express promise by the person injured, that he would not take any legal proceedings to redress the injury done to him, could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and therefore not binding. Applying, then, the principles above enumerated to the present case, — firstly, it is clear that there was no acquiescence on the part of the plaintiff in the defendant becoming the purchaser of the *Columbine*, and obtaining the profit of the sale to the Prince of Gayshieu, at any time before the sale to the Prince was a completed transaction. He said nothing, — did nothing; there was nothing which he abstained from saying or doing by which he induced the defendant to do or abstain from doing anything, or to alter his position before the transaction with the Japanese Prince was completed. *Prima facie*, therefore, the plaintiff was entitled to bring his action to recover the profit derived by the defendant from the transaction.

Secondly, there has been no release by the plaintiff of his right of action, or anything which could be held to amount to accord and satisfaction.

Thirdly, assuming that, under certain circumstances, a person might by his conduct, whether constituting *laches* or amounting to an estoppel, entirely preclude himself from enforcing a vested right of action, yet, in the present case, no conduct having that effect can properly be imputed to the plaintiff. He made no representation to the defendant that he would not take proceedings, even if his conduct could under any circumstances be held to have been equivalent to such a representation, or to constitute *laches*, it was pursued, as already pointed out, in ignorance, due to the defendant's own concealment of the terms of the sale to the Prince of Gayshieu, and especially of the fact that such sale preceded the purchase by the defendant; and lastly, the principal element of an estoppel by conduct — namely, that it should have been pursued with the intent, or so as to induce the person relying upon the estoppel to act in a particular manner — is here wholly wanting, for the plaintiff was quite unaware, until after the defendant's answer to the suit was put in, that the defendant

had run any risk or incurred any expenses in obtaining payment of the price stipulated to be paid by the Japanese Prince.

We are of opinion, therefore, that the plaintiff has not by his conduct in any way precluded himself from taking these proceedings.

In dealing with the case, we have put aside one topic which was discussed in the argument for the appellant, but which is beside the real questions between the parties, — namely, the righteousness or unrighteousness of the transaction impugned. The law under which an agent is prevented from making a profit out of his employment by acting as a principal instead of as an agent is wholly independent of considerations of this kind, and it is most important in the interests of commercial honesty in general that the honesty of the agent concerned in the particular transaction should not be inquired into as a question upon which its validity depends; for by this strictness the temptation to embark in what must always be a doubtful transaction is removed. If the defendant could have made out by the most conclusive evidence that $90,000 in cash was a full, and more than a full, equivalent for the bargain which he got from the Japanese Prince, it would be wholly irrelevant. At the same time, we must add that the present case is one which comes very clearly within the mischief which the law is intended to obviate. Looking to the large price which the defendant stipulated to receive upon his sale of the *Columbine*, and the amount which was to be paid in cash, one cannot but feel some doubt whether his purchaser might not possibly, if the defendant's own interests had been out of the way, have been induced to give, instead of $160,000, partly in cash, and partly on credit, a sum down in cash exceeding, at least to a small amount, the limit of $90,000, fixed by the plaintiff. But even if that were not so, it is at all events highly probable that if the offer of the Japanese Prince had been submitted to the plaintiff, he would have been willing to sell direct to him upon the terms of the contract made by the defendant with him.

It is urged, no doubt, by the defendant that the terms were mixed up with the terms of the contemporaneous contract by which the defendant gave the Prince further time for payment of debts then due, while hastening the period of payment for those coming due; but when those terms are looked at more closely, it

becomes apparent that under any circumstances the Prince was prepared to give a large sum of money, with a considerable cash payment, for the plaintiff's vessel, and when it is asked, as it has been in argument, "What was the defendant to do in the face of the alleged positive prohibition to sell for anything but cash?" the answer is plain. He might have said, and ought to have said, "I cannot get all cash, but I can get so much cash and so much credit from a customer of mine; and if you do not like that, let me accept his offer for myself, and I will give you your limit in cash" Full opportunity for taking this course, either through the post or by means of the telegraph, was open to the defendant; but instead of taking it, he thought proper to conceal altogether from the plaintiff, from Gilman & Co., and even from his own manager at Nagasaki, the real nature of the transaction in which he was engaged; and although he may have acted without any fraudulent or improper motive, he cannot reasonably be said to be free from blame, or to have a right to complain of consequences which a more due regard to his duty towards his principal could easily have obviated. There was one matter alleged by the defendant, and actually supported by evidence, although admitted to be untenable in argument, which ought not to pass without notice and reprobation, — that is, an alleged custom or practice in the ports in which the defendant trades, for an agent for sale with a minimum limit, himself to take at that limit and at his own option the thing he is employed to sell. We cannot but express a hope that the Court will never again hear of such a contention or have before it such evidence. The fact that there has been a notion entertained by some commercial agents of the existence of such a custom or practice may go far to explain how such a transaction as that complained of in the suit came to be. In conclusion, we are of opinion that although some hardship may have been caused to the defendant by the delay of the plaintiff in taking these proceedings, he has, nevertheless, most properly been made liable in them, that the decree of the Vice Chancellor should in all respects be affirmed, and this appeal be dismissed with costs.

ENGLISH NOTES.

In *Peirce* v. *Corf* (1874), L. R., 9 Q. B. 210; 43 L. J. Q. B. 52, BLACKBURN, J., thought it clear (L. R., 9 Q. B. 215) that an auction-

eer's clerk has not, by general custom, authority to sign a contract for a purchaser, so as to make the contract binding under the Statute of Frauds; although it is well settled that the auctioneer himself has such implied authority. *Hinde* v. *Whitehouse* (1806), 7 East, 558; 8 R. R. 676. *Bird* v. *Boulter* (1833), 4 B. & Ad. 443 (as BLACKBURN, J., further observed), is distinguishable on the ground that the purchaser in that case, by a sign made to the clerk, authorised him to sign and so made him his own agent in that behalf. The same distinction is made by Lord ELDON in *Coles* v. *Trecothick*, 9 Ves. 234; 7 R. R. 167, where the clerk was held authorised on evidence of assent by the purchaser.

The former branch of the rule is further exemplified in the following cases: *Cockran* v. *Irlam* (1813), 2 M. & S. 301; 15 R. R. 257; *Solly* v. *Rathbone* (1814), 2 M. & S. 298; and *Catlin* v. *Bell* (1815), 4 Camp. 183; and *Henderson* v. *Barnewall* (1827), 1 Y. & Jer. 387, as to agents (whether factors or brokers) for sale; *Doe* v. *Robinson* (1837), 3 Bing. N. C. 677, as to an agent for giving notice to quit; *Cartnell's Case* (1874), L. R., 9 Ch. 691; 43 L. J. Ch. 588, as to directors having authority, under the articles of association of a company, to buy shares for the company.

AMERICAN NOTES.

Ordinarily an agent may not delegate his powers of a discretionary character. *Lyon* v. *Jerome*, 26 Wendell (New York), 485; 37 Am. Dec. 271; and cases cited in note, 278; *Sayre* v. *Nichols*, 7 California, 535; 68 Am. Dec. 280; *Wright* v. *Boynton*, 37 New Hampshire, 9; 72 Am. Dec. 319; *White* v. *Davidson*, 8 Maryland, 169; 63 Am. Dec. 699; *Appleton Bank* v. *McGilvray*, 4 Gray (Mass.), 518; 64 Am. Dec. 92. Thus in the first case cited above, it was held that canal commissioners could not delegate to an engineer the power conferred on them by statute to enter on and take lands for canal purposes.

But authority to employ a sub-agent may be inferred, in the absence of such conferred discretion, from the nature of the business or from necessity or from custom. *Appleton Bank* v. *McGilvray*, 4 Gray (Mass.), 518; 64 Am. Dec. 92. So a collecting agent may employ a bank. Id. So the master of a vessel, charged to sell the cargo, may put it with a reputable merchant, if unable himself to find a purchaser. *Day* v. *Noble*, 2 Pickering (Mass.), 615; 13 Am. Dec. 463. So an agent to sell land may employ another to exhibit it. *McKinnon* v. *Vollmar*, 75 Wisconsin, 82; 6 Lawyers' Rep. Annotated, 121. See to same effect, *Renwick* v. *Bancroft*, 56 Iowa, 527; *Smith* v. *Sublett*, 28 Texas, 163; *Lynn* v. *Burgoyne*, 13 B. Monroe (Kentucky), 400; *Gray* v. *Murray*, 3 Johnson Chancery (New York), 167; *Johnson* v. *Cunningham*, 1 Alabama (N. S.), 249. In the last case it was held that "there are cases in which the authority may be implied; as where it is indispensable, by law, in order to accomplish the end; or it is the ordinary custom of trade; or it is understood by the parties to be the mode in which the particular business would or might be done." "The rule is that an agent in whom is reposed some trust

or confidence in the performance of his agency, or who is required to exercise therein discretion or judgment, has no authority to intrust the performance of those duties to another, and thus bind the principal by the acts of the latter, without the consent of the principal. . . . On the other hand, the agent may appoint a sub-agent to do acts in the course of the agency which do not call for the exercise of judgment or discretion, but which are purely executive or ministerial, and the principal is bound by the acts of such sub-agent" *McKinnon* v. *Vollmar*, *supra*.

See Mechem on Agency, § 190, *et seq*.

Section III. — *Ratification.*

No. 6. — ASHBURY, &c. CO. *v.* RICHÉ, Appeal in the Action of RICHÉ *v.* ASHBURY, &c. CO.

(H. L. 1875.)

RULE.

In order that the act of an agent may be ratified, it must be an act which the principal would have had the legal capacity to do.

The legal capacity of a company constituted under the Companies Acts, 1862, &c., is limited by the objects set forth in the memorandum of association; and any act outside the scope of these objects is *ultra vires* of the company, and cannot be ratified so as to charge the company even by the unanimous assent of all the shareholders.

Ashbury, &c. Co. (Defendants), Appellants, v. **Riché** (Plaintiff), Respondent.

44 L. J. Ex. 185 (s. c. L. R., 7 H. L. 653).

This was a proceeding in error from a judgment of the Court of Exchequer Chamber, which had affirmed a judgment of the Court of Exchequer. In the Court of Exchequer, Channell, B., and Martin, B., were of opinion that judgment should be given for the plaintiff. Bramwell, B., dissented. The Court of Exchequer Chamber were equally divided in opinion, Blackburn, J., Brett, J., and Grove, J., being of opinion that the judgment of the Court below should be affirmed, Archibald, J., Keating, J., and

QUAIN, J., that judgment should be entered for the defendants, the now appellant Company.

The question raised by the pleadings was as to the liability of the Company upon certain contracts entered into on their behalf with Messrs. Riché, now represented by the respondent, Mr. Hector Riché, whereby the Company, which, as stated in their memorandum of association, was formed for the purpose of carrying on the business of "mechanical engineers and general contractors," had agreed to supply the necessary funds for the construction of a Belgian line, which was to be constructed from Antwerp to Tournai, Messrs. Riché having agreed to construct the line for a certain sum, payments on account of which were to be made in proportion as the works were executed, and the Company having previously purchased the concession for the construction of the line, which was granted by the Belgian Government. Although the contract was entered into directly between the Company and Messrs. Riché, it was not provided that the Company should itself employ and pay the contractors, but, it being necessary, by the law of Belgium, that a *société anonyme* should be constituted for the purpose of making and owning the line, the Ashbury Company agreed with Messrs. Riché that they would create a *société anonyme*, and that that *société*, when formed, should employ Messrs. Riché to make the line on terms thereby agreed upon, and that the Ashbury Company should keep the *société anonyme* in funds to pay Messrs. Riché according to those terms.

The main question, therefore, was, whether or not the contracts were not, *ultra vires* of the Company, wholly void, and such, therefore, as they could not be sued upon. Another question arose as to whether, if originally voidable, they had not been adopted or ratified by the subsequent acts of the Company; and a third question was, as to whether the Company had not constituted itself the *société anonyme*, so that the same number of persons constituted two distinct companies, — one in England, subject to English law, another in Belgium, subject to Belgian law, which latter Company clearly had power to make the contracts in question, though such might have been *extra vires* of the English Company. The facts were stated in a special case, which incorporated the memorandum of association, the articles of association, the contracts, several reports of meetings held by

the Ashbury Company, and other documents, too long to be printed here, but which may be epitomised as follows:—

The facts found by the special case were, that the plaintiff in the action, now defendant in error, Mr. Hector Riché, was a railway contractor, and that the now plaintiffs in error, defendants to the action below, were a company incorporated under the Act of 1862. That the objects for which the Company was established were, as stated in the 3rd paragraph of the memorandum of association, to be, "To make and sell, or lend on hire, railway carriages and waggons, and all kinds of railway plant, fittings, machinery, and rolling stock; to carry on the business of mechanical engineers and *general contractors;* to purchase, lease; work and sell mines, minerals, land, and buildings; to purchase and sell, as merchants, timber, coal, metals, or other materials, and to buy and sell any such materials on commission or as agents."

The articles of association recited an agreement dated the 30th of September, 1862, between John Ashbury, of the one part, and the Company, of the other part, whereby the Company agreed to purchase Mr. Ashbury's railway carriage and iron-works business, with the good-will of and the premises upon which that business had been carried on, and also all the appurtenances, machinery, plant, patents, trademarks, credits, contracts, engagements, and rights relating to the business, as carried on by the vendor, John Ashbury, at Openshaw and Ardwick, in the county of Lancaster, but not elsewhere. The articles then confirmed and adopted the agreement, but certain contracts therein specified, and which were then in the course of completion, were excepted, and remained the property of the vendor.

The special case found that the business thus taken to was "the building of railway carriages and waggons, and the making of turntables, points, crossings, and roofs," but that, "in the year 1860, a line of railway, from Riga to Dunaberg, in Russia, was being constructed by a Mr. James Jackson, a contractor for the same, Mr. Hawkshaw being the chief engineer," with whom Mr. Ashbury had contracted for the necessary carriages and waggons for the line. "During a visit by Mr. Ashbury (for the purposes of his contract), with Mr. Hawkshaw, to the railway in Russia, Mr. Hawkshaw, finding that Jackson had failed in his contract," asked Mr. Ashbury as a favour, and to save him (Hawkshaw) the trouble of going back to England to find a contractor, to complete

the construction of the line in partnership with a Mr. Watson. Mr. Ashbury agreed to this, and, in partnership with Watson, completed the construction of the line. The works of these partners for this purpose were at Riga; and this was the only railway in the construction of which Mr. Ashbury ever took part. He never tendered for the construction of any other railway.

The articles of association contained the following clause, numbered 4: "An extension of the business beyond or for other than the objects or purposes expressed or implied in the memorandum of association shall take place only in pursuance of a general resolution." Also, clause 5 provided that "No person except the directors, or a person from time to time authorised by these presents, or by a board so to do, shall have authority to enter into any contract, so as to bind the Company thereby." The articles also provided that Mr. John Ashbury should, for one year at least, act as managing director of the Company.

The contracts on which the action was brought, out of which this appeal arose, were entered into by the Company under the following circumstances: —

On the 14th March, 1864, the Belgian Government granted to Messrs. Gillon and Baertsoen a provisional concession for making a line of railway in Belgium, from Antwerp to Tournay, a sum of £4000 being deposited with the Government as part payment of the caution money for the grant of the said concession, a further sum of £16,000, being payable before the concession, was to be made absolute, as in fact it was on the 3rd February, 1865.

Previous to the 30th January, 1865, negotiations had been carried on between the plaintiff's firm and the directors of the Ashbury Company with reference to the proposed line of railway from Antwerp to Tournay. And Mr. James Ashbury, who, from the formation of the Company down to the end of December, 1866, acted as assistant managing director of the Ashbury Company, was sent to Brussels by the directors, as the agent of the Company, to make all necessary arrangements for carrying out these negotiations, and was furnished by the directors with a sum of £26,000 for this purpose.

On the 30th January, 1865, at Brussels, Mr. James Ashbury, as such agent, entered into four contracts, marked respectively, A, B, C, and D.

No. 6. — Ashbury, &c. Co. v. Riché.

A was a contract between the concessionnaires and the Ashbury Company.

B was a contract between the anonymous Company, for the Antwerp and Tournay Railway, and the plaintiff's firm.

C was a contract between the Ashbury Company and the plaintiff's firm.

D was a further contract between the plaintiff's firm and the Ashbury Company.

By A, the concessionnaires made over to the Ashbury Company the concession for the line of railway from Antwerp to Tournay in Belgium. For this the Ashbury Company were to pay 1,752,630 francs (£70,105 4*s.*), half in specie and half in shares; of the half in specie, there was to be paid, on signing the contract, £6000, and the day after £4000 was to be paid to the concessionnaires, and £16,000, the balance of the caution money, to the Belgian State; the remainder of the specie payment — viz., £9,052 12*s.* — was to be made in proportion, as payment was to be made to the contractors of the works. The shares of the Company for an equal nominal value were to be handed to the concessionnaires in proportions, as the payments were made to the contractors. The Ashbury Company were to form a Belgian company, to be called the anonymous Company, for the purposes of the line of railway, the capital of which was to be 32,760,000 francs, to be represented by 65,520 bonds at 250 francs each; and 32,760 shares at 500 francs each. They were to have the right of appointing four out of seven of the directors of the said anonymous Company and two out of five of the commissaires of the same. The Ashbury Company were also to have the right to elect or take, on certain terms, any concession which might be granted to the said concessionnaires by the French Government, for an extension of the line of railway from Tournay to Douai, in France.

By B the plaintiff's firm agreed with the anonymous Company to construct the railway, and find and provide all the rolling stock, and to receive in payment the whole of the capital of the Company; namely, the 32,760 shares and 65,520 bonds.

By C the plaintiff's firm agreed to accept and carry out the contract for constructing the railway from Antwerp to Tournay, and the Ashbury Company bound themselves that the plaintiff's firm should have such contract, and to provide the plaintiff's firm

with the necessary cash for the carrying out of the undertaking, and for that purpose to pay into the treasury of the anonymous Company 15,816,000 francs (£612,640), to furnish rolling stock for the railway instead of the plaintiff's firm, and to pay sundry expenses, and for this the defendants were to receive 65,520 bonds of £20, taken at £10 each, and 12,937 shares of the nominal value of £20 each, amounting together to £913,940; an arbitration clause was added.

By D the plaintiff's firm agreed to furnish rolling stock in consideration of 1,755,000 francs, to be deducted from the 22,848,500 francs (£913,940) which the Ashbury Company were to receive in bonds and shares under the contract C. The reason for the arrangement contained in D, as stated by Mr. James Ashbury to his directors, was that the minister would not allow the proposed rolling stock for the line to enter Belgium free of duty and that the proposed prices for such rolling stock would, therefore, not be such as would leave a profit to the defendants, and that he therefore proposed to Messrs. Riché that they should manufacture their own stock, or sublet it in Belgium, and pay the defendants for the profit they would have had if the plant had been constructed at Openshaw. Ultimately the arrangement was that Messrs. Riché should provide the stock and take all responsibility thereon, and that the Ashbury Company should receive, as compensation, the sum of £20,000 in shares at par, such shares, of course, bearing no interest during construction.

At the time of signing the contracts, Mr. James Ashbury paid the sum of £26,000 in performance of the provisions contained in contract A.

From various causes, delay took place in carrying out these contracts and making the line of railway. In the months of July, August, and September, the plaintiff made the necessary plans and surveys for constructing the line of railway. Mr. McCandlish was appointed by the directors of the Ashbury Company chief engineer of the line, and was afterwards, on the 4th October, 1865, accredited by them to the plaintiff, as the engineer with whom he, the plaintiff, might arrange all details, and by whom the plaintiff's plans were, if necessary, to be approved.

Early in October, 1865, the directors of the Ashbury Company sent Sir Cusack Roney and Mr. Tahourdin, their solicitor, with him, over to Brussels to make final arrangements on matters

having relation to the contracts of the 30th January, and thereupon Sir Cusack Roney, duly authorised by the said directors to act as the agent of the Ashbury Company in the matter, did on the 14th October, 1865, at Brussels, make three other contracts, marked respectively X, Y, and Z, modifying, in some respects, the contracts A, B, C, and D.

X was a contract between the concessionnaires of the first part, the Ashbury Company of the second part, and the plaintiff's firm of the third part.

Y was a contract between the anonymous Company and the plaintiff's firm; and

Z was a contract between the Ashbury Company and the plaintiff's firm. It was on this contract that the action was brought.

By Z, the Ashbury Company agreed to supply the plaintiff's firm with the funds necessary for the carrying out of their undertaking, and in order to effect this, to pay into the funds of the anonymous Company an amount in cash of 15,316,000 francs, in exchange for 55,000 bonds, taken at the rate of 250 francs each, and 3132 shares of 500 francs each, taken at par; such payment by the Ashbury Company to be effected gradually, in proportion to the payments that would have to be made to the plaintiff's firm, and in such a manner that the latter should always receive from the Company an amount of 15,316 francs in cash, upon a total certificate of 32,760 francs, and so in the same ratio; and the Ashbury Company were to receive 14,894 fully paid up shares of £20 each. This agreement also contained an arbitration clause.

After the 14th October, the plaintiff proceeded to construct the line, as contractor thereof, and entered into several contracts with other persons for that purpose.

In respect of his work the plaintiff sent to the anonymous Company pay sheets, approved and countersigned by Mr. McCandlish; and the proper proportion of each pay sheet was paid in cash into the treasury of the anonymous Company by the directors of the Ashbury Company, in the name of the Company, according to the provisions of the contracts between them and the plaintiff's firm in that behalf.

The statutes of the anonymous Company were duly passed and signed on the 22nd October, 1865, and the directors of the Ashbury Company nominated four of its administrators and three of

its commissaries, and the Company was regularly established according to Belgian law.

On the 18th January, 1866, the secretary of the Ashbury Company informed the plaintiff, by letter, that that Company had decided not to undertake the proposed extension of the line from Tournay to Douai, and in May, 1866, that the Company repudiated the contracts altogether.

With regard to the acts of the Company in ratification or adoption of the contracts, the plaintiff, now defendant in error, relied on the following facts.

At a meeting of the Company held in May, 1865, the item of £27,191 14*s.* 8*d.* for "advances on Anvers and Tournai Railway" was included in the accounts which were approved and adopted by the Company.

At another meeting, held in September, 1866, the same item is entered among bad and doubtful debts.

At an extraordinary general meeting, held in December, 1866, a committee was appointed to inquire into the past proceedings and present position of the Company; and in May, 1867, the report of the committee so appointed was read, and a deputation to confer with the directors was appointed.

The report of the committee stated fully the transactions of the directors with regard to the Antwerp and Tournai Railway, and that counsel's opinion had been obtained to the effect that such transactions were not binding on the Company, also that the £53,000, which had been paid by them in respect of that railway, and of a Spanish railway, could not be recovered, and recommended an arrangement being come to with the directors.

Thereupon, at another general meeting of the Company, a recommendation made by the persons who had been deputed to arrange matters with the directors was read and adopted. The recommendation was that certain of the directors should purchase from the Company, at the sum of £13,000, all the Company's rights and liabilities under the above-mentioned Belgian contracts, which had cost the Company £27,000, and on the 24th December the seal of the Company was, in pursuance of a resolution passed at another general meeting, affixed to a deed by which the Company purported to assign to the persons therein mentioned, and who were the parties thereto of the second part. all its rights under the contracts referred to. The deed recited

that those contracts were *ultra vires* of the Company, and the Company bargained that it should not be precluded from maintaining and alleging in any proceedings at law or in equity, which might be taken against the Company, that all or any of the negotiations and transactions in relation to them, were *ultra vires* of the Company.

The Company having repudiated all liability under the contracts, Mr. Riché brought his action under contract Z, and as judgment was given in his favour, as above mentioned, the Company brought this proceeding in error from that judgment.

The case having been argued by Watkin Williams and Cohen for the appellant (defendants), and by Benjamin and Giffard for the respondent (plaintiff); —

The Lord Chancellor (Lord Cairns). The history and progress of the action out of which the present appeal arises, is not, I must say, creditable to our legal system. There was not in the case any fact in dispute, and the only questions which arose were questions of law, or questions perhaps as to the proper inference to be drawn from facts as to which there was no dispute.

The action was commenced in the month of May, 1868. The litigation appears to have been active and continuing, and yet seven years have been consumed, and the result up to the present time is this: that, in the Court of Exchequer, two out of three Judges were of opinion that the plaintiff should have judgment; and when the case came before the Exchequer Chamber it was heard before six Judges, three of whom were of opinion that the plaintiff was entitled to judgment, the other three thinking the defendant was entitled to judgment. The result, therefore, was that the judgment of the Court of Exchequer was affirmed. But for this difference of opinion amongst the learned Judges, I should have said that the real questions of law which arise in the case — questions which appear to me to be sufficient altogether to dispose of the case — were of an extremely simple character.

The action was brought by the plaintiffs, who are contractors in Belgium, to recover damages for the breach of an agreement entered into between the plaintiff and the appellants, the Ashbury Railway Carriage and Iron Company, limited. This Company was established under the Joint-Stock Company's Act of 1862; and I think it will be therefore necessary to consider, with

some minuteness, some of the leading provisions of that Act of Parliament. But in the first place it may be convenient to ascertain the purposes for which this Company was formed, and also the nature of the contract for breach of which the action was brought. The purposes for which a company established under the Act of 1862 is formed, are always to be looked for in the memorandum of association of the Company. The memorandum of association of this Ashbury Railway Carriage and Iron Company, limited, declares that it was formed for these objects. [His Lordship here read paragraph 3 of the memorandum of association printed above.] Part of the argument at your Lordships' bar was as to the meaning of two of the words used in this part of the agreement, — the words "general contractors." As it appears to me, upon all ordinary principles of construction, those words must be referred to the part of the sentence which immediately precedes them. The sentence which I have read is divided into four classes of words. First, the selling, or lending railway carriages, waggons, and all kinds of railway plant, fittings, machinery, and rolling stock. That is an object *sui generis* and complete in the specification which I have read. Secondly, to carry on the business of mechanical engineers and general contractors. That, again, is the specification of an object complete in itself, and according to the principles of construction, the term "general contractors" would be referred to that which goes immediately before, and would indicate the making generally of contracts connected with the business of mechanical engineers, — such contracts as mechanical engineers are in the habit of making and are in their business required, or find it convenient to make for the purpose of carrying on their business. The third is to purchase, lease, work, and sell mines, minerals, land, and buildings. That is an object pointing to the working and acquiring of mineral property, and the generality of the two last words, "land and buildings," is limited by the purpose for which land and buildings are to be acquired. "Leasing, working, and selling of mines and minerals." The fourth head is purchasing and selling timber, coal, or metals, or other materials; buying and selling any such materials on commission as agents. That requires no commentary. If the term "general contractors" is not to be interpreted as I have stated, the consequence would be this, that it would stand absolutely without any limit of any kind.

It would authorise the making, therefore, of contracts of any and every description; and the memorandum, in place of specifying the particular kind of business, would virtually point to the carrying on of business of any kind whatsoever, and would therefore be altogether unmeaning.

That being the object for which the Company professes, by the memorandum of association, to be incorporated, I now turn to examine the contract upon which the present action is brought. I may relieve your Lordships from any lengthened exposition of the nature of that contract by referring you to the description given of it by BRAMWELL, B., in the Court of Exchequer, which appears to me accurately to describe the general nature of the agreement. BRAMWELL, B., states this: "The substance of those contracts,"— that is, the contract upon which the action is brought and two other contracts which are inseparably connected with them,— "the substance of those contracts was this, Gillon and Posters Baertson had obtained a right to make a railway in Belgium. This right the defendants' directors supposed to be valuable to its owners. That is to say, the line could be constructed for such a certain sum, and a *société anonyme* could be constituted, with shareholders to take its shares to such an amount as would give a large sum over the cost of construction. The benefit of this the directors wished to obtain for the defendant Company, and to do so, they purchased the concession. This was their main object. But the plaintiff had a contract with the concessionnaires to construct the line; and to accomplish the object of the directors, it was necessary or desirable, or they thought it was, that they should agree with the plaintiff that they, the defendant Company, would constitute a *société anonyme*, and, as the plaintiff went on with the work, that they would pay into the hands of the *société anonyme* proportionate funds. The directors accordingly entered into two contracts in the name of the defendant Company, — one with the concessionnaires, to purchase the concession; the other with the plaintiff, to furnish the *société anonyme* with funds, the latter being auxiliary to the former; and they paid the concessionnaires £26,000, part of the price. Now, whatever may be the meaning of 'carrying on the business of mechanical engineers and general contractors,' to my mind it clearly does not include the making of either of these contracts. It could only do so by holding that the words 'gen-

eral contractors' authorised generally the making of any contract, and this they certainly do not do."

I agree entirely both with the description given here by BRAMWELL, B., of the nature of that contract, and with the conclusion at which he arrives, that a contract of this kind was not within the memorandum of association. In point of fact, it was not a contract on which, as the memorandum of association implies, the limited Company were to be employed; they were the employers. They purchased the concession of a railway, — an object not at all within the memorandum of association, — and having purchased that, they employed, or they contracted to pay, as a person employed, the plaintiff in the present action. That was reversing entirely the old hypothesis of the memorandum of association, and was the making of a contract foreign to and not included within the compass of the memorandum of association. Now, those being the results of the documents to which I have referred, I will ask your Lordships to consider the effect of the Act of Parliament, the Joint Stock Companies Act of 1862, upon this state of things; and here I cannot but regret that in the Court of Exchequer the accurate and precise bearing of that Act upon the present case appears to me to have been entirely overlooked or misapprehended, and in the Court of Exchequer Chamber (speaking of the opinion of those learned Judges who thought the decision of the Court of Exchequer should be maintained) the weight which was given to the provisions of this Act appears to me to have entirely fallen short of that which ought to have been given to it.

The Act of Parliament to which I am referring is the Act which put upon its present footing the regulation of joint-stock companies, and more especially of those joint-stock companies who were to be authorised to trade with a limit of their liability. The objects of the provision under which that system of limiting a liability was incorporated were provisions not merely — perhaps I might say not mainly — for the benefit of the shareholders for the time being of the Company, but were also provisions intended to provide for the interests of two other very important bodies, — in the first place, those who might become shareholders in succession to the shareholders for the time being; and, secondly, the outside public, and more particularly those who might be creditors of companies of this kind. I shall now refer to some

of the clauses of that Act of Parliament; and as I do so, I would observe that there is a very marked and entire difference between the two documents which form the title-deeds of companies of this description, — I mean the memorandum of association on the one hand, and the articles of association on the other hand. With regard to the memorandum of association, as has often already been pointed out, although it appears somewhat to have been overlooked in the present case, the memorandum of association is, as it were, the charter and the limitation of the powers of any company established under the Act. With regard to the articles of association, these play a part subsidiary to the memorandum of association. They accept the memorandum of association as the charter of incorporation of the Company, and, accepting it as the charter of incorporation of the Company, the articles proceed to define the duties, the rights and powers of the governing body as between themselves and the Company at large, and the mode and form in which the business of the Company is to be carried on, and the mode and form in which changes in the internal regulations of the Company must from time to time be made. With regard, therefore, to the memorandum of association, if you find anything which goes beyond that memorandum or is not warranted by contract, the question will arise whether that which is done is *intra vires*, not the directors of the Company, but the Company itself. With regard to the articles of association, if you find anything which, still keeping within the memorandum of association, is a violation or in excess of the articles of association, the question will arise whether that is anything more than an act *extra vires* the directors, but *intra vires* the Company.

Now, the clauses to which it is necessary to refer are, in the first place, the 6th clause. [His Lordship read the 6th clause of 8 & 9 Vict. c. 16, and continued:] This is the first section which speaks of the incorporation of the Company; but your Lordships will observe that it does not speak of that incorporation as the creation of a corporation with inherent common-law rights, — such rights as are by the common law possessed by every corporation, without any other limit than would, by the common law, be assigned, — but it speaks of a company being incorporated with reference to a memorandum of association, and you are referred thereby to the provisions which subsequently are to be

found on the subject of that memorandum of association. The next clause which is material is the 8th. [His Lordship here read § 8 of 8 & 9 Vict. c. 16, and said:] Therefore the memorandum which the persons are to sign as the preliminary to the incorporation of the Company must state the objects for which the proposed Company is to be established, and the coming into existence of the Company is to be an existence, and a coming into existence, for those objects and for those objects alone. Then the 11th section provides, "The memorandum of association shall bear the same stamp as if it were a deed." [His Lordship read that section, and continued:] Your Lordships will observe, therefore, that it is to be a covenant in which every member of the Company is to covenant that he will observe the conditions of the memorandum, one of which is that the objects for which the Company is established are the objects mentioned in the memorandum of association, and that he not only will observe that, but will observe it subject to the provisions of this Act. Well, but the very next provision of the Act is that contained in the 12th section. [His Lordship read it.] The covenant, therefore, is not merely that every member will observe the conditions upon which the Company is established, but that no change shall be made by the Company in those conditions; and if there is a covenant that no change shall be made in the objects for which the Company is established, I apprehend that includes an engagement that no object shall be pursued by the Company or attempted to be obtained by the Company in practice, except the object which is mentioned in the memorandum of association. Now if that is so, if that is the condition upon which the corporation is established, if that is the purpose for which the corporation is established, it is, I apprehend, a mode of incorporation which contains in it both that which is affirmative and that which is negative. It states affirmatively the ambit and extent of vitality and power which by law is given to the incorporation, and it states, if it were necessary to state negatively, that nothing shall be done beyond that ambit, and that no attempt shall be made to use the corporate life for any other purpose than that which is so specified.

Now, with regard to the articles of association, I will ask your Lordships to observe how completely the character of the legislation is altered. The 14th section deals with those articles

[His Lordship here read that section.] It provides that the body of shareholders are to be masters of the regulations which, always keeping within the outside limit allowed by law, they may deem expedient for the internal management of the Company. In connection with that section must be taken the 50th section of the Act. [His Lordship read that section, and continued:] Of the internal regulations of the Company, therefore, the Company are absolute masters, and, provided they pursue the course marked out in the Act, holding a general meeting and obtaining the consent of the Company, they may alter those regulations from time to time. But all must be done in the way of alteration subject to the conditions contained in the memorandum of association. That is to override and overrule any provisions of the articles which may be at variance with it. The memorandum of association is, as it were, the area beyond which the action of the Company cannot go; but inside that area they may make such regulations for their own government as they think fit.

That reference to the Act will enable me to dispose of a provision in the articles of association in the present case, which was hardly dwelt upon in argument, but which I refer to that it may not be supposed to have been overlooked. I refer to No. 4 of the articles of association of this Company, which is in these words: "An extension of the Company's business beyond or for other than the objects or purposes expressed or implied in the memorandum of association shall take place only in pursuance of a special resolution." In point of fact, no resolution for the extension of the business of the Company was in this case come to; but even if it had been come to, it would have been extremely nugatory and inefficacious.

There was in this 4th article an attempt to do the very thing which by the Act of Parliament was prohibited to be done, to claim and arrogate to the Company a power, under the guise of internal regulation, to go beyond the objects or purposes expressed or implied in the memorandum.

Now, bearing in mind the difference which I thus take the liberty of pointing out between the memorandum and the articles, we arrive at once at all which appears to me to be necessary for the purpose of deciding this case. I have used the expression, *extra vires* and *intra vires*. I prefer that expression very much

to one which occasionally has been used in the judgments in the present case, and has perhaps been used in other cases, — the expression, illegality. In these cases, in a case such as your Lordships have now to deal with, it is not a question whether the contract sued upon involves that which is *malum prohibitum* or *malum in se*, or is a contract contrary to public policy, and illegal in that sense. I assume the contract in itself to be perfectly legal; to have nothing in it obnoxious to any of the powers involved in the expressions which I have used. The question is, not the illegality of the contract; the question is, the competency and power of the Company to make the contract. I am of opinion that this contract was entirely, as I have said, beyond the objects of the memorandum of association. If so, it was thereby placed beyond the powers of the Company to make the contract. If so, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void at its beginning, it was void for this reason, — it was void because the Company could not make the contract. If every shareholder of the Company had been in this room, and every shareholder of the Company had said, "That is a contract which we desire to make, which we authorise the directors to make, to which we sanction the placing the seal of the Company," the case would not have stood in any different position to that in which it stands now.

The Company would thereby, by unanimous consent, have been attempting to do the very thing which by the Act they were prohibited from doing. But if the Company, *ab ante*, could not have authorised a contract of this kind to be made, how could they subsequently have sanctioned the contract after, in point of fact, it had been made? I have endeavoured to follow, as accurately as I could, the very able argument of Mr. Benjamin at your Lordships' bar upon this point; but it appeared to me that this was a difficulty which he was entirely unable to grapple with. He endeavoured to contend that when a company had found that something had been done by the directors which ought not to have been done, they might be authorised to make the best they could of a difficulty into which they had thus been led, and therefore might acquire a power to sanction the contract being proceeded with. I am unable to sanction that suggestion. It appears to me it would be perfectly fatal to the whole scheme of legislation, to which I have referred, if you were to hold, in the

first place, that directors might do that which even the Company could not do, and that then the Company, finding out what had been done, could sanction subsequently what they could not have authorised antecedently. If this be the point of view of the Act of Parliament, it reconciles, as it appears to me, the opinion of all the Judges of the Court of Exchequer Chamber, because I find BLACKBURN, J., whose judgment was concurred in by two other Judges who took the same view, says, "I do not entertain any doubt that if, on the true construction of the Statute creating a corporation, it appears to be the intention of the Legislature, expressed or implied, that the corporation shall not enter into a particular contract, every Court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and, therefore, wholly void, and to hold that a contract wholly void cannot be ratified."

That sums up and exhausts the whole case. I am of opinion, beyond all doubt, on the true construction of the Statute of 1862 creating the corporation, that it was the intention of the Legislature not implied, but actually expressed, that the corporation should not enter, having regard to this memorandum of association, into a contract of this description. If so, according to the words of BLACKBURN, J., every Court, whether of law or equity, is bound to treat that contract, entered into contrary to the enactment, I will not say as illegal, but as void, as *extra vires*, wholly void, and to hold also that a contract wholly void cannot be ratified.

That relieves me, and if your Lordships agree with me, relieves your Lordships, from any question with regard to ratification. I am bound to say that if ratification had to be considered, I have found in this case no evidence which to my mind is at all sufficient to prove ratification; but I desire to say that I do not wish to found my opinion on any question of ratification. This contract, in my judgment, could not have been ratified by the unanimous assent of the whole corporation. I have only to add, that I observe some cases have been referred to here, cases of *Spackman* v. *Evans, Re The Agriculturist Cattle Insurance Company*, L. R., 37 L. J. Ch. 752; 3 H. L. 171, in your Lordships' house, and the case of *The Phosphate of Lime Company* v. *Green*, L. R., 7 C. P. 43, in the Court of Common Pleas, as if they had some bearing on the present question. Those cases have a bearing on some of the obser-

vations which I have troubled your Lordships with. They are cases which illustrate extremely well what I have said just now, that the articles of association of a company of this kind are the document which define the power of directors, as between themselves and the Company. In those cases which I have mentioned the whole question was, whether the directors had gone beyond the powers which were intrusted to them, and by which their authority was limited under the articles of association. In no one of those cases was there any question as to whether the power of the Company had been exceeded. In *The Agriculturist Cattle Case* no person ever doubted that if the Company all had assembled together, they might have released from the obligation of a partnership contract *inter se* (if there was no question of outside creditors) any member of the Company, upon any terms that they thought fit. The only question was, whether the directors had released those who were released upon terms which they were authorised to make, or whether, if they had not released them upon such terms, the release subsequently became known to the Company, and was sanctioned by the Company. The Company might have passed a resolution sanctioning the release, or altering the terms in the articles of association upon which releases might be granted. If they sanctioned what was done without the formality of a resolution, it was quite clear that that would not have been sufficient. So also, in the case of *The Phosphate of Lime Company*, the question was, whether that had been done by the sanction of the Company which clearly might have been done under a resolution passed by the Company. Those cases have no application whatever to the present case.

For these reasons I submit to your Lordships, and move that the judgment in the present case should be reversed, and judgment entered for the defendants.

Lord CHELMSFORD. The question upon this appeal is whether the appellants are liable upon a contract entered into with the respondent, or whether that contract being *ultra vires*, it cannot be enforced against them. The appellants are a limited company, incorporated under the Companies' Act, 1862, by which "any seven or more persons associated for any lawful purpose, may, by subscribing their names to a memorandum of association, form an incorporated company, with or without limited liability." The 8th section of the Act prescribes what the

memorandum of association shall contain, and, amongst other things, the objects for which the proposed Company is to be established. By the 12th section, power is given to modify the memorandum of association in certain particulars, but the section adds, "Save as aforesaid no alteration shall be made by any company in the conditions contained in its memorandum of association." The memorandum of association, by which the appellant Company was incorporated, described its objects with great particularity. The only part of it to which attention need be directed is that which states that one of the objects of the Company was to carry on the business of mechanical engineers and general contractors. The learned counsel for the respondent sought to give a very wide meaning to the words "general contractors," but he admitted that they required some limitation, contending, however, that they extended at least to the business of constructing railways. It appears to me that the generality of the expression is limited by its association with the words "mechanical engineers," and that it ought to be confined to contracts connected with that business. In common parlance, a mechanical engineer is distinguished from a civil engineer, his business being not to construct railways, but to manufacture machinery of every description. The respondent's interpretation of the language of the memorandum of association, if considered, will not, in my opinion, assist him in the determination of the case in his favour.

The contract upon which the question arises was entered into under the following circumstances. The respondent, under the name of Riché Frères, entered into an agreement with the concessionnaires of a Belgian railway to run from Antwerp to Tournai, to have the contract for the construction of the line. The concessionnaires afterwards agreed to sell the concession to the Ashbury Company for the sum of £70,000; and as, by the law of Belgium, the Company could not carry out the undertaking themselves, they agreed to bring out a *société anonyme* for this purpose. Of this *société* it was agreed that the Company should have the right to appoint four out of the seven directors, and two, afterwards extended to three, of the commissioners of the Company. They bound themselves to perform the engagements and obligations entered into by the concessionnaires with Messrs. Riché, but taking upon themselves the engagement of Messrs.

Riché to supply fixed and rolling stock. The contract for the rolling stock was afterwards re-conveyed by the Company to Messrs. Riché. Upon that contract with the concessionnaires, the Ashbury Company paid the sum of £26,000 in part of the £70,000 for which they purchased the concession. The Ashbury Company then entered into an agreement with Messrs. Riché, which finally settled the rights and liabilities by which Messrs. Riché bound themselves to carry out the undertaking for the construction of the line from Antwerp to Tournai, and the Ashbury Company bound themselves to procure the contract for them. By the terms of one of the articles of this agreement, it is expressly understood that Messrs. Riché have accepted the contract only after having secured the co-operation of the Company, who had bound themselves to supply Messrs. Riché with the funds necessary for the carrying out of their undertaking, and to pay the necessary sums from time to time into the hands of the *société anonyme* as the work progressed, in exchange for a certain number of bonds and shares in the *société*. It is upon this contract that the action is brought.

Messrs. Riché entered into an agreement with the *société anonyme*, in which they are called contractors and general contractors, by which, the contract for the construction of the line and the supply of fixed and rolling stock being granted to them, they bound themselves to complete the construction of the whole line, and to supply fixed and rolling stock specified in the agreement. That is the result of these several contracts. The counsel for the respondent contended that the Ashbury Company were the real contractors for the construction of the Belgian line, that the *société anonyme* was, in fact, the Ashbury Company under another name, and was only formed to enable the Company to obtain the power of constructing the railway, which, by the Belgian law, it could not have otherwise accomplished. But the facts appear to me to furnish no ground for such an argument. There is no doubt that the Ashbury Company were desirous of possessing the power to make the line, and for that purpose they purchased the concession, and paid £26,000 of the moneys of the Company in part of the purchase money. In agreeing to form the *société anonyme*, the Ashbury Company undoubtedly intended to have a control over their proceedings; but the stipulation as to their having the nomination of a certain number of directors and com-

missioners, is a proof that they did not alone form the *société anonyme*. Their binding themselves to Messrs. Riché to procure for them the contract for the construction of the line, proves that they were not the *société* itself, or they would have given them the contract, and not have bound themselves to procure it. The company, therefore, were only in this position. Some of their directors formed part of a *société* empowered to make a railway, and to enter into a contract for its construction. Who, in this state of things, were the contractors for making the railway? Clearly no other than Messrs. Riché, who entered into the contract with the *société anonyme* to make it. Mr. Benjamin stated that Messrs. Riché were the sub-contractors with the Ashbury Company, and that, upon the principle, *qui facit per alium facit per se*, the Company were the real contractors. But it is a misapprehension to assume the contract of Messrs. Riché to construct the railway to have been with the Ashbury Company. The Messrs. Riché did not contract with them for this purpose, but with the *société anonyme*. As to the maxim relied upon, it would very much astonish a railway company, who had procured an engineer to enter into a contract for the construction of a line, to learn that they had thereby constituted themselves contractors for the work, and had thereby become liable for damage. The position of the Company in relation to the contracts is nothing more than this: They purchased the concession for the Belgian railway, and paid the sum of £26,000 of the money of the Company to the concessionnaires, and afterwards entered into an agreement with the contractors for making the railway to support them with funds to carry out the undertaking. Is this an object for which the Company was incorporated by the memorandum of association?

Great stress is laid in the argument for the respondent upon the opinion of BLACKBURN, J., whose judgments are always entitled to respect. He considered the contract entered into by the Company with Messrs. Riché not to be *ultra vires*, on the ground that at common law a corporation could bind itself to do anything to which a natural person could bind himself, and could deal with its property as a natural person could deal with his own; and that if a general power to contract is an incident of a corporation, which it requires an indication of intention in the Legislature to take away, he said that he saw no such indication

in the Act. It would be different, he added, if negative words had been used, and it had been said that the Company should not do any other acts than those necessary for the purpose for which it is formed.

Now, the incorporation of a company with limited liability is entirely a creature of the Statute. It was necessary, not only for the protection of those who might join such companies, but also of persons who might enter into contracts with them, that the privilege of creating them should only be obtained upon certain conditions which should be made known to the public. The Legislature, therefore, required that the objects for which the proposed Company was to be established should be contained in a memorandum of association, which, when signed and registered, is to form the incorporated Company. Whether, if there had been nothing in the Act except this clause as to the formation of companies, they would not have been restrained from entering into contracts for other objects than those contained in the memorandum of association, is a question which it is unnecessary to consider, because there is a clause which imposes that restriction in the most express terms. BLACKBURN, J., observed that he saw no indication in the Statute to take away the general power of contracting incident to corporations; but he afterwards, in mentioning the 12th section, said, it provides in express negative words that, save as aforesaid, no limitation shall be made in the conditions contained in the memorandum of association. I do not know how stronger words than these could be used to prohibit a company formed under the Statute from entering into any contract for any object beyond those mentioned in the memorandum of association. Among the articles of association of the Company, as my noble and learned friend has observed, there is one, the fourth, that "an extension of the Company's business beyond or for other than the objects or purposes expressed or implied in the memorandum of association shall take place only in pursuance of a special resolution." This article is entirely nugatory. I agree in what was held by my noble and learned friend opposite, Lord SELBORNE, in *Dent's Case*, L. R. 8 Ch. 768; 42 L. J. Ch. 474, 857, that under the 10th section of the Act, articles of association professing to confer authority upon a company beyond the limited extent allowed by the Act are simply void.

The real description of the contract entered into by the Com-

pany, then, is an engagement to supply the contractors for the construction of a Belgian railway with the funds necessary to enable them to execute their contract. This is clearly not within any of the objects described in the memorandum of association; and the contract is *ultra vires*, and therefore not voidable, but absolutely void. The learned counsel for the respondent, Mr. Benjamin, after arguing against the conclusion that the contract was *ultra vires*, contended that the contract having been in part performed, and the money of the Company having been paid in respect of it, the shareholders, in order to have the benefit of their money so misapplied, had a right to abstain from objecting to the contract, which might then be enforced against the Company, because, he said, the Companies' Act, though it prohibits the contract being entered into, does not say, if the directors make such a prohibited contract, what the shareholders may do with it; and he enforced his argument by urging the distinction between an illegal act and an act which it is beyond the power of the directors to do, — a distinction which may be exemplified by the difference between the objects for which the Company is established contained in the memorandum of association, and the regulations for the management of the Company in the articles of association. This argument is really directed to the question whether the contract was completed by being ratified by the shareholders, the consideration of which will introduce another question, whether it was in point of fact ratified. I have already observed that the contract entered into by the Company with Messrs. Riché was not a voidable contract merely, but, being in violation of the prohibition contained in the Companies' Act, was absolutely void. It is exactly in the same condition as if no contract at all had been made, and therefore the ratification of it is not possible. If there had been an actual ratification, it could not have given life to a contract which had no existence in itself; but at the utmost it would have amounted to a sanction by the shareholders to the act of the directors, which, if given before the contract was entered into, could not have made it valid, as it does not relate to an object within the scope of the memorandum of association. The cases of *Spackman* v. *Evans, Re Agriculturist Cattle Insurance Co., supra cit.*, *Evans* v. *Smallcombe*, L. R., 3 H. L. 249: 37 L. J. Ch. 93; and *Houldsworth* v. *Evans*, L. R., 3 H. L. 263; 37 L. J. Ch. 800, which were cited in argument

for the purpose of showing that the ratification by the whole body of shareholders of an arrangement which it was not competent to the directors to have made, gave it validity, did not reach the present case. The act of the directors was not prohibited by statute, but was merely not warranted by the deed of settlement of the Company. If the contract entered into by the directors in the present case had been beyond the powers given to them by the articles of association, not being contrary to the objects contained in the memorandum of association, it might have been previously authorised or subsequently ratified by the whole body of shareholders. But assuming the consent of the shareholders would in this case have had the effect of giving life to a still-born contract, no such consent was ever given. A ratification of the contract could only have been established by proof of the acquiescence of each and every shareholder, with full knowledge of the character of the act of the directors. It was argued on the part of the respondent that each shareholder having had notice of meetings of the Company at which arrangements were made with respect to the mode of dealing with the contract, having had the means of knowledge as to the transaction, if he chose to absent himself from the meeting, he must be bound by the resolutions of the shareholders present. But I apprehend, as Lord CRANWORTH said in *Houldsworth* v. *Evans*, L. R., 3 H. L. 263; 37 L. J. Ch. 800, in joint-stock companies absent shareholders should never be bound to do anything more than to assume that the directors are doing their duty; he adds, except in cases where they are informed that, although the directors have not intended to defraud the Company, yet exercising powers not legally conferred upon them, they have gone beyond what they ought to do. I confess it seems to me that in every case of ratification by shareholders of an act *ultra vires* the directors, there ought to be not a mere presumption of assent from notice of the unauthorised act, and absence from a meeting called to legalise it, but proof of the actual assent of each shareholder. But, however this may be, the present case is widely different from the one supposed. The absent shareholders never had any notice of the object of the meetings. The circular convening the meeting of the 14th of May, 1867, is relied upon as a sufficient notification to every shareholder of what was proposed to be done at that meeting. Now, the notice which was given was this: the meeting was called, amongst

other things, "to receive, consider, and, if so determined, to adopt any report or recommendation," &c. What possible information could the terms of this notice convey of the objects of the meeting? BLACKBURN, J., said the balance sheet which accompanied the circular showed a loss, and the directors' report also, accompanying it, declared that there was no dividend. "These are matters," he says, "intelligible to and likely to rouse attention in the dullest and most careless of shareholders." "I certainly feel justified," he adds, "in saying that there is a *primâ facie* case, that every shareholder knew what it was proposed to do." I agree with the learned Judge that there was quite sufficient to rouse attention; it is a very different thing from conveying knowledge; and with great respect, I think the presumption which he draws, as I understand him, that there is a *primâ facie* case that every shareholder knew what it was proposed to do, is scarcely justified. But supposing such a presumption could fairly arise from the facts connected with the convening of the meeting, I think it would not be sufficient in this case, because, in order to imply the assent of an absent shareholder to the proceedings of a meeting called to ratify acts of directors which are *ultra vires*, it is not sufficient to presume that he had knowledge of the object for which the meeting was called, but actual knowledge must be brought home to him; and even it may be questionable whether absence from a meeting afterwards necessarily raises the implication of assent. It is unnecessary to consider what would be the effect of such a state of things, because I am clearly of opinion that in this case the absent shareholders had no knowledge conveyed to them of the proposed business of the meeting, and that means of knowledge or the presumption of knowledge is not sufficient to raise an implication of assent; and therefore if the contract of the directors with Messrs. Riché had been capable of ratification, there is no proof whatever that it was ever ratified.

I agree that the judgment of the Exchequer Chamber ought to be reversed.

Lord HATHERLEY. I am of the same opinion. I must confess it appears to me that the case is really reduced to one of a very simple character, and the question amounts merely to this: What is the true construction of the Act of Parliament, with reference to the memorandum of association, and the powers conferred upon

companies associated upon the limited principle subject to that memorandum?

As regards the first question of fact (which is introduced independently of the question of law), — namely, whether or not the agreement in question upon which the suit has been actually commenced by Messrs. Riché, be one within the memorandum of association, — it appears to me to be scarcely capable of argument; and I say this with the more confidence because every counsel with whom the directors have advised, and every Judge before whom the suit has come, have all concurred unanimously in the opinion that as far as regards that question of fact, or rather that mixed question of fact and law, it is certainly not an agreement within the memorandum of association How it could possibly be brought within any of the terms contained in that memorandum, even with the aid of the ingenious arguments that we have heard at the Bar, it is very difficult to conceive, because it was admitted by those upon whom the burden was thrown of showing that the memorandum of association would cover it, that the words "general contractors" must have some limit.

It could not be contended, Mr. Benjamin did not contend, that under the words "general contractors" the Company were at liberty to contract for anything in the world, — such as, for instance, fire or marine insurance. That expression must be limited, in some degree at least, by the words that precede it; and if so limited in any degree, it would be difficult to conceive how it could cover a contract which was not a contract to carry on the work of a mechanical engineer, which was not for supplying the rolling stock and the like, which was not even for the making of the railway, which is to be intrusted to Messrs. Riché Brothers, not simply as acting as subordinate agents, but as acting as immediate contractors. The contract did at one time contain one single clause as to the furnishing of rolling stock by the Ashbury Company, but that clause was afterwards altered because it was discovered that the Belgian Government was unwilling to make certain concessions with reference to duty on the importation of machinery, on which remission of the duty the Ashbury Company had contemplated as the only source of profit they could derive in taking upon themselves that part of the contract. I need say no more with reference to whether or not

the contract in question, which is a contract to furnish another Company altogether, the *société anonyme* of Brussels, with money, from time to time, in order to carry into effect the works of the railway, is to be considered a contract within the scope of the memorandum of association of the Ashbury Company.

The only other point in the case independent of the Act of Parliament is the question of ratification. I confess I concur with the opinion which has already been expressed by your Lordships, that there is not anything amounting to confirmation, if it were necessary to decide that point. I do not dwell upon it, because I do not think it is necessary to determine that point: but as at present advised, certainly, after looking through all that has taken place in these transactions, I find nothing by which an absent shareholder had fair and full notice of what was contemplated to be done behind his back at the general meeting, and it appears to me that nothing took place which would bind an absent shareholder to suppose or conjecture that anything more was going to be done at the public meeting than that public meeting would have the power to do under the provisions of the Act.

But I do not think we have arrived at that point, because I am of opinion, like my noble and learned friends who have preceded me, that no amount of ratification or confirmation by individual shareholders could give validity to the contract in question. That depends upon the Act of Parliament, which is the real point in the case. When you consider that this Act of Parliament was passed with the view of enabling persons to carry on business on principles which were up to that time wholly unknown in the general conduct of mercantile affairs in this country; when you consider that the general principle of partnership was that every person entering into any partnership whatsoever thereby subjected, before this description of legislation had been entered upon, the whole of his property, whatever it might be, to the demands of his creditors, — it is impossible not to feel that when these legislative enactments which gave power to depart from that principle upon certain conditions to be expressed in the Act of Parliament, by which companies would be framed with that view, came to be made, it was necessary that the public — that is, the persons dealing with a limited company — should be protected as well as that the shareholders themselves should be protected.

Accordingly, your Lordships will find throughout the whole of the Act of Parliament, as has been already pointed out by the LORD CHANCELLOR, a plain and marked distinction drawn between the interest of the shareholders *inter se*, and the interest which the public have in seeing that the terms of the Act of Parliament by which the privilege of limited liability was conceded were to be construed in such a manner as to protect the public in dealing with companies of this description. The mode of protection adopted seems to have been this: The Legislature said, you may meet together and form yourselves into a company; but in doing that, you must tell all those who may be disposed to deal with you the objects for which you have been associated. Those who are dealing with you will trust to that memorandum of association, and they will see that you have the power of carrying on business in such a manner as it specifies, to be limited, however, by the extent of the shares; that is to say, the money you may contribute for the purpose of carrying on that business. You must state the amount of the capital which you are about to invest in it, and you must state the objects for which you are associated, so that the persons dealing with you will know that they are dealing with persons who can only devote their means to a given class of objects, and who are prohibited from devoting their means to any other purpose. Throughout the Act that purpose is apparent. With regard to the amount of capital, which is one point that I have referred to, the Act did give a special power of variation. But with regard to the memorandum of association, that is carefully protected by the 12th section. It is provided that whatever other things you may do in the way of variation, a certain limited power of alteration being given to you, no such power shall you have as to the objects specified in the memorandum of association.

That being so, one turns to the views expressed by the learned Judges, who, concurring with BLACKBURN, J., have decided that the contract which has been entered into in this case is one by which the Company have been bound. Turning to the reasons upon which they have based that opinion, one finds them very clearly expressed (as his judgments always are very clearly expressed) in the judgment of BLACKBURN, J. His view appears to be this: True it is that the objects to which the common seal was applied in this case by the corporation may not be such

as the directors could justify to their corporators; but then the corporation was called into being; and when the corporation was called into being, you had an entity which could act by its common seal just as any physical entity — that is to say, a human being, as distinguished from an entity created by an Act of Parliament in the shape of a corporation — might act through his contract. Having created that body, that entity, you cannot say the contract is void, whatsoever may be the consequence which may ensue to the persons who are affected by the action of the directors in affixing the common seal. Whatever acts they may have to complain of, you cannot say that the act is void as against the persons who claim the benefit of that common seal, the power of affixing which you conferred upon them by making them a corporation.

Then he cites passages from old authorities, to show that, when once you have given being to such a body as this, you must be taken to have given to it all the consequences of its being called into existence, unless by express negative words you have restricted the operation of the acts of the being you have so created. And he cites, for that purpose, a passage which has been referred to several times, from Lord Coke, — namely, "It is a maxim," he says, "in the common law that a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law." He quotes also another passage following it, from Plowden, "Affirmative words may, no doubt, be used so as to imply a negative." Now, I think when these two propositions are taken together and applied to the objects of this present Act of Parliament, it must be clearly seen, not only that the entity this corporation called into existence, for the purpose of trading with limited liability, has by affirmative words, as the objects for which it was called into being, those objects which are specified in the memorandum of association, but also that you find express negative words, providing that, "save as aforesaid, no alterations shall be made in the conditions contained in the memorandum of association." That is a distinct limitation, by way of negative, of the powers or authorities which you have conferred upon this entity. You say we confer upon this corporate body the power of acting according to their memorandum, and we also say that that memorandum shall never be changed. I think it is far too nice a refinement to

say that that is not equivalent to saying, in so many words, the objects of the memorandum are your objects, and no other ever shall or can be your objects.

Now, if it were not for the refinement that is drawn in the distinction which, as I understand it, is the distinction applied to this case by BLACKBURN, J., we should have that learned Judge with us in our opinion. But he appears to me to make a distinction by saying, "Here is this Company, formed for the purpose expressed in the memorandum of association. That is in the affirmative; and I do not say you shall never act for any other purpose, or with any other end, or that any action which you do, with any other end, shall be void." All that the Legislature has said, as he states it, is this, "You shall be gathered together, and, according to the 10th section, the memorandum shall contain the objects with which the proposed Company shall be established." That is in the 10th section, that is affirmative; and then the only other words, he says, are these expressly negative words as to your changing the memorandum, — namely, that you shall never change that memorandum. But he does not consider that, as I understand it to be, an express negative to your doing anything inconsistent with that memorandum. I confess that is a refinement that I am not disposed to adopt.

With regard to the object which the Legislature had in view, I think that the Legislature had in view distinctly the object of protecting outside dealers and contractors with this limited company from the funds of the Company being applied, or from a contract being entered into by the Company for any other objects whatsoever than those specified in the memorandum of association which the Legislature thought should remain forever unchanged. It is quite true, as was said in the argument, that those same gentlemen who signed the memorandum might, the next hour, if they liked, go into another room and frame a new object of business besides those specified in the memorandum of association they had already agreed to. I only say, in answer to that, they might sign a fresh memorandum and form a new company. The same seven gentlemen may form half-a-dozen companies, if they think proper, and half-a-dozen memoranda of association may be executed for that purpose. But it would be a perfectly new company in that case; and neither as regards their shareholders, nor, still more, as regards the general body of the

public, have they the power or authority, under Act of Parliament, of combining together, as a corporation with limited liability, to carry on business for any other purpose whatever than that specified in the memorandum of association.

Now, we listened to an ingenious argument by Mr. Benjamin, and certainly I followed it with great interest, in which, feeling the pressure of the case in reference to the act which has been done, he endeavoured to put this before us: *Fieri non debuit sed factum valet.* He said, Suppose I have to concede, as he must concede, of course (he argued first one point and then the other, and having finished his argument on the point as to whether or not this contract were *intra vires* of the Company he proceeded to this), that the original contract was invalid, still the subsequent arrangements by which the Company endeavoured to make the best they could of the difficult situation in which their directors have placed them, might be taken to be valid. They may have been done, as he said, not for the purpose in any way of evading the Act of Parliament, but rather the contrary, to bring things back to such a state and condition as the law would allow, and to make the best of what had been the misfortune of the Company I apprehend that no such principle can be adopted as that, the directors having committed an unlawful act, and then taken the proper course, as it appears to me, in proposing as they did, by the instrument of the 24th of December, 1867, to take the whole burden and responsibility upon themselves, the very proper act which they then did could give any validity whatsoever to that supposed contract.

I have said all I have to say with reference to the supposed ratification. Holding, in the first place, that nothing could be done by the whole Company to confirm the contract, I certainly should not be disposed to attach the weight which was attached in the argument to the deed of the 24th of December, 1867, which I have already mentioned, as a confirmation, merely from the circumstance that there is a provision in that deed that the Company shall do all in its power to hand over, or assist in handing over, to those who took, as they ought to take, the burden upon themselves (namely, the directors) of recouping the funds of the Company and placing all in *statu quo.* They say nothing in this deed contained shall for a moment justify you in the assertion that we are at all confirming or assenting to that contract. I say.

therefore, that any such construction of the deed would seem to be one scarcely capable of being soundly supported in argument, although it occurred to me, while it was being argued, that it might rest upon some such foundation as the decisions upon those instruments in which a trustee named in a deed, and desirous of disclaiming, has been ill-advised enough, instead of disclaiming *simpliciter*, to convey the trust property to others, in which case he has been held liable because it has been said, "You could not convey it without having it once in you, and you could only take it subject to the trust." I supposed at first that that sort of argument might possibly be advanced in support of such a view as this.

But it really could have no effect, upon this ground; I apprehend that the true construction of that deed is this, that the deed provides that whatsoever rights they might have acquired in consequence of the directors dealing with this property, or in consequence of strangers dealing with them, attempting to take advantage of the contract, knowing that the moneys of the Company had been employed in a manner which was *ultra vires*, that those rights should not be enforced. When a stranger has taken moneys of the Company which ought to have been applied in one way, knowing it ought to be so applied, and applied it in another way, that money is earmarked for the original purpose, and can be followed as against the stranger, with any advantages that he may have derived in consequence of the improper contract which has been made. That being the case, I should read that instrument, if it had to be construed at all, as an admission on their part that — repudiating and rejecting altogether that contract, if they had any right whatever of that description which I have mentioned, namely, a right of following their own money when it is misapplied into that which has been procured by means of its misapplication — if any such rights they had, they would not exercise them.

Perhaps, however, it is unnecessary for me to enter into that point, considering that I hold, as I certainly do, upon this contract, that it was one which no body of shareholders had power to ratify, or could, if they were to meet together, possibly ratify, it being by the 12th section illegal and void, as being contrary to the purpose for which, and for which only, power and authority was given by the Legislature, and any other purpose being one

which the Legislature has, according to my view of the case, by the clauses that I have referred to, expressly and distinctly prohibited.

Lord O'Hagan. I am of the same opinion. The case depends for its result on the answers to three questions: First, Were the contracts in dispute *ultra vires* of the directors? Secondly, Was it possible to ratify them through the action of the shareholders? Thirdly, Were they, in fact, so ratified?

On the first question, I think, notwithstanding the very ingenious reasoning of the counsel for the respondents, especially Mr. Giffard, that the contracts in controversy were clearly *ultra vires* of the directors of the Company. Indeed, this was the view of the directors themselves and of their legal advisers; and I do not find that any of the learned Judges in the Court of Exchequer or the Court of Exchequer Chamber refused to adopt it. I cannot agree with the contention that the memorandum of association is not to be interpreted according to the ordinary rules of construction; and so construed, it seems to me quite plain that the words "general contractors" cannot be held to indicate the possession by the persons so described of unlimited powers to enter into any sort of contract. Taken with the description of the Company contained in the first paragraph of the memorandum, and the immediate context, which identifies them with "mechanical engineers," and points distinctly to the boundaries of their action, I have no doubt that their powers were confined to the making and completion of contracts connected with mechanical engineering, and the various objects, the selling or lending railway carriages, railway plant, and rolling stock, and the purchase ancillary to and necessary for their proper business, which are specified in the 3rd clause of the memorandum, before and after its employment of the description "mechanical engineers and general contractors." The rule *noscitur e sociis* was never more clearly applicable, and its reasonable application was never more clearly necessary, if we would give any practical effect to the memorandum in connection with the Act under which it was framed. That Act gave certain privileges and imposed certain conditions; and one of them was, that the memorandum of association should specify the objects of men seeking to trade with limited liability, for the manifest purpose that those objects should be clear and definite, and known precisely to all who

might have dealings with the Company. But if, in a case like this, it were competent for persons making and registering such a memorandum to segregate particular words, as "contractor" and "merchant," and insist that their generality should be confined neither by the declared purpose of the formation of the Company, nor by the conterminous phraseology, nor by the manifest reason of the thing, the purpose of the Act would be defeated, and the favour given by it would be enjoyed without fulfilment of the condition properly imposed for the public benefit. To hold that in such a case and with such a memorandum, a company describing itself as the Railway Carriage and Iron Company should be at liberty to contract for the clothing of the army, or to trade in diamonds from Natal, would seem to me to nullify the Statute alike in its policy and in its terms.

Having, therefore, no doubt that the action of this Company was *ultra vires*, I have as little that there was no valid ratification of the impeached contracts. Again, we must keep in mind the purpose of the legislation with which we are dealing. It was, as I have said, to give a privilege upon a condition, and the privilege was to be enjoyed upon the terms and with the limitations indicated in the memorandum of association. That memorandum, when put on record, was to be, for contractors, for creditors, and for all the world, a reliable indication of the exact character, purposes, and powers of the Company described in it. And the admission of an authority in shareholders to warrant action inconsistent with that character, antagonistic to those purposes, and beyond those powers, — and in this case it was so undoubtedly, — would seem to encourage evasion of the Statute, to abrogate the condition whilst continuing the privilege, and so to give the benefit without the burden. By the memorandum, the general community are to judge of the association; but how can it do so if shareholders, proposing to bind a corporation by resolutions, perhaps effective between the shareholders themselves, altogether ignore the terms of it and authorise dealings quite beyond the scope of its contemplation? It is plain that if the ratification for which the respondents contend could validly affirm the contracts on which they rely, there is no amount of divergence from the original object of the Company which might not have been approved, no extension of the limits prescribed by the memorandum which might not have been effected, by a simple

resolution of all the shareholders. And if this be so, I cannot think that a conclusion pregnant with consequences so very serious can properly be sustained. I think it is not warranted by the Statute, which equally condemns it by negative and affirmative provisions; and any such ratification as is relied on, being in clear contravention of the purpose and the letter of the law, should, in my opinion, be held void and illegal.

This disposes of the second question, and concludes the case; but it is right to say, on the third point, that, whatever may be the possibility or impossibility of legal ratification, I do not think any ratification was, in fact, accomplished by the shareholders. Assuming the contracts to have been *ultra vires*, we must cast on the respondent the *onus* of showing that they were validly ratified, and it appears to me that he has wholly failed to do so. In the cases decided in this House, to which we have had frequent reference, the assent of all the shareholders was assumed to be essential to a ratification, and we may take it as conceded that such an assent, expressly or by implication, from actual presence or at a meeting, or authority impliedly or directly given, must be proved; even if, when so proved, it would be effectual to ratify an otherwise invalid arrangement. In this case no such proof is forthcoming. The documents and records clearly show that all the shareholders were not present at any meeting, which is important for your Lordships' consideration, and it was admitted that they were not by Mr. Benjamin in his equally able and candid argument. The absent shareholders could not be bound by what was done at those meetings, unless they had given authority for it. There is no allegation of express authority, and no ground for implying authority of any kind. It seems quite just to say that shareholders are not to assume any intention of illegality or any design to transcend their legal powers on the part of the directors at meetings from which, of necessity or choice, they absent themselves. At least, to form any implication of assent to the carrying out of such an intention or design, we must have evidence that notice of it was communicated; and in the case before us I fail to find any such notice. In the circulars calling the meetings there was plainly none, nor do I think there was any in the accounts and balance-sheets of such a character as to put the shareholders necessarily on inquiry, or place them in the alternative of attending and protesting against

possible irregularities, or being bound by them, whatever they might be. A passage from the judgment of WILLES, J., which was cited with approval by the learned Judges in the court below, appears to me very sound and apposite. "The principle by which a person on whose behalf an act is done without his authority, may ratify and adopt it, is as old as any proposition known to the law. But it is subject to one condition: in order to make it binding, it must be either with full knowledge of the character of the act to be adopted, or with the intention to adopt it at all events and under whatever circumstances." As I have said, the burden of proof of ratification lies on the respondent, and I find none to satisfy me either that the absent shareholders had, in the language of WILLES, J., full knowledge of the character of the acts to be adopted, or the intention to adopt them at all events, or under whatever circumstances, or indeed to adopt them at all.

On all the points arising in the case, I am, therefore, clearly of opinion that the appellants are right, and that the appeal should be allowed.

Lord SELBORNE. The action in this case is brought upon a contract, not directly or indirectly to execute any works, but to find capital for a foreign railway company, in exchange for shares and bonds of that company. Such a contract in my opinion was not authorised by the memorandum of association of the Ashbury Company. All your Lordships, and all the Judges in the Courts below, appear to be so far agreed.

But this, in my judgment, is really decisive of the whole case. I only repeat what Lord CRANWORTH in *Hawkes* v. *The Eastern Counties Railway Company*, 5 H. L. Cas. 331; 24 L. J. Ch. 601 (when moving the judgment of this House), stated to be settled law, when I say that a statutory corporation, created by Act of Parliament for a particular purpose, is limited as to all its powers by the purpose of its incorporation as defined in that Act. The present and all other companies incorporated by virtue of the Companies' Act of 1862 appear to me to be statutory corporations within this principle. The memorandum of association is, under that Act, their fundamental and (except in certain specific particulars) their unalterable law, and they are incorporated only for the objects and purposes expressed in that memorandum. The object and policy of those provisions of the Statute which pre-

scribe the conditions to be expressed in the memorandum, and make these conditions (except in certain points) unalterable, would be liable to be defeated if a contract under the common seal, which on the face of it transgresses the fundamental law, were not held to be void and *ultra vires* of the Company, as well as beyond the powers delegated to its directors or administrators. It was so held in the case of the *East Anglian Railway Company* v. *Eastern Counties Railway Co.*, 11 C. B. 775; 21 L. J. C. P. 23, and in the other cases upon Railway Acts, which were approved by this House in *Hawkes' Case*, 5 H. L. Cas. 331; 24 L. J. Ch. 601, and I am unable to see any distinction for this purpose between statutory corporations under Railway Acts and statutory corporations under the Companies' Act of 1862.

The view of the three Judges who were for affirming in the Court of Exchequer Chamber (as I understood it) was that all contracts whatever are *primâ facie* within the powers of all these companies (not expressly or by necessary implication prohibited) merely because they are corporations, but that, inasmuch as the common seal must be affixed to their deeds by some agents having a delegated power, and as the general powers delegated to the directors and general meetings are only for the purposes expressed in the memorandum and articles of association, their agency to seal a contract going beyond these purposes cannot be presumed unless it is made manifest by proof of the consent of every individual shareholder. With this view I cannot agree. I think that contracts for objects and purposes foreign to or inconsistent with the memorandum of association are *ultra vires* of the corporation itself. And it seems to me far more accurate to say that the inability of such companies to make such contracts rests on an original limitation and circumscription of their powers by the law and for the purposes of their incorporation, than that it depends upon some express or implied prohibition, making acts unlawful which otherwise they would have had a legal capacity to do.

This being so, it necessarily follows (as indeed seems to me to have been conceded in Mr. Justice BLACKBURN'S judgment) that where there could be no mandate, there cannot be any ratification, and that the assent of all the shareholders can make no difference when a stranger to the corporation is suing the Company itself in its corporate name upon a contract under the common seal. No

agreement of shareholders can make that a contract of the corporation which the law says cannot and shall not be so.

If, however, this contract (though contrary to the law of the association, and not within the power either of the directors or of a general meeting) could have been susceptible of confirmation or ratification by the universal consent of all the shareholders, I should have been of opinion that there was here no evidence whatever to go to a jury of any such confirmation or ratification. What was relied upon consists entirely of resolutions passed at certain general meetings of the shareholders and a deed executed pursuant to those resolutions. But (assuming these to be acts which might properly have been construed as acts of adoption or ratification) there is no evidence that they were ever communicated to any shareholder who was not present at those meetings, either by notice beforehand or afterwards. The notices under which these meetings were convened contained nothing from which any shareholder could be led to suppose that it was in contemplation to enter into or adopt on the part of the Company any contract or arrangement in excess of the ordinary powers of the Company, as represented by the shareholders assembled at a duly constituted general meeting. There is no obligation upon any shareholder receiving such notices either to attend the meetings or to make inquiries as to what is proposed to be done at them, in order to protect himself from being bound by acts or contracts *ultra vires* of any general meeting. He will, of course, be bound by all that the general meeting can do as to the matters mentioned in the notices within their powers; but he cannot in his absence and without his knowledge be taken to consent that they shall bind him by any resolutions or acts in excess of those powers, whether such acts or resolutions do or do not relate to the particular business for the transaction of which those meetings were called together.

As to the construction placed by the majority of the Judges upon the resolutions and deed, which in this case they held to establish ratification, I only wish to guard myself against being supposed to assent to the proposition that a deed executed between the directors and their shareholders, which was not meant to be, and which as between the parties to it was not a ratification by the company of the agency of the directors in transactions otherwise unauthorised, and which was never acted upon so as

to alter or affect the decision of the plaintiff, could operate in the plaintiff's favour as a ratification of the agency.

Judgment appealed from reversed.

ENGLISH NOTES.

In the case of *East Anglian R'y Co.* v. *Eastern Counties R'y Co.* (1851), 11 C. B. 775; 21 L. J. C. P. 23, a case which was cited in the argument of the appellants in the principal case, it was decided that a railway company incorporated by special Act of Parliament for the purpose of making and maintaining a specified railway, had no power to take in lease other railways, or to expend money upon promoting a bill in Parliament for enabling them to take in lease or to make other railways, however beneficial that might have been to the undertaking which was the proper object of their incorporation; and, accordingly, in an action against this Company to enforce the covenants of a deed by which they purported to undertake to take such a lease and to pay those costs, the Court gave judgment for the defendants.

In *Hope* v. *The International Financial Society* (C. A. 1876), 4 Ch. D. 340; 46 L. J. Ch. 200, the Court of Appeal, affirming the judgment of Bacon, V. C., held a resolution of an extraordinary general meeting of the shareholders, which purported to authorise the directors to purchase on behalf of the Company their own shares, was *ultra vires* of the Company; and accordingly restrained the directors from acting on the resolution. They held that either this was a trafficking in shares not authorised by the memorandum, or an extinguishment of the shares, and therefore, in effect, a reduction of the capital of the Company.

In the later decision of the Court of Appeal in *Re Dronfield Silkstone Coal Co.* (C. A. 1881), 17 Ch. D. 83; 50 L. J. Ch. 387, it is suggested by Cotton, L. J., that the Court in *Hope* v. *International, &c. Society* viewed the transaction as a scheme for restoring capital to the members. The Court of Appeal in this case (*Dronfield, &c.*) held that the objection did not apply to a purchaser of shares by way of compromise with a shareholder who had disputes with directors as to their method of carrying on the business; and that — the shareholder having, under such circumstances, sold his shares to the Company and had his name taken off the register — the transaction could not be subsequently questioned by the Company, or by the liquidator on behalf of creditors. But the reasoning of the Court of Appeal in this case (*Re Dronfield, &c.*) was disapproved by the House of Lords in *Trevor* v. *Whitworth* (1887), 12 App. Cas. 414; 57 L. J. Ch. 28; and the House decided that a company formed under the Act of 1862 is

not competent to purchase its own shares, although authorised by its articles of association to do so. The decision of the House of Lords is based on the ground that such a purchase is, in effect, a reduction of capital contrary to the policy of the Acts; and it would therefore make no difference if the memorandum itself purported to authorise the purchase of its shares by the Company. This decision places these companies in this respect on the same footing with railway and other companies constituted under special acts incorporating the Companies Clauses Consolidation Act, 1845. As to these companies, it has, as Lord Macnaghten observes, never been suggested that they might purchase their own shares.

In *Att. Gen.* v. *Great Eastern R'y Co.* (C. A. 1879–80), 11 Ch. D. 487; 5 App. Cas. 478; 48 L. J. Ch. 428; 49 L. J. Ch. 545, so it was held by the House of Lords, affirming the judgment of a majority of the Court of Appeal, that the Company, having authority under their Acts to enter into agreement with another railway Company for the working of their railway, were acting within their powers by letting for hire rolling stock and locomotive engines to the latter Company. In this case Lord Selborne observed that he agreed with Lord Justice James that this doctrine (*i. e.*, that of the *Ashbury, &c. Comp'y*) "ought to be reasonably and not unreasonably applied; and that whatever may fairly and reasonably be regarded as incidental to, or consequential upon, those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires*."

In *Chapleo* v. *Brunswick Benefit Building Society* (C. A. 1881), 6 Q. B. D. 696; 50 L. J. Q. B. 372, directors purporting to act on behalf of the Society, borrowed money in excess of the powers of the Society; and it was held that the Society could not be charged with the debt.

But if money of a society is lent upon unauthorised security, the borrower cannot set up illegality as a defence against the Society recovering according to the contract. *In re Coltman. Coltman* v. *Coltman* (C. A. 1881), 19 Ch. D. 64; 51 L. J. Ch. 3.

In *Guiness* v. *Land Corporation of Ireland* (C. A. 1882), 22 Ch. D. 349; 52 L. J. Ch. 177, it was held by Chitty, J., and by the Court of Appeal that, where the memorandum of association divided the capital into A and B shares, a clause in contemporaneous articles of association, which made the capital on the B shares available for payment of dividends on the A shares, was *ultra vires* and void. And in *Ashbury* v. *Watson* (C. A. 1885), 30 Ch. D. 376; 54 L. J. Ch. 985, in the case of a company in which the rights of the preference and ordinary shareholders were expressly defined in the memorandum of

association, the Court of Appeal, affirming the judgment of KAY, J. (1884) (28 Ch. D. 56; 54 L. J. Ch. 12), held special resolutions altering the relative interests of these classes of shareholders in the distribution of the revenue to be invalid and incapable of ratification, so that an argument on the ground of acquiescence could not be supported.

In *London Financial Association* v. *Kelk* (1884), 26 Ch. D. 107; 53 L. J. Ch. 1025, a case which was argued at great length and with citation of numerous cases before Vice Chancellor BACON, that learned judge held that the rule in *Ashbury, &c. Co.* did not apply, on the ground that the memorandum of association was, on a fair construction, intended to cover a very wide class of operations.

The express power in a special Act to borrow money not exceeding a certain amount has been construed by the House of Lords (affirming the decision of the Court of Appeal) as an implied prohibition to borrow money in excess of that amount. *Baroness Wenlock* v. *River Dee Co.* (H. L. 1885), 10 App. Cas. 354; 54 L. J. Q. B. 577.

A power in the articles of association to increase capital by the issue of preference shares has been held not inconsistent with a power in the memorandum to increase capital without mention of any particular method. *Re South Durham Brewery Co.* (C. A. Dec. 1885), 31 Ch. D. 264; 55 L. J. Ch. 179. The Court further intimated the opinion that the judgment of the MASTER OF THE ROLLS (Sir G. JESSEL) in *Harrison* v. *The Mexican R'y Co.* (1875), L. R., 19 Eq. 358; 44 L. J. Ch. 403, was sound, notwithstanding the principal case (which was decided subsequently). That was a case where the memorandum stated the capital to be £2,700,000, in 135,000 shares of £20 each, and the MASTER OF THE ROLLS, in effect, decided that any implication of an intention that the shares were to rank equally as to profits, was rebutted by contemporaneous articles empowering the directors, with the sanction of a special resolution of the Company, to issue preference shares.

AMERICAN NOTES.

Acts of a person assuming an illegal agency cannot be ratified. *Harrison* v. *McHenry*, 9 Georgia, 161; 52 Am. Dec. 435; *Newsom* v. *Hart*, 11 Michigan, 237; *Scott* v. *Middletown R. Co.*, 86 New York, 200; *Forbes* v. *Hagman*, 75 Virginia, 168.

Officers of a corporation without authority to bind the corporation by their acts have no power to ratify an unauthorised contract. *Lyndon Mill Co.* v. *Lyndon Inst.*, 63 Vermont, 581; 25 Am. St. Rep. 783; *Despatch Line* v. *Bellamy Manuf. Co.*, 12 New Hampshire, 205; 37 Am. Dec. 203.

A newspaper publishing company cannot bind itself by ratification of a contract to do Sunday advertising. *Handy* v. *Globe Publishing Co.*, 41 Minnesota, 188; 4 Lawyers' Rep. Annotated, 166; 16 Am. St. Rep. 695.

No. 7. — Watson v. Swann. — Rule.

The doctrine of the principal case is declared in the case of public corporations, in *Lewis* v. *Shreveport*, 108 United States, 282; *Smith* v. *Newburg*, 77 New York, 130; *Marsh* v. *Fulton County*, 10 Wallace (U. S. Sup Ct.), 676; *Shawneetown* v. *Baker*, 85 Illinois, 563; *Hague* v. *Philadelphia*, 48 Penn. St. 528; *Bank* v. *Statesville*, 84 North Carolina, 169; *Parsons* v. *Monmouth*, 70 Maine, 262; *Sutro* v. *Pettit*, 74 California, 332; 5 Am. St. Rep. 442.

And as to private corporations. *Tippecanoe Co* v. *Lafayette, &c. R. Co.*, 50 Indiana, 112; *Kent* v. *Quicksilver Mining Co.*, 78 New York, 159; *Hazlehurst* v. *Savannah, &c. R. Co.*, 43 Georgia, 54; *Martin* v. *Zellerbach*, 38 California, 310; *Hood* v. *N. Y., &c. R. Co.*, 22 Connecticut, 510; *Downing* v. *Mt. Washington R. Co.*, 40 New Hampshire, 230.

The principal case is largely quoted from by Mr. Morawetz (Private Corp., p. 114), who says it "is an instructive case showing the difference between the doctrine of ratification in case of a contract made by a corporation in violation of an express statutory prohibition, and in case of a contract which was simply unauthorised by the constating instruments of the Company."

Mr. Beach says (Private Corp., p. 331): "The question of ratifications of the acts of directors can seldom arise in an American court, for the reason that in general the whole power of the corporation itself is vested in the board of directors; therefore what may lawfully be done by the corporation can generally be done by the board of directors. In other words, an act beyond the powers of the directors is *ultra vires* the corporation and void. In England, on the contrary, the question may and frequently does arise, because the directors are regarded simply as special agents of the corporation. In such cases the obviously just rule is adopted that if the act of the directors to be ratified is one which the Company itself has no power to perform, no amount of acquiescence on the part of the shareholders can effect a ratification." Citing the principal case, and *Kean* v. *Johnson*, 9 New Jersey Equity, 401; *Middlesex R. Co.* v. *Boston R. Co.*, 115 Massachusetts, 347; *Rollins* v. *Clay*, 33 Maine, 132.

No. 7. — WATSON *v.* SWANN.

(C. P. 1862.)

No. 8. — In re NORTHUMBERLAND AVENUE HOTEL CO.

(C. A. 1883.)

RULE.

In order that a contract made by an agent without authority at the time may be capable of ratification so as to entitle a principal to the benefit — or charge a principal with the burden — of the contract, it is necessary that, at the time of the contract, the principal should be an existing person, capable of being ascertained, and that the contract should

have been at the time intended and professed to be made on behalf of that principal.

Watson v. Swann.

31 L. J. C. P. 210 (s. c. 11 C. B. (N. S.) 756).

This was an action on a policy of assurance on goods to be carried in "steamers," which was tried, before WILLIAMS, J., at the Surrey Summer Assizes for 1861. The declaration set out the policy, which was an open policy, to cover £2,000. It was dated the 28th of December, 1860, and purported to be effected by "Gray, Beavis, & Caffall, as well in their own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all," and to be an insurance at and from any port on the east coast of Great Britain to any port on the Continent between Hamburg and Havre, "upon any kind of goods and merchandise whatever (except phosphorus and sulphuric acid), with average as customary to be valued and declared as interest might appear, goods on deck being insured against the risk of jettison only." The defendant pleaded, *inter alia*, fifthly, that the policy was not made for the use and benefit, or on account of, the plaintiff.

The plaintiff, who is a shipowner, having steamers trading between this country and the Continent, wrote from Goole, on the 9th of January, 1861, to a Mr. Smith, a ship and insurance broker at Hull, directing him "to take out an open policy to cover risk for a value of £5,000 against jettison on deck, subject to declaration thereafter on machinery, cotton, and other general cargo, from or between Goole, Hull, or Grimsby, and Antwerp, Ghent, Ostend, and Dunkirk." And on the 12th of January, the plaintiff, in a letter to Smith, referring to such proposed policy of £5,000 against jettison on deck, said, "We now beg to declare shipment on deck, per *La Plata*, of to-day from Grimsby to Ostend, of the following." Then followed a description of the goods, amongst which were the goods in respect of which the action was brought. It appeared that Smith, being unable to effect at the time such a policy against jettison only as was required by the plaintiff, wrote to his London agents, Messrs. Gray & Co., who had effected the policy in question, instructing them, in accordance with a course of business usual between Smith and Messrs. Gray & Co., to indorse

on the policy a declaration appropriating the insurance to the goods in which the plaintiff was interested, and which he had desired to have insured against loss by jettison.

The policy was indorsed accordingly with this risk, and the same was initialed by the defendant. There were several other risks insured against, which were in like manner declared by indorsement on the policy, but these related to goods carried in vessels belonging to other persons and in which the plaintiff had no interest. The plaintiff was informed by a letter from Smith, dated the 14th of January, that the risk by the *La Plata* had been covered not upon the plaintiff's own policy (as that was not then completed), but upon Smith's general one, "as usual."

The *La Plata* sailed on the 12th of January, and the loss by jettison occurred on the 14th of the same month. The plaintiff was by the custom of the trade liable, as shipowner, for the loss by jettison of deck cargo, and he had accordingly paid the value of the goods lost to the different owners. It was objected at the trial on the part of the defendant, that the plaintiff could not sue the defendant on this policy, there having been no contract with the plaintiff. A verdict was entered for the plaintiff for £12 14*s.* 8*d.*, but with leave to the defendant on this ground to move to set it aside and enter it instead for him.

A rule *nisi* to that effect was accordingly obtained, against which —

Lush and J. Brown now shewed cause. The insurance was expressed to be made in the name of every person to whom the same might appertain, and to be upon goods "to be valued and declared as interest might appear." The defendant, therefore, by underwriting this policy, contracted with any person who might be interested in the goods insured. It was immaterial whether Smith or his agents, Messrs. Gray, at the time they effected this policy, intended to insure for the plaintiff or not. The cases of *Lucena* v. *Craufurd*, 3 Bos. & P. 75; 2 Bos. & P. (N. R.) 269; 1 Taunt. 325; 6 R. R. 623, and *Routh* v. *Thompson*, 11 East, 428; 13 East, 274; 10 R. R. 539, are in point. There was here a ratification by the plaintiff of what had been done by Smith (*Foster* v. *Bates*, 12 M. & W. 226; 13 L. J. Exch. 88), which shews that where the act of the agent was ratified by the plaintiff after he became administrator, it was no objection that the intended principal was unknown at the time to the person who intended to be agent.

[Willes, J. That was because the title of an administrator relates back to the death of the intestate. It is the same with assignees of a bankrupt, where their title relates back to the time of bankruptcy.]

What had been done by Smith was communicated to the plaintiff in the letter of the 14th of January, and was adopted by the plaintiff. In *Hagedorn* v. *Oliverson*, 2 M. & S. 485; 15 R. R. 317, the plaintiff had effected an insurance on a ship as well in his own name as for and in the name of every other person to whom the same might appertain for the benefit of one Schroeder, an alien enemy, and two years after the loss Schroeder, by letter to the plaintiff, adopted the insurance, and it was held that the plaintiff might recover against the underwriter averring the interest in Schroeder. The case of *Hull* v. *Pickersgill*, 1 B. & B. 282, is an authority in favour of the ratification of an act by the assignees of a bankrupt having relation back so as to justify such act, though at the time of its committal by the defendants they did not know who were the assignees under the bankruptcy.

Bovill and Honyman in support of the rule. At the time this policy was effected, Smith was not the agent of the plaintiff. The plaintiff never gave any order for effecting this policy, nor was it effected for and on his account. In order to make the ratification or adoption of the act of Smith effectual, Smith must have professed to have been acting on the plaintiff's behalf when he caused the policy to be made. *Wilson* v. *Tumman*, 6 Man. & G. 236; 12 L. J. C. P. 306; *Vere* v. *Ashby*, 10 B. & C. 298; *Bird* v. *Brown*, 4 Exch. Rep. 786; 19 L. J. Exch. 154; *Gerhard* v. *Bates*, 2 El. & B. 476; 22 L. J. Q. B. 365; and *Howard* v. *Shepherd*, 9 Com. B. Rep. 312; 19 L. J. C. P. 249. If this policy is upheld, there might be five hundred contracts under one and the same policy, and the stamp duty would be evaded.

Erle, C. J. I am of opinion that this action cannot be sustained. It is an action on a contract, and therefore it is important to ascertain, not only what is the subject-matter of such contract, but who are the parties to it; for it is clear law that no one can sue on a contract but the person who made it, or the person who ratified what purported to be a contract made by his agent. Now here the contract was neither made by Watson, the plaintiff, nor did it ever purport to be made on his behalf; and even if it did so purport, it has not been ratified, for it is clear that Watson never

intended to ratify it *in toto*, but only that part of it which had been appropriated to him by Smith. A very wide extension has been given to the principle to which I have adverted of the parties to a contract, in respect of a policy of assurance, and persons who could not be named at the time, if intended to come within it, and so capable of being ascertained, have been allowed to be entitled to the benefit of the same; but they must have been such as were contemplated at the time the policy was made. Here, however, Watson was not so contemplated when this policy was made; for at that time Smith was not employed by him to effect any policy It was not until some time afterwards that Smith was so employed, and then, finding himself unable to make a contract such as Watson wanted, he appropriated this contract, which was never intended at the time it was made to be so applied. On that ground I give my judgment that Watson cannot take the benefit of the policy and sue on it. It may be that the broker may have a right to sue on the policy as trustee for the parties for whose benefit he may have appropriated it; but it will be time enough to determine that matter when the question arises: it is sufficient to say, that to allow Watson to maintain this action would be acting entirely contrary to the principle of contracts as known at common law. It seems to me also, that the cases which have been cited by Mr. Lush are conformable to our present judgment. The cases of *Lucena* v. *Craufurd* and *Routh* v. *Thompson* are where the prizes were properly vested in the King, and the insurance was made by the agents, of the Crown, and the transaction in each of those cases was such as to have given notice to the assurers that the insurance was what indeed it purported to be, namely, an insurance on behalf of the Crown. Here there never was any idea, at the time the policy was given, that Watson's goods should form the subject of such policy. I think the defendant is entitled to our judgment on the fifth plea.

WILLIAMS, J. I am of the same opinion. I am unwilling to interfere with what may be sanctioned by mercantile usage, by any mere technical form of law, but I think that we could not find in favour of the plaintiff on the present occasion without overruling the doctrine that no one can sue on a contract which was not made by him or by his agent.

WILLES, J. I am also of the same opinion. In order to sue on a contract, the contract must have been made by such person him-

self or by some other person purporting to be his agent. The law requires that the person for whom the agent purports to act must be one who is capable of being ascertained at the time the contract is made. I do not say that it is necessary that he should then be named; but I say that he must be such as may then reasonably be ascertained. Here the policy was on goods to be declared *in futuro*, so that no one was pointed out at the time the policy was effected as the person who was to be the owner of the goods insured. It is clear that the broker might, under this policy, have shipped his own goods on board without being guilty of any breach of trust. The cases of administrators and assignees of bankrupts stand on a peculiar footing, and do not apply to this case. In ordinary cases the policy is effected by the broker for the person who employs him, and the person to sue must be the broker or the person for whom he so acted. With regard to the interest of any third party, the case of *Powles* v. *Innes*, 11 M. & W. 10; 12 L. J. Exch. 163, points out the course to be taken. There the person for whom the policy of insurance had been effected, afterwards assigned away, by bill of sale, his interest in the goods; and it was held he could not sue on the policy; but Lord WENSLEYDALE said, "If the policy had been handed over with the bill of sale, or there had been an order to the brokers to hand it over, the case would be different: then the parties might sue as trustees for the purchaser." I object to giving any opinion as to whether a broker employed by several persons to effect insurances may do so in one policy, so as to enable each of such persons to sue thereon. It is sufficient for me to say that here the defendant is sued by a party with whom he never contracted, and on that ground I am of opinion that this rule must be absolute.

KEATING, J. I am of the same opinion. Mercantile usage, though always treated by the Courts with deference, must not contradict any well-known rule of law. Now, to give effect to the usage here, if any such exists which would enable the plaintiff to maintain this action, would be to allow a party to sue on a contract which had not been made by him or by any one on his behalf, or had even been ratified by him. If it should be considered necessary that such right to sue should exist, the Legislature must be applied to on the subject, as was done in the case of the transfer of bills of lading.

Rule absolute.

In re Northumberland Avenue Hotel Co.

33 Ch. D. 16.

In 1882, C. W. Wallis negotiated with the Metropolitan Board of Works for the grant to him of a lease of certain plots of ground for a term of eighty years from the 29th of September, 1882, at a rent of £5,600, upon his first erecting certain buildings on the ground within a specified time. An agreement in writing was entered into on the 2nd of October, 1882. In the mean time an agreement had been entered into, dated the 24th of July, 1882, between Nunneley of the one part and James Doyle, "as trustees for and on behalf of an intended company to be called the Northumberland Avenue Hotel Company Limited" of the other part, which, after reciting that Nunneley, as agent for and on behalf of Wallis, had agreed to grant to the Company, and Doyle had on behalf of the Company agreed to take an underlease of the plots of ground on the terms, and subject to the conditions therein after mentioned, it was agreed by and between the parties as follows, viz.: "The Company agrees to become under-lessee for the term of eighty years, less one day, from the 29th of September next," of the plots of ground at the rent of a peppercorn for the first year, and £7,000 for subsequent years. The agreement contained stipulations of a character similar to those usually inserted in building agreements, which were to be performed by the Company. By clause 4, the Company were to be entitled to take possession on payment of a certain deposit. By clause 23, reciting that Wallis was negotiating for certain further plots of land, the Company agreed to become lessee of them for such terms and at such rent and on such conditions as might be agreed between them and Wallis.

On the following day, the 25th of July, 1882, the Company was incorporated. The agreement of the 24th of July was not mentioned in the memorandum, but the 2nd clause of the articles purported to adopt that agreement, and provided that the Company should carry it into effect, subject to any modification which might be agreed upon between Nunneley and the Company.

The Company did not after incorporation enter into any further agreement in writing with Wallis, but acted upon the agreement of the 24th of July, took possession of the ground in October, 1882, and expended upon it a large sum of money amounting to

about £40,000. There was no note or memorandum of any contract with Wallis signed or sealed on behalf of the Company after their incorporation.

In April, 1883, Wallis commenced an action against the Company for specific performance of clause 23 of the agreement as to taking a lease of additional pieces of ground. This action was compromised, the Company entering into an agreement under seal to accept a lease of the additional ground, and the matter never came before the court. The Company on several occasions made payments to Wallis on account of rent, and several resolutions were passed by the directors, with the assent of Wallis, purporting to modify some of the terms of the agreement of the 24th of July, 1882, but none of these modifications were carried into effect by means of any written documents. All these proceedings went on the footing that the agreement of the 24th of July was one by which the Company were bound.

The Company did not succeed in obtaining sufficient capital to enable it to continue its works, and in March, 1884, Wallis served the Company with notice to re-enter under a clause in the agreement for non-completion of the works, and on the 13th of May a notice was given by the Metropolitan Board of Works determining the agreement of the 2nd of October, 1882. Shortly after this the Board of Works resumed possession

On the 23rd of October, 1884, the Company passed a resolution for voluntary winding-up, and on the 29th of December, 1884, an order was made for carrying on the winding-up under the supervision of the Court.

Wallis had become bankrupt, and Sully, his trustee, and two encumbrancers on the interest of Wallis under the agreement of the 24th of July, 1882, took out a summons asking that they might be admitted as creditors for damages sustained by them in respect of the breach by the Company of that agreement.

CHITTY, J., said that if Doyle contracted as agent for the Company, then as the Company was not at the time in existence, according to *Kelner* v. *Baxter*, L. R., 2. C. P. 174; 36 L. J. C. P. 94, and other cases, the agreement could not be ratified by the Company; that if he contracted as trustee, then, whatever claims he might have against the Company if they took the benefit of the agreement, there was no contract between the Company and Wallis. His Lordship further held that it was not to be inferred

from the facts that an agreement was made between Wallis and the Company to the same effect as the agreement of the 24th of July, 1882; and that if there had been an agreement of which specific performance could have been originally decreed on the ground of part performance, there would not be any jurisdiction to give damages after specific performance had become impossible. The summons was therefore dismissed.

The applicant appealed.

Hadley, for the appellant. Although, according to the authorities, *Kelner* v. *Baxter* and *In re Empress Engineering Company*, 16 Ch. D. 125; 1 R. C. 699, the Company could not legally ratify the contract, it having been made before the incorporation of the Company, yet, as is remarked in the latter case, the Company may become bound in equity by the provisions of the contract. Moreover, the Court will, as an inference from the facts in this case, hold that there was a contract between Mr. Wallis and the Company in the terms of the document of the 24th of July, 1882. It would, in fact, be a fraud on the part of the Company — they having taken possession of the land and acted as they did — to deny that there was a binding contract. *Crook* v. *Corporation of Seaford*, L. R., 6 Ch. 551; *Wilson* v. *West Hartlepool Railway Company*, 2 D. J. & S. 475; *Melbourne Banking Corporation* v. *Brougham*, 4 App. Cas. 156; *Doe* v. *Taniere*, 12 Q. B. 998; *Ecclesiastical Commissioners* v. *Merral*, L. R., 4 Ex. 162. The last case shows that there is a remedy at law as well as in equity, the Court inferring or presuming a contract from the acts of the parties. [He also referred to *Walsh* v. *Lonsdale*, 21 Ch. D. 9.]

Romer, Q. C., and F. B. Palmer, *contrà*, were not called upon.

Cotton, L. J. This is an appeal from a decision of Mr. Justice Chitty in what, although in form it was a summons from chambers in a winding-up, was in substance an action for damages for breach of an agreement alleged to have been entered into between Mr. Wallis, whom the claimant represents, and the Company The first thing, therefore, that we have to see is whether in fact there was any contract between them. I am not referring to the question whether a contract was made which, in consequence of the provisions of some Act of Parliament, was incapable of being enforced, but to the question whether in fact there was any agreement between these two parties.

The Company was incorporated on the 25th of July, 1882, and

before that date, viz., on the 24th of July, a contract in writing was entered into between a gentleman acting as agent for and on behalf of Mr. Wallis, and another gentleman who described himself as a trustee for the Company, the Company, in fact, having no existence at the time. That was a contract which was binding as between Mr. Wallis and the other gentleman whom I have mentioned, and was a contract which provided that certain things should be done by the Company. That contract in no way bound the Company, because the Company at that time was not formed. In fact, it was not in terms a contract with the Company, although it was a contract by a person who purported to act for the Company that certain things should be done by the Company. It is not contended that this contract was in any way binding on the Company, nor is it disputed that the Company, after it was formed, could not ratify the authority of the gentleman who purported to act as their trustee before they were incorporated, and who therefore could not have any authority to do so.

But it is said that we ought to hold that there was a contract entered into between the Company and Wallis on the same terms (except so far as they were subsequently modified) as those contained in the contract of the 24th of July, 1882. In my opinion, that will not hold. It is very true that there were transactions between Wallis and the Company in which the Company acted on the terms of that contract entered into with Wallis by the person who said he was trustee for them. But why did the Company do so? The Company seem to have considered, or rather its directors seem to have considered, that the contract was a contract binding on the Company. But the erroneous opinion that a contract entered into before the Company came into existence was binding on the Company, and the acting on that erroneous opinion, does not make a good contract between the Company and Mr. Wallis, and all the acts which occurred subsequently to the existence of the Company were acts proceeding on the erroneous assumption that the contract of the 24th of July was binding on the Company. In my opinion, that explains the whole of these transactions. The case is entirely different from those cases which have been referred to where the Court, finding a person in possession of land of a corporation and paying rent, has held that there was a contract of tenancy. There was no mode of explaining why the occupier was there, except a tenancy, unless he was to be treated

as a trespasser. The receipt of rent by the corporation negatived his being a trespasser, and it was therefore held that there was a tenancy. Here we can account, and in my opinion we ought to account, for the possession by the Company, and for what it has done, by reference to the agreement of the 24th of July, which the directors erroneously and wrongly assumed to be binding upon them. We are not therefore authorised to infer a contract, as it was inferred in those cases where there was no other explanation of the conduct of the parties.

In my opinion, the decision of Mr. Justice CHITTY was right, and the appeal must therefore fail.

LINDLEY, L. J. I am of the same opinion. The more closely the case is investigated, the more plainly does it appear that there never was any contract between the Company and Wallis. The more closely the facts are looked into, the more plain is it that everything which the Company did, from the taking of possession down to the very last moment, was referable to the agreement of the 24th of July, 1882, which the directors erroneously supposed to be binding on the Company. I therefore cannot come to any other conclusion than the conclusion at which Mr. Justice CHITTY arrived.

LOPES, L. J. I am entirely of the same opinion.

The question is whether there was a contract between Wallis and the Company. There no doubt was an agreement between a man called Nunneley, who was agent for Wallis, and a man named Doyle, who described himself as trustee for the Company. But at that time the Company was not incorporated, and therefore it is perfectly clear that the agreement was inoperative as against the Company. It is also equally clear that the Company, after it came into existence, could not ratify that contract, because the Company was not in existence at the time the contract was made. No doubt the Company, after it came into existence, might have entered into a new contract upon the same terms as the agreement of the 24th of July, 1882; and we are asked to infer such a contract from the conduct and transactions of the Company after they came into existence. It seems to me impossible to infer such a contract, for it is clear to my mind that the Company never intended to make any new contract, because they firmly believed that the contract of the 24th of July was in existence, and was a binding valid contract. Everything that was done by them after

their incorporation appears to me to be based upon the assumption that the contract of the 24th of July, 1882, was an existing and binding contract. I think, therefore, that the appeal ought to be dismissed.

ENGLISH NOTES.

In applying this rule, the distinction must be borne in mind between *ratification* and the new contract which may result from the adoption of the contract by both parties. The question of a new contract is excluded in both the principal cases, — in the former by the stamp laws, in the latter by the Statute of Frauds.

It is suggested by Mr. Justice KAY in *Howard* v. *Patent Ivory Manufacturers Co.* (1888), 38 Ch. D. 156; 57 L. J. Ch. 879, that there might have been room to infer a new contract in the case of the *Northumberland Avenue Hotel Co.* But that could not have affected the decision, for there was no question of specific performance; and, assuming there had been a new verbal contract, part performance would not have made the contract good for the purpose of claiming damages, when specific performance had become impossible. *Lavery* v. *Purssell* (CHITTY, J., 1888), 39 Ch. D. 518; 57 L. J. Ch. 570.

It is to be observed that the former of the principal cases (*Watson* v. *Swann*) leaves it an open question whether Smith might not have sued on the policy as a trustee for Watson; and the judgment of WILLES, J., seems to indicate the view that he might have done so. That would have raised the question of insurable interest, which was considered at great length, and on which the Court were divided in opinion, in *Ebsworth* v. *Alliance Marine Insurance Co.* (1872–73), L. R., 8 C. P. 596; 42 L. J. C. P. 305, a case where the facts were similar. In the judgment of BOVILL, C. J., and DENMAN, J., which were in favour of the right of the plaintiffs (the brokers) in that case, to sue in their own names for the whole interest, *Watson* v. *Swann* is cited as conclusively establishing the proposition that the persons interested could not have sued upon the contract of insurance by reason of their not having been parties to it.

AMERICAN NOTES.

The principal cases are sustained by *Stainsby* v. *Frazer's Co.*, 3 Daly (New York Com. Pl.), 98; *Marchand* v. *Loan Assoc.*, 26 Louisiana Annual, 389. In the former case it was said: "If the association had been formed when the debt due the plaintiffs was contracted, although without authority from the defendants, the use of the boat and the promise to pay would amount to a ratification of Kingsland's acts, and create a liability. The defendants however had no legal existence at that time, and there was no association or company which represented them. They had necessarily no agent, having no existence, and

one of the essential elements of a ratification does not exist in this case, viz., a principal when the act was done." See also *Farmers' Co-operative Trust Co.* v. *Floyd*, 47 Ohio St. 525; 21 Am. St. Rep. 846.

But an incorporated company will be bound by the agreement of a majority of the individual members on its behalf before incorporation, where the Company has received the full benefit and has promised to pay. *Bell's Gap R. Co.* v. *Christy*, 79 Penn. St. 54; 21 Am. Rep. 39; *Grape Sugar Co.* v. *Small*, 10 Maryland, 395; *Whitney* v. *Wyman*, 11 Otto (U. S.), 392; *Low* v. *Conn. &c. R. Co.*, 46 New Hampshire, 284; *Hall* v. *Vermont, &c. R. Co.*, 28 Vermont, 401; *Van Schaick* v. *Third Ave. R. Co.*, 38 New York, 346; *Rockford, &c. R. Co.* v. *Sage*, 65 Illinois, 328; 16 Am. Rep. 587; *Paxton Cattle Co* v. *First Nat. Bank*, 21 Nebraska, 621; 59 Am. Rep. 852; *New York, &c. R. Co.* v. *Ketchum*, 27 Connecticut, 170. In *Paxton Cattle Co.* v. *First Nat. Bank*, certain persons drew up and signed articles of incorporation of a cattle company, and before they were filed for record, and before the time fixed for the commencement of the business of the corporation, they selected a president, who in their presence and with their approval executed and delivered to M. a note in consideration of certain property for the corporation, which after the organisation was perfected, and after the time fixed for the commencement of its business, came into its possession and ownership, and was used and enjoyed by it. *Held*, that M., indorser, could recover on the note against the corporation.

The principal case is cited in Mechem on Agency, § 124.

Section IV. — *General and Ostensible Authority. — Presumption in favour of Strangers.*

No. 9. — WHITEHEAD *v.* TUCKETT.

(1812.)

RULE.

Where an agent has acted for a principal in a course of dealing in which various transactions are had with other persons; an authority may be inferred, as between the principal and a third party, so as to charge the principal with an act of the agent within the scope of dealing, although the particular act was contrary to instructions.

The authority so inferred has been called a general authority, and has been said to be derived from a multitude of instances.

An agent, described as a broker, acting on behalf of a principal who was a wholesale grocer, was in the habit of

buying and selling in his own name large quantities of sugar. He exercised his judgment as to the price, but from time to time received instructions from the principal as to a limit. There was a running account between the principal and the agent, and the latter had, in some cases at least, the control of the bulk. The agent sold, and received payment for, a certain parcel of sugar upon terms which (as was alleged) were contrary to his instructions. Part of the parcel was delivered to the purchaser accordingly; but the rest remained in the warehouse of the agent, until his bankruptcy, when the principal took possession and refused to deliver to the purchaser. The purchaser brought an action of trover against the principal; and succeeded, on the ground that the sale was within the general authority of the agent as inferred from the course of business.

Whitehead v. Tuckett.

15 East, 400; 13 R. R. 509.

In trover for 37 hogsheads of sugar, which was tried before Le Blanc, J., at Lancaster, a verdict was found for the plaintiffs for £3,000 subject to the opinion of the Court on the following case.

The defendant, a wholesale grocer at Bristol, employed Sill & Co., brokers at Liverpool, to buy and sell on his account great quantities of sugars. The greater part were bought on speculation for resale, and were resold at Liverpool, but some were occasionally sent to the defendant. Sill & Co. usually bought and paid for the sugars in their own names, and in like manner resold and received the purchase-moneys in their own names. They did not draw upon the defendant for the particular amount of each purchase, nor remit to him the particular bill received in payment on each sale; but there was a general running account between them. Sill & Co. never had a general authority to buy for the defendant, but in each instance received his directions for so doing; but when the markets were low, they had sometimes an unlimited authority as to quantity or price. Previously to the transaction which gave rise to the present action Sill & Co. had not a general authority to sell at their discretion, but received the defendant's directions to sell on each occasion, and

were limited as to price; and upon the transaction in question they had no other authority in general, than what appears from the letters hereinafter stated. In May, 1810, Sill & Co. bought in their own names 50 hogsheads of St. Croix sugar of Ewart, Rutson, & Co., on account of the defendant, paid for them by their own draft, and reimbursed themselves by drafts on the defendant; not for the particular amount of this purchase, but on the general account running between them. The samples were sent as usual to Sill & Co.'s office, and remained there till the sale to the plaintiffs hereafter mentioned, and the sugars were removed from the warehouse of the sellers to the warehouse of Sill & Co.

The following are extracts from the correspondence between Sill & Co., and the defendant. Sill to Tuckett, 7th July, 1810. "We attend to your instructions of selling 1 *a* 200 hogsheads of your sugar as soon as we can get 4*s.* to 5*s.* per cwt. on them, and having an order from C. E. Rawlins, of your place, we have sold him forty hogsheads and two barrels, St. Lucia sugar, belonging to you, at 73*s.*, payable by his acceptance at four months, which trust will meet with your approbation." Tuckett to Sill & Co., 9th August, 1810. "We are in no hurry to part with the sugars under your care, but whenever your market should advance 3*s.* above the present price, you may sell the whole of the St. Croix sugars,[1] bought in May last, at 68*s.* or 69*s.*; on the best terms to safe men." Sill & Co. to Tuckett, 11th August, 1810. "We shall not offer any more of yours for the present unless the prices advance further." Tuckett to Sill & Co., 11th August, 1810. "By our B. Sykes's letter, to-day, we see he is arrived at Liverpool, and that you have disposed of five of our lots of sugar at 4*s.* profit, which we are sorry for, as our late intention was to hold every cask until the prices got much higher, which we are very confident will be the case within six weeks. N. B. Of course you will not offer any more for sale till further instructions from Bristol." Tuckett to Sill & Co., 27th August, 1810. "Our raw sugar market, though not brisk, continues to keep up, gives some prices, and we are very confident the price will continue to advance; when you can obtain 10*s.* per cwt. on cost, we may be inclined to sell a few of our sugars. Though we are poor, we are willing to suspend a little while

[1] The sugars in question were part of the St. Croix sugars here mentioned.

longer, being very confident far better prices will be obtained by and by." Tuckett to Sill & Co., 22nd September, 1810. "Sugars we are not inclined to sell at present, from an undoubted opinion that they will soon rally again." Tuckett to Sill & Co., 22nd October, 1810. "Our sugar market is brisk and advancing. Could there be any possibility of selling the St. Domingo coffee at anything like cost price? Should the sugar market advance about 2*s.* higher, you may sell any of our sugars, when cost price and expenses can be obtained, to men of undoubted safety. We see by your letter that raw sugars are much sought after; and if you can get 1*s.* for these three lots of St. Croix, bought in the fifth month, at 69*s.* 6*d.* you may let them go. The 38 hogsheads of A.B.L., that you value at 71*s.* would bring here 74*s.* or 75*s.*, we attend your reply."

On the 15th of October, 1810, Sill & Co. sold the 50 hogsheads of St. Croix sugar to the plaintiffs, at 69*s.* per cwt.; and an invoice was made out and delivered by Sill & Co. to the plaintiffs, headed as follows: "Liverpool, 10th month, 15th, 1810. Whitehead, Whittle, and Herd, Bought of James Sill & Co. 50 hogsheads sugar, payment in three months and twelve days, equal to four months cash." Then follows a statement of the numbers and weights, amounting to 634*c.* 2*q.* 3*lb.* net, at 69*s.*, £2,189 2*s.* 4*d.* The plaintiffs duly paid Sill & Co. for these sugars, according to the contract; and afterwards, on their application, 13 hogsheads were delivered by Sill & Co. to the plaintiffs, and by them removed; namely, 3 hogsheads on the 20th, and 10 on the 25th of October, 1810. Sill & Co. did not inform the defendant of the sale of these sugars to the plaintiffs, nor of the delivery of those last-mentioned, nor did they remit to him the purchase money by them received from the plaintiffs. The remaining 37 hogsheads continued in the warehouse of Sill & Co. until their bankruptcy, when they were taken possession of by the defendant; and upon his refusal to deliver them to the plaintiffs, this action was brought. If the plaintiffs are entitled to recover, the amount of the damages was agreed to be settled by arbitration at Liverpool. The question for the opinion of the Court was whether the plaintiffs were entitled to recover? if they were, the verdict was to stand, or be entered for such sum as should be awarded: if not, a nonsuit was to be entered. [This question having been argued,]

No. 9. — Whitehead v. Tuckett.

Lord Ellenborough, C. J. This is an action brought by the plaintiffs to recover the value of certain hogsheads of sugar purchased by them of Sill & Co., who are brokers at Liverpool, which the defendant claims to retain as his property, as having been improperly disposed of by Sill & Co., to whom he had entrusted them for the purposes of sale under a limited authority, which they had exceeded. Much of the argument in this case has turned upon the question whether Sill & Co. were invested with a general authority to sell the sugars: when that question is discussed, it may be material to consider the distinction between a particular and a general authority; the latter of which does not import an unqualified authority, but that which is derived from a multitude of instances; whereas the former is confined to an individual instance. Such was the distinction which governed the decision in *Fenn* v. *Harrison*, 3 T. R. 757, and in the MS. case cited.[1] Now in that sense of the term "general authority," Sill & Co. were general agents; for they bought and sold in a multitude of instances in their own names, paid and received the money in their own names, and blended their accounts of receipts and payments, without carrying each order to a separate account with the defendant; and although there was a communication between them and the defendant as to the price and time of sale, yet the world was not privy to that communication, and had therefore no means of knowing that their general authority was controlled by the interposition of any check. But even looking to the letters, I find nothing in them to contravene a general power of sale. There are indeed particular allusions as to the price and time of sale, by way of advice and instruction; but I cannot find that they contain any general prohibition to sell, nor any absolute limitation of the terms on which they were to sell. In the letter of the 9th of August, the defendant writes to Sill & Co. "that they may sell the whole of the St. Croix sugars at 68*s.* or 69*s.* on the best terms, to safe men." If these expressions are to be construed into so many restrictions of the power of the brokers, it will follow that they were not only limited as to price, but also as to the terms of sale, which according to the letter were to be the best, and as to the

[1] That was a case where a servant was sent with a horse to a fair with instructions not to sell under a certain price. The servant sold it for a less sum. The master gave notice and brought trover against the purchaser; and it was held that he might recover, because the servant was not his general agent. — R. C.

purchasers who were to be safe men: and if in either of these respects the contract made by them should fail, their principal would have a right to reject it. But if this could be done, in what a perilous predicament would the world stand in respect of their dealings with persons who may have secret communications with their principal! Such communications therefore must not be taken as limitations of their power, however wise they may be as suggestions on the part of the principal. In another letter the defendant, alluding to information which his house had received from Sill & Co., of their having disposed of some lots of sugars, remarks "that they are sorry, as their late intention was to hold every cask until the prices got much higher." Now this is the very language of a person who had given his broker an authority to exercise his discretion upon the subject, and not of one who might have repudiated the contract as being contrary to his instructions. The subsequent letter of the 27th of August to Sill & Co. states, "when you can obtain 10*s.* per cwt. on cost, we may be inclined to sell a few of our sugars," &c. This is a mere communication of speculation and advice from the principal to the brokers, which presumes a general authority in the brokers, with a desire, on the part of the principal, to direct them in the exercise of it. The case of *Paterson* v. *Tash*, 2 Stra. 1178, is not involved in the decision of this: when that case comes directly before us, we shall take occasion to consider it apart. Looking then at this correspondence (which might perhaps have been more properly left to the consideration of a jury), we find that there was a sale of part of these sugars recognized in one instance by the defendant, and that subsequently there was not any positive prohibition against future sale. Upon the whole, therefore, I think it must be inferred that Sill & Co. had a general authority to sell, and that the sale made by them is valid.

Grose, J. I have had considerable doubts on this question as the argument has gone on: I was inclined at first to think, from the letters stated in the case, and from finding the defendant constantly speaking in them of selling at certain prices, that Sill & Co. had not a general authority to sell: but upon consideration I think the discretion of the brokers was left very much at large in the business; and when that is the case, it would be very dangerous to hold third persons bound by communications passing behind their back between a principal and his broker. I think, therefore,

under these circumstances, that the principal was bound by the acts of the brokers.

Le Blanc, J. The plaintiffs are the vendees from Sill & Co. of certain hogsheads of sugars, for which they have paid the value: the defendant is the person who employed Sill & Co.; and the question is whether the Court can collect from the circumstances stated, that Sill & Co. had a general authority to sell? In order to determine that question, I think the Court is not to look to the correspondence as it relates to this particular parcel of sugars only, but as it is connected with all the circumstances of the case. It appears then that the goods were left with Sill & Co. for sale; and although they had not a general authority expressly given to them by the letters, yet that in many instances they bought and sold for the defendant in their own names, without making any specific appropriation to the separate account of the defendant either of the moneys received in respect of such sales, or of the moneys expended on such purchases. Thus they appeared acting as general agents for the defendant; and upon one occasion in particular (already alluded to by my Lord), when the defendant received intelligence of their having sold a lot at a lower price than he intended, instead of repudiating the bargain as contrary to his instructions, we find him indeed expressing his sorrow thereupon, but acquiescing in that which had been done. Can the Court then say, after these instances of general authority exercised over the goods of the principal, that in this particular instance the authority of Sill & Co. was controlled, so as to invalidate a sale made by them to a *bonâ fide* purchaser? I think it cannot, but that under the circumstances we must hold the defendant to be bound by the general authority thus given to Sill & Co. It is unnecessary to enter into the question whether an agent who exceeds his authority can bind his principal.

Bayley, J. I think the only conclusion to be drawn from the facts stated is that Sill & Co. had a general authority to sell, and that it would be a fraud on the public to hold otherwise. Sill & Co. were common brokers for the sale of sugars; and if the defendant suffered them to buy and sell for him in their own names, and thereby to hold themselves out to the world as the owners of the goods, he must be taken to have given them a general authority. There was nothing to designate him as the owner; neither the bills of sale being in his name, nor the price of the goods sold

or purchased carried to his separate account; so that in all respects Sill & Co. appeared as the owners. If therefore they have abused the confidence reposed in them, the defendant, who entrusted them, and not the plaintiffs, the innocent purchasers, must suffer for it. I agree, therefore, that the plaintiffs are entitled to recover.

Per CURIAM: *Postea to the plaintiffs.*

ENGLISH NOTES.

Where there is evidence of agency to go to the jury, the question of fact which they have to determine in every case is whether the alleged agent had an apparent authority to bind his alleged principal by the contract which was in fact entered into, and whether the person entering into the contract with the alleged agent acted on the footing of such authority in fact existing: *Dyer* v. *Pearson* (1824), 3 B. & C. 38; *Reynell* v. *Lewis* (1846), 15 M. & W. 517; 16 L. J. Ex. 25; *Bailey* v. *Macaulay* (1849), 13 Q. B. 815; 19 L. J. Q. B. 73; *Ramazotti* v. *Bowring* (1860), 7 C. B. (N. S.), 851; 29 L. J. C. P. 30.

Where the drawing and accepting of bills was incidental to the carrying on of a business which was ostensibly under the sole control of a salaried manager, whose name alone appeared with the addition of "& Co.," it was held that it was rightly left to the jury to say, whether the manager had authority to bind his principal by his acceptance of a bill of exchange in the firm's name: *Edmunds* v. *Bushell* (1865), L. R., 1 Q. B. 97.

The agent or servant of a horse-dealer has an implied authority to bind his principal or master by a warranty, even though (unknown to the buyer) he has express orders not to warrant; and evidence of a general practice among horse-dealers not to warrant where the horse has been examined by a veterinary surgeon and certified by him to be sound is admissible to rebut the inference of authority. *Howard* v. *Sheward* (1866), L. R., 2 C. P. 148; 36 L. J. C. P. 42. The same principle was applied in *Baldry* v. *Bates* (1885), 52 L. T. 620, to the servant of a proprietor of a riding-school. The rule is the same, where a private individual sells a horse through his servant at a fair or by auction, *Alexander* v. *Gibson* (1811), 11 R. R. 797; 2 Camp. 555; *Brooks* v. *Hassall* (1884), 49 L. T. 569; but not, it seems, in the case of an isolated sale by private contract, in which case it is necessary to show that the servant of a person not a horse-dealer was in fact authorized to warrant: *Brady* v. *Todd* (1861), 9 C. B. (N. S.) 592; 30 L. J. C. P. 223.

A principal is liable for the fraudulent misrepresentation of his agent, where the latter is acting in the course of his business: *Barwick* v. *English Joint-Stock Bank* (Ex. Ch. 1867), L. R., 2 Ex. 259; 36 L. J.

Exch. 147. A similar rule applies where a joint stock company is the principal: *New Brunswick, &c. Co.* v. *Conybeare* (H. L. 1862), 9 H. L. Cas. 711; 31 L. J. Ch. 297. But where a shareholder has been induced to take shares by a fraud or misrepresentation which is imputable to the company, he cannot keep the shares and bring an action against the company for damages; and if, by reason of the company going into liquidation, he is fixed with the ownership of the shares, and his remedy by rescission is gone, his right to damages against the company is also extinguished: *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317.

The effect of a limitation of the authority, where there is no presumption of a general agency, is strongly exemplified by the decision of the Exchequer Judges in *Baines* v. *Ewing* (1866), L. R., 1 Ex. 320; 35 L. J. Ex. 194. In that case the defendant had authorised an insurance broker at Liverpool to underwrite marine policies in his name, the risk not to exceed £100 by any one vessel. The broker, exceeding this authority without the knowledge of the defendant, underwrote a policy for the plaintiff for £150. The plaintiff was not aware that the broker's authority was limited to any particular sum, but it is notorious in Liverpool that a limit of some sort, which remains undisclosed to third persons, is usually imposed on brokers by their principals. In an action on the policy it was held that the principal was not liable even to the extent of £100.

AMERICAN NOTES.

The principal case lays down a rule familiar and accepted in the United States. It is sufficient to refer to Mechem on Agency, § 279; *Munn* v. *Commission Co.*, 15 Johnson (New York), 44; 8 Am. Dec. 219; *Walker* v. *Skipwith*, Meigs (Tennessee), 502; 33 Am. Dec. 161; *Topham* v. *Roche*, 2 Hill (So. Carolina), 307; 27 Am. Dec. 387; *Lobdell* v. *Baker*, 1 Metcalf (Mass.), 193; 35 Am. Dec. 358; *Towle* v. *Leavitt*, 23 New Hampshire, 360; 55 Am. Dec. 195; *Bryant* v. *Moore*, 26 Maine, 84; 45 Am. Dec. 96; *Merchants Bank* v. *Central Bank*, 1 Georgia, 418; 44 Am. Dec. 665; *Williams* v. *Getty*, 31 Penn. St. 461; 72 Am. Dec. 757; *Lister* v. *Allen*, 31 Maryland, 543; 100 Am. Dec. 78; *Carmichael* v. *Buck*, 10 Richardson (So. Carolina), 332; 70 Am. Dec. 226; *Butler* v. *Maples*, 9 Wallace (U. S.), 766; *Paine* v. *Tillinghast*, 52 Connecticut, 532; *Home Life Ins. Co.* v. *Pierce*, 75 Illinois, 426; *Cruzan* v. *Smith*, 41 Indiana, 288; *Bell* v. *Offut*, 10 Bush (Kentucky), 632; *Morton* v. *Scull*, 23 Arkansas, 289; *Furnas* v. *Frankman*, 6 Nebraska, 429; *Golding* v. *Merchant*, 43 Alabama, 705; *Wilcox* v. *Routh*, 9 Smedes & Marshall (Mississippi), 476; *Howry* v. *Eppinger*, 34 Michigan, 29; *Davenport* v. *Peoria, &c. Ins. Co.*, 17 Iowa, 276; *Wachter* v. *Phœnix Ass. Co.*, 132 Penn. St. 428; 19 Am. St. Rep. 600; *Winchell* v. *Nat. Ex. Co.*, 64 Vermont, 15; *Rathbun* v. *Snow*, 123 New York, 343; 10 Lawyers' Rep. Annotated, 355; *Griswold* v. *Gebbie*, 126 Penn. St. 353; 12 Am. St. Rep. 878.

"Although the agent violates his instructions or exceeds the limits set to

his authority, he will yet bind his principal to such third persons," namely, those to whom the principal has held him out as "having a general or a special power," and who "have relied thereon in good faith," — "if his acts are within the scope of the authority which the principal has caused or permitted him to appear to possess." Mechem on Agency, § 279.

No. 10. — CHAPLEO *v.* BRUNSWICK BENEFIT SOCIETY.

(1880, C. A. 1881.)

RULE.

THE doctrine of "holding out" is liberally applied to charge the principal with the acts of an agent.

So where the directors of a Building Society allowed their secretary to act as their "factotum," and he, in the name of the society but beyond the society's statutory powers, borrowed money which he appropriated to his own use, the society was held not bound; but the directors were adjudged to be personally liable to the lenders by reason of their having held out the secretary as invested with the authority which he assumed.

Chapleo v. Brunswick Benefit Society.

49 L. J. C. P. 796; 50 L. J. Q. B. 372 (s. c. 5 C. P. D. 331; 6 Q. B. D. 696).

Further consideration.

The facts and arguments are sufficiently stated in the following judgment, of —

Lord COLERIDGE, C. J. (April 24th, 1880). This case was tried before me and a special jury at Manchester in February last; certain points arising on the findings of the jury were argued before me at Westminster on the 13th and 20th of March; and I now proceed to give judgment.

The action was brought against the Brunswick Building Society, and the directors of the society, to recover a considerable sum of money lent by the plaintiffs to the society under circumstances which I will presently detail. The whole of the sum in dispute, with interest, has been paid by the defendants, except a sum of £100. But as the defence to this sum of £100 is one, upon the validity or invalidity of which the liability to pay many thousands of pounds depends, it is thought worth while, and no doubt is worth while, to resist payment of it.

No 10. — Chapleo v. Brunswick Benefit Society.

The defendant society was established in January, 1871. Its rules were certified pursuant to the Act then in force in March, 1871, and certain amendments to the rules were certified in March, 1873. Its object is defined by the first rule, which is as follows: —

"1. This society shall be denominated the 'Brunswick Permanent Benefit Building Society.' Its object is to enable its members to receive the amount or value of a share or shares to purchase or erect freehold or leasehold property. Payments to be made fortnightly in such sums as are hereinafter specified and defined; each share to be of the value of £10. Members may subscribe for any number of shares."

The sixth rule prescribes that the directors shall at any meeting elect a treasurer from amongst themselves and the other members at such remuneration as may be deemed proper.

The tenth rule is this: "Messrs. Keighley Lea, Son & Co., shall be the secretaries to the society."

The twelfth rule, upon which much of the argument before me turned, is as follows: —

"The directors may at any time, as may be necessary for the purposes of the society, borrow money at interest from any banker with whom the funds of the society shall be deposited, or from any other source, to procure which the directors may give such security as they may think proper; but the total amount of money to be so borrowed shall not at any one time exceed *two-thirds* of the amount for the time being secured by the mortgages to the society."

It is admitted that when the £100 in dispute in this action was paid by the plaintiffs, the total amount of money borrowed by the society exceeded (in fact it very largely exceeded) the amount secured by mortgage within the terms of this twelfth rule. The question is, whether the society and the directors of the society are nevertheless liable to repay it under the circumstances which I now proceed to state.

The money was not paid to the society itself assembled at a general meeting, nor even to one or more of the directors at any board meeting. It was paid to a Mr. Keighley Lea; and his connection with the society and with the directors was this: His firm were made secretaries by the tenth rule. They kept all the business and cash books belonging to the society. One of them

attended the meetings of the directors and kept the minutes. Mr. George Lea had been treasurer, and after his death Keighley Lea acted as treasurer, and received all the money paid to the society; and if he was not treasurer there was none. A question was made as to the exact meaning of certain minutes referring to the appointment of treasurer, — a question which, after the statement of fact just made, and made in the uncontradicted words of one of the witnesses, I do not think it material to discuss.

The office of Keighley Lea was the only office of the defendant society; there only the society met whenever it did meet; there only the meetings (generally once a fortnight) of the directors were held. Keighley Lea was, as one of the directors who was a witness at the trial called him, "the *factotum* of the society." The society borrowed money largely; and the mode in which the borrowing was conducted was, without any exception, from the very beginning of the society, the mode pursued in this case. The lender brought the money to Keighley Lea; a receipt and an undertaking on behalf of the directors to give a promissory note of the directors was given him in the form used in this case on behalf of the society and the directors, either by Keighley Lea or by one of his clerks; promissory notes for the amount of the sum lent were then signed by the directors at their next meeting, and exchanged for the receipt and undertaking through Keighley Lea; and on the sums so borrowed and so secured interest was paid. Except as to the £100 now in dispute this course was followed with respect to the plaintiffs: all the sums lent to the society were secured by the promissory notes of the directors, and these notes have been paid. In the case of this £100 the money was received and the receipt and undertaking was given, but no promissory note was ever procured. The money was paid to Keighley Lea on the 29th of October, 1878, and in December, 1878, or in January, 1879, Keighley Lea absconded, a large sum of money belonging to the society and paid to him having never been paid over to them by him. On application to the directors by the plaintiffs they refused either to pay interest on the £100 or to give their promissory note for it; they repudiated all liability for themselves or for the society; and the question is, Are either or both liable?

At the trial the evidence was substantially all one way; and I left two questions to the jury: first, Did the defendant society hold

out Keighley Lea to the plaintiffs as having authority to receive this loan on their behalf on the terms on which it was received? second, Did the defendant directors? The jury answered both questions in the affirmative; and, if they could so find in point of law, I am of opinion that there was abundant evidence to warrant them so finding in point of fact. It is said, however, that they could not; and this has now to be considered.

The case is not quite the same as it affects the society and as it affects the directors, and I will deal with the liability of each separately; and first as to the society itself.

It is true that though it has been incorporated under the provisions of 37 & 38 Vict. c. 42, it had not been so incorporated, and was not a corporation, at the time of the lending of this £100. But the society as a body, just as any other copartnership as a body, might know, and so act upon their knowledge, as to sanction the proceedings of Keighley Lea. Of this knowledge and of their so acting upon it, there has been abundant evidence given against the society. If it was not so in point of fact it might have been denied. If the members of the society or any of them were really ignorant of what Keighley Lea was habitually doing, and if knowing it they did not sanction it, they might have been called to say so. No one was called to say so, probably for the best reason, that no one could be. The case comes, therefore, under a well-settled principle. The society have put their agent in his place to do the very acts for them which he did, and they must be answerable for the manner in which he has conducted himself in doing those acts. If authority be necessary for this proposition it is to be found in the cases of *Barwick* v. *The English Joint-Stock Bank*, L. R., 2 Ex. 259; 36 L. J. Exch. 147, and *Mackay* v. *The Commercial Bank of New Brunswick*, L. R., 5 P. C. 394; 43 L. J. P. C. 31. The *dicta* of Lord CRANWORTH and Lord CHELMSFORD in the case of *Addie* v. *The Western Bank of Scotland*, L. R., 1 H. L. Sc. App. 145, which have been supposed to conflict with these cases, are clearly explained and reconciled by Sir MONTAGUE SMITH, at p. 413 of the report of the case in the Privy Council.

It has been argued that, in order to ascertain whether the society have put their agent in his place to do for them the acts he did, the constitution of the society itself must be borne in mind. I make no doubt at all that this is true; and if it should turn out that the society could not authorise an agent to do the act, because

it was an act they could not do themselves, they would not be liable for what he did. The argument addressed to me on this point was as follows: This is a society which exists only for certain purposes: it does not exist for the purpose of borrowing beyond the limit ascertained by the twelfth rule; it could not itself borrow; it could not ratify the acts of its directors in so borrowing, any such borrowing therefore, by an agent, as there was in this case, cannot be authorised in point of fact, because there is no power to authorise it in point of law. And the judgment of the House of Lords in *The Ashbury Railway Carriage Company* v. *Riché*, L. R., 7 E. & Ir. App. 633; 44 L. J. Exch. 185, *ante*, p. 304, was cited as establishing conclusively the proposition contended for. I think it establishes nothing of the kind. The company in that case was an incorporated company, with a memorandum and articles of association. The contract on which the action against the company was brought was a contract which, in the opinion of all the Judges (they differed upon other points, but agreed on this), was inconsistent with the memorandum of association; and on this ground the House of Lords decided the case. But in the case before me there is no memorandum and no articles of association; and if it be said, as with some reason it may be, that the first rule is analogous to the memorandum, and the remaining rules to the articles, then there is the authority of *Laing* v. *Reed*, L. R., 5 Ch. 4; 39 L. J. Ch. 1; to show that the existence in such a society as this of such a rule as rule twelve is neither illegal in itself nor inconsistent with a rule exactly like rule one in the present case. I may observe in passing that the authority of *Laing* v. *Reed*, *supra*, is expressly recognised, and in no way diminished by the later case of *In re The National Permanent Benefit Building Society, ex parte Williamson*, L. R., 5 Ch. 309. These cases, it is true, establish only that such a society as this may borrow; they do not ascertain that if it borrows beyond the limit prescribed by the rules it may nevertheless be liable. But both were cases in which this point did not and could not arise; for they were cases in which the plaintiffs were themselves members of the company; and it may well be as between members of the company and the directors, such a rule as rule twelve may in certain circumstances protect the company or certain members of it. But this case is not like those. Rule twelve applies in terms to the directors only. In this case the society, for a purpose in

itself legal, have authorised Keighley Lea to take this £100 for them from the plaintiffs. I am of opinion they are liable to repay it.

So much as to the society. As to the directors it seems to me quite plain that they might, if they pleased, hold out Keighley Lea to the plaintiffs as authorised to undertake for them that they would give their promissory note on the receipt of money paid as this £100 was paid. It seems to me equally plain that there is overwhelming evidence, quite uncontradicted, that they did in fact so hold him out. It follows, I think, that they are bound by his undertaking; and that they must either give their promissory note, or, in the events which have happened, pay the money. Indeed, if the action had been against them alone their very able counsel felt that unless he could get rid of the verdict he could not resist this consequence. But he contended that as the action had been brought against the society as well as the directors the claims were inconsistent, and that if I held the society liable I could not at the same time hold the directors liable. The claims do not seem to me, however, to be inconsistent. I have said that I think the society might and did hold out Keighley Lea as having authority to do what he did and to receive this money for them. I also think that the directors might well, and did in fact, hold him out as having authority from them to undertake for them that they should give their promissory note. He did undertake for them, and they are bound by his undertaking.

I, therefore, give judgment for the plaintiffs against both sets of defendants and with costs.

Judgment for plaintiffs.

The defendants (the society) appealed, and the defendant directors also obtained in the Court of Appeal a rule for a new trial (which had been refused by the Divisional Court) on the ground of misdirection, surprise, and that the verdict was against the weight of evidence.

Sir J. Holker and Crompton, for the defendant directors. On the findings of the jury the directors are entitled to have judgment entered for them. The money in question was deposited with Lea as a principal and not as an agent. The directors did not hold him out as authorised to receive loans after the withdrawal of the advertisement; they could not do so, for the borrowing powers of the society were exhausted. In all cases where

Lea received the money and did not bring it to the notice of the directors, he was the agent of those who lent it, and not of the society or of the directors.

The directors never authorised Lea to receive this loan, nor did they hold him out as having authority to receive loans. The principle of holding out was certainly widely extended in *Drew* v. *Nunn*, 4 Q. B. D. 661; 48 L. J. Q. B. 591; but even that case does not cover this. If the directors did hold out Lea as authorised to receive money, it must have been for the society and not for themselves. The directors never received the money, and cannot be liable as though they had received it. The rule for a new trial has been obtained, as it is contended that the judgment was wrongly entered, notwithstanding the findings of the jury. It is said that there is a well-settled principle that a person who puts his agent in a position to do certain acts is responsible for those acts; but these directors never put Lea as their agent to defraud, so that the cases of *Barwick* v. *The English Joint-Stock Bank*, L. R., 2 Exch. 259; 36 L. J. Exch. 147; *Mackay* v. *The Commercial Bank of New Brunswick*, L. R., 5 P. C. 394; 43 L. J. P. C. 31; and *Addie* v. *The Western Bank of Scotland*, L. R., 1 H. L. Sc. App. 145, do not apply. There was here a fraud, but not one in the course of the business which the agent was appointed to transact. There is no evidence that the directors authorised Lea to receive the money, and to promise that they would give their promissory notes. There was no question left to the jury as to whether the conduct of the directors was a holding out, and therefore on that point at least there should be a new trial. The present plaintiffs cannot rely on any course of business with other persons, and there have been but four transactions with them. The directors may be liable on a warranty if what they did amounted to a warranty; but they cannot be liable for any misrepresentation, unless that misrepresentation was actually and not merely legally fraudulent. *Beattie* v. *Lord Ebury*, L. R., 7 Ch. 777; 41 L. J. Ch. 804; *Eaglesfield* v. *Lord Londonderry*, 4 Ch. D. 693.

Lea cannot have held the money deposited with him, as agent as is suggested, for the depositor till the next meeting of the directors, as they never exercised any discretion, and never rejected any loan. The directors are not liable under the principle of *Weeks* v. *Propert*, L. R., 8 C. P. 427; 42 L. J. C. P. 129.

No. 10. — Chapleo v. Brunswick Benefit Society.

The Solicitor-General (Sir F. Herschell) and Heywood, for the defendant society. Before the plaintiffs can be entitled to judgment against the society, a liability must be shown to have existed in the society before its incorporation, and then it must be shown that that liability was transferred to the incorporated society. By the 4th section of 6 & 7 Will. 4, c. 32, the provisions of the Friendly Society Acts of 10 Geo. 4, c. 56 and 4 & 5 Will. 4, c. 40, are extended to building societies. It is clear that a building society has no authority to borrow money unless its rules specially authorise it to do so, *Ex parte Williamson*, L. R., 5 Ch. 309; but it is also law that a rule empowering the trustees of a building society to borrow a limited amount of money is not illegal, *Laing* v. *Reed*, L. R., 5 Ch. 4; 39 L. J. Ch. 1; while a rule authorising the borrowing of money to an unlimited amount is illegal. *Re The Victoria Permanent Benefit Building Society*, L. R., 9 Eq. 605; 39 L. J. Ch. 628. The power, therefore, given by rule 12 is a good power. By that rule the society authorised the directors and no one else to borrow, and that rule does not give the directors power to hold out any one else as having authority to borrow. The society can only be bound by acts done within and pursuant to its rules by those whom it has authorised to do those acts. In *Richardson* v. *Williamson*, L. R., 6 Q. B. 276; 40 L. J. Q. B. 145, the directors of a society which had no power to borrow money were held liable for money lent to the society; and that principle applies here where the limited power has been exceeded. To the same effect are the decisions in *Weeks* v. *Propert*, L. R., 8 C. P. 427; 42 L. J. C. P. 129, and *Fountaine* v. *The Carmarthen Railway Company*, L. R., 5 Eq. 316; 37 L. J. Ch. 429. In those cases, as here, the borrowing was *ultra vires*, and so void. The society is at all events not liable unless the loan is accepted by the directors, and unless the borrowing powers have not been exceeded. The undertaking as to the giving of a promissory note must be the personal undertaking of Lea.

This society became incorporated pursuant to the provisions of 37 & 38 Vict. c. 42, and by section 15, sub-section 4 of that Act, it is enacted that "any loans to a society under this Act, made before the commencement of this Act, in accordance with its certified rules, are hereby declared to be valid and binding on the society." That is, in fact, a legislative declaration of the view

of the Legislature as to the position of such societies as this, and amounts to a declaration that such a loan as this cannot be binding on the society after incorporation, because it was *ultra vires* before incorporation. The plaintiffs may have been unaware of the limit fixed by the rules, but still they must be bound by that limit, and the result must be that, if the limit has not been exceeded, they will have the security of the society; but if it has, they must have recourse to the directors as individuals. In *Balfour* v. *Ernest*, 5 C. B. (N. S.) 601; 28 L. J. C. P. 170, WILLES, J., held that the plaintiffs were bound to know the deed of settlement of the company; and to the same effect was the decision in *The Royal British Bank* v. *Turquand*, 6 E. & B. 327. *Re The Professional Benefit Building Society*, L. R., 6 Ch. 856; *Re The Kent Building Society*, 1 Dr. & S. 417; 30 L. J. Ch. 785; and *Re The Vale of Neath Railway*, 3 De Gex & S. 149; 18 L. J. Ch. 265, were also cited.

C. Russell (with him Taylor and C. A. Russell), for the plaintiffs. The contention of the plaintiffs is that both the society and the directors are liable. These societies are regulated by 10 Geo. 4, c. 56 and 6 & 7 Will. 4, c. 32. The rules of the society are to be submitted to a barrister and certified by him; but his certificate is little more than a ministerial act. *Laing* v. *Reed*, L. R., 5 Ch. 4; 39 L. J. Ch. 1. This is a voluntary association, not an incorporated entity; it is a partnership governed by statutes. *The Ashbury Company* v. *Riché*, L. R., 7 E. & I. App. 653; 44 L. J. Exch. 185, *ante*, p. 304, was only decided on the ground that, if all the members of the Company had given the authority, they could not have done what was attempted. The partnership is liable for the fraud of their agent, whom they allowed to contract for loans without any practical restriction.

The amount on mortgage varied from day to day; no one effecting a loan could guard himself, because no one, except the secretary, knew the state of affairs.

Assuming the loan was *ultra vires*, still the society put Lea in the position of being able fraudulently to represent that the borrowing limit was not exceeded; the society must, therefore, be liable. The liability of the society cannot be limited to the amount of the benefit it has received. No such limit of liability is imposed in any of the decided cases.

A corporation is bound by the wrongful act of its agent no less

than an individual, if the act is within the scope of the agent's authority. *Mackay* v. *The Commercial Bank of New Brunswick*, L. R., 5 P. C. 394; 43 L. J. P. C. 31; *Houldsworth* v. *The City of Glasgow Bank*, L. R., 5 App. Cas. 317; *Swift* v. *Winterbotham*, L. R., 8 Q. B. 244; 42 L. J. Q. B. 111.

Here the whole business of borrowing money was left to Lea. There is no delegation by the directors. Lea, by the constitution of the society, was the person to transact all business.

The directors are liable, first, because they authorised Lea to obtain loans, undertaking to give their promissory notes as collateral security; secondly, they authorised him to warrant for them that the society had power to borrow money, — that is, that the borrowing powers had not been exceeded.

First, by rule 12, the directors may give such security as they think proper. They uniformly signed the notes, and not as directors, but in their own names. The authority, therefore, is made out. Secondly, as to the authority to warrant, in *Weeks* v. *Propert*, L. R., 8 C. P. 427; 42 L. J. C. P. 129, it was held that the signature by a director was a warranty of authority that the directors had power to issue debentures which would bind the company. *Richardson* v. *Williamson*, L. R., 6 Q. B. 276; 40 L. J. Q. B. 145; *Weir* v. *Bell*, 3 Ex. D. 238; 47 L. J. Ex. 704; *Swire* v. *Francis*, L. R., 3 App. Cas. 106; 47 L. J. P. C. 18; and *Collen* v. *Wright*, 8 E. & B. 647; 27 L. J. Q. B. 217, were also cited.

Crampton, in reply. *Cur. adv. vult.*

Bramwell, L. J. (on March 7). I am of opinion that the judgment should, as far as it stands against the society, be reversed, and that the judgment should be given for the society on the ground put in argument by the Solicitor-General. This society, before it was incorporated, was not a society with any implied power in the partners thereof to borrow. The rules which were adopted allow the directors to borrow a certain amount, and but for the provisions of that rule, and save according to that rule, the directors could have no power to borrow at all. Rule 12 authorised the borrowing of a certain amount, and to that amount the directors were the agents of the society to bind it. In the present case they had exceeded their power in respect of borrowing money at the time when the money in ques-

tion in this case was borrowed. They had, therefore, no power to bind the society, and the society cannot be bound.

Then it is said that there was a holding out that the society had power to borrow. Now the only holding out was that the society had authority to borrow within the limits allowed by the rules.

The question then arises whether the individual defendants — the individual directors, that is — are liable. I own I have grave doubts as to this. There is no fraud alleged: the document signed by Lea was, if it was an agreement at all, either an agreement by himself personally, or on behalf of the Company, and not on behalf of the directors. There was no fraud; there was the customary careless negligent indifference of people who make rules and then disregard them. It is said that it was agreed that the directors would give their promissory notes; it is said that Lea made such an agreement. I do not think that Lea did so personally, or by himself as the agent of the society. He had no authority to do what he did, and it does not follow that because what he did did not bind the society, therefore it must bind some one else. I think, therefore, that there was no agreement on the part of the individual defendants to give these notes. It is said, on the authority of *Collen* v. *Wright*, 8 E. & B. 647; 27 L. J. Q. B. 217, and *Richardson* v. *Williamson*, L. R., 6 Q. B. 276; 40 L. J. Q. B. 145, that the defendants, the directors, purported to act under the authority of the society, and that they therefore undertook to the plaintiff that they had such authority. To me it is difficult to see this. All that they did was to let Lea say that he had the authority of the society to receive the money. It is difficult to see that that would bring them within the principle of the cases referred to. It is manifest that if Lea were solvent he would be liable, as he assumed to have the authority of the society to receive money when he had it not. Lea himself might, indeed, have a remedy against the defendant directors, and this would seem to show that the remedy of the plaintiffs is against Lea, and not against the defendant directors. This difficulty is not removed, but the two Lords Justices think that the plaintiff is entitled to recover against the directors; the same view was taken by the Divisional Court, and especially by Mr. Justice LINDLEY. I do not venture, therefore, to differ, so that in the result the appeal of the society will be allowed, and the appeal of the directors will be dismissed.

No. 10. — Chapleo v. Brunswick Benefit Society.

Baggallay, L. J. The action in which these appeals have been brought was originally commenced for the recovery of five several sums of money, which it was alleged by the plaintiffs had been lent by them to the Brunswick Benefit Building Society, the defendants to the action being the society and its six directors. The loan of four of the five sums was admitted by the society, and the amounts having been paid into court were accepted by the plaintiffs. The action became thenceforth an action for the recovery of £100, alleged to have been lent by the plaintiffs to the society on the 29th of October, 1878, and which was the latest in date of the loans before mentioned. It is consequently immaterial to consider the circumstances of the earlier loans, except so far as they illustrate the mode in which the loan transactions of the society were carried out.

The society was established in the year 1871, its rules being duly certified in accordance with the provisions of the Statute 6 & 7 Will. 4, c. 32. The first rule defined the objects of the society, which were the usual objects of a benefit building society. The second provided for the government of the society by a board of directors, consisting of six shareholders, who were to meet once in every fortnight, or oftener, if necessary, to transact business, and who were to determine all matters provided for, or not provided for, by the rules. And by the 12th rule the directors were empowered to borrow money for the purposes of the society, and to give such security for the same as they might think proper; but the total amount to be so borrowed was not at any time to exceed two-thirds of the amount for the time being secured by the mortgages of the society. Under this power the directors borrowed large sums of money, and the mode in which the several loan transactions were carried out was as follows: Any person desirous of lending money to the society paid it to the firm of Keighley Lea & Co., at their offices in Manchester, taking in return their receipt for the amount so paid, in a form to which I shall have occasion presently to more particularly refer; and such receipt was subsequently exchanged for a promissory note, in favour of the lender, signed by the directors for the time being of the society.

It should be stated that by the 10th rule of the society Messrs. Keighley Lea & Co. were appointed the secretaries to the society, their duties being defined by several other rules. The 32nd has

been relied on by the plaintiffs, and I may conveniently mention it now; it is in these terms: —

"The secretaries shall superintend and direct the general business. They shall keep the accounts in such a manner as shall be satisfactory to the board; they shall call all meetings, whether of the board or the society; they shall attend all meetings, take minutes, and furnish any information in their power, and fully attend to every duty pertaining to that office, in consideration of which they shall receive from the funds the sum of one per cent. upon all receipts. They shall be at liberty to appoint a person to act for them in their absence."

This authority in terms confers upon the secretaries a considerable amount of authority in respect of the management of the society's affairs; but it must be borne in mind that the duties and powers of the directors are at least as clearly defined by the rules, and that the exercise of the power of borrowing is clearly vested in the directors.

It appears from the evidence that the meetings of the directors were held, and that all the business of the Company was transacted at the offices of Messrs. Keighley Lea & Co., who acted in the like capacity for several other benefit building societies.

On the 29th of October, 1878, the plaintiff, Joseph Chapleo, took the sum of £100 to the offices of Keighley Lea & Co., and paid it to a Mr. Fazakerly, a clerk of the firm. A receipt was handed to him, in the following terms: —

"Received from Mr. Joseph Chapleo, of 411 Oldham Road, Manchester, the sum of £100 as a loan to the Brunswick Permanent Building Society; and we hereby undertake to procure the promissory note of the directors for the said loan of £100. Keighley Lea & Co., Secretaries, by Alfred Fazakerly."

The circumstances under which the £100 was taken to the offices of Keighley Lea & Co., and the receipt given for it, were in all respects similar to those under which the four previous loans had been made by the plaintiffs.

Upon the occasion of each of the previous loans, the receipt was given by Fazakerly, and the promissory note of the directors for the time being was subsequently given in exchange for the receipt. Several weeks, and upon one occasion as much as three months, elapsed before the notes were given; but when given they bore the dates of the respective receipts.

Some two months after the receipt for the £100 had been given, Keighley Lea, who since the year 1874 had alone constituted the firm of Keighley Lea & Co., absconded, without having procured from the directors a promissory note in favour of the plaintiffs, in accordance with the undertaking contained in the receipt, nor was any such promissory note, in fact, ever given to the plaintiffs.

The action was thereupon commenced, as already mentioned, to recover the amount of all the five loans, the promissory notes given for the four earlier loans still remaining unpaid.

With the view of keeping the nature of the loan transactions free from complication, I have hitherto abstained from directing attention to the fact that for some time previously to October, 1878, the total amount of the money borrowed on account of the society considerably exceeded that which the directors were empowered to borrow; but this fact is the basis of the defence of the society to the plaintiffs' claim.

Upon the trial, Lord COLERIDGE submitted the two following questions to the jury: —

First, Did the defendant society hold out Keighley Lea to the plaintiffs as having authority to receive this loan on their behalf on the terms on which it was received? Second, Did the defendant directors?

To both of these questions the jury gave answers in the affirmative.

This was on the 20th of March, 1880; and on the 24th of April, the learned judge directed that judgment should be entered for the plaintiffs against both sets of defendants.

From this judgment, both the society and the directors have appealed to this Court, on the ground that upon the findings of the jury the judgment so directed to be entered against them was wrong.

Shortly after the trial, this Court, upon the application of the defendant directors, and by way of appeal from the Divisional Court, granted a rule *nisi* for a new trial, and directed that cause should be shown at the same time that the appeals were heard. We have consequently now to dispose of both appeals, and of the directors' application for a new trial.

It may be mentioned that a rule *nisi* for a new trial has been obtained by the society in the Divisional Court; but the argu-

ment upon the rule has been postponed until after these appeals have been disposed of. I will consider first the appeal of the society.

The judgment of Lord COLERIDGE, from which the society has appealed, was apparently based upon the following considerations: that the society, not being a corporation, might as a body, just as any other co-partnership might as a body, know, and so act upon their knowledge, as to sanction the proceedings of Keighley Lea; that of this knowledge, and of their so acting upon it, abundant evidence had been given against the society; and that the society, having put its agent in its place to do the very acts for it which he did, must be answerable for the manner in which he conducted himself in doing those acts. It had been pressed upon Lord COLERIDGE, as it has been upon us, that the society had no authority to borrow beyond the limit ascertained by the 12th rule, and that it could not ratify the acts of its directors in so borrowing; but he was of opinion that that argument was not well founded. Differing, as I feel bound to do, from the views so taken by Lord COLERIDGE, of the liability of the society in respect of the borrowings beyond the prescribed limits, I proceed to state the grounds upon which I have arrived at a conclusion different from that arrived at by him. Benefit building societies established under the Act 6 & 7 Will. 4, c. 32 have no power to borrow, unless it has been conferred upon them by their certified rules. The authorities upon this point are numerous and free from doubt. If it be necessary to mention one, I will refer to the case of *The Professional Benefit Building Society*, L. R., 6 Ch. 856, in which Lord Justice JAMES stated the well-recognised proposition in the following terms: "A society of this kind is not entitled to borrow money, except under a particular rule; it is no part of its business to borrow money;" and if a limited power is conferred upon a society by its rules, the limits so prescribed ought not to be exceeded, and any borrowing in excess of the limits is a wrongful act.

In the case which we are now considering, the power of borrowing had been exhausted previously to the month of October, 1878, when the £100 was received from the plaintiffs, and the society had not at this time any power or right to borrow that or any other sum; and whether the £100 was borrowed by Keighley Lea upon his own responsibility, or pursuant to

instructions given to him by the directors, or by their implied authority, it was in my opinion equally a wrongful act.

The acts of the directors could in no way give effect to this which was in itself unlawful, nor in my opinion would the assent of every shareholder to the transaction make it binding upon the society, as a society, whatever might have been the liability of individual shareholders.

The observations of the LORD CHANCELLOR upon this subject, in *The Ashbury Railway Carriage Company* v. *Riché*, L. R., 7 E. & I. App. 653; 44 L. J. Exch. 185, appear to me to support this view, though Lord COLERIDGE was apparently of a different opinion. If the society had received the benefit of £100, — if, for instance, that amount had found its way to the credit of their banking account, — the plaintiffs might, upon the authority of some of the decisions which have been cited in their behalf, have been enabled to establish a claim against the society, to the extent of the benefit derived by them from the transaction; but no such benefit was derived by the society from the transaction with which we are dealing.

Our attention was particularly directed, during the argument by the counsel for the plaintiffs, to the observations of Lord HATHERLEY in the case of *Houldsworth* v. *The City of Glasgow Bank*, L. R., 5 App. Cas. 317, to the effect that a corporation, as much as an individual, is bound by the wrongful acts of its agent, and that the result of misrepresentations by an agent must take effect in the same manner against a corporation as it would against an individual. To the general principles involved in these observations of Lord HATHERLEY, especially as applied to the case then under consideration, I give, as I am bound, a ready assent; but it is clear, when the case is examined, that Lord HATHERLEY is referring to an agent acting within the scope of his authority, and I cannot assent to the proposition that either the directors, as such, or Keighley Lea, as secretary, were acting within the scope of their authority when they purported to borrow money on account of the company, at a time when the society had not, to their knowledge, any power or authority whatever to accept a loan. The cases of *Barwick* v. *The English Joint-Stock Company*, L. R., 2 Exch. 259; 36 L. J. Exch. 147, and *Mackay* v. *The Commercial Bank of New Brunswick*, L. R., 5 P. C. 394; 43 L. J. P. C. 31, which were relied upon by the

plaintiffs, were also cases in which the agent was acting within the scope of his authority.

Had it been the case, the other facts remaining the same, that the society had not exhausted its borrowing powers at the time when the £100 was received from the plaintiffs, it might probably have been held that the directors and Keighley Lea were acting within the scope of their authority in receiving the money, and that the society were liable for the subsequent misconduct of its secretary. It has also been urged upon us that the plaintiffs had no means of knowing or ascertaining whether the society had exhausted its powers of borrowing, or whether, indeed, there was any limit to such power. To this argument I can only reply that persons who deal with corporations and societies that owe their constitution to, or have their powers defined or limited by, Acts of Parliament, or are regulated by deeds of settlement or rules deriving their effect more or less from Acts of Parliament, are bound to know or to ascertain for themselves the nature of the constitution, and the extent of the powers of the corporation or society with which they deal. The plaintiffs, and every one else who have dealings with a building society, are bound to know that such a society has no power of borrowing, except such as is conferred upon it by its rules; and if in dealing with such a society they neglect or fail to ascertain whether it has the power of borrowing, or whether any limited power it may have has been exceeded, they must take the consequences of their carelessness. It may be that the plaintiffs in the present case have been misled by the representations or conduct of others into the belief that the company had full authority to accept the loan from them; that is a question which I shall have to consider when dealing with the other appeal. Such representations or conduct may doubtless give rise to a claim against the parties making such misrepresentations, or so conducting themselves; but in my opinion they can in no way give rise to or support a claim against the society.

Holding these views upon the facts of the case, I am of opinion that the appeal of the society should be allowed.

But it is said that the judgment of Lord COLERIDGE ought not to be reversed, having regard to the finding of the jury that the society held out Keighley Lea to the plaintiffs as having authority to receive this loan on their behalf, on the terms upon which it

was received. I am of opinion that the jury ought not to have so found, in point of law, whatever conclusion they might arrive at from the facts. The society could only hold out to the plaintiffs that Keighley Lea had such authority in one or other of two ways. It might have been so represented by the rules of the society; but the rules, taken in connection with the admitted fact that the powers of borrowing were exhausted, negative any such authority. The only other way in which such a representation could be made so as to bind the society would be by the directors acting within the scope of their authority; and this is apparently the view adopted by Lord COLERIDGE. But it was not, in my opinion, as I have already pointed out, within the scope of the authority of the directors to make such a representation as the one found by the jury to have been made. Whether the society held out Keighley Lea to the plaintiffs as having authority to accept the loan of £100, was, in my opinion, a question of law for the Judge to decide, notwithstanding the finding of the jury. Then, as regards the appeal of the directors, the judgment of Lord COLERIDGE appears to have proceeded upon the view that there was ample evidence that the directors held out Keighley Lea to the plaintiffs, as authorised to undertake for them that they would give their promissory notes on the receipt of moneys paid as the £100 was paid, and that they are consequently bound by his undertaking, and must either give their promissory note, or, in the events which have happened, pay the money.

I do not dissent from this view of the case, but I prefer rather to rest my own decision upon the grounds assigned by Mr. Justice LINDLEY when the rule *nisi* for a new trial was refused in the Divisional Court.

The evidence, into which I need not enter in detail, satisfies me that, after the directors well knew that the powers of borrowing had been exhausted, and that any further borrowing would be contrary to the constitution and rules of the society, and therefore wrongful, they authorised Keighley Lea to continue receiving money by way of loan on account of the company, and to do so in the same way as he had previously received money before the borrowing powers were exhausted. Thus, the plaintiffs, who had lent money to the Company before its borrowing powers were exhausted, finding a continuation of the same mode of receiving money on loan, were naturally led into the belief

that Keighley Lea still had authority to receive their money, and they advanced this £100 accordingly. I am of opinion, therefore, that the appeal of the directors should be dismissed. As regards the rule *nisi* for a new trial obtained in this Court by the directors, I am of opinion that it should be discharged.

We have the whole of the materials before us necessary for finally determining the questions in dispute. Moreover, I am of opinion that even if, as has been contended, there was any misdirection at the trial, — as to which I desire to be considered as not expressing an opinion, — no substantial wrong or miscarriage has been thereby occasioned to the defendants, the directors; and the 3rd rule of the 39th Order, and the 10th rule of the 40th Order are, in my opinion, clearly applicable.

Brett, L. J. On this appeal there must be judgment for the society, notwithstanding the findings of the jury. If the answer to the first question left to the jury at the trial means that the society authorised Lea to hold out anything to the plaintiffs, then there was no evidence for the jury as to that proposition, and it is admitted that no future evidence could be given on that point. If it were true that every member of the society agreed to accept the loan, and had authorised Lea to receive money, still, the society as a society could not be sued. The meaning of the question was not that the society did or could authorise Lea otherwise than by or through the directors; but in any case there is no evidence to support the finding of the jury. It appears to me that when the money was paid to Lea, it was accepted as a loan to the society. Now the directors of the society could not do this. If the society had on the face of its constitution an unlimited power of borrowing, but had given a secret order to its agents not to exceed a certain amount, and an agent did exceed that amount, the society would be bound; but where a society is limited in its power of borrowing, then every one who deals with such a society is bound to know that there is a limit to the power of borrowing, and to inquire what limit is fixed either by statute or by the constitutions of the society. This society did fix the limit of the power of the directors to borrow, — that limit was exceeded: the plaintiff did not inquire, and was not aware of this, — that was his misfortune; but it is a misfortune which bars him from recovering against the society.

It is suggested that the society authorised Lea to hold himself

out as a person empowered to accept loans. I think the society did do so by means of the directors. But the directors had no authority to do this, and there is, in my opinion, no ground on which the finding of the jury against the society can be maintained, so that our judgment should be in favour of the society; and the motion for a new trial then becomes immaterial. There remains the direction as to the directors It is clear that there is no evidence of fraud; but assuming that there was no fraud, I am of opinion that the directors are bound, and that for two independent reasons. The directors had authority to issue advertisements for loans They did so; and these advertisements were invitations to persons to lend their money to Lea on certain terms. The moment that any one lent his money to Lea, there was, I think, a loan on certain terms, — on the terms, amongst others, that the directors would, not on behalf of the society, but as themselves principals, give their promissory note, so that they would be sureties for the loan. The directors authorised Lea and his predecessors to issue this advertisement, for months, if not for years. The evidence shows that the money was accepted as a loan to the society; and it is a fact that its acceptance was reported to the directors, not for them to consider whether they would accept the loan, but merely that they might know a loan had been accepted. A mark was put in a book, against all the loans, and this mark shows the knowledge by the directors, that the loan had in each case been notified to them, and the evidence shows that they were aware of the form of the receipt which had for years been given. The cautious evidence given by Smith may appear to bear the construction that he had not seen the receipts; but I think the jury had a right to scan that evidence with care, and that they were justified in saying, by their verdict, that it was idle to suppose that the directors had never seen the form of receipt. These receipts were invariably in the same form, and were given to every one who lent to the society. It must be taken that in every case the money deposited was treated as a loan, and that in every case the directors gave their promissory note. It is then urged that the directors told Lea not to receive or advertise for any more money. They did not, however, withdraw the previous advertisements; so that to those who had seen them there was no more a ceasing to receive money, than if a tradesman, who was in the habit of advertising, were to

cease to advertise, yet to keep his shop open, and then to assert that he had ceased to deal on the terms announced in those advertisements. The directors never ordered Lea not to receive any more money, and never told him to refuse money brought through former advertisements; so that the plaintiffs, who had seen the former advertisements, had a right to bring their money to Lea, and were justified in offering it to be received on the old terms.

What, in the next place, is the construction to be placed on the receipt, the form of which it is clear was known to the directors? It is clear that it imports that the money was lent to the society. The directors were not bound to affix their names to promissory notes unless they contracted so to do; but the course of dealing shows that the agreement was that every lender was to have the personal obligation of the directors. Can it be that the society was to undertake that the directors should give the promissory notes? Surely not: the promise was one by the directors, not by the society. The society accepted the loan, but the society was not bound to get the signature of the directors. For that period of time during which the money was in Lea's hands, and before the directors had signed the notes, the lender was intended to have the security not of the society, but of the directors. Such was the intention of the parties, as is shown by the receipt, which further shows that Lea was authorised to represent that the directors would give to the lender their promissory note. The directors, therefore, are personally liable. If I am in error as to the construction to be put on this receipt, then I think that there was a representation made by the authority of the directors that the money was accepted as a loan by the society, that is a representation by the directors that they were authorised to borrow for the society; and if so, the facts bring the case within the authority of *Collen* v. *Wright*, 8 E. & B. 647; 27 L. J. Q. B. 217.

If, again, there was a promise by the directors on behalf of the society, that the society would procure their signature to the promissory notes, then there was a warranty by them that they were agents with an authority which they did not possess. If there was a holding out by them, then the case is within *Collen* v. *Wright*, *supra*, and there is no difference between the cases. It appears to me that these directors put a construction of their

own on this receipt, by a course of conduct pursued with regularity for years, and that they treated the money as a loan from the moment it was given to Lea. They are, therefore, personally liable.

Judgment for the society, and against the directors.

ENGLISH NOTES.

The doctrine of holding out is frequently applied in cases arising out of partnership transactions. In general each partner is the agent of the firm; Partnership Act of 1890 (53 & 54 Vict. c. 39, § 5); and after a dissolution, notice must be given to persons dealing with the firm, of any change in its constitution [*ib.* § 36 (1)]. As regards persons dealing with the new firm for the first time, a previous advertisement in the London Gazette is sufficient notice [*ib.* § 36 (2)].

Another example of the doctrine of holding out is afforded by the case of *Guidon* v. *Mary Robson* (1809), 11 R. R. 713; 3 Camp. 302, which also arose out of alleged partnership transactions. There the plaintiff, who traded under the firm name of Guidon & Hughes, drew a bill, which was accepted by the defendant. Hughes was in fact a salaried clerk, who did not participate in the profits. Lord Ellenborough nonsuited the plaintiff, upon the ground that Hughes should have been joined as a co-plaintiff, he being held out to the world as a partner.

In *Ramazotti* v. *Bowring* (1860), 7 C. B. (N. S.) 851; 29 L. J. C. P. 30, the Court of Common Pleas had occasion to consider specially the questions which are to be submitted to the jury in cases of holding out. In that case N., representing himself to be the proprietor of a certain business carried on under the name of the Continental Wine Co., induced the defendants to receive from him certain wines and spirits in part satisfaction of a debt previously contracted by him with them. N. was in truth only clerk to the plaintiff, R., who was the real proprietor of the establishment. The name of R. appeared over the entrance to the cellar, but it was not visible to persons going to the counting-house. R.'s name also appeared (though in an ambiguous manner) upon the receipt signed by one of the defendants on the delivery of some of the goods. The plaintiff sued for the price of the goods. It was left to the jury to say whether R. or N. was the real proprietor of the business; but this was held to be a misdirection. In the course of his judgment Erle, C. J., said (at 7 C. B. (N. S.) p. 876), "The proper questions, under the circumstances, would have been whether R. so conducted himself as to enable N. to hold himself out to be the true owner of the

goods, whether N. did so hold himself out, and whether the defendants in dealing with N. believed him to be the owner." ·

As regards associations which have their powers regulated by Act of Parliament, or by regulations which are accessible to the general public, there can be no holding out, so far as regards a pretended exercise of powers, not in fact possessed by the association, on its behalf. *Re Companies Act, ex parte Watson* (1888), 21 Q. B. D. 301; 57 L. J. Q. B. 609. In that case the directors of a building society, which had no borrowing powers, gave their promissory notes in exchange for advances which were made to them for the purposes of the society by one John Watson, to whose estate the appellant had taken out administration. The society afterwards acquired borrowing powers; and subsequently, the administrator applied to the directors for the repayment of the loan; and the directors, in consideration of his giving up the notes, gave him in exchange for it a deposit note of the society. This they did, acting in the belief that the promissory notes were binding on the society. It was held that, under these circumstances, there was no contract binding on the society. For the former transaction was clearly *ultra vires;* and, as no fresh advance of money was obtained, the latter transaction was not an exercise of the borrowing powers.

The principal case further decides that an association (in that case a building society) cannot be bound by an act of a kind authorised to a limited extent, if the power has been in fact exhausted. Such an act is, according to the decision of the Court of Appeal (as the point is well put by Baggallay, L. J.), not within the scope of the authority of any agent of the society. This appears to rest on a sound principle, a principle necessary in order to prevent evasion of the clear intention of the Legislature. The principle is the same as that applied in the well-known case of *Chambers* v. *Manchester, &c. Ry. Co.* (1864), 5 B. & S. 588; 33 L. J. Q. B. 268, in which the court refused to give effect to the issue of *Lloyds Bonds* as an indirect means of borrowing money contrary to the policy of the acts; and is again acted on by the House of Lords in the case of *The Baroness Wenlock* v. *River Dee Co.* (1885), 10 App. Cas. 354; 54 L. J. Q. B. 577.

The distinction is, indeed, very fine between this class of cases, and those in which a company has been held estopped (or liable for representation or holding out) by their certificate of ownership of shares. Of these cases the last and most authoritative is *Balkis Consolidated Company Limited* v. *Tomkinson* (1893), 1893 App. Cas. 396. In that case the House of Lords, affirming the decision of the Court of Appeal, held the company estopped by a share certificate under its seal, from denying the title of the person to whom the certificate had been issued; and that the company were liable to compensate him in damages for

the loss he had sustained by their refusing to register a purchaser under a contract entered into upon the footing of that title. It appeared that the certificate was in fact incorrect, and that before it was sealed, all the authorised capital had been already issued. It was strongly argued that this made the certificate *ultra vires* of the company. The Lords, however, considered that this did not prevent the plaintiff from recovering damages for the misrepresentation. The issue of the certificate was an act done in the ordinary course of business, that course of business being within the proper business of the company, and useful to its proper objects. And it is quite consistent with the decision, that, if the certificate had been issued by agents of the company as part of a scheme for multiplying shares contrary to the constitution of the company, the case would have given rise to very different considerations.

In *Newlands* v. *National Employers Accident Association* (C. A. 1885), 54 L. J. Q. B. 428, the plaintiff failed to prove any agency, express or implied. It was laid down broadly that the secretary of a company is, *primâ facie*, not authorised to make representations to induce persons to take shares. The principle of this case was again recognised in *Barnett* v. *South London Tramways Company* (C. A. 1887), 18 Q. B. D. 815; 56 L. J. Q. B. 452, where the plaintiff had lent money to contractors on the faith of a statement made by the secretary of the company as to money in the hands of the company available for payment to the contractors on the completion of the works.

AMERICAN NOTES.

If directors transcend or abuse their powers they are personally responsible. *Oakland Bank* v. *Wilcox*, 60 California, 135; *Citizens' Bldg. Ass'n* v. *Coriell*, 31 New Jersey Equity, 383; *Farmers' Co-operative Trust Co* v. *Floyd*, 47 Ohio St. 525; 21 Am. St. Rep. 846. As, for example, for debts contracted for the company in excess of the statutory limit. *Stone* v. *Chisholm*, 113 United States, 302. But it is said that they are not liable for excess of the amount prescribed by the charter, in the absence of liability therefor imposed by charter or statute. *Frost Manuf. Co.* v *Foster*, 76 Iowa, 535.

In *Farmers' Co-operative Trust Co.* v. *Floyd*, *supra*, it was held that persons who as directors of a corporation and in its name contract with innocent third parties before the legal amount of corporate stock has been subscribed, do not create any corporate liability, but become personally liable, although they contracted in the honest belief that corporate authority was vested in them.

In *Williams* v. *McKay*, 40 New Jersey Equity, 189; 53 Am. Rep. 775, managers of a savings bank were held liable to the receiver of the insolvent bank for losses incurred through the negligence of a committee to whom they had entrusted the management. The Court said: "Doubtless such officers had the right to rely in many respects on the skill and diligence of their com-

mitteemen, and if exercising a reasonable circumspection they were unaware of the misconduct or neglect of such agents, they would not be responsible for the consequences. But so plain was their duty to oversee the business done by such committeemen, that it seems to me they are chargeable, *primâ facie*, with a knowledge of what was doing or had been done in all important matters by such bodies."

"A person openly and notoriously exercising the functions of a particular agency of a corporation will be presumed to have sufficient authority from the corporation so to act," and the principal will be liable to third persons therefor. *Singer Manuf. Co.* v. *Holdfodt*, 86 Illinois, 455; *Neibles* v. *Minneapolis, &c. R. Co.*, 37 Minnesota, 151.

No. 11. — RABONE *v.* WILLIAMS.

(1785.)

No. 12. — BARING *v.* CORRIE.

(1818.)

No. 13. — COOKE *v.* ESHELBY.

(H. L. 1887.)

RULE.

WERE a factor, dealing for a principal, but concealing the principal, sells and delivers goods in his own name, the person contracting with him has (*primâ facie*) a right to consider him to all intents and purposes as the principal; and is entitled, if the real principal intervenes by bringing an action for the price, to set off a debt due by the factor to himself.

But no such presumption arises in the case of a sale by a broker, who is not ordinarily, in that character, armed with the disposal of the bulk of, or with the documents of title to, the goods, nor (*primâ facie*) with the authority to sell in his own name, or to receive the price.

The real criterion of this right of set-off is whether the purchaser was, by reason of the general or ostensible authority given to the agent, misled, so as to believe and act on the belief that the agent was the owner of the goods, or

had the authority which is *primâ facie* that of a factor, — namely, the authority to sell, and to deal with the purchase money, to all intents and purposes as if he were principal in the business.

Rabone v. Williams.

7 T. R. 360 *n.* (s. c 4 Rev. Rep. 463 *n.*, and 2 Smith's Lead. Cas., note to *George* v. *Clagett*, p 131, edit. 1887).

Sittings after Mich. 1785; which was thus stated. — Action for the value of goods sold to the defendant by means of the house of Rabone, Sen. and Co. at Exeter, factors to the plaintiff. The defendant, the vendee of the goods, set off a debt due to him from Rabone and Co., the factors, upon another account, alleging that the plaintiff had not appeared at all in the transaction, and that credit had been given by Rabone and Co., the factors, and not by the plaintiff. Lord MANSFIELD, C. J. — "Where a factor, dealing for a principal but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled." — Upon this opinion the rest, being a mere matter of account, was referred. In *Bayley* v. *Morley*, London Sittings after Mich. 1788. Lord KENYON recognised the law of this case.

Baring v. Corrie.

2 B. & Ald. 137.

Assumpsit for goods sold and delivered, Plea, general issue. The cause was tried, before Lord ELLENBOROUGH, C. J., at the London sittings after Trinity Term, 1816, when a verdict was found for the plaintiffs with £1423 3*s.* 6*d.* damages, subject to the opinion of the Court, upon the following case, either the plaintiffs or the defendants being at liberty to turn the same into a special verdict.

The plaintiffs are merchants in London, and in the month of June, 1815, employed Messrs. Coles, as their brokers, to sell for them a parcel of sugars. Coles and Co. sold to the defendants the sugars, on the 27th June, 1815, and on the same day

delivered to the plaintiffs the following sale note; "Sold for account of Messrs. Baring Brothers and Co., to Messrs. W. and E. Corrie, per *Active* N. L. R. $\frac{51}{100}$ — 50 hogsheads Surinam sugar, at 85*s*." Coles and Co. were merchants as well as brokers, and bought and sold largely on their own account, and had before the time of the sale of the sugars in question dealt with the defendants both in buying and selling on their own account, and in the course of such dealing had previously bought goods of the defendants, for which they had given them their acceptances for £2700, which fell due on the 25th and 26th August, 1815. At the time of the sale, Coles and Co. did not disclose to the defendants that they acted as brokers, but sold the sugars to them in their own names, and sent them the following note: "Sold Messrs. Corrie and Co., per *Active* N. L. R. $\frac{51}{100}$ — 50 hogsheads Surinam sugar, at 85*s*., June 27th, 1818." The defendants afterwards, on or about the 10th or 11th July, 1815, received the following invoice, dated 27th June, 1815, from Coles and Co. "Messrs. E. Corrie bought of Coles and Co. per *Active* N. L. R. 50 hogsheads Surinam sugar, at 85*s*. per cwt." The prompt or time of payment of the sugars, according to the usual course of the sugar trade, was two months. Coles and Co. as sworn brokers, kept a book, in which they entered a memorandum of every contract made by them as such brokers, and amongst the rest was the memorandum of the sale of these sugars to the defendants, made at the time of sale: "Bought of Baring Brothers and Co., for account of Corrie and Co. per *Active* N. L. R. $\frac{51}{100}$ hogsheads Surinam sugar, at 85*s*." But the defendants never saw the book or memorandum, nor did they ever desire to see it till after the bankruptcy of Coles and Co., although they might at any time have seen it, by calling at the counting-house. At the time of the sale, Coles and Co. were employed by the plaintiffs, as their brokers, not only to sell for them their imported goods, but also to receive from the buyers thereof the price when due, but they did not receive a *del credere* commission. Coles and Co. became bankrupts on the 14th July, 1815, and the prompt upon the sugars expired upon the 27th August. On the 3rd July, the defendants received from Coles and Co. the following order for the delivery of the sugars from the West India Docks, where they were landed and then lying: "To the principal storekeeper of the West India Docks. Deliver to the order of Messrs. W. and E. Corrie, the under mentioned goods imported in the month of June, 1815, and entered by

No. 12. — Baring v. Corrie.

John Deacon per ship *Active*, Captain Mustard, from Surinam (prime dock rates thereon being paid), June, 1815, N. L. R. $\frac{51}{100}$ — 50 hogsheads sugar. For Baring Brothers, and Co., (signed) John Walker." John Walker was the custom-house clerk of the plaintiffs, and John Deacon, one of the partners in the house of Baring Brothers and Co., and one of the plaintiffs in the cause. By the usage in the West India Docks, the sugars, or other produce imported, remain in the names of the importer, or person making the entry, until such time as some purchaser thereof chooses to have the goods rehoused and entered in his name. In the mean time, and until such rehousing takes place, the order for delivery must be signed by the importer or his agent, whatever number of sales may have been made of them; and such order is made out for delivery to the first purchaser, unless the importer should have received a written direction from the first purchaser to make it out to some other person; and that person, if he sells, indorses over such order to his vendee, unless, as in the former cases, such vendee should in like manner, by order in writing, direct the indorsement to be made out to some other person. On the 22nd August, 1815, the following letter, bearing date the 27th July, was sent by the plaintiffs to the defendants, being five days before the prompt upon the sugars expired: "We request you will settle with Mr. Edward Kensington, for the amount of N. L. R. 50 hogsheads sugar, per *Active*, sold you by Coles and Co. on the 27th June last." The defendants returned the following answer, dated August 23rd: "We are surprised at the directions contained in your letter dated 27th July last, but only delivered to us yesterday, respecting 50 hogsheads sugar sold by Coles and Co. on the 27th June. We consider Coles and Co. as the proprietors of these sugars, and therefore the same will be settled for in account with them or their assignees." On the 14th July, 1815, when Coles and Co. became bankrupts, the defendants were the holders of their acceptances for £2700.

In the argument were cited the cases of *George* v. *Clagett*, 4 R. R. 462; 7 T. R. 359; *Rabone* v. *Williams*, 7 T. R. 360 *n.*; 4 R. R. 463 *n.*; No. 11, *ante*, p. 391; *Escott* v. *Milward*, Co. Bank Laws, 236; *Scrimshire* v. *Alderton*, 2 Str. 1182; *Morris* v. *Cleasby*, 4 Maule & Selw. 566; *Moore* v. *Clementson*, 11 R. R. 653; 2 Camp. 22; and *Hern* v. *Nichols*, Salk. 289.

Abbott, C. J. If the defendants were to succeed in this case the effect would be that the goods of one man would be applied in

discharge of the debts of another. I am not disposed to come to such a conclusion unless compelled to do so by authorities which I do not find in this case. It is said that where a loss is to fall on one of two innocent parties by the deceit of a third, that it should fall on him who employs and puts a trust and confidence in the deceiver. But this rule is by no means universal. Suppose a factor, who is intrusted with the possession of goods, pledges the goods, the real owner may recover them in trover against the person with whom they are pledged. And so, also, if a master trusts his servant with plate or other valuables, and the servant sell them, still, unless they are sold in *market overt*, the master may recover them from the innocent purchaser. These exceptions show that the principle is by no means universal. But in this case has there been any negligence on the side of the plaintiffs? or rather has there not been great negligence on the side of the defendants? Coles and Co., it appears, acted in the double capacity of merchants and brokers; and that fact was well known to the defendants. Now the distinction between a broker and a factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant, residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal; the latter therefore, with full knowledge of these circumstances trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation; he is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker, has a right to expect that he will not sell in his own name. In all the cases cited the factor was in actual possession of the goods, and the purchaser could not know whether they belonged to him or not. And at all events they knew that he had a right to sell the goods. But the case of a broker is quite distinguishable. The plaintiffs in this case have only reposed the usual confidence which every merchant must place in his broker, and if the defendants should succeed, it would not be safe for any merchant ever hereafter to employ a broker: for the latter might by delivering to the buyer a false note, defeat the rights of his principal altogether. It is argued, indeed, that there are other facts in this case from which it is to be inferred that the plaintiffs reposed a more than usual confidence in Coles

and Co., and for this purpose that part of the case was relied upon which states that they were employed by the plaintiffs as their brokers, not only to sell for them the several goods imported into this country, but also to receive, when due, the price of such goods from the buyers. But inasmuch as this fact applies only to the receipt of the price of goods sold by them *as brokers*, it seems to me that that fact does not alter the case. But in what situation did the defendants stand in respect to Coles and Co., and what did they omit to do? They knew that Coles and Co. acted both as brokers and merchants, and to derive a benefit from so dealing with them, they ought to have inquired whether in this transaction they acted as brokers or not; but they make no inquiry. They had the name of the ship in which the goods had been imported, and they might have made inquiries into the circumstances of the case, if they had not chosen to remain in ignorance. There is, therefore, a clear omission on their part, and they do not stand in a situation so completely free from blame as the plaintiffs do. There is another circumstance, which shows that if they did not know that Coles and Co. were acting as brokers in this case it was because they chose not to know it. It appears that they received a sale note, and were not required to sign a bought note. Now without entering into the question whether or not, under such circumstances, the bargain could be enforced, it is quite sufficient to say that the ordinary course of dealing was not pursued, and that enough appears to show that the defendants negligently abstained from making those inquiries which they ought to have made. I think, therefore, that they ought not to be allowed the set-off which is claimed; and my opinion is founded on the difference between the characters of factor and broker, and on the plain distinction between the cases cited and this. For even admitting it to be true that where two persons, equally innocent, are prejudiced by the deceit of a third, the person who has put the trust and confidence in the deceiver should be the loser. I think, the defendants are the persons who have in this case placed a more than usual confidence in Coles and Co., and that they must bear the loss occasioned by the act of the latter.

Bayley, J. I am entirely of the same opinion. This is an action brought by a merchant, to recover the price of his own goods, and he ought therefore to succeed, unless payment, or something equivalent to it, appears to have taken place. The demand

however, is resisted on the ground that the defendants, who were buyers of the goods, did not purchase them of the plaintiffs, but of Coles and Co., and that they have a counter demand against them, which they are entitled to set off against the price of the goods. A proprietor, generally speaking, is entitled to receive the price of his own goods, unless by improper conduct on his part, he has enabled some other person to appear as proprietor of the goods, and, by that means, to impose on a third person without any fault on the part of that person. That is the true meaning of the rule laid down in *Hern* v. *Nichols*, Salk. 289. There arise then three questions; first, did the plaintiffs enable Coles and Co. to appear as proprietors of the goods, and to practise a fraud upon the defendants? Secondly, did Coles and Co. actually practise a fraud? and thirdly, did the defendants use due care and diligence to avoid such fraud? All these questions must, under the circumstances of this case, be answered against the defendants. It appears that Coles and Co. were both brokers and merchants, and that they on the 27th June, 1815, were empowered to sell the goods in question. They delivered to the plaintiffs a sold note exactly in the proper form, supposing them to have sold in their character of brokers; and they delivered to the defendants a bought note, exactly suited to the case of their having sold as brokers, without having disclosed the name of the seller. If it were even doubtful whether Coles and Co. sold as merchants or not; there was at least enough to have induced the defendants to make inquiry. For, supposing them to sell in their character of brokers, it was not necessary for them to take a counter-note from the defendants; but, if they had sold as merchants, that would be necessary. When, therefore, they delivered only a sale note, and required none in return, that ought to have raised a strong presumption in their minds of the defendants, that the sale was in their character of brokers. And there is nothing inconsistent in that view of the case; for Coles and Co. do not say that they sell the goods as their own, and the defendants ask no questions on that subject. Then on the 3rd of July, comes the delivery order signed by the plaintiffs: at that time, therefore, the defendants must have known that the plaintiffs were parties concerned, and might have satisfied any doubts which they entertained upon the subject. It is besides to be observed that the plaintiffs did not trust the brokers with either the muniments of their title, or the possession of the goods, as was done both in the

case of *Rabone* v. *Williams*, and that of *George* v. *Clagett*. There is another circumstance by which the defendants might easily have ascertained whether Coles and Co. acted as brokers or not. According to the usual course of dealing, a broker is bound to put down in his book an account of the sales made by him in that capacity, and in fact that was done in this case; so that if the defendants had asked to see the book, they would instantly have discovered whether Coles and Co. acted as brokers or not. I think, therefore, that it appears from these circumstances, the plaintiffs did not by their conduct enable Coles and Co. to hold themselves out as the proprietors of these goods, and so to impose on the defendants: that the defendants were not imposed upon, and even supposing that they were, that they must have been guilty of gross negligence. Besides, when Coles and Co. stood at least in an equivocal situation, the defendants ought, in common honesty, if they bought the goods with a view to cover their own debt, to have asked in what character they sold the goods in question. I therefore cannot think that the defendants believed, when they bought the goods, that Coles and Co. sold them on their own account, and if so they can have no defence to the present action. The course of dealing, it appears, was for the brokers to receive for the plaintiffs the price when due; if therefore the defendants had remained ignorant of the state of things till after that period had arrived, the case might have been different; but, before that time arrived, it appears that they were distinctly informed, that the plaintiffs were the proprietors of the goods. There must therefore be judgment for the plaintiffs

Holroyd, J. I am of opinion that the defendants have not any right of set-off in this case. A factor, who has the possession of goods differs materially from a broker. The former is a person to whom goods are sent or consigned, and he has not only the possession, but in consequence of its being usual to advance money upon them, has also a special property in them, and a general lien upon them. When, therefore, he sells in his own name, it is within the scope of his authority; and it may be right, therefore, that the principal should be bound by the consequences of such a sale; amongst which, the right of setting-off a debt due from the factor is one. But the case of a broker is different; he has not the possession of the goods, and so the vendee cannot be deceived by that circumstance; and besides, the employing of a person to sell goods as a broker does not authorise him to sell in his own name.

If therefore he sells in his own name, he acts beyond the scope of his authority, and his principal is not bound. But it is said that by these means the broker would be enabled by his principal to deceive innocent persons The answer, however, is obvious, that that cannot be so, unless the principal delivers over to him the possession and *indicia* of property. The rule stated in the case in Salkeld must be taken with some qualifications; as for instance, if a factor, even with goods in his possession, acts beyond the scope of his authority, and pledges them, the principal is not bound; or if a broker, having goods delivered to him, is desired not to sell them, and sells them, but not in *market overt*, the principal may recover them back. The truth is, that in all cases, excepting where goods are sold in *market overt*, the rule of *caveat emptor* applies. I think, therefore, that this case differs materially from the cases cited, which are those of principal and factor, and that therefore this claim of set-off cannot be allowed.

Judgment for Plaintiffs.

Cooke v. Eshelby.

56 L. J. Q. B. 505 (s. c. 12 App. Cas. 271).

This was an appeal from a decision of the Court of Appeal (BRETT, M. R., LINDLEY, L. J., and BOWEN, L. J.) which reversed one of BAGGALLAY, L. J.

The appellants, Isaac Cooke & Sons, purchased cotton in April and June, 1883, from Livesey, Sons & Co., cotton brokers of Liverpool. Livesey, Sons & Co. contracted in their own name, but were really acting for an undisclosed principal, Maximos. Before the date fixed for delivery of the cotton, Livesey, Sons & Co. failed, and, in accordance with the rules of the Liverpool Cotton Association, the transactions were closed in the form of repurchases by Livesey, Sons & Co. from the appellants, the result being, that, the price of cotton having fallen, a sum of £680 became due from the appellants to Livesey, Sons & Co. The present action was brought by the respondent Eshelby, as trustee in the liquidation of Maximos (who had also failed), against the appellants to recover the £680. The appellants claimed to set off money due to them from Livesey, Sons & Co. on general account.

The appellants, in answer to interrogatories whether they believed Livesey, Sons & Co. to be acting as principals, said, "We had

no belief on the subject. We dealt with Livesey & Co. as principals, not knowing whether they were acting as brokers on behalf of principals or on their own accounts as the principals."

At the trial, which took place at Liverpool in February, 1884, before BAGGALLAY, L. J., sitting without a jury, it was proved that Livesey, Sons & Co. bought and sold on their own account as well as on behalf of principals, and that this fact was known to the appellants.

BAGGALLAY, L. J., held that the appellants were entitled to the set-off claimed. The Court of Appeal held that they were not.

W. R. Kennedy, Q. C., and T. G. Carver, for the appellants. — Livesey & Co. contracted as principals on the face of the contract, and they did so under express instructions from Maximos that his name was not to be used They were in the habit of making similar contracts on their own account with the appellants, who did not know whether they acted as principals or brokers. The appellants treated Livesey & Co. as principals, and balanced their contract-book on that basis, setting off gains and losses on all contracts. Had Maximos's name been used the appellants would have declined the contracts, because their chance of set-off against Livesey & Co. might be destroyed. The appellants claim on the ground not of estoppel, but of an equitable qualification of the right of the principal to adopt a contract, — namely, that he cannot prevent the right of set-off if he instructs his agent to contract as principal. *Sims* v. *Bond*, 5 B. & Ad. 389; *Isberg* v. *Bowden*, 8 Exch. Rep. 852; 22 L. J. Exch. 322; *Dresser* v. *Norwood*, 17 Com. B. (N. S.) 466; 34 L. J. C. P. 48, *per* WILLES, J. (reversed in Exchequer Chamber on another point), and *George* v. *Clagett*, 7 T. R. 359; 2 Sm. L. C. (8th ed.) 118; 4 R. R. 462. It is not necessary to negative means of knowledge of the existence of an undisclosed principal; absence of knowledge is sufficient. *Borries* v. *The Imperial Ottoman Bank*, L. R., 9 C. P. 38; 43 L. J. C. P. 3; *Stacey* v. *Decy*, 2 Esp. 469; *Carr* v. *Hinchcliff*, 4 B. & C. 547; 4 L. J. K. B. 5; *Purchell* v. *Salter*, 1 Q. B. 197; 10 L. J. Q. B. 81; and *Semenza* v. *Brinsley*, 18 Com. B. (N. S.) 467; 34 L. J. C. P. 161. The *dictum* of WILLES, J., in the last case, that the defendant must deal with the agent as and believe him to be the principal, was not necessary to the decision. *Moore* v. *Clementson*, 2 Camp. 22, 11 R. R. 653, *per* Lord ELLENBOROUGH, and *Turner* v. *Thomas*, L. R., 6 C. P. 610; 40 L. J. C. P. 271. *Baring* v. *Corrie*, No. 12, *ante*, p. 391, was a case of one who clearly acted as a broker, not as a factor;

whereas here, Livesey & Co. might have acted in either capacity. Lord TENTERDEN'S view was that, if the party dealing with an agent did not know he was one, he could set off. HOLROYD, J., went on the ground that the agent had no authority to contract in his own name, — see, as to the distinction between a broker and a factor, *Coates* v. *Lewes*, 1 Camp. 444; 10 R. R. 725. If an agent has received authority to contract as principal he may safely be treated as a principal. *Tucker* v. *Tucker*, 4 B. & Ad. 745; 2 L. J. K. B. 143, *per* PARKE, J. It is not necessary that there should be a representation that the contracting party is solely interested in the contract. All that is required is a representation and belief that he is entitled to contract as principal. *Browning* v. *The Provincial Insurance Company of Canada*, L. R., 5 P. C. 263, 272, and *Maspons* v. *Mildred*, 9 Q. B. D. 530; 8 App. Cas. 874; 51 L. J. Q. B. 604; 53 id. 33. The case should not be treated as resting on estoppel. Estoppel only arises where the agent has no authority to act as principal. If the agent makes a representation that he is a principal, this binds the true principal as against a third party, though made without authority. Where, however, the agent has, in fact, authority to act as principal, estoppel does not arise, for on general principles of equity the principal can only adopt the contract subject to rights of set-off against the agent. The judgments of the Court of Appeal proceed on what is a false assumption, that in the factor's cases there ever is a representation that the factor acts as principal, in the sense that no one else is interested in the contract. The true principle is based on authority, not estoppel. *Wilde* v. *Gibson*, *per* Lord CAMPBELL, 1 H. L. Cas. 605, 633; *Ex parte Dixon*, 4 Ch. D. 133; 46 L. J. Bankr. 20; *The Citizens' Bank of Louisiana* v. *The New Orleans Canal and Banking Company*, L. R., 6 H. L. 352; 43 L. J. Ch. 263; *Farmeloe* v. *Bain*, 1 C. P. D. 445; 45 L. J. C. P. 264; *Armstrong* v. *Stokes*, L. R., 7 Q. B. 598; 41 L. J. Q. B. 253, *per* BLACKBURN, J., and *Irvine* v. *Watson*, 5 Q. B. D. 102; id. 414; 49 L. J. Q. B. 239; id. 531.

French, Q. C., and Synnott, for the respondent, were not called on. *Cur. adv. vult.*

The LORD CHANCELLOR (Lord HALSBURY) (on March 15, 1887). In this case a merchant in Liverpool effected two sales through his brokers. The brokers effected the sales in their own names. The appellants, the merchants, with whom these contracts were made,

knew the brokers to be brokers, and that it was their practice to sell in their own names in transactions in which they were acting only as brokers. They also knew that the brokers were in the habit of buying and selling for themselves. The appellants, with commendable candour, admit that they are unable to say that they believed the brokers to be principals; they knew they might be either one or the other; they say that they dealt with the brokers as principals, but at the same time they admit that they had no belief one way or the other whether they were dealing with principals or brokers.

It appears to me that the principle upon which this case must be decided has been so long established that in such a state of facts as I have recited the legal result cannot be doubtful. The ground upon which all these cases have been decided is that the agent has been permitted by the principal to hold himself out as the principal, and that the person dealing with the agent has believed that the agent was the principal, and has acted on that belief. With reference to both those matters, — namely, first, the permission of the real principal to the agent to assume his character, and secondly, the question whether those dealing with the supposed principal have acted upon the belief induced by the real principal's conduct, — various difficult questions of fact have from time to time arisen; but I do not believe that any doubt has ever been thrown upon the law as decided by a great variety of Judges for something more than a century. The cases are all collected in the notes to *George* v. *Clagett*, 7 T. R. 359; 2 Sm. L. C. (8th ed.) 118; 4 R. R. 462.

In *Baring* v. *Corrie*, No. 12, *ante*, p. 391, in 1818, Lord TENTERDEN had before him a very similar case to that which is now before your Lordships, and although in that case the Court had to infer what we have here proved by the candid admission of the party, the principle upon which the case was decided is precisely that which appears to me to govern the case now before your Lordships. Lord TENTERDEN says of the persons who were in that case insisting that they had a right to treat the brokers as principals: "They knew that Coles & Co. acted both as brokers and merchants, and if they meant to deal with them as merchants and to derive a benefit from so dealing with them, they ought to have inquired whether in this transaction they acted as brokers or not; but they made no inquiry." And Mr. Justice BAYLEY says: "When Coles & Co.

stood at least in an equivocal situation the defendants ought in common honesty, if they bought the goods with a view to cover their own debt, to have asked in what character they sold the goods in question. I therefore cannot think that the defendants believed when they bought the goods that Coles & Co. sold them on their own account. And if so they can have no defence for the present action."

I am therefore of opinion that the judgment of the Court of Appeal was right. The selling in his own name by a broker is only one fact, and by no means a conclusive fact, from which, in the absence of other circumstances, it might be inferred that he was selling his own goods. Upon the facts proved or admitted in this case, the fact of selling in the broker's name was neither calculated to induce the belief, nor in fact induced that belief.

I now move your Lordships to affirm the judgment of the Court of Appeal, and to dismiss this appeal, with costs.

Lord WATSON. Livesey, Sons & Co., cotton brokers and members of the Liverpool Cotton Association, in April and June, 1883, sold two parcels of cotton, for future delivery, to the appellants, who were members of the same association. These sales were in reality made on account of one N. C. Maximos; but in accordance with his instructions they were effected by Livesey, Sons & Co. in their own name and without any mention of a principal. Livesey, Sons & Co. suspended payment on the 20th of July, 1883, at which date they owed the appellants a balance on general account. On the same day Maximos gave written notice to the appellants that both sales had been made by Livesey, Sons & Co. as his agents. The present action was brought by Maximos, and is now insisted in by the trustee in his liquidation, for recovery of the sums due by the appellants in respect of these two purchases. There is no dispute as to the amount of the claim; the only defence pleaded by the appellants being that they are entitled to set off that amount against the balance admittedly due to them from Livesey, Sons & Co.

The only facts which have a material bearing upon the appellants' defence are these. According to the practice of the Liverpool cotton market, with which the appellants were familiar, brokers in the position of Livesey, Sons & Co. buy and sell both for themselves and for principals; and in the latter case they transact sometimes in their own name without disclosing their

agency, and at other times in the name of their principal. In their answer to an interrogation by the plaintiff touching their belief that Livesey, Sons & Co. were acting on behalf of principals in the two transactions in question, the appellants say, "We had no belief upon the subject. We dealt with Livesey, Sons & Co. as principals, not knowing whether they were acting as brokers on behalf of principals, or on their own account as principals."

That is a very candid statement, but I do not think any other answer could have been honestly made by persons who, at the time of the transactions, were cognisant of the practice followed by members of the Liverpool Cotton Association. A sale by a broker in his own name to persons having that knowledge, does not convey to them an assurance that he is selling on his own account; on the contrary, it is equivalent to an express intimation that the cotton is either his own property or the property of a principal who has employed him as an agent to sell. A purchaser who is content to buy on these terms cannot when the real principal comes forward allege that the broker sold the cotton as his own. If the intending purchaser desires to deal with the broker as a principal and not as an agent, in order to secure a right of set-off, he is put upon his inquiry. Should the broker refuse to state whether he is acting for himself or for a principal, the buyer may decline to enter into the transaction. If he chooses to purchase without inquiry, or notwithstanding the broker's refusal to give information, he does so with notice that there may be a principal for whom the broker is acting as agent; and should that ultimately prove to be the fact, he has, in my opinion, no right to set off his indebtedness to the principal, against debts owing to him by the agent.

It was argued for the appellants that in all cases where a broker having authority to that effect, sells in his own name for an undisclosed principal, the purchaser, at the time when the principal is disclosed, is entitled to be placed in the same position as if the agent had contracted on his own account. That was said to be the rule established by *George* v. *Clagett, supra*; and *Sims* v. *Bond, supra*; and subsequent cases. It is clear that Livesey, Sons & Co. were not mere brokers or middlemen, but were agents within the meaning of these authorities, and if the argument of the appellants were well founded, they would be entitled to prevail in this appeal, because in that case their right of set-off had arisen before the

20th of July, 1883, when they first had notice that Maximos was the principal.

I do not think it necessary to enter into a minute examination of the authorities, which were fully discussed in the arguments addressed to us. The case of *George* v. *Clagett*, *supra*, has been commented upon and its principles explained in many subsequent decisions, and notably in *Baring* v. *Corrie*, *supra*; *Semenza* v. *Brinsley*, *supra*; and *Borries* v. *The Imperial Ottoman Bank*, *supra*. These decisions appear to me to establish conclusively that in order to sustain the defence pleaded by the appellants, it is not enough to show that the agent sold in his own name. It must be shown that he sold the goods as his own, or, in other words, that the circumstances attending the sale were calculated to induce, and did induce, in the mind of the purchaser a reasonable belief that the agent was selling on his own account and not for an undisclosed principal; and it must also be shown that the agent was enabled to appear as the real contracting party by the conduct, or by the authority express or implied, of the principal. The rule thus explained is intelligible and just, and I agree with Lord Justice Baggallay that it rests on the doctrine of estoppel. It would be inconsistent with fair dealing that a latent principal should by his own act or omission lead a purchaser to rely upon a right of set-off against the agent as the real seller, and should nevertheless be permitted to intervene and deprive the purchaser of that right at the very time when it had become necessary for his protection.

I therefore agree with the conclusion of the learned Judges of the Court of Appeal, and with the reasoning upon which it is founded. A broker who effects a sale in his own name, with an intimation express or implied that he is possibly selling as an agent, does not sell the goods as his own, and in such a case the purchaser has no reasonable grounds for believing that the agent is the real party with whom he has contracted.

Lord Fitzgerald. The supposed importance of this case in its bearings upon the operations of the Liverpool cotton market appears to render it rather a duty that each of us should deliver his own judgment. But when we reach a correct appreciation of the facts of this case, it seems to me that all difficulty disappears as to the application of the principle on which it ought to be decided. Although my noble and learned friends have concisely

and accurately stated their views of the facts, I ask your Lordships' permission to advert to some parts of the evidence somewhat more in detail. The third defence alleges that "the defendants believed that Livesey & Co. made the contracts as principals," which must be interpreted to mean that they so believed at the time the contracts in question were entered into. This essential averment has not been proved, and has been disproved. My noble and learned friend (Lord WATSON) has already called attention to an answer given by the appellants, which seems to become more pointed when we refer to the actual interrogatories in reply to which that answer was given. The fourth interrogatory was: "Is it not the fact that in the transactions mentioned in the statement of claim the defendants believed that Livesey & Co. were acting as brokers on behalf of principals?" The fifth interrogatory was: "Did the defendants believe that in such transactions Livesey & Co. were speculating and dealing on their own account as the principals?" To which the defendants answered: "To the fourth and fifth interrogatories, that we had no belief on the subject. We dealt with Livesey & Co, as principals, not knowing whether they were acting as brokers on behalf of principals, or on their own account as the principals;" and it appears on the notes of the learned Judge at the trial that to some similar question Mr. Cooke, on his *viva voce* examination, answered: "I had no belief in the matter."

It is quite true that Messrs. Cooke had not at the time of the contract any actual knowledge that Livesey had a principal; but it is equally clear that they purposely abstained from obtaining information from Livesey on the subject. Messrs. Cooke relied on a custom in the Liverpool market, that where the principal was undisclosed at the time of the contract he could only intervene and claim on the contract, provided his doing so "was not to the detriment of the broker of the other contracting party;" or, to put it in the exact words of a question and answer at the trial: "*Mr. Carver:* Then, my Lord, I will put this question: In the arrival market, where one of the parties on the face of the contract fails, is there any custom which governs the right of undisclosed principals to claim upon the contracts made in the name of the party who has failed? — *A.* He can only claim, subject to the rights of the other party to the contract to take into account whatever differences there may be on other outstanding

contracts." The special custom alleged to prevail in the Liverpool arrival market was not established in proof.

The disclosure at the time of the contract that there was an undisclosed principal would not alone have been very undesirable information to Cooke & Co., but would have prevented the contract being entered into, for, in the case of the failure of Livesey & Co., Messrs. Cooke could not (I am giving the language used in the course of the evidence) have "squared their books," — that is, have applied the money due on the contracts to Maximos to discharge the liability of Livesey & Co. Mr. Tobin, one of the principal witnesses for the appellants (defendants), explains the object to be achieved very clearly: "*A.* If I have a number of transactions with a broker, I treat that broker as the dealer. He is called 'broker' technically; but practically he is the dealer or the contracting party with me. I know nobody else in the transaction. I have bought from him certain cotton, and I have sold to him certain cotton. I know how my account stands. If an undisclosed principal can come forward and claim on a certain portion of the contracts those that are in his favour, and saddle me with the rest, my position is entirely altered." Mr. Tobin also says that unless there was such a rule as he had stated in a previous answer, it would be impossible to carry on business in the Liverpool cotton arrival market. He means, of course, that there would be difficulties in the way of carrying on such business in the manner in which it is carried on in that market. Whether that may or may not be so, I do not know, nor shall I venture to speculate whether such a result would prove to be a mercantile calamity. We must not alter the law to suit the views or the convenience of the Liverpool cotton market.

The case at one time seemed to present a novel aspect, which it might have been difficult for the plaintiff to encounter. It was alleged that Maximos authorised Livesey & Co. to contract in their own names, and also prohibited them from disclosing his name as principal; and this seemed to be close on the confines of an express authority to contract in their own names as principals and as if owners of the cotton. I put the case to Mr. Kennedy during the argument; but he did not seem to attribute any weight to it, and properly so, for on examining the evidence carefully it falls short of the allegation, and does not appear to have been relied on in the Court of Appeal or in the Court below. The evidence in

this particular rests on two answers given by Mr. Tobin. In the one, on direct examination, he spoke as to a conversation with Maximos ten days before the trial, and said: "Mr. Maximos told me that he had instructed Messrs. Livesey not to give his (Mr. Maximos') name in the arrival market, but to give his own (Livesey's) name." But on cross-examination he corrected that statement from a memorandum made at the time, "as it was known that Livesey did business for him; but as other brokers came to him for business he authorised Livesey not to give his name, — that is the reason he gave you for saying what you have said he said? — *A.* Yes." This seems to me to fall short of authorising Livesey & Co. to contract in their own name as principals.

If Messrs. Cooke had asked Livesey, have you a principal in these contracts? we may assume their answer to be in the affirmative, and if further asked to name that principal they would have replied: He does not wish us to do so. The ascertained facts appear to stand thus: Livesey & Co. were extensive cotton brokers on the Liverpool cotton arrival market. They also dealt in cotton arrivals on their own account as principals. Their position was well known to Cooke & Co. Maximos employed Livesey & Co. as brokers to sell for him the particular lots of cotton, and they did so, — the contracts which they entered into, though in their own names, being in law contracts for and on behalf of Maximos. He also "authorised them not to give his name," which may be read as meaning not to give his name either in the contract-notes or in answer to inquiries, his special object seeming to be to avoid the jealousies or solicitations of other brokers. He did not prohibit them from giving his name, nor did he give them any right to sell in their own names as principals or as if they were the owners of the goods, and he did not arm them with the *indicia* of property, if any such existed. Cooke & Co., having at their hand the fullest means of information, abstained from making any inquiry as to whether Livesey & Co. were acting as brokers for a principal, or on their own account as principals and owners, and they say "they had no belief on the subject."

Such being the facts, I do not propose to criticise the numerous cases which *George* v. *Clagett*, *supra*, gave rise to, or to enter on the consideration whether the head-note to that case is misleading. The head-note frequently is misleading if you read it alone and do not take the trouble to read the case. It seems to me that the

judgment of the Master of the Rolls in the Court of Appeal is quite correct and supported by a number of authorities, including *Fish* v. *Kempton*, 7 Com. B. 687; 18 L. J. C. P. 206; *Borries* v *Imperial Ottoman Bank*, *supra*, and the lucid passages from the judgment of Mr. Justice Willes in *Semenza* v. *Brinsley*, *supra*.

I concur with my noble and learned friends in adopting at once the decision and the reasons of the Court of Appeal. I have, however, some hesitation in accepting the view that the decisions rest on the doctrine of estoppel. Estoppel *in pais* involves considerations not necessarily applicable to the case before us. There is some danger in professing to state the principle on which a line of decisions rests, and it seems to me to be sufficient to say in the present case that Maximos did not in any way wilfully or otherwise mislead the defendants (Cooke & Co), or induce them to believe that Livesey & Co. were the owners of the goods, or authorised to sell them as their own, or practise any imposition on them. The defendants were not in any way misled.

Order appealed from affirmed, and appeal dismissed with costs.

ENGLISH NOTES.

The right of set-off which is possessed under the circumstances stated in the rule will be ousted, if the principal intervenes and asserts his title before there is an executed contract: *Moore* v. *Clementson* (1809), 11 R. R. 653, 2 Camp. 22; *Kaltenbach* v. *Lewis* (H. L. 1885), 10 App. Cas. 617; 56 L. J. Ch. 58. In the latter case, the appellants, merchants at Singapore, employed M. in London as agent to sell, without authority to pledge, cargoes which they from time to time consigned to him. M. pledged with the respondents certain of the goods consigned to him for sale. The goods were sold for M. by the respondents, but had not been delivered to the purchasers nor paid for, when M. died insolvent and heavily indebted to the respondents on a general account. After the sale, but before receiving the proceeds, the respondents had notice that the appellants claimed the goods and the proceeds. It was held that the respondents could not set off the indebtedness of M. against the claim of the appellants; but were only entitled to retain out of the proceeds of sale the amount of the advance which they had made upon the pledge of the goods, — their title as pledgees being protected by the Factors' Acts.

The principles recognised in *Rabone* v. *Williams*, and *Cooke* v. *Eshelby* (the 1st & 3rd principal cases, pp. 391–398, *ante*), were applied in the recent case of *Montagu* v. *Forwood* (C. A. 1893), 1893, 2 Q. B. 350. There the plaintiffs, who had been employed by cargo owners to collect

the amount of a general average loss from underwriters at Lloyds', employed B. & C. as their agents to collect the money for them. B. & C. were merchants, and not brokers; and, not being members of Lloyds', employed the defendants, who were brokers at Lloyds', to collect the same, which they accordingly did. At the time the defendants received the money, there was a debt due to them from B. & C. Upon the bankruptcy of B. & C., which occurred shortly afterwards, the plaintiffs wrote to the trustee of the estate withdrawing their authority; and to the defendants, claiming any sum which they had received. The defendants believed that B. & C. were acting as principals; and it was held that, as there was nothing to lead them to suppose that B. & C. were not acting as principals, they were entitled to set off the money which they had received against the debts due to them from B. & C.

AMERICAN NOTES.

The doctrine of the first syllabus of the Ruling Cases Nos. 11, 12, 13, is fully sustained by American adjudications. *Tutt* v. *Brown*, 5 Littell (Kentucky), 1; 15 Am. Dec. 33; *Taintor* v. *Prendergast*, 3 Hill (New York), 72; 38 Am. Dec. 618; *Ruiz* v. *Norton*, 4 California, 355; 60 Am. Dec. 618; *Ilsley* v. *Merriam*, 7 Cushing (Mass.), 242; 54 Am. Dec. 721; *Foster* v. *Smith*, 2 Coldwell (Tennessee), 474; 88 Am. Dec. 604; *Peel* v. *Shepherd*, 58 Georgia, 365; *Baltimore C. T. Co.* v. *Fletcher*, 61 Maryland, 288; *Bernshouse* v. *Abbott*, 16 Vroom (New Jersey), 531; 16 Am. Rep. 789; *Eclipse Wind Mill Co.* v. *Thorson*, 46 Iowa, 181.

The doctrine of the second and third syllabi of Ruling Cases Nos. 11, 12, 13, is sustained by American cases. Where the third party knew or had reasonable grounds to believe that the factor was really acting as agent, he may not interpose his set-off. *Darlington* v. *Chamberlin*, 120 Illinois, 585; *Miller* v. *Lea*, 35 Maryland, 396; 6 Am. Rep. 417; *Ladd* v. *Arkell*, 40 New York Superior, 150; *Stewart* v. *Woodward*, 50 Vermont, 78; 23 Am. Rep. 485; *Childers* v. *Bowen*, 68 Alabama, 221; *Frame* v. *W. P. Coal Co.*, 97 Penn. St. 309; *McLachlin* v. *Brett*, 105 New York, 391.

The Ruling Cases Nos. 11 and 12 are cited in Mechem on Agency.

No. 14. — FOWLER *v.* HOLLINS (Exch. Ch. 1872) (Reported on appeal as) HOLLINS *v.* FOWLER.

(H. L. 1875.)

RULE.

Where a person obtains goods or the documents of title to goods from the owner, by a fraud, but without any relation of principal and agent being constituted between

them, he cannot, either by the common law or under the Factors' Acts, confer any title upon a purchaser of the goods.

A. is the owner of cotton. B., a cotton broker, under colour of a purchase on a ten days' credit for a buyer named C., who is known to A., obtains the documents giving control of the cotton, and then sells the cotton and delivers the documents to D., a *bonâ fide* purchaser for cash. D. sells and delivers to other purchasers. The sales are made in the usual manner of sales of cotton at Liverpool, but not in *market overt*. Subsequently, A. ascertains that C.'s name has been made use of without any authority. He then sues D. for conversion of the cotton. D. has no good defence to the action.

Hollins v. Fowler.

44 L. J. Q. B. 169; (s. c. L. R., 7 H. L. 757; and in the court below, S. N. Fowler *v.* Hollins, L. R., 7 Q. B. 616; 41 L. J. Q. B. 277).

This was an appeal from a judgment of the Court of Exchequer Chamber affirming a judgment of the Court of Queen's Bench upon a rule obtained in an action pending in the Court of Common Pleas, by which rule a verdict which at the trial of the action had been entered for the defendant in the action, now appellant, was ordered to be entered for the plaintiff in the action, now respondent.

The appeal to the Exchequer Chamber was brought on a Special Case. The facts were briefly as follows: —

The action was one of trover to recover the value of thirteen bales of cotton. The declaration contained counts in trespass and for money had and received. The defendant pleaded to the counts in trover and trespass not guilty, and to the money count never indebted. The cause was tried before Willes, J., and a special jury. The plaintiff was a merchant at Liverpool, and the defendant was a cotton broker of the same place carrying on business under the firm of Hollins & Co. In December, 1869, the plaintiff had instructed his brokers, Messrs. Rew & Freeman, to sell for him thirteen bales of cotton, and one H. K. Bayley offered to buy the cotton. H. K. Bayley was also a cotton broker, but Messrs. Rew

refused to sell to him unless the name of a responsible person were given as purchaser. Bayley then gave the name of T. Seddon, of Bolton, and to him Messrs. Rew agreed to sell. Bought and sold notes were made out, from and to the plaintiff and T. Seddon, in which the price and other particulars were mentioned, the price to be paid in cash within ten days; and on the same day, the 18th of December, 1869, Bayley obtained delivery of the goods at his warehouse as broker for T. Seddon. T. Seddon had not instructed Bayley to buy for him, and the use of his name by Bayley was a fraud. On the 23rd of December the appellant, who was, as above stated, a cotton broker at Liverpool, agreed with Bayley to buy the cotton at a certain price if it was according to sample then shown to him by Bayley, and a memorandum of the sale was made out to the appellant in his name, and his servant sampled the cotton. This was in the morning of the 23rd. At that time the appellant had no definite order from any customer to buy cotton, but he had a large number of customers, and it was his practice frequently, without definite instructions, to buy cotton which he, knowing as he did the trade and requirements of his customers, believed would suit them, feeling satisfied that they would take it, and trusting if the customer for whom he intended any lot of cotton when buying it should not take it, that he should be able to place it with some other customer. It happened that the appellant had that day received a message from Messrs. Micholls & Co., of Stockport, which firm was one of his customers, stating that they were coming to Liverpool on that day to buy cotton through the appellant. The appellant had had no other communication with Messrs. Micholls as to buying any cotton for them on that day. But he knew that the cotton was such as they were in the habit of buying, and he purchased the cotton, intending to buy it as a broker for Messrs. Micholls, feeling confident that as they were coming to buy they would take this cotton on their arrival at Liverpool. But as there was still a possibility of their not coming or not taking the cotton, he agreed with Bayley in his own name in the first instance, and he promised to send in the name of his principal in the course of the day. Soon after the above-mentioned agreement to buy, the appellant sent one of his men to sample the cotton, and later in the day a member of the firm of Micholls, Lucas & Co. called on the appellant, and having approved the cotton purchased it, paying the appellant the price

agreed on between the appellant and Bayley, together with the appellant's customary charges for commission and cartage. The appellant sent to Bayley a delivery order which stated that the cotton was bought for Micholls & Co. But the invoice had already been made out to the name of the appellant as purchaser. The invoice price of the cotton, £244 19*s.* 8*d.*, was paid by the appellant to Bayley, and, the same day, the cotton was conveyed in the appellant's cart to the railway, whence it was forwarded to Messrs. Micholls' mills at Stockport and was spun into yarn. Bayley kept the price of the cotton, and never accounted for it to the rightful owner nor to the brokers, Messrs. Rew & Co. The respondent, Fowler, not having been paid for the cotton on the 30th of December, 1869, applied to T. Seddon for settlement. He then found for the first time that Seddon had never authorised Bayley to buy the cotton for him. Bayley in the mean time had become bankrupt. The respondent then, as he discovered that his cotton had been removed from Bayley's warehouse by the appellant's servants, applied to the appellant to deliver up to him his said cotton or the value of it, and as the appellant refused to do this, the action was brought.

At the trial the Judge, Willes, J., left to the jury the questions whether the thirteen bales of cotton were bought by the defendant as agent in the course of his business as broker, and whether he dealt with the goods only as agent to his principal. The jury found a verdict on both questions in favour of the defendant, and the verdict was thereupon entered up for the defendant, leave being reserved to the plaintiff to move to enter the verdict for himself for the value of the said thirteen bales. The following are the terms of the leave reserved: If the defendant, having acted throughout honestly, in the ordinary course of business, having bought and paid for the cotton only as agent for Micholls, Lucas & Co., and having dealt with the goods only as agent to forward them, was answerable for the value of the thirteen bales as having converted them to his own use. The defendant to be at liberty to argue, if necessary, that the sale by Bayley gave a good title to a *bonâ fide* purchaser for value without notice.

The rule was moved on three grounds: — 1. That the verdict was against the evidence. 2. Misdirection. 3. On the point reserved. The Court refused the rule on the first two grounds, and made it absolute on the third ground, and ordered the verdict

to be set aside and a verdict entered for the plaintiff instead thereof for the value of the thirteen bales of cotton mentioned in the declaration.

The judgment of the Court of Queen's Bench having been affirmed by the Court of Exchequer Chamber, this appeal was brought upon a joint Special Case, which was as to all material facts similar to the Special Case argued in the Courts below.

The Judges in the Court of Queen's Bench who were unanimous in favour of the judgment for the now respondent were Mellor, J., Lush, J., and Hannen, J. The Judges who constituted the Court of Exchequer Chamber were equally divided, Martin, B., Cleasby, B., and Channell, B., being for affirming that judgment, Kelly, C. B., Byles, J., and Brett, J., being of opinion that judgment should be given for the appellant, the broker.

On this appeal the Judges were summoned, and the following learned Judges attended, — Blackburn, J., Mellor, J., Brett, J., Cleasby, B., Grove, J., and Amphlett, B.

The Solicitor-General (Sir J. Holker) and Herschell, for the appellant. The judgment of the Court of Error was on the facts, not on the finding of the jury. But the question whether there has been a conversion is entirely for the consideration of the jury. The Court cannot supply by intendment the want of its being expressly found by the jury, — Bacon's Abridgment, Trover, B. Now the jury distinctly found that the appellant dealt with the goods only as agent, and not as principal, and in the course of his business as broker; a broker's business being merely to find purchasers for those who wish to sell, and vendors for those who wish to buy, and superintend the making of the bargain between them. Blackburn's Contract of Sale, p. 81. The question therefore is, whether, the acts of the defendant having been the acts of a broker, there was a conversion. Now a conversion is defined in Bacon's Abridgment, Trover, B., as the assuming by one person to dispose of the goods of another as if they were his own. The act must be intentional. It must imply an assertion of a right. *Fouldes* v. *Willoughby*, 8 M. & W. 540; 10 L. J. Exch. 364. Purchasing and selling without handing over has been held no conversion. Micholls & Co. converted because they destroyed the cotton for their own use. A conversion must be for one's own use, or for the use of some one else. To take a watch and dash it against a wall is no conversion. Neither is the mere passing on of goods

a conversion, otherwise a carrier would be liable. But carriers are not liable, because they have no intention to change the property in the goods they carry. In the same way, the appellant did not intend to change the property in this cotton, and why should he be liable for taking the bales to the railway station and the railway company be not liable for carrying them to Stockport? Both the broker and the railway company were acting in the ordinary course of their business. No liability, therefore, attaches to either of them. The action should have been brought against Messrs. Micholls, who were Hollins' undisclosed principal, and who ratified the contract Hollins had made for them. The learned counsel cited *Burroughes* v. *Bayne*, 5 Hurl. & N. 296; 29 L. J. Ex. 185; *Foster* v. *Bates*, 12 M. & W. 226; 13 L. J. Ex. 88; *Greenway* v. *Fisher*, 1 Car. & P. 190; *Heald* v. *Carey*, 11 Com. B. 977; 21 L. J. C. P. 97; *The Lancashire Waggon Company* v. *Fitzhugh*, 6 Hurl. & N. 502; 30 L. J. Exch. 231.

J. Kay, C. Russell, and Bigham, for the respondent. — The defendant bought as principal, and was liable to Bayley as vendee. Even if he had dealt with it merely as a broker in the ordinary course of his business he would be liable as for a conversion as sheriffs and auctioneers are liable in similar cases. Carriers, packers, and wharfingers do not interfere with the dominion or property in the goods they transmit in bulk. But if the carrier misdeliver he is liable in trover. They cited the following authorities: *Baldwin* v. *Cole*, 6 Mod. 212; *McCombie* v. *Davies*, 6 East, 538; 8 R. R. 534; *Stephens* v. *Elwall*, 4 M. & S. 259; *Garland* v. *Carlisle*, 4 Cl. & F. 690; *Newhale* v. *Tomlinson*, L. R., 6 C. P. 405; *Simmons* v. *Lillystone*, 8 Exch. Rep. 431; 22 L. J. Exch. 217; *Greenway* v. *Fisher*, *supra*; *Hardman* v. *Booth*, 1 Hurl. & C. 414; 32 L. J. Exch. 105; *Perkins* v. *Smith*, 1 Wils. 328; *Cooper* v. *Chitty*, 1 Ken. 395; 1 Burr. 20; 1 Black. Rep. 65; *Lee* v. *Bayes*, 18 Com. B. 599; s. c. sub nom. *Lee* v. *Robinson*, 25 L. J. C. P. 249; *Sheridan* v. *The New Quay Company*, 4 Com. B. (N. S.) 618; 28 L. J. C. P. 58; *Bird* v. *Brown*, 4 Exch. Rep. 786; 19 L. J. Exch. 154; Comyn's Digest, Action in Trover E; Story on Agency, 308; Hilyard on Torts, vol. 2, p. 208.

Holker replied.

The following question was submitted to the Judges: —

"Whether under the circumstances stated in the joint case on appeal the respondents were entitled to have a verdict entered for

them for the value of the thirteen bales of cotton mentioned in the declaration."

Opinions were accordingly delivered by BLACKBURN, J., MELLOR, J., GROVE, J., and CLEASBY, B., who in effect concurred in answering the question in the affirmative; and by BRETT, J., and AMPHLETT, B., who answered the question in the negative. As the most important of the opinions of the majority is here set forth the opinion of —

BLACKBURN, J. — It appears from the statement in the case that the plaintiffs had delivered into the actual custody of Bayley, a broker, thirteen bales of cotton, the property of the plaintiffs; the plaintiffs believing that they had sold them to Seddon, through Bayley, as Seddon's broker, after they had refused to trust Bayley himself; and believing that Bayley was the agent of Seddon to receive delivery; so that the plaintiffs thought that they were transferring the property to Seddon, but were mistaken, as in fact Bayley had no authority from Seddon either to purchase or to take delivery.

Under such circumstances the property and legal right to the possession remained in the plaintiffs, and Bayley could not (except by a sale in *market overt*) confer on any one, however innocent, a title superior to his own. He could not do it under the Factors Act, because he was not intrusted by the plaintiffs as their agent, nor could he do it as being a person in whom the property had vested, subject to being divested by the plaintiffs, for no property, even defeasible, ever passed from the plaintiffs, as there never was any contract with any one, though they erroneously thought there was one with Seddon. These points were decided, as I think rightly, in the case of *Hardman* v. *Booth*, *supra*.

From the terms of reservation, it appears that the defendant had an opportunity to have the case reviewed in a Court of Appeal, if so advised, for it is that "the defendant be at liberty to argue if necessary, that the sale by Bayley, under the circumstances, gave a good title to a *bonâ fide* purchaser for value without notice." The Court of Queen's Bench, being bound by the decision of a Court of co-ordinate jurisdiction, could not so hold; and the defendants have not raised the point for a Court of Appeal.

I proceed to state the further facts: — .

The defendants, as brokers, acting for Messrs. Micholls, and

Messrs. Micholls as customers, acting through the defendants as brokers, dealt with Bayley in a manner which would have been quite right, if Bayley had been an honest man, or, even a dishonest man, if intrusted by the plaintiffs with the possession of the goods as an agent for sale.

And the defendants and Micholls were both innocent of any knowledge of any infirmity in Bayley's title, and not only were they innocent, but I think there is nothing amounting even to evidence of negligence on the part of the defendants in dealing with Bayley without further inquiry, nor *a fortiori*, in Micholls, who trusted the defendants to act for him, and dealt with Bayley because the defendants selected him.

Under those circumstances, your Lordships ask the question, whether the respondents were entitled to have a verdict entered for them for the value of the thirteen bales of cotton.

And I answer that question in the affirmative. However hard it may be on those who deal innocently, and in the ordinary course of business, with a person in possession of goods, yet, as long as the law, as laid down in *Hardman* v. *Booth*, *supra*, is unimpeached, I think it is clear law, that if there has been what amounts in law to a conversion of the plaintiffs' goods, by any one, however innocent, that person must pay the value of the goods to the plaintiffs. See *Stephens* v. *Elwall*, *supra*, *Garland* v. *Carlisle*, *supra*.

And, accordingly, I think it has not been disputed by any one, that if the plaintiffs had sued Micholls, who has worked this cotton up into yarn, Micholls must have had judgment against him for the value of the cotton, and would be liable to pay the price over again, though he honestly transmitted the price to the defendants who honestly handed it to Bayley.

And I take it that if the defendants have done what amounts in law to a conversion they also must be liable to pay the plaintiffs.

It is hard on them I agree, but I do not think it is harder than it would have been on Micholls. Indeed I think that if the plaintiffs were told that they had recourse, at their option, against either the broker or the spinner, they might, without any obvious injustice, have said, then make the broker pay, for he went to Bayley's, so that if there is any fault it is his.

But we cannot act on any notions of hardship.

When a loss has happened through the roguery of an insolvent, it must always fall on some innocent party; and that must be a hardship. Had the Legislature thought fit to make a sale in the Cotton Market at Liverpool equivalent to a sale in *market overt*, the loss would have fallen on the plaintiffs. As it is it falls on any one who has done what the law esteems a conversion.

We must, I apprehend, in such cases look only to the question whether on the established principles of law the complaining party makes out that the loss should fall on the innocent defendant rather than on himself the equally innocent plaintiff.

If, as is quite possible, the changes in the course of business since the principles of law were established make them cause great hardships or inconvenience, it is the province of the Legislature to alter the law. That has been done to a very considerable extent by the Factors Acts, and it may be expedient to extend the alteration further, but those Acts have not as yet been extended so far as to embrace the case of any one, whether as broker or otherwise, dealing with a person in the position of Bayley in this case. And I apprehend your Lordships will not, in your judicial capacity, depart from the established principles of law to meet the hardships of a particular case, even if you were so convinced of that hardship as to be willing in your legislative capacity to concur in a change of the law in future. But this leaves open what I take it is the real question in this case, — viz., whether what the defendants did amounts on the established principles of law to a conversion.

I own that it is not always easy to say what does and what does not amount to a conversion. I agree with what is said by my brother BRETT in his judgment below, that in all cases where we have to apply legal principles to facts, there are found many cases about which there can be no doubt, some being clear for the plaintiff and some clear for the defendant, and that the difficulties arise in doubtful cases, on the border line between the two.

I think many cases which at first seem difficult are solved if the nature of the action is remembered.

Lord MANSFIELD says in *Cooper* v. *Chitty*, *supra*, "The bare defining of this kind of action and the grounds upon which a plaintiff is entitled to recover in it, will go a great way towards the understanding and consequently the solution of the question in this particular case. In form it is a fiction, in substance,

a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods. This action lies, and has been brought in many cases where in truth the defendant has got the possession lawfully. When the defendant takes them wrongfully, and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass, and admits the possession to have been lawfully gotten."

It is generally laid down that any act which is an interference with the dominion and right of property of the plaintiff is a conversion, but this requires some qualification.

From the nature of the action, as explained by Lord MANSFIELD, it follows that it must be an interference with the property which would not, as against the true owner, be justified, or at least excused, in one who came lawfully into possession of the goods.

And in considering whether the act is excused against the true owner it often becomes important to know whether the person doing what is charged as a conversion had notice of the plaintiff's title.

There are some acts which from their nature are necessarily a conversion, whether there was notice of the plaintiff's title or not. There are others which if done in a *bonâ fide* ignorance of the plaintiff's title are excused, though if done in disregard of a title of which there was notice they would be a conversion. And this, I think, is borne out by the decided cases. Thus a demand and refusal is always evidence of a conversion. If the refusal is in disregard of the plaintiff's title, and for the purpose of claiming the goods either for the defendant or a third person, it is a conversion. If the refusal is by a person who does not know the plaintiff's title, and having a *bonâ fide* doubt as to the title of the goods, detains them for a reasonable time for clearing up that doubt, it is not a conversion. See *Israel* v. *Clarke*, 2 Bulst. 312; *Vaughan* v. *Watt*, 6 M. & W. 492; 9 L. J. (N. S.) Exch. 272.

The principle being, as I apprehend, that the detention, which is an interference with the dominion of the true owner is, under such circumstances, excused, if not justified.

So the finder of goods is justified in taking steps for their protection and safe custody till he finds the true owner. And there-

fore it is no conversion if he *bonâ fide* removes them to a place of security. And so far the general statement that an asportation is a conversion must be qualified.

I cannot find it anywhere distinctly laid down, but I submit to your Lordships that on principle, one who deals with goods at the request of the person who has the actual custody of them, in the *bonâ fide* belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does, if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods or intrusted with their custody.

I do not mean to say that this is the extreme limit of the excuse, but it is a principle that will embrace most of the cases which had been suggested as difficulties.

Thus a warehouseman with whom goods have been deposited is guilty of no conversion by keeping them, or restoring them to the person who deposited them with him, though that person turns out to have had no authority from the true owner. See *Heald* v. *Carey, supra; Alexander* v. *Southey*, 5 B. & Ald. 247.

And the same principle would apply to the cases alluded to by my brother HANNEN in his judgment in the court below, of persons "acting in a subsidiary character, like that of a person who has the goods of a person employing him to carry them, as a caretaker, such as a wharfinger." It will enable us also to answer a question put during the argument at your Lordships' bar. It was said, "Suppose that the defendant had sent the delivery order to Micholls, who had handed it to the railway company, requesting them by means of it to procure the goods in Liverpool and carry them to Stockport, and the railway company had done so, would the railway company have been guilty of a conversion?"

I apprehend they would not, for merely to transfer the custody of goods from a warehouse at Liverpool to one at Stockport is *primâ facie* an act justifiable in any one who has the lawful custody of the goods as a finder, or bailee, and the railway company, in the case supposed, were in complete ignorance that more was done. But if the railway company, in the case supposed, were fixed with knowledge that they were doing more than merely changing the custody and knew that they were transferring the property from one who had it in fact to another who was

going to use it up, the question would be nearly the same as that in the present case. It would, however, be very difficult, if not impossible to fix a railway company with such knowledge.

And on the same principle I take it the ruling of Lord TENTERDEN in *Greenway* v. *Fisher*, *supra*, may be supported; for the packer was merely giving facilities for the transport of the goods from one place to another, and was ignorant of the circumstances which made it wrong against the true owner to remove the goods, though I admit that his decision is not put by Lord TENTERDEN on this ground, but on that of the packer's being a public employment, which I think my brother BRETT in his judgment below correctly shows to be a mistaken ground; I think the public nature of his employment was strong evidence that he was doing no more than assist in the change of custody, which was, on the principle suggested, excused in one ignorant of all that made the change of custody wrongful, but I do not see how in itself it made any difference. A packer is not like a carrier or innkeeper bound to receive all goods brought to him.

I think, however, it is but candid to admit that the principle I have submitted to your Lordships, though it will solve a great many difficulties, will not solve all.

In Comyn's Digest, Action on the Case upon Trover, E., it is said, "If a man deliver the oats of another to B. to be made oatmeal, and the owner afterwards prohibits him, yet B. makes the oatmeal, this is a conversion." *Per* BERKELY, 1638.

To this every one would agree; but suppose the miller had honestly ground the oats and delivered the meal to the person who brought the oats to him before he even heard of the true owner. How would the law be then? Or suppose the plaintiffs in the case at your Lordships' bar had, for some reason, brought the action against Micholls' men who assisted in turning this cotton into twist? The principle I have suggested would hardly excuse such conversions; and yet I feel that it would be hard on them to hold them liable. If ever such a question comes before me, I will endeavour to answer it. I think it is not necessary now to do so, for I think that what the defendants are found to have done in the present case amounts to a conversion, and is not in any way excused.

I do not rely on the ground taken in the earlier part of my brother CLEASBY's judgment below, that the defendants themselves

were the purchasers from Bayley, for though, if it were left to me to draw inferences of fact, I should draw that inference, I doubt if it is open to me so to do after the finding of the jury. But though it is to be taken in favour of the defendants that they acted throughout as brokers, and only as brokers, for Micholls, I still think them guilty of a conversion.

The case against them does not rest on their having merely entered into a contract with Bayley, or merely having assisted in changing the custody of the goods, but on their having done both. They knowingly and intentionally assisted in transferring the dominion and property in the goods to Micholls, that Micholls might dispose of them as their own, and the plaintiffs never got them back. It is true they did it as brokers for Micholls, and not for any benefit for themselves; but that is not material, see *Parker* v. *Godin*, 2 Str. 813. There, the jury (considering the defendant acted only as a friend, and that it would be hard to punish him) found a verdict for the defendant. But upon application to the court a new trial was granted, upon the fact of its being an actual conversion in the defendant, notwithstanding he did not apply the money to his own use.

No doubt in that case the friend, it may be inferred, knew of the bankruptcy, and was therefore not an innocent party. But that remark will not apply to *Stephens* v. *Elwall*, *supra*. Lord Ellenborough there says, "The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master, but nevertheless his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it." No case harder than that of the defendant in *Stephens* v. *Elwall*, *supra*, can well be imagined, unless perhaps that of a sheriff who seized the goods which, in consequence of a secret act of bankruptcy, had become the goods of the assignees. He was liable to them in trover; see *Garland* v. *Carlisle*, *supra*. The Legislature altered the law to avoid the hardship, making the loss in future fall on the assignees; and the Legislature may, to avoid the hardship on persons situated like the defendants, extend the protection now given to purchasers in *market overt*, and to persons dealing with agents intrusted under the Factors Acts, to brokers dealing with any one in the ordinary markets

Those who agree with the opinion expressed by the Lord Chief Baron that it is unreasonable and unjust that they should be bound, at their peril, to inquire into the title of the sellers with whom they deal, would support an alteration of the law to that effect. Many, having regard to the interests of the true owners of goods, would object to it. But I think the law as it exists does not protect such brokers.

The conversion in the case of *Stephens* v. *Elwall, supra*, consisted in assisting in transferring the goods from Deane to the defendant's master in America, with intent to transfer Deane's *de facto* property to the defendant's master. Deane's title was bad against the plaintiffs, who were assignees of Spencer, because he had bought them from Spencer after an act of bankruptcy, though of that the defendant was ignorant, unavoidably ignorant, says Lord Ellenborough.

The conversion in the present case consists in, by means of the delivery order, transferring the goods from Bayley to Micholls with intent to transfer Bayley's *de facto* property to Micholls. Bayley's title was bad against the now plaintiffs, though of that the defendants were ignorant. I can see no possible distinction between the two cases. No doubt *Stephens* v. *Elwall, supra*, may be overruled in this House, but I do not think it wrong, and no decision cited, or of which I am aware, seems to me in conflict with it. *Ross* v. *Johnson*, 5 Burr. 2825, cited by my brother Brett, is not in point. There the defendant had received goods as plaintiff's warehouseman. They were lost, and the ruling of the Court was, that though an action might lie for negligence, if there was any, there was no conversion.

The Lancashire Waggon Company v. *Fitzhugh, supra*, was an action for the injury to the reversionary interest of the plaintiffs in certain goods let to one Pell, for a term. The sheriff had seized and sold those goods under an execution against Pell. He had a right to sell Pell's limited interest, but none to sell the plaintiff's interest; and the question raised, or at least intended to be raised on the record was, whether the sheriff had done anything injurious to the plaintiff's interest. I have failed to see how the decision bears upon the point now in dispute, except in so far as the decision, that though a sale is no conversion, a sale and delivery to one who sues the goods is, makes against the defendant.

I need hardly say, that where there has been so great a difference of judicial opinion, I express my opinion with diffidence; but the reasons I have given lead me to form the opinion I have expressed, and I therefore answer your Lordships' question in the affirmative.

The judgment of their Lordships' House was moved by —

Lord CHELMSFORD. — The question upon this appeal is whether the appellants are liable in trover for the conversion of thirteen bales of cotton, the property of the respondents. From the difference of opinion which has existed among the Judges, the Court of Exchequer Chamber being equally divided, and two of the six learned Judges, of whose judgment your Lordships have had the benefit, having differed with the majority, the question may be regarded as one of some difficulty, as it certainly is one of general importance.

The respondents are merchants at Liverpool. In 1869 they instructed their brokers to sell the thirteen bales of cotton in question. A person named Bayley, a cotton broker in Liverpool, offered to purchase the cotton. The respondents' brokers refused to sell unless the name of a responsible person were given as purchaser. They were therefore told by Bayley that he was buying as broker for Thomas Seddon, of Bolton. Bayley had no authority from Seddon to buy for him. The brokers being ignorant of this want of authority agreed to sell the cotton to Seddon, and on the 18th of December, 1869, sent to the respondents a sold note, with Seddon's name as buyer, and to Bayley a bought note of the purchase by him for Seddon. On the same day Bayley sent to the respondents' brokers a sampling and delivery order for thirteen bales of cotton bought by him for Seddon. Bayley afterwards offered to sell the cotton to the appellants, Francis Hollins & Co., who are cotton brokers at Liverpool. They agreed to purchase the thirteen bales at $11\frac{1}{4}$ per lb., and to send in the name of their principal in the course of the day. The appellants afterwards applied to Bayley for an order to allow them to sample the cotton by the following note: —

"LIVERPOOL, 23rd of December, 1869.

"Messrs. H. K. Bayley & Co., — Please allow the bearer to sample 13 bales of cotton. *Ex Minesota*, at $11\frac{1}{4}$ per lb., bought this day for Francis Hollins & Co."

No. 14. — Fowler v. Hollins.

It is stated in the joint case upon appeal that the appellants have a large number of customers, and frequently, and without any definite instructions, buy cotton believing it will suit them, but if it should happen that a customer for whom they intended to buy the cotton will not take it they trust to be able to place it with some other customer.

The appellants on the morning of the 23rd of December had received a message from Messrs. Micholls, Lucas & Co., cotton spinners, Stockport, for whom the appellants were in the habit of purchasing cotton, stating that they were coming to Liverpool that day to purchase cotton through the appellants. This was the only communication which the appellants had with Micholls, Lucas & Co., this day, as to buying for them any cotton. But at the time they agreed to purchase the appellants intended the cotton for Micholls, Lucas & Co.

About half an hour after the appellants had agreed with Bayley, Mr. Micholls came to their office, and after seeing samples of the cotton, and satisfying himself as to the quality and price, agreed to take it. Later in the day the appellants sent to Bayley a delivery order, which stated that the cotton was bought for Micholls, Lucas & Co. This was the first intimation Bayley received of Micholls, Lucas & Co., being interested in the purchase of the cotton. He sent to the appellants (whether before or after the introduction of the names of Micholls, Lucas & Co. into the transaction it does not appear) an invoice in these terms —

"Liverpool, December 23rd, 1869.

"Messrs. Francis Hollins & Co., — Bought from H. K. Bayley & Co. 13 bales of cotton, *Ex Minesota*, at $11\frac{1}{2}$ per lb.," &c.

The delivery order received by the appellants was taken to the warehouse of Bayley by one of their clerks, and the thirteen bales of cotton were received by the appellants, and conveyed to the railway station, and forwarded to Micholls, Lucas & Co., at Stockport. The invoice price of the cotton was paid by the appellants to Bayley, and the amount, together with a charge for their commission, they had repaid by Micholls, Lucas & Co. The respondents, having applied to Seddon for payment for the cotton, discovered the fraudulent misrepresentation of Bayley, that he had bought as Seddon's broker, by which he got posses-

sion of it. And learning that Bayley had sold the cotton to the appellants, the respondents called upon them for payment; and upon the appellants' refusal to pay, the present action was brought.

At the trial, the above facts being proved, WILLES, J., left to the jury two questions; first, Whether the thirteen bales of cotton in question were bought by the defendants as agents in the course of their business as brokers? second, Whether they dealt with the goods only as agents to their principals? The jury having answered both questions in the affirmative, the learned Judge directed the verdict to be entered for the defendants, reserving leave to the plaintiffs to move to enter the verdict for them for the price of the cotton.

The respondents accordingly moved the Court of Queen's Bench for a rule to show cause why the verdict entered for the defendants should not be set aside, on the grounds, first, that the verdict was against the weight of evidence; secondly, for misdirection; and thirdly, upon the leave reserved to enter the verdict for them. The court granted the rule on the third question, but refused it on the other two.

Upon the argument of the rule the court were unanimously of opinion that the rule to enter the verdict for the plaintiffs ought to be made absolute, on the ground that the defendants, in effect, bought as principals, and would have been liable to Bayley as vendees; and having dealt with the cotton as if the property were in them, by assigning it to Micholls, Lucas & Co., they were liable to the plaintiffs for a conversion, on its turning out that no property had passed from the plaintiffs to Bayley. Upon the appeal to the Exchequer Chamber, that Court (as I have already mentioned) were equally divided, and in this state of things the appeal is brought to your Lordships' house.

In considering the case it is necessary, in the first place, to determine what is the exact effect of the finding by the jury, which some of the Judges thought bound them to regard the appellants as acting in the transaction merely as brokers in the ordinary mode of dealing by persons in that character. Now there was evidence at the trial (as stated in the case upon appeal) that not an unusual mode of business with the appellants was to purchase cotton upon the chance of its suiting some of their numerous customers; and therefore the finding of the jury, that the cotton in question was bought by the defendants as agents, in

the course of their business as brokers, does not necessarily mean that they bought according to the ordinary dealings of brokers for principals, but merely that they bought in their character of brokers; involving in it the proved course of the business in which they were accustomed to buy as brokers for the purpose, not of retaining the goods for themselves, but of keeping them only till they could find a purchaser for them.

At the time when the appellants purchased the cotton from Bayley they had no principals, and therefore if Micholls, Lucas & Co. had not afterwards intervened, the appellants alone must have been liable; but if once the liability attached, which liability would have been to the true owners of the cotton and not to the fraudulent vendor, the appellants could only have been discharged by the acceptance by the owners of Micholls, Lucas & Co. as purchasers, which it is unnecessary to add never took place. The appellants at the time of the sale to them were in the position of agents with an undisclosed principal. Bayley knew they were agents because they promised to send in the name of their principal in the course of the day; but if the appellants had been sued before they had named a principal they would have had no defence.

The question upon the facts is whether the appellants were guilty of a conversion. There can be no doubt that the property and legal right of possession of the cotton remained in the respondents, and Bayley, who had fraudulently obtained possession of it, could not give a title to any one to whom he transferred the possession, however ignorant the transferee might be of the means by which Bayley acquired it. A great deal of argument was directed to the question what amounts in law to a conversion. I agree with what was said by BRETT, J., in the Court of Exchequer Chamber, in this case: "That in all cases where we have to apply legal principles to facts there are found many cases about which there can be no doubt, some being clear for the plaintiff and some clear for the defendant; and that the difficulties arise in doubtful cases on the border line between the two." But to my mind the proposition which fits this case is, that any person who, however innocently, obtains the possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion.

No. 14. — Fowler v. Hollins.

The Court of Queen's Bench in their judgment in this case thought that it was not distinguishable in principle from *Hardman* v. *Booth*, *supra*. In that case the plaintiffs were worsted manufacturers near Manchester; one of the partners, being in London, called at the place of business of a firm of Gandell & Co. for orders. At that time the firm, which had been long established and was well known, consisted only of Thomas Gandell, whose son, Edward Gandell, was his clerk and managed the business. On inquiring for Messrs. Gandell, one of the workmen directed the plaintiff to the counting-house, where he saw Edward Gandell, who led him to believe he was one of the firm of Gandell & Co., and under that belief the plaintiff sent goods to the place of business of Gandell & Co., and invoiced them to Edward Gandell & Co. Edward Gandell, who, unknown to the plaintiff, carried on business with one Todd, pledged the goods with the defendant Booth for advances *bonâ fide* made to Gandell, and Todd and the defendant afterwards sold the goods under a power of sale. It was held by the Court of Exchequer that the defendant was liable for a conversion on the ground that there was no contract of sale, inasmuch as the plaintiffs believed that they were contracting with Gandell & Co., and not with Edward Gandell personally, and Gandell & Co. never authorised Edward Gandell to contract for them, consequently no property passed by the sale; and the defendant, though ignorant of Gandell & Todd's want of title to the goods, was liable in trover for the amount realised by the sale. I agree with the Court of Queen's Bench that *Hardman* v. *Booth*, *supra*, is not to be distinguished from the present case.

I may also advert to the case of *Stephens* (*assignee of Spencer*) v. *Elwall*, *supra*, mentioned by BLACKBURN, J., in his opinion delivered to your Lordships in this case. There the bankrupts, after their bankruptcy, sold goods to Deane to be paid for by bills on Heathcote, for whom Deane bought the goods. Heathcote was in America and the defendant Elwall was his clerk, and conducted the business of his house in London. Deane informed the defendant of the purchase, and the goods being afterwards delivered to him, he sent them to America to Heathcote. This was held to be a conversion by the defendant. Lord ELLENBOROUGH said: "The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master, but

nevertheless his acts may amount to a conversion, for a person is guilty of a conversion who intermeddles with my property and disposes of it; and it is no answer that he acted under the authority of another, who had himself no authority to dispose of it. This case was decided sixty years ago, and I do not find that the authority of it has ever been disputed."

I think the judgment of the Court of Queen's Bench and of the Exchequer Chamber are right, and should be affirmed.

The Lord Chancellor. — In this case having had the advantage of reading beforehand the opinion of my noble and learned friend, who has moved the judgment of your Lordships, and agreeing entirely with that opinion, I do not delay your Lordships by any reference to the facts of the case.

It is quite clear that in law the appellants at the time when they purchased the thirteen bales of cotton on the 23rd of December, 1869, had no principals, and must themselves have been liable on the contract, and although we must take it on the finding of the jury that the cotton was bought by the defendants as agents in the course of their business as brokers, that is explained by the statement that they were in the habit of making purchases of cotton without any instructions, but believing that the cotton would suit certain purchasers, and trusting to them to take it off their hands. There is no doubt that it is according to this course of their business as brokers that the cotton in question was purchased, and that the appellants bought it intending to request Micholls & Co. to adopt the contract, but until an agreement was made between Micholls & Co. and the appellants that the former would take the cotton, the appellants were the masters of it. They might on the one hand have done with the cotton what they pleased, and on the other hand, if Micholls & Co. refused to take the cotton, the appellants alone would have been liable on the contract.

In this state of circumstances I agree with what is said by Mr. Justice Grove, that the jury appear to have meant that the appellants never bought, intending to hold or to make a profit, but with a view to pass the goods over to Micholls & Co., or if they did not accept them, to some other customer, and that, therefore, in one sense they acted as agents to principals, only intending to receive their commission as brokers, and never thinking of retaining the goods or dealing with them as buyers and

sellers. But, as Mr. Justice GROVE continues, "this would leave the question untouched, whether they did not exercise a volition with respect to the dominion over the goods, and whether although they intended to act and did act in one respect as brokers, not making a profit by resale, but only getting brokers' commission, they did not intend to act in relation to the seller in a character beyond mere intermediates, and not as mere conduit pipes." In my opinion they did act in relation to the sellers in a character beyond mere agents. They exercised a volition in favour of Micholls & Co., the result of which was that they transferred the dominion and property in the goods to Micholls in order that Micholls might dispose of them as their own; and this, as I think, within all the authorities, amounted to a conversion.

I therefore agree with the motion of my noble and learned friend.

Lord HATHERLEY. — I also agree in the opinion that has been expressed by my noble and learned friends, and I have little to add to what has already been said.

It seems to be admitted by everybody without any dispute whatever, that the title of the plaintiffs to the goods in question had not in itself been displaced. The real question comes only to be, whether or not there has been a wrongful conversion of those goods by what took place, — that is, whether the defendants in the action are responsible or Micholls who was introduced in the manner described by Lord CHELMSFORD. That the defendants bought the goods with the intention of acting as agents for any person who might be willing to take the goods, and to take the advantage of the bargain they had made, I have no doubt, and I apprehend, my Lords, that we must look at the whole of the evidence in this case and the verdict of the jury to ascertain the point I have stated, and that point alone. It is plain from the evidence in the case that at the time the purchase was made by the defendants from Bayley they had no definite instructions from any one, although they were prepared to act upon the instructions of any client whom the goods might suit, and they found that Mr. Micholls was a person whom they would suit. The purchase of the goods by Mr. Micholls not having taken place at the time, or previous to the time when the arrangement for the purchase was made, and the purchase was completed by

Bayley, it appears to me that we can only look upon the purchase of the goods as having been made by that right which they led the plaintiffs to suppose they had acquired by their purchase from Bayley, and with the intention no doubt of passing on that right to any one who was willing to accept the goods from them upon the bargain they had made, they being at the same time in such a position that they would have been answerable as upon a *bonâ fide* sale to themselves, and would have had the goods as their own property until such time as they were taken off their hands by a purchaser.

Lord O'Hagan. The result of your Lordships' consideration of this case will, I fear, inflict hardship upon the defendants. They are innocent of any actual wrong doing. But those with whom they are in conflict are as innocent as they, and we can only regard the liability attached to them by the law, without being affected in our judgment by its unpleasant consequences. They appear to me to have been guilty of a conversion in dealing with the plaintiffs' property, and disposing of it to other persons without any right or authority to do so. Confessedly that property never passed from the plaintiffs. Bayley's fraud vitiated the sale to him, and he could not convey to the defendants what in no way belonged to himself. They paid for it and sampled it, and then disposed of it to Mr. Micholls, whom they reasonably expected to make the purchase, but who had not made it and was not bound to make, when the void sale was effected with Bayley, and the defendants got possession of the plaintiffs' cotton. They had it conveyed to the railway station and forwarded to the purchaser in Stockport, who paid for it and made yarn of it. It seems to me that the state of facts entitles the plaintiffs to recover in an action of trover, which rests on a right to property wrongfully interfered with, at the peril of the person interfering with it, and whether the interference be for his own use or that of anybody else.

If the case had been that of a mere broker purchasing for his principal, it would have been, in my mind, much more difficult, for I do not think it plain, with Mr. Baron Martin, that it is of no consequence to a right decision whether the defendants acted in the transaction as principals or agents. In my view of the finding of the jury, which that learned Judge held immaterial, it is not necessary to determine as to the correctness or incorrectness

of his opinion in that respect. But for that finding, the facts in evidence appear to me plainly sufficient to remove all difficulty on the score of agency. The defendants were brokers, and as such had the habit of making purchases on the expectation that clients would take the goods from them; but in the particular matter with which we have to deal, they purchased for themselves in their own names and on their own responsibility. They had no principal at the time of the purchase. Mr. Micholls did not examine the cotton and make his bargain until some time after it had been completed, and the invoice was headed "Messrs. Francis Hollins & Co., bought from H. K. Bayley & Co." On this state of fact I agree with the learned Judges of the Court of Queen's Bench, that this is not the case of a mere broker dealing with goods only in that character. That, although they were actually brokers and intended to make profit in that character, the defendants bought as their own principals, and that the dealing with Micholls & Co. was in fact a resale, in which they acted on the assumption that the property had been transferred to themselves by Bayley, and they conveyed it to a new purchaser in derogation and denial of the plaintiffs' right. So considered, the case appears to me to be concluded by the authority to which my noble and learned friends have sufficiently referred, namely, *Hardman* v. *Booth*, *supra*.

The real difficulty which embarrasses the decision has arisen on the findings of the jury, and the form of reservation by which, properly understood, we are bound to abide. And unquestionably, although that view does not appear to have been pressed in the Court of Queen's Bench, I have felt the force of the objection founded on the findings, and I have doubted whether some of the Judges in the Exchequer Chamber were not right in holding themselves compelled by the verdict to differ from the learned Judges of the Queen's Bench, with whose conclusion they would otherwise have concurred.

But, on consideration, I do not deem the difficulty insurmountable, as I think the findings in one aspect quite reconcilable with what seems to me the true inference from the facts. We must take it, as the jury found, that the defendants acted as brokers or agents in their purchase from Bayley. But, as has been observed already, the case shows that the defendants frequently purchased, not intending to sell for profit, on their own

account, but taking their chance of finding customers who would adopt the bargain, and content to accept their commission, as the only advantage resulting to themselves. In this sense, and according to this usage, they might properly, though perhaps not in perfectly unexceptionable language, be said to have acted as brokers in the dealings before us; but they were not merely brokers, negotiating "only as such," and representing in the ordinary way principals, disclosed or undisclosed, for they had no principals, and they had other relations to the goods with which they meddled, and quite other interests than they would have had if they had been "simple negotiators or mediums of communication between buyer and seller," according to the description of the Lord Chief Baron. They do not seem to me to have been rightly likened to the carrier or the packer who is merely such a medium, and the jury may have been warranted in holding that their dealings were in one sense conducted by them as brokers, according to their peculiar course of business, and with a view to commission and not to sale; though in another sense, they had not the purely representative and intermediary character without regard to personal results or meddling with other men's property, which might have relieved them from the operation of the stringent doctrines of trover and conversion.

I think, therefore, that the appeal should be dismissed, and that the judgments of the Queen's Bench and Exchequer Chamber should be affirmed.

Judgment of the Court of Exchequer Chamber affirmed; and appeal dismissed with costs.

ENGLISH NOTES.

Whenever a person deals with the goods of another, with the intention of affecting the title to them, without the authority of the true owner, he is guilty of a conversion, and is liable to be cast in damages therefor; and the fact that he had no notice of the title of the true owner is no excuse. Thus, an auctioneer selling cabs by auction, upon the instructions of a person who had merely hired them, was held liable in an action of trover at the suit of the bailor; *Cochrane* v. *Rymill* (C. A. 1879), 40 L. T. 744. In the more recent case of the *Consolidated Bank* v. *Curtis & Son* (1892), 1892, 2 Q. B. 495, 61 L. J. Q. B. 325, an auctioneer who had sold by auction goods assigned by a bill of sale, upon the instructions of the grantor thereof, was held liable in a similar action at the suit of the grantee.

But where a person does not by his acts affect, or purport to affect, the title of the true owner, he is under no liability. Thus where the only act of the defendant is to bring a buyer and seller of goods together, — acting, as has been said, as a mere "intermediary" or "conduit pipe," — he cannot be made responsible. *National Mercantile Bank* v. *Rymill* (C. A. 1881), 44 L. T. 769.

It sometimes happens, as in the principal case, that the true owner has been deprived of his goods, or what amounts to the same thing, the documents appearing to show the right to possession of goods, under circumstances which entitle him to impeach the transaction upon the ground that there is no concluded contract. *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459, 47 L. J. Q. B. 481, was a case where the owner was deprived of his goods by a fraud; and he was held not to have lost his right to them. The respondents had consigned goods to "Messrs. Blenkiron & Co., 37 Wood Street," intending to consign them to a certain firm of Messrs. Blenkiron & Co., who carried on business at 123 Wood Street. The goods were fraudulently taken in by one Blenkarn, who had a door to his business numbered as 37 Wood Street. A purchaser from Blenkarn was held liable, in an action of trover, upon the ground that there was no contract between the owner and Blenkarn, and that not even a possessory title had passed to Blenkarn.

The Acts commonly called the Factors' Acts, of which the one now in force is the Factors' Act, 1889, were passed from time to time with the view of protecting mercantile dealings done on the faith of an ostensible authority. The principal case is a good example showing the line beyond which these Acts will not afford protection.

The earlier Factors' Acts, passed in the years 1823 and 1825 (4 Geo. IV. c. 83, and 6 Geo. IV. c. 94), attempt to define the conditions under which an agent is *held out* as having authority to sell; but they do not extend the doctrine of holding out, beyond the decisions at common law. Of these the leading case is *Pickering* v. *Busk* (1812), 15 East, 28, 13 R. R. 364; where a broker, whose ordinary business it was to buy and sell hemp, and into whose name certain hemp had been transferred by the owner in the wharfinger's books, was considered to have been held out as authorised by the owner to sell the hemp.

The next Act, that of 1852 (5 & 6 Vict. c. 39), conferred upon the factor the implied authority to pledge the goods as well as to sell them. It was enacted that "any agent . . . intrusted with the possession of goods or of the documents of title to goods, shall be deemed to be owner of the goods . . . so far as to give validity to any contract by way of pledge," &c. This was construed in *Hayman* v. *Flewker* (1863), 13 C. B. (N. S.) 519, 32 L. J. C. P. 132, to apply to an agent, whose

ordinary business was that of an insurance agent and not an agent for sale, but who was in fact commissioned by the owner to sell certain pictures left in his possession. The 4th section of the same Act makes the possession by an agent of the goods or of the documents of title giving the control of them, *primâ facie* evidence of his employment in the character of a factor having authority to dispose of the goods. *Baines* v. *Swainson* (1863), 4 B. & S. 270, per BLACKBURN, J., at p. 285.

There was another Factors' Act passed in 1877 (40 & 41 Vict. c. 39); but this and all the previous Acts are repealed by the Act of 1889, which now embodies the statutory law on the subject.

The Factors' Act of 1889 (52 & 53 Vict. c. 45) is apparently framed with a view to embody the law as contained in the previous Acts and decisions of the Court, and also to extend the presumption of authority in certain definite directions. For the purposes of the Act, a "mercantile agent" is defined (section 1) as a "mercantile agent having in the customary course of his business, as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods." The Act enacts (section 2) that "where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent shall, subject to the provisions of this Act be as valid as if he were expressly authorised by the owner," and further (section 2, sub-section 2), that the possession with consent having been once constituted, the presumption of authority shall not be determined by the demand of the owner to give them up. It is provided in each case that a person who has notice of the true state of things shall not be entitled to act upon the presumption. It is further (by section 6 of the Act) enacted that "an agreement made with a mercantile agent through a clerk or other person authorised in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent." The Act contains (section 7) a further provision as to goods consigned or shipped by the owner in the name of another, so that the consignee may safely make advances on the goods to the apparent consignor; and (by sections 8, 9, & 10), provisions in favour of persons dealing on the faith of the possession of goods which have been allowed by the purchaser to remain in possession of vendors, or have been delivered by vendors to purchasers subject to the vendors' rights. And by section 11, the privilege enjoyed by a *bonâ fide* transferee of a bill of lading to defeat the right of stoppage *in transitu* is extended to transferees by other "documents of title."

By making the ordinary or customary course of business the basis of the presumption, the Act of 1889 adopts the general scope and spirit of the previous Acts and decisions; but it may happen that a particular case, which was included in the language of the former Acts, may be excluded from the operation of the Act of 1889. Thus in *Hastings Limited* v. *Pearson* (1892), 1893, 1 Q. B. 62, 62 L. J. Q. B. 75, it was held that a man employed at a small salary to sell goods by retail on commission, is not a mercantile agent within the meaning of the Factors' Act, 1889. In the course of his judgment (at p. 64), in which Bruce, J., concurred, Matthew, J., is reported to have said: "It is plain, therefore, that the Act applies only to persons of the class ordinarily carrying on the business of mercantile agents. . . . There is no such business as that of an agent to pledge with pawnbrokers small articles of jewellery for the purpose of raising money for the employer of the agent. The Factors' Act, therefore, does not apply to him at all." It is clear that on this reasoning the person who, in the case of *Hayman* v. *Flewker*, above cited 13 C. B. (N. S.) 519, 32 L. J. C. P. 132, was held to be an agent intrusted, &c., within the Act of 1842, would not be a "mercantile agent," within the Act of 1889.

In other respects the Act of 1889 has distinctly extended the scope of former Acts. Thus, the second sub-section of section 2, overrides the case of *Fuentes* v. *Montis* (1869), L. R., 4 C. P. 93; 38 L. J. C. P. 95, where it was held that the agent who wrongfully detained the goods after the owner had demanded them to be delivered up, could not make a valid pledge of them; and the Act is apparently intended to override such cases as *Cole* v. *N. W. Bank* (1876), L. R., 10 C. P. 354, where a person carrying on two businesses one of which is that of a mercantile agent, is intrusted with goods in his other capacity, *e. g.*, that of a warehouseman. This Act also (by section 2, sub-section 3), does away with such a case as *Hatfield* v. *Phillips* (1842), 9 M. & W. 647; (1845), 14 M. & W. 665, where it was decided that a person was not, by reason of having been intrusted with a bill of lading, to be deemed intrusted with a dock-warrant which he had obtained through his having been possessed of the bill of lading. The vendor and purchaser clauses, again, strike at such a case as that of *Johnson* v. *Credit Lyonnais* (1877), 3 C. P. D. 32, 147 L. J. C. P. 241, where the purchaser of tobacco had left it in bond in the vendor's name. The latter of these clauses (section 9) has been held to enable a person in possession of furniture under a hire and purchase agreement, but who has not paid for the goods, to confer a good title upon a *bonâ fide* purchaser. *Lee* v. *Butler* (C. A. 1893), 1893, 2 Q. B. 318, 62 L. J. Q. B. 591.

But where, as in the principal case, and in such cases as *Kingsford*

v. *Merry* (1856), 1 H. & N. 503, and *Hardman* v. *Booth* (1863), 1 H. & C. 803, a person obtains goods or the documents giving control over them by a fraud, but without any relation of principal and agent being constituted between him and the owner, he doubtless cannot confer any title under the Act of 1889, any more than under previous Acts.

AMERICAN NOTES.

Mr. Mechem (Agency, § 961, note 3) says: "This case which occasioned much division of opinion among the Judges of the various courts, contains interesting discussions of the broker's duties and liabilities," and cites to it *Roach* v. *Turk*, 9 Heiskell (Tennessee), 708; 24 Am. Rep. 360, and *Saltus* v. *Everett*, 20 Wendell (New York), 267; 32 Am. Dec. 541, which impliedly but not directly sustain the principal case. In the latter case, Verplanck, Senator, said: "The universal and fundamental principle of our law of personal property is that no man can be divested of his property without his own consent, and consequently that even the honest purchaser under a defective title cannot hold against the true proprietor. . . . The only exception to this rule in the ancient English jurisprudence was that of sales in *markets overts*, a custom which has not been introduced among us."

A factor who conceals his principal is liable like any other agent. *Baldwin* v. *Leonard*, 39 Vermont, 260; 94 Am. Dec. 324; *Nixon* v. *Downey*, 49 Iowa, 166; *Raymond* v. *Crown, &c. Mills*, 2 Metcalf (Mass.), 319; *Cobb* v. *Knapp*, 71 New York, 348; 27 Am. Rep. 51. But if he discloses his agency, and acts in good faith, he will not be liable although the goods came into his hands from one having no title. *Roach* v. *Turk*, *supra*.

In *Rodliff* v. *Dallinger*, 141 Massachusetts, 1, plaintiff refused to sell to C., a broker, on his own credit, but C. fraudulently representing that he was really buying for another party, undisclosed, who was as good as P., who was known to and in good credit with plaintiff, plaintiff charged the goods to C. and gave him a bill of sale thereof. C. then pledged the goods to defendant, who made a loan on them in good faith. *Held*, that plaintiff could maintain replevin.

In *Peters, &c. Co.* v. *Lesh*, 119 Indiana, 98, it was held that if the seller of personal property, acting under the belief that the purchaser is the agent of another, and that he is selling the property to the latter, which belief is based on the false and fraudulent representations of the purchaser that he is such agent, permits the bills of lading to be made out in the name of such supposed agent, he is not thereby estopped to assert title as against a purchaser from the impostor.

In *Baehr* v. *Clark*, 83 Iowa, 313, defendant bought diamonds from B., who represented that he owned them, but who in fact obtained them from the plaintiff under the representation that he had a customer for them, and promised to return them or the price in an hour. *Held*, that defendant got no title.

It has been held in several cases that the Factors' Acts apply only where the relation of principal and agent or factor exists. *First Nat. Bank* v. *Shaw*,

61 New York, 283; *Thacher* v. *Moors*, 131 Massachusetts, 156. "The Act was not intended to deprive actual owners who had not parted with their title, or who by fraud and without any fault on their part had lost control of it." *Kinsey* v. *Leggett*, 71 New York, 395.

No. 15. — JOLLY *v.* REES.

(C. P. 1864.)

No. 16. — DEBENHAM *v.* MELLON.

(C. A. & H. L. 1880).

RULE.

THE liability of a husband for debts incurred by the wife is based upon the ordinary principles of agency.

The husband is only liable when he has expressly or impliedly, by prior mandate or subsequent ratification, authorised her to pledge his credit, or has so conducted himself as to have held out or represented her as having and so to estop him from denying that she had his authority.

In the case of a dealing with a tradesman for the first time, there can be no such holding out: and the fact that the husband had made his wife a sufficient allowance to supply herself and her children with clothes, and forbidden her to exceed it, is sufficient to negative any implied authority to pledge his credit for clothes ordered by her, although they might be necessary.

Jolly v. Rees.

33 L. J. C. P. 177 (s. c. 15 C. B. (N. S.) 628).

The declaration in this case was for goods sold and delivered.

Plea, never indebted.

The cause was tried, before BYLES, J., at the Bristol Spring Assizes, 1863. It appeared that the plaintiff was a linen-draper at Bath, and that the defendant was a gentleman of small fortune residing at Llanelly, in Carmarthenshire. The goods were supplied by the order of the defendant's wife during the months of

July, August, and September, 1861, and consisted of the usual wearing apparel of women and children. The amount of the bill was £21 8*s.* 4*d.*

Evidence was given that the wife had a separate income of £65, which was always paid to her, and over which the husband exercised no control whatever. The husband professed to allow his wife £50 a year in addition to her separate income, and she purchased clothing for herself and her children. The precise ages of the children were not stated; but it appeared that there were four sons and two daughters, and that all of them were clothed by the mother.

In the year 1851, the husband, being dissatisfied with his wife's expenditure, told her not to pledge his credit, but when she wanted money for the clothing of the children to apply to him. There was no evidence of the plaintiff having had notice of this prohibition. Evidence was given that, in addition to clothing, the wife had supplied the children, especially the two at school, out of her own pocket, with certain extra food, beyond the usual allowance of her husband's and the schoolmistress's house. This was alleged on the one side to have been necessary for the health of the children; whereas, on the other side, it was denied that such necessity existed.

The jury found in answer to questions specifically put to them, first, that the articles supplied were necessaries, in the sense of being suitable to the estate and degree of the wife and children; secondly, that the wife's authority to pledge his credit was revoked by the husband in 1851; thirdly, that the annual sum of £65, together with the sum of £50, if regularly paid, was sufficient to supply the wife and children with necessaries; fourthly, that the annual sum of £50 was not sufficient for that purpose; fifthly, that the £50 which the husband promised to pay was not paid regularly, and that if deductions were made for the necessary articles of food supplied to the children, what remained after making these deductions together with the £65 was not sufficient.

Upon these findings the learned Judge directed a verdict to be entered for the plaintiff, leave being reserved to the defendant to move to enter a verdict for him, if the Court should be of opinion, upon the above findings, that the defendant was entitled to the verdict.

A rule having been obtained accordingly, and argued, —

No. 15. — Jolly v. Rees.

The judgment of the majority (Erle, C. J., Williams, J., and Willes, J.) was now (February 1) delivered by

Erle, C. J. This was a rule for setting aside the verdict for the plaintiff, and entering it for the defendant.

The action was for goods sold. Upon the trial the plaintiff raised a presumption of the defendant's liability by showing that the goods were ordered by his, the defendant's, wife while living with him, for the use of herself and children. The defendant rebutted this presumption by showing that he had forbidden his wife to take up goods on his credit, and had told her that if she wanted money to buy goods with, she was to apply to him for it: and there was no evidence that she had so applied and been refused. The plaintiffs proved, in reply, that the goods were necessaries suitable to the estate and degree of the defendant; that the wife had £65 per annum to her separate use; and that the defendant had promised to allow her £50 per annum in addition, but had not paid it regularly and had not supplied her with such necessaries, or with money sufficient for the purchase thereof. The plaintiffs also showed that they had received no notice of the defendant's prohibition to his wife against taking up goods on his credit.

These facts are in effect found by the jury; and the question is raised whether the wife had authority to make a contract binding on the husband for necessaries suitable to his estate and degree, against his will and contrary to his order to her, although without notice of such order to the tradesman. Our answer is in the negative. We consider that the wife cannot make a contract binding on her husband, unless he gives her authority as his agent so to do. We lay down this as the general rule, premising that the facts do not raise the question what might have been the rights of the wife, either if she was living separate without any default on her part towards her husband, or if she had been left destitute by him.

The whole law upon this subject is well collected in the note to *Manby* v. *Scott*, 2 Smith's L. C.; s. c. 1 Lev. 4; 1 Sid. 109. It is there shown that the general rule is as above stated; and that where a plaintiff seeks to charge a husband on a contract made by his wife, the question is whether the wife had his authority, express or implied, to make the contract; and that if there be express authority, there is no room for doubt; and if the authority

is to be implied, the presumptions which may be advanced on one side may be rebutted on the other; and although there is a presumption that a woman living with a man, and represented by him to be his wife, has his authority to bind him by her contract for articles suitable to that station which he permits her to assume, still this presumption is always open to be rebutted. So was the decision of the majority of the Judges in *Manby* v. *Scott*; and to that effect are the words of Lord Holt in *Etherington* v. *Parrot*, 1 Salk. 118; s. c. 2 Ld. Raym. p. 1006, per Holt, C. J., and this doctrine has been sanctioned in the cases which have followed.

In supporting this conclusion, our decision does not militate against the rule that the husband, as well as every principal, is concluded from denying that the agent had such authority as he was held out by his principal to have, in such a manner as to raise a belief in such authority, acted on in making the contract sought to be enforced. Such liability is not founded on any rights peculiar to the conjugal relation, but on a much wider ground.

The plaintiff contends that the wife has the power above described, and they rely on observations made by Judges, both in *Manby* v. *Scott* and in some later cases; but the answer in point of authority is, that the adjudications have not supported the observations on which they rely. In *Manby* v. *Scott*, those Judges were in the minority; and the observations referred to in later cases have not been the ground of any decision. The weight of authority seems to us to be against the plaintiff.

Then, if we resort to considerations of principle, they lead to the same conclusion. It is not our province here to inquire whether it is advisable to give to the wife greater rights. But taking the law to be that the power of the wife to charge her husband is in the capacity of his agent, it is a solecism in reasoning to say that she derives her authority from his will, and at the same time to say that the relation of wife creates the authority against his will by a *presumptio juris et de jure* from marriage; and if it be expedient that the wife should have greater rights, it is certainly inexpedient that she should have to exercise them by a process tending to disunion at home and pecuniary distress from without. The husband sustains the liability for all debts; he should therefore have the power to regulate the expenditure for which he is to be responsible, by his own discretion and according

to his own means. But if the wife taking up goods from a tradesman can make her husband's liability depend on the estimate by a jury of his estate and degree, the law would practically compel him to regulate his expenses by a standard to be set up by that jury, a standard depending on appearances, perhaps assumed for a temporary purpose, with intention of change. Moreover, if the law was clear that the husband was protected from the debts incurred by the wife without his authority, not only in the ranks where wealth abounds would speculations upon the imprudence of a thoughtless wife be less frequent, because less profitable, but also in the ranks where the support of the household is from the labour of the man, and where the home must be habitually left in the care of the wife during his absence at his work, more painful evils, from debt which the husband never intended to contract, would be checked.

As we collect from the report of the learned Judge that the verdict is for necessaries suitable to the estate and degree of the husband, obtained from the plaintiff by the wife of the defendant without his authority and contrary to his order, according to our view of the law this verdict cannot be supported. It follows that the rule for setting it aside and entering a verdict for the defendant should be made absolute.

Byles, J., dissented from this judgment, and thought the presumption in favour of the wife's authorities was wider than that allowed by the majority. In support of this, he referred to Kent's Commentaries, vol. 2, p. 139, where the learned author lays it down that the husband is bound by the wife's contracts for ordinary purposes, from a presumed assent on his part.

In accordance with the judgment of the majority, the rule was made absolute.

Debenham v. Mellon.

49 L. J. Q. B. 497 ; 50 L. J. Q. B 155 (s. c. 5 Q. B. D 394 ; 6 App. Cas. 24).

The action was to recover £42, the price of various articles of dress supplied by the plaintiffs, who were linen-drapers, to the defendant's wife, for the use of herself and her children. The goods were ordered by and supplied to the wife whilst living with her husband, and were admitted to be necessaries in the sense that they were suitable

to the position in life of the parties. The wife had not dealt with the plaintiffs before she ordered the goods in question, and shortly before she did so the defendant had forbidden her to buy goods on his credit, but had not in any way made public the fact that he had so forbidden her. Bowen, J., at the trial, left to the jury the question whether or not there had been a revocation by the husband of the wife's authority to buy goods on his credit. The jury found that there had; and Bowen, J., gave judgment for the defendant.

The plaintiffs appealed to the Court of Appeal, and there, after argument, and the Court taking time for consideration, the following judgments were delivered: —

Thesiger, L. J. The state of facts upon which the judgment of the Court is to proceed I take to be as follows: A husband and wife living together; the husband able and willing to supply the wife with necessaries or the means of obtaining them; an agreement between them, not made public in any way, that the wife shall not pledge her husband's credit; a tradesman, without notice of that agreement, and without having had any previous dealings with the wife, supplying her upon the credit of her husband, but without his knowledge or assent, with articles of female attire suitable to her station in life; an action brought against the husband for the price of such articles.

The question for us is whether the action is maintainable. I agree with the other members of the Court and with Mr. Justice Bowen that it is not. The appellant's counsel have brought under our notice a considerable number of authorities with the view of establishing that the law, as laid down in *Jolly* v. *Rees*, No. 15, *ante*, is erroneous. I think that the authorities have a contrary effect. They establish beyond controversy that the liability of a husband for debts incurred by his wife during cohabitation is based upon the ordinary principles of agency. It follows that he is only liable when he has expressly or impliedly, by prior mandate or subsequent ratification, authorised her to pledge his credit, or has so conducted himself as to make it inequitable for him to deny or to estop him from denying her authority.

In the present case, express authority is out of the question, and there is no evidence that the defendant even assented in any way to the act of his wife in pledging his credit to the plaintiffs.

But it is said that there is a presumption that a wife living with her husband is authorised to pledge her husband's credit for necessaries; that the goods supplied by the plaintiffs were, and it is admitted they were, necessaries; and that as a consequence, an implied authority is established. This contention is founded upon an erroneous view of what is meant by the term "presumption" in cases where it has been used with reference to a wife's authority to pledge her husband's credit for necessaries. There is a presumption that she has such authority in the sense that a tradesman supplying her with necessaries upon her husband's credit and suing him, makes out a *primâ facie* case against him upon proof of that fact and of the cohabitation. But this is a mere presumption of fact founded upon the supposition that wives cohabiting with their husbands ordinarily have authority to manage in their own way certain departments of the household expenditure, and to pledge their husbands' credit in respect of matters coming within those departments. Such a presumption or *primâ facie* case is rebuttable, and is rebutted, when it is proved in the particular case, as here, that the wife has not that authority. If this were not so, the principles of agency upon which *ex hypothesi* the liability of the husband is founded would be practically of no effect.

Feeling this difficulty, the appellants' counsel shift their ground and contend that, although under the circumstances of this case, the wife may have had no authority in fact or in law to pledge her husband's credit, yet the defendant must be taken to have held out his wife as having authority to pledge his credit to all persons supplying her with necessaries without notice that she had not authority in fact, and consequently is estopped as between him and the plaintiffs from denying her authority. This contention appears to me to have no better ground of support than the one with which I have just dealt. If a tradesman has had dealings with the wife upon the credit of the husband, and the husband has paid him without demur in respect of such dealings, the tradesman has a right to assume, in the absence of notice to the contrary, that the authority of the wife which the husband has recognised continues. The husband's quiescence is in such case tantamount to acquiescence, and forbids his denying an authority which his own conduct has invited the tradesman to assume, just as it would forbid his denying the authority of a servant who had

been in the habit of ordering goods for him from tradesmen, and whose authority he had secretly revoked. But what, in the case of a tradesman dealing with his wife for the first time, has the husband done or omitted to do which renders it inequitable for him to deny his wife's authority? For the tradesman it is said that the mere relationship of husband and wife entitles him to assume, in the absence of notice to the contrary, that the wife has authority to pledge her husband's credit for necessaries. But this is a fallacy; the tradesman must be taken to know the law; he knows (for the present argument proceeds upon that supposition) that the wife has no authority in fact or in law to pledge the husband's credit even for necessaries unless he expressly or impliedly gives it her, and that what the husband gives he may take away. How, then, can the tradesman dealing with the wife for the first time, and without any communication with or knowledge on the part of the husband, say that he is induced or invited either by the law or by the husband, or by both combined, to deal with the wife upon the faith and in the belief of her being in fact authorised to pledge her husband's credit? If he be so induced or invited, it can only be upon the footing of the law making a husband absolutely liable for necessaries purchased by his wife to any person dealing with her, although for the first time, without notice that her authority is limited; but if the law does so make him liable, there is no need for any estoppel, and we are driven back upon the exploded notion that the husband's liability is founded upon some law other than that which governs in general the relations of principal and agent. It is urged that it is hard to throw upon a tradesman the burden of inquiring into the fact of a wife's authority to buy necessaries upon her husband's credit. I assent to the answer that, while the tradesman has at least the power to inquire or to forbear from giving credit, it is still harder, and is contrary, if not to public policy, yet to general principles of justice, to cast upon a husband the burden of debts which he has no power to control at all except by a public advertisement that his wife is not to be trusted, and in respect of which, even after such advertisement, he may be made liable to a tradesman who is able to swear that he never saw it.

It appears to me that the decision of the majority of the Court in *Jolly* v. *Rees, supra,* has put the law as regards this matter upon

No. 16. — Debenham v. Mellon.

a proper footing, and that there is no ground for disturbing the judgment in this case, which the defendant has obtained.

Bramwell, L. J. The question in this case is, whether a husband is liable to pay for necessaries obtained by the wife without his authority. The articles supplied were necessaries in the sense that they were suitable to her condition in life, but not necessaries in the sense that she stood in actual need of them. The question was, and is always, necessarily argued on technical grounds; there is no statute on the subject; the husband is in these cases charged as a debtor and as liable on a contract. Prior to the Judicature Acts, the action was founded on *assumpsit*, and now the action is with regard to the Statute of Limitations, founded on an express contract. The case was argued so as to show that the wife is the agent of her husband to pledge his credit. No doubt there are cases where the wife has authority to pledge her husband's credit, and is in fact, as of necessity, her husband's agent for that purpose. If the husband turns his wife out of doors, or if she is obliged, owing to his conduct, to leave the house, then he is bound to maintain her; and if he fails to do so, she has power to provide herself with necessaries, and authority to pledge his credit for them. So if she is living with her husband, and he gives her shelter and nothing more, then she has a right to provide herself with food and clothes. There may also be other cases, as, for instance, where a husband and wife are living together, and the articles are such as in the usual course, regard being had to the style in which the parties live, are had upon credit. One may instance the joint supplied by the butcher, for which people do not usually, when they live in a certain style, pay on delivery, but for which bills are run. In such a case I think that the wife would presumably have authority to pledge her husband's credit; and if he desires to negative this authority, he should give distinct intimation to that effect to the tradespeople. Nor would such an authority be presumed to exist in the wife alone; but a sister who was living with him, or his housekeeper, could also pledge his credit in respect of such matters.

It was on such considerations that the judgment in *Ruddock* v. *Marsh*, 1 Hurl. & N. 601, was founded. Whether we were then right in drawing the conclusions we drew, I doubt; but unless those were the considerations upon which we drew them, that judgment cannot be supported. But there the authority was to

act as persons in a certain position, and living in a certain locality, generally do act. Such is not the case here. It cannot be pretended that there is any practice, convenience, or usage as to such articles as those in question in this case being supplied on credit. There is no reason of convenience, there is no usage, there is no authority; there is, on the contrary, a prohibition. The question is whether a tradesman can in such circumstances trust somebody, and whether a wife can pledge her husband's credit. The question is not whether she has authority to spend ready money; probably if her husband lets her have the money, he cannot afterwards and when it has been spent claim to recover the money from the tradesman; although if the wife spend that ready money on articles evidently unsuited to her position, I am not sure that the husband might not, on offering to return the goods, recover that money. But the question is not whether a wife may or may not spend money if she has got it, it is one of credit.

Now, first, why should the wife have this authority? The husband can give it if he desires she should have it; there is no need for the law to imply it or to give it. The tradesman need not trust or give credit; he can say that his business is a ready-money business, or he can inquire whether she has her husband's authority, or he can trust her individually and trust that she will get the money somehow. If she says that she has her husband's authority when she has not, the tradesman has this security, that then she is liable to be indicted for obtaining goods by false pretences. I do not say a conviction would follow; but at all events she must commit a crime in order to obtain the goods. Or the tradesman might ask for the authority in writing, or might get it direct from the husband. If it be said that such a proceeding would offend the customer, I answer that that may be an excellent reason why the tradesman should not ask the question; but it is no reason for seeking to make the husband pay, because the question is not asked. There is no reason, convenience, or usage for so making him liable; there is no authority for it, and the law is the other way. I think that this judgment should be affirmed, and that the law would be mischievous if it were different from that which it is, and if it were possible for a foolish wife and a tradesman eager for business to injure a husband contrary to his orders and without his authority.

Baggallay, L. J. I have had an opportunity of reading the

judgment of THESIGER, L. J., and I agree with it and desire to adopt it as my judgment in this case. I do not wish to imply that I do not agree with the observations of BRAMWELL, L. J., which appear to me to be just.

The judgment of BOWEN, J., was therefore affirmed.

The plaintiffs appealed to the House of Lords, and there, after argument, the following judgments were pronounced : —

The LORD CHANCELLOR (Lord SELBORNE). This case raises the very important question whether the decision of the Court of Common Pleas in 1864, in the case of *Jolly* v. *Rees*, which, so far as I know, has not been seriously called in question since that time, and which was never brought to this House for consideration, is right.

The point determined was this, as I understand it, that the question whether a wife has authority to pledge her husband's credit is to be treated as a question of fact, to be determined upon the circumstances of each particular case, whatever may be the rules of law as to the *primâ facie* presumptions to be drawn from a particular state of circumstances.

That principle is now controverted; and the first question is, whether the mere fact of a marriage implies a mandate by law making the wife (who cannot herself contract, unless so far as she may have a separate estate) the agent in law for the husband, to bind him and to pledge his credit, by what otherwise might be her own contract if she were a *feme sole*.

It is sufficient to say that all the authorities show that there is no such mandate in law, except in the particular case of necessity, — a necessity which, perhaps, *primâ facie* may arise when the husband has deserted the wife, or compelled her to live apart from him, without properly providing for her, but which, when the husband and wife are living together, cannot be said ever *primâ facie* to arise, because if in point of fact she is maintained, there is, in that state of circumstances, no *primâ facie* evidence that the husband is neglecting to discharge his proper duty, or that there can be any necessity for the wife to run him into debt, for the purpose of keeping herself alive or supplying herself with necessary clothing.

I therefore lay aside that proposition, and think it clear that there is no mandate in law by the mere fact of marriage applicable to such a state of circumstances as we have at present.

Then the next question is, whether the law implies a mandate from cohabitation. If it does, on what principle does it do so? Cohabitation is not, like marriage, a *status*, or a new contract, — it is a general expression for a certain condition of facts; and if the law does imply any such mandate from cohabitation, it must be as an implication of fact, and not as a necessary conclusion of law. There are, no doubt, various authorities which say that the ordinary state of cohabitation between husband and wife carries with it some presumption, some *primâ facie* evidence, of an authority to do those things which in the ordinary circumstances of cohabitation between husband and wife, it is usual for a wife to have authority to do. Mr. Benjamin says that those words are not the best which might be used for the purpose, but that "apparent authority" or "ostensible authority" would be better. I am not at all sure that Mr. Benjamin's words may not be very good words for that ordinary state of circumstances in the case of cohabitation between husband and wife, out of which the presumption arises, because in that ordinary state of circumstances the husband may truly be said to do acts, or to consent evidently to acts, which hold the wife out as his agent for certain purposes. Then the word "apparent" or the word "ostensible" becomes appropriate. But where there is nothing done, nothing consented to by the husband, to justify the proposition that he has held out the wife as his agent, then I apprehend that the question whether, as a matter of fact, he has given the wife authority, is one that must be examined upon the whole circumstances of the case. No doubt, though not intending to hold her out as his agent, and though she may not actually have had authority, the husband may so have conducted himself as to entitle a tradesman dealing with him to rely upon some appearance of authority. If he has done so, he may be bound; but the question must be examined as one of fact, and all the authorities, as I understand them, practically treat it so, when they speak of this as a presumption *primâ facie* not absolute, not in law, but capable of being rebutted; and when Lord Chief Baron POLLOCK, in the case of *Johnston* v. *Sumner*, 3 H. & N. 261; 27 L. J. Ex. 341, said that all the usual authorities of a wife under those circumstances might be assumed, notwithstanding any private arrangement, I apprehend that he had in view that state of facts under cohabitation, when a wife is managing her husband's house and establishment, which usually raises the presumption which, when

once raised by the husband's acts, or by his assent to the acts of his wife, doubtless as against the person relying upon that appearance of authority, might not be got rid of by a mere private agreement between the husband and wife. Lord Chief Baron POLLOCK, in another case which was cited during the argument, — namely, the case of *Reneaux* v. *Teakle*, 8 Ex. 680 ; 22 L. J. Ex. 241, — said that the case of the wife, as to principle, at all events, was not different from that of anybody else in an establishment. If there is an establishment of which there is a domestic manager, — although, perhaps, the wife is the most natural domestic manager, and the presumption may be strongest in particular circumstances when she is so, — yet the presumption is the same from similar facts, even if she be not a wife, but merely a woman living with a man and passing as his companion, with or without the assumption of the name of wife. It is also the same if the person to whom the domestic management is delegated is a housekeeper, or a steward, or any other kind of servant. Therefore it is in all these cases really a mere question of fact.

Now in this case that ordinary state of circumstances which usually accompanies cohabitation, when there is a house and an establishment, is entirely wanting. There was here no house, there was here no establishment, and none of these things were done in the way of living upon credit for the ordinary necessary purposes of providing for the daily wants of an establishment which ordinarily raise the presumption. The husband and wife were both servants of a company of hotel-keepers at Bradford. They not only were their servants, but they lived in the hotel which belonged to their employers ; the whole of their board and lodging (which, I take it upon the evidence, included that of their children) was found for them, and therefore there was no household to be managed ; there was no domestic management at all, in point of fact. The credit, such as it was, was given by a London tradesman to a woman living in Bradford in these circumstances. No single act was done by him which shows that he was dealing upon the faith of any appearance of authority in the wife, for he made out all the bills to the wife in her own name, which, no doubt, would not have prevented him from resorting to the husband, if the husband was otherwise liable, but which certainly does not assist his case as tending to show that he was misled by any appearance of authority into supposing that he was giving credit to the husband. That

the husband never knew any of these things is made perfectly clear. The necessary conclusion of fact is that the husband never did hold out his wife as having any authority, by any act, or by any consent of his, either to the plaintiff or to the class of persons to whom the plaintiff belongs, and of whose dealings the plaintiff might be presumed to have any knowledge.

Then, if the plaintiff can recover at all, it must be either because there was, notwithstanding this state of things, an authority in fact, or because there is an authority in law from the necessity of the case. I think it would really be doubtful whether the ordinary presumption even shows the authority in the state of facts which I have mentioned; but taking it to be so, seeing that the clothes might be necessary for the wife, and that if there were no means of supplying them otherwise, it would be the husband's duty to supply them, the evidence conclusively shows that there was no authority in fact. It is said that when this married pair lived — four or five years before the beginning of the dealings between the wife and the plaintiff, and a considerably greater distance of time before this particular debt was contracted — at Westward Ho, in Devonshire, there were some other people who did give credit to the husband, the wife acting as his agent. That the plaintiff ever heard of that is not so much as suggested. More than four years before any dealings with the plaintiff began, that state of things, being disapproved by the husband, was put an end to. The husband expressly determined and revoked any authority which he might previously have given to the wife; and he afterwards, at the time this debt was contracted, made her an allowance amply sufficient for any necessary purposes of her clothing, according to the state of the circumstances and his condition in life. It is said that of that revocation the plaintiff had no notice; but the plaintiff had no notice of the circumstances that made the revocation necessary; he never had notice of any single fact except that this was a married woman; and more than four years before the beginning of his dealings with the wife, there was an ending of the authority (if ever it had been given to her) to bind her husband as his agent towards other persons.

Then the question is, whether, because these articles are found to be in some sense necessaries in their nature, the husband can be bound. It would be perfectly clear that when a reasonable allowance is made by the husband to the wife, as in this case was

made, — sufficient to cover a proper expenditure for her own and her children's clothing, — it is totally impossible to imply *ex necessitate* any authority of hers in law to bind him, even if she had purported to do so.

These observations seem to me to dispose of the whole case; but I must add that, without going into the authorities, I think if the principles which run through them from first to last are regarded, rather than casual *dicta*, coloured as they necessarily would be by the circumstances of particular cases, in one judgment or in another, the whole of the judgments being consistent with reason and justice, are also consistent with the decision which was arrived at by the majority of the Court of Common Pleas in the case of *Jolly* v. *Rees*, No. 15, *supra*.

Therefore I humbly move your Lordships that this appeal should be dismissed, and that the judgment of the Court below should be affirmed.

Lord BLACKBURN. If it were not that this case is precisely identical with the case of *Jolly* v. *Rees*, I should think it desirable to speak more at length than I propose now to do. The opinion upon which I advise your Lordships to act is, that the majority of the Court in the case of *Jolly* v. *Rees* were right in the judgment which they gave, and it is admitted that that governs the present case. I also think that the judgment which my brother BYLES gave upon that occasion (which it is admitted might, if it were good, apply to the present case) was not correct as applied to that case, and is not applicable now.

I premise, as did the majority of the Court in *Jolly* v. *Rees*, by saying that no question arises here as to what would be the case — if the wife had been left destitute, and had not been allowed what was proper for her estate and condition. If there had been desertion or cruelty, so that she had not been supplied with what was proper, no question arises here as to whether she would not have had authority to pledge her husband's credit to get such things. But that is not the case here at all. This is simply a case where a husband is living with his wife, though they are not keeping up any household establishment; and he, in fact, makes her an allowance, which both husband and wife seemed to think, so far as one can judge from appearances, would be sufficient to enable her to supply herself with all necessary clothes. She did get clothes, and there was evidence which satisfied the jury that the husband

really and truly told her that she was not to pledge his credit, and that she had assented.

The question comes to be, first, Had she, from her position as wife, authority to pledge her husband's credit, although the husband had revoked that authority? I grant that the fact of a man living with his wife frequently, and indeed always, does afford evidence that he intrusts her with such authorities as are commonly and ordinarily given by husband to wife. I should say that it might be a matter of doubt whether it is so perfectly certain that the articles supplied by milliners are always to be procured upon the credit of the husband, so as to make that a *primâ facie* part of the authority. But I will assume that it would be so. In the ordinary case of the management of a household, the wife is the manager of the household, and would necessarily get short and reasonable credit on butchers' and bakers' bills and such things; and for those she would have authority to pledge the credit of the husband. I think that if the husband and wife are living together, that is a presumption of fact from which the jury may infer that the husband really did give his wife such authority. But even then I do not think the authority would arise, so long as he supplied her with the means of procuring the articles otherwise. But that is not the present question, which is this, Had the wife a mandate to order the clothes which it would be proper for her in her station in life to have, though the husband had forbidden her to pledge his credit, and had given her money to buy clothes? I think, for the reasons given by the majority of the Court in *Jolly* v. *Rees*, and also by the Judges in the Court of Appeal in this case, that there is no authority and no principle for saying that the wife had authority to pledge her husband's credit. I quite agree that if the husband knew that the wife had got credit, if he had allowed the tradesmen to suppose that he himself had sanctioned the transactions by paying them, or in other ways, it might very well be argued that he would have given such evidence of authority that, if he did revoke it, he would be bound to give notice of the revocation to the tradesmen and to all who had acted upon the faith of his authority and sanction. That would be the general rule, that where an agent is clothed with an authority, and afterwards that authority is revoked, unless that revocation has been made known to those who have dealt with him, they would be entitled to say, "The principal is precluded from denying that that authority con

tinued to exist which he had led us to believe, as reasonable people, did formerly exist." Now, there may be many cases in which the husband has so sanctioned his wife's pledging his credit, but there is not any such case here. Those cases in Ireland which have been referred to seem, as far as I could see by a slight glance, to be cases where the husband had assented to the contracts in such a way that he could not deny them afterwards. With that we have nothing at present to do. But I cannot agree with my brother Byles that there is any authority established by the cases that the fact of a wife living along with a husband alone entitles the tradesmen to presume that the husband has given an authority so as to preclude the husband from denying it. I think that when husband and wife are living together, it is open to the husband to prove, if he can, the fact that the authority does not exist, — it being a question for the jury whether a *bonâ fide* authority did or did not exist. This is not a case of withdrawing authority once given. The question is, whether the plaintiff, who had never dealt with the wife or the husband before, was entitled to assume that there was such an authority implied in the mere fact that the wife was living with her husband; and I think the law is not so.

Lord WATSON. In this case I shall content myself with saying that, notwithstanding the able and ingenious argument of the learned counsel for the appellants, I am very clearly of opinion that, both upon principle and according to the authorities, the case of *Jolly* v. *Rees* was well decided; and I therefore concur in the judgment which your Lordships propose.

Order appealed from affirmed, and appeal dismissed with costs.

ENGLISH NOTES.

The cases must be distinguished where there is evidence of subsequent ratification, which need not be in express terms. In *Waithman* v. *Wakefield* (1807), 10 R. R. 654, 1 Camp. 120, goods had been supplied to the defendant's wife, who was then living apart from the defendant. A clerk of the plaintiff called upon her, and in the presence of the defendant demanded a return of the goods or the price. In directing the jury, Lord ELLENBOROUGH said, "If the husband has any control over goods improvidently ordered by the wife, so as to have it in his power to return them to the vendor, and he does

not return them, or cause them to be returned, he adopts her act, and renders himself answerable." It appears, however, that Lord Ellenborough's judgment, in the particular case, proceeded on an assumption of the husband's marital power to use force in compelling the redelivery of the goods (consisting of materials for fashionable dresses), which is hardly in accordance with modern notions.

In *Blades* v. *Free* (1829), 9 B. & C. 167, the Court recognised the principle that, where a man is living with a woman who passes as his wife, she has the same implied authority to pledge his credit as if she were his wife. In this case it was decided that the general rule as to the determination of an agent's authority by the death of the principal, applies to the wife's implied authority. The case was that a man, who had cohabited with a woman who passed as his wife, went abroad, leaving her and her family at his residence in this country; and it was held that his executors were not liable for necessaries supplied to the woman after his death, but before information of his death had been received. In the subsequent case of *Smout* v. *Ilbery* (1842), 10 M. & W. 1; 12 L. J. Exch. 357, it was held that, under similar circumstances, the wife could not be made liable. The considered judgment of the Court was delivered by Alderson, B., who admitted the authority of *Blades* v. *Free*, but proceeded upon the ground that credit was not given to the widow, and that the plaintiff, believing that the husband was still alive, must be taken to have supplied the goods upon the footing that under no circumstances could she be made liable on a contract.

Where an agent has an implied authority to bind his principal, and a third person has been in the habit of dealing upon the footing of the existence of such authority, it is necessary, in order that the principal may avoid liability, to bring home to the creditor express notice of the revocation of the authority. Thus, although the authority of the wife to pledge her husband's credit is determined by her adultery, — *Govier* v. *Hancock* (1796), 3 R. R. 271, 6 T. R. 603, — yet, where the evidence failed to prove that a tradesman had notice of the fact that the wife was living in adultery, he was held entitled to recover from the husband the price of necessaries supplied to the wife. *Norton* v. *Fazan* (1798), 4 R. R. 785, 1 Bos. & P. 226. Where, however, there has been no dealing on the footing of any authority to pledge a principal's credit, no notice of the determination of any implied authority is necessary. *Wallis* v. *Biddick* (1873), 22 W. R. 76. In that case it was held that a husband was not bound, on a separation taking place, to give notice to a tradesman, with whom he had dealt for ready money, that his wife had no authority to pledge his credit.

The husband is to determine what shall be the standard of living for

his family, and the jury have nothing to do with the question. *Harrison* v. *Grady* (1865), 13 L. T. (N. S.) 375.

It is a nice point how far the implied authority of a married woman to pledge her husband's credit is affected by the provisions of the Married Women's Property Acts, 1882 and 1893, which have been passed subsequently to the decisions in the principal cases. By section 1 (3) of the former Act (45 & 46 Vict. c. 75), "Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to, and to bind her separate property, unless the contrary be shown." The latter Act (56 & 57 Vict. c. 63) commences with the words, "Every contract hereafter entered into by a married woman, otherwise than as agent," and shifts the burden as to proof of the existence of separate estate, but is not conclusive upon the point here raised. There are decisions upon the construction of the former enactment to the effect that, unless a married woman has separate property of a substantial character, she cannot be presumed to have contracted with respect to it. *Leak* v. *Driffield* (1889), 24 Q. B. D. 98, 59 L. J. Q. B. 89; *Bonner* v. *Lyon* (1890), 38 W. R. 541; *Braunstein* v. *Lewis* (1891), 64 L. T. 265. Now, if a married woman has no separate estate, it is apprehended that this implied authority to pledge her husband's credit is in no way affected; but where the married woman has separate estate, which entitles the plaintiff to recover judgment against her, will the husband be entitled to say that the contract was made with respect to the wife's separate property, and not with respect to her right to pledge his credit? In other words, is the husband's liability a secondary liability, only available in the event of the total failure of the wife's primary liability? It may still be urged that this authority is in no way affected by express enactment, and that when the Legislature desired to limit the husband's liability at common law it did so in express terms (see sect. 14 of the Act of 1882). In the event of this contention prevailing it will doubtless be a question of fact in each case to whom credit was given (*vide Calder* v. *Dobell*, No. 17, *infra*).

AMERICAN NOTES.

The doctrine of the principal cases is believed to be received in this country. Browne on Domestic Relations, p. 22; *Pierpont* v. *Wilson*, 19 Connecticut, 450; *Morrison* v. *Holt*, 42 New Hampshire, 478; 80 Am. Dec. 120; *Bergh* v. *Warner*, 47 Minnesota, 250; 28 Am. St. Rep. 362; *Baker* v. *Carter*, 83 Maine, 132; 23 Am. St. Rep. 765. In the last case it was held that the wife is *primâ facie* empowered to bind the husband's credit for necessaries, but the authority "may be disproved by the husband by showing that he had abundantly supplied the house with all things necessary and suitable, or that he had fur-

nished the wife with ample ready money for the purpose, and requested her not to purchase on credit, or had provided suitable places where all things necessary could be had and forbidden her to purchase elsewhere."

The husband is liable only in case of an express or implied promise. *Johnson* v. *Williams*, 3 G. Greene (Iowa), 97; 54 Am. Dec. 491; and where the expenditure is necessary for the wife's support or protection. *Morrison* v. *Holt*, 12 New Hampshire, 478; 80 Am. Dec. 120.

The promise is implied where he fails or refuses to supply her (*Keller* v. *Philips*, 10 Barbour (New York Supreme Ct.), 390), or has acquiesced in former similar purchases by her. *Bergh* v. *Warner*, *supra*.

Mr. Bishop says of *Debenham* v. *Mellon*, 5 Q. B. D. 394 (1 Marriage, Divorce, & Separation, § 1197), "But it is not certain the same would have been adjudged if the article had been a steak for breakfast." Citing several cases which do not involve the point, he continues, "The law-created agency extends only to necessaries as to which the husband is delinquent."

There is some difference of opinion as to the burden of proof, some cases holding that authority to pledge the husband's credit is presumed, and many the contrary; but it seems settled that if the husband has expressly prohibited it, he cannot be bound except upon proof that he so neglects his duty that supplies become necessary. *Keller* v. *Phillips*, 39 New York, 351.

Section V. — *Liability of principal not disclosed or not named in contract.*

No. 17. — CALDER *v.* DOBELL.

(Ex. Ch. from C. P. 1871.)

RULE.

Where an agent, avowedly acting for a principal, whether named or unnamed, makes a contract in his own name, the other contracting party has a right — unless (knowing all the facts) he has already determined his election by the intention, appearing on the evidence of the *res gestæ*, to give credit exclusively to the agent — to sue either the agent or the principal upon the contract. And he does not necessarily determine his election by merely making a demand upon the agent and threatening him with proceedings.

Calder v. Dobell.

L. R., 6 C. P. 486; 40 L. J. C. P. 89, 224.

This was an action for not accepting cotton.

At the trial the following facts appeared: The defendant employed one Cherry, a cotton broker, to buy cotton for him, but told him that he did not desire his name to be mentioned in the transaction. Cherry went to the plaintiffs, cotton brokers, to buy from them, but on the plaintiffs refusing to trust to him, gave his principal's name, which, however, in consequence of what the defendant had said, was not put in the written contracts, the sold note signed by the plaintiffs being, "Mr. P. Cherry, — Dear Sir, We have this day sold to you," &c., and the bought note signed by Cherry being, "I have this day bought of you," &c., and Cherry sent to the defendant the following advice note, "I have this day bought for you from Wright & Co. [the plaintiffs' trading name]," &c. In the invoice and the plaintiffs' books only Cherry's name appeared (though in Cherry's books he appeared as agent); and on non-fulfilment of the contract, the plaintiffs communicated with Cherry on the subject, and instructed their attorneys to write to Cherry and threaten to sue him if he did not pay.

The learned Judge, BRETT, J., put questions to the jury which were answered as follows: —

1st. Did the defendant authorise Cherry to make the contract for him? — Yes.

2nd. Did Cherry assume to make the contract for the defendant, and the defendant, knowing this, ratify his act? — Yes.

3rd. Did the plaintiffs, knowing Cherry was acting as agent for the defendant, elect to contract with Cherry as principal on the terms of giving credit to him and him only? — No.

A verdict was entered for the plaintiffs, the learned Judge reserving leave to the defendant to move in the terms mentioned in the judgments of BOVILL, C. J., *infra*.

Holker now moved pursuant to such leave, and also for a new trial on the ground (amongst others) of misdirection, — First, the defendant is entitled to have a nonsuit or verdict entered for him, on the ground that when the principal's name is disclosed at the time of the contract being made in the agent's name, evidence is not admissible to show that he is principal, as this would contradict the document.

Secondly, The agent being, in the writing, named as principal when the principal was known, was conclusive evidence of an election to look to the agent, and not the principal.

Bovill, C. J. The jury having found a verdict for the plaintiffs, my brother Brett reserved leave to the defendant to move to enter a nonsuit or a verdict for him, "if, assuming the facts found by the jury to be true, they could not properly be given in evidence having regard to the written contract, or if having regard to the whole evidence, he (the judge) ought to have directed the jury as matter of law to find for the defendant."

The first ground on which Mr. Holker has moved to enter a verdict for the defendant is founded on the first part of this leave. For this purpose the facts found must be taken to be true; and the question is whether parol evidence was admissible to show that the contract was made on behalf of the defendant as principal. The written contract was by Cherry in his own name, and it is said that the principal's name having been disclosed at the time of the contract, as trust would not be given to the agent, the defendant cannot be sued; in other words, that parol evidence is not admissible to show that the defendant was the real principal. It has for many years been a generally received impression that when a broker makes a contract in his own name for an undisclosed principal, the latter may sue upon it, and equally that, when discovered, he may be made responsible for its performance. There can be no doubt that the defendant might have been sued upon the contract so made by Cherry; and I am equally of opinion that he may be made responsible if parol evidence be admissible. The rule was clearly laid down by Parke, B., in *Higgins* v. *Senior*, 8 M. & W. 834; 11 L. J. Ex 199, where he says, "There is no doubt that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals," unnamed meaning unnamed in the writing, "and this, whether the agreement be or be not required to be in writing by the Statute of Frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another by reason that the act of the agent in signing the agreement in

pursuance of his authority is in law the act of the principal." A principal may sign by another person in his own name, or in a fictitious name, or by means of a stamp, and the principle as respects an agent is explained thus also by PARKE, B., in *Beckham* v. *Drake*, 9 M. & W. 846; 10 L. J. Ex. 356, where, dealing with a similar matter, he says, "The doctrine rests upon this principle, that the act of the agent was the act of the principal, and the subscription of the agent was the subscription of the principal; and I am not aware of the existence of any cases in which a distinction has been suggested between a contract which has been entered into by one individual for another, or by two individuals for themselves and another as to the liability of the principal to be sued." He then refers to the case of a bill of exchange which he treats as an exception, standing upon the law-merchant The same principle is expressed by the judgment of the Court of Queen's Bench in *Trueman* v. *Loder*, 11 Ad. & E. 594. There the agent was acting for a foreign house, and the Court say, "If the defendant chose to appoint an agent to carry on trade for him in the name of Higginbotham, he clearly authorised that person to do all that would be necessary for him so to carry it on; among other things, to employ a broker to sell for him; and it does not lie in his mouth to deny that the name of Higginbotham, so inserted by the broker in the sold note, is the defendant's own name of business." The evidence was held admissible, the principle being that the agent is authorised to sign for his principal, and that the evidence does not contradict the writing, but shows its real purport. But it is said that the agent may be personally liable; and it is quite true that he cannot say that he is agent only, because where he has given his signature to the contract, he is estopped from saying that he did not contract personally. That, however, is a very different thing from saying that the real principal when discovered cannot sue or be sued. The suppression of the principal's name is entirely consistent with the practice of many trades, to conceal transactions of speculation. The effect is that if the broker enters into contracts in his own name, and has a principal, those with whom he contracts will have the responsibility both of the principal, whether named or unnamed, and of the broker. There is nothing inconsistent in thus giving an option to hold either responsible. I am of opinion that, in accordance with all the authorities, the parol evidence was admissible.

The next point arises on the latter part of the leave reserved; but it is impossible to say that the Judge, as matter of law, was bound to direct the jury to find for the defendant. The evidence on all the points was for the jury, and the Judge could not withdraw it from them, and therefore the motion to enter a nonsuit or verdict for the defendant fails. It is then said, that there was an election to treat the agent as principal. In considering this point, we must assume that there was a principal to authorise the agent, that the agent signed in his own name, and that an election had to be made. Now it is said that the allowing the agent to sign in his own name was an election, but evidence may be admitted to show who was the real principal, and evidence being admitted, on the facts it is clear that an election was not intended in fact; it may be equivocal to allow the insertion of the broker's name and make a demand on the broker, the plaintiffs having said that they will not trust him, but a person may conveniently treat with the broker as for his principal, and the practice of many trades is to refer to the broker, though it is not meant to exonerate the principal, and the course of business may show that this affords little evidence of election. All was for the jury, and therefore the Judge could not withdraw the case from them, and the defendant cannot complain of the verdict and ask for a new trial.

Willes, J. I am of the same opinion. When we bear in mind that except for statutory provision there is no difference between a contract made by word of mouth and one made by writing not under seal, the whole difficulty vanishes. The argument has been founded on the fact of there being a note in writing, and on that part of it which contains the agent's name. Now, assume that there were no writing and no Statute of Frauds; the case would stand thus: Dobell authorises Cherry to buy, and Cherry proposes to buy; but being informed that the plaintiffs could not rely on his credit, the principal is named, and then the plaintiffs sell to Cherry for Dobell. On this state of things there can be no doubt Dobell only is liable, and the result is that there is no liability of the agent. Now add that the seller said, "I must have your liability also, as if your principal were not disclosed," and assume that Cherry assented; the result is that by word of mouth Dobell becomes liable as principal, and Cherry as agent, he having in consideration of the sale engaged that he was to be chargeable as if the principal had not been disclosed, so that the result is that until

election the seller might look either to the agent on the special arrangement or to the principal on the contract of sale. Now, what is the effect of the writing? The writing is to satisfy the Statute of Frauds, and a note is handed to the seller containing the agent's name only, but the seller is not precluded from showing there was a principal and charging him, the effect being to make the principal liable, and further to make the agent liable, because of the peculiar form of the writing by which he undertakes to be liable as if the principal were not disclosed, and the result is by the writing that the agent Cherry becomes liable, and the liability of the principal is not excluded. As to the bought note, "bought on your account," sent to the principal, it is sufficient to say that bought and sold notes may vary as to the terms affecting the agent only, and that there is no more variance than there was in *Cropper* v. *Cook*, L. R., 3 C. P. 194. The result is that the defendant must show that his liability was put an end to by the election. That is what Lord TENTERDEN meant when he said in *Thompson* v. *Davenport*, 2 Smith's L. C. 6th edit. p. 333, "if at the time of the sale the seller know not only that the person who is nominally dealing with him is not principal, but agent, and also know who the principal really is, and notwithstanding all that knowledge chooses to make the agent his debtor, dealing with him alone, then according to *Addison* v. *Gandesequi*, ib. p. 320, 4 Taunt. 574; 13 R. R. 689, and *Paterson* v. *Gandesequi*, ib. p. 313, 15 East, 62; 13 R. R. 368, the seller cannot afterwards on the failure of the agent turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other." I do not agree with Mr. Holker that two persons cannot be severally liable on the same contract. The question is whether the circumstances excluded the double liability; the jury say they did not, and we cannot say that in law they did amount to an election, and therefore the liability of the agent is consistent with there being one of the principal. The seller may say, I will have the liability of both, though the principal is disclosed; and it would be absurd if the law prevented this, and if, the more trouble the seller took to secure himself, the less liability should exist; and to say that the calling for the name of the principal should discharge the principal is contrary to common-sense. Several cases have been cited during the argument, but I will only refer to the case of *Mortimer* v. *M'Callan*, 6 M. & W. 58; 9 L. J. (N. S.) Ex. 73, which I do not, of course,

refer to, to show in any way what is the usage of trade, but because there is a decision as to an usage there set up, which makes it very like the present case. There a disclosed principal, being sued, set up an usage that the broker only was liable; and the judge told the jury that although by the regulations of the Stock Exchange the broker was the person considered liable, it did not follow that the principal might not be liable also, and left it to them to say whether the plaintiff had ever given credit to or taken the responsibility of the broker only, or ever consented to release the defendant as principal. And Lord ABINGER, in delivering judgment, said, "I do not apprehend the rules of the Stock Exchange would make any difference as to the right of a party who sells stock to choose to what person credit shall be given if he thinks proper, and the evidence shows that it was the case sometimes to look to the principal. That then brings it to a question in this particular case, — whether or not the plaintiff meant to take the credit of Taylor *only*, and give up that of the defendant, or whether he insisted on the credit of the defendant? Now that was a question for the jury." Whilst ALDERSON, B., said, "The question is, was that (namely, asking for the cheque of the principal) part of the transaction, and what was the conversation itself? It appears to me to be part of the transaction." It is enough to say that in that case it never occurred to any one, or if it did, was immediately disposed of, that the disclosure of the principal had the necessary effect of making it essential that the seller should fix one only. But for the law laid down in *Higgins* v. *Senior*, *supra*, Dobell, the principal, only would have been liable, and then that case only superadds that the agent is liable, and does not detract from the principal's liability; it is clear that apart from the writing Dobell only was liable, and then the writing puts a liability on Cherry also.

MONTAGUE-SMITH, J. I am of the same opinion. The writing on the face of it purports to be an undertaking by Cherry, and the first question is whether evidence is admissible to show that he had a principal. Now it is not denied that it might be admitted if the principal had not been disclosed, but it is said that it is not admissible where the principal is known at the time of the contract. I confess that I cannot see the distinction, and think the evidence admissible equally in the one case and the other, because the principle is that it is not inconsistent with, and does not contradict the writing. It is so put in *Higgins* v. *Senior*, *supra*, "and this evi-

dence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another by reason that the act of the agent in signing the agreement in pursuance of his authority is in law the act of the principal." It was there also said, no doubt, "but on the other hand to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party is not such would be to allow parol evidence to contradict the written agreement; which cannot be done." I confess I have had some doubt as to the soundness of this distinction; but this latter doctrine has been followed and is well established, and though it is technical and rests on the doctrine of estoppel, it appears to consist with the ordinary habits of business, and, whether it be logical or not, is recognised law. But certainly the other principle laid down, that evidence is admissible to show that the signature was intended to bind the principal, is sufficient to decide this case, unless it could be shown that there is a difference, because the principal was named at the time of the contract, I think that there is no ground for any such distinction as to the admissibility of the evidence. The next question is whether, when the principal is thus known, the contract is an election to treat Cherry as principal only, and this is the point which requires most consideration. It was contended that the evidence afforded by the form of the contract and treating with Cherry afterwards showed that there was an election; but the evidence also shows the real transaction, viz., that the defendant gave Cherry authority to buy, and told him to keep his name out of the matter, that the plaintiffs refused to trust Cherry, and that he thereupon disclosed his principal; all this proves that the plaintiffs would not treat Cherry as principal, but would know his principal, whilst at the same time, Cherry having been told that his principal did not want his name known, his name was left out in consequence. But whether the plaintiffs intended to elect or not may be a disputed question of fact, and then it is a matter for the jury, and the Court cannot say, as parol evidence was admissible, that it was not for the jury. It is said that the election was made at the time of the contract being made, and could not be changed. The cases have decided that where there is an undisclosed principal, there may be an election when the principal is known or afterwards, and the only difference, when he is disclosed, is that the election can be made at

the moment of the contract. It is said it was fixed then; but even if that would appear to be so on the documents, if taken alone, yet when we come to the evidence, the question arises whether it was made then, and therefore it was for the jury. [His Lordship then dealt with the other points.]

Brett, J. It is first said that parol evidence that Cherry was agent is to be excluded to charge his principal, on the ground that the name was disclosed at the time of the contract, because this would be a contradiction of the document; but when the name is undisclosed, such evidence is held to be no contradiction, and I confess that I cannot follow the argument. The other ground is that, as by the writing the agent is liable, the principal is not, because then two persons are liable; but this is equally applicable to a case where the principal is undisclosed, and there from the time of the contract the principal is always liable as well as the agent, and so both may be liable, and therefore it seems to me that the evidence was admissible. The other point was whether I ought to have directed the jury, as matter of law, to find that there was a conclusive election, because Cherry's name was in the contract; but this really brings us back to the first point, and if not an election, on the whole evidence there was a question of fact which was for the jury.

The Court, accordingly, refused a rule.

The defendant having appealed against this decision, the points were argued by

Holkar (Herschel with him), for the appellant. First, there was no evidence of authority to Cherry to contract as he did, or of ratification; secondly, parol evidence was inadmissible to show it was a contract of Dobell and not of Cherry; thirdly, the evidence showed a clear election as against Cherry. As respects the first point, it is clear that Cherry was not authorised to contract so as to bind Dobell, and the advice note did not show Dobell that he had bought on his responsibility, and the keeping it was no evidence of ratification.

[The Court. The advice note indicated that Cherry had pledged Dobell's credit, and this Dobell kept without making any objection. Surely, this was evidence of ratification, and the jury have found that there was a ratification.]

The note does not convey that information. Secondly, it is true that when a principal is undisclosed at the time of the contract, the

other party on disclosure may elect; but where he is disclosed, to admit parol evidence as to the principal would be to contradict the written document.

[BLACKBURN, J. Does not the case fall within what was said by PARKE, J., in *Short* v. *Spackman*, 2 B. & Ad. 962? "He (the defendant) was informed that there was an unknown principal, and such was the fact. It is found that the plaintiffs were authorised by Hudson to buy the oil of the defendant, and the contract was binding, both on them, and, if the defendant chose to enforce it, on Hudson." The master of a ship is known to be agent of the owner, but still the owner is liable on a charter party made by the master; this accords with the general rule, the exceptions being the cases of a bill of exchange and writing under seal. And the fact of the plaintiffs asking one to pay does not prevent them from asking the other afterwards.]

If both be liable, the plaintiffs may do anything to get anything from one and then proceed against the other; and if so, what necessity is there for all that has been said about election? If the present contention be not true, then there are two contemporaneous contracts *ab initio*, which is contrary to all principle. The present contention is supported by *Paterson* v. *Gandesequi*, 2 Smith's L. C.

[BLACKBURN, J. The question there was, what was the contract at the time, and whether it was with the agent or not?]

Addison v. *Gandesequi*, 2 Smith's L. C., is stronger, and in *Thompson* v. *Davenport*, 2 Smith's L. C., LITTLEDALE, J., clearly draws a distinction between the cases of a known and unknown principal.

[BLACKBURN, J. Abbott on Shipping and the cases show that a principal, although his name be not in the contract, may be sued; and I know of no distinction as to the principal being undisclosed or not. The effect of *Paterson* v. *Gandesequi*, *supra*, and *Thompson* v. *Davenport*, *supra*, is that where he is known, it is a question whether or not the credit was given to him, and PARKE, J., in *Short* v. *Spackman*, *supra*, lays down that both may be liable. HANNEN, J. And it is said in Story on Agency, § 446: "The liability of the principal to third persons upon contracts made by his agent within the scope of his authority is not varied by the mere fact that the agent contracts in his own name, whether he discloses his agency or not, provided the circumstances of the case do not show that an exclusive credit is given to the agent. Thus, if an agent purchases goods in his own name for his princi-

pal, without disclosing the latter, the principal will be liable when discovered to the vendor for the price. So if the agent purchases the goods, and states at the time that he purchases as agent, but does not disclose the name of his principal, the latter will not be absolved from the contract; for in such a case as the principal is not known, it is impossible to say that the vendor has made his election not to trust the principal, but exclusively to trust the agent. *He may credit both or either;* and he is not to be presumed to have an intention to elect either exclusively until the name and credit of both are fairly before him."]

The case of *Priestly* v. *Fernie*, 34 L. J. (N. S.) Ex. 172, shows that an action cannot be brought against the owner and also the master of a ship; and to hold that Dobell is liable is to hold that two persons may be liable at the same time, and that in fact there are two contemporaneous contracts. Nothing in *Higgins* v. *Senior*, 11 L. J. (N. S.) Ex. 199; 8 M. & W. 834, militates against this.

[Blackburn, J. Parke, B., says there distinctly that the principal may be charged.]

Thirdly. There was a clear election against the agent by inserting his name only in the contract though the defendant was known, and also by the subsequent conduct in charging him.

Counsel for the respondents were not called on.

Kelly, C. B. This case is entirely free from doubt. There are not two contracts, as it has been contended is the effect of the decision below; there is one contract in writing entered into by an agent in his own name, but containing nothing to show that he was not acting for a principal, and it has been shown that there was one whose name was disclosed at the time of making the contract. And there was a clear right to sue either the principal or agent. I agree that if all right of election were determined, there would be an end of the case; but the only case which has been cited to show this was so, was a case where it was held that where one is sued to judgment the other cannot then be sued, but here there was nothing of the kind, and at least up to action brought, the matter was open. There was sufficient evidence on all the questions.

Martin, B. I have always thought that the rule laid down by Parke, B., in *Higgins* v. *Senior*, *supra*, was accepted as the true rule. He says, "There is no doubt that where such an agreement is made it is competent to show that one or both of the contracting parties were agents for other persons and acted as such agents in making

the contract, so as to give the benefit of the contract, on the one hand to, and charge with liability on the other, the unnamed principals, and this whether the agreement be or be not required to be in writing by the Statute of Frauds, and this evidence in no way contradicts the written agreement;" for forty years that has been accepted as the true rule, and when he says "unnamed," he means unnamed in the writing.

BLACKBURN, J. I am of the same opinion, and will only add as to the point of election, that where a man acts as agent, his principal is bound, and is not the less bound because the agent has made a written contract so as to bind himself, or is in the position of a *del credere* agent. There are, however, many cases where the principal or employer is known; and yet it is never supposed that his credit is being pledged, and *Paterson* v. *Gandesequi*, *supra*, and *Addison* v. *Gandesequi*, *supra*, were cases where the question was whether there had not been an election not to give credit to a foreigner.

LUSH, J., and HANNEN, J., concurred, — the latter referring to Story on Agency, § 160 *a*, where it is said: "If the agent possesses due authority to make a written contract not under seal, and he makes it in his own name, whether he describes himself to be an agent or not, or whether the principal be known or unknown, the agent will be liable to be sued and be entitled to sue thereon, and his principal also will be liable to be sued and be entitled to sue thereon, in all cases, unless from the attendant circumstances it is clearly manifested that an exclusive credit is given to the agent, and it is intended by both parties that no resort shall in any event be had by or against the principal upon it."

CLEASBY, B. I may add that the question of election is negatived by the evidence of two witnesses, for both the plaintiffs said that where it was desired to keep the principal's name out of the contract, it was usual to carry the matter through in the broker's name.

The decision of the Court of Common Pleas was accordingly affirmed.

ENGLISH NOTES.

The rule has been applied to an insurance agent effecting a policy in his own name, — whether the policy contains or does not contain the usual words, "as well in his own name as in the name of every person to whom the same shall appertain." *Browning* v. *The Provincial Insurance Co. of Canada* (P. C. 1873), L. R., 5 P. C. 263.

No. 17. — Calder v. Dobell. — Notes.

Where the contract is *signed* by an agent *as such*, whether the principal is named or not, the agent is *primâ facie* not a party to the contract: *Morris* v. *Cleasby* (1816), 4 M. & S. 566; *Fairlie* v. *Fenton* (1870), L. R., 5 Ex. 169; *Southwell* v. *Bowditch* (1876), 1 C. P. D. 374, 45 L. J. C. P. 630.

But whether a broker so signing in a particular form of contract does make himself a party, is a question of construction, admitting in certain cases of evidence of usage.

In *Humphrey* v. *Dale* (Ex. Ch. 1858), E. B. & E. 1004, 27 L. J. Q. B. 390, the plaintiff sued the defendants for the price of oil bargained and sold, but not accepted. The plaintiff had employed T. & M. as brokers to sell the oil. The defendants were the brokers employed by buyers. The brokers had met, and, without disclosing their principals, entered into the following notes: "Sold this day for T. & M. to our principals . . . oil. . . . D. M. & Co., brokers." "Sold to D. M. & Co. for account of Humphrey . . . oil. . . . T. & M., brokers." Evidence was given that, according to the usage of the trade, when a broker purchases or sells oil without disclosing his principal, he is himself liable to be looked to as the purchaser or seller. The Exchequer Chamber by a majority, affirming the judgment of the Queen's Bench, held that, on the evidence of the usage of trade applied to these notes, there was a contract on which the defendants were personally liable, as purchasers of the oil.

In *Fleet* v. *Murton* (1871), L. R., 7 Q. B. 126, 41 L. J. Q. B. 49, the custom of the London fruit trade, that brokers who do not give the names of their principals in the contract note are personally liable, was held to fix the defendants with liability in case of non-acceptance by the principal. The material part of the contract note in that case ran, "We have this day sold for your account to our principal, &c." In the subsequent case of *Hutchinson* v. *Tatham* (1873), L. R., 8 C. P. 482, 42 L. J. C. P. 260, evidence of a trade usage was admitted so as to charge the defendants with liability upon a charter party which had been signed by them as "agents to merchants." The usage in such a case was that if the name of the principal was not disclosed within a reasonable time, the agents were personally liable.

In *Southwell* v. *Bowditch* (C. A. 1876), 1 C. P. D. 374, 45 L. J. C. P. 630, the defendant, a broker, signed and sent to the plaintiffs a note of a contract, of which the following are the material terms: "I have this day sold by your order and for your account to my principals five tons of . . . anthracene. . . . W. A. Bowditch." The action having been brought against the broker, for goods sold and delivered, the Court of Appeal, reversing the judgment of the Common Pleas Division, held that, in the absence of usage making the defendant per-

sonally liable (such as was given effect to in the cases of *Humphrey* v. *Dale* (Ex. Ch. 1858), E. B. & E. 1004, 27 L. J. Q. B. 275, and *Fleet* v. *Murton* (1871), L. R., 7 Q. B. 126, 41 L. J. Q. B. 49, both above cited), the defendant was not personally liable upon the contract. In his judgment (1 C. P. D. 376), the MASTER OF THE ROLLS (Sir G. JESSEL), said: "The first observation which I wish to make is that, so far as I know, there is in law no difference of construction between mercantile contracts and other instruments. The grammatical meaning is, as in other cases, the meaning to be adopted, unless there be reason to the contrary. In the present case, there can be no doubt that the person signing the contract intended to sign as broker. The contract says 'Sold by your order and for your account' and 'to my principals.' There is nothing whatever on the contract to show that the defendant intended to act otherwise than as broker. No doubt, it does not absolutely follow, from the defendant's appearing on the contract to be broker, that he is not liable as principal. There are two ways in which he might so be made liable: first, intention on the face of the contract, making the agent liable as well as the principal; secondly, usage." At p. 379, MELLISH, L. J., said: "Now there is, I think, a material difference between the words 'sold for you to my principals' and 'bought of you for my principals.' The rule of law, no doubt, is that, if the principal is undisclosed, the broker saying, 'bought of you for my principals' is himself liable: but this contract says, 'sold for you to my principals;' *i. e.* I, your broker, have made a contract for my principals the buyers."

Where the custom to be incorporated in the contract is unreasonable or legally void, and was not known to the principal sought to be charged, the custom will be excluded. A custom of the London tallow trade, that the broker may appropriate general purchases made by him, but not made with respect to any particular orders among his principals, was held not to bind a Liverpool trader, who did not know of it: *Robinson* v. *Mollett* (1875), L. R., 7 H. L. 802, 44 L. J. C. P. 362. So, too, the custom of the London Stock Exchange to disregard the provisions of Leeman's Act (30 & 31 Vict. c. 29), which avoids a contract for the sale of bank shares unless the numbers of the shares are specified in the contract note, is not binding on a person who is ignorant of the custom: *Perry* v. *Barnett* (C. A. 1885), 15 Q. B. D. 388, 54 L. J. Q. B. 446.

But in *Seymour* v. *Bridge* (1885), 14 Q. B. D. 460, 54 L. J. Q. B. 347, where it appeared that the defendant had had previous dealings on the London Stock Exchange, and so, presumably, knew of the custom to disregard Leeman's Act, he was held bound by a contract made according to the usage. This decision followed *Read* v. *Anderson* (1884),

13 Q. B. D. 779, 53 L. J. Q. B. 532, which was an action by a betting agent against his principal to recover money paid on bets. And although *Read* v. *Anderson* is struck at by the Gaming Act, 1892 (55 Vict. c. 9), this Act only applies to a promise to pay money paid under a contract void by 8 & 9 Vict. c. 109, and does not strike at an implied promise to pay money paid under any other void contract.

In considering questions of custom, it seems that evidence of customs in a similar trade in the same place is admissible, as tending to corroborate the evidence as to the existence of the custom which is in question: *Fleet* v. *Murton* (1871), L. R., 7 Q. B. 126, 41 L. J. Q. B. 49.

In *Barrow* v. *Dyster* (1884), 13 Q. B. D. 635, brokers entered into a contract for undisclosed principals, which, by the custom of the trade, rendered them personally responsible. The contract itself contained an arbitration clause making the brokers sole arbitrators. It was held that evidence of the custom was rightly rejected, as by reason of the arbitration clause, it would make the brokers judges in their own cause.

The mere fact of filing an affidavit of proof against the estate of an insolvent agent to an undisclosed principal, after that undisclosed principal is known to the creditor, is not conclusive on the question of election: *Curtis* v. *Williamson* (1874), L. R., 10 Q. B. 57, 44 L. J. Q. B. 27. But suing one party will, in general, be so. Thus in *Scarf* v. *Jardine* (1882), 7 App. Cas. 345, 51 L. J. Q. B. 613, where one of two partners retired from the firm, but the business was carried on under the same style, a person who, after notice of the change, sued the remaining partner, for goods supplied before notice, was held not entitled to sue the late partner.

AMERICAN NOTES.

"The other party is at liberty, on discovering the principal, to elect to hold either the agent or the principal, but he cannot hold both." Mechem on Agency, § 698, citing *Bush* v. *Devine*, 5 Harrington (Delaware), 375; *Silver* v. *Jordan*, 136 Massachusetts, 319. To this doctrine, and precisely in point, is *Merrill* v. *Kenyon*, 48 Connecticut, 314; 40 Am. Rep. 174. See also *Argersinger* v. *Macnaughton*, 114 New York, 535; 11 Am. St. Rep. 687; *Clealand* v. *Walker*, 11 Alabama, 1058; 46 Am. Dec. 238; *Bacon* v. *Sondley*, 3 Strobhart Law. (So. Carolina), 542; 51 Am. Dec. 646; *Beymer* v. *Bonsall*, 79 Penn. St. 298; *York Co. Bank* v. *Stein*, 24 Maryland, 447; *Chandler* v. *Coe*, 54 New Hampshire, 561; *Upton* v. *Gray*, 2 Maine, 372; *Barker* v. *Garvey*, 83 Illinois, 184; *Kerchner* v. *Reilly*, 72 North Carolina, 171; *Vermont R. Co.* v. *Clayes*, 21 Vermont, 30; *Borcherling* v. *Katz*, 37 New Jersey Equity, 150; *Thomas* v. *Atkinson*, 38 Indiana, 248; *Ford* v. *Williams*, 21 Howard (U. S.), 288. Election is a question of fact. *Merrill* v. *Kenyon*, 48 Connecticut, 314; 40 Am. Rep. 174; *Cobb* v. *Knapp*, 71 New York, 348; 27 Am. Rep. 51. Taking

the agent's note is not conclusive. *Merrill* v. *Kenyon, supra*: *Keller* v. *Singleton*, 69 Georgia, 703; nor is the commencement of an action against the principals. *Cobb* v. *Knapp, supra*.

Nothing less than a satisfaction is conclusive of election. *Beymer* v. *Bonsall*, 79 Penn. St. 298; approved in *Cobb* v. *Knapp, supra*; *Maple* v. *Railroad Co.*, 40 Ohio St. 313; 48 Am. Rep. 685. But in *Kingsley* v. *Davis*, 104 Massachusetts, 178, it was held that an action prosecuted to judgment was a bar.

No. 18. — ARMSTRONG *v.* STOKES.

(Q. B. 1872.)

RULE.

A VENDOR who has sold goods on the sole credit of the person named in the contract as purchaser may nevertheless, if that person was in fact agent for an undisclosed principal, hold the principal liable to him upon the contract; but if the principal has *bonâ fide* paid the price to the agent, at a time when the vendor still gave credit to the agent, and knew of no one else as principal, the vendor cannot afterwards, on discovery of the principal, sue him for the price.

Armstrong v. Stokes.

L. R., 7 Q. B. 598; 41 L. J. Q. B. 253.

The facts of the case, the shape in which it was presented to the Court, and the nature of the arguments are sufficiently explained in the judgments.

After argument, the Court took time for consideration.

The judgment of the Court (BLACKBURN, J., MELLOR, J., and LUSH, J.) was delivered (on July 6) by

BLACKBURN, J. This was an action for goods sold and delivered. The third plea was demurred to, and issue was also taken upon it. The issue in fact was tried before my brother MELLOR, when the verdict was entered for the plaintiff, with leave to move to enter the verdict for the defendant. A rule was accordingly obtained, against which cause was shown at the sittings after this term before my brothers MELLOR, LUSH, and myself; and at the same time the demurrer was argued. We thought the plea was good,

and gave judgment at once for the defendant on the demurrer; but on the rule the question was, whether the substance of the plea, — that is, enough of it to constitute a defence — had been proved; and in order to determine that, it is necessary to state what the evidence at the trial was. It was proved that Messrs. J. & O. Ryder & Co. were commission merchants, carrying on business at Manchester, sometimes for themselves and sometimes acting in pursuance of orders from constituents. They were not brokers professing never to act for themselves. The plaintiff, who was a merchant at Manchester, had had previous dealings with J. & O. Ryder & Co., in the course of which it appeared that he had never inquired whether J. & O. Ryder & Co. had constituents or not. All former transactions had been duly settled between him and J. & O. Ryder & Co., so that the question had never become material. On the 15th of June, 1871, the plaintiff's salesman made a contract with J. & O. Ryder's salesman, which, as taken down in the plaintiff's book, was as follows: "15th of June, 1871. J. & O. Ryder & Co., 200 pieces, 39 inch 17 square shirtings, 75 yards at 20*s.* 6*d.*, £205, 1½ per cent., 30 days." The meaning of this was explained to be that the shirtings were to be paid for thirty days after delivery, and then with a deduction of 1½ per cent. from the nominal price. As we understand the evidence, that is an ordinary mode of dealing, though the more usual terms in the Manchester market are cash, subject to a discount varying according to the rate of interest and the agreement of the parties, the rate at this time being about 2 or 2½ per cent. When the agreement is for cash, the goods are in practice delivered without actual payment, and the price, less the discount, is paid a few days afterwards, generally on the Friday following, that being the ordinary pay-day. When this practice is pursued, there is a period during which the seller has parted with his vendor's lien before receiving the money, though he is probably not bound to do so, as where he has, by the contract, given credit, and the period is much shorter than where credit has been stipulated for. On the 24th of July the plaintiff sent the goods, which were grey, *i. e.*, unbleached, shirtings, to J. & O. Ryder, with an invoice debiting them with the price, after deducting the discount, viz., £205. The period of thirty days would elapse on the 23rd of August; but J. & O. Ryder's pay-day being Friday, actual payment would not, had all gone right, have been made till the 25th of August. On the 24th,

the plaintiff received a memorandum from J. & O. Ryder requesting him to delay applying for payment till the following Friday, September 1. Nevertheless, his salesman did call upon the 25th, but was refused payment, and told it would be all right on the next Friday. The plaintiff saw in the newspaper an announcement of the death of one of the partners in the firm of J. & O. Ryder, and attributed the delay to this. He was, to use his own phrase in his evidence, considering what to do, but had done nothing, when, on the 30th of August, J. & O. Ryder & Co. stopped payment.

One point that was raised for the defendants may as well be disposed of here. We think that if the plaintiff had, on the non-payment by J. & O. Ryder, any right to come on the defendants, the taking no active step before the 30th was no evidence of any such laches as would deprive him of that right.

To proceed with the evidence: It was not pretended on either side that the plaintiff knew before the 30th of August that the defendants had anything to do with this transaction, so as to afford any evidence, on the one hand, that he had originally parted with the goods on the credit of the defendants, or on the other hand, that he had elected to give credit to J. & O. Ryder, to the exclusion of the defendants. But after the stoppage of J. & O. Ryder & Co., on examining their books, it was discovered that in this case they had been acting as commission merchants for the defendants, and the plaintiff's case was, that under the circumstances he was entitled to demand payment from the defendants as being undisclosed principals of J. & O. Ryder in this transaction. The evidence as to this was, that the defendants are merchants at Liverpool, who had often before given orders to J. & O. Ryder, sometimes for grey, and sometimes for white, that is, bleached, shirtings. When such an order had been previously given for white shirtings, the course of business had always been for J. & O. Ryder to procure grey shirtings, and then to have those grey shirtings bleached; and when they were bleached, to deliver them to the defendants, charging them with the cost of the purchase of the grey shirtings, and of the bleaching, with one per cent. commission on that amount for placing the order, and also with any charges incurred for packing, &c., and this amount the defendants always paid to J. & O. Ryder. As the defendants knew that J. & O. Ryder were neither manufacturers nor bleachers, they were of course aware that J. & O. Ryder must have procured some one

to supply the grey cloths, and some one to bleach them; but they never were in any of the previous transactions brought into communication with those who supplied the goods, or those who bleached them; nor did they ever inquire, nor were they ever told, who they were. There was no running account between the defendants and J. & O. Ryder, but the defendants almost invariably paid on each transaction. It was stated in the evidence that they generally, "but not quite always," paid in cash, that is, as already explained, on the pay-day after the goods were delivered to them. No inquiry was made on either side as to the nature of the exceptional cases in which the defendants did not pay cash. Those exceptions might have thrown light on the nature of the employment of J. & O. Ryder, or they might not. In the present case the defendants gave a verbal order to J. & O. Ryder for bleached shirtings. Nothing was said as to the price at which they were to be procured, which was, therefore, left to the discretion and honesty of J. & O. Ryder; and nothing was said as to the mode in which they were to be paid for, which was, therefore, to be as was usual. In consequence of this order, J. & O. Ryder's manager went to the plaintiff's salesman to negotiate for the supply of the goods. The manager at first wished to buy for cash, but wanted discount at $2\frac{1}{2}$ per cent., whilst the plaintiff's salesman wished to allow only 2 per cent. Finally they agreed to split the difference, and make it $1\frac{1}{2}$ per cent. at thirty days. All this was perfectly *bonâ fide* between them, and the defendants knew nothing about it. When the grey shirtings were delivered by the plaintiff to J. & O. Ryder, they sent them to the bleacher, who, as usual, cut each piece in two, and having received from J. & O. Ryder 200 pieces of grey cloth, sent back to them 400 pieces of white cloth. J. & O. Ryder sent on these 400 pieces of white cloth to the defendants with an invoice dated the 2nd of August, headed as follows: "Invoice of ten packages of goods purchased and forwarded per carrier to Liverpool, by order and on account of Messrs. Bates, Stokes, & Co. (the defendants) by the undersigned." The defendants were in this invoice charged with the actual money which ought to have been paid to the plaintiff as the price of the goods, viz., £205, the actual charge of the bleaching, one per cent. on the amount of those two sums as commission, and the amount of some packing charges, making in all £227 10*s.* 9*d.* noted as being due 11th of August, which was the first pay-day after the

goods would be received in Liverpool. On the 11th of August, the defendants, with perfect *bona fides*, paid J. & O. Ryder that sum of £227 10*s.* 9*d.*

On this state of the evidence Mr. Herschell took three points, — first, he said that the defendants were not undisclosed principals, employing J. & O. Ryder as agents, with authority to create privity between the unknown persons who supplied the goods and the defendants; secondly, that even if they were, the defendants having, before the plaintiff heard of their connection with the matter, and before they heard of the plaintiff, honestly and in the ordinary course of business, paid J. & O. Ryder, were no longer liable to the plaintiff; and thirdly, that the plaintiff had, by *laches*, disentitled himself to sue. It was admitted that all that was sworn was honestly sworn, and neither counsel required anything to be left to the jury. My brother Mellor thereupon directed a verdict for the plaintiff, with leave to move to enter a verdict for the defendants; the Court to have all powers to draw inferences of fact. The third point taken was disposed of at once, but the other two points were fully discussed, and the authorities brought before us. On these we took time to consider.

The first point depends on a question of fact, viz., what was the authority really given to J. & O. Ryder by the defendants? It is, we think, too firmly established to be now questioned, that where a person employs another to make a contract of purchase for him, he, as principal, is liable to the seller, though the seller never heard of his existence, and entered into the contract solely on the credit of the person whom he believed to be the principal, though in fact he was not. It has often been doubted whether it was originally right so to hold; but doubts of this kind come now too late, for we think that it is established law that if on the failure of the person with whom alone the vendor believed himself to be contracting, the vendor discovers that in reality there is an undisclosed principal behind, he is entitled to take advantage of this unexpected godsend, and is not put to take a dividend from the estate of him with whom alone he believed himself to be contracting, and to whom alone he gave credit, and to leave the trustee of that estate to settle with the undisclosed principal, subject to all mutual credits and equities between them. He may recover the price himself direct from the principal, subject to an exception which is not so well established as the rule, and is not

very accurately defined, viz., that nothing has occurred to make it unjust that the undisclosed principal should be called upon to make the payment to the vendor.

We have first to consider whether we should draw from the evidence the inference of fact that the defendants were principals, so as to bring the case within the rule; so that if the price had not been paid by the defendants to Ryder & Co., the plaintiff would have a right to be paid the money rather than look to the trustees of the estate of J. & O. Ryder. This depends entirely on what was the real nature of the employment of J. & O. Ryder by the defendants. The defendants not being known in the matter at all to the plaintiff, there is no room for holding them bound by any apparent authority given to J. & O. Ryder. There can be no case against the defendants of holding them out as having their authority, or clothing them with ostensible authority, to a person who did not know that J. & O. Ryder had any principal at all. As to the real authority, there is evidence both ways. The charge of commission is conclusive to show that, to some extent, there was a relation of principal and agent. The defendants were entitled to have the skill and diligence of J. & O. Ryder to get the goods as cheaply as they could; and the defendants were entitled to have the true cost of the goods debited to them with no further addition than the charges and the commission. Then Ryder & Co. did not engage to supply the goods themselves; they only undertook to find persons who would. If prices had risen after the plaintiff had made his bargain, and the plaintiffs had refused to go on, the now defendants could not have sued J. & O. Ryder for this; they must either have sued the now plaintiff, if there is privity between them, or perhaps have used the name of J. & O. Ryder, as their trustees to sue, as is suggested by Kelly, C. B., in *Mollett* v. *Robinson*, L. R., 7 C. P. 84; 41 L. J. C. P. 84. In the invoice the defendants are not charged as purchasers from J. & O. Ryder, but are debited for goods bought by their order and on their account. This form is also evidence in favour of the plaintiffs. But none of these things are conclusive. The great inconvenience that would result if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods, has led to a course of business in consequence of which it has been long settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from

whom the commissioner buys them by his order and on his account. It is true that this was originally (and in strictness perhaps still is) a question of fact; but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of his order given to a commission merchant at New Orleans, or between a New York merchant and the supplier of every bale of goods purchased in consequence of an order to a London commission merchant, is so obvious and so well known that we are justified in treating it as a matter of law, and saying that in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign constituent's credit. Where the constituent is resident in England the inconvenience is not so great, and we think that *primâ facie* the authority is given, unless there is enough to show that it was not in fact given. It was strongly urged by the defendants' counsel that the course of dealing and the mode of settlement by the defendants with J. & O. Ryder were sufficient to show that J. & O. Ryder were not intended to have authority to establish privity of contract between the defendants and those from whom J. & O. Ryder obtained the goods. We agree that it is evidence that way; but we do not feel justified in finding this question in favour of the defendants. If a special jury, who have knowledge of the course of business beyond what we have, had on this ground found a verdict for the defendants, we should not have been dissatisfied with it. Indeed, we feel this so strongly that if the event of the cause depended upon this point, we should probably have given the defendants liberty to have a new trial on payment of costs, in order that the opinion of a jury might be taken on that new trial, when the nature of the exceptions from the general habit of paying cash might also be ascertained. But it is not necessary to do this, as we have come to the conclusion that the defendants are entitled to the verdict on the second ground. It is right, in order to avoid misapprehension, to say that the phrase repeatedly used by the counsel for the plaintiff, that the vendor has a right to follow the goods, is, in our opinion, calculated to mislead. There are cases such as that of *Wilson* v. *Hart*, 7 Taunt. 295, to which such a phrase would be applicable, but those, as is pointed out in 2 Smith's Leading Cases, 5th ed. p. 332, proceed on the ground of fraud. In the absence of fraud, unless the person receiving the

goods is a party to the contract under which the goods were sold, the vendor has no right to follow them. If the goods were bricks sold to a contractor, he could not charge the owner of the house into which they were built, though he might do so if the person supposed to be the contractor turned out to be really agent for the owner of the house; and the principle is the same in such a case as the present.

The second point raised is one of considerable importance. In *Railton* v. *Hodgson* and *Peele* v. *Hodgson*, reported in a note to *Addison* v. *Gandassequi*, 4 Taunt. 575, 13 R. R. 692, MANSFIELD, C. J., said, "If Hodgson (the undisclosed principal) had really paid Smith, Lindsay, & Co. (the insolvent actual purchasers), it would have depended on circumstances whether he would have been liable to pay for the goods over again; and if it would have been unfair to have made him liable, he would not have been so." This was in 1804. It is, however, to be observed that, as Hodgson had not paid either, this was not necessary for the decision. Two cases of *Waring* v. *Farenck*, 1 Camp. 85; 10 R. R. 638; and *Kymer* v. *Suwercropp*, 1 Camp. 109; 10 R. R. 646, which were tried before Lord ELLENBOROUGH in 1807, are generally cited on this subject, without, as it seems to us, paying sufficient attention to the fact that Kenyon & Co., in consequence of whose insolvency the questions arose, were London brokers, not commission merchants. A broker always professes to make a contract between two principals, and though in recent times the strictness of the rules has to some extent been relaxed, in 1807 a London broker was bound by his bond (the form of which will be found in Holt, N. P. 431, note) to make known to "such person with whom the agreement is made the name of his principal if required, and not to deal on his own account." In *Kemble* v. *Atkins*, Holt, N. P. 427, it was decided that this did not prevent the broker from making the contract in his own name so as to pledge his personal credit to the seller; but still he must necessarily have had a principal. And as is laid down in *Higgins* v. *Senior*, 8 M. & W. 834; 11 L. J. Ex. 199, it was always competent, notwithstanding this form of the agreement, to show who the person was for whom the broker acted as agent in making the contract, "so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals." In every case, therefore, where the sale is to a broker, the vendor knows that there is, or ought to be, a principal between

whom and himself there is established a privity of contract and whose security he has in addition to that of the broker; and the principal also knows that the vendor is aware of this, and to some extent trusts to his liability. This is, therefore, a very different kind of case from that of a person selling goods to a person whom at the time of the contract he supposes to be a principal. The marginal note in *Kymer* v. *Suwercropp*, *supra*, is perhaps too general, even in the case of a broker as is pointed out by MAULE, J., in *Smyth* v. *Anderson*, 7 Com. B. 39, 3 L. J. C. P. 114, but what was actually decided there was probably right. The next case in order of date is *Thompson* v. *Davenport*, 9 B. & C. 78, where Lord TENTERDEN, in speaking of this subject, says. "I take it to be the general rule that if a person sells goods (supposing that at the time of the contract he is dealing with a principal) but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal, *subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal.*" And BAYLEY, J., says, "Where a purchase is made by an agent, the agent does not of necessity so contract as to make himself personally liable, but he *may* do so. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that *the principal shall not be prejudiced by being made personally liable, if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he had looked to the responsibility of the agent.*" In this case, as in *Railton* v. *Hodgson*, the freshly discovered principal had not paid any one; and therefore the two passages above italicised were no necessary part of the decision, though they are weighty authorities as indicating the decided opinion of two judges of great experience in commercial cases. In *Smyth* v. *Anderson*, *supra*, the case arose in such a peculiar way that it is difficult to say exactly what was decided. But MAULE, J., in his very elaborate and able judgment, expresses a decided opinion that the *dicta* of

Mansfield, C. J., and Bayley, J. (he seems not to have noticed that of Lord Tenterden), "afford a sensible rule on the subject." The latter *dictum* of Maule, J., adds very greatly to the weight of those which preceded. Still, there is no actual decision on the point. On the other hand, it is stated in a note to the third edition of Paley's Principal and Agent, p. 249, note, that Parke, J., was amongst those who did not acquiesce in the decision in *Thompson* v. *Davenport, supra*. It is not said on what authority that statement proceeds; and from the context it would seem that this dissent was rather from the extension of the rule by which the principal might be charged, than from the exceptions to that rule. But in *Heald* v. *Kenworthy*, 10 Ex. 739; 24 L. J. Ex. 76, he does, as it seems to us, express dissent from the exceptions. The case itself arose on a demurrer to a plea which is set out. But then it is stated that the Court thought it might amount to the general issue, and therefore it was amended; but the report does not state what the amendments were. It is not easy, therefore, to say what was the actual decision. It does not, however, appear that in any part of the plea it was stated that the plaintiff was ignorant of the existence of the defendant as principal till after the defendant had paid the agent, nor even that the defendant believed such to be the case. Unless the plea was such as to raise the very point, the opinion of Parke, B. (like those of Mansfield, C. J., Bayley, J., and Maule, J.), is but a *dictum* entitled to high respect, but not binding as a decision. Parke, B., lays down generally that "if a person orders an agent to make a purchase for him, he is bound to see that the agent pays the debt, and the giving the agent money for that purpose does not amount to payment unless the agent pays it accordingly." After commenting on several of the cases already referred to, he concludes: "I think that there is no authority for saying that a payment made to the agent precludes the seller from recovering from the principal, unless it appears that he has induced the principal to believe that a settlement has been made with the agent." He states this as generally true wherever a principal has allowed himself to be made a party to a contract, and makes no exception as to the case where the other side made the contract with the agent, believing him to be the principal, and continued in such belief till after the payment was made. He certainly does not in terms say that there is no qualification of the principle he lays down, when applicable to such a case; but,

recollecting how careful PARKE, B., always was to lay down what he thought to be the law fully and with accuracy, we think the counsel for the plaintiff were justified in arguing that PARKE, B., thought that the exception did not exist. It is also to be observed that POLLOCK, C. B., concurred in the opinion expressed by PARKE, B., and this is, in our opinion, a weighty authority in favour of the plaintiff's contention, more especially as POLLOCK, C. B., assents in his judgment to the remark thrown out by PARKE, B., during the argument, and afterwards more elaborately stated by him in his judgment. And ALDERSON, B., in his judgment, appears entirely to assent to the judgment of PARKE, B.

We think that we could not, without straining the evidence, hold in this case that the plaintiff had induced the defendants to believe that he (the plaintiff) had settled with J. & O. Ryder at the time when the defendants paid them. This makes it necessary to determine whether we agree in what we think was the opinion of PARKE, B., acquiesced in by POLLOCK, C. B., and ALDERSON, B. We think that if the rigid rule thus laid down were to be applied to those who were only discovered to be principals after they had fairly paid the price to those whom the vendors believed to be the principals, and to whom only the vendors gave credit, it would produce intolerable hardship. It may be said, perhaps truly, that this is the consequence of that which might originally have been a mistake in allowing the vendor to have recourse at all against one to whom he never gave credit, and that we ought not to establish an illogical exception in order to cure a fault in a rule. But we find an exception (more or less extensively expressed) always mentioned in the very cases that lay down the rule; and without deciding anything as to the case of a broker who avowedly acts for a principal (though not necessarily named) and confining ourselves to the present case, which is one in which, to borrow Lord TENTERDEN'S phrase in *Thompson* v. *Davenport*, *supra*, the plaintiff sold the goods to J. & O. Ryder & Co., "supposing at the time of the contract he was dealing with a principal," we think such an exception is established.

We wish to be understood as expressing no opinion as to what would have been the effect of the state of the accounts between the parties if J. & O. Ryder had been indebted to the defendants on a separate account, so as to give rise to a set-off, or mutual credit between them. We confine our decision to the case before

us, where the defendants after the contract was made, and in consequence of it, *bonâ fide*, and without moral blame, paid J. & O. Ryder at a time when the plaintiff still gave sole credit to J & O. Ryder, and knew of no one else. We think that after that it was too late for the plaintiff to come upon the defendants. On this ground, we make the rule absolute to enter the verdict for the defendants. *Rule absolute.*

ENGLISH NOTES.

In *Irvine* v. *Watson* (1879), 5 Q. B. D. 102, 49 L. J. Q. B. 239 (C. A. 1880), 5 Q. B. D. 414, 49 L. J. Q. B. 531, the defendants employed a broker to make purchases for them. The broker made a purchase from the plaintiffs, informing them, at the time, that he was buying for principals, but did not disclose their names. The plaintiffs delivered to the broker, without insisting on payment on or before delivery, which they were entitled to require by the terms of the contract. The defendants paid the broker, not knowing that the plaintiffs were unpaid. The broker shortly afterwards stopped payment; and the plaintiffs sued the defendants for the price. It was held that the plaintiffs were entitled to recover; and an objection on the ground that they were estopped by conduct, was overruled.

In *Davison* v. *Donaldson* (C. A. 1882), 9 Q. B. D. 623, the plaintiff supplied stores to T., a ship's husband and managing owner. He applied to T. for payment, but without obtaining it. The defendant, who was part owner and jointly interested with T. in the adventure for which the ship was being fitted out, had twice settled accounts with T. on the footing of T. having paid for the goods. Afterwards T. became bankrupt, and the plaintiff sued the defendant for the price of the goods. He was held entitled to recover, although more than three years had elapsed since the goods were supplied, as the defendant failed to show that the plaintiff had misled him into supposing that he had elected to give exclusive credit to the agent T.

There is another class of cases in which it has been held that there is no privity between the principal and the person who made the contract with the agent. The majority of these cases have arisen upon contracts made in this country by agents acting for foreign principals; and in such a case there is a presumption that the credit of the agent, and not of the foreign principal, is looked to by the other party contracting. It is, however, a question of fact in each case, whether this presumption is rebutted: *Elbinger Actien-Gesellschaft* v. *Claye* (1873), L. R., 8 Q. B. 313, 42 L. J. Q. B. 151. The presumption applies to the case where the agent is to purchase and send out goods on the joint account of his firm and the foreign firm: *Hutton* v. *Bullock* (1873),

L. R., 8 Q. B. 331 (Ex. Ch. 1874), L. R., 9 Q. B. 572; and the fact that the defendants knew, or had reason to believe, that the person with whom they are dealing is acting as agent, does not affect the presumption: *New Zealand and Australian Land Co.* v. *Watson* (C. A. 1881), 7 Q. B. D. 375, 50 L. J. Q. B. 433.

AMERICAN NOTES.

The first branch of the rule of the principal case undoubtedly expresses the law in this country. *Episcopal Church* v. *Wiley*, 2 Hill (So. Carolina), 584; 30 Am. Dec. 386; *Smith* v. *Plummer*, 5 Wharton (Penn.), 89; 34 Am. Dec. 530; *Cobb* v. *Knapp*, 71 New York, 348; 27 Am. Rep. 51; *Merrill* v. *Kenyon*, 48 Connecticut, 315; 40 Am. Rep. 174; *Henderson* v. *Mayhew*, 2 Gill (Maryland), 393; 41 Am. Dec. 434; *Byington* v. *Simpson*, 134 Massachusetts, 169; 45 Am. Rep. 314; *Ford* v. *Williams*, 21 Howard (U. S.), 287; *Borcherling* v. *Katz*, 37 New Jersey Equity, 150; Mechem on Agency, § 696.

As to the second branch, there is more doubt. Mr. Mechem limits its application to cases where the principal has settled with the agent in reliance upon such conduct or representations of the vendor as would reasonably induce a belief that the agent had settled with the vendor; in other words, to cases of estoppel. (Agency, § 697.) This is the view of PARKE, B., in *Heald* v. *Kenworthy*, 10 Exch. 739, disapproving the wider view of TENTERDEN, C. J., in *Thomson* v. *Davenport*, 9 B. & C. 78. Mr. Mechem says: "The rule of PARKE, B., seems to be eminently reasonable and just. If a principal sends an agent to buy goods for him and on his account, it is not unreasonable that he should see that they are paid for." "It is difficult to see how this right of the other party" — to hold the undisclosed principal — "can be defeated, while he is not himself in fault, by dealings between the principal and the agent, of which he had no knowledge and to which he was not a party." (Agency, § 697.)

Mr. Mechem quotes BOWEN, L. J., in *Irvine* v. *Watson*, 5 Q. B. D. 102, where he says, "that it must now be taken to be the law" that the seller has no recourse against the undisclosed principal, "if the principal has *bonâ fide* paid the agent at a time when the seller still gave credit to the agent and knew of no one else except him as principal." [Agency, p. 524.] But commenting on *Irvine* v. *Watson*, [p. 526], he says, "The result, therefore, of the English cases seems to be to limit the exception" of the right to hold the undisclosed principal "to that first stated by PARKE, B.," in *Heald* v. *Kenworthy*, 10 Ex. 745.

Mr. Mechem continues: "The subject has not been much considered in the United States, but wherever the question has arisen, the tendency has been to follow the rule laid down by Judge Story and Professor Parsons, based upon the *dictum* of Lord TENTERDEN." This he supports by reference to a *dictum* in *Knapp* v. *Simon*, 96 New York, 284; *Ketchum* v. *Verdell*, 42 Georgia, 531; *Emerson* v. *Patch*, 123 Massachusetts, 541; *Fradley* v. *Hyland*, 37 Federal Reporter (U. S. Cir. Ct.), 49; 2 Lawyers' Rep. Annotated, 749; *Laing* v. *Butler*, 37 Hun (New York Sup. Ct.), 144. The English cases are reviewed in the last case, which is strongly in point, and so is the case in the Federal Court.

The point is implied, not decided in the Massachusetts case. Lord Tenterden's proviso is *obiter* recognised in *Clealand* v. *Walker*, 11 Alabama, 1058; 46 Am. Dec. 238.

The view of Parke, B., is sustained by *Hyde* v. *Wolf*, 4 Louisiana, 231; 23 Am. Dec. 484.

Section VI. — *Implied Warranty of Authority by Agent.*

No. 19. — COLLEN *v.* WRIGHT.

(Q. B. 1857. Ex. Ch. 1858.)

RULE.

A person who enters into a contract expressly as agent for a principal named, impliedly warrants his authority; and if he has in fact no such authority, he may be sued under that implied contract; and is bound to make good to the other contracting party what that party has lost, or failed to obtain, by reason of the non-existence of the authority. So held by the unanimous judgment of the Court of Queen's Bench, and by a majority in the Exchequer Chamber, — Cockburn, C. J., dissenting, on the ground that the decision creates a new species of liability on an implied promise in a written contract.

Collen v. Wright.

26 L. J. Q. B. 147; 27 L. J. Q. B. 215; 7 Ell. & Bl. 301; 8 Ell. & Bl. 647.

This was a case stated for the opinion of the Court without pleadings, under the C. L. P. Act, 1852.

In the beginning of the year 1853, the plaintiff was desirous of obtaining a lease of a farm, situated in Soham Fen, in the county of Cambridge, belonging to William Dunn Gardner, of Fordham Abbey, in the county of Cambridge, Esq., then about to become unoccupied. Robert Wright, deceased, was a land agent and valuer, residing at Norwich, and up to within a short time before the plaintiff's application to him hereinafter mentioned, had had the management of the property of the said W. D. Gardner in and near Soham. The plaintiff, believing the said R. Wright still to have the management of the said property and to be the general

agent of the said W. D. Gardner for the letting of the same, including the said farm in Soham Fen, applied to the said R. Wright as the supposed agent of the said W. D. Gardner for a lease thereof, and after some negotiation between them, on the 21st of April, 1853, an agreement in writing was prepared by the said R. Wright, and signed by him as the agent of the said W. D. Gardner and by the plaintiff. The agreement was set out, and was signed "Robert Wright, agent to William Dunn Gardner, Esq., John Collen." It was further agreed between the plaintiff and the said Robert Wright, that an agreement stating in detail the terms referred to in the agreement should be prepared without delay and be signed by the parties, and on the 22nd of April, 1853, the plaintiff, on the faith of the signature of the said agreement by the said R. Wright as above set forth, took possession of the farm in question. On the 31st of May, 1853, an agreement in writing for a lease which the said R. Wright brought with him, stating the terms in detail, was signed by him and the plaintiff as follows: —

"Witness our hands this 31st day of May, 1853, Robert Wright, agent to William Dunn Gardner, Esq., lessor, John Collen. — Witness, Thomas Hustwick."

On the 1st day of June, 1853, a valuation of the straw and muck on the said farm was made in accordance with the said agreement, and the amount thereof was paid by the plaintiff to Robert John Wright, the son and partner of the said R. Wright, and was by said R. J. Wright paid into the bank of Messrs. Eaton & Hammond, the bankers of the said W. D. Gardner, to the credit of his, the said W. D. Gardner's account there. The plaintiff after he took possession of the said farm, and before the month of September, 1853, relying upon the said agreements, and believing that the said R. Wright had authority to make and sign the same as the agent of the said W. D. Gardner, and that a lease would be granted in accordance therewith, expended a considerable sum of money in the cultivation and improvement of the said farm. On the 16th of November, 1853, the plaintiff was informed, as was the fact, that the said W. D. Gardner refused to sign the said lease, on the ground that the said R. Wright was not authorised to let the said farm for twelve years or on the terms set forth in the said agreements; and the plaintiff shortly afterwards, believing that the said R. Wright was duly authorised by

the said W. D. Gardner to sign the said agreement as his agent and on his behalf, instituted a suit in the Court of Chancery against the said W. D. Gardner for the specific performance of the said contract, and for a decree that the said W. D Gardner might execute and deliver to the plaintiff a lease according to the terms thereof; which suit came on to be heard on the 29th of February, 1856, before the Master of the Rolls, and judgment was pronounced therein that the plaintiff's bill should be dismissed without costs, upon the ground that the said R. Wright had no authority from the said agent, W. D. Gardner, to sign the said agreement as his agent or on his behalf. After the said suit had been commenced, and the said W. D. Gardner had put in his answers to the plaintiff's bill therein, from which it appeared that the said W. D. Gardner defended the suit upon the ground that the said R. Wright had no authority from him to sign the said agreements as his agent, the plaintiff, on the 7th of April, 1855, and before the hearing of the said suit, caused the said R. Wright to be served with a notice, of which the following is a copy: —

"To Mr. Robert Wright of Norwich, land agent. Whereas you, assuming to act as agent for William Dunn Gardner, Esquire, on the 21st day of April, and the 31st day of May in the year of our Lord, 1813, signed two several agreements with Mr. John Collen, dated respectively on the above-named days, for letting to the said John Collen a certain farm, situate in the parish of Soham, in the county of Cambridge, belonging to the said William Dunn Gardner, for the term of twelve years and a half from Lady-day, 1853, at the rent of £350; and whereas the said William Dunn Gardner has refused to execute a lease of the said farm for the said term of twelve years and a half, pursuant to the said agreements, and the said John Collen has instituted a suit in the Court of Chancery against the said William Dunn Gardner to compel a specific performance of the said agreements, and which the said William Dunn Gardner defends upon the ground that you had no authority whatever from him, the said W. D. Gardner, to sign the said agreements as his agent. Now, therefore, take notice that the said John Collen will proceed with the said suit at your risk and expense unless within one week from the receipt hereof you require the said John Collen, by writing under your hand, not further to proceed with the same. And further, take notice that in the event of the bill in the said suit being dismissed on the

No. 19. — Collen v. Wright.

ground of your not having had authority to sign the said agreements or to let the said farm for the term of years therein mentioned, or of your requiring the said John Collen not further to proceed with the said suit, the said John Collen will commence an action against you to recover from you the damages sustained or to be sustained by him by reason of your not having had authority to sign the said agreements as agent for the said W. D. Gardner, and also the costs and charges sustained and incurred by the said John Collen in prosecuting the said suit.

"Dated this seventh day of April, 1855.

"THOMAS HUSTWICK, *attorney for the above-named John Collen.*"

The said Thomas Hustwick, in answer to the said notice, received the following letter: —

"NORWICH, April 11, 1855.

"SIR, — We beg, on the part of Mr. Wright, who has consulted us relative to the notice which you served upon him on Saturday last, to apprise you on behalf of Mr. Collen that Mr. Wright will resist any attempt on the part of Mr. Collen to saddle him with the risk and expense of the suit in Chancery mentioned in such notice. The suit was instituted by Mr. Collen at his own risk and expense, and for his own purposes, without Mr. Wright's privity or sanction, and it has been carried on by Mr. Collen's solicitor without Mr. Wright's consent or concurrence. We have also to inform you that Mr. Wright will defend all actions, if any, which Mr. Collen may bring against him for the purposes mentioned in the said notice. — We are, Sir, yours obediently,

"ADAM & CLEMENT TAYLOR."

For the purposes of this action, it was to be taken as admitted that the said R. Wright was not authorised by the said W. D. Gardner to sign the said agreements or either of them as his agent or on his behalf, or to let the said farm for the period or on the terms specified in the said agreements, and that neither of the said agreements was in law binding upon the said W. D. Gardner. The said R. Wright, however, *bonâ fide* believed at the time when he signed the said agreements that he was so authorised. The plaintiff has always been willing to perform the said contract on his part, and has done all things which it was necessary for him to do in order to entitle him to have the same performed. The

said R. Wright died in the month of January, 1856, leaving the defendants his executrix and executors, and on or about the 22nd of March, 1856, the plaintiff received from the said W. D. Gardner a notice to quit the said farm on the 29th of September next, or at the expiration of the current year of his tenancy, and the plaintiff has since quitted the said farm in pursuance of such notice. It was agreed that the Court should be at liberty to draw such inferences from the facts above stated as a jury might have drawn; and that in the event of the opinion of the Court upon the first of the questions raised being in the plaintiff's favour, the amount of the damages to be recovered by him should be ascertained, in accordance with the judgment of the Court upon the second question, by an arbitrator to be named by the parties, or, in default of their agreeing, to be named by one of the Judges of the Court.

The questions for the opinion of this Court were, first, whether the plaintiff was entitled to maintain an action against the defendants as executrix and executors of the said R. Wright to recover damages; second, whether, if so, the whole of the damages sustained by the plaintiff, including his costs of the said suit in Chancery, can be recovered; or if some of such damages and costs only can be recovered, which of them and to what extent, without regard, however, to the exact amount. If the Court should be of opinion upon the first question in the affirmative, judgment was to be entered up for the plaintiff for such amount of damages as should be awarded by the arbitrator in accordance with the decision of the Court upon the second question, with costs of suit. If the Court should be of opinion upon the first question in the negative, judgment of *nolle prosequi*, with costs of defence, should be entered up for the defendants.

The Judges of the Court, Lord Campbell, C. J., Wightman, J., and Crompton, J., were unanimously of opinion that the action was maintainable, on the ground that Wright by entering into the contract as agent gave, for good consideration, an implied promise that he was agent, and gave judgment for the plaintiff accordingly.

Error was then brought, in the Exchequer Chamber, on the judgment of the Court of Queen's Bench.

After argument, the Court took time for consideration, and ultimately differing in opinion, delivered the following judgments: —

Willes, J., delivered the following judgment, in which Pollock, C. B., Williams, J., Bramwell, B., Watson, B., and Channell, B.,

concurred: — It appears to me that the judgment of the Court of Queen's Bench ought in all respects to be affirmed. I am of opinion that a person who induces others to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent, is answerable to the person who so contracts for any damages he sustains by means of the assertion of the authority being untrue. This is not the case of a bare mis-statement to a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority, affects the moral character of his act, but his moral innocence, in so far as the person he has induced to contract is concerned, in no way aids him or alleviates the inconvenience and damage which he sustains. If one of the two in such cases is to suffer it ought not to be the person who has been guilty of no error, but he who by an untrue assertion, believed and acted upon as he intended it should be, and touching a subject within his peculiar knowledge, and as to which he gave the other party no opportunity of judging for himself, has brought about the damage. The obligation arising in such a case is well expressed by saying that the person professing to contract as agent for another impliedly undertakes with the person who enters into such a contract upon the faith of his being duly authorised, that the authority he professes to have does in point of fact exist. This was in effect the view taken by the Court of Queen's Bench, and to which I adhere.

With respect to the amount of damages, I retain the opinion thrown out in the course of the argument, that all the expenses sought to be recovered were occasioned by the assertion of authority made at the time of the contract, being continued and persisted in by the defendant, and *bonâ fide* acted upon by the plaintiff. That assertion was never withdrawn, not even in the letter of the 11th of April, 1855, in answer by the defendant to the plaintiff's notice, long before the proceedings in Chancery had terminated. I am, therefore, of opinion that the judgment of the Court of Queen's Bench is right, and ought to be affirmed.

Cockburn, C. J. I regret most unfeignedly to find myself differing in this case from so many of my learned brethren, for whose opinions I entertain the profoundest respect and deference, and in whose views I should have every disposition to acquiesce, if after considering the subject with the most anxious desire to concur with them, I could persuade myself that in giving judg-

ment for the plaintiff we were not going beyond what the law warrants. The proposition we are called upon to affirm is, that by the law of England a party making a contract as agent in the name of a principal, impliedly contracts with the other contracting party that he has authority from the alleged principal to make the contract, and that if it turns out that he has not this authority, he is liable in an action on such implied contract. It appears to me that there is no sufficient authority to warrant this position, and that even assuming, for the purpose of the argument, that such a rule might be desirable, in establishing it we shall be creating a new law, instead of expounding that which already exists. I believe I am fully justified in saying that this doctrine is altogether a novel one. I have looked carefully into the various treatises and text-books on the Law of Contracts, and, so far as I have been able to discover, although the doctrine of implied contracts has been fully discussed, and the instances of implied contracts as existing in the law of this country carefully enumerated, no mention is to be found of the implied contract contended for in this case. Nor is any trace of such an action to be found, so far as I am aware, in the printed books of precedents on the forms of actions and of pleading. And what is still more remarkable, in the learned and elaborate works which treat of the law relating to Agency, and in which the liabilities of agents or persons professing to act as such towards third parties are fully considered, not even a hint is to be found of any implied contract on the part of the agent as to the existence of authority. In Professor Story's work on Agency, while it is laid down as clear that a person contracting as agent without authority will be liable to the party with whom the contract is made, yet, when the question as to the mode in which that liability is to be enforced is considered, the alternative is put between a special action on the case on the one hand, and an action on the contract against the professed agent as principal on the other; but it does not appear to have occurred to that very learned and scientific jurist that, either by the law of England or that of America, an action could be maintained on an implied contract as to the existence of authority. In like manner, in the note to the case of *Thompson* v. *Davenport*, 2 Smith's L. C., where the principles as to liability, as collected from the cases on agency, are laid down, it is asserted that if a man state himself to be an agent, but have really no principal, he is, in law, himself the prin-

cipal; but it is not suggested that he is liable *ex contractu* in any other form than as principal on the original contract. Nor is that silence to be wondered at; for on looking to the repeated decisions of our own and of the American Courts, it will be found that at the time these learned authors wrote, no such doctrine had ever been broached; but the remedy against a party contracting on behalf of another without authority, was assumed to be either by an action on the case for the false representation, or by an action against him as principal on the original contract.

The doctrine that a person professing to act as agent without sufficient authority, might be made responsible as principal, was only subverted at a comparatively recent period. In Paley's work on the Law of Principal and Agent, chapter 7, it is laid down and supported by authorities that a party contracting as agent is responsible as principal where there is no responsible principal to resort to, or where he exceeds his authority so that the principal is not bound. Story, we have seen, holds the like language. In the case of *Jones* v. *Downman*, 4 Q. B. Rep. 235, which was an action *ex contractu*, the doctrine of Story, that "whenever any party undertakes to do any act as the agent of another, if he does not possess any authority from the principal, or if he exceeds the authority delegated to him, he will be personally responsible therefor to the person with whom he is dealing, for or on account of his principal," was adopted by the Court of Queen's Bench as "supported by numerous authorities and founded on plain justice." And the defendant, who was there sued as principal, was held to be liable on the contract.

It is true that that case was afterwards reversed, on error, in the Court of Exchequer Chamber, but solely on the ground that the absence of authority was not shown, and the Court, in other respects, appears to have recognised the propriety of the decision of the Court of Queen's Bench. And in a note to the case of *Thomas* v. *Hewes*, 2 Cr. & M. 530; 3 L. J. (N. S.) Ex. 158, the same law is stated to have been laid down on different occasions by the late BAYLEY, B., and by Lord WENSLEYDALE when a Baron of the Exchequer: and in the case of *Smout* v. *Ilbery* (1842), 10 M. & W. 1; 12 L. J. Ex. 357, where an action was brought against a married woman for goods purchased by her on her husband's account after his authority to pledge his credit had terminated by his death, of which fact she was, however, ignorant, though the Court held that

the action could not be maintained under the circumstances, it was never doubted that the action was rightly brought on the contract. The case of *Polhill* v. *Walter*, 3 B. & Ad. 114, in which it was held that a person accepting a bill drawn upon another, in the name of the drawee, without authority, could not be sued upon the bill as acceptor, seems first to have given rise to a contrary impression, though that case turned mainly on the peculiar character of a bill of exchange as being incapable of being accepted by any one but the drawee, except for honour of the latter. But the more recent case of *Jenkins* v. *Hutchinson*, 18 L. J. Q. B. 274, laid down the position broadly, that an action *ex contractu* could not be maintained against the professed agent as principal. And the same doctrine was fully confirmed and acted upon in the succeeding case of *Lewis* v. *Nicholson* (1852), 18 Q. B. 503; 21 L. J. Q. B. 311.

In the mean time the liability of a professed agent for the unwarranted assertion of authority, in an action on the case, underwent further consideration, and the doctrine of some writers, that any misrepresentation whereby another was induced to do or omit to do an act, from which injury resulted, would render the party making it liable, underwent material modification; the modern decisions having established that such misrepresentation will not afford a ground of action when made in good faith and without knowledge that it was untrue. The effect of these doctrines being to leave a person who made a contract with another as agent without a remedy, where the professed agent had acted under a mistaken impression as to his authority, it occurred to the Judges of the Court of Queen's Bench, who decided in the case of *Lewis* v. *Nicholson*, that an action would not lie against the agent, as principal, to suggest that, possibly, the agent might, under such circumstances, be held liable on an implied contract that he had authority to contract in the name of the principal. And the opinion thus incidentally thrown out in that case has been acted upon in this. It was of course impossible, so long as the doctrine prevailed that the professed agent could be sued as principal, that he could be held to be liable on this implied contract. It would have been obviously inconsistent to say that upon one and the same contract a man could at the same time be liable upon an express and also upon an implied promise. To my mind, it by no means follows that, because that which was believed to be the remedy in law turns out upon further consideration not to be so,

we are therefore justified in resorting to the fiction of an implied contract hitherto unknown to our law. To me it seems a very strong argument against the existence of any such implied contract, that, frequently as the question of the absence or excess of authority in supposed agents has been before our Courts, and much as the question of the liabilities of agents has been discussed, no trace of the doctrine is to be found in our law books until within the last few years. I do not think we are justified in introducing such a remedy by the mere fiat of a judicial decree. I do not stop to discuss the expediency or policy of the proposed rule. Otherwise, I think it might be shown that there are two sides even to this part of the case. I doubt whether there is any sufficient ground why erroneous representation, in the absence of falsehood or fraud, should create a greater responsibility in the case of a contract than in the case of any other transaction, especially as the other contracting party might always protect himself by insisting on communicating with the alleged principal, or by requiring a warranty of authority from the agent. But I by no means desire to rest my opinion on this ground. My view is, that this implied contract, to be established by this case, is a thing unknown to our law; that we are dealing, not with a mere mode whereby an acknowledged liability may be enforced, but a supposed liability having turned out to be unfounded in law, we are now creating a new species of liability on a new contract, now for the first time to be implied as to a warranty of authority, which if the party now to be charged had been required expressly to give, he would probably have refused. If it is desirable to establish such a rule, it seems to me it should be done by legislative enactment; and that to establish it by judicial decision is to make the law, which it is only our province to expound. Against this course, though in all humility and with the utmost deference to the better opinion of my colleagues, I feel it my duty to record my protest.

The Judgment of the Court of Queen's Bench was accordingly affirmed.

ENGLISH NOTES.

The above stated rule in *Collen* v. *Wright* is now so well established that a lengthened investigation of the authorities may be dispensed with. It has been applied in the following cases of implied representation of agency: By an alleged agent, that he had power to bind

another to grant a lease, *Spedding* v. *Nevell* (1869), L. R., 4 C. P. 212, 38 L. J. C. P. 133: By a minority of directors, that a manager had authority to draw cheques, *Cherry* v. *Colonial Bank of Australasia* (1869), L. R., 3 P. C. 24, 38 L. J. P. C. 49: By directors that they had power to borrow money, *Richardson* v. *Williamson* (1871), L. R. 6 Q. B. 276, 40 L. J. Q. B. 145: By directors that they had power to issue debenture bonds, *Weeks* v. *Propert* (1873), L. R., 8 C. P. 427, 42 L. J. C. P. 129; or debenture stock, *Firbanks Executors* v. *Humphreys* (C. A. 1886), 18 Q. B. D. 54, 56 L. J. Q. B. 57: By directors that they had power to accept a bill of exchange, *West London Commercial Bank* v. *Kitson* (C. A. 1884), 13 Q. B. D. 361: By a stockbroker that he was authorised to apply for shares on behalf of his principal, *Re National Coffee Palace Co., ex parte Panmure* (C. A. 1883), 24 Ch. D. 367, 53 L. J. Ch. 57: By an agent that he could compromise a claim, *Meek* v. *Wendt* (1888), 21 Q. B. D. 126. The two cases last mentioned were clearly cases of innocent mistake on the part of the agent.

The liability of an agent under this head is irrespective of any fraud: *Re National Coffee Palace Co., ex parte Panmure* (C. A. 1883), 24 Ch. D. 367, 53 L. J. Ch. 57.

To fix a person with liability, it must be proved that he made a representation as to a matter of fact upon which the person seeking to make him liable acted. In *Beattie* v. *Lord Ebury* (1874), L. R., 7 H. L. 102, 44 L. J. Ch. 20, there was an overdraft of a Railway Company's account by the directors; and the House of Lords, affirming on this point the judgment of the Lords Justices, held that the acts of the directors did not amount to a representation that they had special powers to bind the Company by such an overdraft.

In *Saffron Walden Second Benefit Building Society* v. *Rayner* (C. A. 1880), 14 Ch. D. 406, 49 L. J. Ch. 465, solicitors, without authority, wrote accepting, on behalf of trustees, service of notice of an incumbrance. The plaintiff abstained from giving notice to the trustees personally; and, as no notice could be brought home to the trustees, the plaintiff society was postponed to subsequent incumbrancers. It was held that the solicitors were not liable, as they had made no representation of fact; but were acting under a mistaken opinion in law, common to both parties, that their employment as solicitors enabled them effectually to accept service of the notice.

Where the person charged has not expressly stated his character of agent upon a contract purporting to be made by him, it is necessary, in order that he should be charged upon an implied contract, to prove that in fact he represented himself as agent: *Dickson* v. *Reuter's Telegram Co.* (1876), 2 C. P. D. 62, 46 L. J. C. P. 197, (C. A. 1877) 3 C. P. D. 1, 47 L. J. C. P. 1.

No. 19. — Collen v. Wright. — Notes.

The question of the extent of the liability of a person, on an implied warranty of authority, depends on the application of the rule in *Hadley* v. *Baxendale* (1854), 9 Ex. 341, 23 L. J. Exch. 179. In *Spedding* v. *Nevell* (1869), L. R., 4 C. P. 212; 38 L. J. C. P. 133, the plaintiff to whom the defendant "on behalf of his brother," had agreed to grant a lease, was allowed to recover the value of the proposed lease, and the costs paid and incurred in an unsuccessful attempt to enforce specific performance; but not the costs incurred by reason of an assignment to a third person.

The same rule as to the measure of damages, to be recovered upon the breach of implied warranty of authority, was followed and applied in the above mentioned case of *In re National Coffee Palace Co., ex parte Panmure* (C. A. 1883), 24 Ch. D. 367, 53 L. J. Ch. 57. A broker, mistaking the instructions of his client, applied for shares in the Company, which were allotted to his client. The name of the client was accordingly placed on the register; and he promptly repudiated the shares and got his name removed, on the ground that he had not authorised the application. Only a small proportion of the shares had been applied for; and the Company went into liquidation. The liquidator, in the name of the Company, claimed from the broker the sum of £50, being the full amount which would have been payable upon the shares if they had been accepted by the client, who was admitted to be a solvent person. It was maintained on the part of the broker that, assuming his liability, the damages were merely nominal, as the shares were in fact worthless. The Court however held the measure of damages to be that which the plaintiff Company actually lost, by losing the particular contract which would have been made with the principal if the agent had had the authority which he warranted himself to have. *Primâ facie* the amount lost was £50; and as nobody else would have taken the shares, and they were in fact worthless, there was nothing to diminish that loss.

In *Meek* v. *Wendt* (1888), 21 Q. B. D. 126, the plaintiff had sued in England a Californian Company upon a policy of insurance payable in London; and having obtained leave to serve notice of the writ in America, got judgment in default of appearance. The defendant, an agent in London of the American Company which had no assets in England, wrote to the plaintiff's solicitors, stating in effect that he was authorised to compromise the action for £300. This offer was accepted, and it turned out that the agent, who acted in good faith, had mistaken his authority. It was held by Charles, J., that the plaintiff was entitled to recover from the agent the £300, besides the expenses incurred subsequently to the supposed agreement for compromise. Here again there was nothing to diminish the *primâ facie* loss: for *non constat* that

the plaintiff's judgment would have been of any use in California. It could not, according to any general principle of law, have been used there as evidence showing that the matter was *res judicata*. (See *Schilsby* v. *Westenholtz* (1870), L. R., 6 Q. B. 155; 40 L. J. Q. B. 73.)

AMERICAN NOTES.

The doctrine of the principal case is the law in America. Mechem on Agency, §§ 511, 545, 549, 553, citing the principal case. To this effect *Kroeger* v. *Pitcairn*, 101 Penn. St. 311; 47 Am. Rep. 718; *Bank of Hamburg* v. *Wray*, 4 Strobhart (So. Carolina), 87; 51 Am. Dec. 659; *Dale* v. *Donaldson Lumber Co.*, 48 Arkansas, 188; 3 Am. St. Rep. 224; *Bartlett* v. *Tucker*, 104 Massachusetts, 336; 6 Am. Rep. 240; *McCurdy* v. *Rogers*, 21 Wisconsin, 197; 91 Am. Dec. 168; *Dung* v. *Parker*, 52 New York, 494; *Farmers' Co-operative Trust Co.* v. *Floyd*, 47 Ohio St. 525; 21 Am. St. Rep. 846; *Weare* v. *Gove*, 44 New Hampshire, 196.

But if the agent discloses all the facts relating to his supposed agency, he will not be liable if it turns out that he had no authority. *Ware* v. *Morgan*, 67 Alabama, 461.

Whether the remedy is by action for deceit or in assumpsit is a vexed question. Mr. Mechem concludes that if the agent knew he had no authority he could be held for deceit, *Noyes* v. *Loring*, 55 Maine, 408; or in assumpsit; *Dung* v. *Parker*, 52 New York, 494; but if he acted in good faith, assumpsit would seem the more appropriate remedy; *Patterson* v. *Lippincott*, 47 New Jersey Law, 457; 54 Am. Rep. 178.

Section VII. — *Rights of Principal against Agent.*

No. 20. — TYRRELL *v.* BANK OF LONDON.

(H. L. 1864.)

RULE.

Any profit which an agent may make out of the business in which he is employed, beyond the remuneration agreed upon, — whether expressly, or by implication supported by a usage presumably known to the principal, — belongs to the principal, and must be accounted for to him by the agent.

T. (a solicitor), employed as agent to negotiate for the purchase of a site for a joint stock bank (in course of formation under the former Joint Stock Companies Act),

No. 20. — Tyrrell v. Bank of London.

entered into an arrangement with R. to go shares in a purchase of certain property which was to be dealt with by R. in his own name, but as a joint speculation. Under T.'s advice, the bank purchased a large part of this property for a price exceeding the amount which the speculators were to pay for the whole property. On a suit brought by the bank against T., T. was declared a trustee for the bank, so far as relates to his interest in the property purchased by them; and moreover, that he must account to the bank for the value of his interest in the unsold property.

Tyrrell v. Bank of London.

31 L. J. Ch. 369 (s. c. 10 H. L. C. 26).

The appellant was a solicitor, and was lately a member of the firm of Tyrrell, Paine, & Layton.

The respondents, the Bank of London, were a joint-stock banking company, originally projected about the end of the year 1854, and incorporated by letters-patent, dated the 10th of July, 1855.

In the year 1855 the appellant and Edward Rudston Read, were entitled to certain freehold premises in Threadneedle Street, in the city of London, called the Hall of Commerce, and to a piece of vacant land and other hereditaments adjoining; and being so entitled they, in the month of May, 1855, sold the said premises called the Hall of Commerce to the respondents, the Bank of London, for the sum of £64,500, and the question raised on this appeal was as to the right of the respondents, the Bank of London, to the profits made by the appellant in this transaction, the appellant having been, as the respondents contended, their solicitor and agent in the transaction, and the profits in question having been made in the course of such agency, and solely by reason of it.

In the year 1854, under a foreclosure decree, the Hall of Commerce with adjoining premises became the property of Louisa Campbell; and by an agreement, dated the 20th of September of the same year, she agreed to sell the same to Read and three other persons for £49,200, of which the sum of £1000 was to be paid on the execution of the agreement, as a deposit, and the

remainder on the 24th of December, 1854. This agreement was entered into as a speculation by Read and the other persons, on behalf of themselves and certain other persons, their object being to realise a profit by a resale of the property before the expiration of the time allowed for the completion of their purchase. The time for completion of the purchase was subsequently extended to the 24th of June, 1855.

In the latter part of the year 1854, the joint-stock banking Company, which afterwards became established under the name of the Bank of London, was projected by Mr. Bejamin Scott, Chamberlain of the city of London. The firm of Tyrrell, Paine, & Layton were the solicitors of Mr. Scott, and the appellant was personally engaged in assisting him in the formation of the Company; Mr. Scott looking to be its secretary, and the appellant looking to be its solicitor when established.

The preliminary meeting of promoters was held on the 15th of January, 1855, when the scheme was fully considered, and it was resolved that the projected bank should be called the Bank of London. Adjourned meetings of the promoters were held on the 22nd, the 29th, and the 31st of January.

On the 5th of February 1855, the appellant having previously undertaken, in conjunction with Mr. Scott, to look out for a site for the bank, had an interview with Read, whereat the subject of the Bank of London was discussed in reference to the necessity there would be for the projected company to obtain a place of business, and the eligibility of the Hall of Commerce for that purpose.

On the 6th of February Read again saw the appellant, and stated that he had determined to buy up the shares of his co-adventurers, and proposed to the appellant to join him in a new speculation, to which the appellant assented on condition that the shares of Mr. Read's co-adventurers were procured at a reasonable price: and in pursuance of this arrangement, on the 7th of February, Read succeeded in purchasing the shares of his eight co-adventurers, at the price of £1200; and on the 8th of February Read and the appellant finally arranged the terms upon which they were to enter upon their joint speculation. These terms were not reduced into writing until the 10th of March; they were then embodied in a formal agreement, which was antedated the 8th of February. In addition to the stipulations appearing

on the face of the agreement, it was agreed that all negotiations should be made and carried on in Read's name alone, and that the name of the appellant should not appear or be made use of in the matter.

On the 9th of February, Read, acting in concert with the appellant, and in order to give him a written proposal for the sale of the Hall of Commerce to show to the promoters of the bank, wrote in the appellant's office the following letter addressed to him: —

"22 Austin Friars, 9th Feb. 1885.

"Dear Sir, — In reply to your favour of this date, I beg to inform you that the price asked for the Hall of Commerce with the freehold on which it stands is £110,000, an amount if I am credibly informed refused by the original proprietor, who asked and adhered to his price of £120,000. The adjoining freehold plot upon which the Imperial Fire and Life Insurance now stands, and comprising a superficial area of only about one-third of that upon which the building in question stands, realised, naked as I am informed, £32,000, so it is reasonable to infer the ground upon which the Hall of Commerce stands is worth £96,000, leaving only £14,000 for the building, which is substantial and fire-proof, and erected at a cost, if I am not misled, of between £60,000 and £70,000. An early reply will oblige, dear sir, faithfully yours,

"Edward Rudston Read."

In reply, after communicating with Mr. Scott, the appellant wrote to Read a letter, dated the same day, asking that the offer might be considered open for a fortnight, to which Read acceded.

On the 13th of February the first meeting of the directors of the bank took place; at which meeting Mr. Scott was appointed secretary, and the firm of Tyrrell, Paine, & Layton, were appointed solicitors to the bank.

On the 10th of March the terms of the arrangement between the appellant and Read were reduced into a written agreement, antedated the 8th of February, which was to the effect that the purchase, though made in the name of Read, was made on the joint account of himself and the appellant as tenants in common, except as to a certain part of the property which was to belong to Read exclusively; that the purchase money should be borne

and paid as to two-fifth parts thereof by Read, and three-fifth parts thereof by the appellant; that if in selling the property it should be deemed advisable to include the said excepted part, Read should be entitled to the value thereof over and above his half of the purchase money for the residue; and that neither party should sell or otherwise dispose of his share or interest in the property without the consent in writing of the other of them.

Another formal letter was written, on the 27th of March, by Read, to the appellant, in which he stated that he had had an offer of £90,000 for the property. This letter was communicated by the appellant to Mr. Scott.

At a meeting of the board of directors, held on the 31st of March, Mr. Scott reported the result of inquiries which he had made of Mr. Bunning, an architect, in reference to the Hall of Commerce and the adjoining premises. The substance of Mr. Bunning's advice was that the bank ought not to lose the opportunity of securing the property, if they paid £80,000 for it; and thereupon it was resolved, "That the solicitors be intrusted to make inquiries and to obtain the fullest particulars relative to the said property."

On the 2nd of April Read wrote to the appellant a letter informing him that the negotiation for the sale of the property for £90,000 had gone off, and offering it to the company for that amount, provided the offer should be accepted within ten days; and on the following day Read's letter was sent to Mr. Scott, inclosed in a letter written by Mr. Paine, and signed Tyrrell, Paine, & Layton. This letter contained a statement that Messrs. Tyrrell, Paine, & Layton understood Mr. Read had refused one offer which was not so high as the figure which the directors had been advised the property was worth to them, and that Messrs. Tyrrell, Paine, & Layton believed that information to be correct.

At a meeting of the board of directors, on the 5th of April, this letter was communicated to them, and a resolution was passed authorising the solicitors to enter into negotiations for the purchase of the Hall of Commerce, and to offer for it any sum not exceeding £60,000, which offer was declined by Read; but after some negotiation, the directors, on the 3rd of May, agreed to purchase the Hall of Commerce for £64,500. This purchase, however, did not include the whole of the premises purchased from Louisa Campbell.

No. 20. — Tyrrell v. Bank of London.

Pending the investigation of title, Mr. Davis, one of Mr. Read's co-adventurers, served a notice on the solicitors of the bank, in which he denied the right of Read to enter into the agreement with the Company, who thereupon required that all the co-adventurers should concur in the conveyance. This Davis and others declined to do; and the Company consented to accept a conveyance without their concurrence, on condition, that £14,500, part of the purchase money, should be invested in Exchequer bills and held by way of indemnity.

On the 11th of August, 1855, the purchase was completed, and of the purchase money the sum of £48,410 4*s.* 2*d.* was paid to Louisa Campbell, the sum of £14,500 was invested as an indemnity fund, and the residue was paid to Read. The cash paid to Read on completion of the purchase and the indemnity fund, when subsequently received, was divided by Read between himself and the appellant. Shortly before the 11th of August Read made a statutory declaration, which was prepared in the appellant's office, to the effect that he had not signed any instrument in writing whereby any person other than himself was interested in the said premises or in the proceeds thereof.

On the 27th of April, 1857, the appellant was cross-examined in a cause of *Lucy* v. *Read*, which had been instituted in the Court of Chancery respecting certain differences which had arisen between Read and some of his original co-purchasers of the Hall of Commerce, and in his cross-examination admitted that he had an interest in the sale of the Hall of Commerce to the Bank of London, and also in the rest of the property purchased therewith by Read, and then unsold; that he had received half the profits on the sale of the Hall of Commerce, and that his impression was that he had received £6000; that Mr. Scott, his co-promoter of the bank, did not know of his interest in the Hall of Commerce; and that none of the directors of the bank knew anything of it up to that day, namely, the day of his cross-examination.

The reason subsequently assigned by the appellant for the concealment of his interest in the Hall of Commerce was that if it had been known that he was the purchaser for so large a sum as £50,000 of a property which had been long a drug in the market, and might have been had for almost nothing, it might have injured his credit in the City.

On the 19th of December, 1857, the bank filed a bill in Chan-

cery against the appellant and Read, submitting that the arrangement or agreement entered into by the appellant with Read, and his subsequent concealment thereof and of his interest in the hereditaments, the subject of the aforesaid negotiation, was a fraud upon the respondents, his employers, and that Read throughout had notice of and was a party to such fraud, and that neither of them ought to be allowed to retain against the bank any gain or profit whatever accruing to them from the transaction. And the bill prayed that the appellant and Read might account for the profits upon the sale of the hereditaments to the bank, and that the appellant and Read might also be decreed to convey to the bank so much of the hereditaments comprised in the contract for sale of the 20th of September, 1854, as were not comprised in the conveyance of the 11th of August, 1855.

The Master of the Rolls dismissed the bill (but without costs), as against Read, and declared the appellant to be a trustee for the bank of all the interest acquired by him in the hereditaments comprised in the articles of agreement of the 20th of September, 1854, and that the bank were entitled to the clear profits derived by the appellant from the sale to them of the hereditaments in the pleadings described as the "Hall of Commerce," and conveyed to trustees for the bank by the indenture dated the 11th of August, 1855, and ordered the appellant to convey to trustees for the bank all his share and interest in the hereditaments comprised in the agreement of the 20th of September, 1854, remaining unsold.

From this decree, which was enrolled on the 3rd of December, 1859, the present appeal was brought.

The Solicitor-General, Mr. Rolt, and Mr. Speed, for the appellant, contended that when he entered into the partnership with Read the bank had no existence as a company, and that he neither was, nor held himself out to be, the agent of the projected Company; that at the time when the Company was afterwards formed, he had not been authorised to enter into any treaty on their behalf; he was merely the medium for conveying the offer of Read to the Company; that there was no rule of equity which prevented a solicitor purchasing land for his own benefit, which he knew might afterwards be desired by his client, if, at the time he purchased, no fiduciary relation existed between them, as no retrospective agency could be imputed; that even if the

sale to the bank could be impeached on the ground of the bank not being aware of the appellant's interest in the premises, the whole measure of relief to which the bank would be entitled was to have the contract set aside; the Company could not derive any benefit from the contract between the appellant and Read; at all events, the relief must be confined to the property sold to the bank.

They cited *Dale* v. *Hamilton*, 2 Phill. 266; 5 Hare, 369; 16 L. J. Ch. 126, 397; *Driscoll* v. *Bromley*, 1 Jur. 238; *Hitchens* v. *Congreve*, 4 Russ. 562; 1 Mont. 225; *The Great Luxembourg Railway Company* v. *Magnay*, 25 Beav. 595; *Fox* v. *Mackreth*, 2 Cox, 158, 320; 4 Bro. P. C. Toml. edit. 258; 1 Lead. Cas. in Eq. 72, 2nd edit. 92; 2 Bro. C. C. 400; 2 R. R. 55; *Fawcett* v. *Whitehouse*, 1 Russ. & M. 132; 8 L. J. Ch. 50; *Lees* v. *Nuttall*, 1 Russ. & M. 53; 1 Taml. 282; *Bentley* v. *Craven*, 18 Beav. 75; *The York & North Midland Railway Company* v. *Hudson*, 16 Beav. 485; 22 L. J. Ch. 529; *Massey* v. *Davies*, 2 Ves. Jun. 317; 2 R. R. 218; *Beck* v. *Kantorowicz*, 3 Kay & J. 230.

Sir Hugh Cairns, Mr. Amphlett, and Mr. E. Macnaghten for the respondents, by the desire of their Lordships, confined their arguments to the point as to whether the appellant was a trustee for the bank of the whole of the property in which he was interested. They contended that an agent employed by his principal as a negotiator, and having accepted the office, is bound to use his utmost effort to procure the property for his principal on the best terms, and may not intercept for himself any estate or interest therein, and if he does so, his principal is entitled to have the same; that where any estate or interest is acquired by an agent in consideration of his inducing his principal to conclude a bargain, the principal is entitled to a surrender of the estate or interest so acquired; and that the appellant's position with regard to the bank was the price paid for his being taken into partnership with Read.

They cited *Fawcett* v. *Whitehouse*; *Taylor* v. *Salmon*, 4 Myl. & Cr. 134.

The Lord Chancellor. My Lords, the decision which I shall advise your Lordships to pronounce in this case rests, in my opinion, on very clear principles and rules of conduct, of which it would be in the highest degree mischievous to impair the force or to weaken the application.

In my view of the case, it is only necessary to ascertain that, at the time when the appellant agreed to take from Mr. Read one-half of his purchase, he (the appellant) was acting in the capacity of solicitor to the respondents, and that he had advised or intended to advise his clients to purchase that part of the property which was ultimately bought by the clients. It is, I think, immaterial whether a solicitor had before his own contract advised the client to buy, and the client had agreed to act under such advice, or whether the solicitor intended only to give the client such recommendation, if in the result we find the client buying the property whilst acting under the advice of the solicitor. The consequence is, I think, the same, namely, that the solicitor shall not be permitted to make a gain for himself at the expense of his client. The client is entitled to the full benefit of the best exertions of the solicitor. The relation of solicitor and client involves, of course, the relation of principal and agent. The duties of the first relation include all those of the second, and something more; and I prefer, therefore, to rest my opinion in this case on the obligations of a solicitor to his client, and on the conduct of the appellant being a violation of the duties and confidence which are incident to that relation.

Now it is clear that the relation of solicitor and client must be considered as subsisting at the time of the first step that was taken by the appellant in the acquisition of the property in question. It is true that if the 7th of February, 1855, be taken as the date of the first step, the Company was not then in existence; it was unborn, but it was conceived, and was in the process of formation; and it had been arranged between the promoters, of whom the appellant was one, that if the company was formed, the appellant's firm should be the solicitors of that company; and, accordingly, as soon as it was formed, the appellant claimed to have acted as its solicitor from the middle of the month of February, 1855, and he was paid for acting in that character out of the moneys of the Company. If we take the time when the first legal contract between Read and the appellant was made, namely, the 9th or 10th of March, 1855, the Company had then been fully formed, and the appellant's firm were its confidential solicitors, and the Company's want of a building like the Hall of Commerce had been fully ascertained; but I take the earlier time in February as the most favourable to the case of the appellant.

Some difference in the evidence exists as to the actual day of the agreement between the appellant and Read; but I think this difference is altogether immaterial, because my opinion is based upon these palpable conclusions, which are derived from the admitted facts of the case, and which are furnished by the intrinsic evidence of the transaction.

In the beginning of February Read and three other persons were the purchasers of the property in question, together with some adjoining premises. On the 5th or 6th of February (the day is immaterial) there was a meeting between Read and the appellant. It is clear that the formation of the Company, and the eligibility of the Hall of Commerce for the establishment of that Company, were subjects discussed between Read and the appellant. From what took place between them, it is clear that Read immediately concluded a contract with his co-purchasers for the acquisition of their interests; and it is also clear that Read agreed to give to the appellant one-half of the entire purchase which he had thus gathered into his own hands. Now, there was no consideration given by the appellant to Read for that beneficial purchase. The appellant distinctly admits that he believed at the time, that the property in question was worth a very much larger sum of money than that which was to be paid for it under Read's contract. The true consideration between Read and the appellant is to be plainly collected from the letter which it is admitted was written by Read in collusion and in concert with the appellant, and the very form of which was agreed on between them. Now that letter is dated on the 9th of February, 1855; and without thinking it necessary to read it at length to your Lordships, I must remind your Lordships of the important circumstance that the letter commences with that which it is admitted had no reality, namely, it professes to be an answer to an application by the appellant Tyrrell to Read, for the purpose of purchasing the Hall of Commerce for the use of the Company. The appellant must be concluded by that which he has here deliberately caused to be represented. Your Lordships, therefore, must hold that the appellant had placed himself in the position of solicitor for this intended Company, in applying to Read, as the ostensible owner, for the purpose of buying these premises on behalf of the Company.

The language of the letter thus written by Read in pursuance

of this mutual concert begins in the following way: "In reply to your favour of this date I beg to inform you that the price asked for the Hall of Commerce is" such and such a sum. Now, the correspondence that followed, your Lordships will recollect, equally proceeded upon the same fictitious basis, namely, the fiction of Read being the actual owner of the whole entire property, and of Tyrrell being — which, in reality, he was or must be taken to have been — the agent of the intended Company, for the purpose of entering into the contract for the purchase of these premises. Nothing was done, as your Lordships are aware, until some time had elapsed, but, in the intervening period, the real object of these parties, independently of that which has been sworn in evidence in the matter, to which I do not advert, is plainly to be collected from that fact, which I take to be established, that the property was carefully kept by Read and Tyrrell until the Company was in a position to feel the necessity of obtaining such premises, and had been so far formed as to be enabled to proceed to the consideration of the purchase. Accordingly, we find a resolution of the Company, which resolution I must take to have been made under the advice of the appellant Tyrrell himself, and which is dated on the 19th of March, that the Company should proceed to treat for the premises. And a resolution of the 5th of April commits the conduct of the treaty to the solicitors of the Company, that is, to the firm of which Tyrrell, the appellant, was the principal and leading member.

What ultimately followed was this, — that Tyrrell's, the appellant's, interest in this property being most carefully concealed from his clients, whose interest it was to be aware of that fact, and whose right it was, by virtue of the relation between them and their solicitor, to know that fact, — the banking Company, under the advice of this firm, proceeded ultimately to enter into a contract for the purchase of the material part of this property, which was concluded on the 5th of May, 1855, and by which they were to give for the principal part of the premises, the sum of £64,500. Now, that sum alone, independently of the value of the unsold portion of the premises, very considerably exceeded the amount to be paid for the whole of the property by Read; one-half of that sum, therefore, which was secretly purchase money, to be paid to Tyrrell, would very considerably

exceed the amount that Tyrrell had to pay to Read by virtue of the engagement between them of the 8th of February.

I ought to have mentioned that when it was considered reasonably certain that the Company would become the purchasers of the premises, and on or about the 9th or 10th of March, 1855, the agreement between Read and Tyrrell, which does not appear to have been previously committed to writing, assumed the shape of written articles of agreement, in reality signed by the contracting parties, Read and Tyrrell, on the 10th of March, but which were made to bear date on the 8th of February, as being the day when the real original contract, though a verbal contract only, had been made between Read and Tyrrell, and in pursuance of which contract that letter of the 9th of February had been written.

Now upon these admitted facts, independently of any evidence, except simply the evidence that places the relation of Tyrrell to the bank beyond all possibility of question, and which is not attempted to be contradicted, it is abundantly clear that two of the most important principles to be ever most sedulously preserved in considering the cases in which there is any breach of the high duties that are incident to the relation of solicitor and client, have plainly been violated by Tyrrell. It was his bounden duty to have told his clients what he had done. It was his bounden duty to have given his clients the benefit of that exertion which he had made for himself. He forgot the first duty of a solicitor in the concealment and falsehood which were practised. There is no relation known to society, the duties of which it is more incumbent upon a court of justice strictly to require a faithful and honourable observance of, than the relation between solicitor and client, and I earnestly hope that this case will be one of the many which vindicate that rule of duty which has always been laid down, namely, that a solicitor shall not, in any way whatever, in respect of the subject of any transactions in the relation between him and his client, make gain to himself at the expense of his client, beyond the amount of the just and fair professional remuneration to which he is entitled. Therefore, that in respect of the subject-matter of the transaction carried on in this relation, Tyrrell, the appellant, must be converted into a trustee for the respondents, there can be no possibility of doubt.

But the argument on the part of the respondents, and the

decree of the Master of the Rolls, has been carried further in one particular, and it has involved the conclusion not only that Tyrrell shall be a trustee of that particular subject of the relation between him and his client, namely, the property that he actually bought and conveyed to the clients; but that the principle shall be extended further, to give the clients the benefit of property, and the benefit of a contract, with which the clients had no concern. Now, I must submit to your Lordships, that in the particular mode in which that is effected by the decree of the Master of the Rolls, there has been an error, and a departure from the true principles of equity. The foundation of the decree is the relation of solicitor and client, but that is constituted retrospectively by considering, first, what it was that the client took; and then, with respect to the property that was the subject of the transaction, the duties of the relation of trust and the obligation to account necessarily arise. You cannot, I think, with propriety do more than declare Tyrrell to be a trustee for his client of that particular property included in the contract. He shall make no gain of his client in respect of that property; but beyond that, I humbly submit to your Lordships that it would be impossible safely to carry the principle.

But the object that the Master of the Rolls had in view, I think, is to be attained by another mode of proceeding which, in reality, is necessarily involved in the view of the case which I have already submitted to your Lordships. Tyrrell must receive from his client, in his character of vendor to his client, only that sum of money which, as between him and Read, Tyrrell must be taken to have paid for the property conveyed to the client; but that sum of money must be ascertained in the following way: by deducting from it the value of the unsold property included in the contract between Read and Tyrrell, but not included in the contract of sale to the clients, the respondents; for the limit of the agency of Tyrrell, the extent of the obligation of Tyrrell, the bonds of the relation of solicitor and client between Tyrrell and the bank, are all to be ascertained by the extent of the property sold by Tyrrell to the bank. As to that property, the obligation arises. With regard to other property, there is no privity and no obligation; but Tyrrell retaining the other property, the value of the property so retained by Tyrrell must be deducted from the purchase money that Tyrrell had to pay to Read, and must, there-

fore, be deducted from the purchase money which Tyrrell received from his clients, the banking Company. I am very desirous, therefore, of substituting for the language of the MASTER OF THE ROLLS some expressions which I trust, subject to your Lordships' correction, will more clearly and usefully define the exact principle upon which, as I submit to your Lordships, the decree ought to be founded.

But whilst I propose that the decree shall be thus corrected in form and expression, I think that mode of correction necessarily gives rise to a very material addition to be made to the decree, and without which the measure of justice given to the respondents would be insufficient, and the lesson read by the decree itself would be imperfect. That sum of money which constitutes the difference between what Tyrrell would pay, after making the deduction of the value of the unsold property, and what Tyrrell would have to receive as a co-vendor to his client, constitutes the debt of Tyrrell to the bank. It is a sum of money obtained by a breach of duty. It is a sum of money which must be restored to the clients with full compensation for its having been originally wrongly received, and having been so long withheld, and therefore I propose to your Lordships to accompany the repayment of the principal by the repayment of the full amount of interest which is given in cases of breach of duty and violation of trust, namely, 5 per cent.

I am more particularly desirous of altering the language of the decree, because it is necessary for your Lordships to put it upon a basis that shall be consistent with two important considerations. One is, that this bill was dismissed against Read by the MASTER OF THE ROLLS. We cannot deal with that part of the original decree, for it is not the subject of any appeal. I may, however, pass upon it this observation, that as Read was a party implicated in the violation of trust committed by Tyrrell, I should have been better pleased if Read had been retained in the character of surety for the fulfilment of Tyrrell's obligation. But with that your Lordships judicially can have nothing to do. The other circumstance which it is necessary to recollect in the language of your decree, is, that you must put it upon a ground consistent with that fact that you do not undo the transaction, but you leave the clients, the purchasers, the full benefit of the contract of purchase by the retention of the property included in it.

I will, therefore, humbly beg your Lordships' particular attention to the language in which I propose to word the decree, in the hope that it will receive your approbation: "Declare that, having regard to the relation of solicitor and client which subsisted between the appellant and the respondents, at the time of the contract of purchase made by the appellant with Read, and also at the date of the agreement of the 5th of May, 1855, in the pleadings mentioned (it will be recollected that that was the date of the contract of purchase by the bank), and regard being also had to the circumstance that the appellant suppressed and withheld from the knowledge of his clients, the respondents, the fact that he was joint-owner with Read of the property comprised in the last-mentioned agreement, the respondents are entitled as against the appellant to the benefit of the contract made by the appellant with Read, so far as relates to the premises sold and conveyed to the respondents, and, therefore, take an account of the moneys paid by Tyrrell in respect of the agreement dated the 8th of February, 1855, and of the moneys properly expended by Tyrrell in respect of the said hereditaments, including all costs, charges, and expenses properly incurred by him, and all payments properly made by him in relation to the premises, and ascertain the value of the unsold property comprised in the contract between Read and Tyrrell, but not sold to the Company, as the same property stood at the date of the contract of the 5th of May, 1855, and deduct one-half of such last-mentioned value when so found from the sum-total of the moneys found to have been paid and expended by Tyrrell, as aforesaid; and declare that the difference between the balance thus obtained and the sum of £32,250, being one moiety of the purchase money paid by the respondents under the agreement of the 5th of May, 1855, is a debt due from the appellant Tyrrell to the respondents, and became and was such debt on the 11th of August, the day of completion of the contract, and ought to be now paid, together with interest thereon at 5 per cent., computed from the said 11th of August, 1855, up to the time of the payment unto the respondents, and decree the same accordingly."

My Lords, the nature of the alteration which is thus made in the language of the decree, and the other alterations that I have submitted to your Lordships' consideration, forbid, I think, our going on further to make the appellant pay the costs of this

appeal. I should, therefore, advise your Lordships to make no order with regard to the costs of the appeal; but to substitute the declarations and the decree I have proposed, for the declaration and decree pronounced at the Rolls, beginning such substitution from the end of the dismissal of the bill against Edward Rudston Read, but leaving of course untouched that part of the decree which directed Tyrrell to pay the costs of the respondents, the plaintiffs in the Court below.

Lord Cranworth. My Lords, I do not feel it necessary to add much to the observations which have been addressed to your Lordships by my noble and learned friend on the Woolsack. He has most correctly stated the principles on which this and similar cases are to be decided; and I should indeed deeply regret if there could have been anything in the decision of this case that would in the slightest degree lead the public to suppose that the practice and the principles of the Court which are so strict in holding agents in general, but particularly solicitors, to the strictest performance of their duties towards their employers and clients, were in the slightest degree to be infringed upon. I confess that in the course of the argument I had thought that possibly we might arrive at the conclusion that the decree was not only in substance, but also in form, perfectly correct. But I quite admit that in the progress of the argument I was satisfied (although probably the alteration may not in the result make any material difference in the practical bearing of the decree upon the parties), that it would be unsafe to leave it in that form in which it would not have been a safe precedent for similar cases hereafter.

There has appeared to me from the beginning to be one short ground upon which this case might rest. Throughout the whole of the dealing and the negotiations for this purchase, Tyrrell represented to his clients, the Company, that Read was the sole owner of the property. To that representation the Company are entitled to hold him bound. And that being so, the only question is, what was the sum of money which actually came from the pockets or coffers of the Company to Read? For all that passed through Tyrrell's hands in its progress from the Company to Read, but which never came to Read's hands, but was retained by Tyrrell, was so much money which he (I must use the word) fraudulently abstracted from his clients. Now the mode of

arriving at that, I think, has been most correctly pointed out in the decree proposed by my noble and learned friend. The result will be, that, although Tyrrell will — not according to the terms of the MASTER OF THE ROLLS' decree — be entitled to retain one half of the unsold property; yet, in estimating the proportion of what he has paid to Read, which is to be attributed to the Hall of Commerce, the part actually purchased by the bank, the value of that which has not been sold must be deducted. I will not add a single observation, except to say, that if it had been necessary to go into the facts of this case in detail, I should have had no sort of hesitation, if I had been a juryman, in coming to the conclusion, that, from the very beginning to the end, up to the time of the completion of the contract, it was perfectly understood between Tyrrell and Read, that Read was to let Tyrrell have half the benefit of the contract, which they all thought must turn out to be extremely beneficial, and that, in consideration of that, Tyrrell was to recommend his clients to become the purchasers.

Lord CHELMSFORD. My Lords, I agree with my two noble and learned friends in the conclusion at which they have arrived.

With respect to that part of the decree of the MASTER OF THE ROLLS which relates to the portion of the property sold to the Bank of London, if it were not affirmed, the House would make a serious inroad upon those principles established in courts of equity, by which persons clothed with a fiduciary character are restrained within the bounds of honesty and fair dealing.

What was the relation in which Mr. Tyrrell stood to the banking Company from its origin, and whether he purchased the property in question under circumstances which would make him their agent in the transaction, are questions entirely of fact, but upon which, I think, no doubt can reasonably be entertained. On his behalf, it is contended that, admitting that he and his partners were the solicitors to the Company, yet that he made the purchase of the property on his own account, although probably anticipating that he might sell it afterwards, with advantage, to the Company; and that, therefore, all that they can be entitled to do, under the circumstances, is to rescind the contract; but that they cannot keep the property, and compel Tyrrell to refund the profits he had obtained. But I think it clearly appears from the nature of the dealings between Tyrrell and Read, and afterwards between Read and the Company, that Tyrrell's object was

to obtain an interest in the property, that it might afterwards be transferred to the Company in a manner which would enable him secretly to secure to himself a considerable pecuniary benefit out of the transaction.

That Tyrrell, and perhaps his partner, Mr. Paine, were original promoters of the Bank of London, appears from the minutes of the first meeting on the 15th of January, 1855, which is described as a meeting of the promoters of the scheme for establishing a new joint-stock bank. At this meeting the only persons present were Tyrrell, Paine, and Mr. Scott; and upon this occasion Tyrrell and his partner expressed their willingness to undertake the office of solicitors to the bank. From that time, therefore, Tyrrell stood in a relation to the present and future members of the Company which precluded him from deriving any private benefit to himself from any contracts or negotiations entered into by him on their behalf.

Whether, if Tyrrell, without previous authority from the Company to procure the premises for them, had joined Read in his speculation, knowing that the property was likely to be eligible for the purposes of the Company, but had not afterwards attempted to have the property transferred to them, the Company would have been entitled to lay claim to the benefit of his purchase, is a question which it is unnecessary for us to consider. In such a supposed case there would have been wanting the circumstances which exist in the present to warrant the presumption that he acted as the agent of the Company in obtaining the property. Again, if Tyrrell, without the authority of the Company, but knowing the property to be an eligible one for them, and with the expectation that they would be desirous of purchasing it, had acquired it for himself, and, concealing his own interest, had sold it to them through a stranger, the only equitable relief to which they would have been entitled upon discovering the true circumstances, would have been to set aside the whole transaction. They could not have claimed to retain the property (which, upon this hypothesis, had belonged to Tyrrell, and not to them), and also to have had the profits which he had gained, however improperly acquired.

But this case goes far beyond such a supposed transaction. Here it is evident that the whole object and design of Tyrrell was to obtain an interest in property which was about to be, and

was immediately afterwards, offered to his clients, the banking Company, and that the acquisition of this interest was merely the first step in a scheme for securing to himself an improper advantage from dealings with them, which his confidential relation of solicitor strictly prohibited. That this was the object with which Tyrrell entered into what he calls "the joint speculation" with Read is apparent from the evidence. And that Read had in view a sale to the Company, and for the promotion of this end was willing to enlist the influence of Tyrrell, their solicitor, by permitting him to share in the benefit of his dealings with the property, is no unfair presumption; and it is difficult to account in any other manner for the admission of Tyrrell to a participation in Read's expected profit out of a speculation, of the value of which he appears to have formed a highly exaggerated estimate; and I agree in the passing observation which has been made by my noble and learned friend on the Woolsack, and, with him, I should be better satisfied if the bill had not been dismissed as to Read.

[After stating the various dealings and arrangements between the appellant and Read and the bank, his Lordship continued:]

I have gone so fully into the principal circumstances of the negotiations between the parties, for the purpose of justifying the view which I have taken, that Tyrrell, the solicitor of the bank, bound by his relation to them to protect their interests, and to act fairly and conscientiously on their behalf, had clandestinely contrived that the property should be so dealt with in its transmission to them, that he should derive a considerable benefit to himself out of their purchase. And if this is a correct view of his conduct, it would be contrary to those principles of equity which are so justly applied to a person standing in a fiduciary relation to another, if he were to be allowed to retain from those who trusted him the benefit which he has thus derived from the abuse of their confidence.

All that has been already said refers to that part of the decree which relates to the portion of the property sold to the Company. The other part, directing a conveyance of the unsold property to the Company, requires a separate consideration. In order to decide upon the propriety of this part of the decree (as to which the Master of the Rolls himself felt considerable hesitation), it will be necessary to ascertain whether Tyrrell had authority to

negotiate for premises for the Company before the 10th of March, when he completed his agreement with Read, and if he had, whether that authority extended to the whole of the property, or only to that part of it which was afterwards purchased by the Company.

Upon the first question, Mr. Scott in his evidence says, "Mr. Tyrrell was not, before the 5th of April, 1855, authorised to procure premises for the bank." But the respondents contend that the negotiations which commenced on the 9th of February were merely suspended for a time, and that when they were resumed in the month of March they proceeded upon the original footing, and are therefore a mere continuation of what had previously taken place. The appellant says that, by the admission of the respondents themselves, the treaty in February had come to an end, for in their bill they say that "the terms offered in the letter of the 9th of February were so unreasonable that Mr. Scott declined to submit the same to the directors, and the offer dropped without an answer." He therefore contends that the negotiations in March must be considered as original, and not as a continuance of the former ones. It seems to me that the decision of this question is far less important than the determination of the particular property to which the authority extended. After carefully considering the subject, I have come to the conclusion that the property which was purchased by the Company was the same which in the letter of the 9th of February, under the name of the "Hall of Commerce," was offered at the price of £110,000.

The grounds of this opinion may be very shortly stated. Tyrrell, in his answer, says that, on the 19th of March, 1855, an intimation was given to Read "that if he wanted to sell the Hall of Commerce he must lower the terms he had previously asked." This, of course, can only refer to the letter of the 9th of February, no other offer having been made. Read accordingly sent a letter to Mr. Scott, offering the Hall of Commerce for £90,000. This letter was laid before the board on the 5th of April, 1855, and the solicitors were then instructed to enter into negotiations for the purchase of the Hall of Commerce, with authority to offer for the same any sum not exceeding £60,000; and this ended in the purchase at £65,000. Of course, if Tyrrell had been authorised to buy the whole of the property which belonged to Read, and had

purchased it for himself, the Company would have been entitled to the benefit of the entire purchase.

But the respondents contend further, that, supposing the authority to Tyrrell was confined to that portion of the property which was afterwards conveyed to the Company, yet that, the agency of Tyrrell as to this part being established, the circumstances show that he received his share in the rest of the land, as a bribe, to induce him, contrary to his duty, to prevail on the Company to become the purchasers of the part which they bought, and therefore that they are entitled to have the unsold part of the property conveyed to them. No authority has been adduced in support of such a proposition, and I do not think it can be maintained.

In order to simplify the question, let it be supposed that Tyrrell had acquired no interest in the property, but that Read had offered him £5000 to induce the Company to purchase, and that they had been persuaded by Tyrrell to buy at an excessive price; of course, they might have rescinded the contract, but could they in any manner have obtained the £5000 on the ground that it belonged to them? If by reason of the agreement between Read and Tyrrell the Company had been prevailed upon to give too large a sum for the property, they might have maintained an action upon the case against both the parties as to the imposition upon them, and have recovered damages. Or the Company might have sued their agent, Tyrrell, for the damage arising from his breach of duty, and they would probably have recovered an amount equal to the sum which he had improperly received as a fair measure of the injury which they had sustained. But the £5000 itself is a specific demand they could in no manner have recovered. The unsold part of the property, in the same manner, cannot be directly reached by any proceedings of the Company. Their right to relief as to the property which they purchased arises either from their having given their agent authority to buy it for them, or from the sale to them raising an implied agency, which entitles them to all the benefit of their agent's contract to the extent to which they have made it their own. But in either view, their claim cannot be carried beyond the limits of the express or implied agency. The express authority (if any is established before the 10th of March) applies only to the Hall of Commerce. The implied agency arises upon the

purchase by the company of the same premises, and entitles them to all the benefits which the agent has derived from his dealings with this portion of the property, but to nothing beyond it. I think the fair way of ascertaining the extent of that benefit is that which has been proposed by my noble and learned friend. I agree, also, that Tyrrell ought to be charged with interest upon the sum which he will have to refund to the company at the rate of £5 per cent.

Judgment was accordingly pronounced affirming the decree as varied according to the suggestion of the Lord Chancellor (p. 510, *supra*).

ENGLISH NOTES.

The principle of equity embodied in the principal case is established by numerous cases. Most of the cases turn upon the question whether the defendant was in fact an agent at the time of the transaction or not. If he was, *cadit quæstio* as to his obligation to account for his profits. The following are some of the leading cases, where an agent has made a fight for his illicit profits, and ultimately been made to disgorge them: *Kimber* v. *Barber* (1873), L. R., 8 Ch. 56; *Parker* v. *McKenna* (1875), L. R., 10 Ch. 96, 44 L. J. Ch. 425; *Imperial Mercantile Credit Association* v. *Coleman* (1873), L. R., 6 H. L. 189, 42 L. J. Ch. 644; *Emma Silver Mining Co.* v. *Grant* (1879), 11 Ch. D. 918; *Boston Deep Sea Fishing, &c. Co.* v. *Ansell* (C. A. 1888), 39 Ch. D. 339.

Although cases of this character are generally commenced in Courts of equity, the common law allows the principal to recover from the agent, in an action for money had and received, any illicit profit which the latter may have made. *Morrison* v. *Thompson* (1874), L. R., 9 Q. B. 480, 43 L. J. Q. B. 215; *Mayor, &c. of Salford* v. *Lever* (C. A. 1890), 1891, 1 Q. B. 168, 60 L. J. Q. B. 39.

In addition to this, if the person dealing with an agent has given the latter a bribe to induce the making of a contract disadvantageous to the principal, it is a fraud for which an action lies; and the person who has given the bribe and the agent are jointly and severally liable to repay any loss which the principal has sustained by reason of his entering into the contract, without deducting any money which he has recovered from the agent in an action for money had and received. In such a case it is immaterial whether the principal sues the agent or the third person first. *Mayor, &c. of Salford* v. *Lever* (*supra cit.*).

An example of a usage being treated as bad, on the ground of its tendency to alter the proper relations between principal and agent, is

presented in the case of *Robinson* v. *Mollett* (1875), L. R., 7 H. L. 802; 44 L. J. C. P. 362, cited under No. 17, p. 469, *supra*. The House of Lords came to the conclusion that the effect of the custom there attempted to be set up would be to enable the agent to assume a position against the interest of his principal.

In the event of the principal bringing an action for money had and received, he could not recover interest, *London, Chatham & Dover Railway Co.* v. *South Eastern Railway Co.* (C. A. 1891), 1892, 1 Ch. 120, at p. 140, 61 L. J. Ch. 294, at p. 300; and the case is not within the statute 3 & 4 Will. IV. c. 42, s. 29, enabling the jury to give damages in the nature of interest. *London, Chatham & Dover Railway Co.* v. *South Eastern Railway Co.* (H. L. 1893), 1893 A. C. 429, 63 L. J. Ch. 93. In the case of an equitable action for an account of the profit made, interest is allowed, if there has been moral delinquency, at the rate of 5 per cent, *Tyrrell* v. *Bank of London* (the principal case); but where this is not the case, at the rate of 4 per cent. *Liquidators of Imperial Mercantile Credit Association* v. *Coleman* (1873), L. R., 6 H. L. 189, 42 L. J. Ch. 644.

The action for money had and received is barred after the lapse of six years from the date of receiving the money, 21 Jac. 1. c. 16, s. 3. In the event of fraud being alleged and proved, the same period runs from the date of the discovery of the fraud; and a similar rule applies in an equitable action for an account. *Metropolitan Bank* v. *Heiron* (C. A. 1880), 5 Ex. D. 319.

AMERICAN NOTES.

The principal doctrine that all profits made and advantages gained by the agent in the execution of the agency, outside his agreed or reasonable compensation, belong to the principal, is well approved in the American courts. Mechem on Agency, § 469; *Dutton* v. *Willner*, 52 New York, 312; *Dodd* v. *Wakeman*, 26 New Jersey Equity, 484; *Simons* v. *Vulcan, &c. Co.*, 61 Penn. St. 202; 100 Am. Dec. 628; *Ackenburgh* v. *McCool*, 36 Indiana, 473; *Ringo* v. *Binns*, 10 Peters (U. S.), 269; *Coursin's Appeal*, 79 Penn. St. 220; *Leake* v. *Sutherland*, 25 Arkansas, 219; *Moinett* v. *Days*, 1 Baxter (Tennessee), 431; *Stoner* v. *Weiser*, 24 Iowa, 434; *Moore* v. *Mandelbaum*, 8 Michigan, 433; *Greenfield Sav. Bank* v. *Simons*, 133 Massachusetts, 415; *Boston* v. *Simmons*, 150 Massachusetts, 461; 15 Am. St. Rep. 230; 2 Pomeroy Equity Jurisprudence, p. 1386, &c.; Beach Equity Jurisprudence, p. 132; *McNutt* v. *Dix* (Michigan), 10 Lawyers' Annotated Rep. 660; *Grumley* v. *Webb*, 44 Missouri, 444; 100 Am. Dec. 304; *Byrd* v. *Hughes*, 84 Illinois, 174; *Judevine* v. *Hardwick*, 19 Vermont, 180; *Whelan* v. *McCreary*, 64 Alabama, 319; *Clark* v. *Anderson*, 10 Bush (Kentucky), 99; *Krutz* v. *Fisher*, 8 Kansas, 90; *Segar* v. *Edwards*, 11 Leigh (Virginia), 213. Thus if the agent is authorised to sell at a given price and realises more (*Kerfoot* v. *Hyman*, 52 Illinois, 512); or is authorised to buy at a given price and buys for less (*Bunker* v. *Miles*, 30 Maine, 431;

90 Am. Dec. 632); or is authorised to settle claims at a given sum and obtains a reduction (*Rochester* v. *Levering*, 104 Indiana, 562), the advantage must be accounted for to the principal.

The rule is rigid and applies equally to cases of fair and of unfair dealing, and where the principal would have been no better off if the agent had strictly pursued his powers, and where the principal was not in fact injured by the agent's act. Mechem on Agency, § 469.

Section VIII. — *Rights of Agent against Principal.*

No. 21. — LACEY *v.* HILL. CROWLEY'S CLAIM.

(Ch. 1870.)

RULE.

The agent (as well as any person succeeding to him by a universal title) has a right against the principal to be supplied with funds to meet all liabilities incurred by him by reason of the employment; and this right is not limited by the capacity of the agent to satisfy the liability out of his other resources.

Lacey v. Hill. Crowley's Claim.

43 L. J. Ch. 551 (s. c. L. R., 18 Eq. 182).

This was a stockbroker's claim against the estate of Sir Robert Harvey, in the suit of *Lacey* v. *Hill*, which was instituted for the administration of his estate. Messrs. Crowley, as brokers for Sir R. Harvey, had, previously to the 12th of July, 1870, entered into contracts for purchase of large quantities of Spanish and other stocks, in the usual manner, to be completed on the next settling day, which was the 15th of July. Owing to the dispute between France and Germany as to the Hohenzollern candidature, the stocks had fallen considerably in value, and on the 12th of July Messrs. Crowley wrote to Sir R. Harvey as follows: —

"The position is simply this: We depend entirely on you. If you pay us in full on Friday, we can face our other difficulties; but if you do not, we cannot stand. Hence the tone of our last two or three letters.

"If we had to succumb, it would necessitate the closing of your account at perhaps an unfortunate moment, and your name would be divulged, — a thing we very much dread having to do.

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"It is also necessary we should know to-morrow morning early how affairs are to go. If we are to continue, we must do it boldly; and we cannot do that if we are in any doubt about being able to pay up differences on Friday.

"We look to you, therefore, to come, or write, or telegraph an assurance to support, or directions to close, as the case may be. For your guidance we have gone through your account, and at to-night's closing prices the differences due from you would be about £20,000; to-morrow may alter that.

"We confess we do not see any reasonable hope that it will be less, especially as outside the Exchange prices are still worse, — Spanish, 24½, 5; Turks, 43½, ¾; Italians, 50½, 1; and yet not so low as Paris. If we have to carry over, you must also give us power to sell, in case of need, because some things (as Quicksilver) it may be impossible to continue.

"We are, dear Sir,

"Yours truly,

"Crowley Bros.

"Sir Robt. Harvey, Bart."

Sir Robert Harvey replied by telegram on the 13th, "Do what suits you best. I will settle all you say on Friday morning (15th)." Messrs. Crowley accordingly, on the 13th, sold some of the stocks, and entered into arrangements for continuing the rest of the contracts to the settling day next after the 15th, and sent Sir Robert Harvey an account, showing £15,912 12*s.* 1*d.* due to them for loss on stock and brokerage.

On the 15th, they continued the contracts as to the greater part of the stock, according to the usual practice of the Stock Exchange, which is to pay the difference between the contract price and the price on the settling day and a small charge for not completing, and enter into new contracts at their current price for the next settling day. The contracts were in the usual form, "subject to the rules and usages of the Stock Exchange," and the broker's notes which had been sent from time to time to Sir R. Harvey had these words.

On the 15th, Sir R. Harvey did not settle his account, but shot himself, from the effects of which he died on the 19th.

On the 16th, the Norwich Bank, of which Sir R. Harvey was principal partner, stopped payment.

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On the 16th also, Messrs. Crowley were declared defaulters on the Stock Exchange.

According to the rules of the Stock Exchange, when a member fails to meet his engagements, he is to be declared a defaulter, and ceases to be a member; certain officers called official assignees examine his accounts and settle the prices at which his transactions are to be closed. By the 169th rule, the prices are to be those current in the market immediately before the declaration.

Accordingly, all Messrs. Crowley's contracts on the Stock Exchange were closed at the price current on the 16th, the day on which they were declared defaulters.

Sir R. Harvey's account so closed showed £20,482 17*s.* 4*d.* as due to Messrs. Crowley for loss on stock and brokerage. It appeared that if the transactions had been continued to the next settling day the loss to Sir R. Harvey would have been equally great.

According to the rule of the Stock Exchange, a defaulter may be re-admitted on making such payment as the official assignees fix, such payment not to be less than 6*s.* 8*d.* in the pound.

Under this rule, Messrs. Crowley were re-admitted to the Stock Exchange on payment of less than the full amount of their liabilities.

According to the evidence given by a stockbroker and not disputed, it appeared that when a defaulting stockbroker is re-admitted to the Stock Exchange, no actual release is given by his creditors, he in fact remains legally liable to the whole amount of his debts; but on the Stock Exchange his re-admission is considered as tantamount to a release. The official assignee sometimes asks defaulting members if they can make any further payment: if they can, they are expected to do so. But no member of the Stock Exchange is allowed to sue for it without the sanction of the committee. The observance of this rule is enforced by dismissal in case of breach.

Messrs. Crowley had brought in a claim against Sir R. Harvey's estate for the whole £20,482 17*s.* 4*d.*, which had been adjourned into Court.

After argument, in the course of which it was argued against the claim: If the case is to be treated on the same footing as an action at law for the indemnity, then the limit of the claim is the amount actually paid. The agent cannot claim an indemnity against lia-

bility before he has been compelled to pay. *Collinge* v. *Heywood*, 9 Ad. & E. 633; 1 P. & D. 502; 8 L. J. (N. S.) Q. B. 98.

The Master of the Rolls. I must say that, assuming the claimants produce or verify their contracts, which I think is a very material point in the case, they have made out their case.

The case is simply this, — Messrs. Crowley were the brokers of Sir Robert Harvey. In that capacity they bought for him various stocks, Spanish stock amongst the rest, and from time to time according to his orders sold the stock. On a given day in July, we will say the 13th, he owed them some £15,000 on balance; that is, taking the account as if they had sold at the then market price all the stock which they had bought for him. At this time they found that they were in this position, that unless Sir Robert Harvey paid them, they would be defaulters on the Stock Exchange; and therefore they wrote to him to say, "The settling day is Friday, the 15th of July, and unless you pay us on that day, we shall be defaulters. But if you agree to pay us on that day, we can go on with our business; and if you will promise to pay us on that day, we will either then continue your account" (which is in fact entering into a new series of sales and purchases; that is, they contract to sell what stocks they hold, or they contract to buy equivalent quantities), — "we will either continue your account or sell as you think best."

Sir R. Harvey, in answer, telegraphed that they should sell part, and continue part or not, as they pleased; "the selling part" is absolute, but as to the rest they were either to continue it or sell it as they pleased, at the same time stating that he would pay on the Friday. That, of course, was a representation on which they would act. They had told him that they could not continue as honest men; unless he paid, they should be defaulters. He represented that he would pay, and on the strength of that representation they continued a portion of the stocks. He did not pay on the 15th, but made an attempt at suicide. On this, on the 16th, they were declared defaulters, that is, they made default on the 15th; and on the 16th they were declared defaulters, and in the usual course their creditors by their authority, under the Stock Exchange rules, closed their accounts, that is, sold all the stocks they had contracted to buy for Sir Robert Harvey. This, therefore, was a sale by the agents.

The first question I have to decide is, was such a sale authorised? Now, it is said not to be an authorised sale for two reasons. It was

said the only authority they had was to purchase for the next account day, the 30th; and they had no right therefore to sell before that day. Now, granting that their right to sell before that day depends on some right other than the ordinary right of an agent who has contracted to buy for delivery on a future day, I think it is well warranted on both of two grounds; one is that they did not agree to continue except on the representation by Sir Robert Harvey that he would pay on the Friday. He left them to continue or not, knowing they could not continue unless they relied on that representation. He failed to come up by noon on Friday; accordingly, they became entitled to sell. I admit they must sell soon afterwards, under that right. But they did so, — the sale was the next morning. I agree entirely with Mr. Fry's observation that it would not have given them the right to sell at some future time; but in fact no time was really lost.

I think they had also a right to sell on another ground. By the Stock Exchange rules, if the principal dies or becomes insolvent during the currency of the account, the broker has a right to sell immediately. It appears also that these rules were expressly made part of the contract, not only as between the brokers and jobbers from whom they purchase, but as between the brokers and Sir Robert Harvey, and I have no doubt in this particular instance were perfectly well known to them all. What is the meaning of the client becoming "insolvent" in the sense of the rules? Why, it is the simple meaning of the word as it is understood between business men. What happened was this, Sir Robert Harvey having attempted to commit suicide on the afternoon of Friday, being principal partner of the bank of Norwich, the bank puts up its shutters on the next morning, and does no more business. It is soon noised abroad that the bank is insolvent, and so the Stock Exchange people on inquiry were informed. This turns out to be the fact. I am asked to say that that is not "insolvency." Insolvency, within the Stock Exchange rule, of course must be inability to pay your debts in the ordinary commercial sense, and in the ordinary course of business. What should we say to a bank that puts up the shutters and does not pay? Is not that evidence of insolvency? I hardly know how a jury exercising the ordinary common-sense which is to be attributed to juries could find anybody insolvent unless he came forward and showed that the whole amount of his assets was not equal to the whole amount of his liabilities. I think

there was very good evidence of "insolvency," and such evidence as entitled the brokers to act upon it, and therefore they had the right to sell on the second ground also.

The third objection is this. It is said the brokers made default, and that they have not paid for the stock they purchased for Sir Robert Harvey. But if he has had the stock sold for him, and is credited with the proceeds, what difference can it make to him whether the brokers paid for it, or whether the persons who sold it have chosen to give them credit for the amount? He has had it, and he has had it sold for him; that is, he has been credited with the proceeds. It appears to me, looking at it as I do look at it, as a real transaction, it is exactly equivalent to a case where a man has bought a horse or a cargo of corn for his principal, and before the day of the delivery had sold it and credited him with the proceeds in account. The principal had not had the thing delivered; but he has had the benefit of the sale, and been credited with it in account. It appears to me that that is the true view of the transaction, and it is utterly immaterial whether the broker who has become personally liable for the amount has paid at all. But in addition to this, it appears to me the case of a defaulter on the Stock Exchange is not the case of a bankrupt. There is no discharge by the English laws from his debts. All that happens is this, unless he pays 6*s.* 8*d.* in the pound he is not admitted in the Stock Exchange again; if he remains outside, he remains liable to an action. If he pays the 6*s.* 8*d.*, then the Stock Exchange Committee will not allow any member of the Stock Exchange to sue him without their permission, meaning that his assets shall be fairly distributed; and as I understand it, every year a man who has been a defaulter is called upon to show whether he can pay any more, and if he can pay any more he does so till he liquidates the whole debt. So that in point of fact if these gentlemen recover in the suit, they will actually have to distribute it amongst their creditors on the Stock Exchange, and will be in no wise released from the payment.

Then it is said if it is a liability to pay as distinguished from an actual payment made, that the agent or person entitled to be indemnified has no remedy. Whatever may be the case at law, upon which I say nothing because it is not necessary, it is quite plain that in this Court the man has a right to be indemnified, has a right to have a sufficient sum set apart for that indemnity, either

paid to him or paid direct over to the creditor. It is not very material to consider it because it has been actually decided that if the creditor is not a party, you may have the money paid over to the person who is liable to the creditor. As for saying he may compromise for less, the answer is, the person liable to indemnify can go to the creditor and set the matter right. It is his own fault that the liability remains. But he is certainly in equity liable to indemnity, and liable to indemnify to the extent of the liability incurred by the agent on his behalf, which is quite sufficient to substantiate the proof against the estate.

Therefore on these grounds I shall allow the whole proof. I think the contracts must be verified. If they cannot, they must be produced; but I do not say that if they do not exist, you cannot prove the contracts without them. The order will be that, subject to the verification of the contracts, the whole proof is allowed.

Messrs. Crowley's costs, so far as caused by the adjournment into Court, to be allowed in full out of the estate; their other costs to be added to their claim and proved against the estate. The costs of the plaintiff and defendant to be costs in the cause.

ENGLISH NOTES.

The principle as to the extent of the liability in equity commonly referred to by the expression "indemnity" is also contained in the judgment of V. C. Giffard in *Cruse* v. *Paine* (1868), L. R., 6 Eq. 641; 37 L. J. Ch. 711 (affirmed on appeal 4 Ch. D. 441), — a case where the executor of the seller of shares on the Stock Exchange was entitled to recover from the buyer, by way of indemnity, the full amount of calls made on the shares, although the seller's estate would otherwise have been unable to pay them. The same doctrine is frequently applied to the right of a trustee to be indemnified by the beneficiary under the trust. It was applied in many of the cases arising upon the failure of the City of Glasgow Bank in Scotland, where the liability exceeded the means of the trustee. If the trustee had held the shares as an investment authorised by the terms of his trust, the trust fund became available for the calls (by reason of the right of indemnity) to the full extent of the trustee's liability. The same principle was applied by the Master of the Rolls (Sir G. Jessel) in an unreported case of *Isaac* v. *King*, arising out of the breaking down of a footbridge vested in trustees (see Campbell on Sale and Agency, 2 edit. p. 595).

The same principle is involved in the case of *Re Blundell, Blundell* v. *Blundell* (1888), 40 Ch. D. 370; 57 L. J. Ch. 730. In that case a

trustee had allowed his solicitors to retain costs out of the trust estate. The trustee had, as the solicitors knew, committed a breach of trust; but notice was not brought home to them that, at the time when they accepted payment, the trustee had been guilty of such a breach of trust as would preclude him from resorting to the trust estate for payment of costs. It was held that the right of a trustee to be indemnified out of the trust estate covers not only payments actually made by him, but also his liability to pay; and, by virtue of this right of indemnity, a trustee is entitled to resort in the first instance to the trust estate for necessary expenses. The agent was, accordingly, held entitled to accept payment direct out of the trust estate, so long as he had not notice of a breach of trust precluding the trustee from his *primâ facie* right to indemnity.

The case of *Hood* v. *Stallybrass Balmer & Co.* (P. C. 1878), 3 App. Cas. 880, in no way conflicts with this view; but there the right of indemnity was lost by the course of dealing. In that case, an agent for sale who had accepted accommodation bills against consignments, upon the liquidation of the consignor, received a telegram from the receivers in the liquidation to stop all sales and deliveries except to a person named; and he telegraphed back to the receivers that their instructions would be carried out. The consignee was held, by this course of dealing, to have made himself a trustee for the creditors of the consignor, and to have precluded himself from making any claim to indemnity in respect of the bills, at all events, subsequently to his sending of the telegram in answer.

AMERICAN NOTES.

The general rule is that the principal is bound to indemnify the agent for all fair and legal conduct, and to reimburse him for all necessary expenditure in the prosecution of the agency. Mechem on Agency, §§ 652, 653. So when an agent, authorised to contract for the use of a vessel of the principal, did so in his own name, and was compelled to pay damages for the principal's refusal, he was allowed to recover from the principal. *Saveland* v. *Green*, 36 Wisconsin, 612. So when he was sued and arrested for the price of property purchased for his principal, and was compelled to pay it, he recovered from the principal. *Clark* v. *Jones*, 16 Lea (Tennessee), 351. See also *Glenn* v. *Salter*, 50 Georgia, 170; *Searing* v. *Butler*, 69 Illinois, 575; *Ruffner* v. *Hewitt*, 7 West Virginia, 585; *Maitland* v. *Martin*, 86 Penn. St. 120; *Fowler* v. *N. Y. Gold Ex. Bank*, 67 New York, 138; *Knapp* v. *Simon*, 86 New York, 311; *Vandyke* v. *Brown*, 8 New Jersey Equity, 657; *White* v. *Bank*, 102 U. S. 658.

No. 22. — MURRAY *v.* CURRIE.

(N. P. LORD DENMAN, 1836.)

No. 23. — WILKINSON *v.* MARTIN.

(N. P. CH. J. TINDAL, 1837.)

No. 24. — GROGAN *v.* SMITH.

(C. A. 1890.)

RULE.

WHERE an agent is employed for a commission to negotiate a contract, the commission is earned by the introduction of a person who (in consequence of the introduction) enters into a contract — within the scope of the employment; the employer cannot, after obtaining the introduction, withdraw the employment so as to deprive the agent of his commission.

But a commission is not earned by the introduction of a person who does not enter into a binding contract, and is not prevented by the act of the employer from entering into such a contract.

Murray v. Currie.

7 Car. & P. 584.

Assumpsit for work and labour as a land agent. Plea, — General issue.

It appeared that the plaintiff was one of several land agents employed to sell an estate for the defendant; that a gentleman named Protheroe, having gone to the office of the plaintiff to inquire after another estate, was told that it was out of the market, but that the estate in question was to be sold, and a particular of it was given to him, which he took away. Mr. Protheroe afterwards met another of the land agents employed by the plaintiff, named Williams, and with him negotiated the terms of the sale. The plaintiff insisted that he was entitled to commission on the sale from the defendant.

No. 22. — Murray v. Currie.

Several land agents were called as witnesses, and stated that it was the usage, where there were several employed, that the person who found a purchaser should have a commission of 2*l.* per cent., whether he did anything more towards the completion of the purchase or not; but they admitted that they did not know of any instance where one agent had found the purchaser and another had completed the purchase, but only instances in which the vendor himself had completed it. They said, however, that it would be no encouragement to look out for a purchaser, if, when they had found one, the business was to be taken out of their hands.

Sir W. Follett, for the defendant. The only question is, whether the plaintiff is entitled to recover his commission for the sale of the estate, as all the money out of pocket was paid in the year 1829. The sale took place in 1832. Murray, the plaintiff, says that the sale to Mr. Protheroe took place through him, and therefore he is entitled to commission; but Williams was a land agent employed to sell the estate as well as the plaintiff, and the sale was completed by the instrumentality of Williams, and he is clearly entitled to his commission; and the question is, whether the two are entitled? We have the cases of house agents, in which, if a man goes to one house agent and gets information, but does not treat, and afterwards goes to another, with whom he does treat, the latter is the party entitled to commission, and not the former.

Lord Denman, C. J., in summing up (*inter alia*), said, There is no doubt that, from November, 1829, to January, 1830, the plaintiff was employed to sell the estate, — an employment which never appears to have been distinctly revoked; and it is quite possible the plaintiff might be entitled to recover commission, provided he accomplished the sale for the defendant. The real question is, whether, in point of fact, you can say that the plaintiff found the purchaser? that is, the person who ultimately became the purchaser. If you think the plaintiff can be said to have found the purchaser, then he may be entitled to be paid for so doing. It appears that Protheroe, on applying to the plaintiff about a particular estate, was told that it was out of the market, but that the Cairo estate was to be sold, and got the particulars from him; but afterwards meeting the agent Williams, he discussed with him the particulars, and said the price was too much, and it was ultimately agreed for at a less price. Mr. Protheroe says he did not buy the

estate on account of any character of the plaintiff's office, but from his own observations; but this will not, in my opinion, be sufficient to deprive the plaintiff of his right to commission. The question is whether, under the circumstances, you think the plaintiff was the person who found the purchaser? If you do, you will find your verdict for him; if you do not, then you will find for the defendant. If you find for the plaintiff, then you will say what compensation he is entitled to. You are not bound to give the amount of commission, though what is usually paid is some evidence to regulate the decision of a jury.

Verdict for the plaintiff, — damages £40, *being for commission at a less rate than that spoken to by the witnesses.*

Wilkinson v. Martin.

8 Car. & P. 1.

Assumpsit to recover a sum of £29, being 1 per cent. commission, claimed by the plaintiffs as brokers, on the sale of a ship called the *Emerald*, belonging to the defendant, who was also a broker.

On the part of the plaintiffs, Mr. Wyllie, the purchaser of the vessel, was called as a witness, and stated that, being in want of a ship, he met one of the plaintiffs on the Royal Exchange in the month of August, at which time he did not know Martin, the defendant; that the plaintiffs told him that Martin had a vessel named the *Emerald* which they thought would suit him; that early in the month of August, the plaintiffs introduced him to Martin on the Royal Exchange, in consequence of which introduction a negotiation was entered into between the witness and Martin, and the price first mentioned was 3000 guineas; that he afterwards saw Martin once at the plaintiffs' counting-house, when the subject of the purchase was discussed, and that the vessel was afterwards purchased by him for £2900. On his cross-examination he said, "I had mentioned the subject to a Mr. Ashcroft, and we went to the London Docks, and he pointed the *Emerald* out to me as it was lying there. Mr. Ashcroft did not introduce me to the *Emerald;* he is not a broker, but I employ him as a cooper; he was the first person that noticed the *Emerald* to me and told me it would suit me. Not many days after that I saw Martin; the proposal I authorised Ashcroft to make to Martin was £2750. Martin

refused that sum; I believe I did not authorise any further offer. I finally agreed with Martin on the 2nd of September; a Captain Brown was present, but the plaintiffs were not present either at the agreement or the execution of the bill of sale. Neither Ashcroft nor Mr. Neilson were authorised by me to make any offer before I had seen Martin; I saw Martin first by appointment made by the plaintiffs. I knew the plaintiffs were not authorised to sell at £2800. At the interview on the 1st of September, Martin went away saying, 'I'll have nothing more to do with you;' on the next day Martin himself drew out the bill of sale, and it was executed." On his re-examination he said, "Before I saw the plaintiffs I did not know that Martin was the owner of the *Emerald*."

Several brokers were also called as witnesses to support the plaintiffs' claim. One of them said, "If the broker has not the benefit of the first introduction of parties, his business will not be worth following. If I introduced the party as a customer, I should think myself entitled to the commission, but not for a mere personal introduction not connected with the business."

Another said, "Where the broker introduces the customer, and the seller makes the agreement, the commission attaches. I have known frequent instances, and have always known it paid." Another said, "The broker is entitled to his commission if the sale eventually takes place, although the price agreed on and taken may be less than that which the owner authorised the broker to agree for. The broker usually prepares the agreement." Another said, "If the seller accepts the agency in the first instance, he has no right afterwards to withdraw from it. I don't think that the mere fact of introducing the buyer to the seller gives the right to commission."

Taddy, Serjt., for the defendant. They claim £29 as a commission for brokerage on the sale. I admit that if the plaintiffs have sold the defendant's ship, they are entitled to the brokerage. I admit that the commission is 1 per cent., to be paid by the seller: but I deny that the plaintiffs effected the sale. If the mere introduction of the person who afterwards buys were to give the right to commission, one could not look at a broker without paying 1 per cent. The plaintiffs have performed no service for the defendant. They should have proved that the defendant gave them authority in the first instance. I cannot suppose that

if that be done, a case may arise in which a fraud may be committed on a broker by the seller, by taking the matter out of his hands. But here the defendant himself was a broker, and did not want the assistance of the plaintiffs.

The object of the plaintiffs was to get to be brokers to the ship for the purchaser, and they have succeeded. Neilson had the same view as captain, and he also has attained his object.

On the part of the defendant, Ashcroft was examined, and said, "In August, 1834, I was at the London Docks with Wyllie, and pointed out the *Emerald* to him as a ship that would suit him: a few days after I found out that Mr. Martin was the owner; the first thing I did was to get Mr. Woolcombe to survey the ship. I made an offer to Mr. Martin, which was not accepted. Several notes passed between me and Mr. Martin on the subject of the vessel; the first offer was £2700, and the second was either £2750 or £2800. I was at the counting-house of the plaintiffs once, a few days after I had made the offers to Mr. Martin; one of them went out for Mr. Martin. It was previously said that the plaintiffs had authority from Mr. Martin to sell the ship for £2850; when Mr. Martin came, he said, 'I have not authorised that offer,' and then said 'Good-morning' and went away. Mr. Martin mentioned a price to me, and I mentioned it to Mr. Wyllie."

Captain Brown was then called, and was stating that a negotiation went on between Ashcroft and Martin, when R. V. Richards, for the plaintiffs, objected to this evidence.

TINDAL, C. J. They may show that there was a negotiation between Ashcroft and Martin. It will be put to the jury as the real negotiation. You say that the real negotiation was with the plaintiffs. They must run *pari passu* together.

The witness said that he was present when the contract was signed, and witnessed it; that he never saw the plaintiffs on the business, and that the contract was drawn up in the defendant's own counting-house.

Talfourd, Serjt., (in reply) What motive could the plaintiffs have in having the parties at their counting-house, unless they had been accepted by the defendant (himself a broker, knowing that the plaintiffs got their bread by this kind of thing) as his brokers in the transaction? It is clear, from Mr. Wyllie's evidence, that the first introduction was by the plaintiffs. They say, on the other side, not. You shall have your commission,

but you shall not have one farthing for your work and labour. The defendant, being a broker, has not done in this case as he would be done by.

Tindal, C. J. (in summing up), said: The only question for you to decide on the evidence on both sides is, whether the sale really proceeded in effect from the act of the plaintiffs acting as brokers, — whether it really and substantially proceeded from their act, though they did not complete the contract. If it did, they will be entitled to your verdict; but if very far less than this was done, and there was only a mere introduction, and the office of agent or middle-man was never filled by the plaintiffs between the parties, then they will not be entitled to recover. For the plaintiffs two circumstances are relied on, but undoubtedly they appear to have done very little in the matter. The situation of Wyllie appears to be this, — he looks about him in the London Docks, and sees the vessel, and employs Woolcombe. All this he does without the knowledge of the plaintiffs; and when he has done this, he is introduced by the plaintiffs to Martin. Undoubtedly a dry introduction of one man to another will not be enough; it would be absurd to say that it can be the subject-matter of such a claim as this. But if the introduction is the foundation on which the negotiation proceeds, and without which it would not have proceeded, then the parties cannot by their agreement deprive the brokers of their joint remuneration. If the plaintiffs were the middle-men or agents up to a certain time, the parties cannot afterwards deprive them of their right. It is material to see how the defendant came to the counting-house of the plaintiffs, — whether he came there as to the agents employed in the matter. Undoubtedly, unless there is some agency established, there is no foundation for any contract between them. You will decide for yourselves, whether you are satisfied that, with the assent of both these parties, the plaintiffs were the agents or middle-men between them, by whose means the negotiation was made, though they did not complete the contract. If you think they were, you will find for them; if you think they were not, then you will find for the defendant.

Verdict for the plaintiff, — damages £29, *being the full amount of commission claimed.*

Grogan v. Smith.

7 Times L. R. 132–133.

This was an appeal from a decision of GRANTHAM, J. (6 The Times L. R. 427). The owner of a leasehold house in Grosvenor Square had put it into the hands of the plaintiff, a house agent, to find a purchaser. The plaintiff found a proposed purchaser, who offered £5000, the ground rent being £40, upon the terms that there should be a direct lease from the ground landlord, the Duke of Westminster, or that the vendor should pay the costs of assignment and certain repairs to be done. A long correspondence followed with the result (according to the view taken by the Court of Appeal) that the negotiation went off and there was no binding contract. The plaintiff claimed his commission on the ground that he had found a purchaser. At the trial before Mr. Justice GRANTHAM, the learned Judge considered upon the evidence, in which he admitted some oral evidence, that there had been a contract, and gave judgment for £126.

The defendant appealed, and after hearing argument, the Court came to the conclusion that the action could not be maintained.

Lord ESHER, in giving judgment, said the agent, in order to earn a commission, was to get a purchaser, — an actual purchaser; not merely a person who might become a purchaser, but one who would enter into a binding contract, binding him to purchase the house. It was true that the plaintiff had an alternative right of action if he could show that he did obtain a person who was ready and willing to enter into a binding contract; if he could show that the two parties, vendor and purchaser, were really agreed as to all the terms of the contract; that it was prevented from becoming a binding contract only by reason of the fault or default of the defendant in refusing to make the agreement valid and binding. Now, here, had the plaintiff found such a purchaser? It was said that he had, and had made a binding contract in writing. But in order to find that, it must appear that the parties had finally agreed upon all the terms, but here the parties had not. The stipulation as to payment of costs of an assignment had never been withdrawn nor agreed to. There had been a long correspondence, in which there were proposals and counter-proposals and re-proposals, but no contract had finally been agreed upon, and there was no binding contract such as would bind the proposed purchaser to pur-

chase the house. If, indeed, the plaintiff had shown that the parties had agreed as to all the terms, but that the defendant had prevented it from becoming a binding contract, then the plaintiff might have succeeded in this action. But he had not shown this, and, on the contrary, it appeared that the proposed purchaser had never withdrawn a term of the contract which the vendor had never assented to. The plaintiff, therefore, had failed to establish his case. The learned Judge had based his decision on the ground that the contract was completed. In this he differed from the learned Judge, and therefore came to the conclusion that the judgment must be for the defendant.

Lord Justice LOPES concurred, and upon the same ground. The proposed purchaser, he said, had always insisted that there should be a direct lease from the Duke, and that the cost of any assignment should be paid by the vendor, but to this the vendor had never agreed. There was, therefore, no final contract at all.

Lord Justice KAY concurred, and observed that the plaintiff, the agent, had not shown that he had introduced a party who had bound himself to purchase the house.

Appeal allowed. Judgment for the defendant.

AMERICAN NOTES.

The doctrine of the principal cases prevails generally in this country. The subject is discussed exhaustively by Mr. Mechem (Agency, §§ 966–968). Ordinarily the broker's duty is performed when he has found a purchaser who is ready, willing, and able to purchase upon the terms specified. *McGavock* v. *Woodlief*, 20 Howard (U. S.), 221; *Hinds* v. *Henry*, 36 New Jersey Law, 328; *Fraser* v. *Wyckoff*, 63 New York, 445; *Livezy* v. *Miller*, 61 Maryland, 336; *Coleman* v. *Meade*, 13 Bush (Kentucky), 358; *Goss* v. *Stevens*, 32 Minnesota, 472; *Fischer* v. *Bell*, 91 Indiana, 243; *Veazie* v. *Parker*, 72 Maine, 443; *Bell* v. *Kaiser*, 50 Missouri, 150; *Fox* v. *Rouse*, 47 Michigan, 558. Or if no particular terms are stated, when he has produced a purchaser to whom the principal sells. *Hanna* v. *Collins*, 69 Iowa, 51; *Fisk* v. *Henarie*, 13 Oregon, 156; *Stewart* v. *Mather*, 32 Wisconsin, 344; *Sibbald* v. *Bethlehem Iron Works*, 83 New York, 378; 22 Am. Rep. 411; *Veazie* v. *Parker*, 72 Maine, 443; *Attrill* v. *Patterson*, 58 Maryland, 226; *Hartley* v. *Anderson*, 150 Penn. St. 391; *Rice* v. *Mayo*, 107 Massachusetts, 550. The agent's efforts must have been the procuring cause of the sale. *Timberman* v. *Craddock*, 70 Missouri, 638; *Royster* v. *Mageveney*, 9 Lea (Tennessee), 148; *Tyler* v. *Parr*, 52 Missouri, 249, and cases cited above. "The reward comes only with his success." *Sibbald* v. *Bethlehem Iron Works*, *supra*. See also *Plant* v. *Thompson*, 42 Kansas, 664; 16 Am. St. Rep. 512; *Ward* v. *Cobb*, 148 Massachusetts, 518; 12 Am. St. Rep. 587; *Stewart* v. *Murray*, 92 Indiana, 543; 47 Am. Rep. 167;

Dole v. *Sherwood*, 41 Minnesota, 535; 5 Lawyers' Rep. Annotated, 720; *Garcelon* v. *Tibbetts*, 84 Maine, 148; *Hungerford* v. *Hicks*, 39 Connecticut, 259; *Dolan* v. *Scanlan*, 57 California, 261; *Keys* v. *Johnson*, 68 Penn. St. 42.

And the customer must be responsible and able to respond if he breaks the contract. *Coleman* v. *Meade*, 13 Bush (Kentucky), 358; *Pratt* v. *Hotchkiss*, 10 Illinois Appellate Court, 603; *Iselin* v. *Griffith*, 62 Iowa, 668; *Goss* v. *Broom*, 31 Minnesota, 484. Even where the sale was defeated by the defective condition of the title, and the defendants afterwards sold at a higher price to another, the commissions are not earned. *Tombs* v. *Alexander*, 101 Massachusetts, 255; 3 Am. Rep. 349. And so where the title was good, but the owner refused to warrant. *Garcelon* v. *Tibbetts*, 84 Maine, 148.

But if the parties contract, and the purchaser turns out unable to perform, the commissions are earned. *Kalley* v. *Baker*, 132 New York, 1; 28 Am. St. Rep. 542, and note, 546; also note, 12 Am. St. Rep. 587.

Section IX. — *Agency arising from Necessity.*

No. 25. — FREEMAN *v.* E. INDIA COMPANY.

(K. B. 1822.)

RULE.

It is only in an extreme case of necessity that the Master of a Ship is constituted the agent for the owners of the goods carried, so as to authorise a sale by him of the goods.

Freeman v. E. India Company.

5 B. & Ald. 617.

Trover for forty-two chests of indigo. Plea, a general issue. At the trial, before Abbott, C. J., at the sittings after last Hilary term, the following appeared to be the facts of the case: The goods in question, which were the property of the plaintiffs, were shipped at Calcutta, on board the *Cerberus*, for England: the vessel was wrecked off the Cape of Good Hope, and the greater part of the cargo was lost; 252 chests of indigo, however, was saved; and it did not appear that any of them was materially damaged. The forty-two chests which were the subject of the present action were perfectly sound when they arrived in England. The indigo was sold by public auction at the Cape of Good Hope, being advertised as part of the cargo of the *Cerberus*, by order of the captain, who acted *bonâ fide* according to the best of his judgment, and with a

view to the benefit of all parties concerned. The vendees afterwards shipped the same to England, and they were deposited in the warehouses of the East India Company. The action was brought to try the right to the property, the purchasers having indemnified the present defendants. The Lord Chief Justice was of opinion, that the captain of a ship was not justified in selling any part of his cargo, except in case of absolute necessity; and he left it to the jury to say, whether, under the circumstances, there was such a necessity. A verdict having been found for the plaintiffs, —

The Solicitor-General now moved for a new trial, and contended first, that the captain, under the circumstances, had authority to sell the cargo; and, secondly, that the sale having been in *market overt*, the property was thereby transferred to the vendee. It must be admitted that though the captain is not the agent of the owners of the cargo, and that he is to be considered, as to them, a mere depositary and common carrier; yet under special circumstances, the character of agent and supercargo is forced upon him by the general policy of the law. The law is so laid down by Lord Stowell in the case of the *Gratitudine*, 3 Rob. Adm. Rep. 258. That learned Judge there states that, "in some cases, the captain must exercise the discretion of an authorised agent over the cargo, as well in the prosecution of the voyage at sea, and in intermediate ports into which he may be compelled to enter;" and then he mentions, as instances in the prosecution of the voyage, the case of throwing parts of the cargo overboard at sea, and of ransom by the general maritime law; and afterwards, he puts an instance, in which the master, while in an intermediate port, has the same authority forced upon him. The case put is that of a ship driven into port with a perishable cargo, where the master can hold no correspondence with the proprietor, and the vessel is unable to proceed or requires repairs to enable her to proceed in time. The learned Judge says, "In such emergencies, the authority of agent is necessarily devolved upon him, unless it could be supposed to be the policy of the law that the cargo should be left to perish without care. What must be done? He must, in such case, exercise his judgment whether it would be better to tranship the cargo, if he has the means, or to sell it. It is admitted in argument, that he is not absolutely bound to tranship; he may not have the means of transhipment; but even if he has, he may act for the best in deciding to sell; if he acts unwisely in that decision, still the for-

eign purchaser will be safe under his acts; if he had not the means of transhipping, he is under an obligation to sell, unless it can be said that he is under an obligation to let it perish." Now, in this case, the ship was totally lost. It appeared at the trial, that, at the time when the sale took place, there was no other vessel at the Cape of Good Hope, in which that part of the cargo which was saved could be transmitted to England. It is true, that vessels in their way to England were expected, and arrived within a few weeks. At all events, it was for the captain to exercise his judgment *bonâ fide*, whether it was better to tranship or to sell. It is admitted, that he did in this case act honestly; and according to the law as laid down by Lord STOWELL a foreign purchaser has a good title to the property. In the case of *Reid* v. *Darby*, 10 East, 143, 10 R. R. 246, the Court of K. B. were of opinion, that the captain has no right to sell a ship reported, upon survey, not to be seaworthy, if he could have repaired it, and continued the voyage. Indeed, if a captain is not at liberty, under any circumstances, to sell the cargo, it will be impossible to find purchasers for cargoes in case of wreck. How can the purchaser learn whether the captain has any special authority to sell the cargo? The true question, therefore, which should have been left to the jury, was whether, in this case, the captain had acted *bonâ fide* according to the best of his judgment, in making the sale. But, secondly, this was a sale in *market overt*; and by the law of Holland, which prevails at the Cape of Good Hope, such a sale transfers the property to a vendee: and for this he cited Van Leeuwen's Commentaries on the Roman Dutch Law, p. 400.

ABBOTT, C. J. The case of the *Gratitudine*, which has been cited, was one where there was an hypothecation of the cargo by the master, for the purpose of enabling the ship to go on with her voyage. But here the case was quite different, for the vessel having been wrecked, the object of the voyage was entirely at an end; and, under these circumstances, a sale of the cargo, or any part of it by the master, could confer no title on the purchaser, unless there was an apparent necessity for such sale. That question I left to the jury, and they were clearly of opinion that there was, in this case, no such apparent necessity. I also told them, that if the master was not authorised to sell, the purchaser could not acquire any title, unless by a sale in *market overt*, and then only where he was not acquainted with the circumstances under which

the sale was made; but, upon the evidence in this case, it appeared that he was fully acquainted with them. If I was wrong in so leaving the case to the jury, there ought to be a rule granted. But I am still of the same opinion.

Bayley, J. I think the case was properly left to the jury, and that there ought to be no rule granted. The case depends on the extent of the authority which the master has over the cargo. It is a question of considerable importance, but, as it seems to me, not of any great difficulty. The master has a clear right, by the general marine law, to hypothecate either ship or cargo, for the purpose of continuing the voyage; but beyond that, he has no power, except in a case of absolute necessity. There may be indeed, cases in which hypothecation would be useless and absurd. Suppose the ship were wrecked, and her materials alone were saved; or that the cargo was saved, being perishable, and there were no means of transhipment; in such cases, an absolute necessity for sale would exist, and thereby the master would be forced to become the agent of the owners, for the purposes of sale: but otherwise, he would only possess the right of hypothecation. The rule laid down by Holt, C. J., in *Johnson* v. *Shippen*, 2 Ld. Raym. 984, is this, that the master has no authority to sell any part of the ship, and that his sale transferred no property, but that he might hypothecate; and this is cited and relied upon by Lord Ellenborough in *Reid* v. *Darby*, 10 East, 157, 10 R. R. 256. The case of absolute necessity constitutes the only exception to this general rule. Here there was no such necessity existing, and the sale, therefore, transferred no property to the defendant. As to this being a sale in *market overt*, it can make no difference; for as the purchaser knew the circumstances under which the sale took place, he must be considered to have bought at his peril, and to be liable, in case it ultimately turned out that no necessity existed, to have the sale vacated. Here, too, the indigo was bought not for consumption at the Cape of Good Hope, but to be sent forward to the place of its original destination. As to the hardship on the defendant, it does not exist, for he is clearly entitled to recover from the master the price paid by him for the indigo. This rule must therefore be refused.

Holroyd, J. I am of the same opinion. It is clear that there was no necessity for the sale of this indigo, and that that must have been known to the purchaser. In order to justify the master

in acting as the owner's agent, in transferring the property, there must be an absolute necessity for the sale; and if a party purchase, he does so at his peril. The mere possession of goods was never held sufficient, unless accompanied by an authority to sell, express or implied; and the maxim of *caveat emptor* applies to such cases. The only circumstances under which the master has been held to have such an authority, are where there is an absolute necessity for it, as in the case of a wreck, without power of transhipment, or where it becomes necessary to sell part of the cargo, for the purpose of enabling him to prosecute the voyage.

Best, J. A carrier by sea and a carrier by land stand precisely in the same relation to the owner of the goods that are to be carried. Their duty is, to convey the goods to the place of their destination, and their authority with respect to the goods is such only as is necessary for the performance of this duty. In a sea voyage difficulties often occur, from which journeys by land are exempt. The authority of the master of a vessel must increase, in proportion to the difficulties that he has to encounter. If a storm or an accident disables the ship from proceeding on her voyage, and the master finds himself in a country where money can only be procured to pay for her repairs, by sale of part of the cargo, the necessity of his crew, as Lord Stowell has expressed it in the *Gratitudine*, forces upon him an authority to sell. So, if the ship be incapable of repair in a foreign port, and the cargo be perishable, or no place can be got to secure it in, although the voyage be at an end, it would be better for the owner of the cargo that it should be sold than left to perish, and the master might in such case sell the whole. The purchaser, knowing that necessity alone can justify the sale, and give him a title to what he purchases, will assure himself that there is a real necessity for the sale before he makes the purchase; and caution on his part will prevent (what has too frequently happened) the fraudulent sales of ships and cargoes in foreign ports. One of the principal objections to foreign commerce is, that the property of most engaged in it is not within their personal control, and often not within the protection of English courts of justice. The conduct of all who buy or sell such property in the absence of the owner, should be watched with great jealousy, and no sale allowed to be valid which is made on the ground of necessity, unless the necessity be clearly made out. In this case the jury were properly directed to inquire if a sale were

necessary, and they have found that it was not. There was no pretence for a sale; the ship was in a British province, the cargo was not perishable, and warehouses might have been had, where the property could have been secured until the owner's directions as to what was to be done with it should be received. The purchaser must have been aware of all this: he knew by the advertisement of sale, that it was property that came by the ship *Cerberus*, and he either did inquire or ought to have inquired under what circumstances she came to the Cape, and why her cargo was sold. Supposing the law of Holland to be (as is stated to be) the same as the law of England, this knowledge will prevent the purchaser from protecting himself under a sale in *market overt*. The law relative to sales in *market overt* will not render a sale valid when the buyer knows that the seller had no authority to sell. That is distinctly stated by Lord Coke, 2 Inst. 713.

Rule refused.

ENGLISH NOTES.

The rule stated in the principal case has been frequently applied in subsequent cases. A few are here referred to by way of illustration; and from these a clue to the intermediate authorities may be obtained.

The rule is applied by the judgment of the Privy Council in *Australasian Steam Navigation Co.* v. *Morse* (1872), L. R., 4 P. C. 222.

An instructive case is that of the *Atlantic Mutual Insurance Co.* v. *Huth* (C. A. 1880), 16 Ch. D. 474. On the 19th April, 1875, an Austrian ship ran aground, and the master, acting on the advice of the Austrian consul, advertised and sold the ship and cargo by auction in one lot. The purchaser got some part of the cargo out of the wreck; but on the 19th June, the vessel went to pieces with the rest of the cargo on board. The owners of the cargo abandoned it to the underwriters as a total loss. In an action by the underwriters against the purchaser to recover the cargo which had been landed, it was proved that the master had not gone to Port Elizabeth (which was situate some fifty miles by sea and eighty by land from the scene of the wreck), nor endeavoured to procure funds to enable him to save the cargo, nor had he made any attempt to procure persons to undertake the salvage of the cargo. Several witnesses from Port Elizabeth deposed that in their opinion no person could have been induced to undertake the salvage; but there was contradictory evidence, one witness deposing that his firm would have undertaken the work upon receiving a high percentage, *i. e.* half the cargo salved. There was evidence that, in the opinion of persons on the spot, the best course under the circum-

stances had been adopted. But the Court of Appeal, affirming the decision of the MASTER OF THE ROLLS (SIR G. JESSEL), held the underwriters entitled to succeed. In delivering the judgment of the court, COTTON, L. J., said (at p. 481), "The principle is, that the master is authorised by the owners only to convey the goods to the port of discharge, and that nothing but necessity can authorise him to adopt any other course of action. We do not enter into the question whether what will justify a sale is to be called extreme or stringent, or the strongest necessity, or commercial necessity. In our opinion, purchasers of cargo from a master cannot justify the sale unless it is established that the master used all reasonable efforts to have the goods conveyed to their destination, and that he could not by any means available to him carry the goods, or procure the goods to be carried, to their destination as merchantable articles, or could not do so without an expenditure clearly exceeding their value after their arrival at their destination. Here . . . a large and valuable part of the cargo was tin, which, if saved from the wreck, would have been practically uninjured, and certainly capable of being sent on in a merchantable state." Then again (at p. 483), "It is, in our opinion, under these circumstances, impossible to hold that it is established that the captain could not have induced some person to undertake the salvage of the cargo. Certainly the master did not use all the means in his power, or make any effort either to procure funds for enabling him to save the cargo, or to induce others to save the cargo. For both these reasons, we are of opinion that it is not shown that there was such a necessity for the sale as would authorise the master to sell or make him the agent of the owners for that purpose."

The authority of the master to bind the ship-owner by a sale of the ship is based upon similar principles of necessity. *Cobequid Marine Insurance Co.* v. *Barteaux* (1875), L. R., 6 P. C. 319. In the case of the goods, the necessity creates the relation of principal and agent; in that of the ship, it confers upon the agent a new species of authority. But there seems no distinction in principle as to the nature of the necessity in either case.

Where communication with the owner of the ship or cargo is practicable, his instructions should be obtained, *Acatos* v. *Burns* (C. A. 1878), 3 Ex. D. 282, 47 L. J. Exch. 566; and a similar rule applies to hypothecation. *Kleinwort, Cohen & Co.* v. *Cassa Marittima of Genoa* (P. C. 1877), 2 App. Cas. 156. But, where after communication the master did not receive any reply within the time an answer might have been received, he was held justified in acting upon the assumption that the owner assented. *Droege* v. *Stuart* (1869), L. R., 2 P. C. 505, 38 L. J. Adm. 57.

In case of hypothecation, it is for the party relying upon the implied authority to establish the amount of the liability, as well as the circumstances showing the validity of the bond: *The Pontida* (C. A. 1884), 9 P. D. 177, 53 L. J. P. D. & A. 78.

AMERICAN NOTES.

This doctrine is familiar and well settled in American adjudications. The rule is, "supreme necessity, which sweeps all ordinary rules before it." *Pike* v. *Balch*, 38 Maine, 302; 61 Am. Dec. 248; *Butler* v. *Murray*, 30 New York, 88; 86 Am. Dec. 355; as where the cargo cannot be carried to port, or would be worthless on arrival, *Myers* v. *Baymore*, 10 Penn. St. 114; 49 Am. Dec. 586; such a necessity "as supersedes all human laws," *Gaither* v. *Myrick*, 9 Maryland, 118; 66 Am. Dec. 316; and warrants abandonment. *Orrok* v. *Com. &c. Co.*, 21 Pickering (Mass.), 456; 32 Am. Dec. 271; *The Amelie*, 6 Wallace (U. S.), 18.

The master must be diligent to discover available means of saving the cargo. *Caldwell* v. *Western, &c. Co.*, 19 Louisiana, 42; 36 Am. Dec. 667. He must communicate with the owners by other means than mail if possible. *Pike* v. *Balch*, *supra*.

Mere good faith will not justify him if there was no extreme necessity. *Myers* v. *Baymore*, 10 Penn. St. 114; 49 Am. Dec. 586.

No. 26. — ARTHUR *v.* BARTON.

(EX. 1840.)

RULE.

THE authority of the Master of a Ship to pledge the owner's credit for supplies extends only to necessaries, in the sense of things reasonably fit and proper for the ship or for the voyage under the circumstances, and does not usually extend to a case in which the owner can personally interfere, or where he has already appointed an agent who can do the thing required.

Arthur v. Barton.

9 L. J. Ex. 187 (s. c. 6 M. & W. 138).

Debt for money lent, and on an account stated.

Plea — *Nunquam indebitatus.*

At the trial, before PATTESON, J., at the last Merionethshire Assizes, the following facts were proved. The defendant resided

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at Portmadoc, in Merionethshire, and was owner of a coasting vessel, called the *Progress*, which was employed to convey slates to various parts of the coast, and to bring back other commodities in return. In January, 1837, the vessel, after having taken out a cargo of slates, was stranded on her return homeward, at Bude, in Cornwall, where an agent of the defendant advanced to the master £15, which was expended for the necessary use of the vessel. On her return home, the vessel put into Swansea harbour, where the plaintiffs, who were merchants at Swansea and Neath, and who had contracted to put on board the vessel a cargo of culm, for a Mr. Williams, at Portmadoc, advanced to the master the sum of £5. Of this sum £4 17*s.* 6*d.* was expended in loading the vessel, and clearing out the ballast, in procuring a pilot, purchasing a new chart, repairing the compass, and obtaining provisions. The balance of 2*s.* 6*d.* was paid to the defendant on the master's arrival at Portmadoc. The defendant had no agent at Neath or Swansea, and an answer to a letter sent from thence to Portmadoc could be obtained in about four days. On the day after the advance of the £5 the master sailed for Portmadoc.

It was contended, for the defendant, that the plaintiffs ought to be nonsuited, on the ground that the master of a coasting vessel was not authorised to borrow money in an English port, and pledge the credit of the owner, who resided in this country. The learned Judge reserved this point; and on its being also objected, that the money was borrowed on the credit of Williams, the consignee of the cargo, he directed the jury to say, first, whether the money was furnished for the necessary use of the ship; secondly, whether it was advanced on the credit of Mr. Williams. The jury found a verdict for the plaintiffs. Damages, £4 17*s.* 6*d.* The defendant had leave to move to enter a nonsuit, if the Court should be of opinion that the action could not be sustained.

Jervis having accordingly obtained a rule in Michaelmas term, —

Cresswell, Welsby, and Townsend now showed cause. — The master of a vessel may make all contracts that are necessary to carry the object of the owners into effect. He may pledge the owner's credit for repairs, and for necessary supplies of provisions and money, provided the ship be in a foreign port, and the owner or his agent be not present; for, in that case, his authority is superseded. But there is no reason for confining the authority of the master to the case of a foreign port; and no such limitation is

to be found in the rule, as it is laid down in Abbott on Merchant Ships and Seamen, 6th Edit. by Serj. Shee, 116: "In order, however, to constitute a demand against the owners, it is necessary that the supplies furnished by the master's order should be reasonably fit and proper for the occasion, or that money advanced to him for the purchase of them should at the time appear to be wanting for that purpose. The contrary, in either case, would furnish a strong presumption of fraud and collusion on the part of the creditor. The proper mode of ascertaining what is necessary is to ask what a prudent owner would himself have done had he been present." *Webster* v. *Seekamp*, 4 B. & Ald. 352. It also appears, from *Robinson* v. *Lyall*, 7 Price, 592, that the credit of an English owner may be pledged for money borrowed in this country to pay seamen's wages in England. Those decisions proceed on the ground, that repairs and money are necessaries. If that be so, then money may also be a necessary, when borrowed, as in this case, for the payment of a pilot, and for the purchasing of provisions for the crew. The only difference between the borrowing of money abroad and in this country is, that the *necessity* in the latter may be more difficult of proof; but when it *is* established, the same rule, as to the owner's liability, applies. It is always a question for the jury, whether any necessity for borrowing the money existed. Here they have found that it was necessary to borrow the money for the use of the ship, and therefore the owner is liable. They cited *Rocher* v. *Busher*, 1 Stark. N. P. C. 27; *Farmer* v. *Davis*, 1 T. R. 108, 1 R. R. 159; *Rich* v. *Coe*, Cowp. 636; *Garham* v. *Bennett*, 2 Stra. 816; *Palmer* v. *Gooch*, 2 Stark. N. P. C. 428; *Stewart* v. *Hall*, 2 Dow, 29.

Jervis and Cowling, *contrà*. — The cases of *Robinson* v. *Lyall* and *Rocher* v. *Busher* do not apply. In the first of those cases the seamen had a lien upon the ship for their wages; they had a right of legal hypothecation. And that being so, the borrowing of money by the master was merely a borrowing of money on more favourable terms. The right to hypothecate the ship is correlative with the right to borrow money for the use of it. No necessity for the loan of the money has been proved.

[Alderson, B. The Judge told the jury to find for the plaintiffs, if they were of opinion that there was any necessity for borrowing the money, and the jury found a verdict for the plaintiffs accordingly.] *Cur. adv. vult.*

No. 26. — Arthur v. Barton.

On the 30th of January, —

Alderson, B.,[1] delivered the judgment of the court. — In this case, we are of opinion that the rule must be discharged. The point reserved by the learned Judge was, whether the master of a coasting vessel could, by a contract made in England, bind his owner, who also resided in this kingdom, the contract being for a loan of money for the necessary use of the ship. Here, the owner resided in North Wales, and the contract was made in the county of Glamorgan. We think this was a question of fact, and was properly left to the jury by the learned Judge. Under the general authority, which the master of a ship has, he may make contracts and do all things necessary for the due and proper prosecution of the voyage in which the ship is engaged. But this authority does not usually extend to cases where the owner can himself personally interfere, as in the home port, or in a port in which he has beforehand appointed an agent, who can personally interfere to do the thing required. Therefore, if the owner, or his general agent, be at the port, or so near to it as to be reasonably expected to interfere personally, the master cannot, unless specially authorised, or unless there be some usual custom of trade warranting it, pledge the owner's credit at all, but must leave it to him or to his agent to do what is necessary. But if the vessel be in a foreign port, where the owner has no agent, or if in an English port, but at a distance from the owner's residence, and provisions or other things require to be provided promptly, then the occasion authorises the master to pledge the credit of the owner; and then the further question arises, for what things he may pledge that credit. This also is limited either to such things as are necessary, or (as Lord Tenterden in his book on Shipping, p. 116, and Mr. Justice Story, in his valuable work on Agency, § 122, very clearly lay it down) to such things as are reasonably fit and proper for the ship or for the voyage, under the circumstances of the case. If repairs are needed, it is admitted he may pledge the owner's credit for them. But repairs are only instances of the above rule. If, therefore, money be necessary, it may be raised upon credit. In the case cited of *Robinson* v. *Lyall*, this was done. There, without money, the wages of the seamen could not be paid, and unless they were paid, the seamen might have refused to assist in the further navigation

[1] In the report in Meeson & Welsby the judgment is stated to have been delivered by Lord Abinger, C. B.

of the ship. The Court therefore held, that the master could pledge the owner's credit for money to that extent. So also it may, in some cases, be necessary to pay harbour dues or pilotage, or the like, and to pay them in ready money, and if that be the case, and the prosecution of the voyage cannot take place till they are discharged, then also a necessity for having money in specie may arise; and if so, the master would be authorised, under the general power of doing all things necessary for the due prosecution of the voyage, to procure money by loan, and to bind the owner by a contract for that purpose. It is not doubted, that in a foreign port, where the owner has no agent, this may be done, *Evans* v. *Williams*, 7 T. R. 481 *n.*; and we think that all these questions are referable to one principle, although, when it is applied to a case like the present, it will require stronger circumstances to establish the fact of the necessity, upon which the liability of the owner must depend. In the present case, the learned Judge left the question to the jury, and they have found for the plaintiffs. There was clearly evidence on which they might reasonably act, and as the verdict is under £20, we should not, even if we doubted as to the propriety of their conclusion, interfere to grant a new trial. The rule therefore must be discharged.

Rule discharged.

ENGLISH NOTES.

This implied authority is displaced where there is an agent authorised and ready to supply the ship's requirements: *Gunn* v. *Roberts* (1874), L. R., 9 C. P. 331, 43 L. J. C. P. 233.

The burden of proof is upon those who have supplied goods to show the necessity: *Mackintosh* v. *Mitcheson* (1849), 4 Ex. 175, 18 L. J. Exch. 385.

AMERICAN NOTES.

This doctrine finds direct support in *Calef* v. *Steamer Bonaparte*, 1 Robinson (Louisiana), 463; 38 Am. Dec. 190; *Duff* v. *Bayard*, 4 Watts & Sergeant (Penn.), 240; 39 Am. Dec. 73; *McLellan* v. *Cox*, 36 Maine, 95; 58 Am. Dec. 736.

The power does not exist where there is no agency, express or implied. *McLellan* v. *Cox*, *supra*. Or where a third person has a special ownership or authority. *Gracie* v. *Palmer*, 8 Wheaton (U. S.), 605.

The master cannot bind the owners if they are within easy communication. *Woodruff, &c. Works* v. *Stetson*, 31 Connecticut, 51. Or the vessel is at the home port. *Thomas* v. *Osborn*, 19 Howard (U. S.), 22; *Merwin* v. *Shailer*, 16 Connecticut, 489; *Patterson* v. *Chalmers*, 7 B. Monroe (Kentucky), 595; *Prorost* v. *Patchin*, 9 New York, 235.

AGISTMENT.

No. 1. — CHAPMAN *v.* ALLEN.

(K. B. 1631.)

No. 2. — JACKSON *v.* CUMMINS.

(EX. 1839.)

RULE.

THE agister is not, as such, entitled to detain the beasts agisted until payment for their keep.

Chapman v. Allen.

Cro. Car. 271.

Action of trover of five kine. Upon not guilty pleaded, a special verdict was found, that one Belgrave was possessed of those five kine, and put them to pasturage with the defendant, and agreed to pay him twelve pence for every cow weekly as long as they remained with him at pasture; and that afterwards Belgrave sold them to the plaintiff, and he required them of the defendant, who refused to deliver them to the plaintiff, unless he would pay for the pasturage of them for the time that they had been with him, which amounted to ten pounds; afterwards one Foster paying him the said ten pounds by the appointment of Belgrave, he delivered the five beasts to Foster; and if *super totam materiam* he be guilty, they find for the plaintiff, and damages twenty-five pounds; and if &c., then for the defendant.

JONES, Justice, and MYSELF (*sc.* CROKE, C. J.), *Absentibus cæteris Justiciariorum*, conceived that this denial upon demand and delivery of them to Foster was a conversion, and that he may not detain the cattle against him who bought them until the ten pounds be paid, but is enforced to have his action against him who put them to pasturage. And it is not like to the cases of

an innkeeper or tailor; they may retain the horse or garment delivered them until they be satisfied, but not when one receives horses or kine or other cattle to pasturage, paying for them a weekly sum, unless there be such an agreement betwixt them. Whereupon rule was given that judgment should be entered for the plaintiff.

Jackson v. Cummins.

8 L. J. Ex. 265 (s. c. 5 M. & W. 342).

Trespass *quare clausum fregit*, and taking away certain cows.

Pleas, — First, not guilty; second, that the cows had been agisted by the defendant, and that he had a lien upon them for fees by law and by agreement with the plaintiff, and that the plaintiff wrongfully took them away from the defendant's close, and placed them in the *locus in quo*, without paying the sum due for agistment, whereupon the defendant peaceably entered and re-took them.

At the trial, before PARKE, B., the jury negatived the alleged agreement for a lien, and the plaintiff had a verdict, subject to a motion to enter a nonsuit, if a lien for agistment was given by law, and could be insisted upon under the plea. Against a rule granted for this purpose, —

Cresswell showed cause, and argued that such a lien could not be set up, either under the first plea or under the second, which, in effect, was a plea of lien by agreement only, and that agreement had been disproved; but if it could under the second plea, as being also a plea of lien by operation of law, then such a lien did not exist. That no lien exists in the case of agistment was laid down in *Chapman* v. *Allen*, No. 1, *ante*, p. 547, in words sufficiently large to embrace every kind of agistment; and this agrees with the general principle as applied in *Scarfe* v. *Morgan*, 4 M. & W. 270; 7 L. J. (N. S.) Ex. 324. Here there is no application of skill or labour by the bailee; nothing more is done than giving the animal the means of feeding. Consistently with these decisions is the case of *Judson* v. *Etheridge*, 1 Cr. & Mee. 743; 2 L. J. (N. S.) Ex. 300, which lays it down that a livery-stable keeper has no lien.

Alexander, *contrà*. First, the plea leaves it open to the defendant, to set up a lien at law; for though it may be bad for duplicity, that objection is now too late. A lien by law can be supported on the principle that the value of the chattel has been

increased by the food with which it has been provided by the defendant. *Judson* v. *Etheridge* is a solitary case of exception to the general rule, and it stands on a different ground, because, from the very nature of the contract between the parties, it must be assumed that the owner reserved to himself the right of retaking possession at any time. From *Chase* v. *Westmore*, 5 Man. & Selw. 180, to *Bevan* v. *Waters*, Moo. & Malk. 235, and *Scarfe* v. *Morgan*, the principle has always been recognised that where a bailee administers to the chattel that which improves its value, he is entitled to a lien upon it.

Parke, B. I think this rule must be discharged.[1] The general rule of law is, that without any express agreement between the parties, wherever one of them has expended skill and labour in the improvement of a chattel, he is entitled by law to a lien upon it. This was so laid down in *Bevan* v. *Waters*, and recognised in *Scarfe* v. *Morgan*. But if we consider the matter, we shall see that the case of agistment does not fall within this principle; because the bailee in such a case does not communicate value to the chattel, either by himself or by any instrument. Then, there is an express authority in the case from Cro. Car. (*Chapman* v. *Allen*), that an agister has no lien, for though the decision there may have been on the ground that there had been an agreement between the parties, yet it may also have been on the ground that the party had no lien; and it was so considered afterwards in *Judson* v. *Etheridge*. From the nature of the agistment also, that of milch cows, it must be necessary that the owner should have the power to take and have possession of them, for the purpose of milking them; and there is nothing to show that he might not take them away from the field in which they were grazing, in order to have them milked. The reason why no lien should here exist, is analogous, therefore, to that which prevailed in *Judson* v. *Etheridge*. As to the case of the training groom, see *Jacobs* v. *Latour*, 5 Bing. 130; 6 L. J. C. P. 243, the point can hardly be said to have been decided; for although there is a reported case at *nisi prius*, where Best, C. J., ruled in favour of

[1] His Lordship intimated his opinion, that the defendant was at liberty to set up a lien by force of law, under the plea; but as the Court gave no judgment on this point, the observations respecting it are omitted. He further remarked that since the recent decisions in actions of trover, the defendant would have been more prudent had he pleaded that the plaintiff was not possessed of the cows. See *Owen* v. *Knight*, 4 Bing. N. C. 54; 7 L. J. (N. S.) C. P. 27.

the lien, yet it does not appear to have been present to his mind that the owner of the horse must have a right to take away his horse for the purpose of running as a race-horse, which circumstance does not exist in the case of a horse left with a breaker, or delivered to him for a particular race, where a different rule might hold. On these grounds, I think there is no lien.

Gurney, B., Alderson, B., and Maule, B., concurred.

Rule discharged.

ENGLISH NOTES.

An interesting note on the career of the agister's lien in England is furnished by Mr. J. B. Ames in the Harvard Law Review, vol. 2, p. 62. He says, "That such a lien existed before the days of implied contracts is intrinsically probable, and is also indicated by several of the books, — 2 Roll. Ab. 85, pl. 4 (1604); *Mackensey* v. *Erwin* (1608), Hutt, 101; *Chapman* v. *Allen*, No. 1, *ante*, p. 547. But in *Chapman* v. *Allen*, the first reported decision involving the agister's right of detainer, there happened to be an express contract, and the lien was accordingly disallowed. When a similar case arose two centuries later, in *Jackson* v. *Cummins*, No. 2, *ante*, p. 548, this precedent was deemed controlling; and as the old distinction between express and implied contracts was no longer recognised, the agister ceased to have a lien in any case. Thus was established the modern and artificial distinction in the law of lien between bailees for agistment and 'bailees who spend their labour and skill in the improvement of the chattels' delivered to them."

By the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61 § 45), a limitation is imposed on the right of a landlord to distrain live-stock agisted by the tenant on his farm. If the stock are taken by the tenant to be fed "at a fair price," agreed between the tenant and the owner of the stock, the landlord can only distrain for the part of the price remaining unpaid. It has been decided by a divisional court of the Queen's Bench Division under this section that "fair price" extends to any equivalent in a *bonâ fide* agreement; and so, where cows were taken in by the tenant to be fed on the terms that he should have their milk during the period, the Court affirmed a decision of the County Court Judge in effect disallowing the landlord's claim to distrain. *London and Yorkshire Banking Co.* v. *Belton* (1885), 15 Q. B. D. 457; 54 L. J. Q. B. D. 568.

AMERICAN NOTES.

An agister has no lien at common law. *Bissell* v. *Pearce*, 28 New York, 252; *Grinnell* v. *Cook*, 3 Hill (New York), 485; 38 Am. Dec. 663; *Lewis* v.

Tyler, 23 California, 364; *Miller* v. *Marston*, 35 Maine, 155; 56 Am. Dec. 694; *Hickman* v. *Thomas*, 16 Alabama, 669; *Wills* v. *Barrister*, 36 Vermont, 222; *Goodrich* v. *Willard*, 7 Gray (Mass.), 183; *Munson* v. *Porter*, 63 Iowa, 453; *Kelsey* v. *Layne*, 28 Kansas, 218; *Manney* v. *Ingram*, 78 North Carolina, 96; *Jackson* v. *Holland*, 31 Georgia, 339; *Saint* v. *Smith*, 1 Coldwell (Tennessee), 51; *Millikin* v. *Jones*, 77 Illinois, 372; 1 Jones on Liens, § 611; Overton on Liens, § 16

No. 3. — SMITH *v.* COOK.

(Q. B. D. 1875.)

RULE.

THE agister is bound to take reasonable care of the animals committed to him.

The defendant, having received the plaintiff's horse to be agisted, placed the horse in a field with a number of heifers, where it was gored by a bull and killed. It was proved that the bull was, to the defendant's knowledge, in the habit of visiting the heifers, and that there was no sufficient fence to keep him out. The question having been left to the jury whether the defendant had acted without reasonable and proper care, and the jury having found for the plaintiff, the Court refused to disturb the verdict.

Smith v. Cook.

45 L. J. Q. B. 122 (s. c. 1 Q. B. D. 79).

Declaration on a contract to agist, keep, and take care of a horse, alleging for breach that through the negligence of the defendant the horse was killed.

Pleas, traversing the contract and breach.

Issues thereon.

The cause was tried before BLACKBURN, J., at Guildhall, at the sittings after Hilary Term, 1875, when the following facts were proved or admitted.

The plaintiff and defendant are both farmers, the former occupying a farm near Dartford in Kent, and the latter occupying a grass farm of some 600 acres on the Plumstead Marshes. The plaintiff had been in the habit of from time to time sending horses

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and cattle to be agisted for him by the defendant. Accordingly, on the 1st of June, 1874, he sent to the defendant a grey horse, a colt, and a filly. These animals were placed by the defendant on a marsh, called the Thirteen-acre Marsh, along with some heifers of his own, which heifers were bulling. In an adjoining marsh in the occupation of one Russell was a bull. The marshes were divided by a ditch which was under the control of commissioners, and which was about eight feet wide and three or four feet deep. The bull was in the habit of crossing this ditch and coming into the marsh for the purpose of visiting the heifers, and it was admitted that the defendant knew this. On the morning of the 9th of July, the colt was found lying dead in the field, the cause of death being clearly a long wound in the belly. How the wound was caused there was no direct evidence to show, but the veterinary surgeon deposed that in his opinion the colt was gored to death by a horned animal. And no sufficient mode of accounting for his death was shown except the theory that he had been killed by the bull. Several witnesses were called for the plaintiff, who said that it was an obviously dangerous thing to put a colt with bulling heifers in a field to which a bull could get access. On the other hand, the defendant's witnesses said that it was quite usual in the marshes to turn out a bull with horses and cattle, and that there was no danger in it. It was admitted that this particular bull was, so far as was known, a perfectly gentle and harmless animal.

At the close of the plaintiff's case, J. J. Powell applied for a nonsuit, which the learned Judge refused to grant. After the case was concluded on both sides, it was left to the jury to say whether, taking all the circumstances into consideration, the defendant had or had not used reasonable and proper care in taking charge of the colt. It was admitted by the plaintiff's counsel that if evidence of *scienter* was necessary, no such evidence had been given.

The jury found a verdict for the plaintiff for £50, and a verdict was entered for him accordingly, subject to leave to move to enter a nonsuit.

A rule was afterwards obtained by J. J. Powell to enter a nonsuit or for a new trial on the ground, first, that proof of *scienter* was necessary; and secondly, that the verdict was against the weight of evidence.

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Bray (Murphy with him) showed cause. It is conceded that there was no evidence of the *scienter*, but this was not necessary. In a case of contract it is only necessary to show that reasonable care was not taken. This was left to the jury, and they have found for the plaintiff. It is admitted that the cases show that in a question of tort a man is entitled to assume a horse or bull is quiet till the contrary is shown.

[Blackburn, J. You admit that if the action had been against the owner of the bull for not keeping him in, proof of the *scienter* would have been necessary. Is it different here?]

Yes; because here there is a contract to use care. The action for tort is an action for the breach of a duty cast on a man without his consent. It may well be that there are good reasons for not making these involuntary duties too onerous. It is necessary for society that animals like these should be kept, and it would be inconvenient, if not impossible, always to keep them shut up, and experience shows that on the whole they are not likely to do mischief if they are allowed to be loose. The involuntary duty of keeping them shut up, therefore, is limited to cases where a man knows that his animal is savage. When a thing is a necessity, more latitude is always given. For instance, the storing of water is not a necessity in England, and therefore the man who stores does so at his peril. In India it is a necessity, and there a man is only liable when it escapes through his negligence. *The Madras Railway Company* v. *Zemindar of Carvatenagarum*, L. R., 1 Ind. App. 364. The defendant here was not obliged to take in this colt. He voluntarily undertook the risk and fixed his remuneration in proportion. There is no inflexible rule of law that an animal *domitæ naturæ* will not do harm. On the contrary, where such animals are trespassing and do injury, it has often been held that the injury is not too remote. See *Lee* v. *Riley*, 18 Com. B. (N. S.) 722; 34 L. J. C. P. 212: *May* v. *Burdett*, 9 Q. B. 101; 16 L. J. Q. B. 64; *Ellis* v. *The Loftus Iron Company*, L. R., 10 C. P. 10; 44 L. J. C. P. 24. There are no English decisions exactly in point. The American authorities are in the plaintiff's favour. *Dolph* v. *Ferris*, 7 Watt & S. (Pennsylvania) Rep. 367; *Barnes* v. *Chapin*, 4 Allen Rep. 444. In the former case, Kennedy, C. J., says: "I am not satisfied that every owner of a bull is not bound to keep him confined, so that he shall not run at large, or trespass upon the lands of others. The propensity of this animal to rove

and to break into the enclosures of others, especially where cows may be feeding, is notorious; and that when thus suffered to rove about, it is also notorious that it happens only too frequently that he will attack horses with his horns if they come in his way, and so sure as he does, they seldom escape death or very serious injury. Injuries committed by bulls on horses occur so frequently that it is difficult to avoid coming to a conclusion that every owner of a bull ought to be held answerable in an action of trespass for his bull, in killing or injuring when running at large, either by his negligence or permission, the horse of another, though it be the first offence of the kind that the animal has ever been known to commit."

[Blackburn, J. That is certainly very much in your favour on the question of whether the verdict was against the weight of evidence.]

J. J. Powell and G. Shaw, in support of the rule, proceeded to cite *Buxendin* v. *Sharp*, 2 Salk. 662, and *Cox* v. *Burbidge*, 13 Com. B. (N. S.) 830; 32 L. J. C. P. 89; but the Court intimated that the point decided by those cases might be taken for granted. The *scienter* must be proved. There is no negligence unless the defendant knew that what he did was dangerous. This animal was not only not known to be savage, but was known to be quiet. In an ordinary contract of agistment, the case may be framed either in tort or in contract. *Corbett* v. *Packington*, 6 B. & C. 268. In the cases of *Lee* v. *Riley*, *supra*, and *Ellis* v. *The Loftus Iron Company*, *supra*, the only question was the measure of damages. *May* v. *Burdett*, *supra*, was a case of a monkey, which is always ferocious.

[Blackburn, J., referred to *Jackson* v. *Smithson*, 15 M. & W. 563; 15 L. J. Exch. 311.]

The plaintiff might have sued the owner of the bull.

[Blackburn, J. So may the defendant.' The plaintiff's cause of action against the owner would have been more doubtful. I should probably have directed a nonsuit.]

They also argued that the verdict was against the weight of evidence.

Blackburn, J. I am of opinion that we must discharge the rule on both grounds. This is an action against an agister charging that he received a certain horse to agist on the terms that he should keep it with due and proper care; that he neglected so to keep it,

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and that in consequence of his want of care the horse was killed. The facts were these. He took the horse and turned it out into a thirteen-acre field in which were some bulling heifers. These heifers had a bull for their neighbour, and that neighbour was, as the defendant knew, in the habit of crossing the ditch that separated him from the heifers and visiting them. Ultimately the horse was killed. As to this, that the bull did gore the horse, there is ample evidence. How he did it does not exactly appear, but the fact is certain.

The first question is, was it negligence in the defendant to put the horse in a field with bulling heifers, a bull being near? As to this, there was evidence both ways. A great many witnesses said it was dangerous, and that whether mischief ensued or not, it was negligent. Others, coming from the marshes, said it was the most innocent thing in the world. And one man said he had put twenty or thirty bulls in one field with horses and bulling heifers. I thought this proved too much, and that the witness injured the defendant's case. The jury found there was negligence, and I see no reason to quarrel with their decision.

The point of law, as to whether proof of the *scienter* was necessary, was reserved. From early times by a rule of law, founded, I think, more on authority than on reason, it has been held that in the case of domestic animals, such as horses, cattle, dogs, &c., which are not mischievous by nature, you are entitled to suppose that they are harmless until you have express evidence to the contrary. If a man has a ferocious animal, he must keep him in at his peril; but in the case of animals *domitæ naturæ*, he need not keep him in unless there are express reasons for believing him to be dangerous. This doctrine is laid down in the Year-books and in 1 Dyer, 256, pl. 162, who refers to the Book of Exodus, ch. xxi. v. 29 and 36. This rule was in all probability founded on a state of things before enclosures existed, when there was no choice except either to shut an animal up altogether, or to turn him out among other animals. At any rate, whatever the origin of the rule was, no doubt the rule exists. It is clear, therefore, that the mere fact that a quiet bull will sometimes toss, is not enough of itself to compel a man to keep him in at his peril. But the point contended for here is different. The question is, whether, as a matter of law, the fact of turning a bull out with other animals cannot be sufficient evidence of negligence, because a man

is entitled as a matter of law to presume that a bull is a quiet animal, and therefore cannot be negligent in turning out other animals in his company. This seems to me to be a *non sequitur*. I view the settled law as to a man's non-responsibility for mischief done by tame animals without proof of the *scienter*, as depending more on authority than on principle, and I do not feel disposed to extend it to cases where there is an express contract to take reasonable care. It is rather an artificial rule, and ought to be kept within its present limits. Several cases were cited, but none are very closely in point. *Lee* v. *Riley, supra*, is the nearest to the plaintiff's view. But in that case the animal escaped through a defect in a fence which the defendant was bound to keep up, and there was, therefore, clearly negligence on his part in not keeping up the fence. The animal which escaped — a horse — injured another horse, and the decision was that the damage was not too remote. Though this decision is not exactly in point, yet it seems to go far towards saying that the natural result of two horses coming together accidentally is that one should injure the other. It seems to me to be an *a fortiori* case, where a man turns out a horse in a field with a bull, which is pretty much what the defendant did in this case.

The rule must be discharged on both points.

Quain, J. I am of the same opinion The action is founded on a bailment, alleging negligence in the bailee. The question of negligence is the same whether the action be founded on tort or on contract, and the only question is, whether or not the defendant took proper care. The defendant's contention is that there could be no negligence unless he knew that the bull was vicious. I can find no authority for such a proposition. It is a mere question of fact. Lord Denman, in *May* v. *Burdett, supra*, says, " The conclusion to be drawn from an examination of all the authorities appears to us to be this, — that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure *at his peril*, and that if it does mischief, negligence is presumed without express averment." This case was followed by *Jackson* v. *Smithson, supra*. But there is no authority for importing this into cases of contract. If the defendant does know the animal to be ferocious, that is very strong evidence of his negligence in not keeping him safe; but if he does not know it, his

negligence may nevertheless be proved by other means. The rule must be discharged on both points.

Field, J. I am of the same opinion. I think it was to some extent my doing that the rule was granted on the ground of the verdict being against the weight of evidence. I am quite satisfied now that it was not.

As to the other point, the question is whether the single circumstance that the defendant did not know that the bull would gore the horse, is enough to entitle him to the verdict. If this had fallen within the authorities as to *scienter*, we should of course have been bound by them. But it does not. This is an action on a bailment, by which the defendant received the horse on the terms that he should take due and proper care. The facts are that the defendant, after receiving the horse on these terms, turned him out in a field and left him there night and day. He knew that heifers were in the field, and that there was a bull near who was actually in the habit of coming over. All this he admits; but he says, "I am not guilty of negligence because I did not know that the bull would gore." But it is well known that bulls under certain circumstances have a habit of attacking, and the defendant ought not to have exposed the horse to the risk. I think that the plaintiff has fully established the want of reasonable care, and that the rule must be discharged on this point also.

Rule discharged.

ENGLISH NOTES.

The cases of negligence relating specially to the contract of agistment are not many. In this connection may be cited what is said by Byles, J., in *Marfell* v. *South Wales Ry. Co.* (1860), 8 C. B. (N. S.), 525; 29 L. J. C. P. 315, a case where a railway company were sued by a licensee for reward using a tramway belonging to the Company for damages caused by the Company leaving open a gate which ought to have been kept shut. Byles, J., says: "Suppose the defendant for reward to take cattle in to agist in their meadow, the question arises, are the defendants under any obligation to exercise any degree of care in the use of that gate? It is clear on the authorities that they are in the supposed case bound to exercise care in the use of the gate, and are responsible if they leave the gate open. Jones on Bailments, 92; Story on Bailments, 289." The same principle is involved in the case at *nisi prius* of *Broadwater* v. *Blot* (1817), Holt, N. P. 547, where an action was brought against the agister for negligence in keeping a horse which

strayed out of the field, and was lost. Gibbs, C. J., left the case to the jury, with the question: "Were the defendant's fences in an improper state at the time the horse was taken in to agist?" with the further question (perhaps merely suggested as an inference),—"Did he apply such a degree of care and diligence in the custody of the horse as the plaintiff, who intrusted the horse to him, had a right to expect?" There was a verdict for the plaintiff for the value of the horse.

AMERICAN NOTES.

An agister is liable for negligence in the care of animals. *Halty* v. *Markel*, 44 Illinois, 225; 92 Am. Dec 182; *Rey* v *Toney*, 24 Missouri, 600; 69 Am. Dec. 444; as where sheep escape through an insufficient fence into an adjoining field and there become infected with disease from other sheep. *Sargent* v. *Slack*, 47 Vermont, 674; 19 Am. Rep. 136. Or where cattle break through an insufficient fence and are lost. *Cecil* v. *Preuch*, 4 Martin N. S. (Louisiana), 256; 16 Am. Dec. 171. Or where he puts horses with others which are infected with a contagious distemper, and they are thereby diseased. *Costello* v. *Ten Eyck*, 86 Michigan, 348; 24 Am. St. Rep. 128. He must keep his grounds properly enclosed. *Cecil* v. *Preuch*, 4 Martin N. S. (Louisiana), 256; 16 Am. Dec. 171.

AIR.

No. 1. — ALDRED'S CASE.

(K. B. 1610.)

No. 2. — BASS *v.* GREGORY.

(Q. B. 1890.)

RULE.

It is an actionable nuisance to cause pollution of the air entering a dwelling-house; and it has been held that an action on the case lay for erecting a hog-sty so near the house of the plaintiff that the air thereof was corrupted.

The owner of a dwelling-house may by prescription acquire a right to the passage of air through it by a defined channel; and the enjoyment for forty years without inter-

ruption of ventilation by means of air flowing in a definite channel, with the knowledge of the owner and occupier of the adjoining premises, creates a presumption of the grant of such an easement.

Aldred's Case.

9 Co. Rep. 57 *b*.

William Aldred brought an action on the case against Thomas Benton, which began, "Trin. 7 Jacobi, rot. 2802, in Banco," that whereas the plaintiff, 29 Septemb', *anno* 6 Jac., was seised of a house, and a parcel of land in length 31 feet, and in breadth 2 feet and a half, next to the hall and parlour of the plaintiff, of his house aforesaid in Harleston in the county of Norfolk in fee; and whereas the defendant was possessed of a small orchard on the east part of the said parcel of land, "præd' Thomas malitiose machinans et intendens ipsum Willielmum de easimento et proficuo messuag' et parcell' terræ suorum præd' impedire et deprivare" the said 29th day of September, "anno 6 Jacobi quoddam magnum lignile in dicto horto ipsius Thomæ construxit et erexit, ac illud adeo exaltavit, &c. quod per ligne illud, &c. tam omnia fenestr' et luminaria ipsius Willielmi aulæ et camerarum suarum, quam ostium ipsius Willielmi aulæ suæ prædict' penitus obstupat fuer', &c. et præd' Thomas ulterius machinans et malitiose intendens ipsum Willielmum multipliciter prægravare, et ipsum de toto commodo, easimento et proficuo totius messuagii sui præd' penitus deprivare, præd' 29 die Sept' an' 6 suprad' quodd' ædificium pro suibus et porcis suis in horto suo præd' tam prope aulam et conclave ipsius Willielmi prædict' erexit, ac sues et porcos suos in ædificio in horto illo posuit, et ill' ibidem per magnum tempus custodivit, ita quod per fœtidos et insalubres odores sordidorum prædict' suum et porcorum præd' Thomæ in aulam et conclave præd' ac alias partes præd' messuagii ipsius Willielmi penetran' et influent' idem Willielmus et famuli sui, ac aliæ personæ in messuagio suo præd' conversantes et existen', absque periculo infectionis in aulâ et conclavi præd' ac aliis locis messuagii præd' continuare seu remanere non potuerunt: prætextu cujus idem Willielmus totum commodum, usum, easiamentum, et proficuum maximæ partis messuagii sui præd' per totum tempus præd' totaliter perdidit et amisit ad damnum ipsius Willielmi £40, &c." And the defendant

pleaded not guilty, and at the assizes in Norfolk he was found guilty of both the said nuisances, and damages assessed. And now it was moved in arrest of judgment, that the building of the house for hogs was necessary for the sustenance of man; and one ought not to have so delicate a nose that he cannot bear the smell of hogs; for *lex non favet delicatorum votis:* but it was resolved that the action for it is (as this case is) well maintainable; for in a house four things are desired, *habitatio hominis, delectatio inhabitantis, necessitas luminis, et salubritas aëris,* and for nuisance done to three of them an action lies, *sc.*: 1. To the habitation of a man, for that is the principal end of a house. 2. For hindrance of the light, for the ancient form of an action on the case was significant, *sc.* "quod messuagium horrida tenebritate obscuratum fuit," therewith agree 7 Edw. III. 50 b, 22 Hen. VI. 14, by Markham, 11 Hen. IV. 47, and as to this there was a case adjudged in the King's Bench. Trin. 29 Eliz. Thomas Bland brought an action on the case against Thomas Moseley, and declared how that James Bland was seised in fee of an ancient house in Metherousegate in the Parish of St. Michael in the county of the City of York; and that the said James, and all those whose estate he had in the said house, from time whereof, &c. have had and have used to have for them and their tenants, for life, years, and at will in the west side of the said house, seven windows or lights against a piece of land containing half a rood, in the parish aforesaid, adjoining to the said house, which piece of land from time whereof, &c. was without any building, until the 28th day of September, *anno* 28 Eliz., and showed the length and breadth of the said windows for all the time aforesaid, by force of which windows the said James, and all those whose estate he had in the said house from time whereof, &c. have used to have for them and their tenants aforesaid, divers wholesome and necessary easements and commodities, by reason of the open air and light, &c. And that the said James the 20 September, *anno* 28 Eliz., demised to the plaintiff the said house for three years; and that the defendant, maliciously intending to deprive him of the said easements, *et obscurare messuagium prædt' horrida tenebritate, &c.* 20 Nov., *anno* 29 Eliz., had erected a new building on the said piece of land, so near, &c. that the said seven windows were stopped, whereby the plaintiff lost the said easements, &c. "Et maxima pars messuagii prædict' horrida tenebritate obscurata fuit," &c. In bar of which action the defendant pleaded "quod infra

prædict' civitatem Ebor' talis habetur, et a toto tempore cujus contrarii memoria non existit, habebatur consuetudo, videlicet, quod si quis habuerit fenestras et visum per easdem versus terram vicini sui, vicinus ille visum illarum fenestrarum obstruere super terram illam solebat et posset, sicut melius viderit sibi expedire." By force of which custom he justified the stopping of the said windows; and upon that the plaintiff demurred in law; and it was adjudged by Sir Christopher WRAY, Chief Justice, and the whole Court of King's Bench, that the bar was insufficient in law to bar the plaintiff of his actions, for two reasons: 1. When a man has a lawful easement or profit, by prescription from time whereof, &c. another custom, which is also. from time whereof, &c. cannot take it away, for the one custom is as ancient as the other: as, if one has a way over the land of A. to his freehold by prescription from time whereof, &c. A. cannot allege a prescription or custom to stop the said way. 2. It may be, that before time of memory the owner of the said piece of land has granted to the owner of the said house to have the said windows, without any stopping of them, and so the prescription may have a lawful beginning: and WRAY, Chief Justice, then said, that for stopping as well of the wholesome air, as of light, an action lies, and damages shall be recovered for them, for both are necessary, for it is said, *et rescitur aura æthera;* and the said words, *horrida tenebritate*, &c. are significant, and imply the benefit of the light. But he said that for prospect, which is a matter only of delight, and not of necessity, no action lies for stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect, *unde dicitur, laudaturque domus longos qui prospicit agros.* But the law does not give an action for such things of delight. And Solomon says, Ecclesiast. xi. 7, "Dulce lumen est et delectabile oculis videre solem. Et olim [ut Plutarchus in Conv. 7, Sap. refert] Rex Æthiopum interrogatus quid optimum? respondebat lucem; quis enim natura duce tenebras non exhorrescit?" and if the stopping of the wholesome air, &c. gives cause of action, *a fortiori* an action lies in the case at bar for infecting and corrupting the air. And the building of a lime-kiln is good and profitable; but if it be built so near a house that when it burns the smoke thereof enters into the house, so that none can dwell there, an action lies for it. So if a man has a watercourse running in a ditch from the river to his house, for his necessary use; if a glover sets up a lime-pit for calf-skins

and sheep-skins so near the said watercourse that the corruption of the lime-pit has corrupted it, for which cause his tenants leave the said house, an action on the case lies for it, as it is adjudged in 13 Hen. VII. 26 b, and this stands with the rule of law and reason, *sc.* "Prohibetur ne quis faciat in suo quod nocere possit alieno: et sic utere tuo ut alienum non lædas." *Vide* in the book of Entries, Tit. Nuisance, 406 b, he who has a several piscary in a water shall have an action on the case against him who erects a dye-house, "ac fimos fœditates, et alia sordida extra domum præd' decurrentia in piscariam præd' decurrere fecit, per quod idem proficuum piscariæ suæ præd' totaliter amisit," &c. And there is another precedent against a dyer, &c. "quod idem Henricus in mansione sua præd' ob metum infectionis per horridum fœtorem fumi, fœditatis, et aliorum sordidorum, &c. per magnum tempus morari non audebat." So in the case at bar, forasmuch as the declaration is, that the defendant, maliciously intending to deprive the plaintiff of the use and profit of his house, erected a swine-sty "tam prope aulam et conclave ipsius Willielmi, ac sues et porcos suos in ædificio illo posuit, et ill' ibid' per magnum tempus custodivit, ita quod fœtidi et insalubres odores sordidorum præd' suum et porcorum præd' Thomæ in aulam, &c. penetran' et influen', idem Willielmus ac famuli sui, &c. in messuag' prædict' conversantes existen' absque periculo infectionis in aulâ, &c. continuare seu remanere non potuerunt, prætextu cujus idem Will' totum commodum, &c. maximæ partis præd' messuag' per totum tempus præd' totaliter perdidit." To which declaration the defendant pleaded not guilty, and was found guilty of the matter in the declaration; it was adjudged that the plaintiff should recover.

Bass v. Gregory.

25 Q. B. D. 481; 59 L. J. Q. B. 574.

Trial before Pollock, B., at the Nottingham Spring Assizes, 1890. The facts proved at the trial and the arguments of counsel are stated in the judgment.

Buszard, Q. C., and Appleton, for the plaintiff.

Harris, Q. C., and Stanger, for the defendant.

Pollock, B. This case was tried before me at the last spring assizes at Nottingham. The plaintiffs were the owners in fee of a public-house called "The Jolly Anglers;" and the defendant was the owner of some cottages and a yard adjoining the plaintiffs'

premises. The plaintiffs claimed to be entitled as of right to have the cellar of that public-house ventilated by means of a hole or shaft cut therefrom through the rock into an old well situated in the yard which was occupied by the defendant. The statement of claim then alleged that the plaintiffs claimed this right by uninterrupted user and enjoyment thereof from time immemorial; by the like user and enjoyment for a period of fifty years and upwards next before the commencement of the action; also under the Prescription Act (2 & 3 Will. 4, c. 71), § 2, and by lost grant. There was a further allegation that the plaintiffs were entitled by express grant, but no evidence of any express grant which would meet the case was given. The plaintiffs further alleged that the defendant wrongfully removed a grating which was formerly placed across the mouth of the well, so as to stop or prevent the free passage of air from their cellar upwards through the well, and they asked for an injunction and damages. There was a counter-claim by the defendant in respect of the trespass by the plaintiffs upon his premises, but nothing turns upon that counter-claim. The first question is whether the plaintiffs established their case in point of fact. It was fairly and pertinently urged by the counsel for the defendant that this was a case so novel in character and so peculiar that no Judge or jury ought to presume the existence of such a right. One must, however, look at the surrounding circumstances of this particular case, and those who know Nottingham are perfectly well aware that a great many of these chambers have been excavated from the rock, instead of building in the ordinary way. In the present case there is no doubt that for very many years before the memory of man this had been an excavated cellar. It was obvious that, without some ventilation, the cellar could not be used; and it was equally clear that it had been used for a particular purpose in the process of brewing, which, without ventilation, could not be carried on. I think, therefore, that the comment upon the novelty and peculiarity of the claim has not, when you know the surrounding circumstances, the value which it was sought to attribute to it. I find, in fact, that for many years — certainly for forty years — there has been a communication between the plaintiffs' cellar and the old well; and by means of that communication, the air — some of it impregnated by the brewing operations — has passed from the cellar into the well through the hole or shaft which formed the communication, and upwards through

the grating at the top of the well into the open air; so that the well became the ventilating shaft for the cellar. I also find that that state of things was known to the defendant, and to those before him who occupied the yard in which the old well was. Upon the evidence given at the trial it was impossible, to my mind, to suppose that the air, especially when impregnated by the brewing operations, could have passed up the well and out into the open air without it being known to the person, whoever he might be, occupying the yard. Those being my findings, in fact, it becomes necessary to consider the law applicable to them. It was argued for the defendant that no such right as that claimed in this case could exist at law; and in support of that proposition the case of *Bryant* v. *Lefever*, 4 C. P. D. 172; 48 L. J. C. P. 380, was cited. I do not think that case has any application. There the plaintiff and defendant occupied adjoining premises, and the plaintiff's complaint was that the defendant, in rebuilding his house, carried up the building beyond its former height, and so checked the access of the draught of air to the plaintiff's chimneys. Lord Chief Justice COLERIDGE, at *nisi prius*, gave judgment for the plaintiff; but the Court of Appeal, upon the authority of *Webb* v. *Bird*, 10 Com. B. (N. S.) 268; 13 Com. B. (N. S.) 841; 31 L. J. C. P. 335, held, that the right claimed could not exist at law, and that the principle laid down in *Chasemore* v. *Richards*, 7 H. L. Cas. 349; 29 L. J. Exch. 81, 1 R. C. 729 (a case decided with respect to the right to the flow of water), applied. The view of the court was that no man could dictate to his neighbour how he should build his house with respect to the general current of air common to all mankind. It was thought that no such right could by the English law be successfully asserted; and it was said that no such right ever had been successfully asserted in this country. There are many reasons, which I need not now go into, for supporting that principle as a sound principle of law; but it does not apply to the present case, because if ever there was a case of the access of air to premises through a strictly defined channel this is the case. In *Gale* v. *Abbot*, 8 Jur. (N. S.) 187, and *Dent* v. *The Auction Mart Company*, L. R., 2 Eq. 238; 35 L. J. Ch. 555, injunctions were granted to remove and prevent impediments to ventilation. In both cases the right claimed was very much of the same nature as the right claimed here. In both cases it was held, after great consideration, that the right was one known to the English law, which could

protect it by injunction. I do not, therefore, find any difficulty in holding, not only that in point of fact the plaintiffs proved their case, but that the case was proved establishing a legal right. It was said for the defendant that, assuming such a right could exist at law, the Prescription Act did not apply to it, and that upon the evidence a lost grant ought not to be presumed. In *Webb* v. *Bird*, *supra*, Chief Justice ERLE expressed an opinion that the 2nd section of the Prescription Act only applied to rights of way and of water. If it were necessary for me to decide that point, I should certainly prefer to adopt Lord SELBORNE'S view in *Dalton* v. *Angus*, 6 App. Cas. at p. 798; 3 Q. B. D. 85; 50 L. J. Q. B. (H. L.) at p. 733. But it is not necessary, because the plaintiffs have also claimed to be entitled by lost grant. Now, although a good deal has been said from time to time against the doctrine of lost grant, yet almost all civilised countries have adopted it. That doctrine amounts in substance to this, that if a legal right is proved to have existed and been exercised for a number of years, the law ought to presume that it had a legal origin. Perhaps the doctrine has best been stated by Baron PARKE in *Bright* v. *Walker*, 1 Cr. M. & R. 211, who says at page 217: "For a series of years prior to the passing of this Act (the Prescription Act) Judges had been in the habit, for the furtherance of justice and the sake of peace, to leave it to juries to presume a grant from a long exercise of an incorporeal right, adopting the period of twenty years, by analogy to the Statute of Limitations. Such presumption did not always proceed on a belief that the thing presumed had actually taken place, but, as is properly said by Mr. Starkie in his treatise on evidence, a technical efficacy was given to the evidence of possession beyond its simple and natural force and operation." That rule has been acted upon for very many years, and was recognised both in the Court of Appeal and in the House of Lords in *Dalton* v. *Angus*, *supra*. I am of opinion that the court ought to presume a lost grant here, and I know no case in which the doctrine could be more properly applied, because it is impossible to suppose that the precise history of two adjoining tenements such as these should have been preserved. One must look at the state of things existing for a series of years, and then see what is the fair presumption where a person allows an easement of this kind to grow up to the benefit of his neighbour's land and the detriment of his own. I am of opinion, therefore, that the plaintiffs have properly stated

their case, and that they have proved a legal right to the relief which they claim.

Judgment for the plaintiffs, for an injunction and damages, and dismissing the counter-claim.

ENGLISH NOTES.

The right to air as a separate subject of enjoyment has not been frequently discussed; but the two principal cases appear to afford a sufficient definition of the right.

It was at one time a common practice in the pleadings, in cases where an injunction was sought against an interference with ancient light, to insert the words "and air," as if the right to restrain an interference with the enjoyment of air depended upon the same or similar facts as in the case of light. This practice is animadverted upon by Lord SELBORNE in *The City of London Brewery Co.* v. *Tennant* (Ch. App. 1874), L. R., 9 Ch. 212, 220; 43 L. J. Ch. 457, 459. "The nature of the case," he says, "which would have to be made for an injunction by reason of the obstruction of air is, *toto cœlo*, different from a case of light. Cases are very rare indeed, and must be very special, such as to involve danger to health, or something very nearly approaching to that, to justify the interference of the Court on the ground of diminution of air." This is quite consistent with both the principal cases, although it more especially relates to circumstances such as were present in the former than to such as were present in the latter case.

As a case which was nearly the converse of *Bass* v. *Gregory*, may be cited *Harris* v. *De Pinna* (C. A. 1886), 33 Ch. D. 238; 56 L. J. Ch. 344, where the plaintiff claimed an injunction against building so as to interfere with the enjoyment of light and air for a timber-yard in which timber was stacked for ripening. The Court held that the access of the air, not having been enjoyed through any definite channel, could not be claimed as a right. Lord Justice BOWEN says (33 Ch. D. 250; 56 L. J. Ch. 349): "The passage of undefined air gives rise to no rights, and can give rise to no right, for the best of all reasons, — that of common-sense, — because you cannot acquire any rights against others by a user which they cannot interrupt." This is in accordance with the decision of the Exchequer Chamber in *Webb* v. *Bird* (Ex. Ch. from C. P. 1862), 13 C. B. 841; 31 L. J. C. P. 335, where the claim of an easement for the free passage of air for a wind-mill was rejected; and with the decision of the Court of Appeal in *Bryant* v. *Lefever* (C. A. 1879), 4 C. P. D. 172; 48 L. J. C. P. 380, where the plaintiff ineffectually complained of an erection which caused his chimneys to smoke.

AMERICAN NOTES.

The first paragraph of the Rule states the law prevailing in this country. Stagnant water, slaughter-houses, stables carelessly kept, pest-houses, lead-smelting, brick-burning, &c., come within the rule, and so of hog-pens in cities. *State* v. *Holcomb*, 68 Iowa, 107; 56 Am. Rep. 852. This will be more particularly considered under Nuisances.

But the English doctrine of prescriptive right in air, not based on grant, does not prevail here. *Guest* v. *Reynolds*, 68 Illinois, 478; 18 Am. Rep. 570; *Mahan* v. *Brown*, 13 Wendell (New York), 261; 28 Am. Dec. 461; *Keats* v. *Hugo*, 115 Massachusetts, 204; 15 Am. Rep. 80; *Powell* v. *Sims*, 5 West Virginia, 1; 13 Am. Rep. 629; *Turner* v. *Thompson*, 58 Georgia, 268; 36 Am. Rep. 297; *Mullen* v. *Stricker*, 19 Ohio St. 135; 2 Am. Rep. 379; *Stein* v. *Hauck*, 56 Indiana, 65; 26 Am. Rep. 10; *Ray* v. *Sweeney*, 14 Bush (Kentucky), 1; 29 Am. Rep. 388; *Klein* v. *Gehrung*, 25 Texas Supplement, 233; 78 Am. Dec. 565; *Pierce* v. *Fernald*, 26 Maine, 436; 46 Am. Dec. 573, and note, 579; *Lapere* v. *Luckey*, 23 Kansas, 534; 33 Am. Rep. 196; *King* v. *Miller*, 4 Halsted Chancery (New Jersey), 559; 55 Am. Dec. 246; *Hayden* v. *Dutcher*, 31 New Jersey Eq. 219; *Rennyson's Appeal*, 94 Penn. St. 147; 39 Am. Rep. 777.

As to the right to air and light implied from grant, see *Morrison* v. *Marquardt*, 24 Iowa, 35; 92 Am. Dec. 444, where Dillon, C. J., learnedly examines the subject, comments on all the cases, and concludes that the right does not exist here. *Contrà: Robeson* v. *Pittenger*, 1 Green Chancery (New Jersey), 57; 32 Am. Dec. 412; *Janes* v. *Jenkins*, 34 Maryland, 1; 6 Am. Rep. 300.

The Legislature may not declare a private dwelling-house a nuisance simply because it may injure property by cutting off the breeze from and the view of the sea. *Quintini* v. *Board of Aldermen*, 64 Mississippi, 483; 60 Am. Rep. 62.

The owner of a lot on a street has an easement in it to its whole width for air and light. *Adams* v. *Chicago, &c. R. Co.*, 39 Minnesota, 286; 1 Lawyers' Rep. Annotated, 493; *Am. Bank-note Co.* v. *N. Y. El. R. Co.*, 129 New York, 252. And so when the owner of land sells land by a map showing a street. *Dill* v. *Camden Board of Education*, 17 New Jersey, 421; 10 Lawyers' Rep. Annotated, 276.

The distinction between the English and the American law on this subject is very well set forth in several recent cases in this country, which give a general view of the course of adjudication. In *Ray* v. *Sweeney*, 14 Bush (Kentucky), 1; 29 Am. Rep. 388, the court observed: —

"The Supreme Court of New York, in *Parker* v. *Foote*, 19 Wend. 309, said it would be difficult to prove that the rule respecting ancient lights was known to the common law of England previous to April 19, 1775. 'There were,' said Bronson, J., 'two *nisi prius* decisions at an earlier day, — *Lewis* v. *Price*, in 1761, and *Dungall* v. *Wilson*, in 1763, — but the doctrine was not sanctioned in Westminster Hall until 1786, when the case of *Darwin* v. *Upton* was decided by the King's Bench, 2 Saund. 175, note 2. This was clearly a departure from the old law. *Bury* v. *Pope*, Cro. Eliz. 118.'

"Mr. Washburn, in his treatise on the law of Easements and Servitudes, p. 576, referring to the case of *Parker* v. *Foote*, and the foregoing remarks of

Bronson, J., says that 'in Calthrop's Reports, published in 1661, pp. 3–8, it is shown that by *the custom of London* one might not erect a new house upon a vacant lot so as to obscure the windows of an ancient house, for the ancient house had by the enjoyment acquired an easement of light by prescription.'

"This discovery of the learned author does not militate against the conclusion reached by the New York Court, but that he found no other case than that cited very strongly confirms the truth of what the Court said.

"It was only the common law of a general nature and not local to the kingdom of Great Britain that was declared by legislative authority to be in force, either in New York, Virginia, or Kentucky, or indeed in any of the States of the Union; and as the case in Calthrop, and the only one prior in date to 1761, cited by Mr. Washburn, and presumably the only one to be found in any English book of reports of older date, was based on a local custom in the city of London, we hazard nothing in following the Supreme Court of New York in holding that the English common law respecting ancient lights never had an existence in this State.

"But so far as the English rule is based upon sound principles and natural justice, it may be in force here, not indeed because it is law in England, but because, being based on sound reason, it is law everywhere.

"The English rule is based on the ground that long-continued and uninterrupted enjoyment of light and air flowing into one's house laterally across his neighbour's ground is evidence of a grant, or what is the same thing, of an agreement on the neighbour's part not to obstruct the lights; and the period of enjoyment necessary to furnish satisfactory evidence of a grant or agreement not to obstruct the flow of light and air is fixed in analogy to the period of adverse enjoyment necessary to create presumptive evidence of a grant of land.

"But the distinction between the adverse holding of land and the mere enjoyment of light and air flowing into one's house over the adjacent land of his neighbour is quite obvious.

"The adverse holding of one's land, if wrongful, is a continuing injury to him, and affords him a right of action by which such injury may be redressed. His long-continued acquiescence in such holding can only be rationally accounted for by presuming that it was rightful.

"But how can any such presumption apply to this case?

"In *Parker* v. *Foote*, 19 Wend. 316, Justice Bronson, after stating that most of the cases, in which it had been held that the right to incorporeal hereditaments may be acquired by long-continued enjoyment, relate to ways, commons, markets, and the like, where the user, if not rightful, was an immediate injury to the person against whom the presumption was made, proceeds as follows: 'His property has either been invaded or his beneficial interest in it has been rendered less valuable. The injury has been of such a character that he might have immediate redress by action. But in the case of windows overlooking the land of another, the injury, if any, is merely ideal or imaginary. The light and air which they admit are not the subjects of property beyond the moment of actual occupancy, and for overlooking one's privacy no action can be maintained. The party has no remedy but to build on the

adjoining land opposite the offensive window. . . . Upon what principle the courts in England have applied the same rule of presumption to two classes of cases so essentially different in character, I have been unable to discover. If one commit a daily trespass on the land of another, under a claim of right to pass over or feed his cattle upon it, or divert the water from his mill or throw it back upon his land or machinery; in these, and the like cases, long-continued acquiescence affords strong presumptive evidence of right. But in the case of lights there is no adverse user, nor indeed any user whatever of another's property, and no foundation is laid for indulging any presumption against the rightful owner.'

"Again he says: 'The learned judges who have laid down this doctrine have not told us upon what principle or analogy of the law it can be maintained. They tell us a man may build at the extremity of his own land, and that he may *lawfully* have windows looking out upon the lands of his neighbours. *Cross* v. *Lewis*, 2 B. & C. 686; *Moore* v. *Rawson*, 3 id. 332. The reason why he may lawfully have such windows must be because he does his neighbour no wrong; and indeed so it is adjudged, as we have already seen; and yet, somehow or other, by the exercise of a lawful right in his own land for twenty years, he acquires a beneficial interest in the land of his neighbour.'

"We can add nothing to this reasoning. It seems to us conclusive. The same doctrine has been held in Massachusetts, South Carolina, Maine, Maryland, Pennsylvania, Alabama, West Virginia, Iowa, Ohio, Vermont, and Georgia; and in Connecticut the contrary doctrine once held is now discarded, while in Illinois, New Jersey, and Louisiana the English doctrine prevails. *Rogers* v. *Sawin*, 10 Gray, 376; *Napier* v. *Bulwinkle*, 5 Rich. 311; *Cherry* v. *Stein*, 11 Md. 1; *Haverstick* v. *Sipe*, 33 Penn. St. 368; *Pierre* v. *Fernald*, 26 Me. 436; 46 Am. Dec. 573; *Ward* v. *Neal*, 37 Ala. 500; *Powell* v. *Sims*, 5 W. Va. 1; 13 Am. Rep. 629; *Morrison* v. *Marquardt*, 24 Iowa, 35; 92 Am. Dec. 444; *Hieatt* v. *Morris*, 10 Ohio St. 523; 78 Am. Dec. 280; *Mullen* v. *Stricker*, 19 Ohio St. 142; 2 Am. Rep. 379; *Hubbard* v. *Town*, 33 Vt. 295; *Mitchell* v. *Mayor*, 49 Ga. 19; 15 Am. Rep. 669."

In *Stein* v. *Hauck*, 56 Ind. 65; 26 Am. Rep. 10, it was said: —

"We read much in our books about the common-law right in England of an easement, acquired by use or prescription, in light or air coming to ancient windows from the premises of another; but when the history of the right is carefully studied, it will be found that it was sometimes disputed. It was denied in the case of *Bury* v. *Pope*, 1 Cro. Eliz. 118, and, under the reign of Charles II., in the case of *Palmer* v. *Fletcher*, 1 Lev. 122. It was modified by the custom of London, and indeed was never indisputably settled until it was established by the Statute of 3 William IV., c. 71, § 3; but assuming that such an easement was a common-law right in England before the Statute of William IV., the question whether it is a common-law right in the State of Indiana, has never before been directly presented to this court. In the case of *Keiper* v. *Klein*, 51 Ind. 316, the question was incidentally noticed; but that case turned upon the question whether a certain deed conveyed such an easement by implication, not whether it could be acquired

by use or prescription. And it has been held that the common law, as a system, is adopted in this State, except such parts of it as are inconsistent with our institutions, or not suited to the condition of the country. In the case of *Robeson* v. *Pittenger*, 1 Green's Ch. 57 it is held that when ancient lights have existed for upward of twenty years, undisturbed, the owner of an adjoining lot has no right to obstruct them; but this case was decided mainly on the authority of *Story* v. *Odin*, 12 Mass. 157, which has long ceased to be the law of Massachusetts; for in the case of *Randall* v. *Sanderson*, 111 Mass. 114, decided more than sixty years later, it is expressly held, that 'It is the established law, in this Commonwealth, that an easement of light and air cannot be acquired by prescription,' in support of which many cases are cited. In the case of *Durel* v. *Boisblanc*, 1 La. Ann. 407, where the easement of light to a window was coupled with the right of way through a passage, it was held that they could not be obstructed; but the decision was expressly placed upon the ground that these servitudes were visible and palpable, and, on examination of the property, the purchaser must have seen them, — the court remarking that 'could we believe that he was ignorant of them, a very different case would have been presented.' In the case of *Gerber* v. *Grabel*, 16 Ill. 217, it is held that 'Twenty years' uninterrupted and unquestioned enjoyment of lights constitutes them ancient lights; in the enjoyment of which the owner will be protected.' But Caton, J., in a separate opinion, evidently doubts the wisdom of the rule, and Treat, C. J., dissented. These three cases are all the decisions we can find, and these three States — New Jersey, Louisiana, and Illinois — the only States which have adopted the English rule concerning easements in light and air, acquired by use or prescription, and the case in Illinois is the only one fully in accord with the English decisions, and is based upon a full adoption of the English common law by a statute of the State. . . .

"It may not be unprofitable to reason a moment upon the propriety of following the current of American authorities upon this question, to which a few exceptional cases seem as but eddies. In the first place, an easement in light or air is unlike any other easement known to the law. It is neither an appurtenance nor a hereditament. No definition of property known to the law includes it specifically. No exclusive right can be had in light or air; legislation cannot create such a right, because man has no exclusive dominion over them. They are for all in common, 'and upon whom doth not his light arise?' — Job xxv. 3. And 'The wind bloweth where it listeth, and thou hearest the sound thereof, but canst not tell whence it cometh, and whither it goeth.' — St. John iii. 8. To give a right of property in light or air, which can control the right to the use of land, is to make the incident greater than the principal and allow the shadow to control the substance.

"Second, the owner of open space may not know, and cannot know of right, the internal arrangement of his neighbour's house; and may 'stand by' while the invading claim, which is finally to embarrass, if not to destroy, the usefulness of his land, is gradually accruing against him, until it becomes a vested right, which he cannot dispute.

"Third, if he knows that the right is accruing against him, he has no right

of action against the person who enjoys his light or air, to prevent it, because he has not, and cannot have, any exclusive property in the light or air which occupies his space; he has nothing, therefore, to do, except to stand by and lose his rights, or erect his obstruction within a given time, simply for the purpose of protecting what was already his own. Besides, —

"Fourth, the injury of such an easement to the land, which can be used only in the one place where it is, is so great, compared with the value of the easement in light or air, which can be had and used everywhere, that no such easement ought to be acquired by use or prescription, against one who may not know that it is accruing, or knowing it, can defend against it only by suffering expense and inconvenience. The boundaries of the land are generally sufficient for the supply of its own light and air; and we do not see why the owner should be allowed to go beyond them to supply himself with these blessings, against the rights of another: or to turn that which was granted to him as a favour into an injury to the grantor.

"Upon these authorities, and for these reasons, we are prepared to hold, as the law of this State, that no one can acquire an easement in light or air, to be supplied from the premises of another, by mere use or prescription. We cannot see that this rule will work injury to any one; and we think it will place these impalpable and invisible claims upon a safe footing, consistent with the rights of all concerned. It is very easy to reserve such an easement to the vendor, or grant it to the vendee, in the deed which conveys the land, or to create it by any valid contract: then each one knows what he sells and what he buys, and all persons are protected in their rights. Embarrassments have accumulated, and injuries have been suffered, to property, growing out of the unsettled views upon this question. It should be put to rest. No one should stand in danger of unwittingly suffering burdens to be laid upon his property, nor be constantly compelled to guard against such an insidious invasion of his rights."

And in *Rennyson's Appeal*, 94 Pa. St. 117; 39 Am. Rep. 777, the court said:

"Many more cases might be cited, and I have examined every case on the briefs of counsel, save one from Lord Raymond; but enough has been done to justify the conclusions of law which I am about to reach, and which, I think, should become the law of Pennsylvania.

"'1. No implication of a grant of the right to light and air arises upon a sale of one of two adjacent lots having a house upon it, with windows overlooking the land of the grantor.

"'2. The grantor, by such sale, is not estopped from improving his retained lot by building upon it, though his erection darkens the windows of his vendee, and excludes the access of light and air from such windows.

"'3. That the limitation of these two propositions depends upon the fact as to whether such windows are a real necessity for the enjoyment of the grantee's property. If they be, then the implication of the grant of an easement of light and air will be sustained; if they be not, or can be substituted at a reasonable cost, with a view to the purposes of the dominant tenement, then such implication will be denied and rejected.

"'4. The American doctrine as to light and air requires an express grant

or agreement, unless a real and actual necessity exists, to vest a dominant tenement with such right.

"'5. The doctrine of ancient lights is not recognised in Pennsylvania.'"

But it has been held that an easement of light may be implied from a grant of all the "appurtenances," so that the grantor may not, by erections on his own adjoining land, obstruct or darken windows open at the time of the grant on the lands conveyed, and necessary to their enjoyment. *Janes* v. *Jenkins*, 34 Maryland, 1; 6 Am. Rep. 300; *Powell* v. *Sims*, 5 West Virginia, 1; 13 Am. Rep. 629; *Turner* v. *Thompson*, 58 Georgia, 268; 36 Am. Rep. 297. So in *Doyle* v. *Lord*, 64 New York, 432; 21 Am. Rep. 629, the same was held, the court observing: "This conclusion is reached without any departure from what is called the American doctrine as to light and air, as distinguished from the English common-law doctrine, and the law as laid down in the following authorities is fully recognised: *Parker* v. *Foote*, 19 Wend. 315; *Palmer* v. *Wetmore*, 2 Sandf. Super. Ct. 316; *Myers* v. *Gemmel*, 10 Barb. 537; *Mullen* v. *Stricker*, 19 Ohio St. 135; 2 Am. Rep. 379; *Haverstick* v. *Sipe*, 33 Pa. St. 368; *Keats* v. *Hugo*, 115 Mass. 204; 15 Am. Rep. 80. Under these authorities, if the lessor had sold the store and lot upon which it stood, twenty-five feet by fifty-one, the grantee would have taken no right to light and air from the balance of the lot. In that case the grantor could have built upon the balance of the lot, and thus have darkened the windows in the store without violating any rights of the grantee. In this case, if the yard had not been a part of the lot upon which the building was standing, and if it had not been appropriated to use with the building so as to pass as appurtenant thereto, so far as to give easements therein to the tenants of the building, the plaintiffs could not have complained of the acts of the defendants alleged in the complaint."

In *Case* v. *Minot*, 158 Mass. 577, 22 Lawyers' Rep. Annotated, 536, it was held that the right of a tenant of upper floors to light and air from a well or open space which is not accessible to the street may not be obstructed, where it is necessary to the enjoyment of the demised premises, and that a landlord is liable to a tenant of upper floors for wrongful obstruction of light and air from a well or open space in a building by a chimney constructed by another tenant under the landlord's express authority to erect such chimney for the use of boilers in the basement.

The court observed: "It could not properly be held on the facts reported that as matter of law the plaintiffs were not entitled to any relief against anybody. It is true that the description of the premises demised to the plaintiffs contained no express mention of the well or open space for light and air, and the lease contained no express covenants on the part of the lessors; but the situation and habitual use of the demised premises were such as to warrant, if not to require, the finding of an implied grant of a right to light and air from the open space, or at least from that portion of it owned by the defendants. It is true that the doctrine of implied grants of easements or privileges connected with real estate is applied with some strictness in this Commonwealth; but in this case it might well be found, as it was found, that the right to light and air was necessary to the beneficial enjoyment of the demised premises. The

open space was not accessible from the street. Its sole use, so far as the lessors were concerned, was for the benefit of the occupants of their building, and it must have been intended that the plaintiffs should have the benefit of it. There is no other reasonable view to be taken of the facts. The case of *Doyle* v. *Lord*, 64 N. Y. 432; 21 Am. Rep. 629, much resembles the present, and fully sustains the plaintiffs' contention on this point; and the general doctrine that there is an implied grant of whatever is necessary to the beneficial enjoyment of the thing granted is familiar. *Salisbury* v. *Andrews*, 19 Pick. 250; *Thayer* v. *Payne*, 2 Cush. 327, 331; *Pettingill* v. *Porter*, 8 Allen, 1, 6, 7; 85 Am. Dec. 671; *White* v. *Chapin*, 12 Allen, 516, 518; *Oliver* v. *Pitman*, 98 Mass. 46, 50; *Buss* v. *Dyer*, 125 Mass. 287; *Hooper* v. *Farnsworth*, 128 Mass. 487; *Johnson* v. *Knapp*, 146 Mass. 70; 150 Mass. 267; *Brande* v. *Grace*, 154 Mass. 210; Taylor Land. & T. § 161; 2 Washb. Real Prop. 5th ed. 318, 319, 328–331. Without undertaking to define what may in all cases be included as necessary, it is enough to say that, on the facts reported, light and air from this open space might well be found to be necessary. That being so, the facts reported are sufficient to show or at least to warrant a finding of a nuisance, or a substantial interruption of the plaintiffs' right to quiet enjoyment of the premises (*Fuller* v. *Ruby*, 10 Gray, 285, 290; *Sanderson* v. *Berwick-upon-Tweed*, 13 Q. B. Div. 547; *Jenkins* v. *Jackson*, 40 Ch. Div. 71; *Robinson* v. *Kilvert*, 41 Ch. Div. 88, 97; Taylor Land. & T. §§ 305, 309, 380), though perhaps not of an eviction, as to which see *Royce* v. *Guggenheim*, 106 Mass. 201; 8 Am. Rep. 322; *Bartlett* v. *Farrington*, 120 Mass. 284; *Brown* v. *Holyoke Water-Power Co.*, 152 Mass. 463; *Brande* v. *Grace*, *supra*. *Upton* v. *Townend*, 17 C. B. 30."

In *Keating* v. *Springer*, 146 Ill. 481; 22 Lawyers' Rep. Annotated, 511, it was held that a landlord will not be liable for obstructing his tenant's windows by building on the adjoining close, in the absence of any covenant or agreement in the lease forbidding him to do so, but that the right to have the light and air enter the windows of a building from an adjoining lot may exist by express grant, or by virtue of express covenant or agreement.

The court said: "The English doctrine is that 'if one who has a house with windows looking upon his own vacant land sell the same, he may not erect upon his vacant land a structure which shall essentially deprive such house of the light through its windows.' Washb. Easem. *492, par. 5. This doctrine, however, does not prevail in the majority of the American States. It is held to be inapplicable in a country like this, where the use, value, and ownership of land are constantly changing. Air and light are the common property of all. The owner of a lot cannot be presumed to have assented to an encroachment thereon if he has permitted the light and air to pass over it into the windows of his neighbour's house, situated upon the adjoining lot. The actual enjoyment of the air and light by the latter is upon his own premises only. The prevalent rule in the United States is that an easement in the unobstructed passage of light over an adjoining close cannot be acquired by prescription. 2 Woodfall Land. & T. *703, and notes; 1 Taylor Land. & T. §§ 239, 380, and notes; *Keats* v. *Hugo*, 115 Mass. 204; 15 Am. Rep. 80; *Mullen* v. *Stricker*, 19 Ohio St. 135; 2 Am. Rep. 379. In the early

case of *Gerber* v. *Grabel*, 16 Ill. 217, this court held that such a right might be so acquired; but in the later case of *Guest* v. *Reynolds*, 68 Ill. 478; 18 Am. Rep. 570, the *Gerber Case* was, in effect, overruled, and it was held that 'prescription right, springing up under the narrow limitation in the English law to prevent obstructions to window lights,' 'cannot be applied to the growing cities and villages of this country without working the most mischievous consequences, and has never been deemed a part of our law.' It is established by the weight of American authority that a grant of the right to the use of light and air will not be implied from the conveyance of a house with windows overlooking the land of the grantor; and that, where the owner of two adjacent lots conveys one of them, a grant of an easement for light and air will not be implied from the nature or use of the structure existing on the lot at the time of the conveyance, or from the necessity of such easement to the convenient enjoyment of the property. *Keats* v. *Hugo*, and *Mullen* v. *Stricker*, *supra*; 1 Wood. Land. & T. § 209, pp. 422–424, and note; *Morrison* v. *Marquardt*, 24 Iowa, 35; 92 Am. Dec. 444. 'A grant by the owner of two adjoining lots of one of them does not imply the right of an unobstructed passage of light and air over the other.' 2 Woodfall Land. & T. * 703, and note. 'The law of implied grants and implied reservations, based upon necessity or use alone, should not be applied to easements for light and air over the premises of another.' *Mullen* v. *Stricker*, *supra*; *Haverstick* v. *Sipe*, 33 Pa. St. 368; *Keiper* v. *Klein*, 51 Ind. 316. It follows that a landlord will not be liable for obstructing his tenant's windows by building on the adjoining close, in the absence of any covenant or agreement in the lease forbidding him to do so. *Myers* v. *Gemmel*, 10 Barb. 537; *Palmer* v. *Wetmore*, 2 Sandf. 316; *Keiper* v. *Klein*, *supra*: 2 Woodfall Land. & T. * 703, and note. But the authorities all agree that the right to have the light and air enter the windows of a building over an adjoining lot may exist by express grant, or by virtue of an express covenant or agreement. *Hillard* v. *New York & C. Gas Coal Co.*, 41 Ohio St. 662; 52 Am. Rep. 99; *Brooks* v. *Reynolds*, 106 Mass. 31; *Keats* v. *Hugo*, and *Morrison* v. *Marquardt*, *supra*. The question then arises whether the erection of the Springer building could have been regarded as a violation of the express terms of the lease, if proof had been admitted showing that it obstructed the light necessary to carry on the business," &c.

ALIEN.

No. 1. — CALVIN'S CASE.

(K. B. 1608.)

No. 2. — DOE d. THOMAS *v.* ACKLAM.

(K. B. 1824.)

RULE.

A MAN born in Scotland after the accession of King James to the English throne, and before the Act of Union of the Kingdoms, is a natural-born subject, having the capacity at common law to hold lands in England.

One born in the United States of America since the treaty of 1783, by which these States were acknowledged to be free, sovereign, and independent, is an alien so as to be incapable (by the common law) of inheriting land in England.

The father of a child born as last mentioned, having been resident in New York at the time of the treaty, and having (presumably) put off his allegiance pursuant to its provisions, was not, at the subsequent period of the birth of the child, a natural-born subject of the Crown of Great Britain within the meaning of the Statute 4 Geo. II. c. 21, so as to prevent the child being an alien.

Calvin's Case.

7 Co. Rep. 1.

The question of this case as to matter in law was whether Robert Calvin the plaintiff (being born in Scotland since the crown of England descended to his Majesty) be an alien born, and consequently disabled to bring any real or personal action for

any lands within the realm of England. After this case had been argued in the Court of King's Bench, at the bar, by the counsel learned of either party, the Judges of that Court, upon conference and consideration of the weight and importance thereof, adjourned the same (according to the ancient and ordinary course and order of the law) into the Exchequer Chamber, to be argued openly there, —first, by the counsel learned of either party, and then by all the Judges of England; where afterwards the case was argued by Bacon, Solicitor-General, on the part of the plaintiff, and by Laur. Hide for the defendant: and afterwards by Hobart, Attorney-General, for the plaintiff, and by Serjeant Hutton for the defendant; and in Easter Term last, the case was argued by Heron, puisne Baron of the Exchequer, and Foster, puisne Judge of the Court of Common Pleas; and, on the second day appointed for this case, by Crook, puisne Judge of the King's Bench, and Altham, Baron of the Exchequer; the third day by Snigge, Baron of the Exchequer, and Williams, one of the Judges of the King's Bench; the fourth day by Daniel, one of the Judges of the Court of Common Pleas, and by Yelverton, one of the Judges of the King's Bench; and in Trinity Term following, by Warburton, one of the Judges of the Common Pleas, and Fenner, one of the Judges of the King's Bench: and after by Walmesley, one of the Judges of the Common Pleas, and Tanfield, Chief Baron; and, at two several days in the same term, Coke, Chief Justice of the Common Pleas, Fleming, Chief Justice of the King's Bench, and Sir Thomas Eggerton, Lord Ellesmere, Lord Chancellor of England, argued the case (the like plea in disability of Robert Calvin's person being pleaded *mutatis mutandis* in the Chancery in a suit there for evidence concerning lands of inheritance; and, by the Lord Chancellor, adjourned also into the Exchequer Chamber, to the end that one rule might overrule both the said cases). And first (for that I intend to make as summary a report as I can), I will at the first set down such arguments and objections as were made and drawn out of this short record against the plaintiff by those that argued for the defendants. It was observed that in this plea there were four nouns, *quatuor nomina*, which were called *nomina operativa*, because from them all the said arguments and objections on the part of the defendants were drawn: that is to say, — 1. *Ligeantia* (which is twice repeated in the plea; for it is said, *infra ligeantiam*

domini Regis regni sui Scot', *et extra ligeantiam domini Regis regni sui Angl'*). 2. *Regnum* (which also appeareth to be twice mentioned, viz., *regnum Angl'*, and *regnum Scot'*). 3. *Leges* (which are twice alleged, viz., *leges Angl'*, and *leges Scot'*, two several and distinct laws). 4. *Alienigena* (which is the conclusion of all, viz., that Robert Calvin is *alienigena*).

1. *Ligeantia.* By the first it appeareth that the defendants do make two ligeances,— one of England, and another of Scotland; and from these several ligeances two arguments were framed, which briefly may be concluded thus: Whosoever is born *infra ligeantiam*, within the ligeance of King James of his kingdom of Scotland, is *alienigena*, an alien born, as to the kingdom of England: but Robert Calvin was born at Edinburgh, within the ligeance of the King of his kingdom of Scotland; therefore Robert Calvin is *alienigena*, an alien born, as to the kingdom of England. 2. Whosoever is born *extra ligeantiam*, out of the ligeance of King James of his kingdom of England, is an alien as to the kingdom of England: but the plaintiff was born out of the ligeance of the King of his kingdom of England; therefore the plaintiff is an alien, &c. Both these arguments are drawn from the very words of the plea, viz., "quod præd' Robertus est alienigena, natus 5 Nov. anno regni domini Regis nunc Angl', &c., tertio apud Edenburgh infra regnum Scot' ac infra ligeantiam dicti domini Regis dicti regni sui Scot', ac extra ligeantiam dicti domini Regis regni sui Angl'."

2. *Regna.* From the several kingdoms, viz., *regnum Angl'* and *regnum Scot'*, three arguments were drawn. 1. "Quando duo jura (imo duo regna) concurrunt in una persona, æquum est ac si essent in diversis:" but in the King's person there concur two distinct and several kingdoms; therefore it is all one as if they were in divers persons, and consequently the plaintiff is an alien, as all the *antenati* are, for that they were born under the ligeance of another King. 2. Whatsoever is due to the King's several politic capacities of the several kingdoms is several and divided: but ligeance of each nation is due to the King's several politic capacities of the several kingdoms; *ergo*, the ligeance of each nation is several and divided, and consequently the plaintiff is an alien, for that they that are born under several ligeances are aliens one to another. 3. Where the King hath several kingdoms by several titles and descents, there also are the ligeances several: but

the King hath these two kingdoms by several titles and descents; therefore the ligeances are several. These three arguments are collected also from the words of the plea before remembered.

3. *Leges.* From the several and distinct laws of either kingdom, they did reason thus: 1. Every subject that is born out of the extent and reach of the laws of England, cannot by judgment of those laws be a natural subject to the King, in respect of his kingdom of England: but the plaintiff was born at Edinburgh, out of the extent and reach of the laws of England; therefore the plaintiff by the judgment of the laws of England cannot be a natural subject to the King, as of his kingdom of England. 2. That subject that is not at the time and in the place of his birth inheritable to the laws of England cannot be inheritable or partaker of the benefits and privileges given by the laws of England: but the plaintiff at the time and in the place of his birth was not inheritable to the laws of England (but only to the laws of Scotland); therefore he is not inheritable or to be partaker of the benefits or privileges of the laws of England. 3. Whatsoever appeareth to be out of the jurisdiction of the laws of England, cannot be tried by the same laws: but the plaintiff's birth at Edinburgh is out of the jurisdiction of the laws of England; therefore the same cannot be tried by the laws of England. Which three arguments were drawn from these words of the plea, viz., "Quodque tempore nativitatis præd' Roberti Calvin, ac diu antea, et continuè postea, præd' regnum Scot' per jura, leges, et statuta ejusdem regni propria, et non per jura, leges, seu statuta hujus regni Angl' regulat' et gubernat' fuit, et adhuc est."

4. *Alienigena.* From this word *alienigena* they argued thus: every subject that is *alien' gentis* (*i. e.*) *alien' ligeant'*, *est alienigena:* but such a one is the plaintiff; therefore, &c. And to these nine arguments all that was spoken learnedly and at large by those that argued against the plaintiff may be reduced.

But it was resolved by the Lord Chancellor and twelve Judges, viz., the two Chief Justices, the Chief Baron, Justice Fenner, Warberton, Yelverton, Daniel, Williams, Baron Snigge, Baron Altham, Justice Crooke, and Baron Heron, that the plaintiff was no alien, and consequently that he ought to be answered in this assize by the defendants.

This case was as elaborately, substantially, and judicially argued by the Lord Chancellor, and by my brethren the Judges,

as I ever read or heard of any; and so in mine opinion the weight and consequence of the cause, both *in præsenti et perpetuis futuris temporibus*, justly deserved: for though it was one of the shortest and least that ever we argued in this court, yet was it the longest and weightiest that ever was argued in any court, — the shortest in syllables, and the longest in substance; the least for the value (and yet not tending to the right of that least, but the weightiest for the consequent, both for the present and for all posterity. And therefore it was said that those that had written *de fossilibus* did observe that gold hidden in the bowels of the earth was, in respect of the mass of the whole earth, *parvum in magno;* but of this short plea it might be truly said (which is more strange) that here was *magnum in parvo.* And in the arguments of those that argued for the plaintiff, I specially noted, that albeit they spake according to their own heart, yet they spake not out of their own head and invention; wherein they followed the counsel given in God's book, *interroga pristinam generationem* (for out of the old fields must come the new corn) *et diligenter investiga patrum memoriam*, and diligently search out the judgments of our forefathers, and that for divers reasons: first, on our own part, *Hesterni enim sumus et ignoramus, et vita nostra sicut umbra super terram;* for we are but of yesterday (and therefore had need of the wisdom of those that were before us), and had been ignorant (if we had not received light and knowledge from our forefathers), and our days upon the earth are but as a shadow, in respect of the old ancient days and times past, wherein the laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience (the trial of right and truth), fined and refined, which no one man (being of so short a time), albeit he had in his head the wisdom of all the men in the world, in any one age, could ever have effected or attained unto. And therefore it is *optima regula, qua nulla est verior aut firmior in jure, neminem oportet esse sapientiorem legibus:* no man ought to take upon him to be wiser than the laws. Secondly, in respect of our forefathers: *ipsi* (saith the text) *docebunt te, et loquentur tibi, et ex corde suo proferent eloquia,* — they shall teach thee and tell thee, and shall utter the words of their heart, without all equivocation or mental reservation; they (I say) that cannot be daunted with fear of any power above them, nor be dazzled with the applause of

the popular about them, nor fretted with any discontentment (the matter of opposition and contradiction) within them, but shall speak the words of their heart without all affection or infection whatsoever.

Also in their arguments of this cause concerning an alien, they told no strange histories, cited no foreign laws, produced no alien precedents, and that for two causes: the one, for that the laws of England are so copious in this point, as, God willing, by the report of this case shall appear; the other, lest their arguments concerning an alien born should become foreign, strange, and an alien to the state of the question, which, being *quæstio juris* concerning freehold and inheritance in England, is only to be decided by the laws of this realm. And albeit I concurred with those that adjudged the plaintiff to be no alien, yet do I find a mere stranger in this case, such a one as the eye of the law (our books and book-cases) never saw, as the ears of the law (our reporters) never heard of, nor the mouth of the law (for *judex est lex loquens*), the Judges our forefathers of the law, never tasted: I say, such a one as the stomach of the law, our exquisite and perfect records of pleadings, entries, and judgments (that make equal and true distribution of all cases in question), never digested. In a word, this little plea is a great stranger to the laws of England, as shall manifestly appear by the resolution of this case. And now that I have taken upon me to make a report of their arguments, I ought to do the same as truly, fully, and sincerely as possibly I can. Howbeit, seeing that almost every Judge had in the course of his argument a peculiar method, and I must only hold myself to one, I shall give no just offence to any if I challenge that which of right is due to every reporter; that is, to reduce the sum and effect of all to such a method as, upon consideration had of all the arguments, the reporter himself thinketh to be fittest and clearest for the right understanding of the true reasons and causes of the judgment and resolution of the case in question.

In this case five things did fall into consideration: 1. *Ligeantia;* 2. *Leges:* 3. *Regna;* 4. *Alienigena;* 5. What legal inconveniences would ensue on either side.

1. Concerning ligeance: 1. It was resolved what ligeance was; 2. How many kinds of ligeances there were; 3. Where ligeance was due; 4. To whom it was due; and last, how it was due.

2. For the laws: 1. That ligeance or obedience of the subject to the Sovereign is due by the law of nature; 2. That this law of nature is part of the laws of England; 3. That the law of nature was before any judicial or municipal law in the world; 4. That the law of nature is immutable, and cannot be changed.

3. As touching the kingdoms, how far forth by the act of law the Union is already made, and wherein the kingdoms do yet remain separate and divided.

4. Of *alienigena*, an alien born: 1. What an alien born is in law; 2. The division and diversity of aliens; 3. Incidents to every alien; 4. Authorities in law; 5. Demonstrative conclusions upon the premises that the plaintiff can be no alien.

5. Upon due consideration had of the consequent of this case, what inconveniences legal should follow on either party.

And these several parts, I will, in this report, pursue in such order as they have been propounded; and, first, *de ligeantia.*

1. Ligeance is a true and faithful obedience of the subject due to his Sovereign. This ligeance and obedience is an incident inseparable to every subject; for as soon as he is born he oweth by birthright ligeance and obedience to his Sovereign. *Ligeantia est vinculum fidei;* and *ligeantia est quasi legis essentia. Ligeantia est ligamentum, quasi ligatio mentium: quia sicut ligamentum est connexio articulorum et junctararum, &c.* As the ligatures or strings do knit together the joints of all the parts of the body, so doth ligeance join together the Sovereign and all his subjects, *quasi uno ligamine.* Glanville, who wrote in the reign of H. II. lib. 9, cap. 4, speaking of the connection which ought to be between the lord and tenant that holdeth by homage, saith that *mutua debet esse domini et fidelitatis connexio, ita quod quantum debet domino ex homagio, tantum illi debet dominus ex dominio, praeter solam reverentiam,* and the lord (saith he) ought to defend his tenant. But between the Sovereign and the subject there is without comparison a higher and greater connection; for as the subject oweth to the King his true and faithful ligeance and obedience, so the Sovereign is to govern and protect his subjects, *regere et protegere subditos:* so as between the Sovereign and subject there is *duplex et reciprocum ligamen; quia sicut subditus regi tenetur ad obedientiam, ita rex subdito tenetur ad protectionem: meritò igitur ligeantia dicitur a ligando, quia continet in se duplex ligamen.* And therefore it is holden in 20 H. VII. 8 a, that there

is a liege or ligeance between the King and the subject. And Fortescue, cap. 13, *Rex ad tutelam legis corporum et bonorum subditorum erectus est.* And in the Acts of Parliament of 10 R. II. cap. 5, and 11 R. II. cap. 1, 14 H. VIII. cap. 2, &c., subjects are called liege people; and in the Acts of Parliament in 34 H. VIII. cap. 1, and 35 H. VIII. cap. 3. &c., the King is called the liege lord of his subjects. And with this agreeth M. Skeene in his book "De Expositione Verborum" (which book was cited by one of the Judges which argued against the plaintiff), ligeance is the mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects, because they are bound to obey and serve him; and he is called their liege lord, because he should maintain and defend them. Whereby it appeareth that in this point the law of England and of Scotland is all one. Therefore it is truly said that *protectio trahit subjectionem, et subjectio protectionem.* And hereby it plainly appeareth that ligeance doth not begin by the oath in the leet; for many men owe true ligeance that never were sworn in a leet, and the swearing in a leet maketh no denization, as the book is adjudged in 14 H. IV. fol. 19 b. This word ligeance is well expressed by divers several names or *synonyma* which we find in our books. Sometimes it is called the obedience or obeisance of the subject to the King, *obedientia Regi*, 9 E. IV. 7 b, 9 E. IV. 6, 2 R. III. 2 a, in the Book of Entries, *Ejectione firm'*, 7, 14 H. VIII. cap. 2, 22 H. VIII. cap. 8, &c. Sometimes he is called a natural liege man that is born under the power of the King, *sub potestate Regis*, 4 H. III. tit. Dower. *Vide* the statute of 11 E. III. c. 2. Sometimes ligeance is called faith,—*fides, ad fidem Regis, &c.* Bracton, who wrote in the reign of H. III. lib. 5, *tractat' de exception'*, cap. 24. fol. 427: "Est etiam alia exceptio quæ competit ex personâ quærentis, proper defectum nationis, ut si quis alienigena qui fuit ad fidem Regis Franc', &c." And Fleta (which book was made in the reign of E. I.) agreeth therewith; for l. 6, c. 47, "de except' ex omissione participis," it is said, "vel dicere potuit, quod nihil juris clamare poterit tanquam particeps eo quod est ad fidem Regis Franciæ, quia alienigenæ repelli debent in Angl' ab agendo, donec fuerunt ad fidem Reg' Angl'." *Vide* 25 E. III. *de natis ultra mare*, faith and ligeance of the King of England; and Litt. lib. 2, cap. Homage, saving the faith that I owe to our Sovereign Lord the King; and Glanv. l. 9, c. 1, *Salva fide debita*

dom' Regi et hæredibus suis. Sometimes ligeance is called ligealty, 22 Ass. pl. 25. By all which it evidently appeareth that they that are born under the obedience, power, faith, ligealty, or ligeance of the King, are natural subjects, and no aliens. So, as seeing now it doth appear what ligeance is, it followeth in order that we speak of the several kinds of ligeance. But herein we need to be very wary, for this caveat the law giveth, *ubi lex non distinguit nec nos distinguere debemus;* and certainly *lex non distinguit,* but where *omnia membra dividentia* are to be found out and proved by the law itself.

2. There is found in the law four kinds of ligeances: the first is, *ligeantia naturalis, absoluta, pura, et indefinita,* and this originally is due by nature and birthright, and is called *alta ligeantia,* and he that oweth this is called *subditus natus.* The second is called *ligeantia acquisita,* not by nature, but by acquisition or denization, being called a denizen, or rather donaizon, because he is *subditus datus.* The third is, *ligeantia localis,* wrought by the law; and that is when an alien that is in amity cometh into England, because as long as he is within England, he is within the King's protection; therefore so long as he is here, he oweth unto the King a local obedience or ligeance, for that the one (as it hath been said) draweth the other. The fourth is a legal obedience, or ligeance which is called legal, because the municipal laws of this realm have prescribed the order and form of it; and this to be done upon oath at the torn of the leet. The first, that is, ligeance natural, &c., appeareth by the said Acts of Parliament, wherein the King is called natural liege lord, and his people natural liege subjects; this also doth appear in the indictments of treason (which of all other things are the most curiously and certainly indicted and penned) for in the indictment of the Lord Dacre, in 26 H. VIII., it is said, "præd' Dominus Dacre debitum fidei et ligeant' suæ, quod præfato domino Regi naturaliter et de jure impendere debuit, minime curans," &c. And Reginald Pool was indicted in 30 H. VIII. for committing treason *contra dom' Regem supremum et naturalem dominum suum.* And to this end were cited the indictment of Edward, Duke of Somerset, in 5 E. VI. and many others, both of ancient and later times. But in the indictment of treason of John Dethick in 2 and 3 Phil. and Mar. it is said, "quod præd' Johannes machinans, &c., prædict' dominum Philippum et dominam Mariam

supremos dominos suos," and omitted (*naturalis*) because King Philip was not his natural liege lord. And of this point more shall be said when we speak of local obedience. The second is *ligeant' acquisita*, or denization; and this in the books and records of the law appeareth to be threefold: 1. Absolute, as the common denizations be, to them and their heirs, without any limitation or restraint: 2. Limited, as when the King doth grant letters of denization to an alien, and to the heirs males of his body, as it appeareth in 9 E. IV. fol. 7, 8, in *Baggot's Case;* or to an alien for term of his life, as was granted to J. Reynel, 11 H. VI. 3. It may be granted upon condition, for *cujus est dare, ejus est disponere*, whereof I have seen divers precedents. And this denization of an alien may be effected three manner of ways: by Parliament, as it was in 3 H. VI. 55, in Dower; by letters patent, as the usual manner is; and by conquest, as if the King and his subjects should conquer another kingdom or dominion, as well *antenati* as *postnati*, as well they which fought in the field as they which remained at home, for defence of their country, or employed elsewhere, are all denizens of the kingdom or dominion conquered. Of which point, more shall be said hereafter.

3. Concerning the local obedience it is observable, that as there is a local protection on the King's part, so there is a local ligeance of the subject's part. And this appeareth in 4 Mar. Br. 32, and 3 and 4 Phil. and Mar. Dyer, 144. Sherley, a Frenchman, being in amity with the King, came into England, and joined with divers subjects of this realm in treason against the King and Queen, and the indictment concluded *contra ligeant' suæ debitum;* for he owed to the King local obedience, — that is, so long as he was within the King's protection; which local obedience, being but momentary and uncertain, is yet strong enough to make a natural subject, for if he hath issue here, that issue is a natural-born subject; *a fortiori*, he that is born under the natural and absolute ligeance of the King (which, as it hath been said, is *alta ligeantia*), as the plaintiff in the case in question was, ought to be a natural-born subject; for *localis ligeantia est ligeantia infima et minimæ, et maxime incerta.* And it is to be observed, that it is *nec cælum, nec solum*, — neither the climate nor the soil, — but *ligeantia* and *obedientia*, that make the subject born; for if enemies should come into the realm, and possess town or fort,

and have issue there, that issue is no subject to the King of England, though he be born upon his soil, and under his meridian, for that he was not born under the ligeance of a subject, nor under the protection of the King. And concerning this local obedience, a precedent was cited in Hilar. 36 Eliz., when Stephano Ferrara de Gama, and Emanuel Lewis Tinoco, two Portuguese born, coming into England under Queen Elizabeth's safe-conduct, and living here under her protection, joined with Doctor Lopez in treason within this realm against her Majesty; and in this case two points were resolved by the Judges. First, that their indictment ought to begin, that they intended treason *contra dominum Reginam, &c.*, omitting these words (*naturalem domin' suum*), and ought to conclude, *contrà ligeant' suæ debitum.* But if an alien enemy come to invade this realm, and be taken in war, he cannot be indicted of treason; for the indictment cannot conclude *contrà ligeant' suæ debitum*, for he never was in the protection of the King, nor ever owed any manner of ligeance unto him, but malice and enmity, and therefore he shall be put to death by martial law. And so it was *in anno* 15 H. VII. in *Perkin Warbeck's Case*, who, being an alien born in Flanders, feigned himself to be one of the sons of Edward the Fourth, and invaded this realm with great power, with an intent to take upon him the dignity royal; but being taken in the war, it was resolved by the Justices that he could not be punished by the common law, but before the Constable and Marshal (who had special commission under the great seal to hear and determine the same according to martial law) he had sentence to be drawn, hanged, and quartered, which was executed accordingly. And this appeareth in the book of Griffith, Attorney-General, by an extract out of the book of Hobart, Attorney-General to King H. VII.

4. Now are we to speak of legal ligeance, which in our books, viz., 7 E. II. tit. Avowry, 211, 4 E. III. fol. 42, 13 E. III. tit. Avowry, 120, &c., is called suit royal, because that the ligeance of the subject is only due unto the King. This oath of ligeance appeareth in Britton, who wrote *in anno* 5 E. I. cap. 29 (and is yet commonly in use to this day in every leet), and in our books; the effect whereof is: "You shall swear that, from this day forward, you shall be true and faithful to our Sovereign Lord King James and his heirs, and truth and faith shall bear of life and member and terrene honour; and you shall neither know nor

hear of any ill or damage intended unto him that you shall not defend. So help you Almighty God." The substance and effect hereof is, as hath been said, due by the law of nature, *ex institutione naturæ*, as hereafter shall appear: the form and addition of the oath is, *ex provisione hominis*. In this oath of ligeance five things were observed: 1. That for the time it is indefinite, and without limit, "from this day forward." Secondly, two excellent qualities are required; that is, to be "true and faithful." 3. To whom, "to our Sovereign Lord the King and his heirs" (and albeit Britton doth say, to the K. of Eng. that is spoken *proper excellentium*, to design the person, and not to confine the ligeance; for a subject doth not swear his ligeance to the King, only as King of England, and not to him as King of Scotland or of Ireland, &c., but generally to the King). 4. In what manner: "and faith and troth shall bear, &c., of life and member;" that is, until the letting out of the last drop of our dearest heart's blood. 5. Where and in what places ought these things to be done, in all places whatsoever, for "you shall neither know nor hear of any ill or damage, &c." that you shall not defend, &c., so as natural ligeance is not circumscribed within any place. It is holden 12 H. VII. 18 b, that he that is sworn in the leet is sworn to the King for his ligeance,— that is, to be true and faithful to the King; and if he be once sworn for his ligeance, he shall not be sworn again during his life. And all letters patent of denization be, that the patentee shall behave himself *tanquam verus et fidelis ligeus domini Regis*. And this oath of ligeance at the torn and leet was first instituted by King Arthur; for so I read, "Inter leges Sancti Edwardi Regis ante conquestum, 3 cap. 35. Et quod omnes principes et comites, proceres, milites et liberi homines debent jurare, &c., in Folkemote, et similiter omnes proceres regni, et milites et liberi homines universi totius regni Britann' facere debent in pleno Folkemote fidelitatem domino Regi, &c. Hanc legem invenit Arthurus qui quondam fuit inclytissimus Rex Britonum, &c., hujus legis authoritate expulit Arthurus Rex Saracenos et inimicos a regno, &c., et hujus legis authoritate Etheldredus Rex uno et eodem die per universum regnum Danos occidit. *Vide* Lambert inter leges Regis Edwardi, &c. fol. 135 *et* 136." By this it appeareth when and from whom this legal ligeance had his first institution within this realm. *Ligeantia*, in the case in question, is meant and intended of the

first kind of ligeance; that is, of ligeance natural, absolute, &c., due by nature and birthright. But if the plaintiff's father be made a denizen, and purchase lands in England to him and his heirs, and die seised, this land shall never descend to the plaintiff, for that the King by his letters patent may make a denizen, but cannot naturalise him to all purposes, as an Act of Parliament may do; neither can letters patent make any inheritable in this case, that by the common law cannot inherit. And herewith agreeth 36 Hen. VI. Tit. Denizen Br. 9.

Homage in our book is twofold; that is to say, *Homagium ligeum;* and that is as much as ligeance, of which Bracton speaketh, l. 2, c. 35, f 79. *Soli Regi debet' sine dominio seu servitio,* and there is *Homagium feodale* which hath his original by tenure. In Fitz. Nat. Brev. 269, there is a writ for respiting of this later homage (which is due *ratione feodi sive tenuræ: sciatis quod respectuamus homagium nobis de terr' et tenementis quæ tenenter de nobis in capite debit'.* But *Homagium ligeum — i. e. ligeantia —* is inherent and inseparable, and cannot be respited.

3. Now are we come to (and almost past) the consideration of this circumstance, where natural ligeance should be due: for by that which hath been said, it appeareth, that ligeance, and faith and truth, which are her members and parts, are qualities of the mind and soul of man, and cannot be circumscribed within the predicament of *ubi,* for that were to confound predicaments, and to go about to drive (an absurd and impossible thing) the predicament of quality into the predicament of *ubi. Non respondetur ad hanc quæstionem, ubi est?* to say, *Verus et fidelis subditus est; sed ad hanc quæstionem, qualis est? Recte et apte respondetur, verus et fidelis ligeus, &c., est.* But yet for the greater illustration of the matter, the point was handled by itself, and that ligeance of the subject was of as great an extent and latitude as the royal power and protection of the King, *et è converso.* It appeareth by the Stat. of 11 Hen. VII. cap. 1, and 2 Edw. VI. cap. 2, that the subjects of England are bound by their ligeance to go with the King, &c., in his wars, as well within the realm, &c., as without. And therefore we daily see, that when either Ireland, or any other of his Majesty's dominions, be infested with invasion or insurrection, the King of England sendeth his subjects out of England, and his subjects out of Scotland, also into Ireland, for the withstanding or suppressing of the same, to the end his rebels

may feel the swords of either nation. And so may his subjects of Guernsey, Jersey, Isle of Man, &c., be commanded to make their swords good against either rebel or enemy, as occasion shall be offered; whereas if natural ligeance of the subjects of England should be local, — that is, confined within the realm of England or Scotland, &c , – then were not they bound to go out of the continent of the realm of England or Scotland, &c And the opinion of Thirninge in 7 Hen. IV. Tit. Protect', 100, is thus to be understood, that an English subject is not compellable to go out of the realm without wages, according to the Statutes of 1 Edw. III. c. 7, 18 Edw. III. c. 8, 18 Hen. VI. c. 19, &c., 7 Hen. VII c 1, 3 Hen. VIII. c. 5, &c. *In ann.* 25 Edw. I., Bigot, Earl of Norfolk and Suffolk, and Earl Marshal of England, and Bohun, Earl of Hereford and High Constable of England, did exhibit a petition to the King in French (which I have seen anciently recorded) on the behalf of the Commons of England, concerning how and in what sort they were to be employed in his Majesty's wars out of the realm of England; and the record saith that, *post multas et varias altercationes*, it was resolved they ought to go but in such manner and form as after was declared by the said Statutes, which seem to be but declarative of the common law. And this doth plentifully and manifestly appear in our books, being truly and rightly understood. In 3 Hen. VI. Tit. Protection, 2, one had the benefit of a protection, for that he was sent into the King's wars *in comitiva* of the Protector; and it appeareth by the record, and by the chronicles also, that this employment was into France; the greatest part thereof then being under the King's actual obedience, so as the subjects of England were employed into France for the defence and safety thereof: in which case it was observed, that seeing the Protector, who was *Prorex*, went, the same was adjudged a voyage royal, 8 Hen. VI. fol. 16 b, the Lord Talbot went with a company of Englishmen into France, then also being for the greatest part under the actual obedience of the King, who had the benefit of their protections allowed unto them. And here were observed the words of the writ in the Register, fol. 88, where it appeareth that men were employed in the King's wars out of the realm, *per præceptum nostrum*, and the usual words of the writ of protection be *in obsequio nostro*. 32 Hen. VI. fol. 4 a, it appeareth that Englishmen were pressed into Guyienne, 44 Edw. III. 12 a, into

Gascoyne with the Duke of Lancaster, 17 Hen. VI. Tit. Protection, into Gascoyne with the Earl of Huntington, steward of Guienne, 11 and 12 Hen. IV. 7, into Ireland, and out of this realm with the Duke of Gloucester and the Lord Knolles: *vide* 19 Hen. VI. 35 b. And it appeareth, in 19 Edw. II. Tit. Avowry, 224, 26 Ass. 66, 7 Hen. IV. 19, &c., that there was *forinsecum servitium*, foreign service, which Bracton, fol. 36, calleth *regale servitium;* and in Fitz. N. B. 28, that the King may send men to serve him in his wars beyond the sea. But thus much (if it be not in so plain a case too much) shall suffice for this point for the King's power, to command the service of his subjects in his wars out of the realm, whereupon it was concluded that the ligeance of a natural-born subject was not local, and confined only to England. Now let us see what the law saith in time of peace, concerning the King's protection and power of command, as well without the realm as within, that his subjects in all places may be protected from violence, and that justice may equally be administered to all his subjects.

In the Register, fol. 25 b: "Rex universis et singulis admirall', castellan', custodibus castrorum, villar', et aliorum fortalitiorum præpositis, vicecom' majoribus, custumariis, custodib' portuum, et alior' locor' maritimor' ballivis, ministr', et aliis fidel' suis, tam in transmarinis quam in cismarinis partib' ad quos, &c. salutem. Sciatis, quod suscepimus in protectionem et defension' nostram, necnon ad salvam et securam gardiam nostram W. veniendo in regnum nostrum Angl', et potestatem nostram, tam per terram quam per mare cum uno valetto suo, ac res ac bona sua quæcunque ad tractand' cum dilecto nostro et fideli L. pro redemptione prisonarii ipsius L. infra regnum et potestatem nostram præd' per sex menses morando et exinde ad propria redeundo. Et ideo, &c. quod ipsum W. cum valetto, rebus et bonis suis præd' veniendo in regn' et potestat' nostram præd' tam per terr' quam per mare ibid' ut prædict' est ex causâ antedictâ morando, et exinde ad propria redeundo, manuteneatis, protegatis, et defendatis; non inferentes, &c. seu gravamen. Et si quid eis forisfactum, &c. reformari faciatis. In cujus, &c. per sex menses duratur'." T., &c. In which writ three things are to be observed: 1. That the King hath *fidem et fideles in partib' transmarinis;* 2. That he hath *protection' in partib' transmarinis;* 3. That he hath *potestatem in partibus transmarinis.* In

the Register, fo. 26: "Rex universis et singulis admirallis, castellanis, custodiibus castrorum, villarum, et aliorum fortaliitiorum præpositis, vicecom' majoribus, custumariis, custodib' portuum, et alior' locor' maritimorum ballivis, ministris, et aliis fidelibus suis, tam in transmarinis quam in cismarinis partibus ad quos, &c. salutem. Sciatis quod suscepimus in protectionem et defensionem nostram, necnon in salvum et securum conductum nostr' I. valettum P. et L. Burgensium de Lyons obsidum nostrorum, qui de licentiâ nostrâ ad partes transmarinas profecturus est, pro finantia magistrorum suorum prædict' obtinenda vel deferenda, eundo ad partes prædictas ibidem morando, et exinde in Angl' redeundo. Et ideo vobis mandamus, quod eidem I. eundo ad partes præd' ibidem morando, et exinde in Angl' redeundo, ut præd' est, in personâ, bonis, aut rebus suis, non inferatis, seu quantum in vobis est ab aliis inferri permittatis injuriam, molestiam, &c. aut gravamen. Sed eum potius salvum et securum conductum, cum per loca passus, seu districtus vestros transierit, et super hoc requisiti fueritis, suis sumptibus habere faciatis. Et si quid eis forisfactum fuerit, &c. reformari faciatis. In cujus, &c. per tres ann' durat' T., &c." And certainly this was when Lyons in France (bordering upon Burgundy, an ancient friend to England) was under the actual obedience of King Henry VI. For the King commanded *fidelibus suis*, his faithful magistrates, there, that if any injury were there done, it should be by them reformed and redressed, and that they should protect the party in his person and goods in peace. In the Register, fol. 26, two other writs: "Rex omnibus seneschallis, majoribus, juratis, paribus præpositis, ballivis et fidelibus suis in ducatu Aquitaniæ ad quos, &c. salutem. Quia dilecti nobis T. et A. cives civitat' Burdegal' coram nobis in Cancellar' nost' Angl' et Aquitan' jura sua prosequentes, et metuentes ex verisimilibus conjecturis per quosdam sibi comminantes tam in corpore quam in rebus suis, sibi posse grave damnum inferri, supplicaverunt nobis sibi de protectione regia providere: nos volentes dictos T. et A. ab oppressionibus indebitis præservare, suscepimus ipsos T. et A. res ac justas possessiones et bona sua quæcunque in protectionem et salvam gardiam nostram specialem. Et vobis et cuilibet vestrum injungimus et mandamus, quod ipsos T. et A. familias, res ac bona sua quæcunque a violentiis et gravaminibus indebitis defendatis, et ipsos in justis possessionibus suis manu-

teneatis. Et si quid in præjudicium hujus protectionis et salvæ gardiæ nost' attentatum inveneritis, ad statum debitum reducatis. Et ne quis se possit per ignorantiam excusare præsentem protectionem et salvam gardiam nostram faciatis in locis de quibus requisiti fueritis infra district' vestrum publice intimari, inhibentes omnibus et singulis sub pœnis gravibus, ne dictis A. et T. seu famulis suis in personis seu rebus suis, injuriam molestiam, damnum aliquod inferant seu gravamen: et penocellas nostras in locis et bonis ipsorum T. et A. in signum protectionis et sal' gard' memorat', cum super hoc eo quisiti fueritis, apponatis. In cujus, &c. dat' in palatio nostro Westm' sub magni sigilli testimonio, sexto die Augusti anno 44 Edw. III. — Rex universis et singulis seneschallis, constabular' castellanis, præposit', minist', et omnib' ballivis et fidelibus suis in dominio nostro Aquitan' constitutis ad quos, &c. salut'. Volentes G. et R. uxor ejus favore prosequi gratiose, ipsos G. et R. homines et familias suas ac justas possessiones, et bona sua quæcunque, suscepimus in protectionem et defensionem nostram, necnon in salvam gardiam nostram specialem. Et ideo vobis et cuilibet vestrum injungimus et mandamus, quod ipsos G. et R. eorum homines, familias suas, ac justas possessiones et bona sua quæcunque manuteneatis, protegatis, et defendatis: non inferentes eis seu quantum in vobis est ab aliis inferri permittentes, injuriam, molestiam, damnum, violentiam, impedimentum aliquod seu gravamen. Et si quid eis forisfact', injuriatum vel contra eos indebite attentatum fuerit, id eis sine dilatione corrigi, et ad statum debitum reduci faciatis, prout ad vos et quemlibet vestrum noveritis pertinere: penocellas super domibus suis in signum præsentis salvæ gardiæ nostræ (prout moris erit) facientes. In cujus, &c. per unum annum duratur'. T. &c." By all which it is manifest that the protection and government of the King is general over all his dominions and kingdoms, as well in time of peace by justice as in time of war by the sword, and that all be at his command and under his obedience. Now, seeing power and protection draweth ligeance, it followeth that seeing the King's power, command, and protection extendeth out of England, that ligeance cannot be local, or confined within the bounds thereof. He that is abjured the realm, *Qui abjurat regnum amittit regnum, sed non regem, amittit patriam, sed non patrem patriæ:* for notwithstanding the abjuration, he oweth the King his ligeance, and he remaineth

within the King's protection; for the King may pardon and restore him to his country again. So, seeing that ligeance is a quality of the mind, and not confined within any place, it followeth that the plea that doth confine the ligeance of the plaintiff to the kingdom of Scotland, *infra ligeantiam regis regni sui Scotiæ, et extra ligeantiam regis regni sui Angliæ*, whereby the defendants do make one local ligeance for the natural subjects of England, and another local ligeance for the natural subjects of Scotland, is utterly insufficient, and against the nature and quality of natural ligeance, as often it hath been said. And Coke, Chief Justice of the Court of Common Pleas, cited a ruled case out of Hingham's reports, *tempore* Edw. I., which in his argument he shewed in Court written in parchment, in an ancient hand of that time. Constance de N. brought a writ of Ayel against Roger de Cobledike and others, named in the writ, and counted that from the seisin of Roger her grandfather it descended to Gilbert his son, and from Gilbert to Constance, as daughter and heir. Sutton dit, "Sir, el ne doit este responde, pur ceo qŭe el est François et nient de la ligeance ne a la foy Denglitterre, et demand judgement si el doit action aver:" that is, she is not to be answered, for that she is a French woman, and not of the ligeance, nor of the faith of England, and demanded judgment, if she this action ought to have. Bereford (then Chief Justice of the Court of Common Pleas) by the rule of the Court disalloweth the plea, for that it was too short, in that it referred ligeance and faith to England, and not to the King; and thereupon Sutton saith as followeth: "Sir, nous voilomus averre que el ne est my de la ligeance Denglitterre, ne a la foy le Roy et demand jugement, et si vous agardes que el doit este responde, nous dirromus assets:" that is, "Sir, we will aver, that she is not of the ligeance of England, nor of the faith of the King, and demand judgment," &c.; which latter words of the plea (nor of the faith of the King) referred faith to the King indefinitely and generally, and restrained not the same to England, and thereupon the plea was allowed for good, according to the rule of the Court: for the book saith, that afterward the plaintiff desired leave to depart from her writ. The rule of that case of Cobledike did (as Coke, Chief Justice, said) over-rule this case of Calvin, in the very point now in question; for that the plea in this case doth not refer faith or ligeance to the King

indefinitely and generally, but limiteth and restraineth faith and ligeance to the kingdom: *Extra ligeantiam Regis regni sui Angliæ*, out of the ligeance of the King of his kingdom of England; which afterwards the Lord Chancellor and the Chief Justice of the King's Bench, having copies of the said ancient report, affirmed in their arguments. So, as this point was thus concluded, *Quod ligeantia naturalis nullis claustris coercetur, nullis metis refrænatur, nullis finibus premitur.*

4 and 5. By that which hath been said, it appeareth that this ligeance is due only to the King; so as therein the question is not now, *cui*, *sed quomodo debetur*. It is true that the King hath two capacities in him: one a natural body, being descended of the blood royal of the realm; and this body is of the creation of Almighty God, and is subject to death, infirmity, and such like: the other is a politic body or capacity, so called, because it is framed by the policy of man (and in 21 Edw. IV. 39 b, is called a mysticall body); and in this capacity the King is esteemed to be immortal, invisible, not subject to death, infirmity, infancy, nonage, &c. Pl. Com. in the case of the Lord Barkley, 238, and in the case of the Duchy, 213, 6 Edw. III. 291, and 26 Ass. pl. 54. Now, seeing the King hath but one person and several capacities, and one politic capacity for the realm of England and another for the realm of Scotland, it is necessary to be considered to which capacity ligeance is due. And it was resolved that it was due to the natural person of the King (which is ever accompanied with the politic capacity, and the politic capacity as it were appropriated to the natural capacity); and it is not due to the politic capacity only, — that is, to his crown or kingdom distinct from his natural capacity, and that for divers reasons: First, every subject (as it hath been affirmed by those that argued against the plaintiff) is presumed by law to be sworn to the King, which is to his natural person; and likewise the King is sworn to his subjects (as it appeareth in Bracton, lib. 3, De Actionibus, cap. 9, fol. 107), which oath he taketh in his natural person: for the politic capacity is invisible and immortal; nay, the politic body hath no soul, for it is framed by the policy of man. 2. In all indictments of treason, when any do intend or compass *mortem et destructionem domini Regis* (which must needs be understood of his natural body, for his politic body is immortal, and not subject to death), the

indictment concludeth, *contra ligeantiæ suæ debitum; ergo*, the ligeance is due to the natural body. *Vide* Fit. Justice of Peace, 53, and Pl. Com. 384, in the Earl of Leicester's case. 3. It is true that the King *in genere* dieth not; but, no question, *in individuo* he dieth: as for example, Hen. VIII., Edw. VI., &c., and Queen Eliz. died, otherwise you should have many Kings at once. In 2 and 3 Ph. and Mar. Dyer, 128, one Constable dispersed divers bills in the streets in the night, in which it was written that King Edw. VI. was alive, and in France, &c.; and in Coleman Street in London, he pointed to a young man, and said that he was King Edward the Sixth. And this, being spoken *de individuo* (and accompanied with other circumstances), was resolved to be high treason; for the which Constable was attainted and executed. 4. A body politic (being invisible) can as a body politic neither make or take homage. *Vide* 33 Hen. VIII. Tit. Fealty, Brook, 15. 5. *In fide*, in faith or ligeance, nothing ought to be feigned, but ought to be *ex fide non ficta*. 6. The King holdeth the kingdom of England by birthright inherent, by descent from the blood royal, whereupon succession doth attend; and therefore it is usually said, to the King, his heirs, and successors, wherein heirs is first named, and successors is attendant upon heirs. And yet in our ancient books, succession and successor are taken for hereditance and heirs. Bract. lib. 2. de acquirendo rerum dominio, c. 29. "Et sciend' est quod hæreditas est successio in universum jus quod defunctus antecessor habuit, ex causâ quacunque acquisitionis vel successionis, et alibi affinitatis jure nulla successio permittitur." But the title is by descent; by Queen Elizabeth's death the crown and kingdom of England descended to his Majesty, and he was fully and absolutely thereby King, without any essential ceremony or act to be done *ex post facto*: for coronation is but a royal ornament and solemnization of the royal descent, but no part of the title. In the first year of his Majesty's reign, before his Majesty's coronation, Watson and Clerke, Seminary Priests, and others, were of opinion that his Majesty was no complete and absolute King before his coronation, but that coronation did add a confirmation and perfection to the descent; and therefore (observe their damnable and damned consequent) that they by strength and power might before his coronation take him and his royal issue into their possession, keep him prisoner in the Tower, remove such

counsellors and great officers as pleased them, and constitute others in their places, &c. And that these and other (acts) of like nature could not be treason against his Majesty, before he were a crowned King. But it was clearly resolved by all the Judges of England, that presently by the descent his Majesty was completely and absolutely King, without any essential ceremony or act to be done *ex post facto*, and that coronation was but a royal ornament, and outward solemnization of the descent. And this appeareth evidently by infinite precedents and book cases, as (taking one example in a case so clear for all) King Henry VI. was not crowned until the 8th year of his reign, and yet divers men before his coronation were attainted of treason, of felony, &c., and he was as absolute and complete a King, both for matters of judicature, as for grants, &c., before his coronation, as he was after, as it appeareth in the Reports of 1, 2, 3, 4, 5, 6, and 7 years of the same King And the like might be produced for many other Kings of this realm, which for brevity in a case so clear I omit. But which it manifestly appeareth, that by the laws of England there can be no *inter regnum* within the same. If the King be seised of land by a defeasible title, and dieth seised, this descent shall toll the entry of him that right hath, as it appeareth by 9 Edw. IV. 51 But if the next King had it by succession, that should take away no entry, as it appeareth by Littleton, fol. 97 If a disseisor of an infant convey the land to the King who dieth seised, this descent taketh away the entry of the infant, as it is said in 34 Hen. VI. fol. 34, 45, lib. Ass. pl. 6, Plow. Com. 234, where the case was: King Henry III. gave a manor to his brother the Earl of Cornwall in tail (at what time the same was a fee-simple conditional). King Henry III died, the Earl before the statute of *Donis conditional'* (having no issue) by deed exchanged the manor with warranty for other lands in fee, and died without issue, and the warranty and assets descended upon his nephew King Edward I.; and it was adjudged that this warranty and assets, which descended upon the natural person of the King, barred him of the possibility of reverter. In the reign of Edward II the Spencers, the father and the son, to cover the treason hatched in their hearts, invented this damnable and damned opinion, that homage and oath of ligeance was more by reason of the King's crown (that is, of his politic capacity) than by reason of the person of the King,

upon which opinion they inferred execrable and detestable consequences: 1. If the King do not demean himself by reason in the right of his crown, his lieges be bound by oath to remove the King; 2. Seeing that the King could not be reformed by suit of law, that ought to be done by the sword; 3. That his lieges be bound to govern in aid of him, and in default of him. All which were condemned by two Parliaments, one in the reign of Edward II., called *Exilium Hugonis le Spencer*, and the other in Ann. 1 Edw. III. c. 1. Bracton, lib. 2, de acquirendo rerum dominio, c. 24, f. 55, saith thus: "Est enim corona Regis facere justitiam et judic', et tenere pacem, et sine quibus corona consistere non potest nec tenere; hujusmodi autem jura sive jurisdictiones ad personas vel tenementa transferri non poterunt, nec a privatâ personâ possideri, nec usus nec executio juris, nisi hoc datum fuit ei desuper, sicut jurisdictio delegata delegari non poterit quin ordinaria remaneat cum ipso Rege. Et lib. 3, De Actionibus, cap. 9, fol. 107: Separare autem debet Rex, cum sit Dei vicarius in terrâ, jus ab injuriâ, æquum ab iniquo, ut omnes sibi subjecti honeste vivant, et quod nullus alium lædat, et quod unicuique quod suum fuerit rectâ contributione reddatur." In respect whereof one saith that "corona est quasi cor ornans, cujus ornamenta sunt misericordia et justicia." And therefore a King's crown is an hieroglyphic of the laws, where justice, &c. is administered; for so saith P. Val. 1, 41, p. 400: "Coronam dicimus legis judicium esse, propterea quod certis est vinculis complicata, quibus vita nostra veluti religata coercetur." Therefore, if you take that which is signified by the crown, that is, to do justice and judgment, to maintain the peace of the land, &c., to separate right from wrong, and the good from the ill: that is to be understood of that capacity of the King, that *in rei veritate* hath capacity, and is adorned and endued with endowments as well of the soul as of the body, and thereby able to do justice and judgment according to right and equity, and to maintain the peace, &c., and to find out and discern the truth, and not of the invisible and immortal capacity that hath no such endowments; for of itself it hath neither soul nor body. And where divers books and Acts of Parliament speak of the ligeance of England,—as 31 Edw. III. Tit. Cosinage, 5, 42 Edw. III. 2; 13 Edw. III. Tit. Brief, 677; 25 Edw. III. Stat. de natis ultra mare,—all these and other speaking briefly in a vulgar manner (for *loquendum ut*

vulgus), and not pleading (for *sentiendum ut docti*), are to be understood of the ligeance due by the people of England to the King; for no man will affirm that England itself, taking it for the continent thereof, doth owe any ligeance or faith, or that any faith or ligeance should be due to it: but it manifestly appeareth that the ligeance or faith of the subject is *proprium quarto modo* to the King, *omni soli et semper*. And oftentimes in the reports of our book cases, and in Acts of Parliament also, the crown or kingdom is taken for the King himself, as in Fitzh. Natur. Brev. fol. 5. Tenure *in capite* is a tenure of the crown, and is a seignory in gross, that is, of the person of the King; and so is 30 Hen. VIII. Dyer, fol. 44, 45. A tenure in chief, as of the crown, is merely the tenure of the person of the King; and therewith agreeth 28 Hen. VIII. Tit. Tenure, 65, Br. The Statute of 4 Hen. V. cap. *ultimo*, gave Priors aliens, which were conventual to the King and his heirs, by which gift, saith 34 Hen. VI. 34, the same were annexed to the crown. And in the said Act of 25 Edw. III., whereas it is said in the beginning, within the ligeance of England, it is twice afterwards said in the said Act within the ligeance of the King, and yet all one ligeance due to the King. So in 42 Edw. III. fol. 2, where it is first said the ligeance of England, it is afterwards in the same case called the ligeance of the King; wherein, though they used several manner and phrases of speech, yet they intended one and the same ligeance. So in our usual commission of assise, of gaol delivery, of oyer and terminer, of the peace, &c., power is given to execute justice, *secundum legem et consuetudinem regni nostri Angliæ*; and yet Littleton, lib. 2, in his chapter of Villenage, fol. 43, in disabling of a man that is attainted in a præmunire saith that the same is the King's law; and so doth the Register, in the writ of *Ad jura regia*, style the same.

The reasons and causes wherefore by the policy of the law the King is a body politic, are three: viz. 1. *Causa majestatis*; 2. *causa necessitatis*; and 3. *causa utilitatis*. First, *causa majestatis*, the King cannot give or take but by matter of record for the dignity of his person. Secondly, *causa necessitatis*, as to avoid the attainder of him that hath right to the crown, as it appeareth in 1 Hen. VII. 4, lest in the *interim* there should be an *interregnum*, which the law will not suffer. Also by force of this politic capacity, though the King be within age, yet may he

make leases and other grants, and the same shall bind him; otherwise his revenue should decay, and the King should not be able to reward service, &c. Lastly, *causa utilitatis*, as when lands and possessions descend from his collateral ancestors, being subjects, as from the Earl of March, &c. to the King, now is the King seised of the same *in jure coronæ*, in his politic capacity; for which cause the same shall go with the crown; and therefore, albeit Queen Elizabeth was of the half blood to Queen Mary, yet she in her body politic enjoyed all those fee-simple lands, as by the law she ought, and no collateral cousin of the whole blood to Queen Mary ought to have the same. And these are the causes wherefore by the policy of the law the King is made a body politic: so as for these special purposes the law makes him a body politic, immortal and invisible, whereunto our ligeance cannot appertain. But to conclude this point, our ligeance is to our natural liege Sovereign, descended of the blood royal of the Kings of this realm. And thus much of this general part, *De ligeantiâ*.

Now followeth the second part, *De legibus*, wherein these parts were considered: first, that the ligeance or faith of the subject is due unto the King by the law of nature; secondly, that the law of nature is part of the law of England; thirdly, that the law of nature was before any judicial or municipal law; fourthly, that the law of nature is immutable.

The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is *lex æterna*, the moral law, called also the law of nature. And by this law, written with the finger of God in the heart of man, were the people of God a long time governed, before the law was written by Moses, who was the first reporter or writer of law in the world. The Apostle in the Second Chapter to the Romans saith, "Cum enim gentes quæ legem non habent naturaliter ea quæ legis sunt faciunt." And this is within the command of that moral law, *honora patrem*, which doubtless doth extend to him that is *pater patriæ*. And that Apostle saith, "Omnis anima potestatibus sublimioribus subdita sit." And these be the words of the Great Divine, "Hoc Deus in Sacris Scripturis jubet, hoc lex naturæ dictari, ut quilibet subditus obediat superio." And Aristotle (Nature's Secretary, lib. 5, Æthic.) saith that *jus naturale est, quod apud omnes homines eandem habet potentiam*. And herewith doth agree

Bracton, lib. 1, cap. 5, and Fortescue, cap. 8, 12, 13, and 16, Doctor and Student, cap. 2 and 4. And the reason hereof is, for that God and nature is one to all, and therefore the law of God and nature is one to all. By this law of nature is the faith, ligeance, and obedience of the subject due to his Sovereign or superior. And Aristotle (1. *Politicorum*) proveth that to command and to obey is of nature, and that magistracy is of nature: for whatsoever is necessary and profitable for the preservation of the society of man is due by the law of nature: but magistracy and government are necessary and profitable for the preservation of the society of man; therefore magistracy and government are of nature. And herewith accordeth Tully, lib. 3, "De legibus, sine imperio nec domus ulla, nec civitas, nec gens, nec hominum universum genus stare, nec ipse denique mundus potest." This law of nature, which indeed is the eternal law of the Creator, infused into the heart of the creature at the time of his creation, was two thousand years before any laws written, and before any judicial or municipal laws. And certain it is that before judicial or municipal laws were made, Kings did decide causes according to natural equity, and were not tied to any rule or formality of law, but did *dare jura*. And this appeareth by Fortescue, cap. 12 and 13, and by Virgil, that philosophical poet, 7th Æneid,—

> "Hoc Priami gestamen erat, cum jura vocatis
> More daret populis."

And 5th Æneid,—

> "——— Gaudet regno Trojanus Acestes,
> Indicitque forum et patribus dat jura vocatis."

And Pomponius, lib. 2, cap. De origine juris, affirmeth that in Tarquinius Superbus's time there was no civil law written, and that Papirius reduced certain observations into writing, which was called Jus Civile Papirianum. Now, the reason wherefore laws were made and published, appeareth in Fortescue, cap. 13, and in Tully, lib. 2: "Officiorum: at cum jus æquabile ab uno viro homines non consequerentur, inventi sunt leges." Now, it appeareth by demonstrative reason, that ligeance, faith, and obedience of the subject to the Sovereign, was before any municipal or judicial laws: 1. For that government and subjection were long before any municipal or judicial laws; 2. For

that it had been in vain to have prescribed laws to any but to such as owed obedience, faith, and ligeance before, in respect whereof they were bound to obey and observe them: *Frustra enim feruntur leges nisi subditis et obedientibus.* Seeing then that faith, obedience, and ligeance are due by the law of nature, it followeth that the same cannot be changed or taken away; for albeit judicial or municipal laws have inflicted and imposed in several places, or at several times, divers and several punishments and penalties, for breach or not observance of the law of nature (for that law only consisted in commanding or prohibiting, without any certain punishment or penalty), yet the very law of nature itself never was nor could be altered or changed. And therefore it is certainly true that *jura naturalia sunt immutabilia.* And herewith agreeth Bracton, lib. 1, cap. 5, and Doctor and Student, cap. 5 and 6. And this appeareth plainly and plentifully in our books.

If a man hath a ward by reason of a seigniory, and is outlawed, he forfeiteth the wardship to the King: but if a man hath the wardship of his own son or daughter, which is his heir apparent, and is outlawed, he doth not forfeit this wardship; for nature hath annexed it to the person of the father, as it appeareth in 33 Hen. VI. 55 b. "Et bonus Rex nihil a bono patre differt, et patria dicitur a patre, quia habet communem patrem, qui est pater patriæ." In the same manner, *maris et fœminæ conjunctio est de jure naturæ*, as Bracton, in the same book and chapter, and St. Germin in his book of the "Doctor and Student," cap. 5, do hold. Now, if he that is attainted of treason or felony, be slain by one that hath no authority, or executed by him that hath authority, but pursueth not his warrant, in this case his eldest son can have no appeal, for he must bring his appeal as heir, which being *ex provisione hominis*, he loseth it by the attainder of his father; but his wife (if any he have) shall have an appeal, because she is to have her appeal as wife, which she remaineth notwithstanding the attainder, because *maris et fœminæ conjunctio* is *de jure naturæ*, and therefore (it being to be intended of true and right matrimony) is indissoluble; and this is proved by the book in 33 Hen. VI. 57. So if there be mother and daughter, and the daughter is attainted of felony, now cannot she be heir to her mother for the cause aforesaid; yet after her attainder, if she kill her mother, this is parricide and petit trea-

son; for yet she remaineth her daughter, for that is of nature, and herewith agreeth 21 Edw. III. 17 b. If a man be attainted of felony or treason, he hath lost the King's legal protection, for he is thereby utterly disabled to sue any action real or personal (which is a greater disability than an alien in league hath), and yet such a person so attainted hath not lost that protection which by the law of nature is given to the King, for that is *indelebilis et immutabilis*, and therefore the King may protect and pardon him, and if any man kill him without warrant, he shall be punished by the law as a manslayer, and thereunto accordeth 4 Edw. IV. and 35 Hen. VI. 57, 2 Ass. pl. 3. By the Statute of 25 Edw. III. cap. 22, a man attainted in a *Præmunire*, is by express words out of the King's protection generally; and yet this extendeth only to legal protection, as it appeareth by Littleton, fol. 43, for the Parliament could not take away that protection which the law of nature giveth unto him; and therefore, notwithstanding that statute, the King may protect and pardon him. And though by that Statute it was farther enacted that it should be done with him as with an enemy, by which words any man might have slain such a person (as it is holden in 24 Hen. VIII. Tit. Coron. Br. 197) until the Statute made *anno* 5 Eliz. cap. 1, yet the King might protect and pardon him. A man outlawed is out of the benefit of the municipal law; for so saith Fitz. N. B. 161 a, "utlagatus est quasi extra legem positus:" and Bract. 1, 3, tract. 2, c. 11, saith that "caput geret lupinum;" and yet is he not out either of his natural ligeance or of the King's natural protection; for neither of them is tied to municipal laws, but is due by the law of nature, which (as hath been said) was long before any judicial or municipal laws. And therefore if a man were outlawed for felony, yet was he within the King's natural protection, for no man but the Sheriff could execute him, as it is adjudged in 2 lib. Ass. pl. 3. Every subject is by his natural ligeance bound to obey and serve his Sovereign, &c. It is enacted by the Parliament of 23 Hen. VI., that no man should serve the King as Sheriff of any county above one year, and that notwithstanding any clause of *non obstante* to the contrary, that is to say, notwithstanding that the King should expressly dispense with the said Statute: howbeit it is agreed in 2 Hen. VII. that against the express purview of that Act, the King may by a special *non obstante* dispense with that Act, for that the Act could

not bar the King of the service of his subject, which the law of nature did give unto him. By these and many other cases that might be cited out of our books, it appeareth how plentiful the authorities of our laws be in this matter. Wherefore, to conclude this point (and to exclude all that hath been or could be objected against it), if the obedience and ligeance of the subject to his Sovereign be due by the law of nature, if that law be parcel of the laws as well of England as of all other nations, and is immutable, and that *Postnati* and we of England are united by birthright, in obedience and ligeance (which is the true cause of natural subjection) by the law of nature, it followeth that Calvin the plaintiff being born under one ligeance to one King, cannot be an alien born; and there is great reason that the law of nature should direct this case, wherein five natural operations are remarkable: first, the King hath the crown of England by birthright, being naturally procreated of the blood royal of this realm; secondly, Calvin the plaintiff naturalised by procreation and birthright, since the descent of the crown of England; thirdly, ligeance and obedience of the subject to the Sovereign, due by the law of nature; fourthly, protection and government due by the law of nature; fifthly, this case, in the opinion of divers, was more doubtful in the beginning, but the further it proceeded, the clearer and stronger it grew; and therefore the doubt grew from some violent passion, and not from any reason grounded upon the law of nature, "quia quanto magis violentus motus (qui fit contra naturam) appropinquat ad suum finem, tanto debiliores et tardiores sunt ejus motus; sed naturalis motus, quanto magis appropinquat ad suum finem, tanto fortiores et velociores sunt ejus motus." Hereby it appeareth how weak the objection grounded upon the rule of *quando duo jura concurrunt in unâ personâ*, &c. is: for that rule holdeth not in personal things, that is, when two persons are necessarily and inevitably required by law, as in the case of an alien born there is; and therefore no man will say, that now the King of England can make war or league with the King of Scotland, *et sic de cæteris;* and so in case of an alien born, you must of necessity have two several ligeances to two several persons. And to conclude this point concerning laws, "non adservatur diversitas regnor' sed regnant', non patriarum, sed patrum patriar', non coronarum, sed coronatorum, non legum municipalium, sed regum majestatum." And there-

fore thus were directly and clearly answered, as well the objections drawn from the severalty of the kingdoms, seeing there is but one head of both, and the *Postnati* and us joined in ligeance to that one head, which is *copula et tanquam oculus* of this case; as also the distinction of the laws, seeing that ligeance of the subjects of both kingdoms is due to their Sovereign by one law, and that is the law of nature.

For the third, it is first to be understood that as the law hath wrought four unions, so the law doth still make four separations. The first union is of both kingdoms under one natural liege Sovereign King, and so acknowledged by the Act of Parliament of recognition. The 2d is an union of ligeance and obedience of the subjects of both kingdoms, due by the law of nature to their Sovereign; and this union doth suffice to rule and overrule the case in question; and this in substance is but a uniting of the hearts of the subjects of both kingdoms one to another, under one head and sovereign. The 3d union is an union of protection of both kingdoms, equally belonging to the subjects of either of them; and therefore the two first arguments or objections drawn from two supposed several ligeances were fallacious, for they did *disjungere conjungenda*. The 4th union and conjunction is of the three lions of England, and that one of Scotland, united and quartered in one escutcheon.

Concerning the separations yet remaining: 1. England and Scotland remain several and distinct kingdoms. 2. They are governed by several judicial or municipal laws. 3. They have several distinct and separate parliaments. 4. Each kingdom hath several nobilities: for albeit a *postnatus* in Scotland, or any of his posterity, be the heir of a nobleman of Scotland, and by his birth is legitimated in England, yet he is none of the peers or nobility of England; for his natural ligeance and obedience, due by the law of nature, maketh him a subject and no alien within England: but that subjection maketh him not noble within England; for that nobility had his original by the King's creation, and not of nature. And this is manifested by express authorities, grounded upon excellent reasons in our books. If a baron, viscount, earl, marquis, or duke of England bring any action, real or personal, and the defendant pleadeth in abatement of the writ that he is no baron, viscount, earl, &c., and thereupon the demandant or plaintiff taketh issue, this issue shall not be tried

by jury, but by the record of Parliament, whether he or his ancestor, whose heir he is, were called to serve there as a peer, and one of the nobility of the realm. And so are our books adjudged in 22 Ass. 24; 48 Edw. III. 30; 35 Hen. VI. 40; 20 Eliz. Dyer, 360. *Vide* in the Sixth Part of my Reports, in the *Countess of Rutland's Case*. So as the man that is not *de jure* a peer, or one of the nobility, to serve in the Upper House of the Parliament of England, is not in the legal proceedings of law accounted noble within England. And therefore if a countee of France or Spain, or any other foreign kingdom, should come into England, he should not here sue, or be sued by the name of countee, &c., for that he is none of the nobles that are members of the Upper House of the Parliament of England; and herewith agree the book-cases of 20 Edw. IV. 6 a, b, and 11 Edw. III. Tit. Bre. 473. Like law it is, and for the same reason, of an earl or baron of Ireland; he is not any peer, or of the nobility of this realm: and herewith agreeth the book in 8 R. 2 Tit. *Proces. pl. ultim.*; where in an action of debt, process of outlawry was awarded against the Earl of Ormond in Ireland; which ought not to have been, if he had been noble here. *Vide* Dyer, 20 Eliz. 360.

But yet there is a diversity in our books worthy of observation; for the highest and lowest dignities are universal: for if a King of a foreign nation come into England, by the leave of the King of this realm (as it ought to be), in this case he shall sue and be sued by the name of a King; and herewith agreeth 11 Edw. III. Tit. Br. 473, where the case was, that Alice, which was the wife of R. de O., brought a writ of dower against John Earl of Richmond, and the writ was *Præcip. Johann' Comiti Richmondiæ custodi terr' et hæredis* of William, the son of R. de O., the tenant pleaded that he is Duke of Britain, not named duke, judgment of the writ? But it is ruled that the writ was good; for that the dukedom of Britain was not within the realm of England. But there it is said that if a man bring a writ against Edward Baliol, and name him not King of Scotland, the writ shall abate for the cause aforesaid. And hereof there is a notable precedent in Fleta, lib. 2, cap. 3, § 9, where, treating of the jurisdiction of the King's Court of Marshalsea, it is said, "Et hæc omnia ex officio suo licite facere poterit (ss. Seneschal' aul' hospitii Regis) non obstante alicujus libertate, etiam in alieno regno dum tamen

reus in hospitio Regis poterit inveniri secundum quod contigit Paris. anno 14 Ed. I. de Engelramo de Nogent capto in hospitio regis Angl' (ipso rege tunc apud Parisiam existente) cum discis argenti furatis recenter super facto, rege Franc' tunc presente, et unde licet curia regis Franc' de præd' latrone per castellanum Paris. petita fuerit, habitis hinc et inde tractatibus in consilio regis Franc', tandem consideratum fuit; quod Rex Angl' illa regia prærogativa, et hospitii sui privilegio uteretur, et gauderet, qui, coram Roberto Fitz-John milite tunc hospitii regis Angl' Seneschallo de latrocinio convictus, per considerationem, ejus cur' fuit suspensus in patibulo sancti Germani de pratis." Which proveth that though the King be in a foreign kingdom, yet he is judged in law a King there. The other part of the said diversity is proved by the book-case in 20 Edw. IV. fol. 6 a, b, where, in a writ of debt brought by Sir J. Douglas, Knight, against Elizabeth Molford, the defendant, demanded judgment of the writ; for that the plaintiff was an earl of Scotland, but not of England; and that our Sovereign Lord the King had granted unto him safe conduct, not named by his name of dignity, judgment of the writ, &c. And there Justice Littleton giveth the rule: The plaintiff (saith he) is an earl in Scotland, but not in England; and if our Sovereign Lord the King grant to a duke of France a safe conduct to merchandise, and enter into his realm, if the duke cometh and bringeth merchandise into this land, and is to sue an action here, he ought not to name himself duke; for he is not a duke in this land, but only in France. And these be the very words of that book-case; out of which I collect three things: First, that the plaintiff was named by the name of a knight, wheresoever he received that degree of dignity. *Vide* 7 Hen. VI. 14 b, accord. 2. That an earl of another nation or kingdom is no earl (to be so named in legal proceedings) within this realm: and herewith agreeth the book of 11 Edw. III., the Earl of Richmond's case before recited. 3. That albeit the King by his letters patent of safe conduct do name him duke, yet that appellation maketh him no duke, to sue or to be sued by that name within England; so as the law in these points (apparent in our books) being observed and rightly understood, it appeareth how causeless their fear was that the adjudging of the plaintiff to be no alien should make a confusion of the nobilities of either kingdom.

No 1. — Calvin's Case.

Now are we in order come to the fourth noun (which is the fourth general part), *alienigena ;* wherein six things did fall into consideration : 1. Who was *alienigena*, an alien born by the laws of England ? 2. How many kinds of aliens born there were ; 3. What incidents belonged to an alien born ; 4. The reason why an alien is not capable of inheritance or freehold within England ; 5. Examples, resolutions, or judgments reported in our books in all successions of ages, proving the plaintiff to be no alien ; 6. Demonstrative conclusions upon the premises, approving the same.

1. An alien is a subject that is born out of the ligeance of the King and under the ligeance of another, and can have no real or personal action for or concerning land ; but in every such action the tenant or defendant may plead that he was born in such a country which is not within ligeance of the King, and demand judgment if he shall be answered. And this is in effect the description which Littleton himself maketh, lib. 2, cap. 14, Villen. fol. 43 : " Alienigena est alienæ gentis seu alienæ ligeantiæ, qui etiam dicitur peregrinus, alienus, exoticus, extraneus, &c. Extraneus est subditus, qui extra terram, i. e. potestatem Regis natus est." And the usual and right pleading of an alien born doth lively and truly describe and express what he is. And therein two things are to be observed : 1. That the most usual and best pleading in this case is both exclusive and inclusive ; viz. *extra ligeantiam domini Regis, &c. et infra ligeantiam alterius Regis*, as it appeareth in 9 Edw. IV. 7 b, Book of Entries, fol. 244, &c., which cannot possibly be pleaded in this case, for two causes : 1. For that one King is Sovereign of both kingdoms ; 2. One ligeance is due by both to one Sovereign ; and in case of an alien there must of necessity be several Kings and several ligeances. Secondly, no pleading was ever *extra regnum* or *extra legem*, which are circumscribed to place, but *extra ligeantiam*, which (as it hath been said) is not local or tied to any place.

It appeareth by Bracton, lib. 3, tract. 2, c. 15, fol. 134, that Canutus the Danish King, having settled himself in this kingdom in peace, kept notwithstanding (for the better continuance thereof) great armies within this realm. The peers and nobles of England, distasting this government by arms and armies, *odimus accipitrem quia semper vivit in armis*, wisely and politi-

cally persuaded the King that they would provide for the safety of him and his people, and yet his armies, carrying with them many inconveniences, should be withdrawn: and therefore offered that they would consent to a law that whosoever should kill an alien and be apprehended, and could not acquit himself, he should be subject to justice: but if the manslayer fled, and could not be taken, then the town where the man was slain should forfeit sixty-six marks unto the King; and if the town were not able to pay it, then the hundred should forfeit and pay the same unto the King's treasure: whereunto the King assented. This law was penned *quicunque occiderit Francigenam*, &c.; not concluding other aliens, but putting *Francigena*, a Frenchman, for example, that others must be like unto him, in owing several ligeance to a several Sovereign, that is, to be *extra ligeantiam Regis Angl'*, and *infra ligeantiam alterius Regis*. And it appears before, out of Bracton and Fleta, that both of them use the same example (in describing of an alien) *ad fidem Regis Franciæ*. And it was holden that except it could be proved that the party slain was an Englishman, that he should be taken for an alien; and this was called Englesherie, *Englesheria*, that is, a proof that the party slain was an Englishman. (Hereupon Canutus presently withdrew his armies, and within a while after lost his crown, and the same was restored to his right owner.) The said law of Englesherie continued until 14 Edw. III. cap. 4, and then the same was by Act of Parliament ousted and abolished. So amongst the laws of William the First (published by Master Lambert, fol. 125), *omnis Francigena* (there put for example, as before is said, to express what manner of person *alienigena* should be): "Qui tempore Edvardi propinqui nostri fuit particeps legum et consuetudinum Anglorum [that is, madé denizen] quod dicunt ad scot et lot persolvat secundum legem Anglorum."

Every man is either *alienigena*, an alien born, or *subditus*, a subject born. Every alien is either a friend that is in league, &c., or an enemy that is in open war, &c. Every alien enemy is either *pro tempore*, temporary for a time, or *perpetuus*, perpetual, or *specialiter permissus*, permitted especially. Every subject is either *natus*, born, or *datus*, given or made: and of these briefly in their order. An alien friend, as at this time, a German, a Frenchman, a Spaniard, &c. (all the kings and princes in Christendom being now in league with our Sovereign: but a Scot,

being a subject, cannot be said to be a friend, nor Scotland to be *solum amici*), may by the common law have, acquire, and get within this realm, by gift, trade, or other lawful means, any treasure, or goods personal whatsoever, as well as an Englishman, and may maintain any action for the same: but lands within this realm, or houses (but for their necessary habitation only) alien friends cannot acquire, or get, nor maintain any action, real or personal, for any land or house, unless the house be for their necessary habitation. For if they should be disabled to acquire and maintain these things, it were in effect to deny unto them trade and traffic, which is the life of every island. But if this alien become an enemy (as all alien friends may), then is he utterly disabled to maintain any action, or get anything within this realm. And this is to be understood of a temporary alien, that being an enemy may be a friend, or becoming a friend may be an enemy. But a perpetual enemy (though there be no wars by fire and sword between them) cannot maintain any action, or get anything within this realm. All infidels are in law *perpetui inimici*, perpetual enemies (for the law presumes not that they will be converted, that being *remota potentia*, a remote possibility) for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace; for as the Apostle saith, 2 Cor. 6, 15: "Quæ autem conventio Christi ad Belial, aut quæ pars fideli cum infideli, and the law saith, Judæo Christianum nullum serviat mancipium, nefas enim est quem Christus redemit blasphemum Christi in servitutis vinculis detinere." Register, 282, *Infideles sunt Christi et Christianorum inimici.* And herewith agreeth the book in 12 Hen. VIII. fol. 4, where it is holden that a Pagan cannot have or maintain any action at all.[1]

And upon this ground there is a diversity between a conquest of a kingdom of a Christian King, and the conquest of a kingdom of an infidel; for if a King come to a Christian kingdom by conquest, seeing that he hath *vitæ et necis potestatem*, he may at his pleasure alter and change the laws of that kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain. But if a Christian King should conquer a

[1] The position in the text seems to have been a common error founded on a groundless opinion of Justice Brooke, Anon. 1 Salk. 46, and has long since been exploded. *Omichund* v. *Barker*, 1 Atk. 21, s. c. 1 Wils. 84, s. c. Willes's Rep. 538.

kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the decalogue; and in that case, until certain laws be established amongst them, the King by himself, and such judges as he shall appoint, shall judge them and their causes according to natural equity, in such sort as kings in ancient time did with their kingdoms, before any certain municipal laws were given, as before hath been said. But if a king hath a kingdom by title of descent, there seeing by the laws of that kingdom he doth inherit the kingdom, he cannot change those laws of himself without consent of Parliament. Also if a king hath a Christian kingdom by conquest, as King Henry the Second had Ireland, after King John had given unto them, being under his obedience and subjection, the laws of England for the government of that country, no succeeding king could alter the same without Parliament. And in that case, while the realm of England and that of Ireland were governed by several laws, any that was born in Ireland was no alien to the realm of England. In which precedent of Ireland three things are to be observed: 1. That then there had been two descents, one from Henry the Second to King Richard the First, and from Richard to King John, before the alteration of the laws; 2. That albeit Ireland was a distinct dominion, yet the title thereof being by conquest, the same by judgment of law might by express words be bound by act of the Parliament of England, 3 That albeit no reservation were in King John's charter, yet by judgment of law a writ of error did lie in the King's Bench in England of an erroneous judgment in the King's Bench of Ireland. Furthermore, in the case of a conquest of a Christian kingdom, as well those that served in wars at the conquest as those that remained at home for the safety and peace of their country, and other the King's subjects, as well *antenati* as *postnati*, are capable of lands in the kingdom or country conquered, and may maintain any real action, and have the like privileges and benefits there, as they may have in England.

The third kind of enemy is, *inimicus permissus*, an enemy that cometh into the realm by the King's safe conduct, of which you may read in the Register, fol. 25, Book of Entries, Ejectione firmæ, 7, 32 Hen. VI. 23 b, &c. Now, what a subject born

is, appeareth at large by that which hath been said *de ligeantia*; and so likewise *de subdito dato*, of a *donaison*: for that is the right name, so called, because his legitimation is given unto him; for if you derive denizen from *deins nee*, one born within the obedience or ligeance of the King, then such a one should be all one with a natural-born subject. And it appeareth before out of the laws of King Wm. I. of what antiquity the making of denizens by the King of England hath been.

3. There be regularly (unless it be in special cases) three incidents to a subject born: 1. That the parents be under the actual obedience of the King; 2. That the place of his birth be within the King's dominion; and, 3. The time of his birth is chiefly to be considered; for he cannot be a subject born of one kingdom that was born under the ligeance of a king of another kingdom, albeit afterwards one kingdom descend to the King of the other. For the first, it is termed actual obedience, because, though the King of England hath absolute right to other kingdoms or dominions, as France, Aquitain, Normandy, &c., yet seeing the King is not in actual possession thereof, none born there since the crown of England was out of actual possession thereof, are subjects to the King of England. 2. The place is observable, but so as many times ligeance or obedience without any place within the King's dominions may make a subject born, but any place within the King's dominions may make a subject born, but any place within the King's dominions without obedience can never produce a natural subject. And therefore if any of the King's ambassadors in foreign nations have children there of their wives, being English women, by the common laws of England they are natural-born subjects, and yet they are born out of the King's dominions. But if enemies should come into any of the King's dominions, and surprise any castle or fort, and possess the same by hostility, and have issue there, that issue is no subject to the King, though he be born within his dominions, for that he was not born under the King's ligeance or obedience. But the time of his birth is of the essence of a subject born; for he cannot be a subject to the King of England, unless at the time of his birth he was under the ligeance and obedience of the King. And that is the reason that *antenati* in Scotland (for that at the time of their birth they were under the ligeance and obedience of another King) are aliens born, in respect of the time of their birth.

4. It followeth next in course to set down the reasons wherefore an alien born is not capable of inheritance within England; and that he is not for three reasons: 1. The secrets of the realm might thereby be discovered; 2. The revenues of the realm (the sinews of war, and ornament of peace) should be taken and enjoyed by strangers born; 3. It should tend to the destruction of the realm. Which three reasons do appear in the Statute of 2 Hen. V. cap. and 4 Hen. V. cap. *ultimo*. But it may be demanded wherein doth that destruction consist; whereunto it is answered: first, it tends to destruction *tempore belli;* for then strangers might fortify themselves in the heart of the realm, and be ready to set fire on the commonwealth, as was excellently shadowed by the Trojan horse in Virgil's Second Book of his Æneid, where a very few men in the heart of the city did more mischief in a few hours than ten thousand men without the walls in ten years. Secondly, *tempore pacis*, for so might many aliens born get a great part of the inheritance and freehold of the realm, whereof there should follow a failure of justice (the supporter of the commonwealth), for that aliens born cannot be returned of juries for the trial of issues between the King and the subject, or between subject and subject. And for this purpose, and many other, see a chapter worthy of observation, of King Edw. III. written to Pope Clement, *datum apud Westm'* 26 *die Sept. ann. regni nostri Franciæ* 4 *regni vero Angliæ* 17.

5. Now are we come to the examples, resolutions, and judgments of former times, wherein two things are to be observed: first, how many cases in our books do overrule this case in question (for *ubi eadem ratio ibi idem jus, et de similibus idem est judicium.* 2. That for want of an express text of law, *in terminis terminantibus*, and of examples and precedents in like cases (as was objected by some), we are driven to determine the question by natural reason: for it was said, "si cesset lex scripta id custodiri oportet quod moribus et consuetudine inductum est, et si qua in re hoc defecerit, recurrendum est ad rationem." But that receiveth a threefold answer: First, That there is no such rule in the common or civil law: but the true rule of the civil law is, "lex scripta si cesset, id custodiri oportet quod moribus et consuetudine inductum est, et si qua in re hoc defecerit, tunc id quod proximum et consequens ei est, et si id non appareat, tunc jus quo urbs Romana utitur, servari oportet." Secondly, If

the said imaginative rule be rightly and legally understood, it may stand for truth: for if you intend *ratio* for the legal and profound reason of such as by diligent study and long experience and observation are so learned in the laws of this realm as out of the reason of the same they can rule the case in question, in that sense the said rule is true: but if it be intended of the reason of the wisest man that professeth not the laws of England, then (I say) the rule is absurd and dangerous; for "cuilibet in suâ arte perito est credendum et quod quisque norit in hoc se exerceat. Et omnes prudentes illa admittere solent quæ probantur iis qui in suâ arte bene versati sunt," Arist. 1. Topicorum, cap. 6. Thirdly, There be multitudes of examples, precedents, judgments, and resolutions in the laws of England, the true and unstrained reason whereof doth decide this question; for example, the dukedom of Acquitain, whereof Gascoign was parcel, and the earldom of Poitiers, came to King Henry the Second by the marriage of Eleanor, daughter and heir of William Duke of Acquitain, and Earl of Poitiers, which descended to Rich. I., Hen. III., Edw. I., Edw. II., Edw. III., &c. In 27 lib. Ass. pl. 48, in one case there appear two judgments and one resolution to be given by the Judges of both benches in this case following. The possessions of the Prior of Chelsey in the time of war were seised into the King's hands, for that the Prior was an alien born: the Prior by petition of right sued to the King, and the effect of his petition was that before he came Prior of Chelsey, he was Prior of Andover, and whilst he was Prior there, his possessions of that priory were likewise seised for the same cause, supposing that he was an alien born: whereupon he sued a former petition, and alleged that he was born in Gascoin within the ligeance of the King; which point being put in issue and found by jury to be true, it was adjudged that he should have restitution of his possessions generally without mentioning of advowsons. After which restitution, one of the said advowsons became void, the Prior presented. against whom the King brought a *Quare impedit*, wherein the King was barred; and all this was contained in the latter petition. And the book saith that the Earl of Arundel and Sir Guy of B. came into the Court of Common Pleas, and demanded the opinion of the Judges of that Court concerning the said case, who resolved that upon the matter aforesaid the King had no right to seize. In which case,

amongst many notable points, this one appeareth to be adjudged and resolved, that a man born in Gascoin under the King's ligeance was no alien born, as to lands and possessions within the realm of England, and yet England and Gascoin were several and distinct countries; 2. Inherited by several and distinct titles; 3. Governed by several and distinct municipal laws, as it appeareth amongst the records in the Tower, Rot. Vasc. 10 Edw. I. Num 7: 4. Out of the extent of the Great Seal of England and the jurisdiction of the Chancery of England; 5. The like objection might be made for default of trial, as hath been made against the plaintiff. And where it was said that Gascoin was no kingdom, and therefore it was not to be matched to the case in hand, it was answered, that this difference was without a diversity as to the case in question; for if the plea in the case at the bar be good, then without question the Prior had been an alien; for it might have been said (as it is in the case at the bar) that he was born *extra ligeantiam Regis regni sui Angliæ, et infra ligeantiam dominii sui Vasconiæ*, and that they were several dominions, and governed by several laws; but then such a conceit was not hatched, that a King having several dominions should have several ligeances of his subjects. Secondly, it was answered that Gascoin was sometime a kingdom, and likewise Millan, Burgundy, Bavaria, Bretagne, and others were, and now are become, Dukedoms. Castile, Arragon, Portugal, Barcelona, &c. were sometime earldoms, afterwards dukedoms, and now kingdoms. Bohemia and Poland were sometime dukedoms, and now kingdoms; and (omitting many other, and coming nearer home) Ireland was before 32 Hen. VIII. a lordship, and now is a kingdom, and yet the King of England was as absolute a prince and sovereign when he was Lord of Ireland, as now when he is styled King of the same. 10 Edw. III. 41, an exchange was made between an Englishman and a Gascoin, of lands in England and in Gascoin; *ergo*, the Gascoin was no alien, for then had he not been capable of lands in England. 1 Hen. IV. 1, the King brought a writ of right of ward against one Sybil, whose husband was exiled into Gascoin; *ergo* Gascoin is no parcel or member of England, for *exilium est patriæ privatio, natalis soli mutatio, legum nativarum amissio.* 4 Edw. III. 10 b, the King directed his writ out of Chancery under the Great Seal of England, to the Mayor of Burdeaux (a city in Gascoin), then being

under the King's obedience, to certify whether one that was outlawed here in England was at that time in the King's service under him *in obsequio Regis:* whereby it appeareth that the King's writ did run into Gascoin, for it is the trial that the common law hath appointed in that case. But as to other cases, it is to be understood that there be two kinds of writs, *Brevia mandatoria et remedialia, et brevia mandatoria et non remedialia: brevia mandatoria et remedialia*, as writs of right, of *Formedon, &c.*, of debt, trespass, &c., and shortly all writs, real and personal, whereby the party wronged is to recover somewhat, and to be remedied for that wrong was offered unto him, are returnable or determinable in some court of justice within England, and to be served and executed by the sheriffs, or other ministers of justice within England; and these cannot by any means extend into any other kingdom, country, or nation, though that it be under the King's actual ligeance and obedience. But the other kind of writs that are mandatory and not remedial are not tied to any place, but do follow subjection and ligeance, in what country or nation soever the subject is, as the King's writ to command any of his subjects residing in any foreign country to return into any of the King's own dominions. *sub fide et ligeantia quibus nobis tenemini.* And so are the aforesaid mandatory writs cited out of the Register of protection for safety of body and goods, and requiring that if any injury be offered, that the same be redressed according to the laws and customs of that place. *Vide le Reg.* fol. 26. Stamford, Prærog. cap. 12, fol. 39, saith that men born in Gascoin are inheritable to lands in England. This doth also appear by divers Acts of Parliament; for by the whole Parliament, 39 Edw. III. cap. 16, it is agreed that the Gascoins are of the ligeance and subjection of the King. *Vide* 42 Edw. III. cap. 2, and 28 Hen. VI. cap. 5, &c.

Guienne was another part of Aquitain, and came by the same title: and those of Guienne were by Act of Parliament in 13 Hen. IV. not imprinted, *ex Rot. Parliament. eodem anno*, adjudged and declared to be no aliens, but able to possess and purchase, &c., lands within this realm. And so doth Stamford take the law. Prærog. c. 12, f. 39. And thus much of the dukedom of Acquitain, which (together with the earldom of Poitiers) came to King Henry the Second (as hath been said) by marriage, and continued in the actual possession of the Kings of England by

ten descents, viz. from the first year of King Henry the Second, unto the two and thirtieth year of King Henry the Sixth, which was upon the very point of three hundred years, within which duchy there were (as some write) four archbishoprics, 24 bishoprics, 15 earldoms, 202 baronies, and above a thousand captainships and bailliwicks; and in all this long time neither book case nor record can be found wherein any plea was offered to disable any of them that were born there, by foreign birth, but the contrary hereof directly appeareth by the said book case of 27 lib. Ass. 48.

The Kings of England had sometimes Normandy under actual ligeance and obedience. The question is then, whether men born in Normandy, after one King had them both, were inheritable to lands in England, and it is evident by our books that they were; for so it appeareth by the declaratory Act of 17 Edw. II. de Prærog. Reg. c. 12, that they were inheritable to, and capable of lands in England, for the purview of that Statute is *quod Rex habebit escaetas de terris Normannorum, &c. Ergo* Normans might have lands in England, *et hoc similiter intelligendum est, si aliqua hæreditas descendat alicui nato in partibus transmarinis, &c.* Whereby it appeareth that they were capable of lands within England by descent. And that this Act of 17 Edw. II. was but a declaration of the common law, it appeareth both by Bracton, who (as it hath been said) wrote in the reign of Henry the Third, lib. 3, tract. 2, c. 1, f. 116, and by Britton, who wrote in 5 Edw. I. c. 18, that all such lands as any Norman had, either by descent or purchase, escheated to the King for their treason in revolting from their natural liege lord and sovereign. And therefore Stamford, Prærog. cap. 12, fol. 39, expounding the said Statute of 17 Edw. II. cap. 12, concludeth that by that chapter it should appear (as if he had said, it is apparent without question) that all men born in Normandy, Gascoin, Guienne, Anjou, and Britain (whilst they were under actual obedience) were inheritable within this realm as well as Englishmen. And the reason thereof was, for that they were one ligeance due to one Sovereign. And so much (omitting many other authorities) for Normandy: saving I cannot let pass the isles of Guernsey and Jersey, parts and parcels of the dukedom of Normandy, yet remaining under the actual ligeance and obedience of the King, I think no man will doubt, but those that are born in Guernsey and Jersey (though those isles are no parcel of the realm of England, but

several dominions enjoyed by several titles, governed by several laws) are inheritable, and capable of any lands within the realm of England, 1 Edw. III. fol. 7. Commission to determine the title of lands within the said isles, according to the laws of the isles; and Mich. 41 Edw. III. in the treasury, "Quia negotium præd' nec aliqua alia negotia de insulâ præd' emergentia non debent terminari nisi secundum legem insulæ prœd'," &c. And the Register, fol. 22. Rex fidelibus suis de Jernsey et Gersey. King William the First brought this dukedom of Normandy with him, which by five descents continued under the actual obedience of the Kings of England; and in or about the 6th year of King John, the crown of England lost the actual possession thereof, until King Henry the Fifth recovered it again, and left it to King Henry the Sixth, who lost it in the 28th of his reign; wherein were (as some write) one archbishopric and six bishoprics, and an hundred strong towns and fortresses, besides those that were wasted in war. Maud the Empress, the only daughter and heir of Henry the First, took to her second husband Jeffrey Plantagenet, Earl of Anjou, Tourain, and Mayne, who had issue King Henry II. to whom the said earldom by just title descended, who, and the Kings that succeeded him, stiled themselves by the name of *Comes Andegar'*, *&c.*, until King Edward III. became King of all France; and such as were born within that earldom, so long as it was under the actual obedience of the King of England, were no aliens, but natural-born subjects; and never any offer made, that we can find, to disable them for foreign birth. But leave we Normandy and Anjou, and speak we of the little but yet ancient and absolute kingdom of the Isle of Man, as it appeareth by diverse ancient and authentic records; as taking one for many. Artold King of Man sued to King Hen. III. to come into England to confer with him, and to perform certain things which were due to King Hen. III. Thereupon King Hen. III. 21 *Decemb. ann. regn. sui* 34, at Winchester, by his letters patent gave licence to Artold King of Man, as followeth: "Rex omnibus salutem. Sciatis, quod licentiam dedimus, &c. Artoldo Regi de Man veniendo ad nos in Angl', ad loquend' nobisc' et ad faciend' nobis quod facere debet; et ideo vobis mandamus quod ei Regi in veniendo ad nos in Angl', vel ibi morando, vel inde redeundo nullum faciat' aut fieri permittatis dammum, injur', molestiam, aut gravamen, vel etiam hominib' suis quos secum

ducet et si aliquid eis forisfact', fuerit, id eis sine dilat' faciat' emendari. In cujus, &c., duratur' usque ad fest' S. Mich." Wherein two things are to be observed: 1. That seeing that Artold King of Man sued for a licence in this case to the King, it proveth him an absolute King; for that a Monarch or an absolute Prince cannot come into England without licence of the King, but any subject being in league, may come into this realm without licence: 2. That the King in his licence doth style him by the name of a King. It was resolved in 11 Hen. VIII. that where an office was found after the decease of Thomas Earl of Derby, and that he died seised, &c. of the Isle of Man, that the said office was utterly void, for that the Isle of Man, Normandy, Gascoin, &c. were out of the power of the Chancery, and governed by several laws; and yet none will doubt but those that are born within that isle are capable and inheritable of lands within the realm of England. Wales was some time a kingdom, as it appeareth by 19 Hen. VI. fol. 6, and by the Act of Parliament of 2 Hen. V. c. 6, but whilst it was a kingdom, the same was holden, and within the fee, of the King of England; and this appeareth by our books, Fleta, lib. 1, cap. 16; 1 Edw. III. 14; 8 Edw. III. 59; 13 Edw. III. Tit. Jurisdict'; 10 Hen. IV. 6, Plow. Com. 368. And in this respect in divers ancient charters, Kings of old time styled themselves in several manners, as King Edgar, Britanniæ βασιλεύς; Etheldredus, totius Albion' Dei providentiâ Imperator; Edredus Magn' Britann' Monarcha, which among many other of like nature I have seen. But by the Statute of 12 Edw. I. Wales was united and incorporated into England, and parcel of England in possession; and therefore it is ruled in 7 Hen. IV. f. 13 a, that no protection doth lie *quia moratur in Wallia*, because Wales is within the realm of England. And where it is recited in the Act of 27 Hen. VIII. that Wales was ever parcel of the realm of England, it is true in this sense, viz., that before 12 Edw. I. it was parcel in tenure, and since it is parcel of the body of the realm. And whosoever is born within the fee of the King of England, though it be in another kingdom, is a natural-born subject, and capable and inheritable of lands in England as it appeareth in Plow. Com. 126. And therefore those that were born in Wales before 12 Edw. I. whilst it was only holden of England, were capable and inheritable of lands in England.

Now come we to France and the members thereof, as Callice, Guynes, Tournay, &c., which descended to King Edward the Third, as son and heir to Isabel, daughter and heir to Philip le Beau, King of France. Certain it is, whilst King Henry the Sixth had both England and the heart and greatest part of France under his actual ligeance and obedience (for he was crowned King of France in Paris), that they that were then born in those parts of France that were under actual ligeance and obedience were no aliens, but capable of and inheritable to lands in England. And that is proved by the writs in the Register, fol. 26, cited before. But in the enrolment of letters patent of denization in the Exchequer *int' originalia, ann.* 11 Hen. VI. with the Lord Treasurer's Remembrancer was strongly urged and objected, for (it was said) thereby it appeareth that King Hen. VI. *in anno* 11 of his reign, did make denizen one Reynel born in France; whereunto it was answered that it is proved by the said letters patent that he was born in France before King Henry the Sixth had the actual possession of the crown of France, so as he was *antenatus:* and this appeareth by the said letters patent, whereby the King granteth that "Magister Johannes Reynel serviens noster, &c. infra regnum nostrum Franc' oriundus pro termino vitæ suæ sit ligeus noster, et eodem modo teneatur sicut verus et fidelis noster infra regnum Angl' oriundus, ac quod ipse terras infra regnum nostrum Angl' seu alia dominia nostra perquirere possit et valeat." Now, if that Reynel had been born since Henry the Sixth had the quiet possession of France (the King being crowned King of France about one year before), of necessity he must be an infant of very tender age, and then the King would never have called him his servant, nor made the patent (as thereby may be collected) for his service, nor have called him by the name of *Magister Johannes Reynel:* but without question he was *antenatus*, born before the King had the actual and real possession of that crown.

Calais is a part of the kingdom of France, and never was parcel of the kingdom of England, and the Kings of England enjoyed Calais in and from the reign of King Edward the Third, until the loss thereof in Queen Mary's time, by the same title that they had to France. And it is evident by our books, that those that were born in Calais were capable and inheritable to lands in England, 42 Edw. III. c. 10. *Vide* 21 Hen. VII. 33 b; 19

Hen. VI. ; 2 Edw. IV. 1 a, b ; 39 Hen. VI. 39 a ; 21 Edw. IV. 18 a ; 28 Hen. VI. 3 b. By all which it is manifest that Calais being parcel of France was under the actual obedience and commandment of the King, and by consequent those that were born there were natural-born subjects, and no aliens. Calais, from the reign of King Edw. III. until the fifth year of Queen Mary, remained under the actual obedience of the King of England. Guines also, another part of France, was under the like obedience to King Henry the Sixth, as appeareth by 31 Hen. VI. fol. 4. And Tournay was under the obedience of Henry the Eighth, as it appeareth by 5 El. Dyer, fol. 224; for there it is resolved that a bastard born at Tournay, whilst it was under the obedience of Henry the Eighth, was a natural subject, as an issue born within this realm by aliens. If then those that were born at Tournay, Calais, &c., whilst they were under the obedience of the King, were natural subjects and no aliens, it followeth that when the kingdom of France (whereof those were parcels) was under the King's obedience, that those that were then born there were natural subjects, and no aliens.

Next followeth Ireland, which originally came to the Kings of England by conquest; but who was the first conqueror thereof, hath been a question. I have seen a charter made by King Edgar in these words: " Ego Edgarus Anglorum *βασιλεύς*, omniumque insularum oceani, quæ Britanniam circumjacent, Imperator et Dominus, gratias ago ipsi Deo omnipotenti Regi meo, qui meum imperium ampliavit et exaltavit super regnum patrum meorum, &c. mihi concessit propitia divinitas, cum Anglorum Imperio omnia regna insularum oceani, et cum suis ferocissimis Regibus usque Norvegiam, maximamque partem Hibern', cum suâ nobilissimâ civitate de Dublinâ, Anglorum Regno subjugare, quapropter et ego Christi gloriam et laudem in regno meo exaltare, et ejus servitium amplificare devotus disposui," &c. Yet for that it was wholly conquered in the reign of Henry the Second, the honour of the conquest of Ireland is attributed to him, and his style was, Rex Angl', Dominus Hibern', Dux Normann' Dux Aquitan' et Comes Andegav', — King of England, Lord of Ireland, Duke of Normandy, Duke of Aquitain, and Earl of Anjou. That Ireland is a dominion separate and divided from England, it is evident from our books, 20 Hen. VI. 8. *Sir John Pilkington's Case*, 32 Hen. VI. 25; 20 Eliz. Dyer, 360; Plow. Com. 360.

And 2 Rich. III. 12 a: "Hibernia habet Parliamentum, et faciunt leges, et nostra statuta non ligant eos, quia non mittunt milites ad Parliamentum (which is to be understood, unless they be especially named) sed personæ eorum sunt subjecti Regis, sicut inhabitantes in Calesiâ, Gasconiâ, et Guyan." Wherein it is to be observed, that the Irishman (as to his subjection) is compared to men born in Calais, Gascoin, and Guienne. Concerning their laws, *ex rotulis potentium de anno* 11 *Regis* Hen. III. there is a charter which that King made, beginning in these words: "Rex, &c. Baronibus, militibus, et omnibus libere tenentibus L. salutem, satis ut credimus vestra audivit discretio, quod quando bonæ memoriæ Johannes quondam Rex Angl' pater noster venit in Hiberniam ipse duxit secum viros discretos et legis peritos, quorum communi consilio et ad instantiam Hibernensium statuit et precepit leges Anglicanas in Hibern' ita quod leges easdem in scripturas redactas reliquit sub sigillo suo ad Scaccarium Dublin'." So as now the laws of England became the proper laws of Ireland; and therefore, because they have Parliaments holden there, whereat they have made divers particular laws concerning that dominion, as it appeareth in 20 Hen. VI. 8 & 20 El. Dyer, 360, and for that they retain unto this day divers of their ancient customs, the book in 20 Hen. VI. 8, holdeth that Ireland is governed by laws and customs separate and diverse from the laws of England. A voyage royal may be made into Ireland. *Vide* 11 Hen. IV. 7 a & 7 Edw. IV. 27 a, which proveth it a distinct dominion. And *in anno* 33 *Reg. El.* it was resolved by all the Judges of England in the case of O'Rurke, an Irishman, who had committed high treason in Ireland, that he, by the Statute of 23 Hen. VIII. c. 33, might be indicted, arraigned, and tried for the same in England, according to the purview of that Statute, the words of which Statute be, "That all treasons, &c. committed by any person out of the realm of England shall be from henceforth enquired of," &c.; and they all resolved (as afterward they did also in *Sir John Perrot's Case*) that Ireland was out of the realm of England, and that treasons committed there were to be tried within England by that Statute. In the Statute of 4 Hen. VII. cap. 24, of Fines, provision is made for them that be out of this land; and it is holden in Plow. Com. in *Stowel's Case*, 375, that he that is in Ireland is out of this land, and consequently within that proviso. Might not then the

like plea be devised as well against any person born in Ireland, as (this is against Calvin that is a *postnatus*) in Scotland? For the Irishman is born *extra ligeantiam Regis regni sui Angl'*, &c. which be *verba operativa* in the plea; but all men know that they are natural-born subjects, and capable of and inheritable to lands in England. Lastly, to conclude this part with Scotland itself: in ancient time part of Scotland (besides Berwick) was within the power and ligeance of the King of England, as appeareth by our books, 42 Edw. III. 2 b, the *Lord Beaumont's Case*, 11 Edw. III c. 2, &c., and by precedents hereafter mentioned; and that part (though it were under the King of England's ligeance and obedience) yet was it governed by the laws of Scotland. *Ex rotulis Scotiæ, anno* 11 *Ed.* III. amongst the records in the Tower of London: "Rex, &c. Constituimus Rich. Talebot Justiciarium nostrum villæ Berwici super Twedam, ac omnium aliarum terrarum nostrarum in partibus Scot', ad faciend' omnia et singula quæ ad officium Justiciarii pertinent, secundum legem et consuetudinem regni Scot'. And after anno 26 Edw. III. ex eodem rot. Rex Henrico de Percey, Ricarda de Nevil, &c. Volumus et vobis et alteri vestrum tenore præsentium committimus et mandamus, quod homines nostri de Scot' ad pacem et obedientiam nostram existentes, legibus, libertatibus, et liberis consuetudinibus, quibus ipsi et antecessores sui tempore celebris memoriæ Alexandri quondam Regis Scot' rationabiliter usi fuerunt, uti ut gaudere deberent, prout in quibusdam indenturis, &c., plenius dicitur contineri." And there is a writ in the Register, 295 a: "Dedimus potestatem recipiendi ad fidem et pacem nostram homines de Galloway." Now the case in 42 Edw. III. 2 b (which was within sixteen years of the said grant, concerning the laws in 26 Edw. III.) ruleth it, that so many as were born in that part of Scotland that was under the ligeance of the King were no aliens, but inheritable to lands in England; yet was that part of Scotland in another kingdom, governed by several laws, &c. And if they were natural subjects in that case, when the King of England had but part of Scotland, what reason should there be why those that are born there, when the King hath all Scotland, should not be natural subjects, and no aliens? So, likewise, Berwick is no part of England, nor governed by the laws of England; and yet they that have been born there, since they were under the obedience of one King, are natural-born

subjects, and no aliens, as it appeareth in 15 Rich. II. cap. 7, &c. *Vide* 19 Hen. VI. 35 b & 39 Hen. VI. 39 a. And yet in all these cases and examples, if this new devised plea had been sufficient, they should have been all aliens, against so many judgments, resolutions, authorities, and judicial precedents in all successions of ages. There were sometimes in England, whilst the heptarchy lasted, seven several crowned Kings of seven several and distinct kingdoms; but in the end the West Saxons got the monarchy, and all the other Kings melted (as it were) the crowns to make one imperial diadem for the King of the West Saxons over all. Now, when the whole was under the actual and real ligeance and obedience of one King, were any that were born in any of those several and distinct kingdoms aliens one to another? Certainly they being born under the obedience of one King and Sovereign were all natural-born subjects, and capable of and inheritable unto any lands in any of the said kingdoms.

In the holy history reported by Saint Luke, Ex dictamine Spiritus Sancti, cap. 21 et 22 Act. Apostolorum, it is certain that Saint Paul was a Jew, born in Tarsus, a famous city of Cilicia; for it appeareth in the said 21st chapter, ver. 39, by his own words, "Ego homo sum quidem Judæus a Tarso Ciliciæ, non ignotæ civitatis municeps." And in the 22nd chapter, ver. 3, "Ego sum vir Judæus natus Tarso Ciliciæ," &c.; and then made that excellent sermon there recorded, which, when the Jews heard, the text saith, ver. 22, "Levaverunt vocem suam dicentes, Tolle de terra hujusmodi, non enim fas est eum vivere; vociferantibus autem eis et projicientibus vestimenta sua, et pulverem jactantibus in aerem," Claudius Lysias, the popular Tribune, to please this turbulent and profane multitude (though it were utterly against justice and common reason) the text saith "Jussit Tribunus induci eum in castra;" 2. "flagellis cædi," and 3. "torqueri eum (quid ita?) ut sciret propter quam causam sic acclamarent;" and when they had bound Paul with cords, ready to execute the Tribune's unjust commandment, the blessed Apostle (to avoid unlawful and sharp punishment) took hold of the law of a heathen emperor, and said to the Centurion standing by him, "Si hominem Romanum et indemnatum licet vobis flagellare?" Which when the Centurion heard, he went to the Tribune and said, "Quid acturus es? Hic enim homo civis Romanus

est." Then came the Tribune to Paul, and said unto him, "Dic mihi si tu Romanus es? At ille dixit, Etiam." And the Tribune answered, "Ego multa summa civitatem hanc consequutus sum." But Paul, not meaning to conceal the dignity of his birthright, said, "Ego autem et natus sum:" as if he should have said to the Tribune, you have your freedom by purchase of money, and I (by a more noble means) by birthright and inheritance. "Protinus ergo [saith the text] decesserunt ab illo qui illum torturi erant, Tribunus quoque timuit postquam rescivit, quia civis Romanus esset, et quia alligasset eum." So as hereby it is manifest that Paul was a Jew, born at Tarsus in Cilicia, in Asia Minor; and yet being born under the obedience of the Roman Emperor, he was by birth a citizen of Rome in Italy in Europe, that is, capable of and inheritable to all privileges and immunities of that city. But such a plea as is now imagined against Calvin might have made Saint Paul an alien to Rome. For if the Emperor of Rome had several ligeances for every several kingdom and country under his obedience, then might it have been said against Saint Paul that he was "extra ligeantiam Imperatoris regni sui Italiæ, et infra ligeantiam Imperatoris regni sui Ciliciæ," &c. But as Saint Paul was "Judæus patriâ et Romanus privilegio, Judæus natione et Romanus jure nationum;" so may Calvin say, that he is "Scotus patriæ, et Anglus privilegio; Scotus natione, et Anglus jure nationum."

Samaria in Syria was the chief city of the ten tribes; but it being usurped by the King of Syria, and the Jews taken prisoners, and carried away in captivity, was after inhabited by the Panyms. Now, albeit Samaria of right belonged to Jewry, yet because the people of Samaria were not under actual obedience, by the judgment of the Chief Justice of the whole world they were adjudged *alienigenæ*, aliens: for in the Evangelist Saint Luke, c. 17, when Christ had cleansed the ten lepers, "unus autem ex illis [saith the text] ut vidit quia mundatus esset, regressus est cum magnâ voce magnificans Deum, et cecidit in faciem ante pedes ejus gratias agens, et hic erat Samaritanus. Et Jesus respondens dixit, Nonne decem mundati sunt, et novem ubi sunt? Non est inventus qui rediret et daret gloriam Deo nisi hic alienigena." So as, by his judgment, this Samaritan was *alienigena*, a stranger born: because he had the place, but wanted obedience. "Et si desit obedientia non adjuvet locus." And this agreeth

with the divine, who saith, "Si locus salvare potuisset, Satan de cœlo pro sua inobedientia non cecidisset. Adam in paradiso non cecidisset, Lot in monte non cecidisset, sed potius in Sodom."

6. Now resteth the sixth part of this division, that is to say, six demonstrative illations or conclusions, drawn plainly and expressly from the premises.

1. Every one that is an alien by birth, may be, or might have been, an enemy by accident; but Calvin could never at any time be an enemy by any accident, *ergo*, he cannot be an alien by birth. *Vide* 33 Hen. VI. f. 1 a, b, the difference between an alien enemy, and a subject traitor. "Hostes sunt qui nobis, vel quibus nos bellum decernimus, cæteri proditores, prædones," &c. The *major* is apparent, and is proved by that which hath been said. *Et vide* Magna Charta, cap. 30, 19 Edw. IV. 6; 9 Edw. III. c. 1; 27 Edw. III. c. 2; 4 Hen. V. c. 7; 14 Edw. III. stat. 2, c. 2, &c.

2. Whosoever are born under one natural ligeance and obedience due by the law of nature to one Sovereign are natural-born subjects; but Calvin was born under one natural ligeance and obedience, due by the law of nature to one Sovereign; *ergo*, he is a natural-born subject.

3. Whosoever is born within the King's power or protection, is no alien, but Calvin was born under the King's power and protection; *ergo* he is no alien.

4. Every stranger born must at his birth be either *amicus* or *inimicus;* but Calvin at his birth could neither be *amicus* nor *inimicus;* *ergo* he is no stranger born. *Inimicus* he cannot be, because he is *subditus:* for that cause also he cannot be *amicus;* neither now can *Scotiæ* be said to be *solum amici*, as hath been said.

5. Whatsoever is due by the law or constitution of man, may be altered; but natural ligeance or obedience of the subject to the Sovereign cannot be altered; *ergo* natural ligeance or obedience to the Sovereign is not due by the law or constitution of man. Again, whatsoever is due by the law of nature, cannot be altered; but ligeance and obedience of the subject to the Sovereign is due by the law of nature; *ergo* it cannot be altered. It hath been proved before, that ligeance or obedience of the inferior to the superior, of the subject to the sovereign, was due by the law of

nature many thousand years before any law of man was made; which ligeance or obedience (being the only mark to distinguish a subject from an alien) could not be altered; therefore it remaineth still due by the law of nature. For "leges naturæ perfectissimæ sunt et immutabiles, humani vero juris conditio semper in infinitum decurrit, et nihil est in eo quod perpetuo stare possit. Leges humanæ nascuntur, vivunt, moriuntur."

Lastly, whosoever at his birth cannot be an alien to the King of England cannot be an alien to any of his subjects of England; but the plaintiff at his birth could be no alien to the King of England; *ergo* the plaintiff cannot be an alien to any of the subjects of England. The *major* and *minor* both be *propositiones perspicuæ veræ*. For as to the *major* it is to be observed that whosoever is an alien born is so accounted in law, in respect of the King; and that appeareth, first, by the pleading so often before remembered, that he must be *extra ligeantiam Regis*, without any mention making of the subject. 2. When an alien born purchaseth any lands, the King only shall have them, though they be holden of a subject, in which case the subject loseth his seigniory. And as it is said in our books an alien may purchase *ad proficuum Regis*; but the act of law giveth the alien nothing; and therefore if a woman alien marrieth a subject, she shall not be endowed, neither shall an alien be tenant by the curtesy. *Vide* 3 Hen. VI. 55 a; 4 Hen. III. 179. 3. The subject shall plead that the defendant is an alien born, for the benefit of the King, that he upon office found may seize; and 2. that the tenant may yield to the King the land, and not to the alien, because the King hath best right thereunto. 4. Leagues between our Sovereign and others are the only means to make aliens friends, *et fœdera percutere*, to make leagues, only and wholly pertaineth to the King. 5. Wars do make aliens enemies, and *bellum indicere* belongeth only and wholly to the King, and not to the subject, as appeareth in 19 Edw. IV. fol. 6, b. 6. The King only without the subject may make not only letters of safe conduct, but letters patent of denization, to whom and how many he will, and enable them at his pleasure to sue any of his subjects in any action whatsoever, real or personal, which the King could not do without the subject, if the subject had any interest given unto him by the law in anything concerning an alien born. Nay, the law is more precise herein than in a number of

other cases of higher nature; for the King cannot grant to any other to make of strangers born, denizens; it is by the law itself so inseparably and individually annexed to his royal person (as the book is in 20 Hen. VII. fol. 8). For the law esteemeth it a point of high prerogative, *jus majestatis, et inter insignia summæ potestatis,* to make aliens born subjects of the realm, and capable of the lands and inheritances of England in such sort as any natural-born subject is. And therefore by the Statute of 27 Hen. VIII. c. 24, many of the most ancient prerogatives and royal flowers of the crown, as authority to pardon treason, murder, manslaughter, and felony, power to make Justices in eyre, Justices of assize, Justices of peace, and gaol delivery, and such like, having been severed and divided from the Crown, were again reunited to the same; but authority to make letters of denization was never mentioned therein to be resumed, for that never any claimed the same by any pretext whatsoever, being a matter of so high a point of prerogative. So as the pleading against an alien, the purchase by any alien, leagues and wars between aliens, denizations, and safe conducts of aliens, have aspect only and wholly unto the King. It followeth, therefore, that no man can be alien to the subject that is not alien to the King. "Non potest esse alienigena corpori, qui non est capiti, non gregi qui non est Regi."

The authorities of law cited in this case for maintenance of the judgment, 4 Hen. III., Tit. Dower, Bracton, lib. 5, fol. 427; Fleta, lib. 6, c. 47; *In temp.* Edw. I.; Hingham's Report, 17 Edw. II. c. 12; 11 Edw. III. c. 2; 14 Edw. III. *Statut. de Franciâ;* 42 Edw. III. fol. 2; 42 Edw. III. c. 10; 22 lib. Ass. 25; 13 Rich. II. c. 2; 15 Rich. II. c. 7; 11 Hen. IV. fol. 26; 14 Hen. IV. fol. 19; 13 Hen. IV. *Statutum de Guyon;* 29 Hen. VI. Tit. Estoppel, 48; 28 Hen. VI. c. 5; 32 Hen. VI. fol. 23; 32 Hen. VI. fol. 26; Littl. *temps* Edw. IV. lib. 2, c. Villenage; 15 Edw. IV. fol. 15; 19 Edw. IV. 6; 22 Edw. IV. c. 8; 2 Rich. III. 2 and 12; 6 Hen. VIII. fol. 2, Dyer; 14 Hen. VIII. c. 2. No manner of stranger born out of the King's obeisance, 22 Hen. VIII. c. 8. Every person born out of the realm of England, out of the King's obeisance, 32 Hen. VIII. c. 16; 25 Hen. VIII. c. 15, &c.; 4 Edw. VI. Plowd. Comment. fol. 2: *Fogassa's Case,* 2 and 3 Ph. and Mar. Dyer, 145; *Shirley's Case,* 5 El. Dyer, 224; 13 El. c. 7, *de Bankrupts.* All commissions, ancient and late, for the finding of offices, to entitle the King to the lands of aliens born; also all letters

patent of denization of ancient and later times do prove that he is no alien that is born under the King's obedience.

Now we are come to consider of legal inconveniences: and first, of such as have been objected against the plaintiff; and secondly, of such as should follow if it had been adjudged against the plaintiff.

Of such inconveniences as were objected against the plaintiff, there remain only four to be answered; for all the rest are clearly and fully satisfied before: 1. That if *postnati* should be inheritable to our laws and inheritances, it were reason they should be bound by our laws; but *postnati* are not bound by our statute or common laws; for they having (as it was objected) never so much freehold or inheritance, cannot be returned of juries, nor subject to scot or lot, nor chargeable to subsidies or quinzimes, nor bound by any Act of Parliament made in England. 2. Whether one be born within the kingdom of Scotland or no, is not triable in England, for that it is a thing done out of this realm, and no jury can be returned for the trial of any such issue; and what inconvenience should thereof follow, if such pleas that wanted trial should be allowed (for then all aliens might imagine the like plea), they that objected it, left it to the consideration of others. 3. It was objected that this innovation was so dangerous that the certain event thereof no man could foresee, and therefore some thought it fit that things should stand and continue as they had been in former time, for fear of the worst. 4. If *postnati* were by law legitimated in England, it was objected what inconvenience and confusion should follow if (for the punishment of us all) the King's royal issue should fail, &c., whereby those kingdoms might again be divided. All the other arguments and objections that have been made have been all answered before, and need not to be repeated again.

1. To the first it was resolved that the cause of this doubt was the mistaking of the law; for if a *postnatus* do purchase any lands in England, he shall be subject in respect thereof, not only to the laws of this realm, but also to all services and contributions, and to the payment of subsidies, taxes, and public charges, as any denizen or Englishman shall be; nay, if he dwell in England, the King may command him, by a writ of *Ne exeat regnum*, that he depart not out of England. But if a *postnatus* dwell in Scotland, and have lands in England, he shall be chargeable for the same to all intents and purposes as if an Englishman were owner thereof,

and dwelt in Scotland, Ireland, in the Isles of Man, Guernsey, or Jersey, or elsewhere. The same law is of an Irishman that dwells in Ireland, and hath land in England. But if *postnati*, or Irishmen, men of the Isles of Man, Guernsey, Jersey, &c., have lands within England, and dwell here, they shall be subject to all services and public charges within this realm, as any Englishman shall be. So as to services and charges, the *Postnati* and Englishmen born are all in one predicament.

2. Concerning the trial, a threefold answer was thereunto made and resolved: 1. That the like objection might be made against Irishmen, Gascoins, Normans, men of the Isles of Man, Guernsey, and Jersey, of Berwick, &c., all which appear by the rule of our books to be natural-born subjects; and yet no jury can come out of any of those countries and places, for trial of their births there. 2. If the demandant or plaintiff in any action concerning lands be born in Ireland, Guernsey, Jersey, &c., out of the realm of England, if the tenant or defendant plead that he was born out of the ligeance of the King, &c., the demandant or plaintiff may reply that he was born under the ligeance of the King at such place within England; and upon the evidence the place shall not be material, but only the issue shall be, whether the demandant or plaintiff were born under the ligeance of the King in any of his kingdoms or dominions whatsoever; and in that case the jury (if they will) may find the special matter, viz., the place where he was born, and leave it to the judgment of the court; and that jurors may take knowledge of things done out of the realm in this and like cases, *vide* 7 Hen. VII. 8 b; 20 Edw. III. Averment, 34; 5 Rich. II. Tit. Trial, 54; 15 Edw. IV. 15; 32 Hen. VI. 25; Fitz. Nat. Brev. 196. *Vide Dowdale's Case*, in the Sixth Part of my Reports, fol. 47, and there divers other judgments be vouched.[1] 3 Brown, *in anno* 32 Hen. VI., reporteth a judgment then lately given, that where the defendant pleaded that the plaintiff was a Scot, born at St. John's town in Scotland, out of the ligeance of the King; whereupon they were at issue, and that issue was tried where the writ was brought, and that appeareth also by 27 Ass. pl. 24, that the jury did find the Prior to be born in Gascoin (for so much is necessarily proved by the words *trove fuit*). And 20 Edw. III. Tit. Averment, 34, in a *juris utrum*, the death of one of the vouchees was alleged at such a castle in Britain,

[1] Vide note *Dowdale's Case*, 6 Co. Rep. 47 b.

and this was inquired of by the jury; and it is holden in 5 Rich. II. Tit. Trial, 54, that if a man be adhering to the enemies of the King in France, his land is forfeitable, and his adherency shall be tried where the land is, as oftentimes hath been done, as there it is said by Belknap; and Fitz. Nat. Br. 196, in a *Mortdanc*, if the ancestor died *in itinere peregrinationis suæ vers. Terram Sanctam* the jury shall inquire of it; but in the case at bar, seeing the defendant hath pleaded the truth of the case, and the plaintiff hath not denied it, but demurred upon the same, and thereby confessed all matters of fact, the court now ought to judge upon the special matter, even as if a jury upon an issue joined in England, as it is aforesaid, had found the special matter, and left it the court.

3. To the third it was answered and resolved, that this judgment was rather a renovation of the judgments and censures of the reverend judges and sages of the law in so many ages past, than any innovation, as appeareth by the book and book-cases before recited; neither have judges power to judge according to that which they think to be fit, but that which out of the laws they know to be right and consonant to law. "Judex bonus nihil ex arbitrio suo faciat, nec proposito domesticæ voluntatis, sed juxta leges et jura pronuntiat." And as for *timores*, fears grounded upon no just cause, *qui non cadunt in constantem virum, vani timores æstimandi sunt.*

4. And as to the fourth, it is less than a dream of a shadow, or a shadow of a dream: for it hath been often said, natural legitimation respecteth actual obedience to the Sovereign at the time of the birth; for as the *Antenati* remain aliens as to the Crown of England, because they were born when there were several Kings of the several kingdoms, and the uniting of the kingdoms by descent subsequent cannot make him a subject to that Crown to which he was alien at the time of his birth: so albeit the kingdoms (which Almighty God of his infinite goodness and mercy divert) should by descent be divided, and governed by several Kings; yet it was resolved that all those that were born under one natural obedience while the realms were united under one Sovereign, should remain natural-born subjects, and no aliens; for that naturalization due and vested by birthright, cannot by any separation of the Crowns afterward be taken away; nor he that was by judgment of law a natural subject at the time of his birth.

become an alien by such a matter *ex post facto*. And in that case, upon such an accident, our *postnatus* may be *ad fidem utriusque Regis*, as Bracton saith in the afore-remembered place, fol. 427; "Sicut Anglicus non auditur in placitando aliquem de terris et tenement' in Franciâ, ita nec debet Francigena et alienigena, qui fuerit ad fidem Regis Franciæ, audiri placitando in Angliâ; sed tamen sunt aliqui Francigenæ in Franciâ qui sunt ad fidem utriusque; et semper fuerunt ante Normaniam deperditam et post, et qui placitant hic et ibi, eâ ratione qua sunt ad fidem utriusque, sicut fuit Willielmus comes mareschallus et manens Angliâ, et M. de Gynes manens in Franciâ, et alii plures." Concerning the reason drawn from the etymologies, it made against them, for that by their own derivation, *alienæ gentis* and *alienæ ligeantiæ* is all one; but arguments drawn from etymologies are too weak and too light for judges to build their judgments upon: for *sæpenumero ubi proprietas verborum attenditur, sensus veritatis amittitur;* and yet when they agree with the judgment of law, judges may use them for ornaments. But on the other side, some inconveniences should follow, if the plea against the plaintiff should be allowed: for first it maketh ligeance local; *videlicet, ligeantiæ Regis regni sui Scotiæ;* and *ligeantiæ Regis regni sui Angliæ;* whereupon should follow, first, that faith or ligeance, which is universal, should be confined within local limits and bounds; secondly, that the subjects should not be bound to serve the King in peace or in war out of those limits; thirdly, it should illegitimate many, and some of noble blood, which were born in Gascoin, Guienne, Normandy, Calais, Tournay, France, and divers other of his Majesty's dominions, whilst the same were in actual obedience, and in Berwick, Ireland, Guernsey, and Jersey, if this plea should have been admitted for good. And, thirdly, this strange and new devised plea inclineth too much to countenance that dangerous and desperate error of the Spencers, touched before, to receive any allowance within Westminster-hall.

In the proceeding of this case, these things were observed, and so did the Chief Justice of the Common Pleas publicly deliver in the end of his argument in the Exchequer Chamber: First, that no commandment or message by word or writing was sent or delivered from any whatsoever to any of the Judges, to cause them to incline to any opinion in this case; which I remember, for that it is honourable for the state, and consonant to the laws

and statutes of this realm. Secondly, there was observed, what a concurrence of judgments, resolutions, and rules there be in our books in all ages concerning this case, as if they had been prepared for the deciding of the question of this point; and that (which never fell out in any doubtful case) no one opinion in all our books is against this judgment. Thirdly, that the five Judges of the King's Bench, who adjourned this case into the Exchequer Chamber, rather adjourned it for weight than difficulty, for all they in their arguments *una voce* concurred with the judgment. Fourthly, that never any case was adjudged in the Exchequer Chamber with greater concordance and less variety of opinions, the Lord Chancellor and twelve of the Judges concurring in one opinion. Fifthly, that there was not in any remembrance so honourable, great, and intelligent an auditory at the hearing of the arguments of any Executive Chamber case, as was at this case now adjudged. Sixthly, it appeareth that *jurisprudentia legis communis Angliæ est scientia socialis et copiosa:* sociable, in that it agreeth with the principles and rules of other excellent sciences, divine and human; copious, for that *quamvis ad ea quæ frequentius accidunt jura adaptantur*, yet in a case so rare, and of such a quality, that loss is the assured end of the practice of it (for no alien can purchase lands but he loseth them; and *ipso facto* the King is entitled thereunto, in respect whereof a man would think few men would attempt it) there should be such a multitude and *farrago* of authorities in all successions of ages, in our books and book-cases, for the deciding of a point of so rare an accident. *Et sic determinata et terminata est ista quæstio.*

THE JUDGMENT IN THE SAID CASE, AS ENTERED ON RECORD, ETC.

"Whereupon all and singular the premises being seen, and by the Court of the Lord the now King here diligently inspected and examined, and mature deliberation being had thereof; for that it appears to the Court of the Lord the now King here, that the aforesaid plea of the said Richard Smith and Nicholas Smith above pleaded is not sufficient in law to bar the said Robert Calvin from having an answer to his aforesaid writ: therefore it is considered by the Court of the Lord the now King here, that the aforesaid Richard Smith and Nicholas Smith to the writ of the said Robert do further answer."

Doe d. Thomas v. Acklam.

2 Barn. & Cres. 799.

Ejectment, to recover certain premises in Kingston-upon-Hull. The demise was on the 1st of November, 1821. At the trial before Abbott, C. J., at the York Summer Assizes, 1822, the jury found a special verdict, the material parts of which were as follows: —

Elizabeth Harrison, A. D. 1813, became seised in her demesne, as of fee, of and in a certain part of the tenements in the declaration mentioned; and afterwards, and between that year and 1818, E. Harrison became seised in her demesne, as of fee, of and in the residue of the tenements in the declaration mentioned; and being so seised thereof, she afterwards, on the 26th day of November, 1818, at, &c., died so seised of the said tenements, never having been married, and not having made any last will or testament. At the time of the death of Elizabeth Harrison, Frances Mary, the wife of Philip Thomas, was and still is her next heir, if she the said Frances Mary can by law inherit the said tenements from Elizabeth Harrison; and Peter Harrison was, during his lifetime, the uncle of E. Harrison, and also grandfather of the said Frances Mary. P. Harrison, being a natural-born subject of this kingdom, went from England to America, and resided for many years, and until the time of his death, in the town of Newhaven, which is now in the State of Connecticut, in North America, but which was at that time in and part of one of the British colonies of North America, where he (Peter Harrison) held for many years, and at the time of his death, the office of collector of his Majesty's customs. Peter Harrison died at Newhaven, in the year 1775, leaving several children him surviving, all of whom, except one daughter, Elizabeth, died during the lifetime of Elizabeth Harrison, without leaving any issue of their bodies them surviving. Elizabeth, the daughter of Peter Harrison, on the 22nd day of October, 1781, was married at Newport, in the State of Rhode Island, in North America (which State of Rhode Island was at that time one of the British colonies), to James Ludlow, who was born before the year 1776, in the State of New York, which State was also, at the time of the birth of James Ludlow, one of the British colonies. James Ludlow was originally brought up to the profession of the law. Elizabeth Ludlow died in the United States of America,

in the year 1790, leaving at the time of her death one daughter only, namely, Frances Mary, now the wife of the said P. Thomas, her surviving. The said Frances Mary was born at Newport, in America, in the State of Rhode Island, on the 4th day of February, 1784, after the United States of America were recognised as free, sovereign, and independent States, as hereinafter mentioned; and was married at New York, in the State of New York, one of the United States of America, to P. Thomas, in the year 1807. The colonies of Connecticut, Rhode Island, and New York, with other colonies in North America, separated themselves from the government and Crown of Great Britain, and united themselves together, and on the 4th day of July, 1776, declared themselves free and independent States, by the name and style of the United States of America. On the 3rd day of September, 1783, his late Majesty acknowledged the United States of America to be free, sovereign, and independent States, and on the same 3rd day of September a definitive treaty of peace was signed between his said Majesty and the United States of America, which treaty is as follows: —

Article 1st. His Britannic Majesty acknowledges the said United States, viz. New Hampshire, Massachusett's Bay, Rhode Island, and Providence Plantations; Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free, sovereign, and independent States; that he treats with them as such, and for himself, his heirs and successors, relinquishes all claims to the government, proprietary, and territorial rights of the same, and every part thereof.

Article 3d. It is agreed that the people of the United States shall continue to enjoy, unmolested, the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland, also in Gulf of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used at any time heretofore to fish; and also that the inhabitants of the United States shall have liberty to take fish of every kind, on such part of the coast of Newfoundland, as British fishermen shall use, but not dry or cure the same on that island; and also on the coasts, bays, and creeks of all other of his Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbours, and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long

as the same shall remain unsettled; but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without a previous agreement for that purpose, with the inhabitants, proprietors, or possessors of the ground.

Article 4th. It is agreed that the creditors, on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bonâ fide* debts heretofore contracted.

Article 5th. It is agreed that Congress shall earnestly recommend it to the Legislatures of the respective States, to provide for the restitution of all estates, rights, and properties which have been confiscated, belonging to real British subjects, and also of the estates, rights, and properties of persons resident in districts in the possession of his Majesty's arms, and who have not borne arms against the said United States; and that persons of any other description shall have free liberty to go to any part or parts of any of the thirteen United States, and therein to remain twelve months, unmolested, in their endeavours to obtain restitution of such of their estates, rights, and properties as may have been confiscated; and that Congress shall also earnestly recommend to the several States a reconsideration and revision of all acts or laws regarding the premises, so as to render the said laws or acts perfectly consistent, not only with justice and equity, but with that spirit of conciliation which on the return of the blessings of peace should universally prevail: and that Congress shall also earnestly recommend to the several States, that the estates, rights, and properties of such last-mentioned persons shall be restored to them, they refunding to any persons who may be now in possession, the *bonâ fide* price (where any has been given) which such persons may have paid, on purchasing any of the said lands, rights, or properties since the confiscation; and it is agreed that all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment to the prosecution of their just rights.

Article 6th. That there shall be no future confiscations made, nor any prosecutions commenced against any person or persons, for or by reason of the part which he or they may have taken in the present war: and that no person shall on that account suffer any future loss or damage either in his person, liberty, or property; and that those who may be in confinement on such charges at

the time of the ratification of the treaty in America, shall be immediately set at liberty, and the prosecutions so commenced be discontinued.

Article 7th. There shall be a firm and perpetual peace between his Britannic Majesty and the said States, and between the subjects of the one and the citizens of the other, wherefore all hostilities both by sea and land shall from henceforth cease, prisoners on both sides shall be set at liberty; and his Britannic Majesty shall, with all convenient speed, and without causing any destruction, or carrying away any negroes, or other property of the American inhabitants withdraw all his armies, garrisons, and fleets from the said United States, and from every port, place, and harbour within the same, leaving in all fortifications the American artillery that may be therein; and shall also order, and cause all archives, records, deeds, and papers belonging to any of the said States or their citizens, which, in the course of the war, may have fallen into the hands of his officers, to be forthwith restored and delivered to the proper States and persons to whom they belong.

The special verdict then stated, that P. Thomas, and Frances Mary his wife, afterwards, to wit, on the 1st day of November, 1821, demised to the said John Doe the said tenements with the appurtenances in the said declaration mentioned, to have and to hold for the term of seven years thence next ensuing, and fully to be complete and ended in manner and form as the said John Doe hath in that behalf alleged, by virtue of which demise, he, the said John Doe, entered into the said tenements with the appurtenances, and was possessed thereof until the said William Acklam, afterwards, to wit, on, &c. entered, &c., but whether or not upon the whole matter, &c. in the usual form. The case was, on a former day in this term, argued by

Tindal for the plaintiff. In order to establish the plaintiff's right to recover in this action, it will be necessary to make out three propositions: —

1st. That all persons born within the colonies of North America whilst subject to the crown of Great Britain, were natural-born subjects to all intents and purposes, and therefore capable to inherit and hold lands in Great Britain.

2d. That the separation of the colonies from the parent state, and the acknowledgment of their independence, did not in any manner affect the character and capacity of those persons who had

been born within the colonies before such separation, as natural-born subjects of this kingdom; but that they continued capable to inherit and hold lands in Great Britain as before.

3d. That by virtue of the 25 Edw. III., or the 7 Ann. c. 5, explained by 4 Geo II. c. 21, persons born within the United States of America, since their independence has been acknowledged, have the same right to inherit and hold lands as their parents who were born before that time.

The first proposition is so clear that it is rather to be assumed than to be argued: (this was conceded on the other side.) Then James Ludlow the father, and Elizabeth Harrison the mother of Mrs Thomas, were natural-born subjects of Great Britain, able to purchase, hold, inherit, and transmit lands,

The question upon the second proposition is, simply, whether persons born in the colonies before the separation did, in consequence of the separation, become aliens, and thereby incapable to hold or inherit lands in Great Britain; for alienage is the only incapacity now in question. That they did not become aliens, will be made clear by the arguments arising from the situation of the parties at the time when the independence of the colonies was acknowledged; secondly, by the language of the treaty containing that acknowledgment, subsequent treaties and various Acts of Parliament sanctioning those treaties; and, lastly, by authorities in the books And here it may be observed that the affirmative of alienage lies on the other side. Mr. Ludlow was a natural-born subject, it is sufficient for the plaintiff to show that he was *natus ad fidem regis*, it is for the defendant to make out that he became an alien. The situation of the parties at the end of the war does not furnish any reason for supposing that this country intended to make all the inhabitants of the United States aliens. It would have destroyed whatever hopes of a reconciliation and reunion were then entertained. Neither could the Americans have any object in becoming aliens. Many of them held lands in this country at the beginning of the war; they were natural-born subjects, as such had various privileges, and they revolted because they considered that some of those privileges had been violated. It cannot therefore be supposed that they would be anxious to abandon any of them. There was nothing in the claim of their independence by which they could be rendered aliens, they could not of their own accord, and by their own act throw off their alle-

giance, "nemo potest exuere patriam." Again, many individuals adhered to the parent state; would they become aliens? If so, it must be on the ground that the whole nation, and therefore every individual of the nation, became alien. Now, the nation could only be separated from this country by one of three modes, by cession, by conquest, or by voluntary separation acknowledged and sanctioned by the Legislature. If the Crown cedes a colony, that will not convert into aliens those who were before natural-born subjects, and deprive them of the privileges to which, as such, they were entitled. When Florida was ceded to Spain, did those inhabitants who held lands here become liable to lose them upon office found, or would they be incapable of transmitting them to their heirs? If not, it is clear that cession alone does not make the inhabitants of a colony aliens. Neither can they be rendered aliens by conquest, for if they cannot of their own accord put off their allegiance, and if cession by the Crown cannot have that effect, it would be singular if they could be rendered aliens by the violent act of a third power. This point will be made more clear by considering hereafter the history of the possessions which the Crown of England formerly enjoyed, lying on the continent of Europe. But it will be contended that where a colony renounces its obedience and separates itself from the parent state, by which its independence is afterwards acknowledged, there the allegiance is at an end. There is not, however, any authority for that position, it must be rested on general principles, and be established by arguments *ab inconvenienti;* such as the difficulty of owing a double allegiance, and the necessity of contending that all the Americans will be traitors who at any future time may carry arms against this country. As to the first, *Calvin's Case,* 7 Co. Rep. 1, shows that a double allegiance may be due, a man may be "ad fidem utriusque regis," and there are many instances of such an allegiance put in 1 Hale's P. C. 68. As to the other it is sufficient to answer, that it cannot affect the question of law; for if inconveniences necessarily follow out of the law, only the Parliament can cure them, *dictum per* VAUGHAN, C. J., in *Craw* v. *Ramsay,* Vaugh. 274. The situation of the parties at the time when the separation of the colonies took place, shows then that the Americans were not thereby rendered aliens, and the same appears by the several treaties made with them, and the Acts of Parliament by which those treaties were recognised. The first article of

the original treaty simply declares the United States free and independent.

It is a relinquishment, on the part of the Crown, of all claim to government, proprietary, or territorial right; but it is confined to soil and territory, which are thereby made foreign. The King, by the treaty, gave something to the States, but did not take anything from them. The treaty made the nation foreign: that the King had power to do. It did not affect to make the inhabitants personally aliens; that he had no power to effect.

The fifth is the next important article; it contains a direct recognition, by the contracting parties on either side, that the subjects of each State should hold lands in the other. It would have been absurd to restore lands if they could not afterwards be holden. So also it must apply to lands afterwards purchased, and not merely to those which they then held, for a man could not be alien as to part and not as to the residue.

The 6th article provides that no loss or damage should be sustained in person, liberty, or property, by reason of the part taken in the war; but surely to be rendered incapable of holding, inheriting, or transmitting lands would be a damage within the meaning of that article. Eleven years after the making of that treaty, a commercial treaty was made; by the ninth article of which it appears that Americans then held lands in the British dominions, and might transmit them to their heirs, they were therefore considered as British-born subjects for that purpose. This treaty is recognised and confirmed by the 37 Geo. III. c. 97 § 24, which recites and applies to the article in question.

This view of the question is corroborated by several cases, bearing in some degree on the point. The very definition of alien given in Litt. § 198, "born out of the ligeance of our sovereign Lord the King," shows that the place of the birth is not conclusive as to alienage. Lord COKE, in his commentary on that passage, Co. Lit. 129, a, says, "Note here, Littleton saith not *hors del realme*, but *hors de legiance*, for he may be born out of the realm of England yet within the legiance." This shows that Mr. Ludlow and his wife were natural-born subjects, and that character, once acquired, is indelible; no authority save an Act of Parliament is sufficient to destroy it, for that alone can naturalise one born an alien. In *Calvin's Case*, 7 Co. Rep. 54, a difficulty was put as possible in the event of a separation of the Crowns of England and Scotland; but

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Lord COKE says, "albeit the kingdoms should, by descent, be divided and governed by several Kings, yet it was resolved that all those that were born under one natural obedience, while the realms were united under one Sovereign, should remain natural-born subjects, and no aliens, for that naturalisation due and vested by birthright cannot, by any separation of the Crowns afterwards, be taken away; nor he that was by judgment of law a natural subject at time of his birth become an alien by such a matter *ex post facto*." The case of the provinces of Gascoyne, Guienne, Anjou, is decisive to show that the subjects of them were natural subjects, for the purpose of inheritance, not only during the time when they formed a part of the dominions of the Crown, but afterwards when they were conquered by France. Those provinces came to Henry II. by different titles. They were all lost in the reign of King John, and many of the principal persons in them adhered to the French King. The English estates of those persons were confiscated, but the people in general were still inheritable of lands in England, and were accounted "ad fidem utriusque regis." The 17 Edw. II. Stat. de Prærog. Regis was passed to give to the King escheats of the lands which descended to persons born beyond the sea, whose ancestors were, from the time of King John, under the allegiance of the Kings of France; Staunford de Prærog. Regis. During the interval between the loss of those provinces and the Statute in question, there must have been several generations, yet still the descendants must have been considered inheritable. Then, thirdly, the children born, after the separation of the two countries, of American parents born before that time, are natural-born subjects. The 25 Edw. III. expressly provides for such a case, and that is only declaratory of the common law according to Hussey, J., in 1 R. 3. 4. But even if it be doubtful whether that Statute extends to the present case, the 7 Ann. c. 5 § 3 explained by the 4 Geo. II. c. 21 certainly applies to it. A question will be made on the words used in that Act, "at the time of the birth," and it will be urged that the parents of the lessor of the plaintiff, Mrs. Thomas, had not that character at the time of her birth. It is certainly difficult to ascribe any definite meaning to those words, for it has been shown that a natural-born subject must continue so, he cannot put off that character. The 4 Geo. II. c. 21 was extended to grandchildren by the 13 Geo. III. c. 21. The case of *Stewart* v. *Hume*, 6 Morrison's Dict. of Decisions, 4649, is a decision in favour of the plaintiff

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In 1791 Anne Stewart, widow of George Stewart, claimed her *terce* of lands in Scotland. G. S. and his wife were born in America, before the revolt of the colonies, and continued to reside there afterwards. It was objected that she thereby became an alien, and therefore could not claim her terce; but the Lord Ordinary held that the claimant having been born before the revolt of the colonies was to be considered as a subject of Great Britain, residing then in a foreign country. *Gordon and Scott* v. *Brown* (decided in 1810, but not reported), is also in point: in that case Brown, the son and heir of the person last enfeoffed, was born in America, after 1783, and was held entitled to the land. In *Shedden* v. *Patrick*, Morrison's Dict. of Decisions, the same point was involved, but the Court of Session appeared to entertain no doubt about it, the whole question there turned upon the illegitimacy of the claimant. Applying to this case the observation of Lord Hale, in *Collingwood* v. *Pace*, 1 Ventr. 427, "The law of England, which is the only ground, and must be the only measure, of the incapacity of an alien, and of those consequential results that arise from it, hath been always very gentle in the construction of the disability, and rather contracting it than extending it so severely," the Court will be fully justified in giving such a construction to those statutes, and to the doctrine of alienage in general, as will support the claim of the present lessors of the plaintiff.

Parke, for the defendant. Mrs. Thomas, the lessor of the plaintiff, was not a natural-born subject, and therefore cannot be entitled to the lands in question. In *Calvin's Case* it is said that there are three incidents to a subject born: first, that the parents be under the actual obedience of the King; second, that the place of his birth be within the King's dominion; and thirdly, at the time of his birth, the kingdom where he is born must be under the legiance of the King. The first two of these incidents show that at common law Mrs. T. would be an alien, unless under certain special circumstances. It is clear that at the time of the birth of Mrs. T., that being after the ratification of the Treaty of 1783, the United States were independent of this country, *Foliott* v. *Ogden*, 1 H. Bl. 123; 3 T. R. 726; 2 R. R. 736; and, therefore, unless her case falls within the 25 Ed. III. st. 2, the 7 Ann. c. 5, or 4 Geo. II. c. 21, she is clearly an alien. Now, the Statute 25 Ed. III. st. 2, which is a declaratory act, says, "that the children born without the legiance of the King, whose fathers and mothers at the time of their birth shall be at the faith

and legiance of the King, shall have the same privileges as if born within the legiance of the King." Clearly the father and mother, in this case, were not at the faith and legiance of the King at the time when Mrs. Thomas was born. The 7 Ann. c. 5, s. 3, says, "that the children of all natural-born subjects, born out of the legiance of her Majesty, shall be deemed natural-born subjects." Some doubts having arisen upon the construction of that enactment, the 4 Geo. II. c. 21, was passed to remove them, and declared "that the children were to be deemed natural-born subjects only where the parents, *at the time of the birth of the children*, should be natural-born subjects. That Statute shows that, in the opinion of the Legislature, the character of a natural-born subject might be lost. The doctrine of allegiance proceeds on the ground of a mutual compact between the Crown and the subject, *Calvin's Case*, 7 Co. Rep. 9; and it is clear that it cannot be dissolved by either party without the concurrence of the other; but that may be done by the mutual consent of both parties; and here the act of the Sovereign was authorized by Act of Parliament, 22 Geo. III. c. 46. The first article of the treaty is a complete renunciation of all authority on the part of the Crown of Great Britain; on the side of the colonies a claim of freedom from allegiance. Mr. Ludlow, by remaining in America after the treaty, lost his character of a British subject. This was urged by Lord REDESDALE, when arguing the case of *Somerville* v *Somerville*, 5 Ves. 781, 5 R. R. 155, and was not denied, either by the counsel on the other side or by the Court. The subsequent provision giving to the Americans a qualified right of fishing, proves that it was so understood; for had they remained subjects of the King of Great Britain, that clause would have been unnecessary. The clauses for the restoration of property are merely exceptions from that which would otherwise have followed from the first article, and do not treat the Americans and their heirs as capable of holding lands in the character of natural-born subjects. The consequence of deciding for the plaintiff would be that all Americans must be considered as subjects, with all their privileges and duties. There may be instances in which persons may be entangled in a double allegiance; but the inconvenience is so great that the Court will not be inclined to favour the doctrine of a double allegiance. The case supposed in *Calvin's Case*, of a separation of the Crowns of England and Scotland, is a separation by operation of law, without any dissolution of the compact by the consent of the parties. This case

has already been decided in the American Courts, where it has been held that the natives of Great Britain are aliens, and incapable of inheriting lands in that country. *Blight's Lessee* v. *Rochester*, 7 Wheaton's Reports of Cases in the Supreme Court of the United States, 535. *Cur. adv. vult.*

The judgment of the Court was now delivered by

Abbott, C. J. This was an ejectment, brought for the recovery of certain lands in the county of York, whereof Elizabeth Harrison had lately died seised. Frances Mary Thomas claimed as heiress at law, and according to the pedigree, she is entitled so to claim, if she be a person capable of claiming lands in England by descent. She is the daughter of Elizabeth Harrison, afterwards Ludlow, and granddaughter of Peter Harrison. Peter, the grandfather, a native of England, went to America, and resided for many years in Connecticut, where he held the office of collector of his Majesty's customs, and died in 1775. His daughter Elizabeth was married in 1781, in Rhode Island, to James Ludlow, a native of New York, who was born before the year 1776, and who continued to live in America until his death, and died there; Elizabeth also continued to live in America, and died there in 1790. Frances Mary was born in America, in Rhode Island, in 1784. The question is, whether she be the child of a father who, at the time of her birth, according to the expression used in the Statute 4 Geo. II. c. 21, was a natural-born subject of the Crown of Great Britain.

The case was very ably argued before us, and all the authorities bearing on the question were cited; we do not think it necessary to refer again to them.

Some question was raised as to the meaning of the words "fathers, natural-born subjects of the Crown of Great Britain, at the time of the birth of their children." We think the sense of these words is very plain; natural-born subjects are mentioned as distinguished from subjects by donation, or any other mode. A child born out of the allegiance of the Crown of England is not entitled to be deemed a natural-born subject, unless the father be, at the time of the birth of the child, not a subject only, but a subject by birth. The two characters of subject and subject by birth must unite in the father. James Ludlow, the father of Frances Mary, was undoubtedly born a subject of the Crown of Great Britain; he was born in a part of America which was at the time of his birth a

British colony, and parcel of the dominions of the Crown of Great Britain; but upon the facts found, we are of opinion that he was not a subject of the Crown of Great Britain at the time of the birth of his daughter. She was born after the independence of the colonies was recognised by the Crown of Great Britain; after the colonies had become united States, and their inhabitants generally citizens of those States, and her father, by his continued residence in those States, manifestly became a citizen of them. This recognition of independence was made, or rather confirmed, on the 3rd of September, 1783, by a treaty between his late Majesty and the United States of America. Preliminary articles, which are afterwards introduced into, and form this treaty, were signed on the 30th November, 1782, after the passing of the Statute 22 Geo. III. c. 46, whereby his Majesty was authorised to treat of and conclude a peace or truce with the several American colonies therein named. Between the signing of the articles and of the definitive treaty several acts were passed, mentioning the United States of America, and the subjects and citizens of those States; and the name of colonies or plantations is no longer used. (See 23 Geo. III. c. 26; c. 39 & 80.) Many Acts of Parliament, wherein the United States of America are mentioned and treated as a distinct and independent nation, have been since passed; so that, if the sanction of the British Legislature could be thought necessary to give validity to this treaty, such sanction has been abundantly given.

Then what is the effect of this treaty, as it regards the question in the present cause? By the first section, his Majesty acknowledges the United States of America (enumerating by name, as those States, the several countries that had been before, in all Acts of Parliament, mentioned as colonies or plantations) to be free, sovereign, and independent States, that he treats with them as such, and relinquishes all claim to the government, proprietary, and territorial rights of the same, and of every part thereof. It is impossible to yield to one of the observations made by the learned counsel for the plaintiff, that this is to be considered as a relinquishment of the right to the soil or territory only; a relinquishment of the government of a territory is a relinquishment of authority over the inhabitants of that territory, — a declaration that a State shall be free, sovereign, and independent, is a declaration that the people composing the State shall no longer be considered as subjects of

the Sovereign by whom such a declaration is made. It was contended, however, that by some of the subsequent articles of this treaty, or by the subsequent treaty, which was ratified by the Statute 37 Geo. III. c. 97, it appears that persons in the situation of the lessor of the plaintiff are to be considered as the children of natural-born British subjects, and not as the children of aliens. But we think no such effect can be derived from either of these treaties. The third, fifth, and sixth articles of the Treaty of 1783 appear to be the only articles that have any bearing upon this question. The third article gives to the citizens of the United States a liberty of fishing on certain coasts. On the part of the defendant it was said that if they were to be considered as British subjects, they would have this privilege in that character. At all events, it is clear that a liberty thus specially given confers no right beyond that which is so given.

By the fifth article it is agreed, that Congress shall recommend to the Legislatures of the respective States to provide for the restitution of confiscated estates belonging to real British subjects, &c., that persons of every description shall have liberty to go into any part of the United States, and remain twelve months, to endeavour to obtain restitution of their estates. The sixth article provides against future confiscations, by reason of the part that any person may have taken in the war. Now it is impossible to extend the effect of these two articles beyond the particular lands that might be restored, recovered, or retained in virtue of them; and their effect, even as to such lands, with the future residence of their owners, and the rights of descent are not clearly defined. Then, as to the subsequent treaty; it provides only that British subjects who then held lands in the territory of the United States, and American citizens who then held lands in the dominions of his Majesty, should continue to hold them, and might grant, sell, or devise them, as if they were natives, and that neither they nor their heirs or assigns should, so far as might respect the said lands, and the legal remedies incident thereto, be considered as aliens. This article is therefore, in terms, confined to lands *then held*; in its general import, it distinguishes British subjects from American citizens; and the provision that persons should not be considered as aliens, with regard to particular lands, seems to indicate very plainly that they were considered as aliens with regard to other lands. The inconvenience that must ensue from considering the great mass of the

inhabitants of a country to be at once citizens and subjects of two distinct and independent States, and owing allegiance to the government of each, was well commented upon in the argument at the bar. If the language of the treaty could admit a doubt of its effect, the consideration of this inconvenience would have great weight toward the removal of the doubt. As we think the effect of the treaty manifested by its language, we do not think it necessary to observe upon this topic. But, for the reasons already given, we are of opinion that James Ludlow had ceased to be a subject of the Crown of Great Britain, and became an alien thereto, before the birth of his daughter, and, consequently, that she is also an alien, and incapable of inheriting land in England; and judgment must be entered for the defendant.

It is a great satisfaction to us to know that this our judgment is conformable to a decision of the Supreme Court of the United States of America upon a similar question, brought before that Court on a claim of a British subject to land in America.

Judgment for defendant.

ENGLISH NOTES.

Although the disabilities of aliens have been much diminished by modern legislation, it will be interesting to note briefly the nature of the disabilities which existed apart from statute.

By the English common law, an alien could not purchase or take by devise lands for his own benefit, though he may for the benefit of the Crown. *Radcliffe* v. *Roper* (Ch. 1712), 10 Mod. 120, 136.

An alien could not enforce uses or trusts of land. But the King might, in equity, have enforced the trust in favour of the alien. *R.* v. *Holland* (K. B. 1671), Aleyn, 14. The incapacity did not, however, extend to a benefit given to an alien in the distribution of proceeds of land under a trust which absolutely directs a sale of the land. *Du Hamelin* v. *Sheldon* (Ch. 1840), 4 My. & Cr. 525, 529.

An alien friend might, however, acquire goods and leases, and sue in all personal actions. *Tirlot* v. *Morris* (1611), 1 Bulst. 134; *Pisani* v. *Lawson* (1839), 6 Bing. N. C. 90; 9 L. J. C. P. 12.

It has been held that the disability of alienage is neither a penalty nor a forfeiture; and an alien cannot therefore demur to an information filed to discover his birth, in order to establish the fact of alienage. *Att. Gen.* v. *Duplessis* (Exch. 1751), 2 Ves. Sen. 286, and (H. L. 1753) 1 Bro. P. C. 415.

[6] There have been various Acts of Parliament (particularly 7 Anne,

c. 5, 4 Geo. II. c. 21, and 13 Geo. III. c. 21) by which the *status* of natural-born British subjects has been conferred on the children and grandchildren, born abroad, of natural-born British subjects. The extent of the operation of these Acts was much considered in a case in the Chancery Division in 1882, relating to the succession of a person who died before the Naturalisation Act of 1870 (33 & 34 Vict. c. 14; which has been held not to be retrospective, *Sharp* v. *De St. Sauveur* (1871), L. R. 7 Ch. 311; 41 L. J. Ch. 576). It was decided by Kay, J., that the status so conferred by these Acts is a personal status, and is not by the Acts made transmissible to the descendants of the persons to whom it is expressed to be given. *De Geer* v. *Stone* (1882), 22 Ch. D. 243; 52 L. J. Ch. 57. It was likewise, in the same case, decided that the rule of English law by which children (born abroad) of ambassadors in the service of the Crown are treated as natural-born British subjects, does not apply to the children (born abroad) of officers in the military service of the Crown in foreign parts.

By the Naturalisation Act 1870 (33 & 34 Vict. c. 14), a radical change is made in regard to the rights of aliens. By the second section of that Act, real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject. The same Act contains provisions by which a person may acquire and divest himself of the status of a British subject. This Act, though extending to aliens every right in the nature of property, does not necessarily solve every question as to the rights of aliens. For instance, it does not extend to aliens the provisions of Lord Kingsdown's Act (24 & 25 Vict. c. 114) as to the execution of wills by British subjects abroad: *Bloxam* v. *Favre* (1885), 9 P. D. 130; 53 L. J. P. D. & A. 26.

It is to be observed that, in the latter of the principal cases, the inference was drawn that the person in question adhered, upon the treaty of peace, to the American Government. In a subsequent case, where the facts showed an election of the British allegiance, — the person in question having adhered to the King's side during the war, and on the treaty of peace, having embarked for England with the British troops, and remained there for about two years, — it was held that he remained a British subject. *Doe* d. *Auchmuty* v. *Mulcaster* (K. B. 1826), 5 Barn. & Cres. 771.

In 1886 the question as to whether a person was an alien came up for decision in an interesting form. It arose upon an election petition (*In re Stepney Election, Isaacson* v. *Durant*, 17 Q. B. D. 54; 55 L. J. Q. B. 331), and the question was whether a person born in the Kingdom of Hanover before 1837, and during the period when the King of this kingdom was also King of Hanover, was entitled to vote at an

election for a member of the Imperial Parliament at Westminster. By the concurrent judgment of the Court (Lord Coleridge, C. J., Hawkins, J., and Matthew, J.) it was held that the person in question was an alien and not entitled to vote, although on the register. They held that, although up to 1837 he was, as owing allegiance to King William IV. and his predecessors, Kings in both countries, entitled (according to *Calvin's Case*) to all the privileges of a natural-born subject in this country, yet on the accession (in 1837) of Queen Victoria to the Crown of this kingdom, and of the Duke of Cumberland to the Crown of Hanover, his allegiance belonged to the latter, and not to the former; and he became an alien for all purposes relating to her Majesty's dominions.

In the appeal *Jeffreys* v. *Boosey*, in the action of *Boosey* v. *Jeffreys* (1854), 4 H. L. Cas. 815; 24 L. J. Ex. 81, the question considered by the House of Lords was — "Whether an alien resident abroad, and there composing a literary work, is an author within the meaning of the copyright statutes." Although this particular question has become of less importance since the International Copyright Act, 1886 (49 & 50 Vict. c. 33), it is important to observe the reasons on which the decision rests. These reasons, which are substantially those of the House, are stated in the judgment of the Lord Chancellor (Lord Cranworth) as follows: "My opinion is, that the Statute (8 Anne, c. 19) must be construed as referring to British authors only. *Primâ facie* the Legislature of this country must be taken to make laws for its own subjects exclusively; and where, as in the Statute now under consideration, an exclusive privilege is given to a particular class at the expense of the rest of her Majesty's subjects, the object of giving that privilege must be taken to have been a national object, and the privileged class to be confined to a portion of that community for the general advantage of which the enactment is made. When I say that the Legislature must *primâ facie* be taken to legislate only for its own subjects, I must be taken to include under the word "subjects" all persons who are within the Queen's dominions, and who thus owe to her a temporary allegiance. I do not doubt that a foreigner resident here, and composing and publishing a book here, is an author within the meaning of the statute. He is within its words and spirit. I go further; I think that if a foreigner having composed, but not having published, a work abroad were to come to this country, and the week or day after his arrival were to print and publish it here, he would be within the protection of the Statute."

In *Low* v. *Routledge* (1864, 1865), L. R. 1 Ch. 42; 35 L. J. Ch. 114, it was decided by the Lords Justices Turner and Knight Bruce, in effect affirming the decision of V. C. Kindersley, that an alien

author is entitled to British copyright in a work first published in England during the residence of the author in any part of the British dominions. In the speeches of Lord Cairns and Lord Westbury in this case the opinion was strongly expressed that the narrow construction of the Act of Anne adopted by the House of Lords in *Jeffreys* v. *Boosey* did not apply to the later Copyright Act of 5 & 6 Victoria, c. 45. Lord Cairns (Chancellor) there said: "In my opinion the protection (of the Act 5 & 6 Vict.) is given to every author who publishes in the United Kingdom, wheresoever that author may be resident, or of whatever state he may be the subject." Lord Westbury argued strongly in favour of the same construction. Both these opinions are based on the ground that the main purpose appearing on the face of the Act is the encouragement of the publication here of literary works of lasting benefit; and although there is yet no decision on the point, it seems the better opinion that the effect of the decision of the House of Lords in *Jeffreys* v. *Boosey* is wholly done away by the Naturalisation Act. 1870. For copyright is clearly a species of "property." Shortt on Copyright, 2nd ed. p. 20.

The practical importance of the point is, moreover, much diminished by the extension in recent years of international copyright, by conventions under the Acts called the International Copyright Acts, of which the last and most extensive is the International Copyright Act 1886 (48 & 49 Vict. c. 33). It would be beyond the scope of the topic now under consideration to enter in detail into the provisions of these Acts. In a case decided by Mr. Justice Stirling in 1891 it was decided that in order to take advantage of the provisions of these Acts the plaintiff must have registered his publication under the general copyright Acts. *Fishburn* v. *Hollingshead* (1891), 60 L. J. Ch. 768.

AMERICAN NOTES.

An alien is a person born out of the United States and subject to some foreign government, or born in the United States while so subject, and not naturalised. *Dawson* v. *Godfrey*, 4 Cranch (U. S.), 321; *Linslie* v. *Martin*, 9 Massachusetts, 456; *Inglis* v. *Sailors' Snug Harbor*, 3 Peters (U. S.), 99; *Ilzberry* v. *Hawkins*, 9 Dana (Kentucky), 177; 33 Am. Dec. 546.

By statute in almost all the States, aliens are empowered to hold, take and inherit lands. 1 Washburn Real Property, 74, n. 7.

At common law an alien could take land by devise or grant, as against all the world except the Sovereign, and until office found. *Marx* v. *McGlynn*, 88 New York, 357; *Crane* v. *Reeder*, 21 Michigan, 24; 4 Am. Rep. 430; *Harley* v. *State*, 10 Alabama, 689; *Halstead* v. *Commissioners*, 56 Indiana, 363; *Ferguson* v. *Neville*, 61 California, 356; *Emmett* v. *Emmett*, 14 Lea (Tennessee), 369; *Jones* v. *McMasters*, 20 Howard (U. S.), 21; *Phillips* v. *Moore*, 100 United States, 208.

But "by the common law an alien cannot acquire real property by operation of law, but may take it by act of the grantor and hold it till office found." *Phillips* v. *Moore*, *supra*.

No. 3. — BRANDON *v.* NESBITT.

(K. B. 1794.)

RULE.

No action can be maintained either by or in favour of an alien enemy.

Brandon v. Nesbitt.

6 T. R. 23; 3 R. R. 109.

This was an action on a policy of insurance on goods on board the *Greyhound*, an American ship, at and from London to Bayonne; there was an averment in the declaration that the policy was effected for the benefit and on the account of David Brandon, Isaac and David Valery, Samuel and Moyza D'Abraham Nunes, Castro Leon and Co., Solomon David and Joshua Brandon, and N. Pimental and Co., who were interested in the goods; and another averment that the ship was captured as prize. The defendant pleaded that "the persons interested in the goods were aliens born in foreign parts, to wit, at Bayonne in France, out of the allegiance of the King of Great Britain, and within the allegiance of a foreign Sovereign, to wit, the French King;" that before the ship sailed, a public and open war commenced and was carried on between our King and the persons exercising the powers of government in France, and that the persons interested were inhabiting and commorant in France under the government of the persons exercising the powers of government in France, and that they are enemies of our King, and adhering to the King's enemies, &c. . . . The replication stated that the persons interested in the insurance were before the commencement of the war, and at the commencement of the suit, severally and respectively indebted to the plaintiff in divers sums of money exceeding the respective interests of those persons in the goods insured, specifying what sum was due to the plaintiff from each of those persons respectively. To this replication there was a general demurrer, and joinder in demurrer.

Argued in support of the plea: —

It is a good plea in bar to the action (and not merely a plea in abatement) to say that the plaintiff who brings the action is an alien born, and at enmity with the King. Lit. sect. 196, 198; Co. Lit. 127 b, 129 b; Dy. 2 b; Gilb. Hist. C. B. 205; 1 Bac. Abr. p. 4; Comb. 212, 394; *Wells* v. *Williams*, Salk. 46, and 1 Lord Raym. 282; 1 Com. Dig. "Abatement" (E. 4). This plea is founded on good policy; it is to prevent the property sued for being carried out of this country to enrich the enemy. Now, the persons who are interested in the goods insured, and whose interest is stated in the declaration as the foundation of the action, are in reality the plaintiffs in this case, because it there appears that the plaintiff sues for their benefit; and, as far as respects this question, it is immaterial whether they sue in their own name or in that of their agent. It was necessary that the agent should bring the action in his name, because the contract of insurance was formerly made by him, and it was necessary to aver that these parties were interested, because the contract of insurance was substantially made with them. But if they cannot maintain an action in their own names, on account of their alienage, neither can they in the name of their trustee: if the law will not permit them to sue directly, they cannot effect the same thing indirectly. If the plea be good, the next question is, whether there be anything contained in the replication to avoid it. It will be contended, on behalf of the plaintiff, that he has a lien on the goods which were the subject of insurance; but unless the principal himself can make a good title to the property, no other person can have a lien upon it on his account. The agent cannot have a better title than his principal; and it has been shown that the principal in this case has none. And if the replication mean to assert that the plaintiff himself has an insurable interest in the goods, then the replication is bad, because it is a departure from the declaration which avers the interest to be in the principal

Argued, *contrà*: It may be admitted that the plea of alien born is a plea in bar, though it is to be observed that it was said in *Wells* v. *Williams*, 1 Lord Raym. 283, that it is a plea not to be favoured. But there is no instance in which such a plea has been pleaded, imputing the disability to a third person, who is not the plaintiff on the record; in all the cases the disability has been imputed to the party who contracts. In the case of an executor,

indeed, it may be pleaded that the testator was an alien enemy, but the executor is considered as the legal representative of the testator, and as the person to whom the benefit of the contract is by law transferred. But the Court will not take notice of beneficial interests in other persons than the plaintiff, in order to work injustice; and here the parties interested in the goods, and to whom the disability of suing is imputed, were not the contracting parties. And though in *Winch* v. *Keeley*, 1 T. R. 619, the Court took notice of the *cestui que trust*, that was done in order to prevent injustice: whereas if it be done here, it will be to work injustice. But even if the Court can take notice of the beneficial interests of these persons, and consider them as the real plaintiffs in the action, still this plea of alienage is bad, being pleaded to a contract of insurance. At the time when this contract was entered into, which was before the passing of the Stat. 33 Geo. III. c. 27, the insurance of enemy's property even in time of war was not illegal. Then if it were a legal contract, the law will provide the parties with a remedy by action to enforce it. And therefore whether the alien in such a case sue in his own name or in that of his agent, the plea of his being an alien born cannot be set up as a legal bar to the action. An alien in league may buy and sell here, and may maintain a personal action. Co. Lit. 129 b. If however the Court should be of opinion that the plea can be supported, the replication gives a sufficient answer to it. The plea does not state that the plaintiff who made the contract was an alien born, and is thus disabled from suing, but that other persons, who are beneficially interested in the goods are aliens; but the replication discloses an opposing equity to the equity relied upon by the defendant in his plea. And this shows that there is no impolicy in permitting the plaintiff to recover, because the money, which it is the object of this action to recover, when recovered will not go out of the kingdom (as was supposed) to strengthen the hands of the enemy, but will be retained here by the plaintiff by way of set off. As to the plea of alien born being founded on the ground that the property of the enemy is forfeited to the Crown, it is said in Dy. 2 b, that the reason of this plea is that, "being an enemy of the King, he shall not have the benefit of the law." Now, if the replication be supported, that reason will not hold in the present case; for it is the plaintiff, not the aliens, who prays the benefit of the law in this action. Besides,

these goods are not forfeited to the Crown: no property vests in the Crown till found by inquisition, Park. Rep. 267; and if peace should be made before inquest taken, there will be no forfeiture at all. *Ib.*

Argued in reply: It is not true, as a general position, that this Court will not take notice of the beneficial interests of third persons. *Bottomly* v. *Brook*, *Rudge* v. *Birch*, and *Webster* v. *Scales*; cited in *Winch* v. *Keeley*, 1 T. R. 621, 622. This action is to all intents and purposes the action of alien enemies; it is so stated, and unless the plaintiff cannot support their interest, he cannot sue at all. The objection therefore goes to the foundation of the interest of the plaintiff himself; for he avers an interest in persons who by law can have none. The cases in which it has been held that policies of insurance on the goods of an enemy are legal, are either those where the goods were going from one port of the enemy to another, or from a neutral port to an enemy's port; but there is no case in which it has been directly held that a policy of insurance on enemy's property from this country to the enemy's country is good.

This case stood over for a second argument; but the plaintiff's counsel intimating to the Court this day that the parties did not wish a further argument,

Lord KENYON, C. J., said that the Court had considered this case; and unless anything more could be urged at the bar to shake the opinion they had formed, they were of opinion that judgment must be given for the defendant on this ground, that an action will not lie either by or in favour of an alien enemy; that the case of *Anthon* v. *Fisher*, Dougl. 648, n. 1, which was argued in this Court, and upon which judgment was given here for the plaintiff *pro formâ*, in order to give an opportunity of bringing a writ of error (the Judges of this Court being divided in opinion), and which judgment was afterwards reversed in the Exchequer Chamber, ib. 649, n. 132, proceeded on the same principle; that they had not found a single case, in which the action had been supported in favour of an alien enemy. For though it was held in *Ricord* v. *Bettingham*, 3 Burr 1734, and 1 Bl. Rep. 563, that the action by an enemy on a ransom bill might be maintained, the action was not brought until peace was restored, which gets rid of the objection.

Judgment for the defendant.

When the case of *Bristow* v. *Towers*, 6 T. R. 35, was mentioned a few days afterwards, Lord KENYON said, the more they thought of this subject, the more strongly were they convinced of the propriety of this determination.

ENGLISH NOTES.

In a case in 1589 it was held that a person born under the allegiance of a sovereign enemy cannot sue, although there has been no proclamation of war. *Anon.* Owen, 45; s. c. Cro. Eliz. 142.

Where it appeared in the course of the action that the plaintiff had become an alien enemy, judgment was given (notwithstanding the general rule then subsisting that matter arising after commencement of the action could not be pleaded in bar) that the plaintiff be barred from further having or maintaining his action. *Le Bret* v. *Papillon* (1804), 7 R. R. 618; 4 East, 502. So a plea, after the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), that the plaintiff had become an enemy since the last pleading, and that he is residing in this kingdom without the licence of the Queen, was sustained on demurrer; *Alcenius* v. *Nygren* (1854), 4 El. & Bl. 217; 24 L. J. Q. B. 19.

A British subject resident and carrying on trade in an enemy's country is, equally with an alien enemy, incapable of suing in the Courts of this country. *McConnell* v. *Hector* (1802), 6 R. R. 724; 3 Bos. & P. 113; *O'Meeley* v. *Wilson*, 10 R. R. 732; 1 Camp. 482. "If an alien enemy be residing here under the King's protection, he may sue; but if an Englishman be resident in an hostile country, the King cannot enable him to sue," per ROOKE, J., *McConnell* v. *Hector*, *supra*. But a British subject remaining in a foreign country for a short time, so as not to raise any presumption of adherence to the enemy, and not trading there, is not incapacitated. *Roberts* v. *Hardy* (1815), 3 Maule & Sel. 533.

"Although the King's licence cannot, in point of law, have the effect of removing the personal disability of the trader, in respect of suit, so as to enable him to sue in his own name; it purges the trust, in respect to him, of all those injurious qualities in regard to the public interest which constituted the particular ground of objection to the trust," in the principal case. So that, in the case of a licenced trade, an insurance on the enemy's ship, as well as on the goods and specie put on board for the benefit of British subjects, was incidentally legalised; and it was held that the British agent of both parties having insured in his own name might sue on the policy in time of war. *Per curiam*, *Kensington* v. *Inglis* (1807), 9 R. R. 438; 8 East, 273.

The right of an alien, under a contract lawfully contracted during

peace, is only suspended during war; and therefore in bankruptcy a claim upon such a right was allowed to be entered, reserving the dividend. *Ex parte Boussmaker*, 9 R. R. 142; 13 Ves. 71.

AMERICAN NOTES.

This doctrine is prevalent in the United States. *Dorsey* v. *Kyle*, 30 Maryland, 512; 96 Am. Dec. 617; *Peerce* v. *Carskadon*, 4 West Virginia, 234; 6 Am. Rep. 281; *Leathers* v. *Com. Ins. Co.*, 2 Bush (Kentucky), 296; 92 Am. Dec. 483.

So as to a resident of the Confederacy during the late civil war. *Burnside* v. *Matthews*, 54 New York, 78.

No. 4. — POTTS *v.* BELL.

(K. B., ERROR FROM C. P. 1800.)

RULE.

It is a principle of the common law that trading with an enemy or with an enemy's country without licence of the Crown is illegal.

Potts v. Bell.

8 T. R. 548; 5 R. R. 452.

Upon a writ of error brought from the Court of Common Pleas, it appeared that Bell and others brought an action against Potts, upon a policy of insurance on the ship *Elizabeth*, and goods on board, at and from Rotterdam to Hull, with liberty to touch and stay at any ports or places, &c., and declared as for a loss of the goods loaded on board by capture by enemies. There were other counts for money had and received, and upon an account stated; to which the general issue was pleaded.

At the trial a verdict was found for the plaintiffs below; and a bill of exceptions was tendered and allowed on the part of the plaintiff in error, whereby it appeared, that at the trial the plaintiffs below proved in evidence the policy of assurance in the declaration mentioned, subscribed by Potts, and dated the 7th of December, 1797; and that the policy was effected in London by Barrett and Company, insurance brokers there, by the orders, and for the benefit and risk of the plaintiffs, then and still being British merchants resident in London, and interested in the goods insured to the value mentioned. That the ship *Elizabeth* was a neutral

ship belonging to H. Bannermann and Son, of Greetsil and Embden, in Prussia, bound on the voyage insured from Rotterdam to Hull; and that the clearance of the ship was ostensibly from Rotterdam to Norden, because the persons then exercising the powers of government in the United Provinces, would not permit the ship to be cleared out from Rotterdam to Hull, or any other port of Great Britain; and that the goods insured, consisting of sixty casks of madders, were laden on board the *Elizabeth* at Rotterdam, to be conveyed from thence to Hull by one Robert Twiss, then being the agent of the plaintiffs below, and residing at Rotterdam, by their orders and for their use, and were consigned by him to Messrs. Hewson and Gunnes, at Hull, who then were the agents of the plaintiffs below, by their order and for their sole account and risk. That the ship *Elizabeth*, having the goods insured afterwards on the 18th of December, 1797, sailed from Rotterdam for Hull, and was captured on her voyage the next day by a French ship, an enemy to the King; whereupon the counsel for the plaintiff in error, on his part, proved in evidence that the said sixty casks of madders, before the lading of them on board the *Elizabeth*, and before the policy was subscribed, were purchased by Twiss their agent, resident at Rotterdam, in order to be sent from Rotterdam to Hull, on their account and risk at London, and were afterwards laden on board the ship at Rotterdam for that purpose. The six bills of exchange were drawn by Twiss, in payment for the madders at Rotterdam, but dated at Hamburgh, upon the defendants in error; and which bills having been indorsed by the payees thereof respectively, were afterwards duly accepted and paid by the said defendants in error in London. That before and at the time of the said purchase of the said sixty casks of madders by Twiss, and of the loading of them on board the *Elizabeth*, in order to be conveyed from Rotterdam to Hull, for and on account of the defendants in error, and also before and at the time that the plaintiff in error subscribed the policy of assurance thereon, and before and at the time of the ship's departure from Rotterdam towards Hull, and of the capture of the said ship and madders as aforesaid, hostilities had commenced, and still existed between Great Britain and the persons exercising the powers of government in the said United Provinces. That the plaintiff in error also proved the payment of the premium into court in this action; whereupon the counsel for the plaintiff in error insisted at the trial, that upon the

matter so proved in evidence, the plaintiffs below were not entitled to recover against him; that the policy upon the said madders was void, for that it is not lawful for British subjects to carry on trade with any nation which at the time is in a state of open war and hostilities with Great Britain, nor to purchase any goods in such nation, and import them from thence to Great Britain. The bill of exceptions then stated the Judge's direction to the jury, to find a verdict for the plaintiffs below, the finding of such verdict accordingly, and the assignment of errors thereon in the usual form.

This case was first argued in Michaelmas Term last.

Gibbs for the plaintiff in error:

This is an illegal insurance, because it was made to protect the transportation of goods purchased in an enemy's country into this, and by the common law all trading with an enemy is illegal. It appears on the record, that there was open war between this country and Holland; that during that time Bell's agent, resident in the enemy's country, purchased the goods in question for him there, which is direct trading with an enemy; and that Bell afterwards made the contract with Potts, on which this action was brought in order to secure to himself the benefit of such illegal trading. But if the original act were unlawful, no subsequent contract for giving it effect can be supported in law. Trading with an enemy has always been deemed illegal in a subject, on account of the mischievous consequences which ensue from it. The intercourse which it creates between subjects of hostile states, necessarily tends to facilitate the conveyance of intelligence to the enemy. The practice of granting licences by the Crown for such an intercourse in particular cases, from the earliest times down to the present, shows strongly what the common law is in this respect, in addition to which there is a direct authority against the legality of such a trading, in 2 Rol. Abr. 173, pl. 3 (tit. Prerogative, L. Guerre); where trading with Scotland, then in a state of general enmity with this kingdom, was deemed illegal; but the merchants having acted under a licence granted to them by the keepers of the truce, were pardoned by the King. This was adverted to in the case of *Gist* v. *Mason*, 1 T. R. 88; 1 R. R. 154, by Lord Mansfield, who also mentioned another instance, where trading with an enemy was deemed unlawful, from a note given to him by Lord Hardwicke on a reference to all the Judges in the time of King William III. Whether it were a crime at common law to carry

corn to an enemy? — who were of opinion that it was a misdemeanour. Lord MANSFIELD also there said, that by the maritime law, trading with an enemy is cause of confiscation in a subject. Upon the same principle, it was holden illegal in the case of *Bristow* v. *Towers*, 6 T. R. 35, to insure an enemy's property. Now, this is in effect the same thing; for the enemy gets the price of his goods, and he has equally the advantage of our market, without any risk. Questions of this sort more frequently occur in the Courts of Admiralty, to which jurisdiction they properly belong; and there it is a settled maxim, that trading with an enemy is cause of confiscation, if the vessel on board which the goods insured are loaded be captured by any of our cruisers and condemned; and such a condemnation, being a sentence *in rem*, would be conclusive evidence, in the Courts of Common Law, that the ship was engaged in an illegal traffic; as was ruled by Lord KENYON in the case of *Nesbitt* v. *Whitmore*, at the last sittings at Guildhall. This Court then, for the sake of consistency, should be governed by the same law as they would have been if the vessel had been stopped at sea and brought in by our cruisers.

Wigley, *contrà* : —

It is by no means settled as a principle of law, that all trading with an enemy is illegal, even supposing that the decision of that question would govern the present: the law makes express provision for the safety of the persons and property of foreign merchants belonging to an enemy's country, resident here in time of war. 1 Blac. Com. 260. In *Henkle* v. *The Royal Exchange Assurance Company*, 1 Ves. Sen. 320, Lord HARDWICKE said: "It might be going too far to say, that all trading with an enemy is unlawful; for the general doctrine would go a great way, even where only English goods were exported and none of the enemy's imported, which may be very beneficial." Lord MANSFIELD, in *Gist* v. *Mason*, stated the doctrine very doubtfully, and in terms which rather show the leaning of his opinion to have been the other way. Much may depend upon the particular sort of trading. In time of war, it is well known that certain articles are deemed contraband, even with respect to neutrals, such as furnish the enemy with the means of resistance or annoyance; namely, provisions, warlike stores, and the like. To trade with an enemy in such articles, is undoubtedly illegal. The instance mentioned by Lord MANSFIELD, of supplying an enemy with corn, was evidently of

this sort. What the trading was in the case mentioned in Rolle's Abridgment, does not appear; possibly it was of the latter kind; — but, at any rate, that case differs from this; for there our merchants went into an enemy's country to trade; and here the trading was through the medium of neutrals. This distinction will also account for the granting of licences by the Crown, from time to time, to trade with enemies; for a variety of articles have, at different periods, as circumstances varied, been deemed to be contraband; in which case it never was disputed but that a licence from the Crown was necessary for the protection of the trader. In *Brandon* v. *Nesbitt*, 6 T. R. 23, 3 R. R. 109, and *Bristow* v. *Towers*, 6 T. R. 35, the general question concerning the legality of trading with an enemy was much discussed at the bar; but nothing was decided upon that point. In the one, it was holden that no action could be maintained by an alien enemy, and, in the other, that an insurance of enemy's property was void; but neither of those decisions affects this question: and in *Bell* v. *Gilson*, 1 Bos. & Pull. 345; 4 R. R. 823, arising out of the same transaction as the present, in the Common Pleas, the Court held the insurance of goods purchased in an enemy's country to be legal; but even if a direct trading or intercourse with an enemy were illegal, it would not follow that the same rule would apply to a case like the present, where no direct personal intercourse took place, but the trading was through the medium of a neutral power; for this removes all objections, on account of the impolicy of the measure, and indeed throws such arguments into the opposite scale. The goods insured are necessary to be had, for the purpose of carrying on the manufactures of this country; which supply us with the resources for war. It must be admitted that it would have been legal to have purchased such a commodity from a neutral power without any consideration of the country from whence the neutral had originally obtained it. Then, it is much more advantageous for the subjects of this country to import the commodity directly in a neutral bottom from the country of its growth, than to pay the additional profit which will accrue to the neutral from its first passing through his hands.

But, in fact, this is not a trading with an enemy; for at the time when these goods were purchased in Holland, war had not been declared between the two countries, though letters of marque and reprisals had been granted. Hostilities, says Lord Hale, 1

Hale, P. C. 162, may exist without open war. So the King, by his prerogative, may, in a declaration of war, except certain of the enemy's subjects, 1 Ld. Ray. 283. A declaration of war generally contains a prohibition to trade with the enemy; but a proclamation for marque and reprisals only, does not; and it is only from the prohibition of the King, by virtue of his prerogative, that the illegality arises. It is not stated that the goods were purchased of an enemy, nor even in an enemy's country, but only that they were shipped from Holland, under the circumstances before stated. The particular period when the goods were purchased is not mentioned; and this is the more material, because by the treaty before subsisting between England and Holland, it was stipulated, That in case of war, the subjects of either country respectively should have six months to retire to their own country, with their property This amounts to a licence to the subject to bring away his property within that time; but at any rate, the King's licence, obtained after the shipping of the goods, was sufficient to legalise the whole adventure.

He then argued upon the effect of several temporary Acts of Parliament, allowing the importation of Dutch property into this country about the period of this transaction; but the Court thought that those acts did not apply to a case like the present.

Gibbs, in reply: —

The Court will take notice of the existence of open war between this and any other country, if it be necessary, though it be not expressly so stated on the record: but it is sufficient to state, as here, that hostilities existed at the time, which is equivalent to open war. Here the original purchase of the goods was unlawful; and therefore this case is different from that of foreign merchants under the general law, and also from the case of those Dutch subjects who were to be protected by the temporary acts, passed in consequence of the state of things in Holland at the time. It was not intended to bring these goods into England under the sanction of those acts. If this trade be beneficial to the country, either the Legislature will legalise it, or the Crown, upon application, will grant its licence for carrying it on; but that is a matter resting in the discretion of the King, upon which he ought to have the power of deciding in each particular instance. The distinction attempted to be taken between the case in Rolle and the present is not material; for the illegal act was considered to be the trading with

the enemy, and not the mere going into the enemy's country; and so that case was considered by Lord MANSFIELD, in *Gist* v. *Mason*.

In the course of the argument, the counsel on both sides referred to some cases which had been decided at the Admiralty Court and at the Cockpit; and this Court, considering that the subject was more frequently discussed there than in Westminster Hall, desired to hear a second argument by civilians. Accordingly, in Hilary Term last, the case was argued by

Sir John Nicholl, the King's advocate, for the plaintiff in error:

A subject of this country cannot trade with an enemy without the King's licence; and under the circumstances stated in the special verdict, if these goods had been taken at sea by any of our cruisers and brought into the Court of Prize, they must necessarily have been condemned as prize. This rule has been long settled, and is so undeniable that it is unnecessary to enter into the principles on which it is founded, which must now be presumed to be politic, wise, and just. Nor will it be necessary to enter into arguments to show that there can be no distinction between policies of insurance and other contracts in this respect; for if trading with an enemy be illegal generally, it must be so in this particular instance; and every contract of indemnity against the risks attendant on such trading must also be illegal. There is no distinction between policies of insurance made to protect an adventure against the common law, and those against the law of the Admiralty, which equally forms a branch of the general jurisprudence of the kingdom. Neither is it important to discuss the policy of trading with an enemy for particular articles useful in manufactures, agriculture, or war; because the Crown will, in its discretion, judge of each particular instance, and grant or refuse a licence to trade accordingly. Nor is there any distinction, as to the question of prize, between a declaration of war generally and a proclamation for reprisals; the consequence would be the same in either case upon the question now before the Court. War puts every individual of the respective governments, as well as the governments themselves, into a state of hostility with each other. There is no such thing as a war for arms and a peace for commerce. In that state all treaties, civil contracts, and rights of property are put an end to. Vattel, b. 3, c. 5 § 70. The same author (b. 3, c. 15 § 226) shows that the principle of the law imposes a duty on every subject to attack the enemy, and seize his property wherever

found; though by custom this is restrained to those individuals only who have commissions for that purpose from their government. Now, trading, which supposes the existence of civil contracts and relations, and a reference to courts of justice (*vide* Bynk. b. 1, c. 7, and the case of *The Hoop*, 1 Rob. Adm. Rep. 201) and the rights of property is necessarily contradictory to a state of war. Besides, it is criminal in a subject to aid and comfort the enemy; and trading affords that aid and comfort in the most effectual manner, by enabling the merchants of the enemy's country to support their government. Export duties are to be paid when goods are brought from an enemy's country, which is furnishing the very sinews of war to the hostile government. These considerations apply with peculiar force to maritime states, where the principal object is to destroy the marine and commerce of the enemy, in order to enforce them to peace. It may be said, indeed, that such a trading also benefits ourselves, especially if the balance of trade be in our favour. However, it belongs not to individuals, but to the state alone, to balance these benefits; and such a power will best be exercised by granting licences to particular persons, or as to particular commodities, according to the exigency of particular circumstances; for the same reasons, a subject cannot trade with an enemy, even from a neutral country, unless he has acquired a right of citizenship in that country; but certainly, if he reside in this country, he cannot so trade through the medium of a neutral agent; and, *à fortiori*, it is unlawful for him to do so where the trading, as in this case, is direct from the enemy's country to this. The above reasoning is further strengthened by this consideration, that if such direct trading were to be permitted, it would facilitate the means of carrying on a traitorous correspondence, which would greatly counterbalance any little advantage likely to accrue to the individual members of the community from such trading. Further, it has been the practice in all wars to obtain licences from the Crown for any direct intercourse with an enemy's country; and the same has been done during the present war. The governor of Jamaica has power given to him to licence trading with the Spanish West India settlements, which he has exercised accordingly. The governor of Gibraltar has the same power with respect to Spain. The same has been, at different periods of the war, exercised by the government at home in regard to Holland. Now, the very circumstance of granting such

licences from time to time shows that without them the trading with an enemy has always been considered illegal. The exception proves the general rule. It is not only the practice of this country thus to regulate the intercourse of its subjects with the enemies, but the same general law prevails throughout Europe (Bynk. Q. J. P. b. 1, c. 3), and has been acted upon in the present war by France, Spain, and Holland. This principle is also recognised in our books. In the case of *Henkle* v. *The London Exchange Assurance Company* (this is reported in 1 Ves. Sen. 317; but the King's Advocate read a note of it from Sir Thomas Sewell's brief), the then Solicitor-General (Lord MANSFIELD) admitted, in argument, that any trading with an enemy was a misdemeanour; and that by the Maritime Law it was cause of confiscation. All the learning on this subject was fully examined and elucidated in a late case of *The Hoop*, 1 Rob. Adm. Rep. 196, by Sir W. SCOTT. It was there attempted to set up an exception to the general rule, that all trading with an enemy is illegal; but the universality of the rule was established; and in giving judgment, the learned judge adverted to the principal leading authorities and cases on the subject. [He then read the following notes of cases, taken partly from the MS. notes of Sir Edward Simpson, which are a valuable and authentic collection of Admiralty decisions, — and partly from the printed Report by Dr. Robinson, of the judgment delivered by Sir W. SCOTT, in the case of *The Hoop*, before referred to.] "The case of *St. Philip*, in 1747, at the Cockpit, Sir E. Simpson's MSS., Lord Ch. J. WILLIS being present. The Lords refused to give the claimants liberty to prove that goods which had been captured and condemned as prize were bought before the war, the Chief Justice being clearly of opinion that the effects of British subjects taken trading with the enemy are good prize." This establishes the rule that trading with an enemy is subject of confiscation, and excludes any exception, even on the ground that the goods had been purchased before the war; *à fortiori*, therefore, if, as in this case, they were purchased after the commencement of hostilities. "The case of *The Elizabeth*, of Ostend, ib., and also cited in 1 Rob. Rep. 202, though not so fully stated, in 1749. Present, Sir THOMAS DENNISON, and either Mr. Justice BIRCH or Mr. Justice CLIVE. The cargo, taken and condemned as coming from an enemy's port, was claimed to be the property of British subjects. The Lords of Appeal, by their sentence, restored the goods claimed

by Gould, a British subject born, but established at the time in the dominions of the Queen of Hungary; but rejected the claim of Henckell and others, who were then and still subjects of his Majesty." Sir E. Simpson's note on the above case is, that the Lords condemned all the goods of English subjects, the Judges being clearly of opinion that they were prize of war, and confiscable. All trading with an enemy was condemned by the Lords of Appeal in 1704. The same note also refers to several other instances of ships condemned on this account; amongst others, "the *Mary*, of Wexford, in 1707, for trading to Spain." "The *Ringende Jacob*, in 1747, 1 Rob. Adm. Rep 202, a Swedish ship, went from London to Bourdeaux, and took in wine for British subjects, to be delivered at Guernsey; but with false clearances at Bourdeaux, in order to deceive the enemy. She was condemned by the Lords of Appeal on the 7th of February, 1750, in affirmance of the judgment of the Admiralty Court." "The cargo of the *Lady Jane*, ib., a Hamburgh ship, laden at Malaga with wine, was claimed by English merchants as the produce of goods sent to Spain before the war, but it was condemned by the Lords of Appeal: present Mr. Baron Clarke." "The *Deergarden*, of Stockholm, ib., was laden with woollen goods, shipped ostensibly at Lisbon, the voyage being in fact to Bilboa, an enemy's port, but on British account. The cargo was condemned on the 15th of March, 1747." "The *Juffrouw Louisa Margaretha*, 1 Rob Adm. Rep. 203, before the Lords the 3rd of April, 1781 (otherwise called *Escott's Case*). This was a claim by Messrs. Escott and Read, of London, for wines, &c., shipped on board a Dutch ship in 1780, at Malaga, on their account; and it was stated that the house of Escott and Read had, for twenty years before the preceding hostilities between Great Britain and Spain, traded to and from Malaga, where they had an established house of trade, and where Mr. Escott had resided for thirty years till the last ten months, when he had resided in England; that a great quantity of wine belonging to the house had been left at Malaga till a favourable opportunity offered of sending it to London; that the destination was to Ostend; and the property described to be for neutral account and risk, in order to avoid the enemy's cruisers. The whole was therefore claimed as British property, subject to a percentage for commission to their foreign correspondent; but the judgment of the Court of Admiralty rejecting the claim of Mr.

Escott was affirmed by the Lords. Present Lord LOUGHBOROUGH, then Ch. J. of C. B. and Sir J. EARDLEY WILMOT." "The *St. Louis, alias El Allessandro,* ib., 204 (otherwise called the *New Orleans Case*), before the Lords, July 18th, 1781. This was a claim of Messrs. Morgan and Mather, for certain peltries, shipped by them on board a vessel of New Orleans, bound to Bourdeaux, and consigned to merchants there, on account of the shippers. It appeared that Morgan had left England, and settled in West Florida, in 1764; that finding no protection from the British government to those settled on the banks of the Mississippi, he had kept a ship as a floating storehouse from 1774, living himself at New Orleans, by permission of the Governor, on condition of not landing any goods on the Spanish territories; that in 1779, finding that the American troops were in such force on that river as to prevent any English ship from coming up, and that it was impossible to make any remittances to England but in neutral vessels, he shipped the goods in question on board the *St. Louis*, a neutral ship, being the only vessel at New Orleans bound for Europe; that they were consigned to merchants at Bourdeaux to be there sold, and the proceeds remitted to Mather in London; and that he was obliged to resort to this mode of remittance, that the goods might not perish on his hands. There was also a certificate from the British commander in those parts in America, certifying that Mr. Morgan, a British subject, had received permission, under a capitulation with the enemy, to convey himself and family to London, under a passport from the Spanish Governor. Nevertheless, the ship and property were condemned in the Admiralty Court as enemy's property, or otherwise liable to confiscation, and this sentence was confirmed by the Lords. Present, Lord LOUGHBOROUGH, Ch. J. of C. B. But some of the same person's property, sent in another ship from New Orleans, consigned directly for London, was restored." "The *Comte de Wohronzoff*, 1 Rob. Adm. Rep. 205, before the Lords on the 19th of July, 1781 (otherwise called the *Irish Case*). This was a claim of Daley and other Irish merchants for the vessel and certain French wines, shipped at Bourdeaux, in May, 1780, on their account, with ostensible papers for Russia; in support of which it was stated that during the whole war the Commissioners of Revenue and Excise in Ireland had constantly permitted such a trade to be carried on from Bourdeaux to Dublin, in the same manner as before hostilities, by British sub-

jects, on their account, in British ships; that this was done openly, and regular entries made of the same, and the duties paid, that subsequent to hostilities, an act passed the Irish Legislature laying an additional duty on French wines imported from June, 1780, to December, 1781, which, it was contended, was a direct recognition of the legality of this traffic. Nevertheless, the judgment of the Court of Admiralty, condemning the ship and cargo as lawful prize, was affirmed. Present, Lord BATHURST and Lord LOUGHBOROUGH." "The *Expedite Fan Rotterdam*, 1 Rob. Adm. Rep. 206 (otherwise called the *Levant Case*), before the Lords, 18th July, 1782. This was a claim by Gregory and Turnbull, of London, for wine shipped on board a Dutch ship on the 20th of December, 1780, at Malaga for them, though ostensibly for the account and risk of Thomasze of Amsterdam, their agent, Holland being then at peace with this country. The claimants relied on an Act of the 20 George III., permitting the product or manufacture of certain places within the Levant to be imported into Great Britain or Ireland, in British or neutral vessels, from any place whatsoever. But the Court of Admiralty, not thinking that the Act referred to applied to this case, condemned the goods; which sentence was affirmed by the Lords. Present, Lord CAMDEN and Lord ASHBURTON." "The *Bella Guidita*, ib. 207 (otherwise called the *Grenada Case*), before the Lords, 20th July, 1785. After the capture of Grenada by the French, Mr. Vaughan and other British merchants sent a cargo of provisions on board a neutral ship from Ireland to Grenada, intending to bring back in return plantation produce, in payment of the debts owing from proprietors of estates in that island to British merchants. This traffic had been carried on between the conquered islands of Great Britain for some time before, and till the then recent breaking out of hostilities with Holland, through the medium of St. Eustatia, a Dutch colony, under the sanction of British Acts of Parliament. And after the Dutch hostilities, an Act passed 20 George III. reciting the capture of Grenada by the French, and that it was expedient and just to relieve the proprietors of estates there; and enacting that no goods of the growth, &c. of the island, on board neutral vessels going to neutral ports, should be liable to condemnation as prize. The judgment of the Vice Admiralty Court of Barbadoes, condemning the cargo as French property, was affirmed. Present, Lord CAMDEN." "The *Elnigheid*, ib. 210, before the Lords

21st March, 1795. There corn, which was shipped on account of British and Dutch merchants, on board a Lubeck ship from Rotterdam to Nantes, before war declared by France against England and Holland, but which, from accidental circumstances, did not sail till afterwards, being taken, was adjudged good prize by the Court of Admiralty; and afterwards on appeal. Present, Sir R. P. Arden, Master of the Rolls, and Eyre, Lord Ch. J. of C. B." "The *Fortuna*, before the Lords, 27th of June, 1795, 1 Rob. Adm. Rep. 212. There a cargo of wine had been shipped by British merchants carrying on trade at Barcelona, on board a Swedish vessel at Barcelona, in January, 1793, and destined for Calais. She was first captured by a Spanish frigate in April, and released by the Spanish Court of Admiralty; after which she was again captured by one of our cruisers. It was contended, for the captors, that the cargo was liable to confiscation, because the ship sailed from Spain for Calais subsequent to the commencement of hostilities by France against England and Spain, which it was incumbent on the proprietors to have prevented, or at least to have endeavoured to do so. The sentence of condemnation was affirmed." "The *Freeden*, ib. 213, was a case of the same description as the last; but there the British merchants were permitted to produce evidence to show that immediately after the breaking out of hostilities, they had used their best endeavours to prevent being implicated in the illegal commerce on their account from Barcelona to Ostend; but, failing in this, the cargo was condemned in the Court of Admiralty; which sentence on appeal was affirmed. Present, the Master of the Rolls." "The *William*, ib. 214, before the Lords, December 19th, 1795. Prior to the war between France and Great Britain, the claimants, who were British subjects in Grenada, were creditors of certain French merchants in Guadaloupe, and after the war broke out, the agent of the claimants in Guadaloupe received the cargo of sugars in question, in payment of that debt, and shipped them on their account. The sentence of the Vice-Admiralty Court of St. Christopher condemning the ship and cargo was affirmed. Present, the Master of the Rolls." Upon the authority of this long train of decisions, the judgment in the principal case of *The Hoop*, ib. 196, proceeded. There Mr. Malcom of Glasgow, and other Scotch merchants had traded to Holland for articles necessary for the agriculture and manufactures of that part of the country, for

which they had several times before applied for and obtained the King's licence; but after the passing of certain Acts of Parliament, having, upon application to the commissioners of the customs at Glasgow, been informed (erroneously, as it afterwards appeared) that such licences were no longer necessary, they had omitted to obtain one on that occasion; in consequence of which the cargo, being taken, was condemned as prize, on the general ground that all trading with an enemy without the King's licence was illegal, and cause of confiscation. These cases also show that there is no distinction between trading with an enemy and with an enemy's country; nor is such a distinction warranted in principle; for all persons inhabiting an enemy's country are presumed to be enemies. Aid is equally given to the enemy by such trading, whether the goods be furnished immediately by an enemy or neutral merchant; and the danger of traitorous correspondence is the same.

Dr. Swabey, *contrà*, admitted that, so far as the question of prize affected the decision of this case, the principles advanced and authorities cited on the part of the plaintiff in error by the King's advocate, could not be disputed; but how far that concluded the question as to the legality of the insurance at common law, or whether the obtaining of a licence from the Crown prior to the capture would make any difference, he begged leave to refer to the arguments of the common lawyers on behalf of the defendants in error. *Curia adv. vult.*

Lord Kenyon, Ch. J., now said, —

That the Court had very fully considered the question immediately after the very learned argument which had been made by the King's advocate in the last Term; that the reasons which he had urged, and the authorities he had cited, were so many, so uniform, and so conclusive, to show that a British subject's trading with an enemy was illegal, that the question might be considered as finally at rest; that those authorities, it was true, were mostly drawn from the decisions of the Admiralty Courts; and that, after all the diligence which had been used, there was only one direct authority on the subject to be found in the common-law books, and that one was to the same effect; but that the circumstance of there being that single case only, was strong to show that the point had not been since disputed, and that it might now be taken for granted that it was a principle of the common law, that

trading with an enemy, without the King's licence, was illegal in British subjects; that it was therefore needless, in this case, to delay giving judgment for the sake of pronouncing the opinion of the Court in more formal terms; more especially as they could do little more than recapitulate the judgment, with the long train of authorities already to be found, in the clearest terms, in the printed report of the case of *The Hoop*, published by Dr. Robinson: that the consequence was that the judgment of the Court of Common Pleas must be reversed.

PER CURIAM: *Judgment reversed.*

ENGLISH NOTES.

It is lawful, by the licence of the Crown, to trade with the subjects of the enemy's country. *Vandyck* v. *Whitmore* (1801), 1 East, 474; *Esposito* v. *Bowden* (1855), 4 E. & B. 963. 24 L. J. Q. B. 210.

The case last mentioned arose out of a contract of charter-party, pending the execution of which intervened the declaration of war with Russia. The defendant, a British subject, had, before the breaking out of the war, agreed to load a cargo of corn on board the plaintiff's ship (a neutral ship), at Odessa. He pleaded that, by reason of the declaration of the war, the performance of the contract had become legally impossible. The replication set forth three Orders in Council, two of them contemporaneous with the declaration of war, and a third made some time afterwards. The first Order in Council was, in effect, an order recognising, for the occasion, the principle that "free ships make free goods." The second was to give certain immunities to Russian ships. The third (*inter alia*) permitted the subjects of her Majesty freely to trade (by means of neutral ships) with all ports whatsoever which should not be in a state of blockade. It was held that the first order had no application to the loading of British goods on board a neutral ship, and that the second order was wholly inapplicable; but that the third order, if it had been contemporaneous with the declaration of war, would have validated trading between her Majesty's subjects and Russian subjects by means of the neutral ship. It was further held that if the contract had become illegal by the declaration of war, it could not have been resuscitated by the subsequent Order in Council; but that — inasmuch as it would have been consistent with the contract that the ship should have been loaded with goods which were already (before the declaration of war) the property of British subjects, and which it might have been meritorious to save from the grasp of the enemy, and that those British subjects might be persons not domiciled and intending to remain in Russia for the purposes of trade (in which

case they would for this purpose have been considered enemies),— it did not appear that the contract was legally impossible of execution.

It has been decided that a natural-born British subject domiciled in a friendly country may lawfully exercise the rights of a citizen of that country by trading with a country which is at war with this country. So that, where the plaintiff, a British-born subject, domiciled in America, had effected a policy of insurance on ship, freight, and goods from Virginia to any port in the Baltic, and the ship was captured in her way to Elsinore in Denmark, — Denmark being then at war with this country, — he was held entitled to recover. *Bell* v. *Reid* (1813), 1 Maule & Sel. 726, 14 R. R. 557.

AMERICAN NOTES.

This principle is recognised in this country. *Amory* v. *McGregor*, 15 Johnson (New York), 23; 8 Am. Dec. 205, citing the principal case; *Kershaw* v. *Kelsey*, 100 Massachusetts, 561: 97 Am. Dec. 124, citing the principal case; *Nevins* v. *Armstrong*, 42 Mississippi, 429.

ALTERATION.

MASTER *v.* MILLER.

(K. B. 1791 AND EX. CH. 1793.)

RULE.

BY the common law, where a written instrument is relied on as the foundation of a right to be enforced by action, the fact that the instrument has been intentionally altered in a material particular without the assent of the person charged in the action, renders the instrument void.

Master v. Miller.

4 T. R. 320, 2 H. Bl. 140 (s. c 1 Sm L. C and 2 R. R. 399.)

The first count in this declaration was in the usual form, by the indorsees of a bill of exchange against the acceptor; it stated that Peel & Co. on the 20th of March, 1788, drew a bill for £974 10*s.* on the defendant, payable three months after date to Wilkinson & Cooke, who indorsed to the plaintiffs. The second count stated

the bill to have been drawn on the 26th of March. There were also four other counts: for money paid, laid out, and expended; money lent and advanced; money had and received; and on an account stated. The defendant pleaded the general issue; on the trial of which a special verdict was found.

It stated that Peel & Co. on the 26th March, 1788, drew their bill on the defendant, payable three months after date to Wilkinson & Cooke, for £974 10*s.*; "Which said bill of exchange, made by the said Peel & Co. as the same hath been altered, accepted, and written upon, as hereafter mentioned, is now produced, and read in evidence to the said jurors, and is now expressed in the words and figures following: to wit, 'June 23rd, £974 10*s.* Manchester, March 20, 1788. Three months after date pay to the order of Messrs. Wilkinson & Cooke £974 10*s.* received, as advised, Peel, Yates & Co. To Mr. Cha. Miller, C. M. 23rd June, 1788.'" That Peel & Co. delivered the said bill to Wilkinson & Cooke, which the defendant afterwards, and before the alteration of the bill hereinafter mentioned, accepted. That Wilkinson & Cooke afterwards indorsed the said bill to the plaintiffs, for a valuable consideration before that time given, and paid by them to Wilkinson & Cooke for the same. That the said bill of exchange at the time of making thereof, and at the time of the acceptance, and when it came to the hands of Wilkinson & Cooke as aforesaid, bore date on the 26th day of March, 1788, the day of making the same; and that after it so came to and whilst it remained in the hands of Wilkinson & Cooke, the said date of the said bill, without the authority or privity of defendant, was altered by some person or persons to the jurors aforesaid unknown, from the 26th day of March, 1788, to the 20th day of March, 1788. That the words 'June 23rd,' at the top of the bill, were there inserted to mark that it would become due and payable on the 23rd of June next after the date; and that the alteration hereinbefore mentioned, and the blot upon the date of the bill of exchange, now produced and read in evidence, were on the bill of exchange when it was carried to and came into the hands and possession of the plaintiffs. That the bill of exchange was on the 23rd of June, and also on the 28th of June, 1788, presented to the defendant for payment; on each of which days respectively, he refused to pay. The verdict also stated that the bill so produced to the jury and read in evidence was the same bill upon which the plaintiffs declared, &c.

Master v. Miller.

This case was argued in Hilary Term last by Wood for the plaintiffs, and Mingay for the defendant; and again on this day by Chambre for the plaintiffs, and Erskine for the defendant.

For the plaintiffs it was contended, that they were entitled, notwithstanding the alteration in the bill of exchange, to recover according to the truth of the case, which is set forth in the second count of the declaration, namely, upon a bill dated the 26th March; which the special verdict finds was in point of fact accepted by the defendant. More especially as it is clear that the plaintiffs are holders for a valuable consideration, and had no concern whatever in the fraud that was meditated, supposing any such appeared. The only ground of objection which can be suggested is upon the rule of law relative to deeds, by which they are absolutely avoided, if altered even by a stranger in any material part, and upon a supposed analogy between those instruments and bills of exchange; but upon investigating the grounds on which the rule stands as applied to deeds, it will be found altogether inapplicable to bills; and if that be shown, the objection founded on the supposed analogy between them must fall with it. The general rule respecting deeds is laid down in *Pigot's Case*, 11 Co. Rep. 27, where most of the authorities are collected; from thence it appears, that if a deed be altered in a material point, even by a stranger, without the privity of the obligee, it is thereby avoided; and if the alteration be made by the obligee, or with his privity, even in an immaterial part, it will also avoid the deed. Now, that is confined merely to the case of deeds, and does not in the terms or principle of it apply to any other instruments not executed with the same solemnity. When a deed is pleaded, there must be a *profert in curiam*, unless as in *Read* v. *Brookman*, 3 T. R. 151, it be lost or destroyed by accident, which must however be stated in the pleadings. The reason of which is, that anciently the deed was actually brought into Court for the purpose of inspection: and if, as is said in 10 Co. Rep. 92 b, the Judges found that it had been rased or interlined in any material part, they adjudged it to be void. Now, as that was the reason why a deed was required to be pleaded with a *profert*, and as it never was necessary to make a *profert* of a bill of exchange in pleading, it furnishes a strong argument that the reason applied solely to the case of deeds. Even if the alteration should be considered as having destroyed the bill, why may not evidence be given of its contents, upon the

same principle as governed the case of *Read* v. *Brookman*, 3 T. R. 151, where it was held that pleading that a deed is lost by time and accident, supersedes the necessity of a *profert*? But at any rate, the plaintiffs are entitled to recover on the general counts for money paid, and money had and received, on the authority of *Tatlock* v. *Harris*, 3 T. R. 174; for though it is not expressly stated that so much money was received by the defendant, yet that is a necessary inference from the fact of acceptance which is found.

For the defendant it was contended, that the broad principle of law was that any alteration of a written instrument in a material part thereof, avoided such instrument; and that the rule was not merely confined to deeds, though it happened that the illustration of it was to be found among the old cases upon deeds only, because formerly most written undertakings and obligations were in that form. This principle of law was founded in sound sense; it was calculated to prevent fraud, and deter men from tampering with written securities: and it would be directly repugnant to the policy of such a law to permit the holder of a bill to attempt a fraud of this kind with impunity; which would be the case, if, after being detected in the attempt, he were not to be in a worse situation than he was before. If any difference were to be made between bills of exchange and deeds, it should rather be to enforce the rule with greater strictness as to the former; for it would be strange that, because they were more open to fraud from the circumstance of passing through many hands, the law should relax and open a wider door to it than in the case of deeds, where fraud was not so likely to be practised. The principle laid down in *Pigot's Case*, 11 Co. Rep. 27, is not disputed as applied to deeds But the first answer attempted to be given is, that the rule as to deeds is *sui generis*, and does not extend to other instruments of an inferior nature, because it arises from the solemn sanction attending the execution of instruments under seal. As to this, it is sufficient to say that no such reason is suggested in any of the books; but the rule stands upon the broad ground of policy, which applies at least as strongly to bills as to deeds, for the reason above given.

After hearing a reply, the following judgments were delivered:

Lord KENYON, Ch. J. — The question is not whether or not another action may not be framed to give the plaintiffs some remedy, but whether this action can be sustained by these parties

on this instrument? — for the instrument is the only mean by which they can derive a right of action. The right of action which subsisted in favour of Wilkinson & Cooke could not be transferred to the plaintiffs in any other mode than this, inasmuch as a *chose in action* is not assignable at law. No case, it is true, has been cited either on one side or the other, except that in Molloy, *Price* v. *Shute*, 2 Molloy, c. 10 § 28, of which I shall take notice hereafter, that decides the question before us in the identical case of a bill of exchange. But cases and principles have been cited at the bar, which, in point of law as well as policy, ought to be applied to this case. That the alteration in this instrument would have avoided it, if it had been a deed, no person can doubt. And why, in point of policy, would it have had that effect in a deed? Because no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event, when it is detected. At the time when the cases cited, of deeds, were determined, forgery was only a misdemeanour: now the punishment of the law might well have been considered as too little, unless the deed also were avoided; and therefore the penalty for committing such an offence was compounded of those two circumstances, the punishment for the misdemeanour, and the avoidance of the deed. And though the punishment has been since increased, the principle still remains the same. I lay out of my consideration all the case where the alteration was made by accident: for here it is stated that this alteration was made while the bill was in the possession of Wilkinson & Cooke, who were then entitled to the amount of it; and from whom the plaintiffs derive title: and it was for their advantage (whether more or less is immaterial here) to accelerate the day of payment, which in this commercial country is of the utmost importance. The cases cited, which were all of deeds, were decisions which applied to and embraced the simplicity of all the transactions at that time; for at that time almost all written engagements were by deed only. Therefore those decisions, which were indeed confined to deeds, applied to the then state of affairs; but they establish this principle, that all written instruments which were altered or erased, should be thereby avoided. Then let us see whether the policy of the law, and some later cases do not extend this doctrine farther than to the case of deeds. It is of the greatest importance that these instruments, which are circulated throughout Europe, should

be kept with the utmost purity, and that the sanctions to preserve them from fraud should not be lessened. It was doubted so lately as in the reign of George the First, in *Ward's Case*, 2 Str. 747, and 2 Lord Raym. 1461, whether forgery could be committed in any instrument less than a deed, or other instrument of the like authentic nature; and it might equally have been decided there that, as none of the preceding determinations extended to that case, the policy of the law should not be extended to it. But it was there held that the principle extended to other instruments as well as to deeds, and that the law went as far as the policy. It is on the same reasoning that I have formed my opinion in the present case. The case cited from Molloy, indeed, at first made a different impression on my mind; but on looking over it with great attention, I think it is not applicable to this case. No alteration was there made on the bill itself; but the party to whom it was directed, accepted it as payable at a different time, and afterwards the payee struck out the enlarged acceptance; and, on the acceptor refusing to pay, it is said that an action was maintained on the bill. But it does not say against whom the action was brought; and it could not have been brought against the acceptor, whose acceptance was struck out by the party himself who brought the action. Taking that case in the words of it, "that the alterations did not destroy the bill," it does not affect this case: not an iota of the bill itself was altered; but on the person to whom the bill was directed, refusing to accept the bill as it was originally drawn, the holder resorted to the drawer. Then it was contended that no fraud was intended in this case; at least, that none is found: but I think that, if it had been done by accident, that should have been found, to excuse the party, as in one of the cases, where the seal of the deed was torn off by an infant. With respect to the argument drawn from the form of the plea, it goes the length of saying, that a defendant is liable, on *non assumpsit*, if at any time he has made a promise, notwithstanding a subsequent payment; but the question is, Whether or not the defendant promised in the form stated in the declaration? and the substance of that plea is, that according to that form he is not bound by law to pay. On the whole, therefore, I am of opinion that this falsification of the instrument has avoided it; and that, whatever other remedy the plaintiffs may have, they cannot recover on this bill of exchange.

Ashhurst, J. It seems admitted that, if this had been a deed, the alteration would have vitiated it. Now, I cannot see any reason why the principle on which a deed would have been avoided should not extend to the case of a bill of exchange. All written contracts, whether by deed or not, are intended to be standing evidence against the parties entering into them. There is no magic in parchment or in wax; and a bill of exchange, though not a deed, is evidence of a contract as much as a deed; and the principle to be extracted from the cases cited is, that any alteration avoids the contract. If, indeed, the plaintiffs, who are innocent holders of this bill, have been defrauded of their money, they may recover it back in another form of action: but I think they cannot recover upon this instrument, which I consider to be a nullity. It is found by the verdict that the alteration was made while the bill was in possession of Wilkinson & Cooke; and it certainly was for their advantage, because it accelerated the day of payment. Now, upon these facts, the jury would perhaps have been warranted in finding that the alteration was made by them: at all events, it was their business to preserve the bill without any alteration. If Wilkinson & Cooke had brought this action, they clearly could not have recovered, because they must suffer for any alteration of the bill while it was in their custody; then if the objection would have prevailed in an action brought by them, it must also hold with regard to the plaintiffs, who derive title under them. For wherever a party takes a bill under such suspicious circumstances appearing on the face of it, it is his duty to inquire how the alteration was made; he takes it at his risk, and must take it subject to the same objection as lay against the party from whom he received it. Upon the whole, there seems to be no difference between deeds and bills of exchange in this respect in favour of the latter; but, on the contrary, if there be any difference, the objection ought to prevail with greater force in the latter than in the former; for it is more particularly necessary that bills of exchange, which are daily circulated from hand to hand, should be preserved with greater purity than deeds, which do not pass in circulation. It would be extremely dangerous to permit the party to recover on a bill as it was originally drawn, after an attempt to commit a fraud, by accelerating the time of payment. For these reasons, therefore, I concur in opinion with my Lord.

Buller, J. In a case circumstanced as the present is, in which

it is apparent, as found, and has been proved beyond all doubt, that the bill of exchange in question was given for a full and valuable consideration, that the plaintiffs are honest and innocent holders of it, and that the defendant has the amount of the bill in his hands, it is astonishing to me that a jury of merchants should hesitate a moment in finding a verdict generally for the plaintiffs, more especially as I understand it was left to them by the Chief Justice to read the bill as it undoubtedly was drawn, and by that mean to put an end to the question at once. It was rightly so left to the jury by his Lordship; for that was the furtherance of the justice of the case, and it tended to prevent expense, litigation, and delay, which are death to trade. That the defendant cannot be suffered to pocket the money for which this bill was drawn, or to enable the drawer to do so, but that sooner or later, provided a bankruptcy do not intervene, it must be paid, I presume no man will doubt. The drawer has received the value, the plaintiffs have paid it, and the defendant has it in his hands. On this short statement, every one who hears me must anticipate me in saying that the defendant must pay it. Nay, if actual forgery had been committed, the defendant could not be permitted to retain the money; he must not get £900 by the crime of another; but, in such a case, I agree it would be difficult to sustain the present or any action for the money till something further had happened than has yet been done. The law, proceeding on principles of public policy, has wisely said, That where a case amounts to felony, you shall not recover against the felon in a civil action; but that rule does not appear by any printed authority to have been extended beyond actions of trespass or tort, in which it is said that the trespass is merged in the felony. That is a rule of law calculated to bring offenders to justice. But whether that rule extend to any case after the offender is brought to justice, or whether at any time it may be resorted to in an action between persons guilty of no crime, are questions upon which I have formed no opinion, because this case does not require it. Upon this special verdict there is no foundation for saying that any one has been guilty of forgery, nor even of a fraud, as it strikes my mind. Fraud or felony is not to be presumed; and unless it be found by the jury, the Court cannot imply it. *Minet* v. *Gibson*, 3 T. R. 481 in B. R.; 1 H. Bl. 569 in D. P. (1 R. R. 754), is a most decisive authority for that proposition, if any be wanted; and I do not think there is any foundation

for the distinction attempted to be taken between that case and the present. It has been contended that the party there recovered, because the nature of the obligation was not altered; but the determination did not proceed entirely on that ground, but on this, that according to the true intent and meaning of the parties, the bill was intended to be made payable to bearer: so here the plaintiffs do not attempt to enforce the contract contrary to the terms of it, but according to that form by which the defendant originally consented to be bound, as stated in the second count. The special verdict finds that Peel & Co., on the 26th of March, 1788, drew a bill of exchange on the defendant for £974 10*s*., payable to Wilkinson & Co.; which bill, as the same has been altered, accepted, and written upon, is set out *in hæc verba*. Upon the *fac simile* copy of the bill set out in the verdict, there appears to be a blot over the date; and the jury have thought fit to read it, as it now stands, the 20th. I must confess I should never have read it so; for seeing that there was something above the figure 0, that is the last reading which I should have given to it. I should have said on the face of the bill, this must have been either a 6 or an 8; it could not have been 8, because the 0 is as high as the 2, and therefore it must be a 6; but the jury have found no difficulty in saying it was a 6; and I will examine presently whether there be any objection to let it remain as a 6. The verdict further finds, that the defendant, before any alteration of the bill, accepted it; and Wilkinson & Co. indorsed it to the plaintiffs, who paid a valuable consideration for it. Then it is stated, that whilst the bill was in the hands of Wilkinson & Cooke, the date, without the authority of the defendant, was altered by persons unknown, from the 26th to the 20th of March. They further find that the words "23rd of June" were inserted at the top of the bill, to mark that the bill would then become due; and that the alteration and the blot were on the bill when it was delivered to the plaintiffs. This is the full substance of the special verdict; and there is neither forgery, felony, nor fraud found or supposed by the jury: we therefore can neither intend nor infer it. The verdict amounts only to saying there is a blot on the bill, but how it came there we don't know; and we beg to ask the Court, whether the circumstance of a blot being on the bill, which we cannot account for, makes the bill void? Provided I have accurately stated the question, surely such a verdict is without precedent. Suppose a child

had torn out a bit of the bill on which the top of the 6 was written, is the holder of the bill to lose his £974, or is the defendant to get £974 by such an accident? But to decide whether I have accurately stated the question in the cause, it is necessary to examine the words of the special verdict minutely, and by degrees. The jury have said that the bill was altered. The word "altered" may raise a suspicion and alarm in our minds; but let not our judgment be run away with by a word, without examining the true sense and meaning of it as it is used in the place where we find it. How was it altered, what is the alteration, when was it made, and for what purpose? The jury have said it was altered by means of putting a blot over the date; but by whom or when that was done we don't know, further than that it was done whilst the bill was in the possession of Wilkinson & Cooke; but we do not find that it was done for any bad purpose, or with any improper view whatever. Upon this finding, the Court are bound to say it was done innocently. But the jury have also said that "June 23rd" was inserted at the top of the bill to mark when the bill would become due. When and by whom was that done? The jury have not said one word upon the subject. Was that done even during any part of the time whilst the bill was in the possession of Wilkinson & Cooke? No. It is consistent with the finding, that the plaintiffs, who are found to be *bonâ fide* holders of the bill, upon reading the date to be the 20th, and calculating the time which it had to run from that date, put down "June 23rd" with the most perfect innocence. If the bill had been originally dated on the 20th, the 23rd June would have been the true time of payment. But admitting that a wrong date had been put down, as denoting the time of payment, is there any case or authority which says that that circumstance shall render the bill void? Every bill which has been negotiated within the memory of man is marked by some holder or another with the day when it will become or is supposed to become due. That, in some sense of the word, is an alteration; for it makes an addition to the bill which was not there when it was drawn or accepted. But was it done fraudulently? The answer is, It was not, and therefore it is of no avail. So here the jury have not said it was done fraudulently; and therefore it affords no objection. When the jury have stated what the alteration is, and how it was made, namely, by making a blot, and have fixed no sinister or improper

motive for so doing, it is the same as if they had said only, "Here is a blot on the bill." Suppose the jury had said in a few words, that this bill was drawn, indorsed, and accepted, by the defendant, as the plaintiffs allege, but here is a blot upon it which makes the date look like the 20th instead of the 26th; the true answer would have been, Blot out the blot by your own understanding and conviction, and pronounce your verdict according to the truth of the case. It was nobly said in another place (I heard it with pleasure, and thought it becoming the dignity of the person who pronounced it, and the place in which it was pronounced), "That the law is best applied when it is subservient to the honesty of the case; and if there be any rule of law which says you cannot recover on any instrument but according to the terms of it, forlorn would be the case of plaintiffs. By the temperate rules of law we must square our conduct." The honesty of the plaintiffs' case has been questioned by no one; and therefore I should imagine the wishes of us all would have been in favour of their claim, provided we are not bound down by some stubborn rule of law to decide against them. Here, again, I must beg leave to resort to what was forcibly said in another place, upon a similar subject, and which I shall do as nearly in the words which passed at the time as I can, — because they carried conviction to my mind, — because they contain my exact sentiments, — and because they are more emphatical than any which I could substitute in the place of them. "The question (it was said) is, Whether there be any rule of law so reluctant that it will not recede from words to enforce the intention of the parties? I believe there is no such rule. For half a century there have been various cases which have left the question of forgery untouched. If a bill be forged, the acceptor is bound." Speaking of the case of *Stone* v. *Freeland*, it was said, "If any one say that case is not law, let him show why it is not so. Judges can only look to former decisions. This has been a rule in the commercial world above twenty years." This reasoning seems to me to be sound and decisive, if it apply to the present case; and to prove that it does apply, I need only quote the case mentioned at the bar, of *Price* v. *Shute*, reported in Beawes' Lex Mercat. tit. Bill of Exchange, pl. 222, and Moll. 109. There a bill was payable 1st January, and the person to whom it was directed accepted it to pay on the first of March, with which the servant returned to his master, who, perceiving this enlarged

acceptance, struck out "the first of March," and put in "the first of January," and at that time sent the bill for payment, which the acceptor refused; whereupon the possessor struck out "the first of January," and inserted "the first of March" again. In an action brought on this bill the question was, Whether these alterations did not destroy the bill? and ruled by Lord Ch. J. PEMBERTON that they did not. Now, on reading this case, I cannot consider it in any other light than as an action brought against the acceptor; for it only states what passed between those parties. Here, then, is a rule which has prevailed in the commercial world for one hundred and ten years; it stands uncontradicted and unimpeached; it was decided by great authority; and, as I take it, on deliberation. For when it is said to have been in B. R., that must either have been in this Court, or on a case saved by Ch. J. PEMBERTON for his own opinion; which was a common way of proceeding in those days. In that case the term "alteration" is used; and therefore we need not be frightened or alarmed at that word. The effect of the alteration was to accelerate the payment; so it is here. But in one respect that case goes beyond the present; for there the alteration was made by the plaintiff himself; here it was not. It is true in that case, when the plaintiff found he could not receive the money on the first of January, he altered it back to the first of March; but if the first alteration vitiated the bill, no subsequent alteration could set it up against the acceptor without his consent. Here the plaintiffs have not re-altered the bill; but they have acted a more honest part: they have left the bill as it was to speak for itself; but they have treated it as a bill of the 26th of March; they have proved that it was a bill of the 26th of March; they demanded payment according to that date; and the jury have found all these facts to be true: and it is material to consider what was the issue joined between the parties; for there is a great deal of difference between the plea of *non est factum* and the present; here the question is, Whether the drawer made such a bill, and whether the defendant accepted it? and this is found by the jury. Then the case of *Price* v. *Shute*, in sense and substance, is a direct authority in point with the present; though it vary in a minute and immaterial circumstance. The plaintiffs, in treating the bill, and making a demand as they have done, seem to have followed the sober advice and directions given by Beawes in pl. 190, where

he says, "He that is possessor of a bill, which only says 'pay,' without mentioning the time when, or that is without a date, or not clearly and legibly written, payable some time after date, &c., so that the certain and precise time of payment cannot be calculated or known, must be very circumspect, and demand the money whenever there is any probable appearance of the time being completed that was intended for its payment; or that he can demonstrate any circumstance that may determine it, or make it likely when it shall be paid." It is impossible that this writer could have supposed that the bill was rendered void by any blot, obliteration, or erasure; on the contrary, he tells you that it must be demanded in time, and that you may make out by circumstances or other evidence when it was, or was likely to be, payable. That has been made out by evidence in the present case. Upon this head I shall only add one authority more, which is Carth. 460, where a bill was accepted after a day of payment was elapsed. It was objected, that it was impossible in such a case for the defendant to pay according to the tenor of the bill, and therefore the declaration was bad; but the Court held it good, and said the effect of the bill was the payment of the money, and not the day of payment. So here the defendant, having accepted this bill, whatever may be the construction as to the date, must pay the money. I hold that in this case there is no fraud, either express or implied; and that as the plaintiffs have proved that they gave a valuable consideration for the bill, and that it was indorsed to them by those through whose hands it passed, their case is open to no objection whatever. But I will suppose for a moment, though the case do not warrant it, that Wilkinson & Cooke did mean a fraud; still I am of opinion that would not affect the case between the plaintiffs and the defendant. It is a common saying in our law books, that fraud vitiates everything. I do not quarrel with the phrase, or mean in the smallest degree to impeach the various cases which have been founded on the proof of fraud. But still we must recollect that the principle which I have mentioned is always applied *ad hominem*. He who is guilty of a fraud shall never be permitted to avail himself of it; and if a contract founded in fraud be questioned between the parties to that contract, I agree that as against the person who has committed the fraud, and who endeavours to avail himself of it, the contract shall be considered as null and void. But there is no case in which a fraud, intended

by one man shall overturn a fair and *bonâ fide* contract between two others. Even as between the parties themselves, we must not forget the figurative language of Lord Ch. J. Wilmot, who said, "That the statute law is like a tyrant; where he comes he makes all void: but the common law is like a nursing father, and makes void only that part where the fault is, and preserves the rest." 2 Wils. 351. If an alteration be made to effect a fraud, the alteration shall be laid out of the question; but still the contract shall exist to its original and honest purpose, and shall be carried into execution as if the fraud had never existed. A case somewhat similar to this is to be found in the book which I have before quoted, and which, though not a binding legal authority, yet, where its propositions are founded on practice and good sense, is deserving of some attention. Beawes, tit. Bill of Exchange, pl. 132, says: Where the possessor of a bill payable to his order fails, and to defraud his creditors indorses it to another, who negotiates it, and effectually receives the value, indorsing it again to a third, &c., and though the creditors, having discovered the fraud, oppose it, yet the acceptant must pay it to him who comes to receive it, on proof that he paid the real value for it. But it has been contended that there is an analogy between bills of exchange and deeds, and that in the case of deeds any erasure or alteration will avoid the deed. In answer to this, first, I deny the analogy between bills of exchange and deeds; and there is no authority to support it. In the case of deeds, there must be a *profert*; and as we learn from 10 Co. Rep. 92, b, in ancient times the judges pronounced upon view of the deed, though Lord Coke says that practice was afterwards altered. But there never is a *profert* of a bill of exchange: the judges cannot determine on a view of that; but it must be left to a jury to decide upon the whole of the evidence, according to the truth of the case. Again, in the case of joint and several bonds, the objection was founded on its being a substantial injury to the defendant; for if it were considered as a sole bond, the defendant would be answerable for the whole debt: but if it were a joint bond, he would be liable to only half, or other proportionable part of it. So far, in those days, did the Court look into the equity of the case; but the blot on this bill is no injury to the defendant: he is not liable to pay till the bill became due, computing the time from the original date; then he must pay it: he alone is liable; and he never can be charged a second time on the bill. 2ndly, It

is not universally true that a deed is destroyed by an alteration, or by tearing off the seal. In Palm. 403, a deed which had erasures in it, and from which the seal was torn, was held good; it appearing that the seal was torn off by a little boy. So in any case where the seal is torn off by accident after plea pleaded, as appears by the cases quoted by the plaintiffs' counsel; and in these days, I think even if the seal were torn off before the action brought, there would be no difficulty in framing a declaration which would obviate every doubt upon that point, by stating the truth of the case. The difficulty which arose in the old cases depended very much on the technical forms of pleading applicable to deeds alone. The plaintiff made a *profert* of the deed under seal, which he still must do, unless he can allege a sufficient ground for excusing it: when that is done, the deed or the *profert* must agree with that stated in the declaration, or the plaintiff fails; but a *profert* of a deed without a seal will not support the allegation of a deed with a seal. For these reasons I am of opinion that the plaintiffs are entitled to judgment on the second count, which is drawn upon the bill, stating it to bear date the 26th March.

But supposing there could be any doubt on this part of the case, I am also of opinion that the plaintiffs are entitled to their judgment on either of the two counts for money paid, or for money had and received. Here it is material to recall to our minds the facts found by the verdict. The bill produced to the jury was drawn for value, and was accepted by the defendant. He is not found to have no effects of the drawer's in his hands; and his accepting the bill imports, and is at the least *primâ facie* evidence, that he had; and on this verdict he must be taken to have the amount in his hands. In Burr, 1675, Aston, J. said, it is an admission of effects. By his acceptance he gave faith to the bill; and the plaintiffs, giving credit to that fact, have actually paid the value of the bill on receiving it. On this case, the money paid by the plaintiffs is money paid for the use of the defendant; for the money was advanced on the credit of the defendant, and in consequence of his undertaking to pay the bill. Again, the money in the defendant's hands is so much money received by him for the use of the plaintiffs, who were holders of the bill when it became due. The defendant has got that money in his pocket, which in justice and conscience the plaintiffs ought to have, and therefore they are entitled to recover it in action for money had and received

In answer to this, it was in the last term suggested for consideration, Whether this bill after the alteration were not a *chose in action*, which could not be assigned? It is laid down in our old books, that for avoiding maintenance a *chose in action* cannot be assigned, or granted over to another. Co. Lit. 214 *a*, 266 *a*; 2 Roll. 45, l. 40. The good sense of that rule seems to me to be very questionable; and in early as well as modern times it has been so explained away that it remains at most only an objection to the form of the action in any case. In 2 Roll. Abr 45 & 46, it is admitted that an obligation or other deed may be granted, so that the writing passes; but it is said that the grantee cannot sue for it *in his own name*. If a third person be permitted to acquire the interest in a thing, whether he is to bring the action in his own name or in the name of the grantor, does not seem to me to affect the question of maintenance. It is curious, and not altogether useless, to see how the doctrine of maintenance has from time to time been received in Westminster Hall. At one time not only he who laid out money to assist another in his cause, but he that by his friendship or interest saved him an expense which he would otherwise be put to, was held guilty of maintenance. Bro. tit. Maintenance, 7, 14, 17, &c. Nay, if he officiously gave evidence, it was maintenance; so that he must have had a *subpœna*, or suppress the truth. That such doctrine repugnant to every honest feeling of the human heart should be soon laid aside must be expected. Accordingly a variety of exceptions were soon made; and, amongst others, it was held, That if a person has any interest in the thing in dispute, though on contingency only, he may lawfully maintain an action on it, 2 Roll. Abr 115: but in the midst of all these doctrines on maintenance, there was one case in which the courts of law allowed of an assignment of a *chose in action*, and that was in the case of the Crown; for the courts did not feel themselves bold enough to tie up the property of the Crown, or to prevent that from being transferred. 3 Leon. 198; 2 Cro. 180. Courts of equity from the earliest times thought the doctrine too absurd for them to adopt; and therefore they always acted in direct contradiction to it; and we shall soon see that courts of law also altered their language on the subject very much. In 12 Mod. 554, the Court speaks of an assignment of an apprentice, or an assignment of a bond, as things which are good between the parties; and to which they must give their sanction, and act

upon. So an assignment of a *chose in action* has always been held a good consideration for a promise. It was so in 1 Roll. Ab. 29, Sid. 212, and T. Jones, 222; and lastly, by all the Judges of England, in *Mouldsdale* v. *Birchall*, 2 Black. 820, though the debt assigned was uncertain. After these cases, we may venture to say that the maxim was a bad one, and that it proceeded on a foundation which fails. But still it must be admitted that though the courts of law have gone the length of taking notice of assignments of *choses in action* and of acting upon them, yet in many cases they have adhered to the formal objection, that the action shall be brought in the name of the assignor, and not in the name of the assignee. I see no use or convenience in preserving that shadow when the substance is gone; and that it is merely a shadow, is apparent from the later cases, in which the Court have taken care that it shall never work injustice. In *Bottomley* v. *Brooke*, C. B. Mich. 22 Geo. III., 1 T. R. 621, which was debt on bond, the defendant pleaded that the bond was given for securing £103 lent to the defendant by E. Chancellor; and was given by her direction in trust for her, and that E. Chancellor was indebted to the defendant in more money. To this plea there was a demurrer, which was withdrawn by the advice of the Court. In *Rudge* v. *Birch*, K. B. Mich. 25 Geo. III., 1 T. R. 622, on the same pleadings, there was judgment for the defendant. And in *Winch* v. *Keeley*, K. B. Hil. 27 Geo. III., 1 T. R. 619, where the obligee assigned over a bond, and afterwards became a bankrupt, the Court held that he might notwithstanding maintain the action. Mr. J. Ashhurst said: "It is true that formerly courts of law did not take notice of an equity or a trust; but of late years, as it has been found productive of great expense to send the parties to the other side of the Hall, wherever this Court have seen that the justice of the case has been clearly with the plaintiff, they have not turned him round upon this objection. Then, if this Court will take notice of a trust, why should they not of an equity? It is certainly true that a *chose in action* cannot strictly be assigned; but this Court will take notice of a trust, and see who is beneficially interested." But admitting that on account of this quaint maxim there may still be some cases in which an action cannot be maintained by an assignee of a *chose in action* in his own name, it remains to be considered whether that objection ever did hold or ever can hold in the case of a mercantile instrument or transaction. The

law-merchant is a system of equity, founded on the rules of equity, and governed in all its parts by plain justice and good faith. In *Pillans* v. *Van Mierop*, Lord MANSFIELD said: If a man agree to do what if finally executed would make him liable, as in a court of equity, so in mercantile transactions, the law looks on the act as done. I can find no instance in which the objection has prevailed in a mercantile case; and in the two instances most universally in use, it undoubtedly does not hold, — that is, in the cases of bills of exchange, and policies of insurance. The first is the present case; and bills are assignable by the custom of merchants: so in the case of policies of insurance; till the late act was made, requiring that the name of the person interested should be inserted in the policy, the constant course was to make the policy in the name of the broker; and yet the owner of the goods maintained an action upon it. Circulation and the transfer of property are the life and soul of trade, and must not be checked in any instance. There is no reason for confining the power of assignment to the two instruments which I have mentioned; and I will show you other cases in which the Court have allowed it. 1st, in *Fenner* v. *Mears*, where the defendant, a captain of an East Indiaman, borrowed £1000 of Cox, and gave two *respondentia* bonds, and signed an indorsement on the back of them, acknowledging that, in case Cox chose to assign the bonds, he held himself bound to pay them to the assignees. Cox assigned them to the plaintiff, who was allowed to recover the amount of them in any action for money had and received. DE GREY, Ch. J., in disposing of the motion for a new trial, said (2 Bl. Rep. 1272): *Respondentia* bonds have been found essentially necessary for carrying on the India trade; but it would clog these securities, and be productive of great inconvenience, if they were obliged to remain in the hands of the first obligee. This contract is therefore devised to operate upon subsequent assignments, and amounts to a declaration, that upon such assignment the money which I have borrowed shall no longer be the money of A, but of B., his substitute. The plaintiff is certainly entitled to the money in conscience; and therefore, I think, entitled also at law: for the defendant has promised to pay *any* person who is entitled to the money. — So in the present case, I say the plaintiffs are in conscience entitled to the money, and the defendant has promised to pay, or, which is the same thing, is by law bound to pay the money to any person

who is entitled. The very nature and foundation of an action for money had and received is, that the plaintiff is in conscience entitled to the money; and on that ground it has been repeatedly said to be a bill in equity. We all remember the sound and manly opinion given by my Lord Chief Justice here in the beginning of the last term on a motion made by Mr. Bearcroft for a new trial, wherein he said, if he found justice and honesty on the side of a plaintiff here, he would never turn him round, in order to give him the chance of getting justice elsewhere. 2ndly, *Clarke* v. *Adair*, Sittings after Easter, 4 Geo. III. Debray, an officer, drew a bill on the agent of a regiment, payable out of the first money which should become due to him on account of arrears or non-effective money. Adair did not accept the bill, but marked it in his book; and promised to pay when effects came to hand. Debray died before the bill was paid; and the administratrix brought an action against Adair for money had and received. It was allowed by all parties that this was not a bill within the custom of merchants: but Lord MANSFIELD said that it is an assignment for valuable consideration, with notice to the agent; and he is bound to pay it. He said he remembered a case in Chancery, where an agent under the like circumstances had paid the money to the administrator, and was decreed notwithstanding to pay to the person in whose favour the bill was drawn. 3rdly, in *Israel* v. *Douglas*, C. B. East, 29 Geo. III., 1 H. Bl. 242, A., being indebted to B., and B. indebted to C., B. gave an order to A. to pay C. the money due from A. to B.; whereupon C. lent B. a further sum, and the order was accepted by A. On the refusal of A. to comply with the order, it was held that C. might maintain an action for money had and received against him. And Mr. J. HEATH expressly said he thought in mercantile transactions of this sort such an undertaking may be construed to make a man liable for money had and received. This opinion was cited with approbation in the House of Lords in *Gibson* v. *Minet*. Lastly, I come to the case of *Tatlock* v. *Harris*, 3 T. R. 182, in which Lord KENYON, in delivering the judgment of the Court, said, it "was an appropriation of so much money to be paid to the person who should become the holder of the bill. We consider it as an agreement between all the parties to appropriate so much property to be carried to the account of the holder of the bill; and this will satisfy the justice of the case, without infringing any rule of law." All these

cases prove that the remedy shall be enlarged, if necessary, to attain the justice of the case; and that if the plaintiff has justice and conscience on his side, and the defendant has notice only, the plaintiff shall recover in an action for money had and received. Let us not be less liberal than our predecessors, and even we ourselves, have been on former occasions. Let us recollect, as Lord Ch. J. WILMOT said in the case I have alluded to, that not only *boni judicis est ampliare jurisdictionem*, but *ampliare justiciam*; and that the common law of the land is the birthright of the subject, under which we are bound to administer him justice, without sending to his writ of *subpœna*, if he can make that justice appear. The justice, equity, and good conscience of the case of these plaintiffs can admit of no question; neither can it be doubted but that the defendant has got the money which the plaintiffs ought to receive. For these reasons I am of opinion that the plaintiffs are entitled to judgment on either of these three counts in the declaration, namely, on the count on the bill of exchange, stating the date to be the 26th, or on the count for money paid, or on the count for money had and received.

GROSE, J. The only question in this case is, Whether there appears on the face of this special verdict a right of action in the plaintiffs on any of the counts? The first count is on a bill of exchange dated the 20th of March; but there being no proof of any bill of that date, there is clearly an end of that count. The second is on a bill dated the 26th of March: but the defendant objects to the plaintiffs' recovering on this count also, because, the bill having been altered while it was in the hands of Wilkinson & Cooke, it is not the same bill as that which was accepted; and that is the true and only question in the cause. My idea is, that the plaintiffs' right of action, as stated in this count, cannot be maintained at common law, but is supported only on the custom of merchants, which permits these particular *choses in action* to be transferred from one person to another. The plaintiffs, as indorsees, in order to recover on this bill, must prove the acceptance by the defendant, the indorsement from Wilkinson & Cooke to them, and that this was the bill which was presented when it became due. Now, has all this been proved? The bill was drawn on the 26th of March, payable at three months' date; the defendant's engagement by his acceptance was, that it should be paid when it became due, according to that date; but afterwards the date was altered;

the date I consider as a very material part of the bill, and by the alteration the time of payment is accelerated several days; according to that alteration, the payment was demanded on the 23rd of June, which shows that the plaintiffs considered it as a bill drawn the 20th of March; then the bill which was produced in evidence to the jury was not the same bill which was drawn by Peel & Co. and accepted by the defendant; and here the cases which were cited at the bar apply. *Pigot's* is the leading case; from that I collect, that when a deed is erased, whereby it becomes void, the obligor may plead *non est factum*, and give the matter in evidence, because at the time of plea pleaded it was not his deed; and secondly, that when a deed is altered in a material point by himself, or even by a stranger, the deed thereby becomes void. Now, the effect of that determination is, that a material alteration in a deed causes it no longer to be the same deed. Such is the law respecting deeds: but it is said that that law does not extend to the case of a bill of exchange. Whether it do or not must depend on the principle on which this law is founded. The policy of the law has been already stated; namely, that a man shall not take the chance of committing a fraud, and, when that fraud is detected, recover on the instrument as it was originally made. In such a case the law intervenes, and says, That the deed thus altered no longer continues the same deed; and that no person can maintain an action upon it. In reading that and the other cases cited, I observe that it is nowhere said that the deed is void merely because it is the case of a deed, but because it is *not the same deed*. A deed is nothing more than an instrument or agreement under seal: and the principle of those cases is, that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument; and this principle is founded on great good sense, because it tends to prevent the party in whose favour it is made from attempting to make any alteration in it. This principle, too, appears to me as applicable to one kind of instruments as to another; but it has been contended that there is a difference between an alteration of bills of exchange and deeds; but I think that the reason of the rule affects the former more strongly; and the alteration of them should be more penal than in the latter case. Supposing a bill of exchange were drawn for £100, and after acceptance the sum was altered to £1000; it is not pretended that the acceptor shall be liable to

pay the £1000; and I say that he cannot be compelled to pay the £100 according to his acceptance of the bill, because it is not the same bill. So if the name of the payee had been altered, it would not have continued the same bill; and the alteration in every respect prevents the instrument's continuing the same, as well when applied to a bill as to a deed. It was said that *Pigot's Case* only shows to what time the issue relates: but it goes further, and shows that if the instrument be altered at any time before plea pleaded, it becomes void. It is true the Court will inquire to what time the issue relates in both cases. Then to what time does the issue relate here? The plaintiffs in this case undertook to prove everything that would support the *assumpsit* in law, otherwise the *assumpsit* did not arise. It was incumbent on them to prove that before the action was brought, this identical bill, which was produced in evidence to the jury, was accepted by the defendant, and refused: but if the bill which was accepted by the defendant were altered before it was presented for payment, then that identical bill which was accepted by the defendant was not presented for payment; the defendant's refusal was a refusal to pay another instrument; and therefore the plaintiffs failed in proving a necessary averment in their declaration. If the bill had been presented and refused payment, and it had been altered after the action was brought, then it might have been like the case mentioned at the bar. It was contended at the bar that the inquiry before a jury in an action like the present should be, Whether or not the defendant promised to pay the bill at the time of his acceptance? But granting that he did so promise, that alone will not make him liable, unless that same bill were afterwards presented to him. I will not repeat the observations which have been already made by my Lord on the case in Molloy: but the note of that case is a very short one; and the principle of it is not set forth in any other book, nor indeed do the facts of it sufficiently appear. I doubt also whether it was a determination of this Court: it only appears that there was a point made at *nisi prius*, but not that it was afterwards argued here: but it has been said that a decision in favour of the plaintiffs will be the most convenient one for the commercial world; but that is much to be doubted; for if, after an alteration of this kind, it be competent to the Court to inquire into the original date of the instrument, it will also be competent to inquire into the original sum and the original payee,

after they had been altered; which would create much confusion, and open a door to fraud. Great and mischievous neglects have already crept into these transactions; and I conceive that keeping a strict hand over the holders of bills of exchange, to prevent any attempts to alter them, may be attended with many good effects, and cannot be productive of any bad consequences, because the party who has paid a value for the bill may have recourse to the person who immediately received it from him. On these grounds, therefore, I am of opinion that the plaintiffs cannot recover on the second count. Neither do I think that they can recover on the general counts, because it is not stated as a fact in the verdict that the defendant received the money, the value of the bill.

Per CURIAM. *Judgment for the defendant.*

This judgment was afterwards affirmed in the Exchequer Chamber. The following judgment, with which the other Judges present expressed their concurrence, was delivered by

Lord Chief Justice EYRE. I cannot bring myself to entertain any doubt on this case; and if the rest of the Court are of the same opinion, it is needless to put the parties to the delay and expense of a second argument. When it is admitted that the alteration of a deed would vitiate it, the point seems to me to be concluded; for, by the custom of merchants, a duty arises on bills of exchange from the operation of law, in the same manner as a duty is created on a deed by the act of the parties. With respect to the argument from the negotiability of bills of exchange, and their passing through a variety of hands, the inference is directly the reverse of that which was drawn by the counsel for the plaintiff. there are no witnesses to a bill of exchange, as there are to a deed; a bill is more easily altered than a deed; if, therefore, courts of justice were not to insist on bills being strictly and faithfully kept, alterations in them highly dangerous might take place, such as the addition of a cipher in a bill for £100, by which the sum might be changed to £1000, and the holder, having failed in attempting to recover the £1000, might afterwards take his chance of recovering the £100 as the bill originally stood. But such a proceeding would be intolerable. It was said in the argument that the defendant could not dispute the finding of the jury, that they found that he accepted the bill, and therefore that the substance of the issue was proved against him. But the meaning of the plea of *non assumpsit* is, not

that he did not accept the bill, but that there was no duty binding on him at the time of plea pleaded. There are many ways by which the obligation of the acceptance might be discharged; for instance, by payment. And it was certainly competent to him to show that the duty which arises *primâ facie* from the acceptance of a bill was discharged in the present case by the bill itself being vitiated by the alteration which was made. *Judgment affirmed.*

ENGLISH NOTES.

The rule is above stated to be "by the common law" because it is now modified as to Bills of Exchange by a proviso of the Bills of Exchange Act, 1882, 45 & 46 Vict c. 61 § 64 (1), as follows: "Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor." Mr. Chalmers (4th ed. p. 215) mentions that the proviso was introduced in committee to mitigate the rigour of the common-law rule in favour of a holder in due course. The proviso does not apply to Bank of England notes. *Leeds and County Bank* v. *Walker* (1883), 11 Q. B. D. 84, 52 L. J. Q. B. D. 590; and see *Suffell* v. *Bank of England*, "Banker, No. 6," *post*, and cases there noted.

The following have, in the case of bills, been held to be material alterations —

An alteration of the date so as to postpone (as well as one to accelerate, as in the principal case) the time of payment. *Outhwaite* v. *Luntley* (1815), 4 Camp. 179; *Hirschman* v. *Budd* (1873), L. R., 8 Ex. 171, 42 L. J. Exch. 113. The superscription upon the face of the bill and over an indorsement of a particular rate of exchange. *Hirschfield* v. *Smith* (1866), L. R., 1 C. P. 340, 35 L. J. C. P. 177. An alteration of the date of a cheque payable on demand. *Vance* v. *Lowther* (1876), 1 Ex. D. 176, 45 L. J. Exch. 200. The addition of a new maker's name to a joint and several note. *Gardner* v. *Walsh* (1855), 5 El. & Bl. 83, 24 L. J. Q. B. 285. An alteration of the place of payment, or an addition of a place of payment, in an action to charge the acceptor. *Tidmarsh* v. *Grover* (1813), 1 M. & S. 735, 14 R. R. 563; *Burchfield* v. *Moore* (1854), 3 El. & Bl. 683, 23 L. J Q. B. 261. An alteration in the number of a Bank of England note. *Suffell* v. *Bank of England* (1882), 9 Q. B. D. 555, 51 L. J Q. B. 401. See *post*, "Banker, No. 6."

In *Gardner* v. *Walsh* (1855) it was stated that the rule would equally

apply where the alteration could not have operated to the prejudice, but only to the benefit of the person charged.

The crossing of a cheque is now, by the express enactment of the Bill of Exchange Act, 1882 (45 & 46 Vict. c. 61 § 78), a material part of the cheque. This, together with 24 & 25 Vict. c. 25, which makes the alteration of a crossing a forgery, overrides the effect of the decision of the Exchequer Chamber in *Simmonds* v. *Taylor* (1858), 27 L. J. C. P. 248.

The following alterations have been held immaterial: Conversion of a bill or cheque payable to bearer into one payable to order. *Attwood* v. *Griffin* (1826), 2 C. & P. 368. The alteration in the name of the firm to which a bill is addressed so as to correspond with the name in which it is accepted, being the true name of the firm. *Farquhar* v. *Southey* (1826), 1 Moody & Malkin, 14. The conversion of a blank indorsement into a special indorsement. *Hirschfield* v. *Smith* (1866), L. R., 1 C. P. 340, 353, 35 L. J. C. P. 177; and (now) B. of E. Act, 1882, 45 & 46 Vict. c. 61 § 34 (4). The addition to a promissory note, in which no time of payment is expressed, of the words "on demand," which were implied by law. *Aldous* v. *Cornwell* (1868), L. R., 3 Q. B. 573, 37 L. J. Q. B. 201. And since the Bill of Exchange Act, 1882, § 4 (8), makes the bill payable to a particular person payable to his order, the striking out of the word "order" in a bill payable "to order A. B." is immaterial. *Decroix* v. *Meyer & Co.* (C. A. 1890), 25 Q. B. D. 343, 59 L. J. Q. B. 538. The case was appealed to the House of Lords, where it was affirmed (30 July, 1891), 1891, App. Cas. 520; but the decision on this point was not questioned, the only question on the appeal being whether a separate writing "in favour of A. B. only" above an acceptance printed by a stamp formed a qualified acceptance, which the House held it did not.

In *Gaggard* v. *Lewis* (1882), 10 Q. B. D. 30, it was decided by Bowen, J., that the marginal figures are not an essential part of a bill of exchange by reason of the rule of commercial construction (since embodied in the B. of E. Act, 1882, § 9 (2)), that where the sum payable is expressed in words and also in figures and there is a discrepancy, the words prevail; and that, consequently, where an acceptance blank in the body of the document but with a marginal figure denoting the sum for which the defendant had intended to accept, had been filled up with a larger sum in words and the marginal figures had been altered, a *bonâ fide* holder (even before the Act of 1882) might recover on the bill for the full amount.

Although the most frequent examples occur in the case of bills, the rule applies equally to all written instruments. In *Davidson* v. *Cooper* (Exch. from Ex. 1844), 13 M. & W. 343, the principle is explained by

Lord Denman, C. J., as follows: "The strictness of the rule on this subject, as laid down in *Pigot's Case*, can only be explained on the principle that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud, or laches on his part." In the case of *Davidson* v. *Cooper* itself the Court applied the principle to avoid an instrument of guarantee which had been altered while in the plaintiff's custody by the addition of a seal to the defendant's signature.

It has been held that although a bill has become void by an alteration, there may still remain a right of action upon the original obligation in respect of which the bill was given. *Atkinson* v. *Hawdon* (1835), 2 A. & E. 628, 4 L. J. (N. S.) K. B. 85; *Sutton* v. *Toomer* (1827), 7 B. & C. 416. But this is subject to the condition that the party charged has not been deprived of a remedy over against a third person, in which case the holder in whose custody the bill was when altered must be taken to have irrevocably substituted the obligation in the bill for the original one, just as if he had neglected to present the bill for payment when due. *Alderson* v. *Langdale* (1832), 3 B. & Ad. 660. And there is doubtless a further condition, namely, that the person suing on the original obligation has not committed a fraud in the alteration. For clearly he could not, having taken the chance of profiting by a fraud, be remitted to his original rights.

And in *Pattison* v. *Luckley* (1875), L. R., 10 Ex. 330, 44 L. J. Ex. 180, the plaintiff was a builder employed by the defendant under a written contract which made the architect's certificate a condition precedent of the right to payment; and sued upon a *quantum meruit* for work for which no certificate had been given. The contract had been altered in a material particular by an erasure which the jury found to have been made by the architect who had the custody of the document for the defendant. It was held that the document might be used in evidence, even in the interest of the defendant, to show the terms upon which the plaintiff was entitled to be paid, and he was nonsuited accordingly.

Where an instrument is altered by the act of a stranger and while properly in the custody of a stranger, the alteration does not vitiate the instrument, but the instrument is given effect to according to its original tenor, if that is ascertainable. This was decided by the King's Bench in the case of an award which had been altered by the umpire after making it and before the parting with the custody. *Henfree* v. *Bromley* (1805), 6 East, 309, 8 R. R. 491.

AMERICAN NOTES.

This principle that alteration by a party to the writing is fatal, is supported by a multitude of American authorities. It will be sufficient to cite *Inglish* v. *Breneman*, 5 Arkansas, 377; 41 Am. Dec. 96, citing the principal case; *Bridges* v. *Winters*, 42 Mississippi, 135; 97 Am. Dec. 443; *Woodworth* v. *Bank of America*, 19 Johnson (New York), 391; 10 Am. Dec. 239, and note, 267; *Newell* v. *Mayberry*, 3 Leigh (Virginia), 250; 23 Am. Dec. 261; *Wheelock* v. *Freeman*, 13 Pickering (Mass.), 165; *Waring* v. *Smyth*, 2 Barbour, Chancery (New York), 119; 47 Am. Dec. 299; *Wallace* v. *Harmstad*, 15 Penn. St. 462; 53 Am. Dec. 603, citing the principal case; *Warder, &c. Co.* v. *Willyard*, 16 Minnesota, 531; 24 Am. St. Rep. 250; *Walton Plow Co.* v. *Campbell*, 35 Nebraska, 173; 16 Lawyers' Rep. Annotated, 468; *Dietz* v. *Harder*, 72 Indiana, 208; *Burnham* v. *Ayer*, 35 New Hampshire, 351; *Davis* v. *Coleman*, 7 Iredell Law (No. Carolina), 424; *Mills* v. *Starr*, 2 Bailey (So. Carolina), 359; *Osborne* v. *Van Houten*, 45 Michigan, 444; *Knoxville Nat. Bank* v. *Clarke*, 51 Iowa, 264.

The instrument is admissible in evidence, however, and the question of the time of alteration is for the jury. *Neil* v. *Case*, 25 Kansas, 510; 37 Am. Rep. 259, and note, 260, in which the cases on this vexed point are cited.

Mr. Daniel points out the distinction between the English and the American law of alteration of negotiable instruments, the former holding that a material alteration avoids the instrument, although made by a stranger, and the latter holding that alteration by a stranger is not fatal, unless it renders the instrument unintelligible or uncertain. (2 Negotiable Instruments, § 1373 *a*.) He cites the principal case, and also *Tutt* v. *Thornton*, 57 Texas, 96; *Church* v. *Fowle*, 142 Massachusetts, 13; *Andrews* v. *Calloway*, 50 Arkansas, 359; *Eckert* v. *Louis*, 84 Indiana, 99; *Whitlock* v. *Manciet*, 10 Oregon, 166; *Crockett* v. *Thomason*, 5 Sneed (Tennessee), 342; *Bigelow* v. *Stilphen*, 35 Vermont, 521; *Terry* v. *Hazlewood*, 1 Duvall (Kentucky), 104; *Lubbering* v. *Kohlbrecher*, 22 Missouri, 596; *Waring* v. *Smyth*, 2 Barbour Chancery (New York), 119; 47 Am. Dec. 299; *Davis* v. *Carlisle*, 6 Alabama, 707; *Vogle* v. *Ripper*, 34 Illinois, 106; *Langenberger* v. *Krager*, 48 California, 147; *Union Nat. Bank* v. *Roberts*, 45 Wisconsin, 373. See *Nichols* v. *Johnson*, 10 Connecticut, 192; *Robertson* v. *Hay*, 91 Penn. St. 242; *Bridges* v. *Winters*, 42 Mississippi, 135.

Story says (*United States* v. *Spalding*, 2 Mason, 478) that the English doctrine is repugnant to common sense and justice, and deserving of no better name than a technical quibble.

It was early held, however, that a material alteration, by a third person, of a deed is fatal. *Den* v. *Wright*, 2 Halsted (New Jersey), 175; 11 Am. Dec. 546; but this was reversed in *Hunt* v. *Gray*, 35 New Jersey Law, 227; 10 Am. Rep. 232.

Lawson (Contracts, § 430, subdiv. 1) says: "The alteration must be by a party to the instrument, or by his procurement or connivance." Citing *Bridges* v. *Winters*, 42 Mississippi, 135; 2 Am. Rep. 598; *Nichols* v. *Johnson*, 10 Connecticut, 192; *Condict* v. *Flower*, 106 Illinois, 105; *Lee* v. *Alexander*, 9 B. Monroe (Kentucky), 25; 48 Am. Dec. 412; *Pierson* v. *Grimes*, 30 Indiana, 129; 95 Am. Dec. 673.

AMBASSADOR.

PARKINSON *v.* POTTER.

(1885.)

RULE.

By the common law of England, embodying the principle of international comity, all persons associated in the performance of the duties of the embassy are, as well as the ambassador, privileged from having their goods seized by civil process of the courts of law. And an attaché is within the privilege.

Parkinson v. Potter.

16 Q. B. D. 152 (s. c. 55 L. J., Q. B. 153).

Appeal from the Westminster County Court.

The action was by lessor against lessee to recover the sum of £37 1*s.* 9*d.* as damages for breach of a covenant by the defendant contained in a demise of premises, No. 1 Blandford Square, in the parish of Marylebone, by the plaintiff to the defendant. The covenant was in the following terms: —

"And likewise shall and will from time to time, and at all times during the continuance of the term hereby demised, bear, pay, and discharge the sewers' rate, and all other rates, taxes, assessments, and impositions of what nature or kind soever, and whether parliamentary, parochial, or otherwise, which now are, or at any time hereafter during the said term shall be, assessed, charged, or imposed upon the said messuage, or tenement, and premises hereby demised or intended so to be, or on any part thereof, or on the landlord in respect thereof (except as before excepted)." The exception related merely to landlord's property tax, the reddendum of the lease providing that the rent reserved should be payable without any deduction except such property tax. It appeared that the defendant had assigned the term to one De Basto, the

assignment containing covenants by De Basto to perform the covenants of the lease and indemnify the defendant against any breach thereof. By a local Act (35 Geo. III., c. lxxiii. s. 190) relating to the parish of Saint Marylebone, and providing for the levying of parochial rates therein for various purposes, it was provided that "every rate or assessment which shall be made, laid, or assessed by virtue of this Act for or in respect of any land, ground, house, &c., which any ambassador, envoy, resident, agent, or other public minister of any foreign prince or state, or the servant of any such ambassador, envoy, resident, agent, or other public minister, or any other person not liable by law to pay such rate or assessment now doth or hereafter shall inhabit, shall be paid by and be recoverable from the landlord, owner, lessor, or proprietor of such land, ground, house, &c., who shall be liable and compellable to the payment thereof, and the same shall be recovered and applied as the other rates hereby made payable are to be recovered and applied."

A parochial rate having been made under the above-mentioned Act in respect of the premises demised as aforesaid, De Basto claimed as an attaché of the Portuguese embassy to be exempt from payment of it, and the parochial authorities had thereupon, under the above-mentioned section, compelled the plaintiff, as landlord of the premises, to pay the rate. The action was brought to recover the amount which the plaintiff had been so compelled to pay.

It was proved at the trial in the County Court that De Basto resided on the demised premises, and was the Consul General for Portugal. No very direct evidence was adduced of his appointment to the position of an attaché to the Portuguese legation or as to the nature and duties of that position. A clerk from the Consulate, however, gave evidence, and stated that he had been frequently at the Portuguese embassy and seen De Basto there; that De Basto was generally addressed there and spoken of as an attaché; that he was there two or three times a week, and was from time to time in communication with the minister; that there was no salary attached to the appointment, but that certain small services were required of attachés; and that De Basto had in fact been employed by the Portuguese minister occasionally to write letters and take messages, and help in the translation of documents connected with the diplomatic work of the embassy. The County Court Judge found that De Basto was an attaché of the Portuguese

legation, and gave judgment for the plaintiff for the amount claimed.

A rule *nisi* had been obtained to set aside this judgment and enter judgment for the defendant, or reduce the damages to nominal damages, on the grounds, first, that the rate paid by the plaintiff was not within the covenant sued upon; and secondly, that the rate was not recoverable as damages, as the plaintiff was not shown to be legally liable to pay such rate, and that no damage legally recoverable was shown to have been sustained by the plaintiff.

Dec. 12. Gainsford Bruce, Q. C. (J. Martin Routh, with him), for the plaintiff, showed cause. The plaintiff was entitled to recover the amount which he was legally compelled to pay for rates from the defendant upon the covenant in the lease. The effect of the local Act being to throw the rates upon the landlord where the occupier is privileged from payment of them, as De Basto clearly was, the words of the covenant are quite wide enough to cover the case.

[He was then stopped by the Court.]

Charles, Q. C. (Gore, with him), for the defendant, in support of the rule. It must be remembered, in considering the extent of the privilege, that it is that of the ambassador, not of the servant of the ambassador, and it is therefore confined to those persons who are *bonâ fide* servants or part of the suite of the ambassador, and consequently essential to the performance of his functions or his convenience and comfort. 7 Anne, c. 12, s. 3, only mentions domestic servants of the ambassador, but it must be admitted that the privilege applies to persons not strictly speaking domestic servants.

[Wills, J. That enactment is declaratory of the common law only.]

It is submitted that the privilege must be confined to persons who perform *bonâ fide* and substantial services for the ambassador. *Fisher* v. *Begrez*, 1 C. & M. 117; 2 C. & M. 240. There is no evidence here to show that De Basto was really part of the suite of the ambassador, or performed any substantial services for him. The evidence as to his duties and functions was of the most shadowy character. There is no sufficient evidence that he was an attaché, whatever the position of an attaché may be, and, even if there be, it is submitted that an attaché is not within the privi-

lege. There is no salary attached to the post, and apparently no substantial duties. At any rate, it is not shown that De Basto was in any way essential to the performance of the ambassador's duties, or to his convenience and comfort. Assuming that the attaché, as the servant of the ambassador, would have been privileged from arrest, there is a distinction between the ambassador and a servant of the ambassador with regard to the liability to seizure of goods. In the case of a servant not part of the ambassador's household, and therefore not residing at the embassy but in his own house, the servant's goods are not necessarily privileged as against an execution or a distress for rates: *Novello* v. *Toogood*, 1 B & C. 554; 1 L. J. K. B. 181. The privilege being that of the ambassador not of his servant, it can only exist where it can be shown that it is claimed in the interests of the ambassador as necessary to the exercise of his functions and his comfort and convenience. Nothing of the kind was shown here.

[He cited on this point: *Hopkins* v. *De Robeck*, 3 T. R. 79; 1 R. R. 650; *Magdalena Steam Navigation Co.* v. *Martin*, 2 E. & E. 94; 28 L. J. Q. B. 310, *Taylor* v. *Best*, 14 C. B. 487; 23 L. J. C. P. 89; *Poitier* v. *Croza*, 1 Wm. Bl. 47, 48; Wheaton's International Law, ed. 1880, p. 282.] If De Basto was not entitled to the privilege, it is clear that the plaintiff need not have paid the rate, and cannot recover. 2ndly The position held by De Basto is not within the terms of the 190th section of the local Act, and the case was therefore not one in which the plaintiff was compellable to pay the rate. 3rdly. The case is not within the terms of the covenant. The covenant only applies to assessments and impositions charged on the premises or on the landlord in respect thereof. This is an occupier's rate. It is not charged on the premises or on the landlord primarily.

Gainsford Bruce, Q. C., in reply. *Cur. adv. vult.*

Dec. 14. MATHEW, J. In this case the plaintiff, the landlord, has recovered judgment against his lessee for the amount of certain parochial rates assessed on the demised premises which the plaintiff had paid, and which, as he alleged, the defendant had covenanted to repay. A rule *nisi* was obtained to set aside that judgment and enter judgment for the defendant, on the ground that the evidence did not establish any liability against the defendant.

The facts are as follows: The plaintiff demised a dwelling-house

to the defendant, and the lease contained a covenant that the lessee would pay and discharge the sewers rate and all other rates, taxes, assessments, and impositions of what nature and kind soever, and whether parliamentary, parochial, or otherwise, which then were or at any time thereafter should be assessed, charged, or imposed upon the premises or on the landlord in respect thereof. This covenant appears to have been intended to have the widest possible operation, if read by the light of the reddendum, which provides that the rent shall be payable without any deduction except in regard of landlord's property tax. The house so demised was afterwards assigned to De Basto, who undertook to indemnify the defendant against the covenants of the lease. De Basto was alleged by the plaintiff to have become a member of the Portuguese legation, and it appeared that as such he claimed exemption from payment of rates. Certainly the parochial authorities found themselves unable to recover the rates from him, and, accordingly, in pursuance of the provisions of the local Act, they called on the plaintiff as landlord to pay them. He did pay them, and now seeks to recover the amount so paid from the defendant, his lessee. It was argued by counsel for the defendant that the evidence was not sufficient to show that De Basto had acquired the privilege claimed by him. In support of that argument our attention was called to the evidence given before the County Court Judge to prove that De Basto had become a member of the suite of the ambassador. We can only say that on that evidence unanswered it appears to us that the County Court Judge was warranted in finding that De Basto was an attaché of the embassy. No suggestion was made that there was any want of *bonâ fides* in reference to the appointment of De Basto, and, that being so, it seems to us that the evidence not being answered by the defendant was sufficient to entitle the County Court Judge to come to the conclusion at which he arrived. Then it was urged that, assuming that De Basto was an attaché, it did not follow that he was within the privilege of the embassy; and our attention was called to the provisions of the Statute 7 Anne, c. 12, s. 3, which only mentions the ambassador and his domestic servants. But it appears from the authorities that the privilege of the embassy is recognised by the common law of England as forming a part of international law, and according to that law it is clear that all persons associated in the performance of the duties of the embassy are privileged, and

that an attaché is within that privilege. I do not think it necessary to refer to *Taylor* v. *Best*, 14 C. B. 487; 23 L. J. C. P. 89, and the other cases at length, or to the more recent authorities which my Brother Wills proposes to cite. In *Hopkins* v. *De Robeck*, 3 T. R. 79; 1 R. R. 650, the Court recognised the privilege in the case of a secretary of an embassy, and an attaché seems to come within the same principle. The next question is whether the case came within the provisions of the local Act, and whether, under those provisions, the plaintiff was liable to pay the rates. It does not seem to me on reading the section that there can be any doubt that De Basto came within the terms of it. I think it clear that, if he did not come within any of the previous words, he must come within the words "or any other person not liable by law to pay such rate."

It was said, and there is authority for the assertion, that there are certain charges, amongst which are rates of this description, in respect of which it is not usual to set up this privilege, but it is none the less clear that, if the privilege is claimed, the only remedy of the person against whom it is asserted is by appealing to the authorities of the country from which the ambassador is accredited. It seems to me that, upon the true construction of the Act, De Basto comes within its provisions, and that it therefore imposes the liability on the landlord. That being so, the only remaining question is whether the case comes within the provisions of the covenant. It was not very strenuously denied in argument that it did. It seems to me clear that it does, and that the defendant was therefore liable upon the covenant to pay the amount claimed. For these reasons I think the judgment of the County Court Judge was right, and that the rule must be discharged.

Wills, J. The plaintiff in this case sues the defendant for parochial rates which he has paid, and which he contends he is entitled to be repaid by virtue of the defendant's covenant with him. The plaintiff is the owner and the defendant the lessee of a house, in respect of the occupation of which the rates were assessed. The defendant has assigned or sublet to Senhor Pinto de Basto, who is said to be an attaché of the Portuguese embassy and who has on that ground refused to pay them. Under a local Act the landlord is liable in such a case; and the first question that arises is whether the person in question was entitled to the immunity which he has claimed.

The evidence that Senhor Pinto de Basto is an attaché to the

Portuguese legation is slight, but I think there is evidence of the fact. It seems that he is known at the embassy as an attaché, and is there spoken to and spoken of as an attaché, and treated as an attaché. It seems that there is no salary attached to the post, but that the government of his country can exact from him certain small services; and that he has in fact been employed by the minister occasionally to write letters and to take messages, and to help in the translation of documents connected with the diplomatic work of the embassy, and that he goes often to the embassy and places himself at the disposal of the ambassador.

I think this is evidence upon which the County Court Judge might fairly find that he was an attaché. If it be once ascertained that he was a person treated at the embassy as a member of the legation, possessing in diplomatic matters more or less of the confidence of the minister and employed from time to time by him in the work of the legation, I think it is not for us to measure the *quantum* of the services either required from or rendered by him. If there were any reason to suppose that the so-called appointment was a sham, as in a case reported in the books, in which a Christian clergyman was supposed to be domestic chaplain to the ambassador of the Emperor of Morocco; if he were one of an inordinate number of idlers nominally attached to the embassy and not wanted there, or there were any other circumstances from which it might be gathered that the appointment was not *bonâ fide*, the case would be otherwise. But I can very well understand that, seeing the close connection between diplomatic business and some of the matters which it falls to a consul-general to transact, there may be a convenience in clothing the consul-general with the additional character of an attaché, which may explain and justify his appointment in that capacity, although his services in a diplomatic character may be only slight and occasional.

An attaché is a well-known term in the diplomatic service. He forms part of the regular suite of an ambassador. He is classed by Calvo, the author of an elaborate French work on International Law, published in 1880, and written with admirable clearness and with a copiousness of historical illustration which makes his treatise most interesting as well as instructive, along with "Conseillers et Sécrétaires," and he gives a common description of the functions of all three classes of officers as consisting in supporting the minister in all things, in preparing and forwarding official

despatches, in carrying out communications by word of mouth with the public administrative authorities of the country to which the minister is accredited, in classifying and keeping charge of the archives of the mission, in ciphering and deciphering despatches, in making minutes of the letters which the minister may have to write, and similar services; and he treats the attaché as undoubtedly entitled to all the immunities accorded to the suite of an ambassador: Calvo, International Law, vol. i. p. 486.

One of these immunities, insisted upon by all writers on International Law with whose works I have any acquaintance, as beyond question, is the complete exemption from the jurisdiction of the courts of the country to which the minister is accredited. They are all, so far as I have been able to ascertain, equally clear in the opinion that the exemption extends to the family and suite of the ambassador. "This immunity," says Wheaton, "extends not only to the person of the minister, but to his family and suite, secretaries of legation and other secretaries, his servants, moveable effects, and the house in which he resides." International Law, ed. 1863, p. 394. Again, "the wife and family, servants, and suite of the minister participate in the inviolability attached to his public character." Ib. 397. For these propositions he quotes Grotius, Bynkershoek, Vattel, and Martens, and he treats these privileges as essential to the dignity of his sovereign and to the duties he is bound to perform. Martens says: "The exemption from civil jurisdiction, contentious and voluntary alike, is general, and belongs to ministers throughout the whole extent of the country in which they reside. They enjoy it for themselves, for their suite, and for their effects, in as far, be it always understood, as they do not travel out of their diplomatic character." Guide Diplomatique, vol. i. p. 81. To the same effect is the statement by Calvo: "The staff of the mission, the wife and family of the diplomatic agent, participate in these prerogatives;" and amongst the prerogatives there enumerated is that "he is exempt from the local jurisdiction of the country into which he is sent; no legal process can be brought against him before the tribunals of the place of his residence." Vol. i. p. 381. "The person who enjoys exterritoriality," says the German Bluntschli, "cannot be subjected to any impost." International Law Codified, art. 138. "The family, the staff, the suite, and the servants of him who has the right of exterritoriality," says the same writer, "enjoy the same immunity

as himself. His suite have the right but indirectly and on account of him to whom they are attached." Art. 145. "Such persons are exempt from jurisdiction." Art. 147. "The immunity of the person exempted extends to the members of his suite." Heffter, International Law of Europe, s. 42, VI. These are amongst the most recent French and German authorities upon the subject, and are for the most part subsequent to those cited in the elaborate arguments in *Taylor* v. *Best*, 14 C. B. 487, 23 L. J. C. P. 89; and *Magdalena Steam Navigation Co.* v. *Martin*, 2 E. & E. 94, 28 L. J. Q. B. 310; and, so far as I have been able to ascertain, no writer on international law appears to entertain any doubt upon this point.

It was urged for the defendant that there are English authorities conflicting with these propositions. I do not think it is so, if they are carefully considered. It was said that in *Fisher* v. *Begrez*, 1 C. & M. 117, 2 L. J. Ex. 13, it was held that the goods of a chorister to the Bavarian embassy were not privileged from execution under a *fi. fa.*; but in that case the sheriff had not executed the *fi. fa.*; nor was the protection of the Court claimed by the ambassador or his servant. The sheriff claimed to be exempt from the duty of levying. The defendant had allowed himself to be sued and the action to proceed to judgment and execution without claiming the privilege, and the sheriff applied to the Court upon affidavits which were quite insufficient to show, and failed to satisfy the Court, that there was any foundation for the allegation that the defendant was then in the service of the Bavarian minister.

In *Novello* v. *Toogood*, 1 B. & C. 554, 1 L. J. K. B. 181, it was held that the goods of a chorister in the service of the Portuguese ambassador were not privileged from distress for poor-rates. But in that case the servant was carrying on the business of a lodging-house keeper in the house in question. Most writers on international law say that with regard to an ambassador even, although he does not lose his privileges as an ambassador by engaging in trade in the country to which he is accredited, yet the immunity of his goods does not extend to protect his stock-in-trade. The *ratio decidendi* in *Novello* v. *Toogood* is that the plaintiff Novello, who claimed exemption from poor-rate, was carrying on the business of a lodging-house keeper in the house in question.

An exception from the privilege of being exempt from jurisdiction is, by the Statute of 7 Anne, c. 12, s. 5, specifically applied to the case of an ambassador's servant carrying on a trade; and in

Novello v. *Toogood*, *supra*, ABBOTT, C. J., so far from hinting a doubt as to the general principle that the immunity from process extends to the servant of the ambassador, observes, "I do not say that he may not have a house fit and convenient for his situation as the servant of an ambassador, nor that the furniture in such a house will not be privileged." It may be added that Novello was a British-born subject, and that most writers on international law are of opinion that a subject of the country in which the ambassador is resident remains subject to the law of his country, and that in respect of him the immunity which would be afforded to a foreigner cannot be claimed. *Poitier* v. *Croza*, 1 Wm. Bl. 48, was cited, but in that case the Court was convinced that the alleged service was a sham.

Reliance was placed on *Taylor* v. *Best*, 14 C. B. 487, 490, 23 L. J. C. P. 89. But the substance of the decision in that case was that, where the ambassador had voluntarily appeared as one of several defendants, and defended the action up to judgment, he had waived his privilege, and it was too late for him to apply to have all further proceedings stayed, or to have his own name struck out of the record. It is true that MAULE, J., expressed doubts as to whether an ambassador in England could claim a complete immunity from all English process. But that doubt was removed and pronounced to be ill-founded in the considered and elaborate judgment of the Court of Queen's Bench in *Magdalena Steam Navigation Co.* v. *Martin*, 2 E. & E. 94, 28 L. J. Q. B. 310, in which it was held that the minister of a foreign country cannot be sued against his will in this country, although the action may arise out of commercial transactions carried on by him here. There is, therefore, nothing in the current of English authorities to contravene the doctrine of exemption from process, — a part of the privileges which constitute the "exterritoriality" of foreign jurists, — as laid down by the writers on international law; and there is nothing in the circumstances of this case to prevent its application to Senhor de Basto. He is not carrying on trade nor letting lodgings; and the house in question is simply the private residence of himself and his family; and I am of opinion that he was not liable to pay the rates assessed upon him in respect of his occupation.

It follows that under sect. 190 of the local Act the plaintiff, as the landlord of his house, was liable to pay them; and, having paid them, it is clear that, under the covenant sued upon, the

defendant is bound to recoup him. The judgment of the County Court Judge was right therefore, and the appeal must be dismissed with costs. *Appeal dismissed.*

ENGLISH NOTES.

The Statute of 1708 (7 Anne, c. 12) which was passed in consequence of certain proceedings in the *Case of Matueof*, the Russian Ambassador (see 10 Mod. 4), is understood to have been intended as declaratory of the common law recognising the law or comity of nations. By sect. 3 of the Act it is declared that "all writs and processes whereby the person of any ambassador or other public minister of any foreign prince or state authorised and received as such by her Majesty, her heirs or successors, or the domestic or domestic servant of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever."

A *consul* is now a "public minister" within the Statute; and in the case of a British subject and merchant of London, who had been appointed consul to a foreign reigning prince, it has been expressly decided that he is not within the protection of the Statute. *Viveash* v. *Becker* (K. B. 1814), 3 M. & S. 284, 15 R. R 488.

In *Hopkins* v. *De Robeck* (K. B. 1789), 3 T. R. 79, 1 R. R. 650, it had been decided that the privilege under the Statute of Anne — which it was observed is only explanatory of the law of nations — extends to a person employed as secretary to an ambassador.

In the case of *Magdalena S. S. Co.* v. *Martin* (Q. B. 1859), 2 E. & E. 94, 111, 28 L. J. Q. B. 314, the privileges of an ambassador are thus described by Lord CAMPBELL, C. J.: "The great principle is to be found in *Grotius de jure Belli et Pacis*, lib. 2, c. 18, § 9: *Omnis coactio abesse a legato debet.* He is to be left at liberty to devote himself body and soul to the business of the embassy. He *does* not owe even a temporary allegiance to the sovereign to whom he is accredited, and he has at least as great privileges from suits as the sovereign he represents. He is not supposed even to live within the territory of the sovereign to whom he is accredited, and, if he has done nothing to forfeit or to waive his privilege, he is for all judicial purposes supposed still to be in his own country. For these reasons the rule laid down by all jurists of authority who have written upon the subject is, that an ambassador is exempt from the jurisdiction of the courts of the country where he resides as ambassador."

As to the termination of the privilege in case of recall, see *Marshall* v. *Critico* (1803), 9 East, 447; *Mumms Bey* v. *Gadran* 1894, 1 Q. B. 533.

AMERICAN NOTES.

By the United States Revised Statutes (§§ 4062–4065), all civil process against the minister and his servants is void. So held as to a secretary of legation. *Ex parte Cabrera*, 1 Washington (U. S. Circ.), 232.

AMBIGUITY.

No. 1. — SAUNDERSON *v.* PIPER.

(C. P. 1839.)

RULE.

WHERE a legal relation is sought to be established by means of a written instrument, if an uncertainty of intention appears by the expression of the instrument itself, the true intention cannot be ascertained by the aid of extrinsic evidence. For, as it has been said by Lord Bacon (Maxims Reg. 23), "*ambiguitas patens* cannot be holpen by averment."

Saunderson v. Piper.

5 Bing. N. C. 425 (s. c. 8 L. J., C. P. 227).

The plaintiffs, as indorsees, declared against the defendants as acceptors of a bill of exchange for £245 for value received, bearing date the 30th of August, 1836, and payable six months after date. Second count on an account stated. Plea to the first count, that the defendants did not accept; to the second, that they did not promise as in that count alleged.

At the trial the plaintiffs produced, in support of their declaration, a bill of exchange, of which the following is a copy: —

£245. LONDON, Aug. 30, 1836.

Six months after date, pay to our order two hundred pounds for value received.

To Messrs. H. H. Piper & Co., 42 East Change

Per Procuration of Thos. Maltby, Son, & Co.
HENRY MALTBY.

Indorsed Thomas Maltby, Son, & Co.

No. 1. — Saunderson v Piper.

The jury found a verdict for the plaintiffs for £245 and interest, subject to the opinion of the Court upon the following case: —

The plaintiffs are extensive bill-brokers in London. It was proved upon the trial that the bill was drawn by Maltby & Co. upon and accepted by the defendants in payment of the sum of £245, being the contract price of ten tons of lead sold by Maltby & Co. to the defendants. The bill was drawn in figures for £245, but the words "and forty-five" were omitted in the body of the bill by mistake. The bill, when drawn, was upon a 6s. stamp; and the defendants, when they accepted it, intended to accept a bill for £245.

It was further proved that the bill was left with the defendants for two or three weeks for their acceptance; and application was made to them three several times for the bill as a bill for £245; the usual mode of applying for bills for acceptance being by the amount as expressed in the figures on the bill; and it was referred to on those occasions by the drawers and the defendants as a bill for £245.

It was also proved that the usual course of business among extensive bill-brokers in the city of London is, to examine the bills discounted by them, by the figures and the stamp, not by reading the body of the bill, as it would be almost impossible, from the number of bills discounted daily, to take them by anything but the figures and stamps.

On the 14th of January, 1837, the plaintiffs discounted the bill for Maltby & Co., and the plaintiffs paid them £245, less the discount for the same. Before the bill arrived at maturity Maltby & Co. failed.

The defendants, upon the trial, objected to the admissibility of the evidence of the facts relating to the transaction in respect of which the bill was drawn, of the intention of the parties, of the circumstances relating to the applications for the acceptance, and of the defendant's conduct in regard to them; but the evidence was received, subject to the opinion of the Court upon the admissibility of the whole or any part of the same.

The question for the opinion of the Court was, whether, upon such of the evidence given at the trial as might be deemed to be admissible, the plaintiffs were entitled to recover in this action, either the sum of £245 and interest, or the sum of £200 and interest. If the Court should be of opinion that the plaintiffs

were entitled to recover either of those sums, a verdict was to be entered accordingly. If the Court should be of opinion that the plaintiffs were not entitled to recover any sum from the defendants, a nonsuit was to be entered.

Wilde, Serjt., for the plaintiffs. The amount of the stamp, the value of the goods for which the bill was accepted, and the conduct of the acceptors shows clearly that it was their intention to accept a bill for £245; and the bill being drawn for value received, the plaintiffs only explain, and do not contradict or vary the instrument, by showing what the amount of that value was. It has always been the practice so to explain mercantile instruments. Thus in *Rex* v. *Elliott*, 2 East, Pl. Cr. 951, where the prisoner was indicted for forging a £50 promissory note, the body of the note omitted the word *pounds;* but the margin containing the figures, £50, it was held that the prisoner was properly convicted. Marius lays it down, p. 32, 3rd ed.: "If it so fall out, that through unadvisedness, or error of the pen, the figures of the sum, and the words at length of the sum that is to be paid upon any bill of exchange do not agree together, either that the figures do mention more and the words less, or that the figures do specify less, and the words at length more, in either, or in any such like case, you ought to observe and follow the order of the words mentioned at length, and not in figures, *until further order be had concerning the same,* because a man is more apt to commit an error with his pen in writing a figure than he is in writing a word; and also because the figures at the top of the bill do only, as it were, serve as the contents of the bill, and a breviat thereof, but the words at length are in the body of the bill of exchange, and are the chief and principal substance thereof, whereunto special regard ought to be had." He is followed by Beawes, *Lex Mere.* 441, pl. 193, nearly in the same words; and Forbes, in his work on Bills of Exchange, extracts the passage, omitting the qualification. The qualification, however, implies that the drawee may wait for and receive information as to what was the real intention of the parties; and the whole passage applies rather to bills drawn on a general account of the details of which the drawee may be ignorant, than to bills drawn to obtain payment on a specific contract. Then, every contract must be taken *fortius contrà proferentem;* and there exists here in the amount of the stamp an indication of intention which could not be found in the time of Marius. The rule which pre-

cludes the receipt of evidence to explain a patent ambiguity, does not apply to mercantile contracts, which are often framed in characters partaking of the nature of hieroglyphics, or expressed in language which conveys no meaning to an ordinary reader, and, therefore, from the necessity of the case, must be explained by parol evidence. Thus, in *Smith* v. *Wilson*, 3 B. & Ad. 728, evidence was admitted to show that by the expression "1000 rabbits," the parties meant "1200." In *Bold* v. *Rayner*, 1 M. & W. 343, a variance between the bought and sold note was explained by the usage of trade. See also *Bottomley* v. *Forbes*, 5 New Cases, 121. And where a question arises as to the general intention of the parties, concerning which the instrument is not decisive, it has been held that proof of independent facts, collateral to the instrument, may be properly admitted. *Rex* v. *Laindon*, 8 T. R. 379. Here, as the bill purports to be for value received, the plaintiff may show, as a collateral fact, what that value was, and then the intention of the acceptors may be collected from the figures they have used. As in *Fonnereau* v. *Poyntz*, 1 Bro. Ch. C. 472, where a certain amount of stock was bequeathed, evidence was admitted to show that the testator meant the amount of money which could be raised by the stock, and not the amount of the stock itself. In *Beaumont* v. *Fell*, 2 P. Wms. 141, in explanation of a bequest to Catherine Earnley, evidence was admitted that the testator meant Gertrude Yardley. In *Gibson* v. *Minett*, 1 H. Bl. 569; 3 T. R. 481; 1 R. R. 754, where a bill was made payable to a fictitious payee or order, and the defendants sought to avail themselves of their own fraud, evidence was admitted which enabled the indorsee to recover as on a bill payable to bearer. In like manner the nature of an alteration in an instrument may be explained by extraneous evidence. Thus, in *Knight* v. *Clements*, 3 Nev. & Perr. 375, 7 L. J. Q. B. 144, where a bill of exchange, the appearance of which left it uncertain whether it had been altered before or after issue, was submitted to a jury, with a direction that if, from its appearance, they believed the alteration to have been made before the bill was completed, and while the ink was wet, they should find for the plaintiff, — the Court set aside the verdict, on the ground that the plaintiff should have shown, by extraneous evidence, that the alteration was properly made.

If the defendants had been sued for £245, the contract price of the lead they purchased, it would have been a sufficient defence to show that they gave this bill in payment.

Peacock, for the defendants. There is a patent ambiguity on the face of this bill of exchange, and statements could not be made to explain that ambiguity, without violating one of the clearest rules of evidence.

In *Rex* v. *Elliott* there was no discrepancy between the body of the note and the margin, but a mere omission in the body of the note which the margin sufficiently supplied; as the venue in the margin of a declaration may supply the place of, but not contradict, a venue in the declaration itself. The stamp cannot be called in aid without resorting to the parol evidence; and, in the ordinary question, whether an agreement between landlord and occupier be a lease, or merely an agreement for a lease, the decision of the Court is never governed by the stamp, for a leased stamp is often affixed on that which turns out to be a mere agreement. The passages in Marius and Beawes are altogether in favour of the defendants; and though it may be prudent for the drawee to wait for further advice, it by no means follows that evidence of such advice would be admissible in a court of law to explain a patent ambiguity. But at the time when those authors wrote, bills might be accepted by parol, and the acceptance therefore might be open to parol explanation. Since 1 & 2 Geo. IV. c. 78, acceptances can only be in writing. In all the cases where mercantile usage has been admitted to explain a contract, the ambiguity has been latent, as it was in *Fonnereau* v. *Poyntz* and *Beaumont* v. *Fell*. Whether or not this bill would furnish a defence to an action for £245 on the contract for the sale of lead, is only the same question as the present put in other words: the short answer is, that the ambiguity, being patent, is not by the rules of our law open to explanation; the meaning of the parties being uncertain, the instrument is void, and the plaintiff can recover nothing.

Wilde, in reply. The question is, what was the intention of the parties; and when that intention is shown, as it may be shown by the collateral fact of the contract for lead, there is no ambiguity in the instrument, especially when mercantile usage shows that the acceptor always accepts the figure in the superscription. The rule of *fortius contrà proferentem* would have no applicability at all, if it were not applicable to a case like the present.

May 1, 1839. Tindal, C. J. The only question in this case is, whether the evidence adduced on the trial of the cause was admissible or not: and, under the circumstances, I am of opinion that it

was not admissible. This is a case of *ambiguitas patens*, and, according to the rules of law, evidence to explain such an ambiguity is not admissible. Where there is doubt on the face of the instrument, the law admits no extrinsic evidence to explain it. Now, on the body of the bill in question, it appears to have been drawn for two hundred pounds; but in the margin, the figures express the sum of £245. If this creates any ambiguity, it is one which arises on the face of the instrument. In most of the cases cited for the plaintiff the ambiguity arose from matters not appearing on the instrument. In *Gibson* v. *Minett* parol evidence introduced the difficulty, not the language of the instrument; and parol evidence was admitted to remove it.

So, in the instance of commercial instruments the difficulty rarely appears upon the face of the instrument, but arises from the custom of the country or the usage of trade. In *Rex* v. *Elliott* the Court looked at the sum in the margin in order to show the intention of the party in uttering the bill, but not to show the meaning of the bill itself. The evidence in question not being admissible, we cannot shake the rule of commercial writers, that where a difference appears between the figures and the words of the bill, it is safer to attend to the words. If we take the authority of those writers where we have none of our own, this is a good bill for the sum expressed in the body; and therefore I am of opinion that the plaintiff is entitled to judgment for £200.

Bosanquet, J. I am of the same opinion. The question is, whether this instrument is a bill for £245, or £200, or whether it is altogether void. If it turns out to be a bill for £200, it is a case for amending the declaration, and the verdict should be entered accordingly. It is true that there was abundant evidence to show that this was intended as a bill for £245, if that evidence was admissible; but the evidence was not admissible, because this is a case of patent ambiguity, and our rules of evidence exclude explanation where the ambiguity is patent. It is true, some foreign writers have said that in such a case the drawee should wait for instructions; and it would, no doubt, be prudent he should do so; that, however, cannot alter our rules of evidence. But the same writers also lay it down that in the absence of instructions the words at length, and not the figures, are to determine the sum to be paid: and we think that is the rule that should be followed.

The argument that pressed me most, is the rule of *fortius contrà*

proferentem: that an instrument must be taken most strongly against the party making it. But there is no case in which that principle has been applied to an instrument, the body of which expresses a clear amount, and the ambiguity arises from a different amount expressed in the margin. Under such circumstances the rule of law as to evidence must prevail.

COLTMAN, J. This is a case of some difficulty; and though evidence cannot be admitted to explain a patent ambiguity, I cannot help thinking that where a party signs an instrument with two hundred pounds in words, and £245 in figures, it should be taken most strongly against the party signing it; as in *Edis* v. *Bury*, 6 B. & C. 433, where an instrument was made in terms so ambiguous as to make it doubtful whether it were a bill of exchange or a promissory note, it was held, that the holder might at his election (as against the maker of the instrument) treat it as either: and Lord TENTERDEN says, "Where a party issues an instrument of an ambiguous nature, the law ought to allow the holder, at his option, to treat it either as a promissory note or bill of exchange."

This seems to me to fall within the principle of that case. The oversight of the acceptor has tended to mislead the holder: if it was done with a fraudulent intention, there can be no doubt that the plaintiff would be entitled to the whole; there is no fraud here; but, upon the whole, I think this should be taken to be a bill for £245.

ERSKINE, J. I think this is a bill for £200, and not for £245. The rule of law is, that where an ambiguity appears on the face of an instrument, you cannot adduce evidence to explain it; as, where there is a devise to one of the sons of J. S., evidence cannot be received to explain which: but if a testator leaves property to the eldest son of J. S., and two persons — as in the case of a second marriage — meet that designation, you may admit evidence to explain which of the two was intended. Here the ambiguity is entirely on the face of the instrument. It is doubtful which of the two sums mentioned is the amount intended to be paid; but the doubt must be solved by the ordinary rules of construction: if the larger sum had been in words, I should have agreed with my brother COLTMAN; for, according to the authorities, figures are not of the same authority as words in the body of a bill, except in cases where the margin does not contradict, but is only an index to the body, as in *Rex* v. *Elliott*. I am of opinion that the words in the body must be taken as containing the amount of the bill to be paid. *Judgment for* £200.

ENGLISH NOTES.

The judgment of Tindal, C. J., in the principal case contains so complete a statement of the rule as to need no other illustration.

In Shep. Touch. 251, it is said, "If one grants to one of the children of J. S. and J. S. hath more than one, and he do not describe which he doth intend, this grant is void for uncertainty."

There are not, however, many cases in which the rule, purely and simply, has been applied. The Courts lean towards putting some meaning on the document; as in the principal case mercantile usage was called in aid. And it generally happens that there is something in the context which may be used to explain an ambiguity in a part of the instrument. For as Bacon says in his Maxim above cited, p. 23: "All ambiguity of words by matter within the deed and not out of the deed shall be holpen by construction, or in some cases by election, but never by averment."

The case of *In re Harrison, Turner* v. *Hellard* (C. A. 1885), 30 Ch. D. 390, is a case exemplifying the disinclination of the Court to find a patent ambiguity. The testatrix had made her will by filling up a printed form. The form had a blank for the name of the universal legatee and another blank for the name of the executrix. The testatrix filled up the latter blank with the name of her niece C. H. and did not fill up the former blank. The Court of Appeal, affirming the decision of Kay, J., inferred the intention — on looking at the original will — that the name was intended to stand for the legatee as well as the executrix.

The rule as laid down by Tindal, C. J., in the principal case, was applied in the case of *Higginson* v. *Clowes* (1808), 10 R. R. 112, 15 Ves. 516, in which a vendor, in his suit for specific performance, was not allowed to adduce evidence of a verbal declaration by the auctioneer, to remove an apparent discrepancy between the particulars and the conditions of sale. In a subsequent suit by the purchaser (*Clowes* v. *Higginson* (1813), 12 R. R. 284, 1 Ves. & B. 524) to enforce the same contract, the vendor *was* allowed, *by way of defence*, to adduce parol evidence so as to avoid a contract being forced on him by mistake or surprise; the result being that neither party could enforce the contract according to their own construction of it.

A contract of sale which reserved "the necessary land for making a railway through the estate to Princetown" was held, in a suit by the purchaser, too uncertain for the Court to enforce specific performance. *Pearce* v. *Watts* (1875), L. R., 20 Eq. 492, 44 L. J. Ch. 492.

The general principles as to extrinsic evidence, of which the above rule forms part, were much considered in the House of Lords in the *Case of Wilson* v. *Shore* (appeal in action, *Shore* v. *Wilson*, 1842), 9 Cl. & Fin. 355

No. 1. — Saunderson v. Piper. — Notes.

The opinion of the consulted judges was expressly given (*inter alia*) upon the question how far extrinsic evidence was admissible for the purpose of construing a written document. From the opinion of ERSKINE, J. (9 Cl. & Fin. 511), the following passages may be extracted: "The first general rule is that all instruments in writing are to be construed by the Court and the meaning employed ascertained and fixed by reference to the whole instrument, but nothing beyond it unless specially referred to in the instrument itself. But this rule is subject to many exceptions: first, where the instrument is in a foreign language, in which case the jury must ascertain the meaning of the terms upon the evidence of persons skilled in the particular language; second, if the instrument be a mercantile contract the meaning of the terms must be ascertained by the jury according to their acceptation amongst merchants; third, if the terms are technical terms of art their meaning must in like manner be ascertained by the evidence of persons skilled in the art to which they refer. . . . But there are other cases in which the meaning of words employed in a written instrument is also the fit subject of inquiry upon evidence before a jury, but this arises not out of the language of the writing itself, but in consequence of facts which are brought to the knowledge of the Court by evidence *dehors* the instrument."

PARKE, B. (9 Cl. & Fin. 555), stated his opinion as follows: "I apprehend that there are two descriptions of evidence (the only two which bear upon the subject of the present inquiry), and which are clearly admissible in every case for the purpose of enabling a Court to construe any written instrument, and to apply it practically. In the first place, there is no doubt that not only where the language of the instrument is such as the Court does not understand, it is competent to receive evidence of the proper meaning of the language, as when it is written in a foreign tongue; but it is also competent, where technical words or peculiar terms, or indeed any expressions, are used which at the time the instrument was written had acquired an appropriate meaning, either generally or by local usage or amongst particular classes. The authorities in support of this proposition are, *Attorney-General* v. *Cast Plate Glass Co.* (1792), 1 Anstr. 39, 3 R. R. 543; *Goblett* v. *Beechy* (1829), 3 Sim. 24; *Smith* v. *Wilson* (1832), 3 B. & Ad. 728; *Richardson* v. *Wilson* (1833), 4 B. & Ad. 787, and *Clayton* v. *Greyson* (1836), 5 Ad. & E. 302. This description of evidence is admissible, in order to enable the Court to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which the instrument is intended to operate. For the purpose of applying the instrument to the facts, and determining what passes by it, and who take an interest under it, a second description of

evidence is admissible, viz.: every material fact that will enable the Court to identify the person or thing mentioned in the instrument, and to place the Court, whose province it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it. The authorities for this position are also numerous; they are referred to in Vice-Chancellor WIGRAM'S excellent treatise on the admission of extrinsic evidence, under the fifth proposition (p. 53, 3rd ed.). From the context of the instrument, and from those two descriptions of evidence, with such circumstances as by law the Court, without evidence, may of itself notice, it is its duty to construe and apply the words of that instrument; and no extrinsic evidence of the intention of the party to the deed, from his declarations, whether at the time of his executing the instrument, or before or after that time, is admissible; the duty of the Court being to declare the meaning of what is written in the instrument, not what was intended to have been written."

TINDAL, C. J., with more conciseness stated his opinion (9 Cl. & Fin. 565) as follows: "The general rule is, that where the words of any written instrument are free from ambiguity, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict plain common meaning of the words themselves; and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible."

AMERICAN NOTES.

Although Lord Bacon's celebrated maxim was adopted by very early cases in this country, it is now practically if not avowedly discarded.

"Such ambiguities," said PARSONS, C. J., in *Storer* v. *Freeman*, 6 Massachusetts, 435; 4 Am. Dec. 155, "must be removed by a sound construction of the words of the deed." So parol evidence was held incompetent, at law, in *Newcomer* v. *Kline*, 11 Gill & Johnson (Maryland), 457; 37 Am. Dec. 74, to supply the word "dollars," accidentally omitted from a bill single; and to correct "degrees" to "perches," in a deed. *Clarke* v. *Lancaster*, 36 Maryland, 196. To the same effect, *White* v. *Hermann*, 51 Illinois, 243; 99 Am. Dec. 543; *McNair* v. *Toler*, 5 Minnesota, 435. The most recent direct recognition of the maxim is in *Palmer* v. *Albee*, 50 Iowa, 429, but the Chief Justice dissented. A long list of authorities cited to support the maxim may be found in 1 Am. & Eng. Enc. of Law, p. 529.

But the maxim was criticised at an early date. "It will not do to say that a patent ambiguity cannot be explained by evidence *aliunde*, though such

remarks are frequently found in the books." Cowen & Hill's Notes, 1359. In *Herring* v. *Boston Iron Co.*, 1 Gray (Mass.), 138, it was said: "The ambiguity is latent if it results from viewing the instrument in the light of the collateral facts, or what may be called the necessary extrinsic evidence." Chief Justice SHAW expressed himself to the same effect in *Sargent* v. *Adams*, 3 Gray (Mass.), 78. After a very learned discussion the maxim was rejected in *Fish* v. *Hubbard's Administrators*, 21 Wendell (New York), 651. Professor Thayer, of Harvard University, in his recent "Cases on Evidence," says, "Those do wisely who reject the use of Lord Bacon's maxim and commentary upon ambiguity;" and among these he numbers Wigram and Stephen and Nichols. "It does not help; it confuses. It is inextricably connected with a hopeless mass of mere jargon in our later books; and it cannot be understood by the mere reading of it," &c. Mr. Irving Browne (Parol Evidence, § 49) offers this rule: Parol evidence is admissible in respect to the subject matter, the situation and relations of the parties, and all the circumstances, to explain any ambiguity apparent upon the face of the instrument; but mere direct evidence of intention, except as derivable from such proof, is incompetent in respect to such patent ambiguity." Possibly wills should be excepted from this concluding limitation. He further says (p. 123): "So in the last solution, Lord Bacon's famous and much-vexed maxim seems to amount to no more than this. An incurable ambiguity is fatal." The latest writer on Wills, Mr. Schouler, says (Wills, § 581), the maxim "is rather fanciful and misleading;" his "illustrations are good, but practice carried the force of his rule beyond his own examples; and his distinction of patent and latent, though convenient in some respects, can hardly serve as a criterion."

In *Shore* v. *Miller*, 80 Georgia, 93; 12 Am. St. Rep. 239, the Court held evidence admissible to explain an ambiguity in a deed, "whether latent or patent." So in *Gunson* v *Madigan*, 15 Wis. 153, evidence was allowed to show the meaning of the word "team" "in reality a patent ambiguity." The Court said: "There is undoubtedly some confusion in the authorities upon this subject, especially if we look to the earlier cases; but the later decisions seem to be more uniform." Such evidence has been admitted to show whether a guaranty was intended to be continuing. *Lowry* v. *Adams*, 22 Vermont, 160; *White's Bank* v. *Myles*, 73 New York, 335; 29 Am. Rep. 157. To show the meaning of "early spring." *Phœnix Iron Co.* v. *Samuel*, 160 Penn. St.; and so of "incurred" — whether past or future, or both. *Agawam Bank* v. *Streven*, 18 New York, 502. So of "your account." *Walrath* v. *Thompson*, 4 Hill (New York), 200. So of "his crop of flax," — whether embracing what one had contracted to buy of others or limited to his own clip. *Goodrich* v. *Stevens*, 5 Lansing (New York Supreme Ct.), 230. So of "all the large cottonwood trees." *Bement* v. *Claybrook*, 135 Indiana.

A recent instance of an ambiguity regarded as incurable is in *Hollen* v. *Davis*, 59 Iowa, 144, 44 Am. Rep. 688; where a note read "— dollars." So in *Griffith* v. *Furry*, 30 Illinois, 251, where the note was not conditioned to be on interest, but merely read "ten per cent." So where an instrument was drawn in name of A., but executed by B. *Brauns* v. *Stearns*, 1 Oregon, 367. So where a will directed the sale of "the following described land," but omitted the description. *Crooks* v. *Whitford*, 47 Michigan, 283.

No. 2. — DOE d. HISCOCKS *v.* HISCOCKS.

(EX. 1839.)

RULE.

WHERE a determinate intention appears to be expressed by the written instrument, extrinsic evidence is admissible to show that the description of an object contained in the instrument is applicable with legal certainty to either of two objects; and, a latent ambiguity having been thus disclosed, evidence of the surrounding circumstances is admissible to show which of the objects was meant by the description; and if, on this evidence, one of the objects is indicated with sufficient certainty, direct evidence of declarations of intention is not admissible.

Doe d. Hiscocks v. Hiscocks.

9 L. J. Ex. 27 (s. c. 5 M. & W. 363).

Ejectment. The lessor of the plaintiff claimed under the will of Simon Hiscocks, the grandfather of both himself and the defendant, whereby the testator devised the premises sought to be recovered to his son, John Hiscocks, for life, and on his decease, to his grandson, John Hiscocks, eldest son of the said John Hiscocks, for life, and on his decease, to the first son of the body of his said grandson John Hiscocks, and the heirs male of his body, with remainder over. At the time of making this will, the testator's son, John Hiscocks, had issue by a first marriage, Simon, the present lessor of the plaintiff, and by a second marriage, John, the present defendant, besides other younger children. Evidence of the testator's instructions to the attorney who prepared the will, and of the declarations made by him after its execution, was tendered on the part of the lessor of the plaintiff, in order to show that *he* was the grandson intended to be benefited by the devise. The learned Judge received it; and the plaintiff having a verdict, leave was reserved to the defendant to move to enter a nonsuit, if the Court should think it inadmissible.

Erle having moved accordingly, —

No. 2. — Doe d. Hiscocks v. Hiscocks.

Crowder and Bere showed cause, and argued, that the ambiguity was not one upon the face of the will, but raised by extrinsic evidence of the state of the testator's family, from which it appeared, that he had applied a wrong christian name to his eldest grandson, and, under such circumstances, parol evidence of the nature in question was admissible. They cited *Bradshaw* v. *Bradshaw*, 2 You. & Coll. 72, 6 L. J. (N. S.) Ex. Eq. 1; *Cheyney's Case*, 5 Co. Rep. 68; *Counden* v. *Clark*, Hob. 31; *Jones* v. *Newman*, 1 W. Bl. 60; *Day* v. *Trig*, 1 P. Wms. 286; *Beaumont* v. *Fell*, 2 P. Wms. 141; *Hampshire* v. *Pierce*, 2 Ves. sen. 217; *Dowset* v. *Sweet*, Ambl. 175; *Bradwin* v. *Harpur*, *Ib.* 374; *Thomas* v. *Thomas*, 6 T. R. 671, 3 R. R. 306; *Price* v. *Page*, 4 Ves. 680; *Smith* v. *Coney*, 6 Ves. 42; *Careless* v. *Careless*, 19 Ves. 601, 15 R. R. 134; *Doe* d. *Chichester* v. *Oxenden*, 3 Taunt. 147, 12 R. R. 619; *Goodtitle* v. *Southern*, 1 M. & S. 299, 14 R. R. 435; *Doe* d. *Le Chevalier* v. *Huthwaite*, 3 B. & Ald. 632; *Doe* d. *Morgan* v. *Morgan*, 1 C. & M. 235, 2 L. J. (N. S.) Ex. 88; *Richardson* v. *Watson*, 4 B. & Ad. 787, 2 L. J. (N. S.) K. B. 134; *Miller* v. *Travers*, 8 Bing. 244, 1 L. J. (N. S.) Ch. 157; *Doe* d. *Gord* v. *Needs*, No. 3, p. 726, *post*, 2 M. & W. 129; 6 L. J. (N. S.) Ex. 59.

Erle and Butt, *contrà*, contended, first, that the words of the will were capable of application as soon as the state of the family was disclosed, — *i. e.*, by interpreting them to contemplate the eldest son by the second marriage; and the Judge should so have applied them. *Steele* v. *Berrier*, 1 Freem. 292; *Foster* v. *Ramsay*, 8 Vin. Abr. 310, pl. 9, 2 Sid. 149; *Wilkinson* v. *Adam*, 1 V. & B. 422; *Beacheroft* v *Beacheroft*, 1 Mad. 430; *Gill* v. *Shelley*, 2 Russ. & Myl. 336, 9 L. J. C. 68; *Fraser* v. *Pigott*, 1 Younge, 354; *Lewis* v. *Lewellyn*, 1 Turn. & Russ. 104; *Davis* v. *Williams*, 1 Ad. & El. 588, 3 L. J. (N. S.) K. B. 217. Next, that the evidence of intention was inadmissible, because it was contradictory of an intention disclosed by the will itself. *Parsons* v. *Parsons*, 1 Ves. jun. 266 n.; *Baylis* v. *The Attorney-General*, 2 Atk. 239; *Herbert* v. *Reid*, 16 Ves. 481. Thirdly, that the declarations made subsequently to the will were, at all events, inadmissible. *Doe* d. *Morgan* v. *Morgan*; *Harris* v. *The Bishop of Lincoln*, 2 P. Wms. 136; *Rachfield* v. *Careless*, Ib. 158.

In a subsequent term, the judgment of the Court was delivered by —

Lord Abinger, C. B. This was an action of ejectment, brought on the demise of Simon Hiscocks against John Hiscocks.

No. 2. — Doe d. Hiscocks v. Hiscocks.

The question turned on the words of a devise in the will of Simon Hiscocks, the grandfather of the lessor of the plaintiff and of the defendant. By his will, Simon Hiscocks, after devising estates to his son Simon for life, and from and after his death, to his grandson, Henry Hiscocks, in tail male, and making, as to certain other estates, an exactly similar provision in favour of his son John, for life, then, after his death, he devises those estates to "my grandson John Hiscocks, eldest son of the said John Hiscocks." It is on this devise that the question wholly turns. In fact, John Hiscocks the father had been twice married: by his first wife, he had Simon, the lessor of the plaintiff, his eldest son; and the eldest son of the second marriage was John Hiscocks, the defendant. The devise, therefore, does not, both by name and description, apply to either the lessor of the plaintiff, who is the eldest son, but whose name is Simon, or to the defendant, who, though his name is John, is not the eldest son.

The cause was tried before Bosanquet, J., at the Spring Assizes for the county of Devon, 1838; and that learned Judge admitted evidence of the instructions of the testator for the will, and of his directions after the will was made, in order to explain the ambiguity in the devise, arising from the state of facts; and the verdict having been found for the lessor of the plaintiff, a rule has been obtained for a nonsuit or a new trial, on the ground that such evidence of intention was not receivable in this case: and after fully considering the question, which was very well argued on both sides, we think that there ought to be a new trial.

It must be admitted, that it is not possible altogether to reconcile the different cases that have been decided on this subject, which makes it the more expedient to investigate the principles upon which any evidence to explain the will of a testator ought to be received. The object in all cases is, to discover the intention of the testator. The first and most obvious mode of doing this is, to read his will as he has written it, and to collect his intention from his words: but as his words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his will, it is evident, that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects of his allusions or statements; and if these

are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property to which the will relates, are undoubtedly legitimate and often necessary evidence, to enable us to understand the meaning and application of his words.

Again, the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cipher, or in a foreign language. The habits of the testator in these particulars must be receivable in evidence to explain the meaning of his will.

But there is another mode of obtaining the intention of the testator, which is, by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for the purpose of explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous.

Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted; and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is, on the face of it, perfect and intelligible; but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors, of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case, there is what Lord Bacon calls "an equivocation," — *i. e.* the words equally apply to either manor; and evidence of previous intention may be received to solve this latent ambiguity, for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction.

It appears to us, that in all other cases parol evidence of what was the testator's intention ought to be excluded — upon this plain

ground, that his will ought to be made in writing; and, if his intention cannot be made to appear by the writing, explained by circumstances, there is no will.

It must be owned, however, that there are decided cases which are not to be reconciled with this distinction in a manner altogether satisfactory. Some of them, indeed, exhibit but an apparent inconsistency. Thus, for example, in the cases of *Doe* v. *Huthwaite* and *Bradshaw* v. *Bradshaw*, the only thing decided was, that, in a case like the present, *some* parol evidence was admissible. There, however, it was not decided that evidence of the testator's intention ought to be received. The decisions, when duly considered, amount to no more than this, that when the words of the devise, in their primary sense, when applied to the circumstances of the family and the property, make the devise insensible, collateral facts may be resorted to, in order to show that in some secondary sense of the words — and one in which the testator meant to use them — the devise may have a full effect. Thus, again, in *Cheyney's Case*, and in *Counden* v. *Clark*, "the averment is taken," in order to show which of two persons, *both equally described* within the words of the will, was intended by the testator to take the estate; and the late cases of *Doe* d. *Morgan* v. *Morgan* and *Doe* d. *Gord* v. *Needs*, both in this Court, are to the same effect. So, in the case of *Jones* v. *Newman*, according to the view the Court took of the facts, the case may be referred to the same principles as the former. The Court seem to have thought the proof equivalent only to proof of their being two J. C.s strangers to each other; and then the decision was right, it being a mere case of what Lord Bacon calls equivocation.

The cases of *Price* v. *Page*, *Still* v. *Hoste*, 6 Mad. 192, and *Careless* v. *Careless* do not materially vary in principle from those last cited. They differ, indeed, in this, that the equivocal description is not entirely accurate; but they agree in its being (although inaccurate) equally applicable to each claimant; and they all concur in this, that the inaccurate part of the description is either, as in *Price* v. *Page*, a mere blank, or, as in the other two cases, applicable to no person at all. These, therefore, may fairly be classed also as cases of equivocation; and, in that case, evidence of the intention of the testator seems to be receivable. But there are other cases, not so easily explained, and which seem at variance with the true principles of evidence. In *Selwood* v. *Mildmay*, 3 Ves. 306, 4 R. R. 1, evi-

dence of the instructions for the will was received. That case was doubted in *Miller* v. *Travers;* but perhaps having been put by the Master of the Rolls as one analogous to that of the devise of all a testator's freehold houses in a given place, where the testator had only leasehold houses, it may, as suggested by Lord Chief Justice TINDAL in *Miller* v. *Travers,* be considered as being only a wrong application to the facts of a correct principle of law. Again, in *Hampshire* v. *Pierce,* Sir JOHN STRANGE admitted declarations of the intentions of the testatrix to be given in evidence to show that by the words, "the four children of my niece Bamfield," she meant the four children by the second marriage. It may well be doubted whether this was right; but the decision on the whole case was undoubtedly correct; for the circumstances of the family, and their ages, which no doubt were admissible, were quite sufficient to have sustained the judgment, without the questionable evidence. And it may be further observed, that the principle with which Sir J. STRANGE is said to have commenced his judgment, is stated in terms much too large, and is so far inconsistent with later authorities. *Beaumont* v. *Fell,* though somewhat doubtful, can be reconciled with the principles upon this ground, — that there was no such person as Catherine Earnley, and that the testator was accustomed to address Gertrude Yardley by the name of Gatty. This, and other circumstances of the like nature, which were clearly admissible, may perhaps be considered to warrant that decision; but there, the evidence of the testator's declarations as to his intention of providing for Gertrude Yardley was also received; and the same evidence was received, at *Nisi Prius,* in *Thomas* v. *Thomas,* and approved, on a motion for a new trial, by the *dicta* of Lord KENYON and LAWRENCE, J. But these cases seem to us at variance with the decision in *Miller* v. *Travers,* which is a decision entitled to great weight. If evidence of intention could be allowed, for the purpose of showing that by Catherine Earnley and Mary Thomas the respective testators meant Gertrude Yardley and Elinor Evans, it might surely equally be adduced to prove, that by the county of Limerick a testator meant the county of Clare Yet this was rejected, and we think rightly. We are prepared on this point (the point in judgment in the case of *Miller* v. *Travers*) to adhere to the authority of that case. Upon the whole, then, we are of opinion, that in this case there must be a new trial.

Where the description is partly true as to both claimants, and

no case of equivocation arises, what is to be done is to determine whether the description means the lessor of the plaintiff or the defendant. The description, in fact applies partially to each; and it is not easy to see how the difficulty can be solved. If it were *res integra*, we should be much disposed to hold the devise void for uncertainty; but the cases of *Doe* v. *Huthwaite*, *Bradshaw* v. *Bradshaw*, and others, are authorities against this conclusion. If, therefore, by looking at the surrounding facts to be found by the jury, the Court can clearly see, with the knowledge which arises from those facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide, and direct the jury accordingly; but we think that, for this purpose, they cannot receive declarations of the testator of what he intended to do in making his will. If the evidence does not enable the Court to give such a direction to the jury, the defendant will, indeed for the present, succeed; but the claim of the heir-at-law will, probably, prevail ultimately, on the ground that the devise is void for uncertainty. *Rule absolute for a new trial.*

ENGLISH NOTES.

Before evidence of the surrounding circumstances can be admitted to assist in the construction, it must be impossible to put a rational construction on the instrument without its assistance: *Gordon* v. *Gordon* (H. L. 1871), L. R., 5 H. L. 254. It is in fact a contest between the two canons of construction that the grammatical meaning of the words shall alone be looked at, and that the intention shall prevail over a literal construction. In the case of deeds a good example is afforded by assignments for the benefit of creditors where deeds *primâ facie* limited to scheduled creditors or creditors who execute the deed have been held to extend to all creditors. *Jolly* v. *Wallis* (1800), 3 Esp. 228; *Spottiswoode* v. *Stockdale* (1815), G. Coop. 102, 14 R. R. 221; *Raworth* v. *Parker* (1855), 2 K. & J. 163, 169. For an example of the admission of parol evidence to make a principal liable on a contract entered into by an agent: *Calder* v. *Dobell* (Exch. 1871), *ante*, p. 457, L. R., 6 C. P. 486, 40 L. J. C. P. 224.

The literal construction has prevailed over evidence of the surrounding circumstances in the following cases: *Re Blower's Trusts* (Ch. App. 1871), L. R., 6 Ch. 351, 42 L. J. Ch. 24; *Webber* v. *Corbett* (1873), L. R., 16 Eq. 515, 43 L. J. Ch. 164; *Wells* v. *Wells* (1874), L. R., 18 Eq. 504, 43 L. J. Ch. 681; *Re Parker*, *Bentham* v. *Wilson* (C. A. 1881), 17 Ch. D. 262, 50 L. J. Ch. 639; *Merrill* v. *Morton* (1881), 17 Ch. D. 382, 50 L. J. Ch. 249.

No. 2. — Doe d. Hiscocks v. Hiscocks. — Notes.

In the following cases evidence of the surrounding circumstances has been taken into consideration. Two societies claimed a legacy. There was evidence that the father of the testatrix, his widow, and the testatrix had been subscribers to the funds of Society A. There was no evidence that the testatrix, or any of her family, had subscribed to the funds of Society B. These facts were held to entitle Society A. to succeed: *Re Kilvert's Trusts* (Ch. App. 1871), L. R., 7 Ch. 170, 41 L. J. Ch. 351; same point, *Re Fearns Will* (1879), 27 W. R. 392. So where there was a residuary gift to "my nephews and nieces living and the issue of any of my nephews and nieces dead before me," and it was in evidence that the testator had no brothers and sisters living at the date of his will, nor any nephews and nieces of his own, the nephews and nieces of the wife were held to be designated. *Sherratt* v. *Mountford* (Ch. App. 1873), L. R., 8 Ch. 928, 42 L. J. Ch. 688.

Evidence of the surrounding circumstances was admitted to supply a surname in a description which ran Percival . . . of Brighton, Esquire the Father: *In the goods of De Rosaz* (1877), 2 P. D. 66, 46 L. J. P. D. & A. 6. Again, where a testatrix gave a share of her residue to her "cousin, Harriett Cloak;" and the testatrix had no cousin of that name, but had a married cousin, Harriett Crane, whose maiden name was Cloak, and a cousin T. Cloak, whose wife's name was Harriett: evidence was admitted to show the testatrix's knowledge of and intimacy with the members of the Cloak family. In the event "cousin" was read in the secondary sense of "wife of a cousin," and the claim of Harriett the wife of T. Cloak allowed: *Re Taylor, Cloak* v. *Hammond* (C. A. 1886), 34 Ch. D. 255, 56 L. J. Ch. 171.

Grant v. *Grant* (Ex. Ch. 1870), L. R., 5 C. P. 727, 39 L. J. C. P. 272, in which direct parol evidence was admitted, will be referred to under No. 3, *post*, 737, and its position as an authority pointed out.

In the case of *Charter* v. *Charter* (H. L. 1874), L. R., 7 H. L. 364, 43 L. J. P. & M. 73, the Lords were equally divided; but this difference of opinion was not due to any real conflict as to the principles, but merely to the application of the principles to the facts of the case. The judgments of Lord Cairns, L. C., and Lord Selborne, in favour of affirming upon this point the decision of the Court below, prevailed; and extrinsic evidence was admitted of the state, circumstances, and habits of the testator's family, for the purpose of assisting the construction of what was, in their view, a doubtful will. The dissenting judgments were delivered by Lord Chelmsford and Lord Hatherley.

AMERICAN NOTES.

That extrinsic evidence is admissible to explain a latent ambiguity as stated in the Rule is well settled in this country. *Powell* v. *Biddle*, 2 Dallas (Penn.),

70; 1 Am. Dec. 263; *Morgan* v. *Burrows*, 45 Wisconsin, 211; 30 Am. Rep. 717; *Gallup* v. *Wright*, 61 Howard Practice Rep. (New York), 286; *Dunham* v. *Averill*, 45 Connecticut, 61; 29 Am. Rep. 642; *St. Luke's Home* v. *Association, &c.*, 52 New York, 191; 11 Am. Rep. 697; *Bradley* v. *Rees*, 113 Illinois, 327; 55 Am. Rep. 422; *Faulkner* v. *Nat. Sailors' Home*, 155 Massachusetts, 458; *Tilton* v. *Am. Bible Society*, 60 New Hampshire, 377; 49 Am. Rep. 321; *Houston* v. *Bryan*, 78 Georgia, 181; 6 Am. St. Rep. 252; *Webster* v. *Morris*, 66 Wisconsin, 366; *Begg* v. *Begg*, 56 Wisconsin, 531; *Simpson* v. *Dix*, 131 Massachusetts, 179; and many cases. 1 Am. & Eng. Enc. of Law, p. 535.

The foregoing cases embrace instances of ambiguity as to persons and as to subject matter. The case of *Bradley* v. *Rees*, *supra*, where there was a devise to "the four boys," and the testator had seven sons, is a good type of the American doctrine. So of *Hardy* v. *Warren*, Browne, Parol Evidence, 461, where there was a bequest by a woman to her "husband," and she had obtained a void divorce and was living with another man as his wife.

See Browne on Parol Evidence, §§ 98, 126.

No. 3. — DOE d. GORD *v.* NEEDS.

(EXCH. 1836.)

RULE.

ASSUMING that the intention appears on the face of the instrument to be determinate, if, after exhausting such evidence of the surrounding circumstances as is necessary to place the Court at the point of view of the maker of the instrument, there is still an ambiguity as to which of two objects is meant, — the description being sufficient to point with legal certainty to either if there were no other, — the intention as between those objects may be proved by direct evidence outside the instrument.

Doe d. Gord v. Needs.

2 M. & W. 129 (s. c. 6 L. J. Ex. 59).

Ejectment for a house and garden, in the parish of Burlescombe, in the county of Devon, tried before LITTLEDALE, J., at the last spring assizes for that county. The lessor of the plaintiff claimed under the will of John Spark, who died seised in fee of the premises in question, and others in the same parish. The will was dated the 21st of March, 1807, and devised as follows: —

No. 3. — Doe d. Gord v. Needs.

"I give and bequeath unto my two friends, Richard Corner and Henry Bond, yeomen, all those my freehold lands, tenements, and hereditaments, which I hold in fee-simple, situate, lying, and being in the parish of Burlescombe, and county of Devon, called or known by the names of Harris's and Moor's Croft, upon this special trust and confidence in them reposed, and to the intent or purpose that they, the said Richard Corner and Henry Bond, and the survivors and survivor of them, do and shall permit and suffer my wife, Mary Spark, to have, hold, and enjoy the same, and to take to her own use and behoof the rents, issues, and profits thereof during her natural life; and after her decease, upon this further trust and confidence, and to the intent and purpose that the said trustees, or survivors or survivor of them, do and shall, out of the rents, issues, and profits arising out of my said freehold lands and tenements, pay or cause to be paid unto my brother David Spark the yearly sum or annuity of ten pounds for the term of five years, if he should so long live; as also my wearing apparel of every sort. Also I give and bequeath unto John Gord the dwelling-house, called the Middle House, and part of the orchard, together with the garden thereto belonging, to hold to him during his natural life, and after his decease to his wife, Mary Gord, and after their decease to John Gord, the son of George Gord, and his assigns. Also I give and bequeath unto John Gord and Jane Needs the aforesaid close of land, called Moor's Croft, to hold to them during their natural lives as tenants in common, and not as joint tenants; and after their decease to George Gord, the son of George Gord, and to his heirs. Also I give and bequeath unto Jane Needs the dwelling-house wherein I now reside, together with the pound-house, garden, and other appurtenances thereunto belonging, to hold to her during her natural life; and after her decease to her daughter Ann Needs, and her assigns. Also I give and bequeath unto Ann Needs, until the decease of George Needs and Jane Needs, the lower house and garden; and after their decease to George Gord, the son of Gord, and his assigns. Also I give and bequeath unto George Gord, the son of John Gord, the sum of ten pounds, and to Jane and Elizabeth, the two daughters of the said John Gord, the sum of five pounds each. Also I give and bequeath unto Mary Gord, the daughter of George Gord, the sum of five pounds, and to George Gord, the son of the said George Gord, the sum of ten pounds, and to John Gord, one other son of the said George Gord,

No. 3. — Doe d. Gord v. Needs.

the sum of twenty pounds. Also I give and bequeath unto George Needs, the son of George Needs, the sum of ten pounds. All which said legacies to each of them given I order, will, and direct, shall be paid them respectively by my trustees, or survivors or survivor of them, when they come to the age of twenty-one years; and if either of the children of John Gord, George Gord, or George Needs, happen to die before the legacies herein and hereby to them given, the share of he, she, or they so dying shall remain in the surviving brothers and sisters, share and part alike. And it is my will and meaning that my said trustees, or either of them, shall not be liable to answer or make good any loss or losses that shall or may happen in consequence of this my will. And, lastly, I do hereby nominate, constitute, and appoint my said wife, Mary Spark, to be sole executrix of this my last will and testament."

The testator died in January, 1812, without having revoked or altered his will. Mary Spark, his widow, died in 1819. The devisees, Jane Needs, Ann Needs, and George Needs, had also died before the commencement of this action. The lessor of the plaintiff, who was the George Gord, the son of George Gord, mentioned in the will, claimed the premises in question under the devise to "George Gord, the son of Gord," and offered evidence of declarations by the testator, showing that he, the lessor of the plaintiff, was the intended devisee in remainder of the "lower house and garden." It was contended for the defendant that this evidence was not admissible, but the learned Judge overruled the objection. It was also objected that the plaintiff could not recover, for that by the will the legal estate was vested in the trustees. The learned Judge reserved this point; and a verdict having been found for the plaintiff,

Ball, in Easter Term, moved pursuant to the leave reserved, and obtained a rule *nisi* for a nonsuit or new trial on these two points: citing, as to the first, 2 Stark. Evid. 925, and, as to the latter, 2 Saund. 11 a, n. 17; and *White* v. *Parker*, 1 Bing. N. C. 573. In Trinity Term, cause was shown by

Bompas, Serjt., and Moody. First, the estate is vested in the devisee, unless the trustees took the legal fee. It is submitted that they did not.

Secondly, the ambiguity occasioned by the omission of the Christian name in this devise, was one which parol evidence was properly admitted to explain. The distinction always referred to

on this subject is between patent and latent ambiguities; and it is commonly said the ambiguity is patent, where you can see on the face of the instrument that there is an ambiguity, and latent where you cannot. But it is conceived that this is not an accurate statement of the principle, and that the true distinction is this, — that a patent ambiguity is one which arises on the inquiry to discover the meaning of the testator from the words he has used, abstractedly from all external facts or persons; but that where it is impossible to ascertain the meaning without a reference to extrinsic things, that is a latent ambiguity, which you must have recourse to evidence *aliunde* to explain. Suppose a devise to Mr. Smith; that is a patent ambiguity in one sense, for every one who reads it sees that it is ambiguous; yet parol evidence would clearly be admissible to explain it. *Cheyney's Case*, 5 Co. Rep. 68, p. 734 *post*; *Abbott* v. *Massie*, 3 Ves. 148, 3 R. R. 79; *Beaumont* v. *Fell*, 2 P. Wms. 141. But why is such a devise ambiguous? Because we know extrinsically that there are a multitude of Mr. Smiths; to which of them the bequest applies can be known only by extrinsic evidence. In like manner, how otherwise do we know that there is not a George, the son of Gord? There is therefore of necessity some extrinsic evidence admitted, to show that this is not a true description. We cannot have any apprehension of the existence of an ambiguity, without some reference to external circumstances, without an assumption in our own minds of some extrinsic evidence. If there were a person of the name of Gord, having no Christian name, this is a correct description. The cases in which evidence of this kind has been refused were where it was tendered to prove the intention of the testator, — his own construction of the meaning of his will, — not what were the persons or things referred to by it. Where a blank was left for the Christian name, evidence was received to show the testator's intentions with regard to the person answering to the surname. *Price* v. *Page*, 4 Ves. 680. So, where two initials of the party only were given; *Abbott* v. *Massie*. [Alderson, B., referred to *Doe* d. *Morgan* v. *Morgan*, 1 C. & M. 235; 2 L. J. (N. S.) Exch. 81]. In *Miller* v. *Travers*, 8 Bing. 251; 1 L. J. (N. S.) Ch. 157, Tindal, C. J., enters fully into the consideration of this subject, and states the distinction deducible from the authorities to be this: "That an uncertainty, which arises from applying the description contained in the will either to the thing devised, or to the person of the devisee, may be helped by parol

evidence; but that a new subject-matter of devise, or a new devisee, where the will is entirely silent upon either, cannot be imported by parol evidence into the will itself. . . . In the former case, the evidence is produced to prove facts, which, according to the language of Lord Coke, in 8 Co. Rep. 155, 'stand well with the words of the will.'" This is a case falling within the first branch of this classification. On the face of the will, the testator has clearly disposed of this particular estate to a particular person: but the uncertainty arises from applying the disposition to the person of the devisee. It does not of necessity appear on the face of the will, even that the description applies to either of the George Gords mentioned in the will. It may or may not turn out, from the parol evidence, that he means one of them. The principles applying to this subject are admirably laid down by Mr. Wigram, in his work on the admission of extrinsic evidence, in the interpretation of wills (p 78). The following are additional authorities in support of the distinction contended for by the plaintiff: *Hodgson* v. *Fitch*, 2 Vern. 593; *Richardson* v. *Watson*, 4 B. & Ad. 787; 2 L. J. (N. S.) K. B. 134; *Masters* v. *Masters*, 1 P. Wms. 421; *Smith* v. *Coney*, 6 Ves. 42; *Careless* v. *Careless*, 1 Mer. 384, 15 R. R. 134.

Ball, in support of the rule. The lessor of the plaintiff is not entitled to recover, if any estate, whether a chattel interest or not, still remains in the trustees. [PARKE, B. If the only point made on the trial was that they took an estate in fee, I think you are too late now to raise the objection; because, if it had been then contended that they took a chattel interest, the lessor of the plaintiff might have supplied the defect by showing that the legacies were discharged.]

The evidence of the testator's declarations was not admissible. Mr. Starkie thus states the rule: "Ambiguities which arise on the face of the will cannot be removed by the aid of extrinsic evidence; they may be helped by construction, but never by averment." In *Doe* d. *Preedy* v. *Holton*, 5 Nev. & M. 391; 5 L. J. (N. S.) K. B. 10, the testator devised to A. the messuage and tenement in S. wherein he resided, with the outhouses, &c., to the same adjoining, and all those closes called, &c., part of the farm and lands in his own occupation; and he devised to B. all his hereditaments in S. not before devised: and evidence of declarations by the testator that he meant that certain cottages adjoining to his

residence, and not in his own occupation, should go to B., was held inadmissible: and Patteson, J., says, "In every case extrinsic evidence must be received for the purpose of showing the state of the property, so as to see what comes within the clear terms of the devise; but not to clear up any difficulty arising upon the will itself." Here there is, on the face of the will itself, the greatest difficulty to be cleared up. The two George Gords, the sons of George and John, are both express objects of the testator's bounty. Looking, therefore, at the other parts of the will, it is impossible to say with certainty which is the object of the devise in question. This is in effect defeating the object of the Statute of Frauds, and making a devise of lands by parol. It is not like the case of a devise to two persons of the same name, either of whom will fit the terms of the devise. In *Price* v. *Page*, there was no express decision; the case, however, is distinguishable. [Alderson, B. The principle is very forcibly laid down by Gibbs, C. J., in *Doe* v. *Chichester*, 4 Dow. Parl. C. 65, 16 R. R. 32; he seems to take it as a question arising on the construction of the whole instrument.] In *Castledon* v. *Turner*, 3 Atk. 257, it was held that where there is an absolute omission, it cannot be supplied by parol evidence. *Baylis* v. *the Attorney General*, 2 Atk. 239, is an authority to the same effect.

Parke, B. As to the first point, if it appears that it was taken at the trial, we shall consider whether on that ground the rule ought to be made absolute. If not, the rule must be discharged on that point; because there is no ground for saying that the trustees took a fee, but only a chattel interest for some indefinite term, sufficient to enable them to satisfy the legacies. There can be no doubt that it was unnecessary for them to take the fee; it is different from the cases of a direction for the payment of taxes, repairs, &c.; for those purposes it is necessary for the trustees to take the fee without limitation. And it is equally clear that it was necessary here for them to take a chattel interest, either till the legacies were paid, or till the legatees attained twenty-one; which of the two, it is unnecessary to determine if the point was not taken. We will inquire whether it was or not.

On the other point, *Cur. adv. vult.*

In the present term the judgment of the Court was delivered by Parke, B. In this case, which was heard before my brothers

BOLLAND, ALDERSON, GURNEY, and myself, a *rule nisi* for a new trial was obtained on two grounds: first, that upon the true construction of the will of John Spark, under which the lessor of the plaintiff claims, the legal estate in the land in question was not in the plaintiffs, but in the trustees; and, secondly, that evidence of the devisor's declarations was improperly received on the trial, to show what he meant by a particular description in the will.

The substance of the will was as follows. [His Lordship stated the provisions of the will set forth above.] Upon showing cause against the *rule nisi* for a new trial, it was contended, on the part of the lessor of the plaintiff, that the trustees took only a chattel interest, till the annuity and legacies were paid, and these having been satisfied, the legal estate of the trustees ceased; and the case of *Doe* d. *White* v. *Simpson*, 5 East, 162, and the authorities there cited, were referred to in support of the proposition; and the first objection on the part of the defendants was no further insisted upon. The only point therefore remaining to be considered is, whether evidence was properly admitted of the devisor's declarations to show what person he meant to designate by the description of "George Gord, the son of Gord." And we are of opinion that such evidence was properly admitted.

If, upon the face of the devise, it had been uncertain whether the devisor had selected a particular object of his bounty, no evidence would have been admissible to prove that he intended a gift to a certain individual: such would have been a case of *ambiguitas patens*, within the meaning of Lord Bacon's rule, Maxims, 25, which ambiguity could not be holpen by averment; for to allow such evidence would be, with respect to that subject, to cause a parol will to operate as a written one; or, adopting the language of Lord Bacon, "to make that pass without writing, which the law appointeth shall not pass but by writing." But here, on the face of the devise, no such doubt arises. There is no *blank* before the name of Gord the father, which might have occasioned a doubt whether the devisor had finally fixed on any *certain* person in his mind. The devisor has clearly selected a particular individual as the devisee.

Let us then consider what would have been the case, if there had been no mention in the will of any *other* George Gord the son of a Gord: on that supposition there is no doubt, upon the authorities, but that evidence of the devisor's intention, as proved by his

declarations, would have been admissible. Upon the proof of extrinsic facts, which is always allowed in order to enable the Court to place itself in the situation of the devisor, and to construe his will, it would have appeared that there were at the date of the will *two* persons, to each of whom the description would be equally applicable. This clearly resembles the case put by Lord Bacon of a *latent* ambiguity, as where one grants his manor of S. to J. F. and his heirs, and the truth is that he has the manors both of North S. and South S.; in which case Lord Bacon says, "it shall be holpen by averment, whether of them was that which the party intended to pass." The case is also exactly like that mentioned by Lord Coke in *Altham's Case*, 8 Co. Rep. 155 a: "If A. levies a fine to William his son, and A. has two sons named William, the averment that *it was his intent* to levy the fine to the younger is good, and *stands well with the words of the fine.*" Another case is put in *Coundon* v. *Clarke*, Hob. 32, which is in point: "If one devise to his son John, where he has two sons of that name;" and the same rule was acted upon in the recent case of *Doe* v. *Morgan*, 1 C. & M. 235; 2 L. J. (N. S.) Ex. 88. The characteristic of all these cases is, that the words of the will *do* describe the object or subject intended; and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever: it only enables the Court to reject one of the subjects, or objects, to which the description in the will applies; and to determine which of the two the devisor understood to be signified by the description which he used in the will. This subject has been most ably discussed by Mr. Wigram, in his excellent treatise on the rules of law respecting the admission of extrinsic evidence in the interpretation of wills.

There would then have been no doubt whatever of the admissibility of evidence of the devisor's intention, if the devise to "George, the son of Gord," had stood alone, and no mention had been made in the will of George the son of *John* Gord, and George the son of *George* Gord. But does the circumstance that there are two persons named in the will, each answering the description of "George the son of Gord," prevent the application of this rule? We are of opinion that it does not. In truth, the mention of persons by those descriptions in other parts of the will has no more effect, for this purpose, than proof by extrinsic evidence of the existence of such persons, and that they were known

to the devisor, would have had: it shows that there were two persons, to either of whom the description in question would be applicable, and that such two persons were both known: and the present case really amounts to no more than this: that the person to whom the imperfect description appears on the parol evidence to apply, is described in other parts of the same will by a more full and perfect description, which excludes any other object than himself. Still he is pointed out in the devise itself by a description which, so far as it goes, is perfectly correct. In the case of *Doe* v. *Morgan*, above referred to, precisely the same circumstance occurred.

We are therefore of opinion that the lessor of the plaintiff is entitled to recover; and the rule must be discharged.

Rule discharged.

ENGLISH NOTES.

The *Lord Cheyney's Case* (in the Court of Wards, 1601), 5 Co. Rep. 68*a*., which is referred to in the argument for the plaintiff in the principal case, contains an important statement of the principles of extrinsic evidence. Although requiring to be supplemented by the minute discussion of more recent cases, and therefore hardly to be now set down as a ruling case, the report may be here usefully given in full. It is as follows: —

Sir Thomas Cheyney, Knt. Lord Warden of the Cinque Ports, 1 Eliz., made his will in writing, and thereby devised to Henry his son divers manors, and to the heirs of his body, the remainder to Thomas Cheyney of Woodley, and to the heirs male of his body, on condition "that he or they, or any of them shall not alien, discontinue, &c." And it was a question in the Court of Wards, between Sir Thomas Perot, heir general to the Lord Warden, and divers of the purchasers of Sir Thos. Cheyney, if the said Sir Thos. should be received to prove by witnesses that it was the intent and meaning of the devisor to include his son and heir within these words of the condition (he or they) and not only to restrain Thomas Cheyney of Woodley, and his heirs males of his body: but Wray and Anderson, Chief Justices, on conference had with other justices resolved, that he should not be received to such averment out of the will, for the will concerning lands, &c., ought to be in writing, and the constructions of wills ought to be collected from the words of the will in writing, and not by any averment out of it; for it would be full of great inconvenience, that none should know by the written words of a will, what construction to make, or advice to give, but it should be controlled by collateral averments out of the will: but if a man has two

sons both baptized by the name of John, and conceiving that the elder (who had been long absent) is dead, devises his land by his will in writing to his son John generally, and in truth the elder is living; in this case the younger son may in pleading or in evidence allege the devise to him; and if it be denied, he may produce witnesses to prove his father's intent, that he thought the other to be dead, or that he at the time of the will made, named his son John the younger, and the writer left out the addition of the younger: for in 47 E. 3, 16 b. the case was, Robert Peynel had issue two sons baptized by the name of William, and levied a fine to Sir John Fanningbridges and others *come ceo, &c.*, who granted and rendered to Robert and William his son generally; and after the death of Robert, William the younger son brought a *scire facias* against the heir of William the elder: and the younger by the rule of the court averred that the fine was levied to make him heir *prist, &c.*, and upon that issue was taken. And no inconvenience can rise if an averment in such case be taken in case of a devise by will, for he who sees such will, whereby land is devised to his son John, cannot be deceived by any secret invisible averment: for when he sees the devise to his son John, he ought at his peril to inquire which John the testator intended, which may easily be known by him who wrote the will, and others who were privy to his intent; and if no direct proof can be made of his intent, then the devise is void for the incertainty, as the render also would be in the said case of the fine, as to William, for the law will not make the one or the other by construction inheritable, for neither the elder son shall have it by course of law, because the elder need not have an addition, nor shall the younger have it by construction by reason the father need not have limited the land to the elder, because the land after the death of the father would descend to the elder. But he shall have it whom the father intended to advance with it, and for want of proof of such intent, the will or the render for the incertainty (as hath been said) is void; and so the doubt in 11 H. VI. 13, well explained.

In delivering the opinion of all the judges who were called in to assist the House of Lords in *Doe d. Oxenden* v. *Chichester* (H. L. 1816), 4 Dow. 65 (16 R. R. 32), Sir Vicary Gibbs, J., said (at p. 93): "The courts of law have been jealous of the admission of extrinsic evidence to explain the intention of the testator; and I know only of one case in which it is permitted, that is, where an ambiguity is introduced by extrinsic circumstances. There from the necessity of the case extrinsic evidence is admitted to explain the ambiguity; for example, where a testator devises his estate called Blackacre and has two estates called Blackacre, evidence must be admitted to show which of the Blackacres is meant; so if one devises to his son John Thomas, and he has two sons of the name of John Thomas, evidence must be received to show which

of them the testator intended. And so also if one devises to his nephew William Smith, and has no nephew answering the description in all respects, evidence must be admitted to show which nephew the testator meant by a description not strictly applying to any nephew. The ambiguity there arises from an extrinsic fact or circumstance, and the admission of evidence to explain the ambiguity is necessary to give effect to the will, and it is only in such a case that extrinsic evidence can be received. It is of great importance that the admission of such extrinsic evidence should be avoided where it can be done, that a purchaser or an heir at law may be able to judge from the instrument itself what lands are or are not affected by it."

In cases falling under this rule a similar course of procedure is adapted to that mentioned under the foregoing rule, namely, the surrounding circumstances must not be sufficient to enable the court to construe the instrument; *Charter* v. *Charter* (H. L. 1874), L. R., 7 H. L. 364, 43 L. J. P. & M. 73. There, two of the learned Lords, Lord Chelmsford and Lord Hatherley, thought that evidence of the surrounding circumstances was not required to enable the will to be construed, and that A. was entitled; Lord Cairns, L. C., and Lord Selborne thought that the evidence was admissible, and that B. was entitled; but all the learned Lords agreed that it was a case in which direct parol evidence of the intention by declaration of the testator outside the will was inadmissible. For it was not a case in which apart from the aid given by this evidence, the description of the legatee was equally applicable to two persons.

In the case of *In the goods of O'Reilly* (1873), 43 L. J. Prob. 5, the testator appointed as his executrix Georgina Geraldine de Bellin, but there was no person exactly answering to that combination of names. He left a grand-daughter named Adelaide Geraldine de Bellin, and a great grand-daughter named Georgina Geraldine Kate de Bellin. The great grand-daughter was six months old at the date of the execution of the will. Sir James Hannen held that direct extrinsic evidence of intention of the testator was admissible to show who was designated by the description Georgina Geraldine de Bellin. Again in *Re Wolverton Mortgaged Estates* (1877), 7 Ch. D. 197, 47 L. J. Ch. 127, the testator left a legacy to the children of his daughter by any husband "other than and except Mr. Thomas Fisher, of Bridge Street, Bath." At the date of the will there lived in Bridge Street, Bath, a Mr. Thomas Fisher who was a married man. Henry Tom Fisher, a son of this Mr. Thomas Fisher, was a commercial traveller, and was often at his father's house. Vice-Chancellor Malins admitted parol evidence that Henry Tom Fisher (who was familiarly called "Tom Fisher") was paying his addresses to the testator's daughter; and that the testator was opposed to his marry-

ing her. This decision may perhaps be considered in accord with the opinion of Lord Cairns and Lord Selborne in *Charter* v. *Charter*, but it is opposed to those of Lord Chelmsford and Lord Hatherley.

In the case of *In the goods of Brake* (1881), 6 P. D. 217; 50 L. J. P. D. & A. 48, the testator appointed William McCormack, of Canonbury, one of his executors. The only persons of the name of McCormack in Canonbury were Thomas McCormack, and his son, William Abraham McCormack. Evidence was admitted to show that the testator had told one of the attesting witnesses that he wished Mr. S. or Mr. McCormack, two of the deacons of his chapel, to be his executors; that the attesting witness, being under the impression that Mr. McCormack's Christian name was William, inserted it accordingly; that there never had been a deacon of the chapel named William McCormack, but the only deacon of any similar name was Thomas McCormack, who had been one of the deacons for ten years.

In *Grant* v. *Grant* (Ex. Ch. 1870), L. R., 5 C. P. 727; 39 L. J. C. P. 272, a testator devised property "to my nephew Joseph Grant." The following evidence was adduced: (1) that the brother of the testator had a son christened Joseph, and that the brother of the testator's wife had a son of the same name; (2) that the latter resided with the testator and assisted him in his business and that the testator did not at the time of making his will know the name of the former, or know how many children his brother had; (3) that the testator habitually referred to the former as his nephew; and (4) declarations of the testator as to the person intended. It had been held by the Court of Exchequer, L. R. 5 C. P. 380, that the evidence under heads (1) and (2) disclosed a latent ambiguity; and that the evidence under heads (3) and (4) was admissible to remove the latent ambiguity thus disclosed. The decision of the Exchequer Chamber was more guarded, and although the opinion of some of the judges appear to express, leaves it in doubt whether they allowed the heads of evidence (3) and (4) to influence the decision, the judgments of Kelly, C. B., Martin, B., and Blackburn, J., were expressly rested on the evidence excluding the heads (3) and (4). The judgment of Lord Penzance, L. R., 2 P. & D. 8, 39 L. J. P. & M. 17, which gave effect to the same will in the appointment of an executor, appears to have given some weight to head (3) of the evidence though it does not appear that he admitted head (4).

The case of *Grant* v. *Grant* has given rise to much adverse criticism. The admission of extrinsic evidence to raise a latent ambiguity, as involving the assumption that the primary sense of "nephew" includes "wife's nephew," is in direct conflict with the decision of the Court of Appeal in *Re Blower's Trusts* (Ch. App. 1871), L. R., 6 Ch. 351; 42 L. J. Ch. 24 (a decision of James and Mellish, L. JJ.), and is dis-

approved by the Master of the Rolls (Sir G. Jessel) in *Wells* v. *Wells* (1874), L. R., 18 Eq. 504; 43 L. J. Ch. 681; and by Malins, V. C., in *Merrill* v. *Morton* (1881), 17 Ch. D. 382; 50 L. J. Ch. 249; and its doubtful character as an authority was adverted to by Cotton, L. J., in *Re Parker, Bentham* v. *Wilson* (1881), 17 Ch. D. 262, 265; 50 L. J. Ch. 639, and in *Re Taylor, Cloak* v. *Hammond* (1886), 34 Ch. D. 255, 257; 56 L. J. Ch. 171. If it be admitted that "nephew" can only be read as wife's nephew in a secondary sense, the decision would be clearly opposed to the authority of *Doe d. Thomas* v. *Beynon* (Q. B. 1840), 12 Ad. & El. 431; 9 L. J. (N. S.) Q. B. 359, where there was a devise to B. and her daughter Elizabeth, and it was proved that B. had had a legitimate daughter who was dead at the date of the will, but the testator did not know of her death; and this evidence was held sufficient to rebut the claim of an illegitimate daughter of the same name.

The case of *Grant* v. *Grant* is, however, referred to by Mellish, L. J., in *Re Kilvert's Trusts* (1871), L. R., 7 Ch. 170, 172; 41 L. J. Ch. 351, as an authority for the admission of evidence of subscriptions by a testator to one of two societies of similar names, where the existence of two such societies had disclosed a latent ambiguity. It may further be observed that the judgment of the Court of Exchequer in admitting the evidence under head (4) and perhaps that under head (3) is opposed to the opinion of all the Lords in *Charter* v. *Charter*, unless it could be said that after exhausting the evidence under heads (1) and (2) the description was equally applicable to the two objects.

In *Sherratt* v. *Mountford* (1871), L. R., 7 Ch. 928, 930; 42 L. J. Ch. 688, *Grant* v. *Grant* is cited by James, L. J., as an authority in favour of the admission of evidence to show that the testator used the words "nephews and nieces" in the sense of wife's nephews, &c. There, however, it had been shown that the testator never had any nephews or nieces of his own; and it was held that the wife's nephews and nieces were nephews and nieces *in a secondary* sense. There had been an attempt by residuary legatees to show that the testator was on unfriendly terms with his wife's nephews and nieces, and that the gift failed. Lord Justice James said (L. R., 8 Ch. 930): "The only safe rule is that when persons have been found sufficiently answering the description in the will, there we are to stop, and are not to go further unless it is shown that there is another class of persons also sufficiently answering the description, in which case evidence is admissible to remove the latent ambiguity, and show which of the two classes was intended."

AMERICAN NOTES.

Mr. Browne says (Parol Evidence, § 126): "Where the object of a testator's bounty, or the subject of disposition, is described in terms applicable,

indifferently, to more than one person or thing, for the purpose of ascertaining the beneficiary, identifying the thing bestowed, or determining the quantity of interest given in a will, the court may inquire into every material fact relating to the claimant, the property claimed, and the circumstances and affairs of the testator and his family, and of the claimant; and the testator's declarations before, at, or after the making of the will are admissible in this view; but no evidence of mere mistake on the part of the testator or the draftsman is admissible."

The clause as to the testator's declarations is supported by *Cleverly* v. *Cleverly*, 124 Massachusetts, 314; *Morgan* v. *Burrows*, 45 Wisconsin, 211; *Vernor* v. *Henry*, 3 Watts (Penn.), 385; *Wadsworth* v. *Ruggles*, 6 Pickering (Mass.), 63; *Haydon* v. *Ewing's Devisees*, 1 B. Monroe (Kentucky), 113; *Ayres* v. *Weed*, 16 Connecticut, 302; *Maund's Administrator* v. *McPhail*, 10 Leigh (Virginia), 205; *Powell* v. *Biddle*, 2 Dallas (Penn.), 70; *Doe* v. *Roe*, 1 Wendell (New York), 549; *Trustees* v. *Colgrove*, 4 Hun (New York Supreme Ct.), 362; *Wagner's Appeal*, 43 Penn. St., 102.

No. 4. — WALSH *v.* TREVANION.

(Q. B. 1850.)

RULE.

WHERE the operative words of a deed are clear and unambiguous, their meaning cannot be altered by inference, from the recital, of a different intention.

But where those words are of doubtful meaning, the recitals of the deed may be used as a test to discover the intention.

Walsh v. Trevanion.

19 L. J. Q. B. 458 (s. c. 15 Q. B. Ad. & El. (N. S.) 733).

By an order of his Honour the Vice Chancellor of England, the following case was submitted for the opinion of the Judges of the Court of Queen's Bench.

By a deed-poll, bearing date the 1st of November, 1823, J. T. P. B. Trevanion, since deceased, appointed that all his property situate in the county of Cornwall should, after his decease, go to his eldest son, J. C. B. Trevanion (one of the defendants), and his heirs male. There were two schedules annexed to the deed, and which formed part of the case.

By an indenture of bargain and sale, duly inrolled, bearing date the 8th of November, 1823, and made between the said J. T. P. B.

Trevanion, of the first part, the said defendant, J. C. B. Trevanion, of the second part, E. Coode of the third part, and H. Coode of the fourth part, all the manor and lordship of Carhais, situate in the county of Cornwall, and also the messuage and mansion-house, farm and desmesne lands known by the name of Carhais, and the park thereunto belonging, called Carhais Park, and also all other lands comprised in the schedules thereunder written, were conveyed unto the said H. Coode and his assigns, to hold the same during the life of the said J. T. P. B. Trevanion, to the intent that a common recovery might be suffered of the same for barring the estate tail of the said defendant, J. C. B. Trevanion, therein, and that such recovery, when perfected, should enure to such uses as the said father and son, by any deed or writing, should at any time during their joint lives appoint, and in default of and subject to any such appointment to the uses thereinafter expressed. There were annexed to the said indenture two schedules, which were exact copies of the two schedules to the said deed-poll of the 1st of November, 1823.

In the year 1832 a common recovery was duly suffered, in pursuance of and in conformity with the said indenture.

By indentures of lease and release, bearing date the 18th and 19th of July, 1824, and made between the said J. T. P. B. Trevanion of the one part and the Governor and Company of the Bank of England of the other part, the said J. T. P. B. Trevanion, and the said defendant, J. C. B. Trevanion, in the exercise of the power vested in them by the deed of the 8th of November, 1823, appointed "such and such only of their said messuages, lands, premises, and hereditaments, situate in the said manor of Carhais, and the said several parishes of St. Michael Carhais, Cuby, Goran, Probus, Veryan, St. Teath, and St. Denis, as were comprised in the schedule thereto," to the use of the Governor and Company of the Bank of England, their successors and assigns, subject to redemption on repayment of a certain sum therein mentioned, with interest at 4 per cent. thereon. A copy of this schedule also formed part of the case.

By indenture of appointment and further charge, bearing date the 15th of July, 1825, and made between the said J. T. P. B. Trevanion and the defendant, J. C. B. Trevanion, of the one part, and the Governor and Company of the Bank of England of the other part, the said J. T. P. B. Trevanion and J. C. B. Trevanion

appointed that the said hereditaments comprised in the said last-mentioned schedule, and such only, should stand charged with the payment of a further sum, with interest at 4 per cent. thereon, to the Bank of England. These two sums together amounted to £20,000. Shortly prior to the 13th of June, 1827, a marriage was agreed upon between the defendant, J. C. B. Trevanion, and Charlotte Trelawney. In pursuance of that agreement, a settlement was made which, so far as it is material, is as follows.

By an indenture made the 13th of June, 1827, between J. T. P. B. Trevanion of the first part, J. C. B Trevanion of the second part, Mary T. Brettleton of the third part, Charlotte Trelawney of the fourth part, W. L. S. Trelawney and J. H Tremayne of the fifth part, and H. B. Trelawney and J. T. Fane of the sixth part; after reciting that the said J. T. P. B. Trevanion and J. C. B Trevanion had power to appoint the lands, &c., thereinafter appointed, and also granted, released, &c., or expressed and intended so to be, with their rights, &c., together with other hereditaments; and also reciting the indenture of the 8th of November, 1823, and of the 19th of July, 1824, and of the 15th of July, 1825, and that a marriage had been agreed upon between the said J C. B. Trevanion and Charlotte Trelawney, and that the said C. Trelawney was entitled to certain real and personal property, and that it was upon the treaty of the said intended marriage agreed that such of the hereditaments subject to the joint appointment of them the said J. T. P. B. Trevanion and J. C. B. Trevanion as are comprised in the said recited indentures of mortgage, and the whole of the said real and personal estate of the said C. Trelawney, should be settled to certain uses for the benefit of the said J. C. B Trevanion and C. Trelawney and their issue, &c.; for carrying into execution the said agreement as far as respects such of the said hereditaments, subject to the joint appointment of the said J. T. P. B. Trevanion and J. C. B. Trevanion, as were thereinafter appointed and granted, released, and confirmed, or expressed and intended so to be: It was witnessed that they the said J T. P. B. Trevanion and J. C. B. Trevanion, in consideration of the said marriage and the settlement of the said C. Trelawney's fortune, in exercise of the power vested in them by the deed of the 8th of November, 1823, appointed that the messuages or tenements, lands, and other hereditaments thereinafter granted, released, and confirmed, or expressed or intended so to be, with their and every of their appurtenances, should remain (but subject to and

charged as thereinafter mentioned) to the uses thereinafter expressed; and it was further witnessed, that the said J. T. P. B. Trevanion and J. C. B. Trevanion granted, released, &c., to the said W. S. Trelawney, J. S. Tremayne, H. B. Trelawney, and J. T. Fane, all and singular the messuages, lands, tenements, and other hereditaments of them the said J. T. P. B. Trevanion and J. C. B. Trevanion, situate and lying within the manor of Carhais, and also within the several parishes of St. Michael Carhais, Cuby, Goran, Probus, Veryan, St. Teath, and St. Denis, in the county of Cornwall, and which were intended to be specified and described in the schedule thereunder written (but which schedule was not intended to abridge or affect the generality of the description thereinbefore expressed), to the several uses and upon the several trusts in the said deed mentioned. One of the trusts declared by the settlement was to pay an annuity or yearly rent-charge of £250, with powers of distress and entry in default of payment. There was annexed to this deed a schedule, which specified and contained the same messuage, lands, and hereditaments as were contained in the schedule to the indenture of the 18th and 19th of July, 1824.

It was stated as a fact for the purposes of this case that the releasors in the said indentures of the 12th and 13th of June, 1827, were seised of the legal estate of and in such of the messuages as passed by such last-mentioned indenture.

The rental of the lands included in the mortgage deeds was £1390 *per annum*.

The plaintiffs contended that such messuages, lands, and hereditaments only as were comprised in the schedule to the deed of the 12th and 13th of June, 1827, and no others, passed and were conveyed under and by virtue of the same indenture; but one of the defendants, H. C. Trevanion, the first tenant in tail under the limitations contained in the said last-mentioned indenture, contended that the messuages, lands, and hereditaments of the said J. T. P. B. Trevanion and J. C. B. Trevanion, situate in the manor and parishes aforesaid, and specified in the schedule to the deed of bargain and sale of the 8th of November, 1823, and the said messuage or mansion-house of Carhais and Carhais Park did pass under the said indenture of the 12th and 13th of June, 1827.

The question submitted for the opinion of the Court was, whether any, and, if any, what, lands and hereditaments other than those comprised in the indenture of the 18th and 19th of July, 1824,

and the 15th of July, 1825, in the pleadings mentioned, were conveyed by the said indenture of the 12th and 13th of June, 1827.

Sir F. Kelly (with whom was Willcock), for the plaintiffs (June 20). By the marriage settlement of the defendant Trevanion the lands mortgaged to the Bank of England alone passed. This is obvious from the recitals, which expressly refer to the deed of 1824 as forming the subject of the agreement. Reliance will probably be placed on the words employed in the description of the parcels in the operative part, which are certainly large enough if they stood alone to comprise the property conveyed by the earlier instrument of 1823. The entire deed, however, must be looked at, in order that the real intention of the parties may be ascertained and receive its proper effect. The law applicable to the subject is clearly laid down in Sheppard's Touchstone, 86, 87, 88. There it is said that in the construction of deeds the following rules are to be observed: "That the construction be favourable, and as near to the minds and apparent intention of the parties as may be and law will permit." "That the construction be made upon the entire deed, and that one part of it doth help to expound another, and that every word (if it may be) may take effect, and none be rejected, and that all the parts do agree together, and there be no discordance therein." "That if there be two clauses or parts of the deed repugnant the one to the other, the first part shall be received and the latter rejected, unless there be some special reason to the contrary." And the same doctrine is adopted by Willes, C. J., in *Smith* v. *Packhurst*, 3 Atk. 135, Willes, 327; and Sir T. Plumer, M. R., in *Cholmondeley* v. *Clinton*, 2 J. & W. 101. According to this rule, the interpretation contended for by the plaintiffs must be adopted. The intention of the parties is clearly expressed in the earlier portions of the deed, and the words of the operative part are not repugnant to that intention; the Court will therefore construe them in the way which is most likely to effectuate the object the grantors had in view. But further, when there is a particular recital in a deed, and general words of release are afterwards inserted, the generality of those words are qualified by the recitals. 4 Cruise's Dig. 245, 4th edit. This has been established by a long series of cases. *Henn* v. *Hanson*, 1 Sid. 141; *Thorpe* v. *Thorpe*, 1 Ld. Raym. 235; *Morris* v. *Wilford*, 2 Shower, 46. In *Moore* v. *Magrath*, Cowp. 9, where a person by deed for selling the undivided moieties of his manors

lands, &c., thereinafter mentioned, granted the said undivided moieties, particularly describing them, together with all his lands, tenements, and hereditaments in Ireland, to hold the said undivided moieties before granted, together with all other his estate in Ireland, to A., to the several uses thereinafter declared, and for no other use whatever, and then declared the uses of the undivided moieties only, it was held that only the undivided moieties passed. In *Doe* d. *Meyrick* v. *Meyrick*, 2 Cr. & J. 223, 1 L. J. (N. S.) Ex. 73, it was decided that a previous specific enumeration of lands in a deed confined the operation of subsequent general words, and that only the property passed that was so specified. *Payler* v. *Homersham*, 4 M. & S. 423, 16 R. R. 516; *Solly* v. *Forbes*, 2 B. & B. 48; *Pearsall* v. *Summersett*, 4 Taunt. 593; *Lindo* v. *Lindo*, 1 Beav. 496, 8 L. J. (N. S.) Ch. 284, are also authorities to the same effect. Here, therefore, the recitals control and qualify the subsequent general description, and those lands only pass which are particularly mentioned in the recitals.

Martin (C. Beavan was with him), *contrà*. According to the authorities, the operative part of this deed must be held to govern the recitals. No doubt, where there are general words in the operative part of a deed, they will be restrained by the recitals, but where the operative part is particular and specific it must take effect independently of the recitals. The decisions relied on for the plaintiffs are cases of releases, where the recitals are the only part of the deed which shows what it is on which the general words of release operate, — they in fact showed the object of the deed, which could not be annihilated by general words. *Moore* v. *Magrath* and *Doe* d. *Meyrick* v. *Meyrick* alone turned on the construction of conveyances of land, but there the words of conveyance were general, and not particular as here. *Cholmondeley* v. *Clinton* is much weakened as an authority by the fact that three common-law Judges and Sir W. Grant disagreed with the opinion there expressed by Sir T. Plumer. However, there is in the present case the important expression, that the schedule should not "abridge or affect the generality of the description thereinbefore expressed." How, then, can the recital have such an effect? Those words must be taken to have some meaning, and unless they refer to land other than that included in the mortgage to the Bank they are quite insensible. The argument of the plaintiffs rejects them altogether. Being the words of the grantor they must be read most strongly against him.

No. 4. — Walsh v. Trevanion.

[Coleridge, J. "Generality" is different from "comprehensiveness." The schedule is not to restrict the generality of the operative part, but the recital may still control its comprehensiveness.]

The addition to the operative part of the words "which are described in the schedule" is a *falsa demonstratio*, which is provided for by the subsequent clause.

[Erle, J. The recital is of an agreement to settle lands mortgaged to the Bank, and the deed is expressed to operate in pursuance of that agreement, so far as respects such of the hereditaments as were thereinafter released.]

The recitals must be understood as applying to some different agreement from that carried out by the deed. In *Bailey* v. *Lloyd*, 5 Russ. 330, 7 L. J. Ch. 98, Sir J. Leach, M. R. says, "if the operative part of a deed be doubtfully expressed, there the recital may safely be referred to as a key to the intention of the parties; but where the operative part of the deed uses language which admits of no doubt, it cannot be controlled by the recital."

[Erle, J. It is quite consistent that if the recital and witnessing part conflict, the former is to prevail.]

The witnessing part is here free from doubt, and therefore must prevail. "A recital does not confine subsequent words by which the intention appears more at large;" Com. Dig. Parols, A. 19, citing 2 Roll. 347, l. 30; Holt, C. J., in *Bath* v. *Montague*, 3 Ch. Ca. 106. In 1 Preston on Abst. 62, it is said, "Whatever errors may be in the recitals, and in whatever degree they may perplex the evidence in point of deduction, yet a substantive independent grant of parcels, &c. by a full description, or by certainties which are free from mistake, will not be impugned by any error in the recitals." Here it is impossible to say that the error is not in the recital instead of the operative part. *Ingleby* v. *Swift*, 10 Bing. 84, 2 L. J. (N. S.) C. P. 261; *Cholmondeley* v. *Clinton*, 2 Mer. 171; *Strutt* v. *Finch*, 2 Sim. & S. 229, *Alexandre* v. *Crosbie*, Ll. & G. 145. The limitation of a power of distress and entry cannot apply to a mere equity of redemption, nor are the mortgaged lands alone sufficient to satisfy the trusts of the settlement. These circumstances show an intention to settle all the lands in the specified parishes.

Sir F. Kelly in reply. The agreement clearly was to settle only the mortgaged lands, and the settlement being expressed to be for the purpose of carrying out that agreement, can only operate on the mortgaged lands. At all events, there is an ambiguity in the

operative part, as the words "and which are described in the schedule" may mean either to limit the operation of the deed to those lands found both in the schedule and in the operative part, or it may mean to pass all the lands in the specified parishes, and which are now about to be described in the schedule. The recital, therefore, which is clear and unambiguous, must prevail Moreover, the appointment is expressed to be "subject and charged as hereinbefore mentioned," which clearly shows that the deed operated only upon lands subject to a charge. *Cur. adv. vult.*

The judgment of the court was now delivered by —

Patteson, J. We do not feel it to be necessary in this case to enter upon an examination of the authorities cited on one side or the other; because, taking the rule of construction in the strongest and most favourable way for the defendants, it cannot be pressed beyond this, that when the words in the operative part of a deed of conveyance are clear and unambiguous, they cannot be controlled by the recitals or other parts of the deed. On the other hand, when those words are of doubtful meaning, the recitals and other parts of the deed may be used as a test to discover the intention of the parties, and to fix the true meaning of those words. The words here are "all and singular the messuages, lands, tenements, and other hereditaments of them the said J. T. P. B Trevanion and J. C. B. Trevanion, situate, lying and being within the manor of Carhais, and also within the several parishes of St. Michael Carhais, Cuby, Goran, Probus, Veryan, St Teath, and St. Denis, in the said county of Cornwall, *and* which are intended to be specified and described in the schedule hereunder written, but which schedule is not intended to abridge or affect the generality of the description hereinbefore expressed and contained." These words are not clear and unambiguous. They may either include all the lands of the parties situate in the manor and parishes mentioned, whether those lands be specified and described in the schedule or not; or they may include only such lands in the same manor and parishes as are virtually and in substance specified and described in the schedule, though they may be imperfectly and inaccurately so specified and described. The latter meaning is the more sensible and probable one to be collected from the words used, independently of any supposed intention of the parties or any other parts of the deed At any rate, the former meaning is not clear and unambiguous

We must, therefore, look to the recitals and other parts of the deed; and when we do so, it is utterly impossible to doubt that the parties intended to confine the operation of the deed to the lands which were in mortgage to the Bank of England. The deed recites that the Trevanions, father and son, had power to appoint the lands, &c., "hereinafter appointed and granted, released and confirmed, or expressed or intended so to be, with their rights, members and appurtenances, together with other hereditaments." It is plain, therefore, that it was not intended to pass all the lands and hereditaments over which they had a power of appointment. The deed afterwards recites a mortgage to the Bank of England of certain of the said lands, and afterwards recites the intended marriage of J. C. B. Trevanion with Miss Trelawney, who had considerable property, and that "upon the treaty for the said intended marriage, it was agreed that such of the hereditaments subject to the joint appointment of them, the said J. T. P. B. Trevanion and J. C. B. Trevanion, as are comprised in the said recited indentures of mortgage, and the whole of the said real and personal property of her, the said Charlotte Trelawney, should be settled to certain uses," &c. It then recites that Miss Trelawney's property was to be settled by another deed of even date with the deed in question. It then goes on, "Now, therefore, for carrying into execution the said *agreement*, as far as respects such of the said hereditaments, subject to the joint appointment of the said J. T. P. B. Trevanion and J. C. B. Trevanion as are hereinafter appointed and granted, released and confirmed, or expressed or intended so to be, this indenture witnesseth that in consideration of the said intended marriage, and of the settlement which has been made or is intended to be made" of Miss Trelawney's property, "they, the said J. T. P. B. Trevanion and J. C. B. Trevanion, direct, limit, and appoint that the messuages or tenements, lands and other hereditaments hereinafter granted, released and confirmed, or expressed or intended so to be, shall be and remain (*but subject and charged as hereinbefore is mentioned*) to the uses," &c. So that in the *appointing* part of the deed, which is an operative part, as well as the granting and releasing part, the lands are said to be *subject and charged;* which can only refer to the mortgage to the Bank of England, for no other charge is alluded to or pretended to exist, and therefore must be confined to the lands in mortgage; and then follows the granting and releasing part, which contains the words before stated, and on which this

question arises. Those words, as far as the description of the parcels goes, are precisely the same as the words in the mortgage deed; but in the mortgage deed the concluding words are, "which are specified and described in the schedule hereunder written;" whereas in the deed in question the concluding words are, "*and* which are intended to be specified and described in the schedule hereunder written, but which schedule is not intended to abridge or affect the generality of the description hereinbefore expressed and contained." The insertion of the word "and" makes no real difference in the sense of the passage, and the qualifying words relate only to the operation of the schedule, and must be taken in the latter of the two meanings we have formerly mentioned, otherwise the appointing part of the deed and the granting part will relate to different lands, which is absurd. The schedules in the two deeds are identical. Now, taking all these passages together, we think the intention of the parties to be clear beyond all doubt, as we have already intimated.

Something was said as to the trusts of this deed, the first of which is to pay an annuity or rent-charge of £250, with power of distress and entry; and it was argued that such a trust could never have been intended to apply to a mere equity of redemption (for the mortgage to the Bank of England is in fee), and, therefore, that other lands not in mortgage must have been intended to be conveyed; also, that the rental of the lands mortgaged was inadequate to pay the interest of the mortgage money and the annuity together. As to the first of these arguments, it amounts only to this, that the mortgagors (the settlors) treat the lands as if they were their own, as if they had the legal estate, instead of an equity of redemption only, which is a case of common occurrence, though it may be that some difficulties might arise in pursuing the remedies by distress and entry. Moreover, as the power of distress and entry extends to all the lands appointed, and so will, at any rate, include the mortgaged lands, the difficulty is at best but partially removed, by supposing the other lands to pass by the deed; even then, the same inference would remain necessarily to be made, that the mortgagors had mistaken the nature of their present interest. As to the second argument, it appears by the case that the sum borrowed on mortgage was £20,000 at £4 per cent., if paid punctually, so that the interest would be £800; the annuity being added would make the whole charge £1,050, and the rental is

stated to be £1,390. So that neither of these arguments are of weight enough to alter our view of the intention of the parties, or of the legal effect of this deed, which we are of opinion is to convey only the lands which were in mortgage to the Bank of England; and we shall certify this our opinion to the High Court of Chancery accordingly.

A certificate was afterwards sent in accordance with this judgment.

ENGLISH NOTES.

The rule in the principal case was again enunciated, and applied in *Dawes* v. *Tredwell* (C. A. 1881), 18 Ch. D. 354. The question in that case was how far, if at all, a covenant in a marriage settlement to settle after-acquired property of the intended wife could be controlled by a recital which was more extensive in its scope. The Court of Appeal, reversing the decision of Fry, J., held that as the words of the covenant were clear, no recourse could be had to the recitals. The Master of the Rolls (Sir G. Jessel) said: "Now the rule is that a recital does not control the operative part of a deed where the operative part is clear. The recital here, is in general terms; the operative part is in definite terms. There is another rule, that the recital of an agreement does not create a covenant where there is an express covenant to be found in the witnessing part." Baggallay, L. J., said. "As has been pointed out by the Master of the Rolls, there is no doubt or ambiguity upon the covenant itself, and therefore there can be no reason for any reference to the recital." The doctrine was again applied in *Page* v. *Midland Railway Co.* (C. A. from Ch. D. 9 Nov. 1893), 1894, 1 Ch. 11, where the Court refused to restrict the operation of a covenant for title which, upon a literal construction, was wide enough to apply to a defect in title disclosed by a recital in the deed of conveyance itself.

An example of the control of the operative part of the deed by the recitals is afforded by the case of *Danby* v. *Coutts & Co.* (1885), 29 Ch. D. 500, 54 L. J. Ch. 577. The question in that case arose upon the construction of a power of attorney; and Kay, J., who decided the case, thought that powers of attorney stood on the same footing as releases or bonds. In this point of view it was only necessary to apply the well-known exception, that general words are not within that description of clear words of conveyance which cannot be controlled by recitals.

In *Re de Res' Trust Hardwicke* v. *Wilmot* (1885), 31 Ch. D. 81, 55 L. J. Ch. 73, a marriage settlement contained a covenant by the

husband alone that he and the wife "should assure and transfer" after-acquired property of the wife, and that until such settlement he and his wife should stand possessed of the same upon the trusts of the settlement. The wife, as well as the husband, executed the deed. During the coverture certain property was given to the wife for her separate use. The question raised was whether this property was bound by the covenant. It was held that the form of the covenant, that she should join in the conveyance, raised a possible ambiguity, and that recourse might be had to the recital.

The rule was applied by the Judicial Committee of the Privy Council in *Pallikegatha Marcar* v. *Sigg* (P. C. 1880), L. R., 7 Ind. App. 83.

The rule is the same in the case of a Crown grant. *R.* v. *Bishop of Chester* (1698), 2 Salk. 561.

AMERICAN NOTES.

Washburn (3 Real Property, p. 431), cites this as "a celebrated case," but it appears to have no American brothers.

No. 5. — JUSTICE WINDHAM'S CASE.

(K. B. ERROR, 1588.)

RULE.

WHERE a grant is ambiguous only in the sense that the thing granted is capable of a more extended or of a more restricted interpretation, the rule is to construe it most strongly against the grantor, and in favour of the grantee.

Justice Windham's Case.

5 Co. Rep. 7 b

In trespass between Francis Wyndham, one of the Justices of the Common Pleas, plaintiff, and John Debney and others defendants, in the Common Pleas, for trespass, done in a meadow called Sexten's Meadow in Trowse in the County of Norfolk, the case was such: the Dean and Chapter of the Holy and Individed Trinity of Norwich were seised of the said meadow called Sexten's Meadow, and of another meadow in the said town called Cheese Meadow; and by indenture under their common seal, 37 Hen. VIII., demised Cheese Meadow to Howlins for forty years; and afterwards 4 & 5 Phil. &

No. 5. — Justice Windham's Case.

Mary, by indenture under their common seal, demised Sexten's Meadow to the said Howlins and Debney for twenty-one years. And afterwards, 12 Eliz., the said Dean and Chapter demised to Nicholas Manne both the meadows, with a several *habendum*, *scil.* to have and to hold Cheese Meadow for forty years after the end of the first lease thereof made; and to have and to hold Sexten's Meadow for forty years after the first lease thereof made, with several reservations of rents. The said Manne assigned his interest to John Hoe, who, 15 Eliz., surrendered and took a new lease by indenture of the said Dean and Chapter under their common seal (in which the first leases were recited) of both the meadows, habendum sibi ab & post determination' præd' separalium dimission', videlicet, præd' dimissionis præd. Rob. Howlyns in forma præd. fact', & præd, dimissionis præf. Rob. Howlyns & J. Debney, &c. in forma præd. fact', sivè esset per surs. reddit', determinat', &c. usque ad fin' & termin' 40 annor' extunc proxim. sequen', existen' verum numerum annor' mentionat. in dict. sursum reddit.' Indentur.' dict.' Nicholao Manne made: reddendo, &c., the ancient rent severally for the said meadows, so that in effect the case is; a man makes a lease of Sexten's Meadow to A. for ten years, and of Cheese Meadow to B. for twenty years; and afterwards by indenture reciting the said two leases, makes a lease to another of both for forty years, to begin after the end and determination of the said several leases made to A. and B. And afterwards the former lease of Sexten's Meadow ends, and the lease of Cheese Meadow continues; and when the last lease as to Sexten's Meadow now in question should begin, was the question; for if it should not begin till the lease of Cheese Meadow be ended, then the plaintiff had entered before his time, for the former lease of Cheese Meadow hath yet continuance. But if the said *habendum* in the later lease should be taken "*respectivè* or *distributivè*," *reddendo singula singulis*, so so that when the lease in Sexten's Meadow determines, the new term for forty years therein should begin, then judgment ought to be given for the plaintiff. And after many arguments at bar and bench in the Common Pleas, it was resolved and adjudged, that the *habendum* in the later lease should be taken *respectivè*, that is to say, the lease of Sexten's Meadow to John Hoe for forty years should begin presently after the end of the first lease thereof made. For every deed shall be taken more strongly against the grantor, and more beneficially for the grantee, and it is more strong

against the lessor, and more beneficial for the lessee to have the lease of Sexten's Meadow to begin presently after the expiration of the first lease made thereof than to tarry till the lease of Cheese Meadow be ended. As in 9 Edw. IV. 42 b & 19 Hen. VI. 4 a. If I release unto you all actions which I have against you and another, in this case notwithstanding the joint words, all actions which I have against you alone are released, for it shall be most beneficially for him to whom the release is made, and most strongly against him who makes it; and the joint words of the parties shall be taken respectively and severally.

1. Sometimes in respect of the several interests of the grantors; as if two tenants in common, or several tenants join in a grant of a rent-charge, yet in law this grant shall be several, although the words are joint, as Sir Robert Catlyn, Chief Justice, held in *Browning's Case* in Plow. Commentaries.

2. Sometimes in respect of the several interests of the grantees, &c., (16) 19 Hen. VI. 63, 64, a warranty made to two of certain lands shall enure as several warranties in respect that they are severally seised, the one of part of the lands, and the other of the residue in severalty, 6 Edw. II. Covenant Br. 49. A joint covenant taken several in respect of the several interests of the covenantees.[1] *Vide* 16 Eliz., Dyer, 337, 338, between *Sir Anthony Cook* and *Wotton*, a good case.

3. Sometimes in respect that the grant cannot take effect, but at several times, as 24 Edw. III. 29 a, a remainder limited to the right of heirs of J. S. and J. N (J. S. and J. N. being alive), in which case the words are joint, and yet the heirs shall take severally; for they shall not join in action.

4. Sometimes in respect of the incapacity and impossibility of

[1] The general rule established by the authorities cited in the note to *Eccleston* v. *Clipsham*, 1 Saund. 153, is, that wherever the interest of the covenantees is joint, although the covenant be in terms joint and several, the actions follow the nature of the interest and must be brought in the name of all the covenantees, but where the interest of the covenantees is several, they may maintain separate actions although the language of the covenant be joint, *per curiam* *Withers* v. *Bircham*, 3 B. & C. 255, s. c. 5 Dow. & Ryl. 106; and accordingly where by a deed reciting the grant of two distinct annuities to A. and B. during the life of the grantors and the survivor, it was witnessed that C. covenanted with A. and B., and their executors to pay the annuities, or either of them, when the grantors should make default in payment; A. died. The Court held that the interest in the annuities being several, the covenant was also several, and that the annuity granted to A. being in arrear, his executor might maintain an action against C. *Vide* also *James* v. *Emery*, 5 Price, 533, and note *a*; *Slingsby's Case*, 5 Co. Rep. 18 *b*.

the grantees to take jointly, as a lease made to an abbot and secular man, or a gift to two men, or to two women, and to the heirs of their two bodies begotten, the inheritance is several, 7 Hen. IV. 17, *vide Chapman's Case*, Pl. Com.

5. Sometimes in respect of the cause of the grant, or *ratione subjectæ materiæ*, as 15 Hen. VII. 14 a. One coparcener grants a rent to two other coparceners for owelty of partition, although the words are joint, yet the cause of the grant shall be respected, and the rent shall be of the quality of the land, and therefore they shall have the rent in degree and quality of coparcenary, and not jointly. And KNIVET, Chief Justice and Chancellor, said, in 38 Edw. III. 26, that if two coparceners make a feoffment in fee, rendering rent to them and their heirs, the heirs of both shall inherit, because their right in the land was several, 22 Edw. IV. 25 b, and 2 Rich. III. 18 b. A joint submission to arbitrament taken severally in respect of the several causes, &c.[1]

6. Sometimes ne res destruatur, & ut evitetur absurdum, as in 6 Hen. VII. 7 b, in *cessavit*, where the tenure is alleged by homage, fealty, and rent, and the demandant counts that *in faciendo servitia debit' cessavit* shall be by construction taken to mean such services only, of which a man may cease, 17 Edw. VI. 1 b & 2 a. The prior of Tikeford's case in a *scire facias* against the successor of the prior on a judgment given in a writ of annuity for the arrearages in the time of the predecessor, and of the successor, and the writ was that the predecessor and successor *nondum reddiderunt:* to which, exception was taken that the predecessor was supposed not to render *that* which the successor ought, and *non allocatur;* for *reddendo singula singulis*, by reasonable construction, the words may well stand together. *Vide* 21 Edw. III. 48 a, in a *per quæ servitia* F. N. B. 14, in *monstraverunt:* and the reason of all these cases is, either *quod res non destruatur*, or that the grant shall be taken more strong against the grantor, and shall take effect as near as may be according to the intent of the parties. And such construction concurs with two of the said reasons in the principal case: 1. It shall be taken more strongly against the lessor. 2. This construction will concur with the intent and meaning of the parties, for after the *habendum* and the number of the years these words are

[1] Words in deeds or wills, receive a different construction according to the nature of the estate to which they are applied. *Southby* v. *Stonehouse*, 2 Ves 616; *Elliot* v. *Jekyl*, 2 Ves. 683. *Vide Manzell* v. *Burridge*, 7 T. R. 352, a joint and several contract taken jointly in respect of the joint subject-matter.

added, existen' verum numerum annor' in dict' sursum reddit' indent' mentionat', in which indenture *habendum* was several, so that the intent of the parties was to have several beginnings in this new lease, &c., and the lessor and lessee never imagined but that the leases should begin severally, and not that the lessee should wait for Sexten's Meadow until the lease of Cheese Meadow, which is another distinct lease, and a distinct thing, should end. And so it was adjudged, and the plaintiff had execution.

Upon which judgment a writ of error was brought; and after many arguments it was resolved by Sir CHRISTOPH. WRAY, Sir THOMAS GAWDY, and the whole Court of King's Bench, that the lease to Hoe should have several beginnings. And so this case was resolved by both courts. And afterwards the same term in a case between *Pollard* and *Alcocke* in the Court of Wards, WRAY, Chief Justice, clearly held, that if a man be seised of three acres of land in fee, and makes a lease of one acre to A. for life, of another acre to B. for life, and of the other to C. in tail, and afterwards by deed (reciting the said estates) covenants with his brother, that after all the said estates ended and determined, he and his heirs would stand seised of the said three acres to the use of his brother in tail, &c. That in this case presently by the death of B. the brother should have the acre leased to B., and should not tarry till all the estates, *scil.* the other estate for life, and the estate-tail be ended; but *reddendo singula singulis*, by the covenant the estate in the several acres should vest presently in the brother, and should take effect in possession, as the several estates in possession end or determine, which was granted by the whole court. And in the case of *Pollard*, WRAY cited and relied on the said case of *Justice Windham*. And afterwards the plaintiffs in the writ of error, perceiving the opinion of the Court, did not proceed in their writ of error.

ENGLISH NOTES.

Before any inference can be made in favour of the grantee, there must in fact be an ambiguity of the nature mentioned in the rule: *Re an arbitration between Stroud and the East and West India, &c. Co.* (1849), 8 C. B. 502, 19 L. J. C. P. 117; *Birrell* v. *Dryer* (H. L. 1884), 9 App. Cas. 345.

The principle was recognised in *Doe d. Davies* v. *Williams* (1788), 1 H. Bl. 25; 2 R. R. 703; *Johnson* v. *Edgware, &c. Railway Co.* (1866), 35 Beav. 480; *Taylor* v. *Liverpool and Great Western Steam*

Co. (1874), L. R. 9 Q. B. 546, 43 L. J. Q. B. 205; *Hayn* v. *Culliford* (1878), 3 C. P. D. 410, 47 L. J. C. P. 755. It is disputed by the Master of the Rolls (Sir G. Jessel) in *Taylor* v. *Corporation of St. Helens* (C. A. 1877), 6 Ch. D. 264; 46 L. J. Ch. 857. He says (6 Ch. D., at p. 270): "I will take the liberty of making an observation as regards a maxim quoted by Mr. Christie, and which is to be found, I believe, in a great many text-books, and, I am afraid, also in a great many judgments of ancient date, and that is, that a grant, if there is any difficulty or obscurity as to its meaning, is to be read most strongly against the grantor. I do not see how, according to the new established rules of construction, as settled by the House of Lords in the well-known case of *Grey* v. *Pearson* (H. L. 1857), 6 H. L. C. 61, 26 L. J. Ch. 473, followed by *Roddy* v. *Fitzgerald* (H. L. 1858), 6 H. L. C. 823, and *Abbott* v. *Middleton* (H. L. 1858), 7 H. L. C. 68, 28 L. J. Ch. 110, that maxim can be considered as having any force at the present day." The choice of authorities mentioned by the learned Judge was unfortunate, as they were all cases upon the construction of wills. The rule is referred to by all the Law Lords without dissent in *Birrell* v. *Dryer* (*supra cit.*).

Sir James Mansfield, Ch. J., was disposed, by analogy to the above mentioned rule, to hold that upon an implied grant of a way of necessity, the grantee should have the way most convenient to himself: *Morris* v. *Edgington* (1810), 12 R. R. 579, 3 Taunt. 24: but this seems opposed by the authorities referred to in the note to the Report in the Revised Reports. See in particular *Dodd* v. *Burchell* (Exch. 1862), 1 H. & C. 113, 31 L. J. Ex. 364.

The principle is doubtless grounded on the same reason as the rule of evidence which presumes most strongly against the party whose action has left the matter in doubt, as in the case of the defendant sued in trover for a jewel which he does not produce, and where the jury are directed to find the value as of a jewel of the first water. *Armorey* v. *Delamirie*, 1 Strange, 504, referred to by Lord Cairns in *Hammersmith Ry. Co.* v. *Brand* (H. L. 1869), L. R. 4 H. L. 224; 1 R. C. 661.

A similar principle is involved in the case of *Munday* v. *Duke of Rutland* (C. A. 1883), 23 Ch. D. 81. The lessor of certain seams of coal, &c., reserved power to work coal not included in the demise, provided that the powers of working the demised coal should not be "unnecessarily" interfered with. This reservation, which was set up as giving power to work a seam of coal under the demised seam, was held void for uncertainty; and the principle enunciated that if a lessor (or any other grantor) intends to reserve rights in derogation of his grant he must do so in plain terms. And as it was shown that the

lower seam could not be worked without destroying the mine the subject of the demise, the landlord was restrained from working it.

AMERICAN NOTES.

This rule obtains in America. *Rung* v. *Shoneberger*, 2 Watts (Penn.), 23; 26 Am. Dec. 95; *Jackson* v. *Hudson*, 3 Johnson (New York), 387; 3 Am. Dec. 500; *Pike* v. *Monroe*, 36 Maine, 309; 58 Am. Dec. 751; *City of Alton* v. *Ill. Trans. Co.*, 12 Illinois, 38; 52 Am. Dec. 479; *Melvin* v. *Proprietors, &c.*, 5 Metcalf (Mass.), 15; 38 Am. Dec. 384; *Budd* v. *Brooke*, 3 Gill (Maryland), 198; 43 Am. Dec. 321; *Com* v. *Erie &c. R. Co.*, 27 Penn. St. 339; 639 Am. Dec. 471; *Dodge* v. *Walley*, 22 California, 224; 83 Am. Dec. 61.

No. 6. — DANN *v.* SPURRIER.

(C. P. 1803.)

RULE.

On a principle similar to the last rule, if the thing granted is expressed by an alternative, it may be determined by the election of the grantee.

Dann v. Spurrier.

3 Bos. & P. 399 (s. c. 7 R. R. 797).

The following case was sent by the Lord Chancellor for the opinion of this Court: —

The defendant, on the 14th October, 1791, entered into the following agreement with one William Atkinson: —

"London, 14th October, 1791

"Memorandum. I, William Atkinson of Saint Olaves, Southwark, have this day agreed to take on lease of John Spurrier the dwelling-house and premises now occupied by him in Old Broad-street, together with a bedroom now in the possession of Mr. Amory, and which bedroom is over the one now used by the said John Spurrier himself, to hold for seven, fourteen, or twenty-one years, at the yearly rent of £150, payable half yearly, including all taxes, which are to be paid by the said John Spurrier, the term and rent to commence from Christmas next, the usual fixtures, carpets, and floor-cloths fitted to the floors, to be taken and paid for at a fair valuation by the said William Atkinson. An outside

door to be put to the kitchen entrance of the house at the expense of the said John Spurrier." And on the back of the said agreement is the following memorandum: "I agree to let the premises mentioned on the other side hereof upon the terms and conditions expressed therein. JOHN SPURRIER." The said William Atkinson accordingly took possession of the premises, and afterwards disposed of his interest therein to the plaintiff Richard Dann, who took possession thereof and paid the rent.

The defendant, on the 20th day of June, 1798, duly gave notice to the plaintiff to quit the premises at Christmas then next, which he refused to do, alleging that the defendant had no right to determine the agreement at the expiration of the first seven years, but that the tenant only had that right; in consequence of which the defendant, in Hilary Term, 1799, duly commenced an action of ejectment in the Court of King's Bench, in order to obtain possession of the said premises; upon which the plaintiff and the said William Atkinson, in Hilary Term, 1799, filed a bill in the High Court of Chancery against the said defendant for a specific performance of the said agreement, and that the defendant might be compelled to execute a lease of the premises to them or one of them for twenty-one years. See 6 R. R. 119, 7 Ves. 231. The question for the opinion of the Court was, whether upon the legal construction of the said agreement the defendant had a right to determine the term of twenty-one years, thereby agreed to be granted at the end of the first seven years.

Shepherd, Serjt., for the plaintiff: —

The question to be considered in this case is precisely the same as if a lease had actually been granted, and therefore it will be for the Court to decide, whether, if a lease had been granted for twenty-one years, determinable at the end of seven or fourteen years, such lease would have been determinable at the option either of the lessor or lessee, or of the lessee only. In *Goodright* d. *Hall* v. *Richardson*, 3 T. R. 462, the Court of King's Bench decided that a lease for three, six, or nine years, was a lease for nine years, determinable at the third or sixth year at the option of either party. During the argument a case of *Ferguson* v. *Cornish*, 2 Burr. 1034, was cited, as having been decided by Lord MANSFIELD, and in which it was supposed to have been doubted by him whether a lease for seven, fourteen, or twenty-one years, was not void for uncertainty after the seven years. But that was a mistake; and

indeed though the Court in *Goodright* d. *Hall* v. *Richardson* intimated that the lease was determinable at the option of either party at the end of the third or sixth year, yet it is observable that any opinion on that point was extra-judicial, for the only point in dispute was, whether the lease was not void for more than three years. It is open, therefore, for me to contend that this species of lease is determinable at the option of the lessee only; and indeed if that is not the construction put upon it, the provision will be wholly nugatory, inasmuch as the lessor, to whom such an option is supposed to be reserved, is in no better condition with than without it, because he may always renew if he pleases. Besides, such words as these are to be construed most favourably for the grantee. Indeed the plain intent of the provision is to encourage the lessee to expend more money upon the premises than he would otherwise do. If, therefore, the intent of the parties can be fairly collected, that intent must prevail; and if no intent can be collected, then the lease must be construed most strongly against the lessor.

Heywood, Serjt., *contrà* : —

This question arises not on a lease, but on an agreement for a lease. Indeed if it were in form a lease, still the question would occur, in whom the option of determining that lease is vested. In answer to the observation that the agreement is to be construed most strongly against the defendant according to the common rule adopted in cases of grantor and grantee, it is to be remembered that the party applying the agreement is the plaintiff, and that the undertaking being completely mutual, the analogy does not exist. It has been contended that unless the option of determining or continuing the lease be given to the lessee solely, the provision will be nugatory; but that mode of reasoning is very fallacious, for at all events it saves the trouble and expense of a renewal, where both parties are inclined to renew. Tenancies at will are determinable at the option of either party: now the species of lease under consideration of the Court is framed on an analogy to that species of holding, for though both parties are bound by their agreement up to a certain period, yet when that period arrives each may exercise his will whether the relation of landlord and tenant shall continue any longer, with this restriction only, that if they choose it should continue, it must then continue for another definite period. The case of *Goodright* d. *Hall* v

Richardson, though subject to the observation which has been made upon it, is nevertheless a very strong authority in favour of the defendant, for Lord KENYON says, "it was not intended that this lease should take effect for three years at all events, and that it should be in the election of either of the parties to put an end to it at that time or at the end of six years, giving reasonable notice to the other. It is like a lease for a year, and so from year to year, where if the lessee wish to determine it at the end of the year, he must give reasonable notice to the other party."

Cur. adv. vult.

23 May, 1803. On this day the opinion of the Court was delivered by Lord ALVANLEY, Ch. J.: —

This question turns upon the legal construction of the agreement stated in the case. It is to be observed that the agreement is not an offer on the part of the lessee to take a lease for seven, or a lease for fourteen, or a lease for twenty-one years, but it is an offer to take a lease with an *habendum*, as stated by the lessee in his proposals, viz., to hold for seven, fourteen, or twenty-one years The lessor having assented to let the premises upon the terms and conditions proposed, it must now be taken as if a lease had been actually granted containing such an *habendum* as that stated in the proposals. It is for us, therefore, to determine what is the legal construction of such an *habendum* in a lease. It has been contended that where the terms are not defined, either positively or by any circumstance, but an alternative is stated which cannot be made certain without the option of one of the parties, the lease is determinable at the option of either. There seems to be great authority for such a proposition, for undoubtedly Lord KENYON and Mr. Justice BULLER both intimate in the case of *Goodright* d. *Hall* v. *Richardson*, that the option would be in either party. But it must not be forgotten (for I wish it to be understood that had the judgment of the Court in that case proceeded upon the point alluded to, it would probably have guided our judgment in the construction of such doubtful words as those which occur in this case) that Lord KENYON and Mr. Justice BULLER only threw out their opinion *obiter;* had it been otherwise, there are no authorities, particularly that of Lord KENYON, upon a point of law arising out of real property, to which I should be more disposed to defer. The lease in that case was for three, six, or nine years, determin-

able in the years 1788, 1791, and 1794, and the construction put upon that lease was, that it gave an option to either party, but that such option must be exercised with reasonable notice previous to the expiration of any of the terms; and as reasonable notice had not been given, the Court held that the lease was not determined. With respect to the case of *Ferguson* v *Cornish*, there referred to, it is surprising that any doubt should have arisen; and indeed it does not appear that any doubt was entertained by the Court. A lease having been granted for seven, fourteen, or twenty-one years, and an action of covenant having been brought against the lessee during the first seven years, it was contended by the lessee that it was no lease at all, according to the old doctrine that a lease uncertain in its commencement or duration was void. Lord MANSFIELD held that at all events it was a good lease for seven years. These two cases decide nothing with respect to the point now before the Court. It remains, therefore, for us to consider, notwithstanding the opinions thrown out in these cases, whether, according to the construction which deeds between lessor and lessee have received, the power of determining the lease in this case must not be confined to the lessee. Much is to be found in the books relative to the construction of deeds which contain covenants in the alternative; from all of which the rule appears to be perfectly clear, that if a doubt arise as to the construction of a lease between lessor and lessee, the lease must be construed most beneficially for the latter. It is laid down in the books, that if a man covenant to do one of two things, and he does either, the covenant is not broken. Thus in 1 Roll. Abr. tit. Condition, (Y) pl. 3, fo. 446, it is said that if a condition be that the obligor shall enfeoff a man of lands in D. or S. upon request, the obligor has his election of which of the two he shall enfeoff him. So in pl. 4, it is laid down that if the condition be that the obligor shall pay £20 or a pint of wine upon request, he has his election. This election, however, is said to depend upon which of the two parties to the contract is to do the first act. Therefore, if a man make a grant in the alternative, and the grantee enter into possession, the grantor is no longer at liberty to exercise an option. So if A. says to B., I grant you a horse out of my stable, he puts it in the power of B. to take what horse he shall think proper. In the *Bishop Bath's Case*, 6 Co. Rep. 35 b, it was resolved that the construction of law as to the commencement of leases should be taken strongest against

the lessor, and most beneficially for the lessee. Another strong authority to this effect is *Sir Rowland Heywood's Case*, 2 Co. Rep. 35 a, where one having demised, granted, bargained, and sold certain lands, and the question being whether the grantee should take by demise or by bargain and sale, it was held that the grantee had his election. In Dyer, 261 b, the Court of Common Pleas held that where a lease of premises, which had been granted for thirty-one years, was granted to a new lessee, a *die confectionis præsentium termino prædicto finito usque ad finem termini* 31 *annorum tunc immediate sequentium*, that the term should commence in possession from the end of the former term, and not from the making of the deed, and the reason which they give for the opinion is, that every grant shall be expounded most favourably for the grantee, and if the lease were to commence from the making of the deed, the lessee would only have four years. It is true that Brown doubted upon this point, and that the Court of King's Bench came to a different decision. But although the Court of King's Bench might not think proper to go so far in favour of the lessee as the Court of Common Pleas did, yet it does not follow that they were disposed to deny the rule of construing leases favourably for the lessee; for where two periods are mentioned in a deed, from which the commencement of a lease is to take place, the legal construction is, that it shall commence from which of the two periods shall first happen; and so it was determined in Dyer, 312, b, *in marg.* This principle of exposition is sound; but it is not applicable to this case, which does not depend upon the priority of different periods, but upon the question, in whom the option of deciding upon the alternative is vested. The lease agreed for in the present case was seven, fourteen, or twenty-one years. An option, therefore, was certainly intended. If then the principle be just, that a lease is to be construed most favourably for the lessee, why are we to determine in this instance that the option is in the lessor? If, indeed, a provision had been inserted that the lease should be determinable at the option of either party, the lessor would have been entitled to take advantage of it; but where no such proviso is inserted, the true construction seems to be that the lessee is entitled, at his option, to take that term which is most beneficial to himself. Notwithstanding, therefore, the opinions which have been referred to, of Lord Kenyon, and Mr. Justice Buller, we think that where no custom of the country

exists upon the subject, the principle of construing deeds between lessor and lessee requires us to hold, that where a grant is made in an alternative which cannot be determined by extrinsic circumstances, the option is left in the lessee. And we shall certify accordingly. There is a case of *Keble* v. *Hall*, *Litt.* 363, 370, which bears very strongly upon this subject. In that case, a lease having been granted to A. and B. for forty years if they and three others, or any of them, should so long live, a second lease was granted "*habendum* from the annunciation, which should be in the year 1568, or from and after the surrender, forfeiture, or other determination of the said lease to A. and B.;" and some of the persons for whose life the first lease was granted having survived the year 1568, a question arose when the second lease ought to commence. The case indeed does not appear by the report to have been finally determined, but the Court strongly inclined to think the lessee should have his election, because that construction ought to be adopted which is most favourable for lessees.

The following certificate was sent to the Lord Chancellor: —

This case has been argued before us, and we are of opinion that upon the legal construction of the said agreement, the defendant had not a right to determine the term of twenty-one years thereby agreed to be granted at the expiration of the first seven years.

Alvanley.
J. Heath.
G. Rooke.
A. Chambre.

ENGLISH NOTES.

The rule was again recognised by the Court of King's Bench in *Doe d. Webb* v. *Dixon* (1807), 9 East, 15, 9 R. R. 501. The Court in that case thought the principle so well established that they refused a rule to show cause why a nonsuit, which had been entered on the authority of the principal case, should not be set aside. So, too, where an instrument was in terms so ambiguous as to make it doubtful whether it was a promissory note or a bill of exchange, the Court held that the holder was entitled (as against the maker of the instrument) to treat it as either. *Edis* v. *Bury* (1827), 6 B. & C. 433, 5 L. J. K. B. 179.

In the case of *Clinan* v. *Cooke* (L. C. Ir. 1802), 1 Sch. & Lef. 22, 9 R. R. 3, there is a dictum of Lord Redesdale, in which he apparently ignored the rule. In that case, a suit for specific performance,

the defendant had advertised lands "to be let for three lives or thirty-one years." The proposals were accepted by the plaintiffs, who entered into a written agreement with an agent of the defendant Cooke, which agreement did not refer to the advertisement. Lord Redesdale (at p. 33 of the original report) said: "The plaintiffs have taken it to be a contract for a lease for three lives; therefore the contract they propose to perform is a contract at the rent expressed in the paper for three lives. Now a reference to the advertisement will not serve their purpose, because the ambiguity remains, for in the advertisement it is 'three lives or thirty-one years;' there is nothing in the advertisement that gives a choice to the tenant."

This *dictum* is, however, inconsistent with the decision of Sir Wm. Grant, M. R., in *Price* v. *Dyer* (1810), 17 Ves. 356, 11 R. R. 102; and that of Lord Romilly, M. R., in *Powell* v. *Smith* (1872), L. R., 14 Eq. 85, 41 L. J. Ch. 734, in which the rule was treated as settled as well in the construction of an agreement for a lease in a suit for specific performance as in the legal construction of a deed.

NO. 7. — SIR WALTER HUNGERFORD'S CASE.

(1585.)

RULE.

The King's grant is taken most strongly against the grantee; and if the thing granted is indeterminate on the face of the grant, it cannot be determined by election of the grantee.

Sir Walter Hungerford's Case.

1 Leon 30.

In a replevin by Sir Walter Hungerford, the case was this: the Queen being seised of a great waste called Ruddesdown, in the parish of Chipnam, granted to the Mayor and Burgesses of Chipnam the moyety of a Yard-land in the said waste, without certainty in what part of the waste they should have the same, or the special name of the land, or how it was bounded, and without any certain description of it; and afterwards the Queen granted to the said Sir Walter the said waste; and afterwards the said Mayor and Burgesses, by warrant of attorney under the common seal, authorised one A. to enter in the said waste, and in the behalf of the said Mayor and Burgesses to make election of the said moy-

ety, &c., who did so accordingly. And upon this matter given in evidence the parties did demur in law, and the jury were discharged. And it was holden and resolved by the whole Court, that the grant to the Mayor, &c., was utterly void for the uncertainty of the thing granted; and if a common person do make such a grant it is good enough, and there the grantee may make his choice where, &c., and by such choice executed, the thing shall be reduced into certainty: which choice the grantee cannot have against the Queen, which difference was agreed by the whole Court; and it was further holden, that this grant was not only void against the Queen herself, but also against Sir Walter Hungerford, her patentee. It was further holden by the Court, that if a common person had made such a grant, which ought to be reduced to certainty by election, and the corporation to whom the grant was made (*ut supra*) should not make their election by attorney, but after that they were resolved upon the land, they should make a special warrant of attorney, reciting the grant to them, and in which part of the said waste their grant should take effect, east, west, &c., or by buttals, &c., according to which direction the attorney is to enter, &c.

ENGLISH NOTES.

An early case to which reference is frequently made in the earlier authorities is *Lovel's Case* (Ex. Ch. 18 Hen. VIII.), 2 Bro. Abr. tit. Patentes, pl. 104, where the Court had to construe a grant from the Crown to "J. S. *et heredibus masculis suis.*" It was unanimously resolved that an estate in fee simple was not conferred, by reason of the exclusion of heirs female; nor could the grantee claim an estate in tail male, by reason of the absence of apt words of limitation; and that an estate at will only passed. So, too, in *Reg.* v. *Earl of Northumberland* (1566), Plowd. 310 (better known as *The case of Mines*), a Crown grant of lands with the mines under them were held not to pass royal mines and ores (*i.e.* gold and silver). Again, in *Rex* v. *Capper* (1817), 5 Price 217, A. obtained a grant of a liberty in a manor, and granted the manor and the liberty to the Crown. The Crown granted the manor to B. with all liberties "in as full and ample a manner as A. had it." It was held that the Crown grant passed nothing but what was expressly mentioned in words as the subject-matter of the grant, and that notwithstanding the words of reference to the former grant, the new grant did not pass certain appendant franchises which (as it was contended) were contained in the former one.

No. 7. — Sir Walter Hungerford's Case. — Notes.

A well-known example of the strict construction put upon Crown grants is the case of letters patent to secure to an inventor the monopoly of his invention. So that if the specification describes alternative methods of attaining the result; and one of those methods (although pursued intelligently, skilfully, and with faith, patience, and the honest wish to succeed) will not succeed: the patent is void. *Simpson* v. *Holiday* (H. L. 1866), 5 N. R. 240 (per Lord Westbury). Compare *Edison, &c. Co.* v. *Holland*, 6 P. O. R. 243.

But even in the case of a Crown grant the construction has been said in a certain sense to be "favourable." In the case of *The Churchwardens of St. Saviour, Southwark* (1614), 10 Co. Rep. (at fol. 67 *b*), it was said, "If two constructions may be made of the king's grant, then the rule is, when it may receive two constructions, and by force of one construction the grant may, according to the rule of law, be adjudged good, and by another it shall by law be adjudged void, then for the king's honour, and for the benefit of the subject, such construction shall be made that the king's charter shall take effect, for it was not the king's intent to make a void grant, and therewith agrees *Sir J. Molin's Case* in the sixth part of my reports" (at p. 6). This view was adopted in *Bovill* v. *Finch* (1870), L. R., 5 C. P. 523, 39 L. J. C. P. 277, where the question arose upon an extension, contained in one document, of three letters patent for three inventions, one of which was originally void for want of novelty. The Court refused to accede to the argument that the whole grant was void, and treated the extension as if there were three separate documents. The case was distinguished from that of an original grant of a patent for several inventions, where the grant is void if one of the inventions claimed is not new; for here the novelty of all forms one entire consideration for the grant. *Brunton* v. *Hawkes* (K. B. 1821), 4 B. & Ald. 541.

This favourable, or, as it has been sometimes called, "benignant" or "benevolent" principle of construction has been frequently discussed in patent cases; where the limits of its application are perhaps more difficult to describe than to understand. The judgment of the Master of the Rolls (Sir G. Jessel) in *Otto* v. *Lenford* (C. A. 1882), as corrected by the perhaps more careful language of Lord Justice Bowen in *Cropper* v. *Smith* (C. A. 1889), may be cited as presenting the best expression of the principle.

The Master of the Rolls, in *Otto* v. *Linford* (the often quoted gas-engine case, 46 L. T. 35 at p. 39), said: "I have heard judges say, and I have read that other judges have said, that there should be a benevolent interpretation of specifications. What does this mean? I think, as I have explained elsewhere, it means this: when the judges are convinced that there is a genuine great and important invention,

which, as in some cases, one might almost say produces a revolution in a given art or manufacture, the judges are not to be astute to find defects in the specification, but, on the contrary, if it is possible, consistently with the ordinary rules of construction, to put such a construction on the patent as will support it. They are to prefer that construction to another which might possibly commend itself to their minds if the patent was of little worth and of very little importance. That has been carried out over and over again, not only by the Lord Chancellor on appeal, but by the House of Lords. There is, if I may say so, and I think there ought to be, a bias, as between two different constructions, in favour of the real improvement and genuine invention, to adopt that construction which supports an invention. Beyond that I think the rule ought not to go."

Lord Justice Bowen's observations in *Cropper* v. *Smith* (C. A. 1884, 1 P. O. R. at p. 89), are as follows: "We were pressed very earnestly to give this document what has been called a benevolent construction. It seems to me that that prayer for grace is very often addressed to Courts under circumstances which preclude the propriety of their entertaining it for a moment. It is quite true that in old times a great many judges were supposed to be astute to defeat patents, and as a corrective, so to speak, to that inclination of the Courts it became necessary for the tribunal to warn itself that patentees must be fairly dealt with as between themselves and the public, and as a canon of construction accordingly reference has been from time to time, in various cases, made to the idea that a benignant or benevolent construction was one that ought to be invoked, that is to say, reference has been made to an old principle of construction, which is not at all special to the subject-matter of patents, but applies to all documents and all deeds, which is as old as Coke and Shepperd's Touchstone, to the effect that the interpretation of a written document ought to be benevolent or benign: '*Verba debent intelligi cum effectu ut res magis valeat quam pereat.*' Now that is only a caution against excessive formalism; it only means that when you can see what the true construction of the document is, or, in other words, what the true intention of the parties is as expressed in their language, you must not allow yourself to be drawn away from the true view of the document by over-nicety in criticism of expression. That is what seems to me to be meant. You must remember that the parties meant to do something by their deed, and you must not defeat it if effect can be given to their intention by a fair construction of the whole of the document. It is almost always coupled with another maxim which seems to me really to be the same thing in another shape. '*Verba intentioni debent inservire.*' You must construe particular words so as not to defeat the clear intention of the whole. That is

what seems to me to be the meaning of the maxim that the interpretation of documents ought to be benevolent or benign; but having said that, it follows that although there may be cases in which you use it, when the validity of a patent is in question, it certainly never can be used when the construction of a document is clear; that is to say, it is a guide to help you to construe a document; it is not an excuse to justify you in misconstruing a document."

AMERICAN NOTES.

This principle was recognised in *Lansing* v. *Smith*, 4 Wendell (New York), 9; 21 Am. Dec. 89, where it was held that a legislative grant of rights in public waters must be strictly construed and never extended by implication. Exactly the contrary was held in respect to a government grant of lands in *Middleton* v. *Pritchard*, 3 Scammon (Illinois), 510; 38 Am. Dec. 112, the Court observing: "The grant is to be taken most strongly against the grantor;" and where there is no reservation, nor evidence of intention of any, "we must construe its grant most favourably for the grantee, and that it intended all that might pass by it." A construction that renders a patent operative is preferred to one that renders it void. *Alexander* v. *Lively*, 5 T. B. Monroe (Kentucky), 159; 17 Am. Dec. 50.

AMENDMENT.

No. 1. — BLACKAMORE'S CASE.

(1610.)

RULE.

The Courts of law have, at common law, power to amend their own records during the term in respect of errors made by misprision of the clerks of Court mistaking the instructions of the parties, or by the mistake of the Court itself. But they have not, at common law, power to amend the original writ which issues out of the Chancery.

By the Statute 8 Hen. VI. c. 12, the power of amendment for misprision of the clerks is extended to all records, whether made in the same or in another term, and

to writs original as well as judicial. But the Statute does not extend to a want of legal form in the writ, which the clerk is bound to have the skill and knowledge to supply.

In making out a writ, the defendant was therein styled *Generosus* instead of *Miles* by a mistake of the clerk in Chancery, through his not strictly attending to the note of instructions furnished by the plaintiff's attorney. Process followed according to the writ; and in a subsequent term judgment was given by default against the defendant, by his correct designation of *Miles*. It was held that the original writ might be amended, under the Statute, by reference to the attorney's note.

Blackamore's Case.

8 Co. Rep. 156 a.

An original writ was brought in London: Jacobus Dei gratiâ Angliæ, &c. Præcipe Leventhorp Franke nuper de Hatfield Brodock in comitatu Essex, Generoso, alias dicto Leventhorp Franke de Hatfield Brodock in comitatu Essex, Generoso, quod reddat Arthuro Blackamore, et Johanni Whittingham, £100, quas eis debet et injuste detinet, returnable mense Michaelis: the entry of the *Capias, alias, et pluries*, was according to the said original: but in the *Exigent* and Proclamation, and the entry thereof, the defendant (as the truth was) was named Knight, and in Easter Term, *anno* 8 *Jac.* he put in a *supersedeas* by the name of Knight, and so the plaintiff declared against him: and the defendant imparled till Trinity Term following, in which term judgment was given against him by default, by the name of Knight. And this Mich. Term, *anno* 8 *Jacobi Regis* a writ of error was brought; and it was moved by Houghton, Serjeant, that the said original might be amended, because John Bunbury, the plaintiff's attorney, drew a note or title of the writ in this form: London: Leventhorp Franke *nuper de Hatfield in comitatu Essex, Militi, alias dict' Leventhorp Franke de Hatfield Brodock in comitatu Essex, Generoso, &c. ut supra*, and delivered this note or title to the Cursitor of London; and he mistook it *in hoc*, that where *in primo nomine* he ought to be named *Militi, in primo nomine* the Cursitor named him *Generoso*, as he was named in the obligation; and this was the true case, as ap-

pears on the examination of the Cursitor, and of the said attorney, upon their oaths, and upon view of the note or title in full Court. And whether this was amendable or not by this Court, the original being purchased out of another Court, *scil.* the Chancery, was the question.

And the case was well argued at the bar by counsel on both sides; and at last it was resolved, *per totam curiam*, that the record should be amended by the said Cursitor, and made according to the note or title delivered him by the attorney. And for the better understanding of the law, and of the true reason of the rule of our books in this and other cases of amendments, 1. We must consider if in this case the said original writ was amendable by the common law, or by any statute, and by what statute? And it was resolved that an original writ was not amendable by the common law in the case of a common person. *Vide* 13 Edw. III. Amendment 63, which was before any statute made concerning amendments, &c., and in 16 Edw. III. Variance 59; 29 Edw. III. Amendment 68. But in the King's case, in a *quare impedit*, where the writ of *quare impedit* was *præsentere* for *præsentare*, after exception taken to it, and before answer, by the advice of the Chancellor (out of which Court this writ issued), and of the Judges of the King's Bench, the writ was amended in the Chancery, and the defendant was put to answer it by award. *Vide* 4 Hen. VI. 16 b, and 40 Ass p. 26.

And where there appears in 20 Edw. IV. 7, 10 Hen. VII. 25 a, b, a diversity of opinions, whether there were any amendment at the common law or not? It is without question that at the common law a fault of entry of a continuance, or of an essoin, which was the misprision of the Court itself, in the form of entry, was amendable by the Court; as appears by 5 Edw. III. 25, where W. brought a *Præcipe* against B., who vouched to warranty C., who entered into the warranty and pleaded to issue, a *venire facias* issued, &c., and the jury was respited; and in the roll it was entered, *Jur' inter B. and C.* (which was between the tenant and the vouchee) in such a plea, *ponitur in respect'* where the entry ought to be, *Jur' inter W. et C. quem B. vocavit ad warrant' et qui ei warr'*; and because this misprision of the entry in the roll was taken to be the default of the Court (it was, as in the case of an essoin), amended by the Court. So in 10 Edw. III. 20 a, the misprision of the Court, in the entry of an essoin, was amended by the

Court. And 12 Edw III. Amendment 62, acc., which books were before any statute of amendment. *Vide* 2 Hen. IV. 4 a.; 18 Edw. III. Amendment 56; 19 Edw. III. tit. Amendment 65. And at the common law, variance in any part of the record of the original was amendable by the common law, as it is said in 7 Hen. VI. 45 a. So at the common law the Judges might amend as well their judgment as any other part of the record, &c. in the same term, for during the term the record is in the breast of the Judges, and not in the roll. *Vide* 7 Hen. VI. 29 a, b; 9 Edw. IV. 3 b; 2 Rich. III. 11 a, b.

But at the common law, the misprision of clerks in another term in the process was not amendable by the Court, for in another term the roll is the record, and therefore by the Statute of 14 Edw. III. cap. 6 (which was the first Act of amendment), it is enacted by the misprision of clerks in every place wheresoever it be, no process shall be annulled or discontinued by mistaking in writing one letter, or one syllable too much or too little, &c., but shall be hastily amended in due form: but this Statute extends only to the amendment of the mistake of the clerk in process to be amended in due form; for *anno* 15 Edw. III. Amendment 58, which was the next year after the Statute made, in *Detinue* of three writings, by omission of one writing in the continuance, all the proceeding was discontinued, notwithstanding the new Statute (*scil.* 14 Edw. III.), which gave that the process should be amended. *Vide* 45 Edw. III. 19 b.

And this Statute extends to a writ judicial, or process, as in trespass, the *nisi prius* was *ad damnum* 100*s.* where the record was £100, and the jury at the *nisi prius* found £20, and the writ of *nisi prius* was amended by force of this Statute, and made £100, according to the record 2 Hen. IV. 6 a, *vide* 45 Edw. III. 19. And in 44 Edw. III. 18 it is observed that a man has often seen the judicial writs amended by the roll, but the roll never (before the same case, as it is there said) was amended. *Vide* 40 Edw. III. 15, 36; 19 Hen. VI. 15; 3 Hen. IV. 8 and 11; 47 Edw. III. 14; 7 Edw. IV. 15 b; 9 Hen. VII. 8; 4 Hen. VI. 6.

But this Statute doth not extend to an original writ, nor to a writ which is in the nature of an original, for that is not included within this word "Process." And therefore Finchden saith, in 41 Edw. III. 14 a, if an original writ wants form, it is abatable, because an original is made in one place, and pleadable in another.

and by consequence cannot be amended; otherwise it is of a writ judicial; *vide* 11 Hen. IV. 70 a. A protection shall not be amended in the Common Pleas, because made in another court. So it is held in 4 Hen. VI. 4 a. Every original writ shall abate for want of form (as if the wife be named before the husband), as well as if it wants matter without any amendment: but a judicial writ shall not abate for want of form, if it has sufficient matter. 3 Hen. IV. 4 a. An original, or that which is in the nature of an original, shall not be amended; and therewith agree 29 Edw. III. Amendment 68, in *Wagam's Case*, 22 Edw. IV. 47; *vide* 8 Hen. VI. 37 a. So in 46 Edw. III. Amendment 53, in a writ of entry *sine assensu capituli* brought by an Abbot against R., who pleads *non dimisit, &c. et de hoc ponit se super patriam et prad' R. similiter;* where it should be, *et prad' Abbas similiter*, and the jury was discharged, and it was not amended, for it was not within the Statute which gave, that process should be amended in due form, and therefore the parties repleaded. And it is to be known that this word (process), which is the only word in this Statute which is to be amended, is taken in law in two significations, — in one largely, and in the other strictly; and in the large sense it is taken for all the proceedings in all real and personal actions, and in all criminal and Common Pleas: *et processus derivatur a precedendo ab originali usque ad finem. Vide* Britton, 138. And in this sense it is taken in the Register Original 128 a, in the writ *De continuando processum post mortem Capitalis Justic'* in a writ of Oyer and Terminer, within which words (*Processus*), as it there appears, is included not only the judicial process, but also the commissions, indictments, rolls, *et alia memoranda;* and *in alio sensu*, this word (*Processus*) is taken more strictly, *sc.* for the proceedings after the original upon the plea-roll before judgment, and that appears in the writ of error in the Register 216, and F. N. B., the words of which are, *Quia in recordo et processu, ac etiam in redditione judicii*, &c., where *recordum* contains the plea-roll, and *processus* all the proceeding upon it until the judgment. See the writ of *certiorari* in the Register, 167 a. And in this sense, in all actions, real, personal, and mixed, and not in pleas of the Crown, is the said Act of 14 Edw. III. to be intended. And this appears by the said book in 46 Edw. III. Amendment 53, for the misprision was in the plea-roll, and therefore it was not amended, and 46 Edw. III. 19 a, b, in Trespass, distress issued *Quindena Trin'*

retornable *Quind' Mich.*, and the roll was, *De quinden' Trin' ad quinden' Hilar'* and at *Quinden' Mich'* it was pleaded to issue, and found for the plaintiff, and the defendant showed this matter in arrest of judgment, and the Justices would not amend the roll (which there is called the original), but awarded the parties to replead. But in 18 Edw. III. Amendment 56, the mistake was in the entry of the essoin, which was out of the record or plea-roll, and that was part of the process, *i. e.* proceeding amendable by the said Act: and that appears more fully after. But upon this Statute there were diversity of opinions in divers points, *sc.* If the Justices before whom the plea should be depending by adjournment, error, or otherwise (*vide* 17 Ass. p. 2), should have power to amend the mistake of the clerk in process in writing a letter or syllable, &c., also, if they might amend it as well after judgment as before; and these doubts were explained and declared by the Statute of 9 Hen. V. c. 4, and 4 Hen. VI. c. 3, to extend to all the Justices, and as well after as before judgment. And also a great doubt was conceived on these words, "Writing a letter or syllable too much or too little," if a word might be amended; and 40 Edw. III. 34 b, Belknap saith, That the Statute of 14 Edw. III. c. 6, that a letter or syllable too much or too little in a word may be amended: but where there wants a word, of that the Statute speaks nothing. Thorp: It was heretofore debated here before us, if a word fail in the record, if it might be amended, as if it had failed but in a syllable or letter; and Sir Hugh Green and I went together to the council, and they were twenty-four of the Bishops and Earls, and we demanded of them who made the Statute, if the record might be amended; and the Archbishop or Metropolitan said that it was a nice demand, and a vain question of them, if it might be amended or not; for he said that it might be as well amended in this case as if it were but one letter; for if a letter or syllable fail in a word, it is no word; wherefore, if all the word fail, it may be amended as well as if it failed but of a letter or of a syllable; for there is no more difference in the one case than in the other. And in 39 Edw. III. 21 a, the question also was, if a word might be amended by the Statute of 14 Edw. III. and there Thorp said, That it shall be amended by the Statute, for heretofore we were in doubt of it; and because there was diversity in the surname in a writ, it was brought for the same cause into Parliament; and the Lords who made the Statute said, their meaning

was that in all these cases the process should be amended. Note where it is said in 40 Edw. III 34 b, that the Justices went to council; it appears by 39 Edw. III. 21 a, that they went to the Parliament to know the opinion of those who made the law, 11 Hen. IV. 70 a. In a *Precipe* the original was, Mich. *de T.* and the mean process was, Mich. T. and *de* omitted, and a protection was cast by the name of M. T., and the mesne process was amended by the Statute of 14 Edw. III., and that a word shall be amended within these words, *letter or syllable*, and *eo potius*, because *de* is a word and syllable also; but the protection was not amended, because it was made in another Court. 7 Hen. VI. 45, it seems that a title shall be amended within these words, *letter or syllable*. To take away all which doubts, and to enlarge the power of the Justices in amendments, the Statute of 8 Hen. VI. cap. 12, was made. And that stands upon two general parts, *sc.* 1. Against corrupting and falsifying of records by erasing, interlining, &c., which clause doth not concern the case in question. 2. Against the mistake of clerks (by force of which the amendment was in the case at bar) the words of which branch are, "And that the King's Judges of the Courts, and places in which any record, process, word, plea, warrant of attorney, writ (original or judicial, for so the Statute speaks in the first clause), panel or return which for the time shall be, shall have power to examine such record, process, word, plea, warrant of attorney, writ, panel, and return, by them or by their clerks, and to reform and amend in affirmance of the judgment of such records and processes, all that to them, in their discretion, seemeth to be the misprision of the clerk in such records, process, word, plea, warrant of attorney, writ, panel, and return, &c. So that by such misprision of the clerk no judgment shall be reversed or annulled."

Note, reader, where the Act of 14 Edw. III. speaks only of process, this Act of 8 Hen. VI. is of far greater extent, for it extends to process, and to seven other things, *scilicet*, 1. To any record 2 Word. 3. Plea. 4. Warrant of attorney. 5. To a writ original and judicial, as appears by the first branch of the Act. 6. Panel. 7. Return. So that the power of the justices as to amendment is by this Statute greatly enlarged. Also, 1. This Statute gives them power of examination. 2. Of reformation and amendment. 3. The Statute expresses the matter which they shall reform and amend; *scilicet*, all that which to them, in their discre-

tion, seems to be the misprision of the clerk in such records, process, word, plea, warrant of attorney, writ, panel, and return. As to the first, they have power to examine such records, process, &c. in two manners, — 1. By themselves. 2. By their clerk.

As to the power of reformation and amendment, they have power only to do it in affirmance of the judgments of such records and processes; but although their power be thus enlarged, yet the misprision of the clerk (as it was in the Act of 14 Edw. III.) is only to be amended. And because there appears *primâ facie* great uncertainty in our books concerning amendments (whereas in truth there are not any more certain rules in the law, if they are well observed and understood, than in case of amendment), it will be necessary briefly to collect them out of the books at large, touching the construction of this Statute. And because this principal case was of the amendment of an original· 1 It shall be showed in what cases the misprision of the clerk in original writs shall be amended within this Statute, and in what not. Every original writ stands upon two parts, one upon an artificial form, according to the Register, and that the clerk ought *ex officio* to do by his knowledge and skill, without any instruction of the party; the other upon the true instruction by the party of the truth and particularity of his case, requisite to the composing of the writ, and that the clerk cannot do without the party, so that an original writ may be vicious, by misprision either of the clerk or of the party; by misprision of the clerk in five manners: 1 By mistaking the legal form. 2. By mistaking of one word which is not any Latin for another. 3. By omission or addition of words. 4. By mistaking the record, specialty, writing, copy, instruction, note, or titling of the writ delivered to the clerk, or taken by the clerk for framing the writ. 5. By misprision of the clerk or officer in negligent keeping, or voluntary defacing, &c. of a record. &c And because the case of amendment in the case at bar was not for any misprision of the bond on which the writ was grounded (for he has pursued it in all) in which bond the defendant was named *Generosus*, as he was in the writ. But the misprision of the clerk of the Chancery was in this, that he did not pursue the note or instruction in writing delivered him, *scil.* to name the defendant knight *in primo nomine*, because after the making of the bond he was made knight; this difference is first to be observed, that if the original writ wants legal form, it is such a misprision which is not

amendable by this Act, for the officers and clerks of the Chancery are bound by the duty of their offices to have skill and knowledge in the true form of original writs (which are the foundations upon which the whole law depends), and therefore if form of original writs shall be neglected, ignorance, the mother of error and barbarousness, will follow, and in the end all will be involved in confusion, in subversion of the ancient law of the land, for in this case it is true that *forma dat esse;* and therefore it was never the meaning of the makers of the Act within these general words (misprision of the clerk in original writ), to extend it to misprision of the form of the original writ, which would introduce so great inconvenience, and therewith agrees a notable judgment, in 22 Edw. IV. 21 b and 22 a, in *Eliz. Hatley's Case*, where a writ of debt was brought against executors for a debt due by the testator in the *Debet et Detinet*, where by the form of the Register it ought to be in the *Detinet only:* and there it is resolved by the whole Court, that it shall not be amended, for there a difference is taken and resolved between negligence and ignorance of the clerk; for negligence, that is, the oversight of the clerk in mistaking, as if he has the bond or a copy of the bond, and doth not follow it, the mistaking, that is, oversight and negligence in this case, and in all like cases, shall be amended by the Statute of 8 Hen. VI But ignorance or not knowing (for *scientia sciolorum est mixta ignorantia*) of the clerk in the legal form, and course of the original, is not a misprision amendable by the said Statute. So if the writ be *Præcipe quod solvat*, for *Præcipe quod reddat*, or *Worr' chartæ unde pactum habet*, for *unde chartam habet*, these are faults of form, and therefore are not amendable by this Act. And for the first part of this difference, as to the copy of the bond, it is held, in 38 Hen. VI. 4 a, that where the clerks of the Chancery use to take titling of the matter which the party shows them, if the party to have a *Formedon in descender* show the clerk that the land descended to one as son and heir of the donees, &c., and the clerk draws the writ, that the land descended to him as son (and omits "heir"); if the clerk shows his titling and will testify it, it shall be amended in the Common Pleas, and that is by the said Statute of 8 Hen. VI *Vide* 22 Edw. IV. 48 b. 38 Hen. VI. 39, a, b, and 11 Hen. VII. 41 b, agree to the case of a copy. But if the writ wants legal form, it is not amendable. *Vide* 14 Hen. IV. 10, 11; 27 Hen VI. 6 b; 11 Hen. VI. 14; 34 Hen. VI. 26; 28 Hen. VI. 11; and upon this reason it has been

often adjudged since this Statute of 8 Hen. VI., that false Latin in an original writ shall not be amended, because it wants legal form, and is to be imputed to the ignorance of the clerk, 9 Hen. VII 16 b, as *hos breve* for *hoc breve;* and the common law is curious in observing the form of the Register, and therefore it is adjudged in 6 Edw. III. 36 b, 37 a, that where a trespass done by divers is joint or several, at the will of the plaintiff, yet in an action against John, guardian of the hospital of B., and brother Rob. L. and brother Rich. F., inasmuch as this default of the clerk for want of form, that these brethren are not named Confrerers, as it ought to be by the form of the Register, the writ shall abate against all, although the guardian be well named. But in trespass against two, misnomer of one of the defendants shall not abate the whole writ, but it shall stand against the other who is well named; for there Herle took the difference, when the writ abates by the plea of the one for want of form, although the others have pleaded to issue, the writ shall abate against all; but although one may abate the writ for matter in fact, as by reason of the misprision of his name, nevertheless the writ shall stand against the others. *Vide* 2 Hen. VII. 16; 11 Hen. VII. 5, 6; 21 Hen. VII. 31; 7 Edw. IV. 10; 5 Edw. IV. 2; 11 Ass. 15; 12 Ass. p. 14; 27 Ass p. 45; 9 Hen. VI. 36; 12 Edw. III. Brief 670; 12 Edw. III. Brief 481; 27 Hen VIII. 26; 5 Plow Com. in assise of Fresh Force.

But as to the second manner of misprision in negligent writing of a word which is not a Latin word, that is amendable, as *imaginavit* for *imaginatus est*, it shall be amended, as it is adjudged in 11 Hen. VI. 3, 17. So was it adjudged in 3 Edw. VI. as Bendloes, Serjt., reports, that where in a writ of *Aiel* the writ was *ava*, for *aria*, it was amended.

As to the third manner of misprision in negligent omission or addition of a thing which it appears he himself ought to have added, or omitted, of course; as by the omission of *Dei Gratia* in the king's stile, it shall be amended. 22 Hen. VI. 8. So 3 Edw. VI., as Bendloes, Serjt., reports, these words in a *Partitione faciend'* (*ostensur' quare non fecerat*) were left out, and it was amended. *Vide* 35 Hen. VI. 6, 10a; 2 Hen. VII. 11 b; 9 Hen. VII. 19, for addition of that which is apparent ought to be omitted. But the omission or addition of anything which alters the form of the writ is not amendable, as the addition or omission of *Detinet*, as appears in 11 Hen. VI. 14 a, b, or the addition of *Debet*, as appears in 22 Edw. IV. 21 b, 22 a.

As to the fourth manner of misprision, *sc.* of the record or specialty, &c. *Vide* 21 Hen. VI. 8; 22 Hen. VI. 43; 37 Hen. VI. 34; 19 Hen. VI. amendment 47; 8 Edw. IV. 4.

As to the fifth manner of misprision, in negligence of a clerk or officer, not in writing, &c., but in negligent keeping of the records, or in voluntary defacing of them, whereby the record becomes imperfect or erroneous, in Trin. 24 Eliz. the case was that Henry Fitz-Allen, late Earl of Arundel, in the reign of Queen Mary suffered a common recovery of divers manors, and of lands and tenements in the county of Sussex; and the original writ upon which the recovery was had, being greater and broader than the other writs of the same file, by the negligence of the officer by continual handling of it, a great part of this writ, which was more spacious than the rest, was obliterate, and worn out, so that but one letter of many of the names of divers of the said manors could be perceived, but the names of the manors were truly recited as well in the count (which always briefly recites the writ) as in the *Habere facias seisinam;* and whether this original was amendable or not, was a great question between P. Howard Earl of Arundel, cousin and heir of the said Henry Earl of Arundel, and the Lord Lumley, to whom the said Henry Earl of Arundel had conveyed divers of the said manors, &c. And to resolve this question, Sir Christopher Wray, Chief Justice of England, Sir Edward Anderson, Chief Justice of the Common Pleas, Sir Roger Manwood, Chief Baron of the Exchequer, and all the justices of England, assembled themselves together. And it was resolved by them all *una voce*, that the original writ should be amended according to the other parts of the record, *scil.* the count, and the *Habere facias seisinam;* and that this misprision and negligence of the clerk in keeping of the original writ should be amended by this Statute of 8 Hen. VI., for here doth not appear any want of knowledge in the clerk, but misprision and negligence in keeping of the writ, which is a misprision within the letter and meaning of the Act; and *eo potius* in this case, because it was in a common recovery suffered by assent of the parties for assurance of lands. And although it is enacted that if any record, or parcel thereof, writ, return, panel, process, or warrant of attorney in the King's Courts, &c., are voluntarily stolen, carried away, withdrawn, or avoided by any clerk, that it shall be felony; that doth not prove that if the original writ or other part of the record be voluntarily

stolen, &c., that it cannot be supplied and amended by the other parts of the record; for it was resolved that in both cases, as well where the record becomes imperfect and erroneous by voluntary offence of the clerk as by his careless negligence, that it should be amended, for all is within this general word, — misprision of the clerk. But if such part of the record which is so stolen, &c., or which appears not, cannot be supplied by the other parts of the record, nor by any exemplification made of the record, then it cannot be amended; and *vide* the first clause of this Act of 8 Hen. VI. gives remedy, amongst others, where any subtraction or diminution is of any record, process, warrant of attorney, original writ, &c. And according to this resolution a fine was amended of Mich. 8 Jac., as appears by the order and rule of Court following.

Crompton. Mich. 8 Jacobi Regis.

Lincoln ss. In fine levat' in cur' hic in Octab' Sancti Hilarii, anno regni dom' Eliz. nuper Reginæ Angliæ 16 inter Robertum Tyrwhite Militem et al' quer' et Edmund Dighton, Armiger' et al' defore' de maneriis de Magna Sturton, Parva Sturton, et al' in com' præd'; quia constat cur' super visum pedis ejusdem finis, quod per humiditatem aeris, et pluviam super illam descenden' idem pes fines adeo obliteratus est, ut multæ lineæ ejusdem totalit' deletæ ita ut legi non possunt: tamen per breve de conventione, et dedimus potestatem de cognitione inde capiend' ac per concordiam et notam ejusdem finis satis liquet et apparet quæ fuerunt verba in eodem pede prius script'. Ideo ordinat' est, quod præd' pes finis cum proclam' super inde indorsat' per chirographar' de novo rescribatur, ita quod concord' cum præd' brevi de convent', dedimus potestatem, concordia, et nota ejusd' finis, et cum aliis proclam' indorsat' super pedes finium ejusd' term' et quod præd' pes finis sic obliterat' a filac' inde abstrahatur, et præd' pes finis sic de novo rescript' in loco ejusdem affiletur.

And this briefly shall suffice for amendment of the misprision of the clerk in an original writ. And as to the case at bar, the rule of the Court was in these words: "Crompton. Ordinatum est per cur' hic super auditu consilii utriusque partis et examinatione Clerici Cursistar' London et attornat' quer' super sacramenta sua in cur' hic, quod hæc additio (generoso) nomini defend' in priori parte brevis original' de debito 100 li. inde retorn' et affilat' in Banco hic

mense Michaelis anno regni Regis nunc septimo, et omnes misprisiones in recordo et process' ejusd' placiti proinde subsequen' emendentur, et fiat (Militi) secundum instructiones in script' prius deliberat' præf' Cursistar', viz. præd' breve originale per præfat' Cursistar' et recordum, et process' præd' per Philizar' hujus curiæ."

The next word in the Act of 8 Hen. VI. is (record) and the first part of the record is the count; and briefly a count which wants substance shall not be amended in another term, as appears 7 Hen. VI. 26 a; 35 Hen. VI. 37 b; 38 Hen. VI. 1 a; 7 Edw. IV. 26 b; 9 Edw. IV. 5; 33 Hen. VI. 2 a. *Vide* 38 Hen. VI. 2, 33, and 30 Hen. VIII. Br. Amendment 80, for the King's case.

But it is enacted by the Statute of 36 Edw. III. c. 15, that by the ancient forms and terms of pleaders no man be prejudiced, so that the matter of the action be fully showed in the declaration and in the writ. *Vide Ereleigh's Case*, 13 Eliz. Dyer, 299, by the Statute of 36 Edw. III. c. 15, the declaration having substance shall not abate for form. *Vide* 28 Hen. VI. 8 a. In a writ brought by John Gargrave against Thomas Beamond on a bond, and the bond was, *Noverint, &c. me Thomas Beamond, teneri, &c.* Joseph Gargrave (without addition) and the writ was, *Præcipe, &c. quod reddat Joseph Gargrave Armig'* with addition; and it was moved that it might be amended by the Statute, for it is the misprision of the clerk; but it was adjudged that the writ should abate for this variance and should not be amended, as it should if it was on the defendant's part; for where the surplusage is on the plaintiff's part, as well in the writ as in the count, a man cannot mend his own count. And this judgment was after the said Statute of 8 Hen. VI. which proves that the said first clause of this very Act, which speaks of addition or diminution, &c., extends only to corruption, and misdemeanour in addition or diminution, and in vitiating of a record, and not where it is done *in rei veritate*, although it be by misprision. *Vide* 4 Edw. IV. 14 b. A space in the declaration for the place where the obligation was made was not amendable in another term. And this which has been said of the count shall suffice. Other parts of the record are, plea in bar, replication, &c., and regularly matter of substance in them, and especially matters of fact shall not be amended in another term, as omission of averment, *et hoc parat' est verificare*, &c., for in some cases, as in avowry, &c., it is not of necessity, but colour which is of course, and in which there is a misprision of the Clerk, shall be amended.

And the record in another term may be amended by the paper book of the office, for it was the misprision of the clerk in the entering of it, and no fault in the party or his counsel, 27 Hen. VI. 6 b; 10 Hen. VII. 23 a, b, 25 a; 11 Hen. VII. 2 a, b; 20 Hen. VI. 18 a; 27 Hen. VIII. 1 b, the misprision of a certificate of a record on a writ of error shall be amended according to the record, 22 Edw. IV. 46, and 21 Hen. VII. 41, but that is by the express provision of the said Statute of 8 Hen. VI., for it was the act of the Judge, which was not amendable by the said branch of the Act, as shall be said after.

A thing apparent to be a misprision, which the clerk of course ought to have added, without any instruction of the party, although it be in a material point, shall be amended in another term. As if in debt brought, the defendant pleads *nil debet et de hoc ponit se super patriam, et prad' defendens similiter;* where it ought to be, *et prad' querens similiter*, it shall be amended by this Act of 8 Hen. VI., 11 Hen. VII 2 acc., which case was not amended by this Act of 14 Edw. III., as appears by the book in 46 Edw. III. before; for the first Act speaks only of process, and this Act speaks of the record and plea. So in an action brought against Sir Roger Townsend, he pleaded in bar, and concluded, which matter *prad' Johan'* is ready to aver, where it should be *Rogerus;* and it was amended by the advice of all the Justices; as it is reported in 11 Hen. VII. 25 a.

And as to the writ of *nisi prius*, it is to be known that the misprision of the Clerk of the Treasury, who writes it, is also therein amendable by this Statute, and to be made according to the record, but with this caution, *scil.* that the record of *nisi prius* have sufficient matter in it, either expressed or implied, to give authority to the Justices of *nisi prius* to try the issue; for they cannot try any issue by force of the statutes made thereof, without authority given to them by writ of *nisi prius*, and so it is adjudged in 11 Hen. VI. 11 a, b, in debt against J. S., husbandman; issue was taken, if he was husbandman *die impetrati' brevis;* and the writ of *nisi prius* was whether he was husbandman (omitting these words, *die impetrationis brevis*), which was the material point of the issue; but the roll was well, and the jury passed for the plaintiff, and found that the defendant was husbandman *die impetrationis brevis*, and the writ of *nisi prius* could not be amended by the Statute of 8 Hen. VI., because the Justices of

nisi prius have no power to try the issue contained in the record, because *die impetr' brevis* was omitted in the *nisi prius*; and if the Justices of *nisi prius* had taken the verdict according to the issue in the writ of *nisi prius* that he was husbandman generally, without saying *die impetrat' brevis*, it had been contrary to the roll; wherefore it was awarded that the plaintiff should sue a *venire facias de novo*. But 9 Eliz. Dyer, 260, 261, *in partitione fac'* by Wotton against Anthony Cook and Temple, who appeared, and Temple confessed the partition, and judgment given accordingly, *sed cesset executio*. Cook conveyed title in severalty, and traversed the supposal of the writ and count by *absque hoc*, the plaintiff maintained the writ and count, *et hoc petit quod inquiratur per patriam et prad' Anthonius similiter*, *ideo* 12, &c. And in the record of *nisi prius* the issue was well recited, and no part of it omitted: but where the plaintiff concluded, *et hoc petit inquiratur per patriam*, by the negligence of the Clerk of the Treasury, the writ of *nisi prius* was, *et prad' similiter*, omitting this word *Anthonius* in the close and joining of the issue. And farther, the *jury* entered into the record of *nisi prius* was, *inter* Wotton plaintiff, and Cook and Temple defendants, where Temple had made a confession of the partition before, and so a stranger to the issue: but the record which warranted it was well enough; and notwithstanding these faults and misprisions, the issue was tried at *nisi prius*, and afterwards by the rule of the Court of Common Pleas, the verdict was well taken, and the said misprisions were amended; for sufficient authority was given by the writ of *nisi prius* (which is but the transcript of the record) to try the issue, and to take the verdict. If a man declare of damages of £100 and the record of *nisi prius* is 100*s*., and the jury give damages £20, the *nisi prius* shall be amended and made £100 according to the roll; for it is the misprision of the clerk, which doth not change the issue. *Vide* 11 Hen. VII. 1 b; 10 Hen. VII. 25 a, b; and so it was adjudged in 2 Hen. IV. 6 a. *Vide* 39 Edw. III. Br. 105; 7 Edw. IV. 15. *Vide* after, when misprision of the clerk in the entry of the verdict of judgment, which are other parts of the record, shall be amended. As to (word) that has been explained before.

As to this word (plea), that has been explained before in the word (record) which includes it.

As to (warrant of attorney) see 23 Hen. VIII. Amendment 85; 24 Hen. VIII. Amendment 47; 2 Ma. Dyer, 105; 2 Eliz. Dyer,

180; 5 Eliz. Dyer, 225; 6 Eliz. Dyer, 231. But when no warrant of attorney is put in, it is not remedied by this Act. As to panel and return, in what cases misprisions of them shall be amended within this Statute, *vide* 2 Edw. IV. 7 a, b; 9 Edw. IV. 14 a; 33 Hen. VI. 42; after the sheriff is removed or dead, &c., 37 Hen. VI. 12; 3 Hen. VII. 14; 12 Hen. VII. 19. But no return is not helped by this Statute.

And it is to be observed that those things which are amendable before the writ of error brought are amendable after the writ brought; and if the inferior court doth not amend them, the superior court may amend them.

It is necessary now to show two things: 1. What things are not amendable by this Act of Hen. VI. 2. How many of them, not remedied by this Act, are remedied by other Statutes. As to the first, this Act of Hen. VI. c. 12, nor the Act of 8 Hen. VI. c. 15, do not extend to 14 misprisions: They do not extend to want of an original, but to misprision of the clerks, as is aforesaid, in an original. 2. They do not extend to misprision of form in the original, either false Latin or variance from the Register. 3. They do not extend to a material variance betwixt the original and the count. 4. They do not extend to insufficient trial, *scil.* when the venue is mistaken; but misprision of the clerk in the entry of the verdict shall be amended in another term, according to the note found by the jurors: so was it adjudged in *Rawlin's Case*, in the Fourth Part of my Reports, 29 & 30 Eliz. 52 *b*. 5. They do not extend to a jury returned by the coroners, where the sheriff ought to return it, or *e contra*. *Vide Bainham's Case*, in the Fifth Part of my Reports, fol. 36 b. *Vide* 21 & 22 Eliz. Dyer, 367. 6. They do not extend to a trial where no return is indorsed on the *venire facias*, *Rowland's Case*, in the Fifth Part of my Reports, Mich. 35 & 36 Eliz. fol. 41 b. 7. They do not extend to a trial, where one appears who was not returned on the *venire facias*. The *Countess of Rutland's Case*, in the Fifth Part of my Reports, folio 42. 8. They do not extend to a return of the *venire facias* without the name of the sheriff. 9. They do not extend to a jeofail, want of colour, insufficient pleading, or to any other default of the party, or of his counsel. 27 Hen. VI. 10; 18 Edw. IV. 3; 20 Edw. IV. 6; 11 Hen. VI. 28. For the Statute extends only to misprision of clerks. 10. For the same reason they do not extend to any error or misprision of the Judges in any term past. 2

Rich. III. 11 ; 9 Edw. IV. 3. *Vide* 30 Hen. VI. 1. But misprision of the clerk in the entry of the judgment of a thing which is apparent, and not of necessity, is amendable, as the misprision of the summing of the arrearages before and pending the writ of annuity, shall be amended. 35 Hen. VIII. Dyer, 55. 11. They do not extend to that, where the Justice of *nisi prius* takes the verdict *post ipsum diem* in bank. 1 Ma. Dyer, 97, and 33 Hen. VI. 25. 12. They do not extend to want of warrant of attorney. 13. This Statute nor the Statute of 32 Hen. VIII. c. 30, do not extend to help any of the imperfections or misprisions, where a verdict is given on an issue joined betwixt the demandant and the vouchee, or the tenant and the vouchee, as it was resolved Mich. 1 & 2 Phil. & Mar. Bendloe. But if any error in law be in the judgment, as *ideo in misericordia*, for *pro capiatur*, or *e contra*, or the like ; that is not amendable in another term, as it has been oftentimes adjudged. 14. Nor do they extend to an appeal, nor to pleas of the Crown, nor to any proceeding upon them, for they are excepted ; nor to the amendment of any exigent, to make any one to be outlawed, &c. 20 Hen. VI. 18 ; 7 Edw. IV. 16 ; 22 Edw. IV. 7 ; 38 Hen. VI. 3 ; 21 Hen. VII. 34. *Vide* 7 Hen IV. 27. Now as to misprisions not remedied, neither by the Statute of 32 Hen. VIII. c. 30, nor by the Statute of 18 Eliz. c. 14. 1 All the said misprisions not remedied by the said Statute of 8 Hen. VI. remain yet not remedied by any law or statute where no verdict is given upon issue joined : as if judgment be given upon confession, demurrer, *nihil dicit, non sum informatus*, or otherwise than by verdict of twelve men upon issue joined. 2. When a verdict upon issue tried is given, ten misprisions are not remedied by the Statutes of 32 Hen. VIII., 18 Eliz., or any other Statute, but yet remain not amendable. 1. Material variance betwixt the original and the count, as it is resolved in *Bishop's Case*, in the Fifth Part of my Reports, 37. 2. When the original or count wants substance : *Vide Freeman's Case*, Pasch. 41 Eliz. in the Fifth Part of my Reports, fol. 45. 3 Insufficient trial, *scil.* when the venue is mistaken, and verdict passes. 4. When the return of the jury is by the coroner, where it ought to be by the sheriff, or *e converso*. 5. When the sheriff doth not put his name to the return of the jury. 6. Where on the *venire facias*, &c., no return is endorsed, although verdict passes. 7. When one appears, and is sworn, and amongst the others gives verdict who is not returned on the *venire facias*, &c. 8. In an

appeal, or plea of the Crown, as indictments, &c., or any proceeding upon them; for they are excepted in the Acts of 8 Hen. VI. and 18 Eliz., and the Statute of 32 Hen. VIII. doth not extend to them. 9. Although verdict on issue tried be given for the plaintiff, yet if on the whole record it appears to the Court that the plaintiff has no cause of action, he shall never have judgment; and that is not remedied by any Statute, as it has been oftentimes adjudged. 10. An error in law by misprision of the Judges in the judgment entered in another term is not amendable by any Statute. If the plaintiff in an assise recovers, and has not put in any warrant of attorney, this error was not remedied by the Statute of 32 Hen. VIII., as appears 20 Eliz. Dyer, 363; for the words of that Act are, "for lack of any warrant of attorney of the party against whom the issue shall be tried:" so that when the verdict passes for the plaintiff, the lack of warrant of attorney for the plaintiff is not aided by that Statute, nor *e contra*, but it is helped by the Statute of 18 Eliz.; for there the words are general, "for want of any warrant of attorney;" so that these words extend as well to lack of warrant of attorney of the party for whom as against whom the verdict passes.

ENGLISH NOTES.

Although the powers of amendment of legal proceedings have been much extended in modern times, particularly by the Common Law Procedure Acts, 1852, 1854, and 1860, and ultimately by the Rules of Court under the Judicature Acts (R. S. C. Ord. 28; Ord. 58, s. 4), the rules of the common law, and the principles adopted in construing the earlier Statutes, as exemplified in the principal case, may often supply important considerations in dealing with a question of amendment at the present day. It is not intended here to travel through the crowd of cases in which particular amendments have been allowed or disallowed. The following are selected as assisting to show the principles on which the Court has acted.

In *Wynne* v. *Thomas* (C. P. 1745), Willes Rep. 573, Willes, J., observes (at p. 568): "The true rule is, that original writs may be amended by 8 Hen. VI. c. 12, where it is only the misprision or negligence of the clerk; but a mistake occasioned by the nescience or ignorance of the clerk is not amendable by that statute, nor any other mistake, when there is nothing to amend it by."

In *Carr* v. *Shaw* (K. B. 1797), 7 T. R. 299, Lord Kenyon said: "There was no doubt but that even an original might be amended on an appli-

cation to the MASTER OF THE ROLLS, though it could not be amended in this Court." This is consistent with the principal case. The point is not now of practical importance, since the original writ issues out of the Central Office of the Supreme Court, and to the High Court of Justice (which is a branch of that Court) are transferred all the powers ministerial as well as judicial of the former Courts of Judicature, including doubtless any power of the MASTER OF THE ROLLS in regard to judicial writs issuing out of the chancery.

In *Doe* d. *Mears* v. *Dolman* (K. B. 1798), 7 T. R. 618, 4 R. R. 525, an ejectment case in which the Statute of Limitations was pleaded, an application was made to amend the plea-roll and record of *nisi prius* by making them of Easter Term, 1792, instead of Easter Term, 1797. The declaration in ejectment had been served on the tenants in possession on the 22nd of March, 1792; the other defendants had obtained the rule for making them defendants as landlords in Easter Term, 1792, and in the same term all the defendants had entered into the common rule to confess, &c. Lord KENYON said (4 R. R. 527): "There is no instance in which the Court have refused the parties leave to amend according to the truth of their case, to prevent their being barred by the Statute of Limitations for a supposed laches of which they really have not been guilty. It is a matter of course to grant leave to amend in these cases, to enable the parties to arrive at the real justice of the case."

In *Vanderbyl* v. *McKenna* (1868), L. R., 3 C. P. 252, it was held that an order made "by consent" may be amended, where the order has been erroneously drawn up, so as to effectuate the real intention of the parties; but not so as to introduce a term which they have not consented to.

There are numerous instances in which the Court of Common Pleas, as a Court having control over its own records, has amended the proceedings in fines and recoveries. The bearing of these cases upon the question of rectifying an error in a disentailing assurance under the Fines and Recoveries Act (3 & 4 Will. IV. c. 74) is exemplified in the case of *Hall-Dare* v. *Hall-Dare* (C. A. 1885), 31 Ch. D. 251, 55 L. J. Ch. 154, where, having regard to this power of amendment existing before the Act, the Court held that the 47th section of the Act was not intended to exclude the jurisdiction of the Court, as a Court of Equity, to rectify the deed according to the true intention, of which there was evidence by instructions in writing.

AMERICAN NOTES.

Every Court may amend its own records in respect to clerical mistakes and omissions even after term. *Hollister* v. *Judges, &c.*, 8 Ohio St. 201; 70 Am. Dec. 100; *Sweeny* v. *Delany*, 1 Penn. St. 320; 44 Am. Dec. 136; *Jones* v.

Lewis, 8 Iredell Law (No. Carolina), 70; 47 Am. Dec. 338; *King* v. *State Bank*, 9 Arkansas, 185; 47 Am. Dec. 739; *Lewis* v. *Ross*, 37 Maine, 230; 59 Am. Dec. 49; *Whitwell & Hoover* v. *Emory*, 3 Michigan, 84; 59 Am. Dec. 220; *Rew* v. *Barker*, 2 Cowen (New York), 408; 14 Am. Dec. 515; *Graham* v. *Lynn*, 4 B. Monroe (Kentucky), 17; 39 Am. Dec. 493; *Burnett* v. *State*, 14 Texas, 455; 65 Am. Dec. 131; *Frink* v. *Frink*, 43 New Hampshire, 508; 80 Am. Dec. 189; *Hill* v. *Hoover*, 5 Wisconsin, 386; 68 Am. Dec. 70; *Heaston* v. *Cincinnati, &c. R. Co.*, 16 Indiana, 275; 79 Am. Dec. 430; *Gibson* v. *Chouteau*, 45 Missouri. 171; 100 Am. Dec. 366.

Under the Code Practice in the States the Court has power to amend the summons. *McCrane* v. *Moulton*, 3 Sandford (New York Superior), 736; *Weil* v. *Martin*, 24 Hun (New York Supreme Ct.), 645; *Fink* v. *Manhattan Ry. Co.*, 18 Civil Procedure Rep. 141.

No. 2. — TILDESLEY *v.* HARPER.

(C. A. 1878.)

RULE.

UNDER the modern rules of procedure, leave to amend a pleading ought not (as a general rule) to be refused, unless the Court is satisfied that the party is acting *malâ fide*, or that his blunder has done some injury to the other side, which cannot be compensated by payment of costs or otherwise.

Tildesley *v.* **Harper.**

10 Ch. D. 393; 48 L. J. Ch. 495.

This was an appeal from a judgment of Mr. Justice FRY, 7 Ch. D. 403; 47 L. J. Ch. 266.

The action was brought by Matthew Tildesley, the executor and trustee of the will of Mary Hitchcocks and several infants, *cestuis que trust* under the will, against certain mortgagees, and against W. H. Anderson, a lessee, claiming to have the mortgages and the lease set aside As to the lease, the statement of claim stated that Mary Hitchcocks by her will authorised and empowered Matthew Tildesley, or other the trustees of her will, to demise and lease all or any part of her real estate to any person or persons for any term or number of years not exceeding twenty-one years, so that in every such lease there should be reserved the most improved yearly rent that could be reasonably obtained for the same; that a part of the estate of the testatrix consisted of a freehold inn,

called the Golden Fleece, and two houses behind it; and that by an indenture of lease dated the 31st of December, 1873, Matthew Tildesley, in alleged exercise of the power in that behalf contained in the aforesaid will, purported to lease the inn and the two houses to W. H. Anderson for twenty-one years, at £200 a year rent. The statement of claim then stated as follows: "When such alleged lease was granted, the defendant Anderson knew that the plaintiff Matthew Tildesley was a trustee only of the said Golden Fleece Inn and premises, with a power of leasing. The said rent of £200 was not (and both the plaintiff Matthew Tildesley and the defendant Anderson knew it was not) the most improved rent that at the date of such lease could have been obtained for the said premises. Such premises were at the date of such lease, as they are now, worth £350 *per annum* or thereabouts. The defendant Anderson, however, knowing as he did that the plaintiff Matthew Tildesley was in straitened circumstances at the time, offered him the said Matthew Tildesley personally a bonus, and in fact a bribe, of £500 if he would grant him the said lease for twenty-one years at the rent of £200, and arranged to give him such sum of £500 if he would grant such lease, and the plaintiff Matthew Tildesley being at the time very hard pressed for money accepted such offer and assented to such arrangement, and in fact granted Anderson the said lease in consideration of such bribe, and in pursuance of such arrangement. And the defendant Anderson has in pursuance of such arrangement, and in fact, paid to the plaintiff Matthew Tildesley £200, part of the said £500. Under the above circumstances, the plaintiffs charge that the said lease was not granted *bonâ fide* nor in a proper exercise of the said power of leasing, and that it is not binding on the plaintiffs, and ought to be set aside."

The statement of defence of W. H. Anderson was as follows: "The said rent of £200 was the most improved rent that at the date of such lease could have been obtained for the said premises. The defendant William Henry Anderson denies that such premises were at the date of such lease worth £350 *per annum* or thereabouts. The defendant William Henry Anderson denies that he knew that the plaintiff Matthew Tildesley was in straitened circumstances at the time. The said defendant denies that he offered the said plaintiff personally a bonus and in fact a bribe of £500 if he would grant him the said lease for twenty-one years at the rent of £200, and that he arranged to give him such sum of £500 if he

would grant such lease, and that the said plaintiff, being at the time very hard pressed for money, or in fact accepted such offer and assented to such arrangements, and in fact granted the said defendant the said lease in consideration of such bribe and in pursuance of such arrangement. The said defendant denies that he has in pursuance of such arrangement and in fact paid to the said plaintiff Matthew Tildesley the sum of £200, part of the said sum of £500."

The plaintiff replied to the defence, and both parties went into evidence. The defendant Anderson filed an affidavit, in which he distinctly denied having given any bribe at all.

When the action came on for trial Mr. Justice FRY was of opinion that the giving of a bribe was not sufficiently denied by the statement of defence, and must be taken to be admitted under Order XIX., Rule 17, and he refused to give the defendant leave to amend his defence, but at once gave judgment for the plaintiffs.

From this decision the defendant Anderson appealed.

Fischer, Q. C., and C. Herbert Smith, for the appellant: —

The defendant has sufficiently denied the charge of bribery made in the plaintiffs' statement of claim, for he has categorically denied each of the allegations. Even if there is no denial of having given some bribe, that is not an admission of the fact, for the mere omission to deny a fact is no admission of it unless the fact is alleged in the statement of the other party. This is shown by Order XIX., Rule 17. And so the plaintiffs understood the effect of the defence, otherwise they would have moved for judgment on the admission under Order XL., Rule 11. Instead of which they have joined issue and put the defendant to the expense of bringing up his witnesses.

If the Judge was right in his view of the pleadings, he ought to have given the defendant leave to amend. By his refusal great hardship has been inflicted on the defendant, who has been, from a mere slip in the pleading, deprived of his lease, under which he has expended considerable sums, and also deprived of the opportunity of meeting the charge of bribery. There can be no question of the *bona fides* of the defence, because the defendant, before he knew that the statement of defence would be objected to as insufficient, had filed an affidavit denying the charge of bribery altogether.

Cookson, Q. C., and Maclean, for the plaintiffs: —

Under the present system the rules as to pleading are to be construed strictly. *Thorp* v. *Holdsworth*, 3 Ch. D. 637. With respect to the leave to amend, it is entirely within the discretion of the Judge. His Lordship, on considering the whole of the pleadings, came to the conclusion that the defence as to the charge of bribery was not *bonâ fide*, and the Court of Appeal ought not to interfere with his discretion.

The Court having intimated a strong opinion that leave to amend ought to have been given, they declined to argue the question further.

Baggallay, L. J. We all think that leave to amend ought to be given. The order will be to discharge the judgment of Mr. Justice Fry, with liberty to the defendant to amend his statement of defence; the plaintiffs to pay the costs of the appeal; and the costs of the day of trial in the Court below to be costs in the cause. The plaintiffs will also be at liberty to amend their pleadings.

Bramwell, L. J. I think Mr. Cookson has exercised a wise discretion in retiring from the discussion. In my opinion the defendant ought to have been allowed to amend his statement of defence. I have had much to do in Chambers with applications for leave to amend, and I may perhaps be allowed to say that this humble branch of learning is very familiar to me. My practice has always been to give leave to amend, unless I have been satisfied that the party applying was acting *malâ fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise. I confess that if the present case had come before me, I should have had some doubt whether the defendant had made a *bonâ fide* mistake, as the mistake is so very obvious. I should probably have required some affidavit or statement by the solicitor to show that the slip in the pleading was a *bonâ fide* one, and if satisfied on that point, I should not have refused leave to amend. Mr. Justice Fry seems to have thought it right to trust to his own strong impression that the pleader could not have pleaded as he had done unless there had been *mala fides*, rather than to the positive affidavit of the defendant, who had sworn, before he knew that any objection could be taken to the pleading, that he had not given any bribe. It is quite right that the rules of the Court should be observed, and that a party should be fined for his mistake, but the fine should be measured by the loss to the other side, and not by the importance of the stake between the parties.

THESIGER, L. J. I am also of opinion that it is important that the rules of the Court as to pleading should be enforced, but this may be done at too great a price. The object of these rules is to obtain a correct issue between the parties, and when an error has been made, it is not intended that the party making the mistake should be mulcted in the loss of the trial.

As to the substantial point on which the appeal was brought, it is not necessary that I should give any opinion. At the same time, so far as I have heard the arguments, which were not brought to a conclusion, and considering the case of *Thorp* v. *Holdsworth*, 3 Ch. D. 637, it appears to me doubtful whether a defendant can be held to admit what the plaintiff has not stated, when he has specifically denied all that the plaintiff has stated.

ENGLISH NOTES.

On a similar principle is the decision of the Court of Appeal in *Laird* v. *Briggs* (C. A. 1881), 19 Ch. D. 22.

The latter qualification of the rule is confirmed by *Claparede* v. *Commercial Union Assurance Co.* (Q. B. D. 1883), 32 W. R. 151; and *Steward* v. *Metropolitan Tramway Co.* (C. A. 1886), 16 Q. B. D. 556.

Amendment is matter of right, not of grace or favour. "I know of no kind of error or mistake which is not fraudulent, which the Court will not correct if it can be done without injustice to either party." Per BOWEN, L. J. *Cropper* v. *Smith* (C. A. 1884), 26 Ch. D. 700, 710, 53 L. J. Ch. 891, 896.

It has been decided in the Court of Appeal that after an action has been heard without an amendment having been asked for, the Court, on an appeal by way of rehearing, will not allow an amendment which substantially alters the character of the action. *Hipgrave* v. *Case* (C. A. 1885), 28 Ch. D. 356, 54 L. J. Ch. 399.

AMERICAN NOTES.

Under the American Code Practice the party has generally the right once to amend his pleading as of course. When it becomes necessary to apply to the Court for leave, the English rule prevails. Technical objections are discouraged. It has been said that a plaintiff who expects to recover where there is a substantial defence, solely because of defects in the answer, or a defendant who thinks of succeeding because of errors in the complaint, without regard to the merits, may as well stay out of court. *Wood* v. *Wood*, 26 Barbour (New York Supreme Ct.), 356; *Decker* v. *Mathews*, 5 Sandford (New York Super. Ct.), 439; 12 New York, 313. To defeat the application for amendment on the trial, the other party must show that he has been misled or

is surprised, to his prejudice. *Smith* v. *Rathbun*, 13 Hun (New York Supreme Ct.), 47. But the Court may not on the trial permit an amendment changing the nature of the action. *Avery* v. *N. Y., &c. R. Co.*, 106 New York, 142. With these exceptions, the power is unlimited. *Van Ness* v. *Bush*, 14 Abbott Prac. 33. The New York rules probably prevail in all the States having a similar code of practice.

It is the general rule under the Code Practice that after trial an amendment will not be allowed which changes the character of the action. This is the provision of the New York Code of Civil Procedure, § 723. After trial and appeal no amendment will be allowed except to sustain the judgment. *Volkening* v. *De Graaf*, 81 New York, 268. Otherwise the power is unlimited, whether before or after judgment. Even on appeal. *Pratt* v. *Hudson R. R. Co.*, 21 New York, 307; *Bate* v. *Graham*, 11 New York, 237.

END OF VOL. II.

NOTES
ON
ENGLISH RULING CASES
CASES IN 2 E. R. C.

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2 E. R. C. 1, HAMBLY v. TROTT, Cowp. pt. 1. p. 371.

Survival of actions.

Referred to as leading case in Warren v. Fustenheim, 1 L.R.A. 40, 35 Fed. 691, as basis or starting point of most modern decisions and legislation upon the subject.

Cited in Wynn v. Tallapoosa County Bank, 168 Ala. 469, 23 So. 228, holding that at common law not only cause of action but action itself dies with person of perpetrator of tort or wrong; Devine v. Healy, 141 Ill. App. 290, holding that statute does not make any change in common law rule as to liability or nonliability of executor or administrator of wrongdoer: Steiger v. Hillen, 5 Gill & J. 121, holding compensation given to widow for detention of dower survives in equity; Re Gallagher, 10 Pa. Dist. R. 736, 32 Pittsb. L. J. N. S. 163, holding that orphan's court has jurisdiction of claims for damages in testamentary libel as rules of abatement of personal actions have no application to such case: Carson v. Bryant, 2 Brev. 159, holding that action on case for harboring negro woman did not survive against personal representatives, if founded on tort; Noyes v. Hyde Park, 73 Vt. 261, holding that when injury has accrued to estate, action which survives is for recovery of damages for such injury; Cavanaugh v. Scott, 84 Wis. 93, 54 N. W. 328, holding that under statute court on motion may allow or compel action to be continued by or against personal representative of deceased person.

Cited in notes in 7 E. R. C. 561, on right of purchaser of shares from original allottee to maintain action for misrepresentations in prospectus of corporation against executors of director: 15 E. R. C. 636, on what actions are maintainable against an executor; 2 Eng. Rul. Cas. 15, 16, 18, on abatement of action for tort by death of wrongdoer; 15 E. R. C. 541, on survival of action.

— Tort actions in form "against the peace" or "by force" or to which "not guilty" is pleadable.

Referred to as leading case in Shafer v. Grimes, 23 Iowa, 550, holding that at common law action for seduction does not survive seduced females.

Cited in Gimbel v. Smidth, 7 Ind. 627, holding that in actions ex delicto, when plea is "not guilty," right of action does not survive death of wrongdoer at common law; Ott v. Kaufman, 68 Md. 58, 11 Atl. 580, holding that cause of action by husband for assault and battery on wife, per quod he lost her services, does not survive on death of defendant; Fernald v. Ladd, 4 N. H. 145,

holding action for malicious prosecution does not survive against administrator of wrongdoer; Raymond v. Stiles, Smith (N. H.) 87, holding representative of representative liable for waste committed by latter; Hegerich v. Keddie, 99 N. Y. 258, 52 Am. Rep. 25, 1 N. E. 787, holding statutory cause of action arising out of death alone abated by death of wrongdoer; Boyles v. Overby, 11 Gratt. 202 (dissenting opinion), on non-survival of action in which "not guilty" is general issue.

— Wrongs sounding in contract.

Cited in State ex rel. Evans v. Houston, 4 Blackf. 291, holding that if justice of peace is sole or surviving obligor on his official bond action thereon for breach of his official duties survives against his executors or administrators; Chase v. Fitz, 132 Mass. 359, holding action for breach of contract to marry does not survive against executor of promisor; Lattimore v. Simmons, 13 Serg. & R. 183; Hayden v. Vreeland, 37 N. J. L. 372, 18 Am. Rep. 723; Stebbins v. Palmer, 1 Pick. 71, 11 Am. Dec. 146,—holding that action for breach of promise of marriage, where no special damage is alleged, does not survive against administrator; Simpson v. Sprague, 6 Me. 470, holding that cause of action against attorney for negligence survives against his administrator; Dinsmore v. Hanson, 48 N. H. 413, holding that cause of action against physician arising from want of care or skill, does not survive against executor; Yearteau v. Bacon, 65 Vt. 516, 27 Atl. 198, holding cause of action survives against estate whenever it has received benefit from transaction for which recovery may be had in form ex contractu; Grubb v. Sult, 32 Gratt. 203, 34 Am. Rep. 765, holding that action for breach of promise of marriage will not lie against personal representative of promisor, in case where no special damage is alleged and proved; Lee v. Hill, 87 Va. 497, 24 Am. St. Rep. 666, 12 S. E. 1052, holding action survives if assumpsit will be for injury complained of, though declaration be in form ex delicto; Monohan v. Oke, 1 Ont. App. 268, holding that action will lie against representative of deceased father for maintenance of his illegitimate child: Sawyer v. Goodwin, 36 L. J. Ch. N. S. 578, 15 Week. Rep. 1008, holding partner's estate liable for loss resulting because of co-partner's concealment of prior mortgages upon mortgaged property in securing mortgage upon which partnership acted as solicitor; Finlay v. Chirney, L. R. 20 Q. B. Div. 494, 57 L. J. Q. B. N. S. 247, 58 L. T. N. S. 664, 36 Week. Rep. 534, 52 J. P. 324, holding action for breach of promise to marry, no special damage being alleged, does not survive against executors of promisor.

— Trespass or conversion by defendant's decedent.

Cited in United States v. Bean, 120 Fed. 719, holding estate of decedent liable for benefit received from timber trespass committed by decedent; Nettles v. Barnett, 8 Port. (Ala.) 181, holding that action for trespass proper, does not survive against representative of wrongdoer, where commenced in his lifetime; Sillivant v. Reardon, 5 Ark. 140, on non-liability of executor to action of trover for conversion by his testator; Fox v. Hale & N. Silver Min. Co. 108 Cal. 478, 41 Pac. 328, holding action survives against executor where property is acquired which benefits testator; Wilbur v. Gilmore, 21 Pick. 250, to the point that at common law whenever property taken by testator was converted to his own use so as to become part of his estate, action in some form would lie against his representative; Melvin ex rel. McVey v. Evans, 48 Mo. App. 421, holding action survives for value of property beneficial to wrongdoer or his estate which wrongdoer acquires in doing the wrong; Cooper v. Crane, 9 N. J. L. 173, holding action in assumpsit lies against executors for value of quantity of wood cut,

carried away and sold by testator in his lifetime, without permission; Terhune v. Bray, 16 N. J. L. 53, to the point that action of trover for bond and mortgage would not lie at common law against executors, on conversion by their testator; Lahey v. Brady, 1 Daly, 443; Potter v. Van Vranken, 36 N. Y. 619, holding neither statute of 4 Edw. III., ch. 7, nor common law gave right of action against executor or administrator of person who had tortiously taken goods in his lifetime; State v. Starkeweather, 8 Jones & S. 453, holding cause of action to recover money owned by municipal corporation obtained from it without right, and without making lawful compensation, survives against personal representatives of deceased defendant; Franklin v. Swartwout, 1 Johns. 396, holding suit against representatives of deceased postmaster for embezzlement of money by clerk in office not maintainable; Decrow v. Mone, 2 N. C. (1 Hayw.) 21, holding that trover would lie against executors for conversion in time of their testator; Cummings v. Meaks, 2 Pittsb. Rep. 494, holding that demand upon and refusal by executor to deliver up specific article which came to his hands lawfully will not sustain trover against him as executor; Chaplin v. Barrett, 12 Rich. L. 284, 75 Am. Dec. 731, holding that trover will not lie against executor for conversion by testator; Frederick v. Gibson, 37 N. B. 126, holding that where one converts and sells goods and dies after writ issued, but before declaration action may be continued against executors; Phillips v. Homfray, L. R. 24 Ch. Div. 439, 52 L. J. Ch. N. S. 833, 49 L. T. N. S. 5, 32 Week. Rep. 6, holding estate of decedent not liable for use of roads or passages under farm of another in conveying coal and iron-stone wrongfully removed from such farm, nor for damage to such farm due to manner of removing the ore; Phillips v. Homfray, L. R. 44 Ch. D. 694, 39 Week. Rep. 45, 59 L. J. Ch. N. S. 547, 62 L. T. N. S. 897, holding action of trover dies with the person.

Distinguished in Parrot v. Dubignon, T. U. P. Charlt. (Ga.) 261, holding trover can be sustained by executor for conversion in lifetime of testator.

— Augmentation of assets of wrongdoer's estate as basis of survival.

Cited in United States v. DeGoer, 38 Fed. 80; United States v. Riley, 104 Fed. 275,—holding that action by United States to enforce value of imported goods because of fraudulent undervaluation abates on death of defendant and cannot be revived against representative; Payne's Appeal, 65 Conn. 397, 33 L.R.A. 418, 48 Am. St. Rep. 215, 32 Atl. 948, holding that cause of action for tort will not survive unless by wrongful act specific property was acquired by which assets in hands of representative are increased; Haldane v. Fisher, 1 Yeates, 121, holding that after recovery in ejectment against tenants, and death of landlord assumpsit will lie against his executors to recover rents received from time plaintiff's title accrued, unless testator had no notice of title; Nettles v. D'Oyley, 2 Brev. 27, holding that where wrong has been done to testator, which operates to prejudice his estate, and lessen assets, right of action survives to personal representative; Burgess v. Gates, 20 Vt. 326, holding that claim for mesne profits after judgment in ejectment does not survive against executor; Southworth v. Kimball, 58 Vt. 337, 2 Atl. 120, holding that bill in equity will not lie against administrator of married woman's estate to recover value of government bond, claimed to have been delivered by mistake to intestate in her lifetime, as there is remedy at law; Peek v. Gurney, L. R. 6 H. L. 377, 43 L. J. Ch. N. S. 19, 22 Week. Rep. 29, 7 Eng. Rul. Cas. 527, holding where estate of decedent derived no benefit from misrepresentation to which he was party, his executors could not be held liable.

— Breach of official duty.

Cited in Witters v. Foster, 23 Blatchf. 457, 26 Fed. 737, holding that under

laws of Vermont action against director of national bank for not requiring bond from cashier, abates by his death and cannot be revived; United States v. Dewey, 39 Fed. 251, holding that cause of action against assignee in bankruptcy for wrongfully paying assets in his hands to other creditors, does not abate on assignee's death; United States v. Daniel, 6 How. 11, 12 L. ed. 323, holding that action on case will not lie against executors of marshal where returns to executions were false in some instances and imperfect in others; Mitchell v. Hotchkiss, 48 Conn. 9, 40 Am. Rep. 146, holding that action brought upon liability of corporate officer for failure to file annual report does not survive death of officer; Cravath v. Plympton, 13 Mass. 454, holding that action against deputy sheriff for nonfeasance does not survive against his executors or administrators; Bank of California v. Collins, 5 Hun, 209, holding that action given by statute against trustees of corporation for failure to file report does not survive against executor of trustee; People v. Gibbs, 9 Wend. 29, holding that action will not lie against executors of sheriff for default of his deputy in returning process for omission to return which action is given by statute; Moies v. Sprague, 9 R. I. 541, holding that liability incurred by officer of manufacturing corporation under sections 2, 3 and 13 of chapter 128 of Revised Statutes, is tort and does not survive.

Distinguished in Dayton v. Lynes, 30 Conn. 351, holding action maintainable against administrator of sheriff for tort of deputy in neglecting to keep possession of attached property.

Criticized in Neal v. Haygood, 1 Ga. 514, holding action of debt against sheriff for escape out of final process survived against his representative under statute.

— Actions for personal injuries.

Cited in Fulgham v. Midland Valley R. Co. 167 Fed. 660, holding that railroad employer's liability act of 1908, employee's right of action for injury does not survive his death; Ward v. Blackwood, 41 Ark. 295, 48 Am. Rep. 41, holding that under statute representative of decedent may sue for injury to his person, but statute does not apply to torts which do not directly affect person, but only feelings or reputation; Stanley v. Vogel, 9 Mo. App. 98, holding that actions for personal injuries do not survive death of party through whose negligence injury is caused; Wolf v. Wall, 40 Ohio St. 111, holding that at common law action for injury to person by lack of skill of surgeon did not survive death of contract; Connolly v. Shives, 18 N. B. 606, holding that action for injury caused by defendant's breach of contract to furnish plaintiff safe place to work, survived against defendant; Cameron v. Milloy, 22 U. C. C. P. 331, holding that action against owner of steamer for injury to passenger in consequence of negligence of such owner, died with defendant.

— Actions for penalties.

Cited in Jones v. Van Zandt, 4 McLean, 604, Fed. Cas. No. 7,504, holding that action for penalty abates on death of defendant; Diversey v. Smith, 103 Ill. 378, holding that action to recover for statutory penalty does not survive death of defendant; The Governor v. McManus, 11 Humph. 152, holding that action for penalty for failure to make report as required by statute will not lie against executor of person so failing to make report.

— Actions for fraud.

Cited in Baker v. Crandall, 78 Mo. 584, 47 Am. Rep. 126, holding that right to maintain action for deceit survives to legal representatives of party injured, both under statute and at common law; Lamphere v. Hall, 26 How. Pr. 509, holding that cause of action for fraud in false reading of summons served in justice's court, by means of which judgment was obtained by default, is not assignable;

Hamilton Provident & Loan Soc. v. Cornell, 4 Ont. Rep. 623, holding that in absence of fiduciary relationship no recovery can be had against representative of deceased person who is charged with fraud unless profit accrued to his estate.

Survivable causes of action on contract.

Cited in Johnson v. Watkins, 40 Fed. 188, holding that liability of stockholder to contribute towards debts of company paid by other stockholders survives him: Diversey v. Smith, 9 Ill. App. 437, holding no action lies against the executor of a decedent to enforce the personal liability of the latter as a stockholder in an insurance company; Field v. Milburn, 9 Mo. 492, holding that right of action for work and labor done for decedent as his wife under void marriage induced by decedent, survived against administrator; Lawson v. Lawson, 16 Gratt. 230, 80 Am. Dec. 702, holding action of assumpsit maintainable by executor to recover from defendant money counted out to defendant by plaintiff's testator.

Rights and liabilities of representatives under contracts of decedent.

Cited in Arkansas Valley Smelting Co. v. Belden Min. Co. 127 U. S. 379, 32 L. ed. 246, 8 Sup. Ct. Rep. 1308, on rights and liabilities of executors and administrators under contracts of decedent; Bickford v. Daniels, 2 N. H. 71, holding money due on mortgages belongs in first instance to representatives of mortgagee, not to heirs.

Waiver of tort and suit in assumpsit.

Cited in Tome v. Dubois, 6 Wall. 548, 18 L. ed. 943, holding that owner of personal property way waive tort in converting it by another so as to pass good title to property; Plummer v. Webb, 4 Mason, 380, Fed. Cas. No. 11,233, holding that tort may be waived, and action, as ex contractu, maintained for child's services, in case of tortious abduction of minor; Philadelphia Loan Co. v. Towner, 13 Conn. 249, holding in some cases where goods have been illegally taken from owner and sold, he may waive tort and bring assumpsit; Rhodes & Son Furniture Co. v. Jenkins, 2 Ga. App. 475, 58 S. E. 897, holding that if one wrongfully obtains money of another, tort may be waived and suit brought for money had and received; Horne v. Mandelbaum, 13 Ill. App. 607, holding that where injury to child is result of culpable negligence, action must be in form ex delicto, and neither assumpsit or debt will lie; Stockett v. Watkins, 2 Gill & J. 326, 20 Am. Dec. 438, holding that where one gets possession of chattels tortiously, and converts them into money, real owner may waive tort and sue in assumpsit for proceeds; Cummings v. Noyes, 10 Mass. 433, holding assumpsit maintainable to recover mesne profits from defendant who entered under judgment in his favor afterwards reversed; Perkins v. Dunlap, 5 Me. 268, to the point that person may be held accountable in damages, on implied contract, in cases of tort arising from contract: Perry v. Lewis, 49 Miss. 449, holding that when goods have been tortiously taken and converted by sale, owner may affirm sale and sue for proceeds in assumpsit: Hill v. Davis, 3 N. H. 384, holding that tort in taking and converting goods of another may be waived by latter and action in assumpsit brought for price; Jenkins v. French, 58 N. H. 532, holding that assumpsit cannot be maintained against administrator to recover damages arising from unskilful treatment of patient of deceased physician; Schroeppel v. Corning, 6 N. Y. 107 (dissenting opinion), on waiver of tort for conversion of goods and bringing assumpsit as giving rise to new cause of action: Osborn v. Bell, 5 Denis, 370, 49 Am. Dec. 275, holding person whose goods are wrongfully taken by public officer may waive tort and maintain assumpsit; Doedt v. Wiswall, 15 How. Pr. 128, holding that, under statute, action against carrier of passengers, for death of passenger may be brought on contract, tort being waived; Stanton v. Philadelphia & R. R. Co. 236

Pa. 419, 84 Atl. 832, to the point that where there is gain to tort feasor, suit may be in quasi-contract, but where wrong results in no such profit, remedy is in tort only; Centre Turnp. Co. v. Smith, 12 Vt. 212, to the point that person who takes property of another and converts it into money may be sued in assumpsit; Doyle v. Taylor, 2 N. B. 325, to the point that when party has converted goods action for money had and received may be brought against him; McCulley v. Ward, 10 N. B. 505, holding that right to waive tort and bring action ex contractu applies only to actions for money had and received; Flewelling v. Lawrence, 21 N. B. 529, to the point that right to change cause of action for tort into action of contract extends only to action for money had and received; Foster v. Bates, 2 E. R. C. 129, 13 L. J. Exch. N. S. 88, 12 Mees. & W. 226, holding that administrator may waive tort in conversion of goods and bring action of assumpsit for goods sold and delivered.

Distinguished in Hutton v. Wetherald, 5 Harr. (Del.) 38, where evidence contradicted any contract; Jones v. Hoar, 5 Pick. 285, where there was no contract express or emplied between parties; Robinson v. Clarke, Smith (N. H.) 147, holding that action for money had and received does not lie to recover back money paid under judgment for costs which ought not to have been taxed and which were allowed in consequence of false certificate of creditor.

Retention of benefits of another's wrong as basis of liability.

Cited 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 estoppel may account for master's liability because he has retained benefit of servant's wrong as in some cases of fraud and conversion.

Actions in tort.

Cited in Bank of Orange v. Brown, 3 Wend. 158, holding that action solely upon custom against carrier is action in tort.

2 E. R. C. 18, ASHBURNER v. MACGUIRE, 2 Bro. Ch. 108.

When legacy is specific and when adeemed.

Cited in Myers Ex'r's v. Myers, 33 Ala. 85, holding legacy of part of testator's slaves specific; Lang v. Vaughn, 137 Ga. 671, 40 L.R.A.(N.S.) 542, 74 S. E. 270, Ann. Cas. 1913B, 52, holding that where testator conveys to another property specifically devested, devise is adeemed, and such result cannot be obviated by extrinsic evidence; Doughty v. Stillwell, 1 Bradf. 300, holding specific legacy is not always destroyed by change of form in its substance; Re Hastings, 6 Dem. 307, on distinction between general and specific legacies; Beck v. McGillis, 9 Barb. 35, holding if specific legacy does not exist at death of testator, it is adeemed, and rule prevails without regard to intention of testator; Cascaden's Estate, 8 Phila. 582, 28 Phila. Leg. Int. 157, holding that legacy is general when it does not amount to bequest of money or any particular thing distinguished from all others of same kind; Pleasant's Appeal, 77 Pa. 356, 32 Phila. Leg. Int. 189, 7 Phila. Leg. Gaz. 204, 2 W. N. C. 24, holding where devise of slaves was specific and conversion thereof into money took place in lifetime of testator, money received as substitute could not be held by devisees; Gilbreath v. Winter, 10 Ohio, 64, holding gift of "all money" to be recovered from a specified source is specific and subject to ademption; Pell v. Ball, Speers, Eq. 48, as to whether changes through which property passed after execution of will constituted an ademption; Warren v. Wigfall, 3 Desauss, Eq. (S. C.) 47, as to whether bequest to testator's wife of all she brought him, with certain exceptions, was specific; Cogdell v. Widow, 3 Desauss, Eq. 346, on specific legacies and ademption; Lee v. Cabell,

19 Gratt. 758, holding there is no ademption where subject of bequest is changed in name and form only and is in existence substantially the same; Hood v. Haden, 82 Va. 588, holding if identical thing bequeathed is not in existence, or has been disposed of so that it does not form part of testator's estate at time of his death, legacy is extinguished; White v. Beattie, 16 N. C. 87, holding specific legacy is bequest of particular thing, distinguished from all others of same kind; Colville v. Middleton, 3 Beav. 570, 4 Jur. 1197, holding legacies were demonstrative and not specific; Williams v. Hughes, 27 L. J. Ch. N. S. 218, 24 Beav. 474, 6 Week. Rep. 94, 4 Jur. N. S. 42, holding principle is that it must appear distinctly from will that testator intended legatee at all events to have the legacy.

Cited in Smith, Pers. Prop. 248, on ademption.

Cited in notes in 40 L.R.A.(N.S.) 544, on disposal, loss, or destruction, or payment of debt, as ademption of specific legacy or devise; 140 Am. St. Rep. 582, on meaning of, and distinction between specific demonstrative and general bequests.

— Gifts of "shares of stock" or like things.

Referred to as leading case in Shethar v. Sherman, 65 How. Pr. 9, holding gifts of shares of stock not specific where testator did not give certain number of shares as such, but word "dollars" was uniformly used.

Cited in Ives v. Canby, 48 Fed. 718, holding that bequest of $2,000 of "South Ward Loan of Chester, Pennsylvania" by person owning $10,000 worth of bonds known by that name, is demonstrative and not specific legacy; Gilmer v. Gilmer, 42 Ala. 9, holding that bequest of specified amount of bonds which testator held is specific legacy; Nusly v. Curtis, 36 Colo. 464, 7 L.R.A.(N.S.) 592, 118 Am. St. Rep. 113, 85 Pac. 846, 10 Ann. Cas. 1134, holding gift of money to become due on insurance policy is specific; New Albany Trust Co. v. Powell, 29 Ind. App. 494, 64 N. E. 640, holding bequest of certain number of shares of stock is specific and is adeemed pro tanto by testator's alienation of part of shares during his lifetime; Sparks v. Weedon, 21 Md. 156, holding bank stock, bills obligatory, and chest and contents were all specific legacies; Kunkel v. Macgill, 56 Md. 120, holding that legacy of certain amount of railroad bonds worth less than their face value was specific; White v. Winchester, 23 Mass. 48, holding gift of income of certain amount of stock by testator owning just such amount is specific, and adeemed pro tanto by testator's sale of part of such stock; Re Worthington, 39 Mass. 299, holding where testator bequeathed all his stock in certain bank to his wife, being then owner of certain number of shares, and afterwards bought additional shares, that bequest was of shares owned by him at time of bequest: Proctor v. Robinson, 35 Mich. 284, holding that bequest of note and mortgage is specific and title vests in legatee at testator's death; Abernethy v. Catlin, 2 Dem. 341, holding legacy of mortgage adeemed by payment of amount thereof to testator; Walton v. Walton, 7 Johns. Ch. 258, holding bequest of testator's interest in corporate stock was specific: also that legacy was pro tanto adeemed by payment of dividends to testator after corporation's charter expired; also that legacy of stock was not adeemed by change in number of shares and vesting of company's property in state; Noon's Estate, 49 Or. 286, 88 Pac. 673, as to when gift of stock is specific; Keeple's Estate, 19 Pa. Dist. R. 627, holding that bequest of all my shares of stock in "South West Railway Company" is specific and adeemed by subsequent sale; Pruner's Estate, 222 Pa. 179, 40 L.R.A.(N.S.) 561, 70 Atl. 1000, holding that provision after bequest of life insurance policy which testator holds on another's life as security that legatee "pay premiums on same till they mature" does not destroy specific character of legacy; Re Tillinghast, 23 R. I. 121, 49 Atl. 634, holding mortgages not adeemed by testatrix's transferring them over

to her own name; Ludlam's Estate, 3 Clark (Pa.) 332, 1 Pars. Sel. Eq. Cas. 116, holding gift of stock "standing in 'my' name on books of loan office, as per certificate No. ——" was specific; Hoke v. Herman, 21 Pa. 301, holding specific legacy of note to its maker adeemed pro tanto by part payment thereon after testator became insane; Re Wible, 12 Pittsb. L. J. N. S. 396, holding that bequest of proceeds of of "movable" property and "stock" directed to be sold, is specific; Hood v. Haden, 82 Va. 588, holding that legacies are specific when testator intends legatee to have identical thing bequeathed,—such as "Five thousand dollars of my Virginia registered state bonds;" Re Logan Trusts, 4 Manitoba L. Rep. 22, holding legacy of so much money out of stock is demonstrative and not specific legacy; Archer v. Severn, 14 Ont. App. 723, holding that bequest cancelling and releasing to legatee mortgage executed by latter, was not specific bequest.

Cited in note in 11 L.R.A.(N.S.) 59, 61, 65, 79, 86, on bequest of stocks, bonds, or notes as general or specific.

Criticized in Stout v. Hart, 7 N. J. L. 414, holding bequest of all money due on bond is specific, but is not adeemed by acts of testator in giving up bond and taking others in lieu thereof, and in accepting payments upon the debt.

2 E. R. C. 27, TRIMMER v. BAYNE, 7 Ves. Jr. 508, 6 Revised Rep. 173.

Ademption or satisfaction of legacy by gift subsequent to will.

Cited in Langdon v. Astor's Exr's, 16 N. Y. 9, reversing 3 Duer, 477, holding satisfaction, according to terms of will, is within principle of cases of implied satisfaction; Dawson v. Dawson, L. R. 4 Eq. 504, holding direction to pay debts and legacies in previous will has no effect upon subsequent settlement made by bond.

Cited in note in 38 L.R.A.(N.S.) 590, 592, 593, on gift by testator as ademption of general legacy to donee.

Distinguished in Arthur v. Arthur, 10 Barb. 9, holding doctrine of satisfaction inapplicable to devise or bequest of residue; Strother v. Mitchell, 80 Va. 149, where it did not appear when advancement was made if at all; Brunn v. Schuett, 59 Wis. 260, 48 Am. Rep. 499, 18 N. W. 260, where release of note and mortgage given by legatee was executed by testator prior to making of will; Pym v. Lockyer, 108 L. J. Ch. N. S. 153, 5 Myl. & E. 29, 5 Jur. 620, holding provision by will is not entirely, but only pro tanto, adeemed by advancement to beneficiary of portion less than provision by will.

Criticized in Leighton v. Leighton, L. R. 18 Eq. 458, 43 L. J. Ch. N. S. 594, 22 Week. Rep. 727, holding that to raise presumption of ademption it is only necessary to show that testator, having given legacy of certain amount, afterwards gave legatee a sum of money.

— Differences between will and gift.

Cited in Hine v. Hine, 39 Barb. 507, holding when legacy is given for particular purpose specified in will, and testator, during his life, accomplishes same purpose, or furnishes intended legatee and beneficiary with money for that purpose, legacy is satisfied, though advancement differ from provisions of will; Magee v. Magee, 67 Barb. 487, holding if provisions of covenant and of will by which it is satisfied are substantially the same, trifling differences will not vary application of rule; Stevenson v. Masson, L. R. 17 Eq. 78, 43 L. J. Ch. N. S. 134, 22 Week. Rep. 150, 29 L. T. N. S. 666, holding distinction between gift by will and trusts created by settlement not sufficiently substantial to prevent ademption; Durham v. Wharton, 3 Clark & F. 146, 10 Bligh, N. R. 526, 3 Myl. & K. 698, 6 L. J. Ch. N. S. 15, 2 Eng. Rul. Cas. 38, holding principle of satisfaction unaffected by difference between

limitations in will and those in settlement; Monck v. Monck, 1 Ball & B. 298, 12 Revised Rep. 33, holding variance between provision by settlement and will is circumstance not available to prove it is not satisfaction of legacy given as provision.

— What constitutes portion.

Cited in Pym v. Lockyer, 10 L. J. Ch. N. S. 153, 5 Myl. & C. 29, 5 Jur. 620, holding sums settled as nearly as possible in same way provided by will were portions.

— Advancement to child.

Cited in Jones v. Mason, 5 Rand. (Va.) 577, 16 Am. Dec. 761; Hansbrough v. Hooe, 12 Leigh, 316, 37 Am. Dec. 659,—holding where parent or person in loco parentis, gives legacy as portion, and afterwards, upon occasion calling for it, advances in nature of portion to that child, it will amount to an ademption of the gift by will; Moore v. Hilton, 12 Leigh, 1, on satisfaction pro toto or pro tanto by advancement made to child subsequent to will; Cooper v. MacDonald, L. R. 16 Eq. 258, 42 L. J. Ch. N. S. 533, 28 L. T. N. S. 693, holding when question is as to effect of subsequent covenant to pay money for benefit of child, such effect cannot be influenced by presence or absence, in will of any mere general provision for payment of testator's debts.

Cited in 2 Beach, Trusts, 1532, on advancement by portion; 2 Thomas, Estates, 1544, on what constitutes an advancement.

Admissibility of parol evidence concerning intention.

Cited in Reynolds v. Robinson, 82 N. Y. 103, 37 Am. Rep. 555, on admissibility of parol evidence.

Cited in 1 Beach, Trust, 238, on admissibility of parol evidence to show intention; 2 Thomas, Estates, 1474, on extrinsic evidence as to testator's intent in bequest to creditor.

— Concerning intention of testator as to ademption or satisfaction.

Cited in May v. May, 28 Ala. 141, holding parol testimony admissible to show testator did not intend by subsequent provision to satisfy that previously made in his will; Rogers v. French, 19 Ga. 316, holding presumed ademption may be destroyed or confirmed by application of parol evidence of different intention by testator; Gill's Estate, 1 Pars. Sel. Eq. Cas. 139, holding presumed ademption of legacy may be destroyed or confirmed by application of parol evidence of different intention by testator; Arthur v. Arthur, 10 Barb. 9, holding parol evidence admissible to rebut or corroborate presumption of satisfaction; Jones v. Mason, 5 Rand. (Va.) 577, 16 Am. Dec. 761, holding evidence of declarations of testator admissible to rebut presumption of satisfaction of legacy, if facts without regard to such declarations, raise the presumptions; Tuckett-Lawry v. Lamoureaux, 1 Ont. L. Rep. 364, holding evidence of declarations of, and facts showing intention of testator as to ademption of legacy admissible; Powys v. Mansfield, 7 L. J. Ch. N. S. 9, 3 Myl. & C. 359, 1 Jur. 861, holding evidence adduced to prove uncle had placed himself in loco parentis to nicce admissible and sufficient to establish the point, that presumption against double portions, therefore, arose, and was not repelled by evidence adduced by plaintiff; Hall v. Hill, 1 Drury & War. 94, 1 Connor & L. 120, 4 Ir. Eq. Rep. 27, holding parol evidence admissible to rebut general presumption against double portions; Griffith v. Bourke, Ir. L. R. 21 Eq. 92, holding parol declarations whether contemporaneous or subsequent admissible to show character of act relied on as ademption; Kirk v. Eddowes, 2 E. R. C. 264, 13 L. J. Ch. N. S. 402, 3 Hare, 509, holding that parol evidence cannot be used for pur-

pose of raising presumption of intention, but only to assist presumption where law has raised it.

Cited in note in 2 Eng. Rul. Cas. 271, on parol evidence to prove satisfaction of legacy by advancement.

2 E. R. C. 38, DURHAM v. WHARTON, 3 Clark & F. 146, 6 L. J. Ch. N. S. 15, 10 Bligh, N. R. 526, reversing the decision of the Lord Chancellor or reported in 3 Myl. & K. 472, which affirms the decision of the Vice Chancellor reported in 5 Sim. 297.

Doctrines of ademption and satisfaction.

Cited in Miner v. Atherton, 35 Pa. 528, holding legacy adeemed by advancement of portion to child; Leighton v. Leighton, L. R. 18 Eq. 458, 43 L. J. Ch. N. S. 594, 22 Week. Rep. 727, on satisfaction of legacy by advancement of portion; Dawson v. Dawson, L. R. 4 Eq. 504, on taking away of legacy by subsequent engagement, with respect to portions.

Cited in note in 38 L.R.A.(N.S.) 592, on gift by testator as ademption of general legacy to donee.

The decision of the Lord Chancellor was cited in Roberts v. Weatherford, 10 Ala. 72, holding giving marriage portion by deed ademption of prior legacy where such the intention.

— Ademptive disposal different from testamentary.

Cited in Tuckett-Lawry v. Lamoureaux, 3 Ont. L. Rep. 577, holding circumstance that limitations of portions differ is not sufficient to prevent application of principle of ademption; Chichester v. Coventry, L. R. 2 H. L. 71, holding that in cases of satisfaction persons intended to be benefited by covenant, and persons intended to be benefited by bequest or devise must be the same, while in cases of ademption, they may be different.

2 E. R. C. 49, RE POLLOCK, L. R. 28 Ch. Div. 552, 52 L. T. N. S. 718, 54 L. J. Ch. N. S. 489.

Ademption of legacy given for particular purpose.

Cited in Re Smythie [1903] 1 Ch. 259, 72 L. J. Ch. N. S. 216, 87 L. T. N. S. 742, 51 Week. Rep. 284, holding legacy to A. in trust for B. is not adeemed by subsequent settlement.

Cited in note in 38 L.R.A.(N.S.) 590, 594, on gift by testator as ademption of general legacy to donee.

Distinguished in Re Fletcher, L. R. 38 Ch. Div. 373, 57 L. J. Ch. N. S. 1032, 59 L. T. N. S. 313, 36 Week. Rep. 841, where presumption of ademption arose from circumstances.

Admissibility of parol evidence as to ademption.

Cited in Tuckett-Lawry v. Lamoureaux, 1 Ont. L. Rep. 364, holding evidence of declarations of, and facts showing intention of, testator as to ademption admissible; Griffith v. Bourke, Ir. L. R. 21 Eq. 92, holding parol declarations of testator, contemporaneous or subsequent, admissible to show character of act relied on as an ademption.

2 E. R. C. 57, ENOCHIN v. WYLIE, 10 H. L. Cas. 1, 8 Jur. N. S. 897, 31 L. J. Ch. N. S. 402, 6 L. T. N. S. 263, 10 Week. Rep. 467, affirming the decree of the Lords Justices reported in 1 De G. F. & J. 410, 6 Jur. N. S. 259, 29 L. J. Ch. N. S. 341, 8 Week. Rep. 316, which affirmed the decree of the Probate Court reported in 1 Swabey & T. 118.

Conflict of laws governing succession and administration of decedent's property.

Cited in Columbia National Land Dredging Co. v. Morton, 28 App. D. C. 288, 7 L.R.A.(N.S.) 114, 8 Ann. Cas. 511, on construction of foreign will and administration of testator's assets; Jacobs v. Whitney, 205 Mass. 477, 91 N. E. 1009, 18 Ann. Cas. 576, holding that construction and effect given to will of personalty by courts of testator's domicil are everywhere recognized as binding; Shannon v. White, 109 Mass. 146, holding rights of succession in or allowance out of personal property of decedent must be regulated by laws of his domicil; Sewall v. Wilmer, 132 Mass. 131, holding as to personal property construction and effect of will, are governed by law of testator's domicil; Richardson v. Lewis, 21 Mo. App. 531, holding succession of personal property of deceased person is governed by law of his actual domicil at time of his death; Babcock v. Collins, 60 Minn. 73, 51 Am. St. Rep. 503, 61 N. W. 1020, holding except where there are paramount local rights, such as those of local creditors, law of foreign domicil controls in disposition of personal property; Ford v. Ford, 70 Wis. 19, 5 Am. St. Rep. 117, 33 N. W. 188, holding validity of bequest or disposition of personal property by last will and testament must be governed by law of testator's domicil at time of his death; Knights Templars & M. Mut. Aid Asso. v. Greene, 79 Fed. 461, on construction of word "heirs" in will according to law of testator's domicil; Re Jones, 20 Ont. L. Rep. 465, to the point that administration of personal estate belongs to court of country where deceased was domiciled at his death; Abd-Ul-Messih v. Farra, L. R. 13 App. Cas. 431, 57 L. J. P. C. N. S. 88, 59 L. T. N. S. 106, 5 Eng. Rul. Cas. 772, holding law of testator's domicil must govern in all questions arising as to his testacy or intestacy, or as to rights of persons who claim his succession ab intestato; Re Hawthorne, L. R. 23 Ch. Div. 743, 52 L. J. Ch. N. S. 750, 48 L. T. N. S. 701, 32 Week. Rep. 147, on construction of foreign will and administration of testator's estate; Bloxam v. Favre, L. R. 8 Prob. Div. 101, 52 L. J. Prob. 42, 31 Week. Rep. 610, holding validity of will is determined according to law of testator's domicil at time of his death.

Cited in notes in 2 L.R.A.(N.S.) 445, on conflict of laws as to wills; 2 Eng. Rul. Cas. 89, on law governing succession and administration; 2 Eng. Rul. Cas. 89, on law governing succession and administration; 5 E. R. C. 782, on law governing testamentary capacity and rights of succession to personalty; 12 E. R. C. 9, on derivation of executor's title from will.

— Jurisdiction.

Cited in Pratt v. Douglass, 38 N. J. Eq. 516, holding parties who might insist upon jurisdiction of courts of domicil over the subject, may by their conduct, give foreign court jurisdiction to construe will and make administration upon testator's property; Hutton v. Hutton, 40 N. J. Eq. 461, 2 Atl. 280, holding court of domicil is forum to which legatees under will, or parties entitled to distribution of estate of an intestate are required to resort; Re Seixas, 73 Misc. 488, 133 N. Y. Supp. 406, holding that holographic will made in this state by nonresident is valid as to personal property here when executed in accordance with law of state of residence; Concha v. Concha, L. R. 11 App. Cas. 541, 56 L. J. Ch. N. S. 257, 55 L. T. N. S. 522, 35 Week. Rep. 477, 11 Eng. Rul. Cas. 22, holding succession of

personal property is administered by court of England according to English law, and is administered by ascertaining domicil and law of domicil ascertainment being made by court of distribution.

Disapproved in Re Ewing, L. R. 22 Ch. Div. 456, L. R. 9 App. Cas. 34, 53 L. J. Ch. N. S. 435, 50 L. T. N. S. 401, 32 Week. Rep. 573, denying that it is the rule that courts of that country only in which testator dies domiciled can administer his personal estate.

— As to what is domiciliary and what ancillary.

Cited in Hopkins's Appeal, 77 Conn. 644, 60 Atl. 657, holding every administration granted in another state, not based upon adjudicated fact of decedent's domicile in that state but solely on accidental situation of some personal property, as administration ancillary to administration of domicile; Stirling-Maxwell v. Cartwright, L. R. 11 Ch. Div. 522, 48 L. J. Ch. N. S. 562, 40 L. T. N. S. 669, 27 Week. Rep. 850, holding where general probate of will of domiciled scotchman was granted in England, decree for administration of personalty would be given without limiting it to assets in England.

— Effect of domiciliary decrees and acts.

Cited in Curtis v. Smith, 6 Blatchf. 537, Fed. Cas. No. 3,505, holding judge of probate court is authorized to accept as proof of due execution and validity of will, an exemplified copy of same, with foreign probate thereof in domicile of testator; Re Medbury, 11 Ont. L. Rep. 429, holding court ought to follow grant of administration de bonis non made by court of jurisdiction wherein testatrix died domiciled; Miller v. James, L. R. 3 Prob. & Div. 4, 42 L. J. Prob. N. S. 21, 27 L. T. N. S. 862, 21 Week. Rep. 272, holding where court of testator's domicile at time of death has granted probate of his will, its validity cannot be attached in another jurisdiction; Re Trufort, L. R. 36 Ch. Div. 600, 57 L. J. Ch. N. S. 135, 57 L. T. N. S. 674, 36 Week. Rep. 163, holding where title to estate of deceased person domiciled abroad has been adjudicated upon by courts of the domicile such adjudication is binding upon courts of England.

Cited in notes in 27 L.R.A. 117, on judgments of another state or country rendered against an executor or administrator; 5 E. R. C. 744, on conclusiveness and enforceability of judgment of foreign court having jurisdiction.

Disapproved in Ewing v. Ewing, L. R. 10 App. Cas. 453, 53 L. T. N. S. 826, holding that after succession to the moveable estate has been determined by recourse to law of testator's or intestate's domicile, rights resulting therefrom belong to, and follow person of living successor, and not the dead predecessor; also explaining use of word "administration" in cited case, with reference to regulation of right to administer property by situs thereof.

— Person entitled to administer.

Cited in Re Cook, 2 Sask. L. R. 333, holding that when intestate dies ex juris leaving property in juris, court should grant administration to person clothed by court of country of domicile with power of administering estate; Re Earl, L. R. 1 Prob. & Div. 450, 36 L. J. Prob. N. S. 127, 16 L. T. N. S. 799, holding grant of administration should be to person who has been clothed by court of domicile of deceased with power to administer his estate; Eames v. Hacon, L. R. 16 Ch. Div. 407, holding legal personal representative constituted by forum of domicile of deceased is entitled to receive latter's personal estate.

Regulation of rights in personalty according to law of owner's domicile.

Cited in Ex parte Chale, L. R. 24 Q. B. Div. 640, 59 L. J. Q. B. N. S. 254, 62 L. T. N. S. 781, on limiting bankruptcy proceedings to single proceeding had in bankrupt's domicile.

Effect of restrictive words upon testamentary disposition of corpus of estate.

Cited in Williams v. Brice, 201 Pa. 595, 51 Atl. 376 (affirming 10 Pa. Dist. R. 721), on construction of will; Re Holden, 5 Ont. L. Rep. 156, holding that request of all stock in trade "now" in house etc., did not limit gift to such as existed at date of will.

Distinguished in Travers v. Blundell, L. R. 6 Ch. Div. 436, 36 L. T. N. S. 341, where language referring to corpus of an estate was followed by defective enumeration of its constituent parts; King v. George, L. R. 4 Ch. Div. 435, where question was whether general gift should be cut down by defective enumeration.

Appearance of foreign government in court.

The decision of the Lords Justices was distinguished in Larivière v. Morgan, L. R. 7 Ch. 550, 41 L. J. Ch. N. S. 746, 26 L. T. N. S. 859, 20 Week. Rep. 731, where foreign government did not appear.

2 E. R. C. 78, PRESTON v. MELVILLE, 8 Clark & F. 1.

Conflict of laws.

Cited in Ex parte Melbourn, 8 E. R. C. 653, L. R. 6 Ch. 64, 40 L. J. Bankr. N. S. 25, 23 L. T. N. S. 578, 19 Week. Rep. 83, holding that question of priority between creditors of bankrupt must be decided according to law of court where concourse of creditors takes place.

— As to administration of estates.

Cited in Banta v. Moore, 15 N. J. Eq. 97, holding right of administration is irrespective of domicil of intestate; Isham v. Gibbons, 1 Bradf. 69, holding that situs of property regulates jurisdiction as to administration of estate of decedent; Dent's Appeal, 22 Pa. 514, holding administration of estate must be in country in which possession of it is taken under lawful authority; Grant v. Great Western R. Co. 7 U. C. C. P. 438, on grant of administration of personal estate of nonresident; Enohin v. Wylie, 31 L. J. Ch. N. S. 402, 10 H. L. Cas. 1, 8 Jur. N. S. 897, 6 L. T. N. S. 263, 10 Week. Rep. 467, 2 Eng. Rul. Cas. 57, holding in performance of duty of administration court will be guided by law of testator's domicil; Blackwood v. R. L. R. 8 App. Cas. 82, 52 L. J. P. C. N. S. 10, 48 L. T. N. S. 441, 31 Week. Rep. 645, holding that for purpose of legal representation of collection, and of administration, as distinguished from distribution among successors, personal assets are governed by law of their own locality; Ewing v. Ewing, 10 App. Cas. 499, 53 L. T. N. S. 826, 53 L. J. Ch. N. S. 435, on grant of probate or letters of administration by forum rei sitæ.

Cited in notes in 2 E. R. C. 89, on law governing succession and administration; 2 E. R. C. 97, on grant of administration to agent under power of attorney by person abroad.

Distinguished in Lamar v. Micou, 114 U. S. 218, 29 L. ed. 94, 5 Sup. Ct. Rep. 857, holding investment of ward's estate is governed by law of ward's domicile.

— Rights between domiciliary and ancillary representatives.

Cited in Moses v. Hart's Adm'r, 25 Gratt. 795, holding question whether distribution should be made by ancillary administrator should depend upon circumstances of each case; Re Thorp, 15 Grant, Ch. (U. C.) 7, on want of power of original administrator to discharge debt of debtor in another jurisdiction; Shaver v. Gray, 18 Grant, Ch. (U. C.) 419, on satisfaction of debts of deceased by local representative before transmission of surplus remaining to his domicile; Re Kloebe, 54 L. J. Ch. N. S. 297, L. R. 28 Ch. Div. 175, 52 L. T. N. S. 19, 33

Week. Rep. 391, on requirement that assets be administered in foreign country where legal representative has been constituted, with effect of giving foreign creditors priority as to foreign assets.

Distinguished in Stirling-Maxwell v. Cartwright, L. R. 9 Ch. Div. 173, L. R. 11 Ch. Div. 522, 48 L. J. Ch. 845, 40 L. T. N. S. 669, 27 Week. Rep. 850, holding where grant of letters of administration was general decree for administration of personal estate of testator would not be limited to assets in England; Ewing v. Ewing, L. R. 9 App. Cas. 34, 53 L. J. Ch. N. S. 435, 50 L. T. N. S. 401, 32 Week. Rep. 573, where same trustees got possession of all the property.

— Remission of distributable funds to domicile.

Cited in Yandell v. Elam, 1 Tenn. Ch. 102, holding courts of two different states may secure transfer of funds of an estate from one state to another where person entitled thereto is domiciled; Clanton v. Wright, 2 Tenn. Ch. 342, holding funds of lunatic resident in foreign state transmissible to state of lunatic's residence.

2 E. R. C. 92, NORRIS'S GOODS, 27 L. J. Prob. N. S. 4, 1 Swabey & T. 6, 6 Week. Rep. 261.

2 E. R. C. 95, GOLDBSBOROUGH'S GOODS, 5 Jur. N. S. 417, 1 Swabey & T. 295, 7 Week. Rep. 375.

2 E. R. C. 98, SANDS'S CASE, 3 Salk. 22.

Right of husband to administer upon estate of his deceased wife.

Cited in Re Cleveland, 29 N. B. 70; Randall v. Shrader, 17 Ala. 333,—on reference of right of husband to administer wife's estate to fact that he is next friend of his wife; Barnes v. Underwood, 47 N. Y. 351, holding at common law surviving husband has sole right to administer in preference to next of kin; McCosker v. Golden, 1 Bradf. 64, holding right to administer has always belonged to husband exclusively of all other persons.

Revocation of letters testamentary or grant of administration.

Cited in Morgan v. Dodge, 44 N. H. 255, 82 Am. Dec. 213, sustaining power of probate court to revoke letters testamentary independent of statute; Potts v. Smith, 3 Rawle 361, 24 Am. Dec. 359, on want of power of ordinary under statute to revoke administration once granted to widow or next of kin.

Effect of probate of will devising lands at common law.

Cited in Buchanan v. Matlock, 8 Humph. 390, 47 Am. Dec. 622, holding probate of will for land cannot prejudice heir, because it is no evidence at common law, it being as to lands, coram non judice; Dower v. Seeds, 28 W. Va. 113, 57 Am. Rep. 646, holding when will bequeathed chattels, though it also devised lands ecclesiastical courts were not prohibited from probating it entire, as such probate did not prejudice heirs.

2 E. R. C. 104, FIELDER v. HANGER, 3 Hagg. Eccl. Rep. 769.

As to who is entitled to administer.

Cited in Re Degnan, 75 N. J. Eq. 197, 71 Atl. 668, holding that husband of married woman dying intestate is entitled to administration upon her estate, but if he be dead then grant of letters must be to next of kin.

2 E. R. C. 107, MERCER v. MORLAND, 2 Lee Eccl. Rep. 499.

Right of administration as between whole and half-blood.

Distinguished in Single's Appeal, 59 Pa. 55, holding males of half blood entitled to administration as against females of whole blood under statute.

2 E. R. C. 110, SAVAGE v. BLYTHE, 2 Hagg. Eccl. Rep. Appx. 150.

Administration by next of kin or person having beneficial interest.

Cited in Public Administration v. Peters, 1 Bradf. 100, holding right to administer under statute of 21 Henry VIII. has been considered to extend only to those who are next of kin at time of intestate's death and entitled to beneficial interest in the estate; Cooper v. Cooper, 43 Ind. App. 620, 88 N. E. 341, holding that those who have beneficial interest in estate of intestate are ordinarily preferred in making appointments of administrators; Lathrop v. Smith, 24 N. Y. 417, (dissenting opinion), on right of next of kin at time of death to administer on estate under statute; Stellarton v. Acadia Coal Co. 31 N. S. 261, holding that surviving administrator to whom deceased administrator owed sum of money was entitled to administration de bonis non, as to assets omitted from inventory; Re Cunningham, 31 N. S. 264, on grant of administration de bonis non.

Cited in note in 12 E. R. C. 11, on necessity of taking out administration de bonis non when chain of representation is broken.

Distinguished in Griffith v. Coleman, 61 Md. 250, where law of state gave administrator no beneficial interest in personal property of intestate.

2 E. R. C. 117, R. v. BETTESWORTH, Smith's Case, 2 Strange, 892.

When mandamus will lie.

Cited in State v. Bruce, 3 Brev. 264, 6 Am. Dec. 576, holding that mandamus will not lie to compel manager of election of sheriff to return candidate duly elected after they have already certified to governor that election was void.

2 E. R. C. 119, EX PARTE EVELYN, 2 Myl. & K. 3.

Administration during infirmity of body or mind.

Cited in Corrigal v. Henry, 2 Grant, Ch. (U. C.) 310, holding spiritual courts have power to grant administrations "durante corporis aut animi vitio."

Action in lunatic's case by court without commission of lunacy.

Cited in Post v. Mackall, 3 Bland, Ch. 486, holding where expense of commission could only be paid out of fund already deficient, court will act upon fact of lunatic's mental incapacity as fully as if he had been found to be non compos mentis by regular inquisition.

2 E. R. C. 121, CLARE & HODGE'S CASE, cited in 1 Lutw. 342.

Who may be appointed as administrator.

Cited in note in 2 E. R. C. 118, on discretion of court as to person to whom grant or administration during minority of person shall be given.

Abatement of action against administrator.

Cited in note in 1 E. R. C. 190, on grounds for abatement.

2 E. R. C. 123, RENDALL v. RENDALL, 1 Hare, 152, 11 L. J. Ch. N. S. 93.

Appointment of receiver to protect property of intestate.

Cited in Re Colvin, 3 Md. Ch. 278, holding that court of chancery has power to protect property of intestate or testator, by appointing receiver, pending liti-

gation in orphan's court for probate or administration; Underground Electric R. Co. v. Owsley, 99 C. C. A. 500, 176 Fed. 26, holding that circuit court of United States has power in suit where it has jurisdiction of parties to appoint receiver of estate pending probate of will; Beatty v. Haldan, 4 Ont. App. 239, holding that administrator pendente lite is amenable to suit in equity.

Cited in High Receiv. 4th ed. 866, on appointment of receiver pending contest in ecclesiastical courts over right to administer estate; High Receiv. 4th ed. 858, on extreme caution in appointment of receivers over executors and administrators on ground of abuse of trust.

2 E. R. C. 129, FOSTER v. BATES, 1 Dowl. & L. 400, 7 Jur. 1093, 13 L. J. Exch. N. S. 88, 12 Mees. & W. 226.

Doctrine of relation in general.

Cited in Low v. Connecticut & P. River R. Co. 45 N. H. 370, holding if services are rendered corporation upon promise of corporators that they shall be paid for when organization is perfected, and thereafter corporation adopts contract, promise to pay will be implied; Tilt v. Jarvis, 5 U. C. C. P. 486, holding neither sheriff nor execution creditors, to whom surplus remaining from prior execution sale was paid, could be held trespassers by reason of anything shown to have been done under attachment not issued at such creditors' instance.

Relation back of title and powers of personal representative.

Referred to as leading case, in Holcomb v. Roberts, 57 Pa. 493, 25 Phila. Leg. Int. 285, holding administratrix may recover for breach of contract made with her intestate committed after latter's death and prior to grant of letters of administration.

Cited in Dempsey v. McNabb, 73 Md. 433, 21 Atl. 378, holding doctrine of relation applicable to grant of letters of administration; Hatch v. Proctor, 102 Mass. 351, holding personal estate of deceased intestate, when administrator is appointed, vests in him by relation from time of the death; Stanley v. Gaylord, 1 Cush. 536, 48 Am. Dec. 643, on rights of administrator before administration granted; Woodruff v. Mutschler, 34 N. J. Eq. 33, annulling cancelation of mortgage by next of kin at suit of administrator appointed after the cancelation; Rockwell v. Saunders, 19 Barb. 473, holding that on appointment of administrator personal property of intestate vests in him, by relation, from death of intestate; Brown v. Lewis, 9 R. I. 497, holding it is competent for administrator, after appointment to adopt contract which is for benefit of the estate; United States v. Loughrey, 172 U. S. 206, 43 L. ed. 420, 19 Sup. Ct. Rep. 153 (dissenting opinion), on relation of title of administrator; Christie v. Clarke, 16 U. C. C. P. 544, holding contract made by person before becoming administrator enforceable by such person after being made administrator; Robertson v. Burrill, 22 Ont. App. Rep. 356, holding plaintiff after becoming administrator might take advantage of written admission of indebtedness made by another previously; Beard v. Ketchum, 5 U. C. Q. B. 114; Beard v. Ketchum, 6 U. C. Q. B. 470,—on right of administrator to recover upon debt barred by statute, and afterwards received by express promise made by debtor to stranger before administrator received letters; 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 where person acting as executor de son tort employs an agent, agency relates back from time such person becomes administrator; Re Pryse [1904] P. 301, 73 L. J. Prob. N. S. 84, 90 L. T. N. S. 747, holding administrator may sue for trespass to decedent's realty committed in interval between decedent's death and grant of letters; Baker v. Baker, 55 L.

T. N. S. 723, holding administrator entitled to enforce contract entered into after death of intestate but before grant of administration, whether contract be made by himself or another.

Cited in notes in 12 Eng. Rul. Cas. 134, on relation back of title of administrator; 12 Eng. Rul. Cas. 9, on contract between powers and rights of executor and administrator.

Distinguished in Sinclair v. Dewar, 19 Grant, Ch. (U. C.) 564, holding administrator not bound by power of attorney given by him when he was not administrator; Beard v. Ketchum, 5 U. C. Q. B. 114, where promise to pay certain notes barred by limitation was made to a stranger to the estate before plaintiff received letters of administration.

Ratification of agent's act done as volunteer or without disclosure.

Cited in Hadden v. White, 4 N. B. 634, holding plaintiff might adopt and ratify acts of another though there was no evidence previous authority was given: Durant & Co. v. Robarts & K. M. & Co. [1900] 1 Q. B. 629, 69 L. J. Q. B. N. S. 382, 48 Week. Rep. 476, 82 L. T. N. S. 217, 16 Times L. R. 244, holding it is not necessary that agent avow he is acting for a principal at times of transaction, in order to enable principal to ratify agent's acts; Keighley, M. & Co. v. Durant [1901] A. C. 240, 1 B. R. C. 351, 70 L. J. K. B. N. S. 662, 84 L. T. N. S. 777, 17 Times L. R. 527, holding that a contract made by a person intending to contract on behalf of a third party, but without authority, cannot be ratified by the third party so as to render him able to sue or liable to be sued on the contract where the person who made the contract did not profess at the time of making it to be acting on behalf of a principal; Watson v. Swann, 2 E. R. C. 346, 31 L. J. C. P. N. S. 210, 11 C. B. N. S. 756, holding that contract made by agent without authority, cannot be ratified so as to entitle principal to benefit, unless at time of contract, principal was existing person.

Cited in note in 2 B. R. C. 263, on attempted ratification as conferring right or imposing liability upon one not contemplated by agent as his principal.

Cited in Tiffany Ag. 57, on necessity of agent's designating principal; Reinhard Ag. 95, on necessity for existing principal when act was performed; Reinhard Ag. 91, on acts of assumed agents before incorporation.

Distinguished in Hayden v. Smith, 1 B. C. pt. 2, p. 312, where person was neither agent nor trustee of party seeking to benefit by former's person's acts.

Liability of executor upon implied promise of testator.

Cited in Masson v. Hill, 5 U. C. Q. B. 60, holding executor cannot traverse testator's promise in law.

2 E. R. C. 135, HUDSON v. HUDSON, FORESTER Cas. t. Talb 127.

Survival of power of executor or administrator.

Cited in People ex rel. Eagle v. Keyser, 28 N. Y. 226, 84 Am. Dec. 338, holding that upon death of one or two executors all rights and powers of both vest in his survivor; People v. Byron, 3 Johns. Cas. 53, holding executor may continue trust by transmitting it to his own executor, while an administrator cannot.

Cited in note in 2 E. R. C. 137, on survival of administration on death of one of several administrators.

Power of executor to sue before attaining possession.

Cited in 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, to the point that executors can sue in trover before obtaining actual possession.

2 E. R. C. 137, ANDREW v. WRIGLEY, 4 Bro. Ch. 124.

Power of executor or administrator to mortgage, sell or convey.

Cited in Carter v. Manufacturers' Nat. Bank, 71 Me. 448, 36 Am. Rep. 338, holding executor may mortgage or pledge assets for general purposes of will, in absence of prohibitory provision in will; McLean v. Hime, 27 U. C. C. P. 195, on limits to rule that executor has absolute power of disposition over whole personal estate of testator; Campbell's Case 2 Bland, Ch. 209, 20 Am. Dec. 360, holding law by which devisees were authorized to mortgage real estate of decedent could not affect rights of decedent's creditors.

Notice to purchaser of trust property.

Cited in Graff v. Castleman, 5 Rand. (Va.) 195, 16 Am. Dec. 741; Downman v. Rust, 6 Rand (Va.) 587,—holding trustee cannot alien in payment of his own debt.

— Assets of decedent.

Cited in Rogers v. Fort, 19 Ga. 94, holding whenever executor commits breach of trust, and another person takes advantage of the devastavit, knowing executor is not proceeding according to will, such complicity will authorize those interested in estate to hold purchaser liable; Norfleet v. Southall, 7 N. C. 189, (dissenting opinion), on absence of protection for purchaser from executor with full knowledge money will be misapplied; Saxon v. Barksdale, 4 Desauss. Eq. 522, denying right of executor to sell specific legacy to pay his own debts; Garnett v. Macon, 6 Call. (Va.) 308, 2 Brock 185, Fed. Cas. No. 5,245, drawing analogy between sales of chattel by executor in breach of his trust and sale of freehold estates charged with payment of debts; Davis v. Christian, 15 Gratt. 11, holding purchaser from executor is not bound to make any inquiry; Smith v. Henning, 10 W. Va. 596, holding if purchaser at sale of executor has notice or knowledge of executor's purpose to exercise power of sale for any other purpose than payment of testator's debts as provided by will his purchase and deed do not protect him; Colt v. Lansnier, 9 Cow. 319, holding any person receiving from an executor assets of his testator knowing his disposition of them is violation of his duty, is to be adjudged as conniving with executor; Morrison v. Page, 9 Dana, 428, holding purchaser of assets from administrator, with knowledge administrator is committing breach of trust in selling, holds the property subject to the trust.

Distinguished in Trotter v. Shippen, 2 Pa. St. 358, where interest upon mortgage, which was property of an estate, was paid to the executor as rent by lessees of the mortgaged property, by furnishing the executor coal upon his own account.

Right of purchaser without, to sell to purchaser with, notice of claim.

Cited in Bellas v. M'Carty, 10 Watts, 13 (dissenting opinion), as to whether person with notice of equitable claim may safely buy of person who purchased bona fide and without notice of it; Griffith v. Griffith, Hoffm. Ch. 153, holding purchaser with notice has right to avail himself of want of notice in party from whom he derives title.

Lapse of time as bar to equitable right.

Cited in McKean & E. Land & Improv. Co. v. Clay, 149 Pa. 277, 24 Atl. 211, on effect of lapse of time to bar making out of constructive trust; Piatt v. Vattier, 1 McLean, 146, Fed. Cas. No. 11,117, holding statute not required to make lapse of time operate as bar to equitable right; Mitchell v. Thompson, 1 McLean 96, Fed. Cas. No. 9,669, holding right to land claimed on ground of

fraudulent survey barred by lapse of more than thirty years after survey was executed.

Cited in notes in 1 Beach Trusts, 465, on continued acquiescence as barring right to claim under a constructive trust; 2 Beach Trusts, 1663, on period of equitable relief in case of fraud or misapplication of proceeds of sale of trust property.

Distinguished in Cartmell v. Perkins, 2 Del. Ch. 102; Decouche v. Savetier, 3 Johns. Ch. 190,—holding no time bars direct trust as between trustee and cestui que trust.

— Remaindermen.

Cited in Edwards v. Woolfolk, 17 B. Mon. 376, holding where trustee holds legal title in fee for benefit of particular estate and remainder, both estates are affected if his legal right to sue is barred; Sullivan v. Sullivan, 21 L. Rep. 531, Fed. Cas. No. 13,598, holding in equity owner of even contingent remainder in personalty may file bill for protection of trust fund against breaches of trust which threaten its existence; and as soon as he discovers breach, voluntarily begins to delay proceedings; Badger v. Badger, 2 Cliff. 137, Fed. Cas. No. 718, holding in equity rule is that question of acquiescence is not affected by circumstance that particular estate had not determined during lapse of time, relied upon to bar right to have fraudulent conveyance set aside.

2 E. R. C. 147, STAG v. PUNTER, 3 Atk. 119.

Allowances for funeral expenses of decedent.

Cited in Donald v. McWhorter, 44 Miss. 124, holding an administrator might be allowed out of the estate of the decedent the amount expended in the erection of a tombstone, the decedent requesting it and the estate being sufficient to pay for it; Steger v. Frizzell, 2 Tenn. Ch. 369, holding the value of a suit of clothes in which to bury the dead might be properly allowed as a funeral expense.

Cited in notes in 33 L.R.A. 669, on liability of decedent's estate for funeral expenses; 8 E. R. C. 476, on right to funeral expenses; 9 E. R. C. 324, on liability of executor or administrator for devastavit.

2 E. R. C. 150, WARNER v. WAINSFORD, Hobart, 127.

Right to plead specially.

Cited in Gardner v. Webber, 17 Pick. 407, holding court might properly on motion strike out a special plea amounting to the general issue; Baltimore & O. R. Co. v. Polly, 14 Gratt. 447; Phillips v. Phillips, 21 N. J. L. 42,—holding that plea setting forth matters specially which amounts only to general issue should be stricken out on motion; M'Bride v. Duncan, 1 Whart. 269, holding that in action against sheriff for taking plaintiff's goods special plea defendant took goods under execution against third person will be stricken out on motion as evidence admissive under general issue; Baker v. Sherman, 75 Vt. 88, 53 Atl. 330, on right to plead specially.

Right to raise sufficiency of plea on demurrer.

Cited in Crandall v. Gallup, 12 Conn. 365, holding the objection that a special plea amounts to the general issue is not available on demurrer; Marmora Foundry Co. v. Boswell, 1 U. C. C. P. 175, on right to raise sufficiency of plea on demurrer.

Right of retainer by executor or administrator.

Cited in note in 9 E. R. C. 349, 350, on right of retainer by executor or administrator.

2 E. R. C. 152, BURKE v. JONES, 2 Ves. & B. 275, 13 Revised Rep. 83.

Revival of barred debts by testamentary provision.

Cited in Peck v. Botsford, 7 Conn. 172, 18 Am. Dec. 92, holding that clause in will directing all just debts of testator to be paid, will not save debt barred by statute of limitations from operation of that statute; Martin v. Gage, 9 N. Y. 398, holding a devise of real estate to an executor for the payment of debts generally does not prevent the running of the statute of limitations against debts due prior to the decease of the testator; Roosevelt v. Mark, 6 Johns. Ch. 266, holding same as to case of a debt discharged by a certificate of bankrupt; Rogers v. Rogers, 3 Wend. 1503, 20 Am. Dec. 716, holding the same as to debt due executor and barred by statute; Johnston v. Wilson, 29 Gratt. 379; Pratt v. Northam, 5 Mason, 95, Fed. Cas. N. 11,376; Tazewell v. Whittle, 13 Gratt. 329,—on a testamentary devise for the payment of debts as not receiving debt barred by the statute of limitations.

—By testamentary trust for creditors.

Cited in Carrington v. Manning, 13 Ala. 611, holding on facts the will did not create a trust by implication in favor of creditors which would take the debts due by the deceased out of the statute of limitations; Agnew v. Fetterson, 4 Pa. 56, 45 Am. Dec. 67; Murray v. Mechanics' Bank, 4 Edw. Ch. 567,—holding debts barred by statute of limitations could not be received by a devise on trust for the benefit of creditors of the deceased generally.

Cited in note in 5 L.R.A.(N.S.) 361–365, on testamentary trusts for payment of debts barred at testator's death.

Testamentary provisions suspending statute of limitations as to debts not already barred.

Cited in Baylor v. Dejarnette, 13 Gratt. 152; Woonsocket Inst. for Sav. v. Ballow, 16 R. I. 351, 1 L.R.A. 555, 16 Atl. 144, holding a testamentary charge on real estate for the payment of debts prevents the running of the statute of limitations against debts not barred in the testator's life time.

Right to avail of statute of limitations as a defense to debts against estate of decedent.

Cited in Spencer v. Spencer, 4 Md. Ch. 456, holding the legatees of decedent could not set up the defense that a debt owed by decedent to executor was barred by the statute of limitations.

Necessity that personal representative avail himself of available defenses.

Cited in Tunstall v. Pollard, 11 Leigh, 1, on necessity that personal representative of decedent avail himself of defenses available as to claims against estate.

2 E. R. C. 165, JERVIS v. WOLFERSTAN, 43 L. J. Ch. N. S. 809, L. R. 18 Eq. 18, 30 L. T. N. S. 452.

Right of trustee to be indemnified for payments made in behalf of cestui que trust.

Cited in Fraser v. Murdock, L. R. 6 App. Cas. 855, 45 L. T. N. S. 417, 30 Week. Rep. 162, on right of trustees to be indemnified for payments made on behalf of cestui que trust.

Cited in Underhill Am. Ed. Trusts, 422, on liability of beneficiary to indemnify trustee where trust accepted at request of beneficiary.

—Assessments on stock liabilities.

Cited in Hobbs v. Wayet, L. R. 36 Ch. Div. 256, 56 L. J. Ch. N. S. 819, 57 L. T. N. S. 225, 36 Week. Rep. 73, holding an executor was entitled to be indemnified

for payments made on shares of stock in the names of his testator, and another decedent, out of the estate of such other decedent to whom the moneys invested belonged; Whittaker v. Kershaw, L. R. 45 Ch. Div. 320, 60 L. J. Ch. N. S. 9, 63 L. T. N. S. 203, 39 Week. Rep. 23, holding the wife of a residuary legatee to whom he has assigned the residue in the nature of shares of stock not fully paid up which the executors did not transfer but paid her the cash balance of the residue, was liable to indemnify the executors for debts paid by them after such distribution of residue.

Right to compel legatees to make restitution after final distribution of estate.

Cited in Gallen's Estate, 20 Phila. 13, 47 Phila. Leg. Int. 106, 8 Pa. Co. Ct. 37, 6 Kulp, 25, 26 W. N. C. 308, holding court would compel legatees to make restitution to a creditor where estate was settled without his knowledge and the legatees concealed their knowledge of his claims from the accountant and the court; Sutter's Estate, 19 Phila. 103, 45 Phila. Leg. Int. 267, 5 Pa. Co. Ct. 591, holding after a final distribution of the estate the court may compel a legatee, receiving a share to which not entitled, to make restitution; Uffner v. Lewis, 27 Ont. App. Rep. 242 (dissenting opinion); Re Kirkpatrick, 3 Ont. Rep. 361,—on legatee taking residue of assets subject to right to satisfy liabilities of testator and other legacies out of it; Leitch v. Molson's Bank, 27 Ont. Rep. 621, holding that under statute administrator cannot recover back what was paid after advertisement for claims, for purpose of paying new claims.

Cited in note in 2 E. R. C. 170, on recourse by personal representative against estate which has been distributed in case a possible liability has become a debt.

Right to recover interest where restitution from legatees is compelled.

Cited in Boys' Home v. Lewis, 3 Ont. L. Rep. 208, holding executors who were also residuary legatees on being compelled to make restitution of money they were not entitled to, were not chargeable with interest there being no fraud or misconduct on their part; Barber v. Clark, 20 Ont. Rep. 522, holding on recoupment by a legatee of over payments made him by executor he is not chargeable with interest on such overpayments.

Distinguished in Uffner v. Lewis, 5 Ont. L. Rep. 684 (dissenting opinion), on right to recover interests on recoupments made by legatee.

Covenant to bequeath residue as not creating a debt.

Cited in Atty.-Gen. v. Murray, Ir. L. R. 20 Eq. 124, holding a covenant to bequeath by will the residue of settler's estate did not constitute a debt due by him at his death.

Allowance of costs.

Distinguished in Re Knott, 56 L. J. Ch. N. S. 318, 56 L. T. N. S. 161, 35 Week. Rep. 302, holding in action by cestui que trust against trustee in bankruptcy of surviving trustee and the trustee of the decedent trustee to recover the trust funds, such trustees were not entitled to costs out of the fund found available but which did not fully satisfy the claims of the trust with costs.

Protection of executor or administrator for payment of debts.

Cited in note in 9 E. R. C. 324, on protection of executor of administrator against debts ascertained after distribution.

2 E. R. C. 172, LITTLEHALES v. GASCOYNE, 3 Bro. Ch. 73.

Liability of personal representative or trustee for interest on moneys held by him.

Cited in Springer v. Oliver, 21 Ga. 517, holding an executor was not liable for

interest on money received from the sale of real estate for the years it lay in a bank before distribution, he having acted under legal advice and with the sanction of the court; Voorhees v. Stoothoff, 11 N. J. L. 145, holding where executor was directed to place out at interest the interest on the principal sum, he was liable for interest on the principal sum and on that where he rendered no account for the principal sum or the amount received on; Darrel v. Eden, 3 Desauss. Eq. 241, 4 Am. Dec. 613, holding an executor chargeable with interest on balances remaining in his hands; Pace v. Burton, 1 McCord, Eq. 247, holding an administrator was not chargeable with funds remaining in his hands where the interest of the estate demanded such a retention; Duncan v. Dent, 5 Rich. Eq. (S. C.) 7, holding an administrator is not excused from payment of interest on balances remaining in his possession, because various persons have instituted suits, claiming different rights; Taveau v. Ball, 1 McCord, Eq. 456, on liability of executor for interest on funds remaining in his hands; Dexter v. Arnold, 3 Mason, 284, Fed. Cas. No. 3,855, on liability of administrator for interest on funds in hand.

Cited in notes in 31 L.R.A.(N.S.) 353, on liability of executor or administrator to distributees for interest where settlement of estate delayed; 9 E. R. C. 324, on liability of executor or administrator for interest on uninvested balances; 14 E. R. C. 574, on liability of trustee for interest.

Liability of executor for acts of co-executor.

Cited in Ochiltree v. Wright, 21 N. C. (1 Dev. & B. Eq.) 336, holding an executor was not liable for the devastavit of a coexecutor who handled the estate, the former executor doing no more than was required of him by law.

Cited in note in 11 L.R.A.(N.S.) 299, on liability of coexecutor for default of one permitted to manage estate.

Equity jurisdiction.

Cited in Baker v. Biddle, Baldw. 394, Fed. Cas. No. 764, on the concurrency of law and equity jurisdiction in some matters.

2 E. R. C. 175, WILKES v. GROOM, 3 Drew. 584, 2 Jur. N. S. 681, 25 L. J. Ch. N. S. 724, 4 Week. Rep. 697.

Liability of trustee on deposit lost by bank failure.

Cited in Re Marcon, 40 L. J. Ch. N. S. 537, holding an administrator was not liable for the loss of monies deposited in a private bank on a separate account allowed to remain there for over three years.

Cited in note in 14 L.R.A. 103, on liability of executor or trustee for loss of funds by failure of bank.

Right to make a deposit of trust funds.

Cited in State v. Hill, 47 Neb. 456, 66 N. W. 541, on right of public official to make a deposit of public funds.

Title to deposit by person as agent.

Cited in Bank of Northern Liberties v. Jones, 42 Pa. 536, holding a deposit in a bank by a depositor as agent is not liable to attachment as the debt of the "agent."

Deposit and investment distinguished.

Cited in Re Price [1905] 2 Ch. 55, distinguishing between money deposited and money invested.

2 E. R. C. 187, ATTY. GEN. v. KOHLER, 8 Jur. N. S. 467, 5 L. T. N. S. 5, 9 Week. Rep. 933, 9 H. L. Cas. 654.

Liability of personal representatives for interest on moneys erroneously paid by them.

Cited in Shaw v. Turbett, 14 Ir. Ch. 476, holding administrators liable for interest on money erroneously paid by them; Re Hulkes, L. R. 33 Ch. D. 552, 55 L. J. Ch. N. S. 846, 55 L. T. N. S. 209, 34 Week. Rep. 733, on liability of personal representatives for interest where moneys were erroneously paid: Re Sharpe [1892] 1 Ch. 154, 61 L. J. Ch. N. S. 193, 65 L. T. N. S. 806, 40 Week. Rep. 241, holding the personal representative of a deceased director was liable to pay interest on dividends erroneously paid by such director from the time the creditors should have received payment.

Cited in note 2 Beach Trusts, 1194, on liability of executors for interest upon principal sum wrongfully paid.

Liability of Crown for interest.

Cited in Algoma C. R. Co. v. Rex, 7 Can. Exch. 239, holding that Crown is not liable to pay interest except upon contract, or where liability therefor is fixed by contract; Re Gosman, L. R. 15 Ch. Div. 67, 49 L. J. Ch. N. S. 590, 42 L. T. N. S. 804, 29 Week. Rep. 14, holding the Crown must pay interest upon the rents and profits received to next of kin when discovered where the property had been assigned to be held for the benefit of the Crown in the absence of a heir or next of kin.

Distinguished in Noble v. Newfoundland, Newfoundland Rep. (1897-1903) 571, holding in action against Crown on contract for services rendered government interest was not recoverable on the amount recoverable.

Right of heir or next of kin to make claim against an estate.

Distinguished in Eames v. Hacon, L. R. 16 Ch. Div. 407, 50 L. J. Ch. N. S. 182, 43 L. T. N. S. 567, 29 Week. Rep. 259, holding the next of kin was not entitled to make any claim against estate where assets were received from abroad except through the intervention of the legal personal representative.

Evidence admissible to establish pedigree.

Cited in Fulkerson v. Holmes, 117 U. S. 389, 29 L. ed. 915, 6 Sup. Ct. Rep. 780, holding in an action of ejectment an ancient deed reciting the death of the former owner and that the grantor was his son and heir and conveyed the lands to a person under whom plaintiff claims title is admissible after a lapse of sixty years to prove the pedigree of the son; Rollins v. Atlantic City R. Co. 73 N. J. L. 64, 62 Atl. 929, holding a recital of pedigree in an ancient deed is evidence of such matters being made by one of the family; Sitler v. Gehr, 105 Pa. 577, 51 Am. Rep. 207, 15 W. N. C. 193, 41 Phila. Leg. Int. 328, on the admissibility of evidence of the question of pedigree.

2 E. R. C. 200, RE WILLIAMS, 42 L. J. Ch. N. S. 158, 15 Eq. 270.

Priority between creditors of estate.

Cited in Cotterell v. Dunn, 27 N. S. 533, to the point that assets in hands of executor are regarded as species of trust property to be distributed ratably among creditors; Smith v. Morgan, L. R. 5 C. P. Div. 337, 49 L. J. C. P. N. S. 410, holding a judgment creditor is entitled to priority in the administration of the assets of the deceased person.

Cited in note in 2 E. R. C. 205, on priority of creditor first obtaining judgment against personal representative.

Distinguished in Re Stubb, 47 L. J. Ch. N. S. 671, L. R. 8 Ch. Div. 154, 26 Week. Rep. 736, 2 Eng. Rul. Cas. 203, holding creditors obtaining an order to sign judgment under certain conditions were not entitled to priority over other creditors, one of whom came in and recovered judgment in behalf of the others.

Priority between simple contract debts and debts due by specialty.

Cited in Re Hankey [1899] 1 Ch. 541, 68 L. J. Ch. N. S. 242, 80 L. T. N. S. 47, 47 Week. Rep. 444, 15 Times L. R. 162, holding simple contract debts could not be paid in preference to specialty debts in the case of an insolvent estate; Re Samson [1906] 2 Ch. 584, 76 L. J. Ch. N. S. 21, 95 L. T. N. S. 633, holding an executor might in the payment of testator's debts pay a simple contract creditor in preference to a specialty creditor.

Distinguished in Re Bentinck [1897] 1 Ch. 673, 66 L. J. Ch. N. S. 359, 76 L. T. N. S. 284, 45 Week. Rep. 397, holding specialty and simple contract creditors being put on the same footing in the sharing of assets of estate of decedent, a simple contract debt to the Crown was payable out of the assets of the simple contract creditors.

Distinction between specialty debts and simple contract debts.

Cited in Frontenac Loan Co. v. Morice, 3 Manitoba L. Rep. 462, on the distinction between simple contract debts and debts due by specialty as having been abolished.

Right of retainer by executor for simple debt.

Cited in Crowder v. Stewart, L. R. 16 Ch. Div. 368, 50 L. J. Ch. N. S. 136, 29 Week. Rep. 331, holding the right of retainer is not affected by the act abolishing the distinction between specialty and simple contract debts.

Distinguished in Re Jones, L. R. 31 Ch. Div. 440, 55 L. J. Ch. N. S. 350, 53 L. T. N. S. 855, 34 Week. Rep. 249, on the equality between simple contract debts not pursued to judgment and creditors under a specialty.

Liability of executor or administrator for paying creditors out of their order.

Cited in note in 9 E. R. C. 323, on liability of executor or administrator for devastavit in paying creditors out of their order.

Liability of executor or administrator permitting sale of assets of insolvent estate on execution.

Cited in Taylor v. Brodie, 21 Grant, Ch. (U. C.) 607, holding that executor permitting sale of assets on execution should be charged with excess amount received by creditor over proportionate amount of insolvent estate.

2 E. R. C. 203, RE STUBBS, L. R. 8 Ch. Div. 154, 47 L. J. Ch. N. S. 671, 26 Week. Rep. 736.

Effect of abolishment of distinction between specialty and simple contract debts on right of retainer.

Cited in Crowder v. Stewart, L. R. 16 Ch. Div. 368, 50 L. J. Ch. N. S. 136, 29 Week. Rep. 331, holding the right of retainer is not affected by an act abolishing the distinction between specialty and simple contract debts; Re Jones, L. R. 31 Ch. Div. 440, 55 L. J. Ch. N. S. 350, 53 L. T. N. S. 855, 34 Week. Rep. 249, holding an executrix who was a simple contract creditor could only exercise her right of retainer as against the dividends payable to simple contract creditors.

2 E. R. C. 207, RE HOPKINS, L. R. 18 Ch. Div. 370, 45 L. T. N. S. 117, 29 Week. Rep. 767.

Right of creditor in administration proceedings to prove claim after resorting to securities.

Cited in Re McMurdo [1902] 2 Ch. 684, 71 L. J. Ch. N. S. 691, 50 Week. Rep. 644, 86 L. T. N. S. 814, holding after the issuance of a certificate in the administration of an insolvent's estate, a creditor who had elected to rely on his securities could not come in and prove his claims, there being no special circumstances in his favor.

Distribution of estate of an insolvent.

Cited in Bank Comrs. v. Security Trust Co. 70 N. H. 536, 49 Atl. 113; Merrill v. National Bank, 173 U. S. 131, 43 L. ed. 640, 19 Sup. Ct. Rep. 360 (dissenting opinion),—on the distribution of the state of an insolvent bankrupt.

Application of rules of bankruptcy to judgments in administration proceedings.

Cited in Re Hildick, 44 L. T. N. S. 547, 29 Week. Rep. 733, holding in a creditor's administration action when there is any probability that the estate of the deceased person may prove insufficient to pay the debts a provision should be inserted in the judgment that the rules in bankruptcy are to apply.

Fixing rights of creditors.

Cited in note in 7 E. R. C. 713, on order to wind up company as fixing rights of creditors.

2 E. R. C. 214, FARR v. NEWMAN, 4 T. R. 621, 2 Revised Rep. 479.

Seizure of property in hands of executor or administrator in execution of judgment against executor personally.

Cited in Burton v. Robinson, 3 Houst. (Del.) 154, holding that goods of testator remaining in specie in hands of administrator cannot be seized in execution of judgment administrator in his own right, until he has closed estate; Satterwhite v. Carson, 25 N. C. 549, holding that goods of deceased person in hands of administrator pendente lite, cannot be taken under execution against administrator for his individual debt; Robinson v. Grange, 18 U. C. Q. B. 260, holding that stock in loan association in hands of administrator is not property of administrator as individual, that sheriff should seize under execution against him personally.

Cited in note in 11 E. R. C. 665, on what may be taken under writ of fieri facias.

Liability of land descending to heirs at law to payment of ancestor's debts.

Cited in Peck v. Bucke, 2 Ch. Chamb. Rep. (Ont.) 294, holding that land descending to heirs at law and purchased with notice at a sheriff's sale is liable for the debts of the ancestor.

Attaching or levying execution on property in possession of another officer.

Cited in Odiorne v. Colley, 2 N. H. 66, 9 Am. Dec. 39, holding that while property is held under valid attachment, it cannot be duly attached by another officer; Duncan v. M'Cumber, 10 Watts, 212, holding that constable could not under execution against defendant individually take goods of defendant that had belonged to his testator, so long as sheriff had in his hands execution against defendant as executor which bound goods; United States v Conyngham, Wall Sr.

178, Fed. Cas. No. 14,850, holding that suspending execution and leaving property with debtor for unreasonable length of time, fraudulent as against execution in hands of another officer; Wilmer v. Atlanta & R. Air-Line R. Co. 2 Woods, 409, Fed. Cas. No. 17,755, holding that goods of a stranger wrongfully taken under execution against a debtor may be replevied from the officer.

Liability of officer for seizure of property.

Cited in Overby v. McGee, 15 Ark. 459, 63 Am. Dec. 49, holding that sheriff, who executes writ of attachment as execution is guilty of trespass for taking goods of stranger; State ex rel. O'Bryan v. Koontz, 83 Mo. 323, holding that sheriff must determine at his peril whether personal property seized or about to be seized is that of defendant in writ; Curtis v. Patterson, 8 Cow. 65, holding that sheriff is bound to call jury to try title to property in dispute in order to relieve himself from charge of making false return to execution placed in his hands; Vulcan Iron Works v. Edwards, 27 Or. 563, 36 Pac. 22, holding that third person who gives notice of his claim to property seized by sheriff on execution in accordance with statute is bound by verdict as to remedy against sheriff.

Liability of sheriff for release of property.

Cited in Loring v. Wittich, 16 Fla. 498, on liability of sheriff for release of property levied upon by him where title is in doubt.

Protection of sheriff in proceedings to try right to property seized on execution.

Cited in Fisher v. Gordon, 8 Mo. 386, holding that in proceeding before sheriff, to try right of property between defendant in execution and claimant, verdict of jury is full protection to officer.

Amendment or vacation of sheriff's return.

Cited in Whiting v. Bradley, 2 N. H. 79, holding that return of sheriff, when erroneous by mistake, may in certain cases be amended or vacated.

Effect of possession of personal property as against creditors.

Cited in Haven v. Low, 2 N. H. 13, 9 Am. Dec. 25, holding that possession by mortgagor of personal property is not conclusive evidence of fraud; Alexander v. Williams, 2 Hill, L. 522, holding that possession of legacy for four years after assent of executor, will confer title against creditors of testator; Doe ex dem. Vernon v. White, 9 N. B. 314, holding that estate of mortgagee in fee, who has not taken possession of land, is not seizable in execution on judgment against him.

Laches of creditors of testator.

Cited in Clagett v. Salmon, 5 Gill & J. 314; Mitchell v. Mitchell, 1 Gill, 66, holding that if creditors of estate will lie by, and not assert their rights, it is reasonable for third persons to suppose that all debts of estate are satisfied.

Rights of purchasers from executors or administrators.

Cited in Ikelheimer v. Chapman, 32 Ala. 676; Kimball v. Moody, 27 Ala. 130, to the point that executor has absolute power of disposal over personal estate, and such property cannot be followed by creditors or legatees into alienee's hands; Carhart v. Vann, 46 Ga. 389, holding that sale of land by administrator take precedence of lien of judgment against decedent; Rogers v. Zook, 86 Ind. 237, holding that at common law, assignee of notes, bartered by administrator of estate would take good title to notes; Sutherland v. Brush, 7 Johns. Ch. 17, 11 Am. Dec. 383, holding that bare act of sale of assets by executor is sufficient indemnity to purchaser if there is no collusion; Rhame v. Lewis, 13 Rich. Eq. 269, holding that assets may be followed into hands of distributee who takes them from administrator mala fide; Jones v. Clark, 25 Gratt. 642, holding that bona fide

purchaser of assets from executor will acquire good title even though executor commit devastavit by making sale for purpose of converting proceeds.

—At sheriff's sale.

Cited in Griffith v. Fowler, 18 Vt. 390, holding that purchaser of goods at sheriff's sale acquires no greater title, than that of execution debtor had at time of sale.

Priority of executions.

Cited in Jones v. McNeill, 1 Hill. L. 84, holding that execution for debt of testator takes precedence over execution for debt of executor.

Injunction to restrain sale of testator's estate.

Cited in Labitut v. Prewett, 1 Woods, 144, Fed. Cas. No. 7,962, holding that executor may bring action to enjoin sale of property of estate on judgment against himself personally.

Powers and duties of executor and administrators.

Cited in Waring v. Lewis, 53 Ala. 615, holding that executor may release, compound and discharge debts due deceased being answerable for improvidence: May v. May, 7 Fla. 207, 68 Am. Dec. 431 (dissenting opinion), on power of executor to dispose of personal estate of testator; Wright v. Smith, 1 Ga. 324, holding that executor under will authorizing sale to pay debts, but without specifying manner of sale, may dispose of slaves of testator at private sale; Doe ex dem. Cofer v. Roe, 1 Ga. 538, holding that at common law title to personal property of intestate devolves upon administrator, and he may dispose of it or incumber it; Weyer v. Second Nat. Bank, 57 Ind. 198, holding that under statute executor must sell personal property at public auction only, unless otherwise ordered by court; Latta v. Miller, 109 Ind. 302, 10 N. E. 100, holding that administrator has power, upon sufficient consideration, to release one maker of promissory note executed to him in his fiduciary capacity; Pittsburgh, C. C. & St. L. R. Co. v. Gipe, 160 Ind. 360, 65 N. E. 1034, holding that administrator may compromise claim under statute for death by wrongful act, without order of court; Armstrong v. Armstrong, 1 Or. 207, 75 Am. Dec. 555, holding that executor has absolute power of disposal over whole of personal effects of testator; Jennings v. Teague, 14 S. C. 229, holding that sale by executor under power is valid, even though such power is to be exercised "when value of property shall recover from depression caused by existing war;" Sneed v. Hooper, Cooke (Tenn.) 200, 5 Am. Dec. 691, holding that executor may sell, give away, or dispose of as he thinks proper, goods and chattels of testator; McLean v. Hime, 27 U. C. C. P. 195, holding that executor had power to pledge mortgage belonging to estate for loan of money; Union Bank v. Harrison, 11 C. L. R. (Austr.) 492, holding that under statute execution have same power of disposal over real estate as over personalty for purpose of paying debts.

Effect of execution of mortgage by executor or administrator in individual name.

Cited in Allender v. Riston, 2 Gill & J. 86, holding that mortgage executed by administrator in her individual name will be presumed to be made in her character of distributee and not as administrator.

Set-off of individual debts of administrator or executor.

Cited in Lacompte v. Seargent, 7 Mo. 351, holding that where administrator took note for money loaned in which note he was named A. B. administrator, etc., individual debts of administrator may be set off against note.

Assets of estate or trust property.

Cited in Magraw v. McGlynn, 26 Cal. 420, holding that executor holds money

received from proceeds of estate in fiduciary capacity for use of those interested in estate to be distributed according to law; Winchell v. Sanger, 73 Conn. 399, 66 L.R.A. 935, 47 Atl. 706, holding that administrator of estate is trustee for all parties interested in estate; Marvel v. Babbitt, 143 Mass. 226, 9 N. E. 566, holding that assets of estate including money so long as fund can be identified, in hands of executor are held by him in trust; Streeter v. Sumner, 31 N. H. 542, on the point that contracts of bankrupt respecting trusts do not pass as property to his assignee, under bankrupt law; Chamberlen v. Clark, 9 Ont. App. 273, holding that under statute creditor receiving more than his share of insolvent estate may be compelled to return excess.

Cited in 2 Beach Trusts, 972, on trust estate in bankrupt trustees.

Rights of residuary legatees.

Cited in Lafferty v. People's Sav. Bank, 76 Mich. 35, 43 N. W. 34, holding that title of residuary legatee under statute is derived from will, and is not absolute, but is held subject to payment of testator's debts.

Devastavit by executor.

Cited in Williamson v. Branch Bank, 7 Ala. 906, 42 Am. Dec. 617, holding that assets of testator may be sold under execution in action by creditor against executor, whenever there has been devastavit; Le Baron v. Fauntleroy, 2 Fla. 276, holding that payment of legacy by executor of will, probate of which was afterwards set aside did not constitute a devastavit; Giles v. Pratt, 1 Hill, L. 239, 26 Am. Dec. 170, holding that administrator who allows judgment by default to be taken liable for costs de bonis propuis; Commercial Bank v. Woodruff, 13 U. C. C. P. 621, holding that application by trustees of proceeds of personalty to obtain release of right of dower in land was a devastavit.

Contents of special verdict.

Cited in note in 24 L. R. A. (N. S.) 8, on what special verdict must contain.

Sufficiency of pleading.

Cited in Wells v. Mason, 5 Ill. 84, holding that plea to action for rent by administrator, which avers eviction by another having prior title, is good bar to action.

Writs and records as authority.

Cited in McKim v. Odom, 12 Me. 94, to the point that writs and records from the law of the land.

Forms of pleading as authority.

Cited in Ridgway v. English, 22 N. J. L. 409, to the point that established forms of pleading are of greater authority than adjudged cases.

Rules of property in courts of equity and law.

Cited in Rangely v. Spring, 28 Me. 127; Yunker v. Nichols, 1 Colo. 551, 8 Mor. Min. Rep. 64,—holding that different rules in relation to property should not exist in court of equity from rule in court of law.

2 E. R. C. 228, RE BLAKE, L. R. 29 Ch. Div. 913, 54 L. J. Ch. N. S. 880, 53 L. T. N. S. 302, 33 Week. Rep. 886.

Right to have an administration of an estate.

Cited in O'Connor v. Fahey, 12 Manitoba L. Rep. 325, refusing an application for an order for the administration of a testator's estate where the executors are doing their best to realize the assets and are in no default.

Cited in Underhill Am. Ed. Trusts, 440, 442, on right of trustee to have trust administered by the court.

Powers of trustees.

Cited in Underhill Am. Ed. Trusts, 335, 342, on general powers of trustees.

2 E. R. C. 234, Elliott v. Dearsley, L. R. 16 Ch. Div. 322, 44 L. T. N. S. 198, 29 Week. Rep. 494.

Legacies chargeable on real estate.

Cited in Turner v. Gibb, 48 N. J. Eq. 526, 22 Atl. 580; Re Bawden [1894] 1 Ch. 693, 63 L. J. Ch. N. S. 412, 70 L. T. N. S. 526, 42 Week. Rep. 235; Re Boards [1895] 1 Ch. 499, 64 L. J. Ch. N. S. 305, 72 L. T. N. S. 220, 43 Week. Rep. 472,—holding them chargeable on realty and personalty blended in a residuum where the personalty does not suffice; Re Grainger [1900] 2 Ch. 756, 69 L. J. Ch. N. S. 789, 83 L. T. N. S. 209, 49 Week. Rep. 197, as to when legacies in a will are chargeable on the real estate.

Exoneration of mortgaged lands from the debt.

Cited in Mason v. Mason, 13 Ont. Rep. 725, holding a devise of one tract of mortgaged land to the son of the testator and the other tract to his executors on trust for heirs at law did not indicate that the land devised to son was to pass free from the mortgage debt.

Charging personal estate with mortgage debts.

Cited in note in 18 Eng. Rul. Cas. 192, on liability of personal estate of decedent to payment of mortgage debts.

2 E. R. C. 243, COOPER v. JARMAN, 12 Jur. N. S. 956, 36 L. J. Ch. N. S. 85, L. R. 3 Eq. 98, 15 Week. Rep. 142.

Termination of contract by death of party to.

Cited in Cox v. Martin, 75 Miss. 229, 36 L.R.A. 800, 65 Am. St. Rep. 604, 21 So. 611, holding a contract by a farmer to obtain supplies for making crops under which he mortgages his crops and personalty to secure payment is not terminated by his death but is enforceable by and against his administrator; Chisholm v. Chisholm, 2 D. L. R. 57, holding that contract to pay certain sum per annum so long as testator was able to do so, provided payee would agree to place testator's granddaughter in certain institution for purpose of educating her, is not terminated by death of testator.

Cited in note in 23 L.R.A. 713, on effect on contract of death of party.

— Completion of houses under construction at land owner's death.

Cited in Re Day [1898] 2 Ch. 510, 67 L. J. Ch. N. S. 619, 79 L. T. N. S. 436, 47 Week. Rep. 238, holding a devisee of land was entitled to have buildings completed which were commenced under a contract with his father, out of the testator's personal estate.

Distinguished in Re Murray, 4 Ont. L. Rep. 418, holding where a father on leasing a farm to his son had agreed to erect a house thereon within a certain time and dies after the expiration of such time without erecting the house the son was not entitled to have the house built at the expense of his father's personal estate.

2 E. R. C. 246, DAVID v. FROWD, 2 L. J. Ch. N. S. 68, 1 Myl. & K. 200.

Right of persons interested in a fund to be heard in chancery as parties.

Cited in Williams v. Gibbs, 17 How. 239, 15 L. ed. 135; Jones v. Stockett, 2 Bland, Ch. 409,—on right of all persons interested in a fund in chancery to be heard upon their claims therein; Bickford v. McComb, 88 Fed. 428, on creditor of

insolvent corporation, not a party to the insolvency proceedings as having right to maintain bill for contribution from distributee receiving more than his share of assets; Re McMurdo [1902] 2 Ch. 684, 86 L. T. N. S. 814, 77 L. J. Ch. N. S. 691, 50 Week. Rep. 644, on right of creditor not a party to distribution proceedings to come in and prove his claim.

Notice to creditors and next of kin of distribution of estate.

Cited in Hammond v. Hammond, 2 Bland, Ch. 306, on how creditors and next of kin are given notice of the distribution and settlement of an estate.

Cited in note in 63 L.R.A. 104, 107, on remedy of distributee as to accounting without notice to or appearance by him.

Jurisdiction of equity over estates of decedents.

Cited in Tessier v. Wipe, 3 Bland, Ch. 28, on jurisdiction of a court of equity to assume administration of estate of a decedent; Hammond v. Hammond, 2 Bland Ch. 306, holding that court of chancery may in certain cases, for protection of representatives of deceased, assume administration of estate.

Personal representative of a decedent when estopped by his representations.

Cited in Lawyers' Surety Co. v. Reinach, 25 Misc. 150, 54 N. Y. Supp. 205, holding false representations by an administratrix as to who were the next of kin did not estop her from recovering overpayments made to a purchaser under her.

Conclusiveness of decree of distribution of estate of decedent.

Cited in Johnson v. Culbertson, 79 Fed. 5, holding a creditor of decedent not a party to distribution proceeding may maintain a bill in equity against distributees for the satisfaction of his claims; Continental Nat. Bank v. Heilman, 81 Fed. 36; Boyd v. Northern P. R. Co. 170 Fed. 779; Robin's Estate, 4 Pa. Dist. R. 277, 16 Pa. Co. Ct. 375,—on decree of distribution of estate of a decedent not being conclusive as to persons not parties to proceedings.

Cited in Smith Eq. Rem. 101, on necessary parties to suit for distribution of common fund among those interested.

Protection of administrator by final decree of distribution.

Cited in Woodward's Estate, 2 Chest. Co. Rep. 11, holding that administrator is protected by final decree of distribution, where it is made without requiring refunding bonds.

Recoupment of funds of decedent erroneously paid out.

Cited in Pulliam v. Pulliam, 10 Fed. 53, holding a creditor of a testator who appropriates assets in satisfaction of a debt barred by limitations is liable to the executor for the money thus wrongfully received; Mohan v. Broughton [1899] P. 211, 66 L. G. Prob. N. S. 91, 81 L. T. N. S. 57, 69 L. J. Prob. N. S. 20 [1900] P. 56, 82 L. T. N. S. 29, 48 Week. Rep. 371; Doner v. Ross, 19 Grant, Ch. (U. C.) 229,—on right to have a recoupment of money erroneously paid to legatees or next of kin.

2 E. R. C. 252, EDWARDS v. FREEMAN, 2 P. Wms. 345.

Advancement what may constitute.

Cited in Wilks v. Greer, 14 Ala. 437, holding a deed by father to his daughters of a female slave with a reservation of the use of to himself and his wife during their lives vested a title to slaves in the daughters from the date of the deed and in legal intendment was an advancement; Hatch v. Straight, 3 Conn. 31, 8 Am. Dec. 152, holding a deed of land of the value of two thousand dollars from father

to son in consideration of love and affection and five dollars was an advancement; Marshall v. Rench, 3 Del. Ch. 239, holding conveyances of land by a father to his children in consideration of love and affection made subsequent to the date of a will in which he made provision for the children were not advancements; Barber v. Taylor, 9 Dana, 84; Hook v. Hook, 13 B. Mon. 526,—holding a conveyance of property to take effect at the death of grantor may constitute a good advancement; Quarles v. Quarles, 4 Mass. 80, holding a deed by a father to a son purporting to be made for a valuable consideration was an advancement in full where the son made a deed acknowledging himself satisfied with his share and discharging the estate from any demand as heir; Callender v. McCreary, 4 How. (Miss.) 356, holding the settlement of slaves by a marriage contract did not amount to an advancement where at the time they belonged to a stranger to the contract; Garrett v. Colvin, 77 Miss. 408, 26 So. 963, holding that money placed by father in hands of his infant son, with which to obtain college education, if distinctly intended as advancement, should be so treated by courts; Sanford v. Sanford, 61 Barb. 293, 5 Laws 486, holding a considerable sum of money given by a father to his son to start him in business would be considered an advancement; Armstrong's Estate, 2 Pa. Co. Ct. 166, on effect of appointment not testamentary as operating an advancement; Re Knabb, 30 Phila. Leg. Int. 361, holding advancement was made where testator furnished money to his son-in-law, who gave bond for payment of interest during his life and for payment of principal upon his death to the daughter; Dutch's Appeal, 25 Phila. Leg. Int. 381, holding that deeds of land, the value of which is large compared with whole estate, by testator to his children are presumably advancements; Davis v. Newman, 2 Rob. (Va.) 664, 40 Am. Dec. 764, holding that bill does lie to compel legatee to refund legacy, voluntarily paid, unless it becomes necessary for discharge of debts; Person v. Twitty, 28 N. C. (6 Ired. L.) 115, holding a parol gifts of slaves by a father to his daughter was not to be treated as an advancement where he disposed of his realty by will but made no disposal of his personalty; Rickenbacker v. Zimmerman, 10 S. C. 110, 30 Am. Rep. 37, holding a policy of insurance purchased by an intestate on his own life for the benefit of his daughter and on which he paid the premiums was an advancement; Cooner v. May, 3 Strobh. Eq. 185, holding money expended on the education of a child was no advancement; Rains v. Hays, 2 Tenn. Ch. 669, holding money paid by the father as surety of his son-in-law is chargeable to the daughter as an advancement; Merriman v. Lacefield, 4 Heisk. 209, holding a sale of property from father to son would not be treated as an advancement merely because of inadequacy of price; Clark v. Willson, 27 Md. 693; Harley v. Harley, 57 Md. 340; Grey v. Grey, 22 Ala. 233,—defining what may constitute an advancement; Grattan v. Grattan, 18 Ill. 167, 65 Am. Dec. 726; Knabb's Estate, 2 Woodw. Dec. 386, 1 Legal Chron. 337; Kyle v. Conrad, 25 W. Va. 760; Harris v. Allen, 18 Ga. 177,—on what is necessary to constitute an advancement; Dutch's Appeal, 57 Pa. 461, on a conveyance of land from parent to child as presumptively an advancement; Taylor v. Taylor, 44 L. J. Ch. N. S. 718, L. R. 20 Eq. 155, holding payments made for fees in case of a child intended for the bar and the price paid for a commission in the army were advancements by portions; Boyd v. Boyd, L. R. 4 Eq. 305, 36 L. J. Ch. N. S. 877, 16 L. T. N. S. 660, 15 Week. Rep. 1071, holding the premium paid upon the occasion of a son being articled to an attorney and solicitor was an advancement; Re Blockley, L. R. 29 Ch. Div. 250, 54 L. J. Ch. N. S. 722, 33 Week. Rep. 777, holding a gift by a father to a son to enable him to pay a debt was an advancement.

Cited in note in 2 E. R. C. 262, on what constitutes an advancement.

Cited in 2 Beach Trusts, 1530, on advancement by portion; 2 Beach Trusts, 1525, on accumulations for payment of portions.

Bringing advancements into hotchpot.

Cited in Beavors v. Winn, 9 Ga. 189, holding that widow of intestate is not entitled to have advancements, made by intestate to his children, brought into hotchpot for her benefit; Arthur v. Arthur, 10 Barb. 9, on when land given by a decedent must be brought into hotchpot.

Valuation of an advancement, how obtained.

Cited in Chinn v. Murray, 4 Gratt. 348, on how an advancement is to be valued.

Right to compel distributees to refund where distribution was erroneous.

Cited in Buchanan v. Pue, 6 Gill, 112, holding a legacy delivered in the sincere belief that the assets are sufficient to pay the debts of the decedent may be recovered in equity where such assets prove inadequate; Miller v. Mitchell, Bail. Eq. 437, on right to compel a legatee to refund where the distribution was erroneous; Robinson v. Harrison, 2 Tenn. Ch. 11, on legatees liable to make contribution where the debts exceed the assets available for that purpose.

Distinguished in Moore v. Lesueur, 33 Ala. 237, holding an administrator voluntarily making distribution of assets without retaining sufficient to pay out standing claims against the estate of which he has knowledge, cannot maintain a bill against a distributee for contribution.

Right to compel a distribution of estate of decedent.

Cited in McGinnis v. Foster, 4 Ga. 377, on right to compel administrator to make a distribution of the intestate's estate; State v. Hamlin, 86 Me. 495, 25 L.R.A. 632, 41 Am. St. Rep. 569, 30 Atl. 76, on right to compel administrator to make a distribution of assets.

— Rule at common law.

Cited in Slosson v. Lynch, 28 How. Pr. 417, to the point that at common law no way of enforcing distribution of estates of intestates existed, and administrator could keep whole surplus.

Occasion of enacting statutes of distribution.

Cited in Re Eakin, 20 N. J. Eq. 481; Jones v. Burden, 4 Desauss. Eq. 439; Bruce v. Baker, Wilson Super. Ct. (Ind.) 462,—on the occasion of making a statute of distribution.

Distributees of estate of decedent.

Cited in Hagthorp v. Hook, 1 Gill. & J. 270; Slosson v. Lynch, 43 Barb. 147, 28 How. Pr. 417; Norwood v. Branch, 4 N. C. (2 Car. Law Repos.) 400; Jones v. Jones, 6 N. C. (2 Murph.) 150 (dissenting opinion); Neale v. Hagthrop, 3 Bland, Ch. 551,—on the distribution of the surplus of the estate of a decedent; Butler v. Elyton Land Co. 84 Ala. 384, 4 So. 675, holding that under statute when bastard dies intestate, leaving no descendants, his real estate descends to his half brother on mother's side to her exclusion; Donnell v. Mateer, 40 N. C. (5 Ired. Eq.) 7, on the division of intestate residue of realty; Barnes v. Underwood, 47 N. Y. 351,—holding that amendment of statute of distributions, in 1867, did not affect right of husband to administration and enjoyment of wife's personal estate, except in case therein specified, of her dying leaving descendants; Lamb v. Cleveland, 19 Can. S. C. 78, holding that under statute as at common law personal property of wife passed upon her death to husband and not to next of kin; Davis

v. Rowe, 6 Rand (Va.) 355, on the distribution of property under statute of distribution.

— Children.

Cited in Kelsey v. Hardy, 20 N. H. 479, holding where the son of an intestate dies under age without parents, unmarried and without brother or sister, his maternal grandmother inherits his estate; Bennett v. Toler, 15 Gratt. 588, 78 Am. Dec. 638, holding under a devise to a daughter for life with the remainder to be divided among her children, an illegitimate child will inherit.

— Posthumous children.

Cited in Ex parte State Bank, 21 N. C. (2 Dev. & B. Eq.) 75, holding a child not born until over ten months after the death of the intestate was not entitled to share in the estate; Wells v. Ritter, 3 Whart. 208, on child en ventre sa mere as taking property under statute of distributions; Villar v. Gilbey, [1907] A. C. 139, 1 Brit. Rul. Cas. 568, 76 L. J. Ch. N. S. 339, 96 L. T. N. S. 511, 23 Times L. R. 392, holding that there is no fixed rule of construction which compels court to hold that child was born in lifetime of testator because it was at that time en ventre sa mere.

Materiality of course of descent of title.

Cited in Mazyck v. Vanderhorst, Bail. Eq. 48, holding in a given case the devolution of the father's estate was unaffected whether testator took from the particular tenant or the remainderman.

Equitable and future estates.

Cited in Shute v. Harder, 1 Yerg. 3, 24 Am. Dec. 427, holding the equitable interest of a purchaser in land covenanted to be conveyed to him by a bond for title is not subject to the levy of an execution.

2 E. R. C. 264, KIRK v. EDDOWES, 3 Hare, 509, 8 Jur. 530, 13 L. J. Ch. N. S. 402.

Admissibility of parol or extrinsic evidence to prove gift or advancement or satisfaction of legacy.

Cited in Johnson v. McDowell, 154 Iowa, 38, 38 L.R.A. (N.S.) 588, 134 N. W. 419, holding extraneous evidence admissible upon question of whether money paid by testator to a niece was intended as satisfaction of legacy; Gilliam v. Chancellor, 43 Miss. 437, 5 Am. Rep. 498, holding parol evidence was admissible to prove whether a legacy was in performance and satisfaction by a covenant was a gift: Van Houten v. Post, 33 N. J. Eq. 344, holding evidence of parol declarations of testator that he did not intend that payments should operate in satisfaction of legacies is admissible: Arthur v. Arthur, 10 Barb. 9, to the point that parol evidence is admissible to corroborate or rebut presumption of satisfaction of legacy by advancement; Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716, holding an intention to adeem may be shown by extrinsic evidence; Griffith v. Bourke, Ir. L. R. 21 Eq. 92; Tuckett-Lawry v. Lamoureaux, 1 Ont. L. Rep. 364,—holding declarations of testator were admissible to show his intention that there should be an ademption of legacies: Re Turner, 53 L. T. N. S. 379, holding evidence was admissible to show that at time testator made a gift he expressed his intention that it should be considered an advance.

Parol evidence as to terms of will.

Cited in Arthur v. Arthur, 10 Barb. 9, on the admissibility of parol evidence in the construction of a will; DeGroff v. Terpenning, 14 Hun, 301, on the admissibility of the declarations of a testator in evidence.

Distinguished in Smith v. Conder, L. R. 9 Ch. Div. 170, 47 L. J. Ch. N. S. 878, 27 Week. Rep. 149, holding letters of a testator were not admissible to construe or vary the terms of the will.

Satisfaction of legacies by advancement.

Cited in Weston v. Johnson, 48 Ind. 1, on the application of the doctrine of ademption of legacies; Wallace v. DuBois, 65 Md. 153, 4 Atl. 402, holding an advancement by a father to a son of money to aid him in going into business was a part payment of a legacy left to the son without stating any particular purpose for which given; Langdon v. Astor, 16 N. Y. 9 (reversing 3 Duer. (N. Y.) 477), distinguishing between ademption and revocation; Brunn v. Schuett, 59 Wis. 260, 48 Am. Rep. 499, 18 N. W. 260, on question whether release of note against legatee by testator, after making will operated as ademption of legacy.

Cited in note in 38 L.R.A.(N.S.) 594, on gift by testator as ademption of general legacy to donee.

— Presumption of.

Cited in Langdon v. Astor, 3 Duer, 477, holding that satisfaction of legacy by subsequent advancement is question of intention, and such intention must either be presumed or established by legal evidence.

Cited in note in 2 Eng. Rul. Cas. 55, on presumption of ademption of legacy for specific purpose by subsequent gift by testator for same purpose.

Satisfaction by will.

Cited in Chichester v. Coventry, L. R. 2 H. L. 71, on right to satisfy a covenant pro tanto and converse right to satisfy part of one by will; Re Blundell [1906] 2 Ch. 222, 75 L. J. Ch. 561, 94 L. T. N. S. 818, 22 Times, L. R. 570, holding on facts a bequest in a will was a satisfaction of a wife's interest in a marriage settlement.

2 E. R. C. 274, BERKELEY v. HARDY, 5 Barn. & C. 355, 8 Dowl. & R. 102, 4 L. J. K. B. 184, 29 Revised Rep. 261.

Execution of instrument by agent to be act of principal.

Cited in Brinley v. Mann, 56 Mass. 337, 48 Am. Dec. 669, holding that deed executed by C. C. treasurer of corporation, signed and sealed by him, with his own name and seal, is not deed of corporation; Borcherling v. Katz, 37 N. J. Eq. 150, holding that fact that lessee takes lease for unnamed principal, but in his own name, will not support action for rent against unnamed principal; Townsend v. Hubbard, 4 Hill. 351, holding that a sealed instrument when executed by one acting as attorney, must be executed in the name of the principal and purport to be sealed with his seal; Hefferman v. Addams, 7 Watts, 116, holding that in the execution of a deed by one person for another, under a power of attorney, the name of the principal must be used in some form or another; Providence v. Miller, 11 R. I. 272, 23 Am. Rep. 453, holding that contract under seal made by agent will not bind principal unless made in name of principal; Stewart v. Griffith, 217 U. S. 323, 54 L. ed. 782, 30 Sup. Ct. Rep. 528, 19 Ann. Cas. 636, on enforceability of contracts under seal executed by agent; Lynch v. W. Richards Co. 37 N. B. 549, holding that in order that a written assignment of a debt may be an act of the company, it must be executed in the name of the company under its seal, or by a duly authorized agent in its name: Cullen v. Nickerson, 10 U. C. C. P. 549, holding that where four parties described not by their own names and personal descriptions, but as a collective body not shown to be

corporate, signed and sealed a deed with their own names and seals, they were to be individually bound.

Cited in note in 41 L.R.A.(N.S.) 814, 820, on form of execution of deed by attorney in fact or agent.

Distinguished in Elliott v. Douglas, 30 U. C. C. P. 398, holding that where the grant of the land was to one person and the habendum clause and the consideration paid by him, that he received a good title though signed by another in his behalf.

Necessity of sealed authority to agent to execute instrument under seal.

Cited in British North America Min. Co. v. Pigeon River Lumber Co. 2 D. L. R. 609, holding that agent appointed by parol cannot bind principal by deed; Steiglitz v. Egginton, 8 E. R. C. 622, Holt, N. P. 141, 17 Revised Rep. 620, to the point agent authorized to execute deed for principal must be authorized to do so by instrument under seal.

Cited in note in 8 Eng. Rul. Cas. 629, on requisites of power of attorney to execute deed under seal.

Cited in Tiffany, Ag. 21, on appointment to execute instrument under seal; Tiffany, Ag. 244, on liability of undisclosed principal on contract under seal; Parsons, Partn. 4th ed. 150, on power of partner to affix a seal to be by seal.

Distinguished in Beecher v. Austin, 21 U. C. C. P. 334, holding that where the statute required the authority of an agent to give a chattel mortgage to be in writing, it was not necessary that it be under seal.

Action by third party upon covenants for his benefit in contract inter partes.

Cited in Hager v. Phillips, 14 Ill. 260; Haskett v. Flint, 5 Blackf. 69, 33 Am. Dec. 452,—holding that a deed between two parties containing covenants for the benefit of a third, cannot be enforced as to such covenants by such third party; DeBolle v. Pennsylvania Ins. Co. 4 Whart. 68, 33 Am. Dec. 38; Johnson v. McClung, 26 W. Va. 59,—on the right of one not a party to a contract to maintain an action upon it; Frost v. Liverpool & L. & G. Ins. Co. 13 N. B. 278, holding that where a policy of insurance was made out to a firm and the policy was signed by an agent of the insurance company who afterward signed an assignment to a third party, the latter could not maintain an action on the policy in his own name; Maritime Bank v. Guardian Assur. Co. 19 N. B. 297, holding that where a policy was made out to a firm and the loss payable to these plaintiffs, they could not maintain an action in their name on the policy; French v. Weir, 17 U. C. Q. B. 245, holding that where an agreement was made by one person on behalf of the rest of the partners of the firm and he alone signed it, the firm could not maintain an action on the covenants contained in the agreement; Hyndman v. Williams, 8 U. C. C. P. 293, holding that where the lease was made by one person as attorney for another, and the lease reserved a right to re-enter by the former not mentioning the latter, it was of no effect.

Cited in Tiffany, Ag. 308, on right of undisclosed principal to sue in his own name on agent's contract under seal; Smith, Pers. Prop. 318, on action of covenant against tenant in name of covenantee holding legal interest only.

Distinguished in National Union Bank v. Segur, 39 N. J. L. 173, holding that a deed inter partes may be enforced as to a covenant therein contained, by a third party if it appears from the instrument that it was the intention to confer such right.

Action on joint covenant by holders of legal interests.

Cited in Buckner v. Hamilton, 16 Ill. 487, holding that if covenant be joint, suit must be brought by those having legal interests and jointly or severally as it is held by them.

Action on lease for rent by non-signing owner.

Cited in Sanborn v. Randall, 62 N. H. 620, holding that where one of several owners in common signed a lease of land as the lessor, he could maintain an action thereon for the rent without joining his co-owners.

Distinguished in Municipal Council v. Chestnut, 9 U. C. Q. B. 365, holding that the fact that the lessors had not signed the lease and that their agent had no authority to do so was no defense to an action for rent thereunder where the lessee had enjoyed the use of the premises for the full term.

Action by agent on contract principal not allowed to make by statute.

Cited in Ireland v. Noble, 3 U. C. Q. B. 235, holding that clerk to commissioners exercising public trust under statute could not be permitted to recover rent under contract that commissioners were not entitled to make by statute.

2 E. R. C. 276, Re WHITLEY PARTNERS, L. R. 32 Ch. Div. 337, 55 L. J. Ch. N. S. 540, 54 L. T. N. S. 912, 34 Week. Rep. 505.

Signature of person to a writing by agent.

Cited in Finnegan v. Lucy, 157 Mass. 439, 32 N. E. 656, holding that where the statute does not require the signature of the person to be in his own hand writing or by mark, if his name is signed by another with his consent and knowledge it is sufficient; Thomson v. McInnes, 12 C. L. R. (Austr.) 562, holding that memorandum of contract signed by another person with name of party to be charged, who was illiterate, at request and in presence of that party, was not signed by that party within meaning of statute.

— Authority of agent to sign.

Cited in Spilling Bros. v. Ryall, 8 Can. Exch. 195, holding that a duly authorized agent may sign a declaration for a trade mark; Dennison v. Jeffs [1896] 1 Ch. 611, 65 L. J. Ch. N. S. 435, 74 L. T. N. S. 270, 44 Week. Rep. 476, holding the consent of a principal to the dissolution of a building society may be signed by an agent in his behalf.

— Necessity of written authority.

Cited in Ronne v. Montreal Ocean S. S. Co. 19 N. S. 312, holding that the defendant's chief clerk was competent to sign the name of the firm to bills of lading in the ordinary course of business without written authority to do so.

Acts performable through agent.

Cited in Jackson v. Napper, L. R. 35 Ch. Div. 162, 56 L. J. Ch. N. S. 406, 55 L. T. N. S. 836, 35 Week. Rep. 228, on right to exercise a personal right conferred by legislative enactment through an agent; Bevan v. Webb [1901] 2 Ch. 59, 70 L. J. Ch. N. S. 536, 49 Week. Rep. 548, 84 L. T. N. S. 609, 17 Times L. R. 440, holding a partner was entitled to have a book of accounts examined on his behalf by an agent appointed for that purpose.

2 E. R. C. 281, RE D'ANGIBAU, 49 L. J. Ch. N. S. 756, L. R. 15 Ch. Div. 228, 43 L. T. N. S. 135, 28 Week. Rep. 930, affirming the decision of the Master of the Rolls, reported in 21 E. R. C. 349.

Incompleted intention to create a right.

Cited in McCartney v. Ridgway, 160 Ill. 129, 32 L.R.A. 555, 43 N. E. 826

(affirming 57 Ill. App. 453), holding that an incompleted intention to create a trust does not create one and a court of equity will not give it that effect; Real Estate Loan Co. v. Molesworth, 3 Manitoba, L. Rep. 116, to the joint mortgagee who is not party to agreement to sell land could not enforce such agreement.

Distinguished in Re Flavell, L. R. 25 Ch. Div. 89, 53 L. J. Ch. N. S. 185, 32 Week. Rep. 102, holding that under a covenant in the articles of partnership to pay the widow of the deceased partner an annuity, that it was a completed trust.

Capacity of infant.

Cited in Re Forster, 39 N. B. 526, holding that power of appointment may be exercised by infant where testator's intention for such exercise is clearly expressed.

Cited in notes in 64 L.R.A. 907, on execution by will of power of appointment by infant; 24 E. R. C. 182, on capacity of infant to execute mandate.

Distinguished in Shipway v. Ball, L. R. 16 Ch. Div. 376, 50 L. J. Ch. N. S. 263, 44 L. T. N. S. 49, 29 Week. Rep. 302, holding that a fund in court belonging to an infant married woman will not be paid out to her husband as she cannot waive her equity to a settlement.

Execution by will of power of appointment.

Cited in note in 64 L.R.A. 907, on execution by will of power of appointment.

Commencement of trust.

Cited in McCartney v. Ridgeway, 160 Ill. 129, 32 L.R.A. 555, 43 N. E. 826 (affirming 57 Ill. App. 453), holding that where instrument contemplates that there shall be transfer of property to trustee, relation of trustee and cestui que trust does not arise until such transfer is made.

2 E. R. C. 287, HOWARD'S CASE, L. R. 1 Ch. 561, 36 L. J. Ch. N. S. 42, 14 L. T. N. S. 747, 14 Week. Rep. 942, affirming the decision of the Vice Chancellor, reported in 14 Week. Rep. 883.

Delegation of delegated powers.

Cited in Smith v. Franklin Park Land & Improv. Co. 168 Mass. 345, 47 N. E. 409, holding that stockholders must direct by vote manner of sale of shares and cannot delegate their power; Re Behari Lal, 13 B. C. 415, holding that the powers of the governor general to prohibit the landing of immigrants cannot be delegated; Sovereign Bank v. McIntyre, 44 Can. S. C. 157 (dissenting opinion), on lack of power to delegate authority of directors conferred by section 34 of Bank Act.

— By board of directors of a corporation.

Cited in Winnipeg & H. Bay R. Co. v. Mann, 7 Manitoba L. Rep. 81, on the authority of the board of directors to delegate their authority to one or more of its own members.

Distinguished in New Sombrero Phosphate Co. v. Erlanger, L. R. 5 Ch. Div. 73, 46 N. J. Ch. N. S. 425, 36 L. T. N. S. 222, 25 Week. Rep. 436, holding that where the by-laws made three a quorum of the directors to act and there were only three appointed, and a contract was made by them for the corporation which was performed, without any fraud or concealment of facts, the contract was binding.

— Of power to allot stock.

Cited in Monarch Life Ins. Co. v. Brophy, 14 Ont. L. Rep. 1 (dissenting opinion), on the power of the directors of a corporation to delegate their powers to allot shares of stock; Re Bolt & Iron Co. 10 Ont. Pr. Rep. 434, holding that a board of directors cannot delegate to its officers or to third parties its statutory powers to allot stock or make calls; Re Pakenham Pork Packing Co. 12 Ont. L. Rep. 100, holding same as to stock; Harris's Case, L. R. 7 Ch. 587, 41 L. J. Ch. N. S. 621, 26 L. T. N. S. 781, 20 Week. Rep. 690 (decision of the vice chancellor), on the power of the directors to delegate their power to allot stock.

Distinguished in Re Standard F. Ins. Co. 7 Ont. Rep. 448, holding that where the power was not expressly delegated to the directors to allot stock, the mere ministerial acts connected therewith could be delegated.

Conditional acceptance of shares of stock.

Cited in Carlisle v. Saginaw Valley & St. L. R. Co. 27 Mich. 315, holding that where the subscription was made before any by-laws were adopted, the person was not bound by any by-law passed afterward and adopting it; International Fair & Exp. Asso. v. Walker, 88 Mich. 62, 49 N. W. 1086, on the power of subscribers to stock becoming shareholders in a manner other than that provided by the by-laws.

2 E. R. C. 289, DE BUSSCHE v. ALT, L. R. 8 Ch. Div. 286, 47 L. J. Ch. N. S. 381, 3 Asp. Mar. L. Cas. 584, 38 L. T. N. S. 370.

Right of agent to appoint sub-agent.

Cited in Ross v. Fitch, 6 Ont. App. 7, holding that where exigencies of business require it agent originally employed may appoint substitute who may bind principal; Armour v. Dinner, 4 Terr. L. Rep. 30 (dissenting opinion), on the right to appoint subagents; Meyerstein v. Eastern Agency Co. 1 Times L. R. 595, holding that where goods were consigned to agents to be sold on the best possible terms, the agents without authority to do so, could not entrust them to others to sell, and thus make such persons subagents; The Fanny, 48 L. T. N. S. 771, 5 Asp. Mar. L. Cas. 75, holding that the master of a ship had no authority to bind his owners by writing forward to a broker in a foreign port prior to its arrival to authorize the broker to charter his ship.

Accounting by agent for profits.

Cited in Pommerenke v. Bate, 3 Sask. L. R. 417 (dissenting opinion), on duty of agent to account for all profits made in transactions in which he is engaged; Powell v. Evan Jones & Co. [1905] 1 K. B. 11, 74 L. J. K. B. N. S. 115, 53 Week. Rep. 277, 21 Times L. R. 55, 92 L. T. N. S. 430, holding that an agent is bound to his principal for any profit made by him at the principal's expense and without his knowledge.

Liability of third parties conniving with agent in his breach of trust to principal.

Cited in Pommerenke v. Bate, 3 Sask. L. R. 51, holding that parties dealing with agent and knowing of his relationship to his principal and who connive in his breach of trust or derive profit therefrom, are liable to principal therefor.

Doctrine of laches.

Cited in Parker v. American Woolen Co. 195 Mass. 591, 10 L.R.A.(N.S.) 584, 81 N. E. 468, on the loss of rights through laches.

Cited in 1 Beach, Contr. 1019, on what constitutes laches.

— As working estoppel.

Cited in Anderson v. South Vancouver, 45 Can. S. C. 425, holding that mere laches as distinguished from acquiescence or estoppel, will not preclude recovery upon legal right.

What constitutes acquiescence.

Cited in Kilbourn v. Sunderland, 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct Rep. 594, holding that mere submission to an injury after the act inflicting it is completed cannot generally, and in the absence of other circumstances take away a right of action unless it continues during the time of the statute of limitations; Moore v. McGuire, 142 Fed. 787, on what constitutes acquiescence so as to loose control of land by prescription; Mallory v. Mallory, 61 Conn. 131, 23 Atl. 708, holding that in order to constitute acquiescence the person must have had an opportunity to act, and to act with perfect freedom; Morse v. Hill, 136 Mass. 60, holding that mere delay in bringing an action does not amount to an acquiescence; Pope Mfg. Co. v. Rubber Goods Mfg. Co. 110 App. Div. 341, 97 N. Y. Supp. 73, holding that a pleading which did not allege that the party was in any way prejudiced or was induced to do any act which it would not otherwise have done is insufficient in alleging acquiescence; Allen v. Wilmington & W. R. Co. 106 N. C. 515, 11 S. E. 826; Graham v. British Canadian Loan & Invest. Co. 12 Manitoba L. Rep. 244 (dissenting opinion), on the application of the doctrine of acquiescence; Re Pepperell, 27 Week. Rep. 410; McIntosh v. Carritte, N. B. Eq. Cas. 406,—holding that if a person stands by in such a manner and encourages another, though but passively, to lay out his money through expectation that no obstacle will thereafter be imposed, no substantial interference with it will be allowed; Blake v. Gale, L. R. 31 Ch. Div. 196, 53 L. T. N. S. 689, on the meaning of the term acquiescence; Northumberland v. Bowman, 56 L. T. N. S. 773, holding that a delay of fourteen months by a plaintiff in taking steps to prevent the continuance of a restrictive covenant will not amount to such acquiescence as to disentitle him to an injunction; Allcard v. Skinner, L. R. 36 Ch. Div. 145, 56 L. J. Ch. N. S. 1052, 57 L. T. N. S. 61, 36 Week. Rep. 251 (dissenting opinion), on the delay in asserting a right as constituting acquiescence.

Distinguished in Myers v. Bolton, 157 N. Y. 393, 52 N. E. 114, 28 N. Y. Civ. Proc. Rep. 397, holding that where there was no action or representation upon which an estoppel could be predicated there was no acquiescence; Thompson v. Canada F. & M. Ins. Co. 9 Ont. Rep. 284, holding that where several shareholders protested against the appointment of a certain person as manager and afterward acted under him, they were held to have acquiesced in his appointment.

— As working an estoppel.

Cited in Fox v. Drewry, 62 Ark. 316, 35 S. W. 533, on mere silence as working estoppel; Davis v. Neal, 100 Ark. 399, 140 S. W. 278, holding that mere silence will not estop party to claim land unless in some way party relying upon estoppel is put to disadvantage by action of party said to be estopped; Crisman v. Lanterman, 149 Cal. 647, 117 Am. St. Rep. 167, 87 Pac. 89, holding that in order to work an estoppel by acquiescence the party must have induced the person committing to act to believe that he assented to its being committed; DePauw Plate Glass Co. v. Alexandria, 152 Ind. 443, 52 N. E. 608, holding that corporation, having notice of attempted annexation of its property to city, and making no protest is estopped from setting up invalidity of annexation for purpose of escaping taxation; Pope Mfg. Co. v. Rubber Goods Mfg.

Co. 110 App. Div. 341, 97 N. Y. Supp. 73, holding that mere knowledge of or assent to breach of contract does not constitute waiver, but there must be formed release, sufficient consideration, or such conduct on part of assenting person as will have created condition to detriment of other party; Jones v. Bouffier, 12 C. L. R. (Austr.) 579 (dissenting opinion), on establishment of estoppel by acquiescence; Laycock v. Lee, 1 D. L. R. 91, holding that to establish estoppel by ratification of voidable transaction between parties in fiduciary relationship, it must be shown by clear evidence that party claimed to be estopped acted with full knowledge.

Cited in Hollingsworth, Contr. on rescission of contract for fraud—effect of acquiescence.

— As distinguished from laches.

Cited in Hall v. Otterson, 52 N. J. Eq. 522, 28 Atl. 907, holding that acquiescence relates to inaction during performance of an act, and laches to the delay afterward.

—Necessity of knowledge of facts before acquiescence.

Cited in Chilberg v. Lyng, 63 C. C. A. 451, 128 Fed. 899, holding that a general custom among brokers in regard to sales of land is not binding upon the owner in the absence of his knowledge of it.

Right of agent to commission.

Cited in Culverwell v. Campton, 31 U. C. C. P. 342, holding that principal cannot refuse to pay agent's commission on sale of land because he received commission from other party with their knowledge and consent.

Usage making agent principal.

Cited in Benjamin, Sales, 5th ed. 255, on power of usage to change the intrinsic character of a contract by converting agent into principal.

2 E. R. C. 304, ASHBURY R. CARRIAGE & IRON CO. v. RICHE, 44 L. J. Exch. N. S. 185, L. R. 7 H. L. 653, 33 L. T. N. S. 450, 24 Week. Rep. 794, reversing the decision of the Court of Exchequer Chamber reported in L. R. 9 Exch. 224, 23 Week. Rep. 7.

Power of corporation to ratify contracts ultra vires.

Cited in Highway Comrs. v. VanDusan, 40 Mich. 429, holding that a municipal corporation cannot ratify an act which it would have been positively unlawful for it to do; La Compagnie DeVillas v. Hughes, 3 Dorion (Quebec) Lib. 175, holding that an act by a quasi-corporation beyond its powers cannot be ratified.

Cited in notes in 7 E. R. C. 640, 641; 7 E. R. C. 367,—ratification of unauthorized act of agent by corporation.

The decision of the Court of Exchequer Chamber was cited in Wood v. Ontario & Q. R. Co. 24 U. C. C. P. 334, to the point that act of agent may be ratified by board of directors as to contracts which company is permitted to make.

— Ratification by shareholders.

Cited in Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478, holding that a contract not within the scope of the powers conferred on a corporation cannot be made valid by the assent of every one of the shareholders; Germania Safety-Vault & T. Co. v. Boynton, 19 C. C. A. 118, 37 U. S. App. 602, 71 Fed. 797, holding that a defect in the power of a corporation is not supplied by an agreement of the stockholders; Oregon R. & Nav. Co. v. Oregonian R. Co. 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. Rep. 409; Louisville Trust Co. v. Louisville, N. A. & C. R. Co. 22

C. C. A. 378, 43 U. S. App. 550, 75 Fed. 433,—on the power of stockholders to ratify a contract ultra vires; Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. 36 C. C. A. 155, 95 Fed. 497, on contracts wholly beyond the corporate powers as void and incapable of ratification or enforcement; Steiner v. Steiner Land & Lumber Co. 120 Ala. 128, 26 So. 494; Brisay v. Star Co. 13 Misc. 349, 35 N. Y. Supp. 99; Hatch v. Western U. Teleg. Co. 9 Abb. N. C. 430,—holding that ultra vires acts which are forbidden by law cannot be ratified by the stockholders; Hill v. Atlantic & N. C. R. Co. 143 N. C. 539, 9 L.R.A.(N.S.) 606, 55 S. E. 854 (dissenting opinion), on the power of shareholders to make valid a contact which is ultra vires as without the powers of the corporation; Dominion Salvage & Wrecking Co. v. Atty. Gen. 21 Can. S. C. 72, holding that no ratification waiver or acquiescence by the shareholders can validate as against the crown any act which is ultra vires; Gibson v. Barton, L. R. 10 Q. B. 329, 44 L. J. Mag. Cas. N. S. 81, 32 L. T. N. S. 396, 23 Week. Rep. 858 (dissenting opinion), on the power of the shareholders to ratify ultra vires acts: Re West of England Bank, L. R. 14 Ch. Div. 317, 49 L. J. Ch. N. S. 400, 42 L. T. N. S. 619, 28 Week. Rep. 809, on the power of shareholders to ratify ultra vires acts; Ashbury v. Watson, L. R. 28 Ch. Div. 61, L. R. 30 Ch. Div. 376, 54 L. J. Ch. N. S. 12, 51 L. T. N. S. 766, 54 L. J. Ch. N. S. 985, 54 L. T. N. S. 27, 33 Week. Rep. 882, holding that though an act be done by the consent of the whole number of shareholders it will not be valid if ultra vires; Chapleo v. Brunswick Ben. Bldg. Soc. L. R. 5 C. P. Div. 331, 49 L. J. C. P. N. S. 796, 42 L. T. N. S. 741, 29 Week. Rep. 153, 2 Eng. Rul. Cas. 366, holding of an unincorporated body that the assent of shareholders or directors would not make them liable for an act beyond the powers conferred upon their managing agent and their own rules but not beneficial.

Cited in 1 Elliott, Railr. 2d ed. 606, on necessity for concurrence of stockholders to lease of real estate by railroad company.

Distinguished in Camden & A. R. Co. v. May's Landing & E. H. City R. Co. 48 N. J. L. 530, 7 Atl. 523; Hoyt v. Quicksilver Min. Co. 78 N. Y. 159, holding that acts of a corporation which are not illegal per se or malum prohibitum, but which are ultra vires as affecting the rights of the stockholders only, can be ratified by them; Dominion Type Founding Co. v. Gazette Pub. Co. 32 N. B. 692, holding that where the act was ultra vires as to the directors but intra vires as to the shareholders, the latter could ratify such act of the directors.

The decision of the Exchequer Chamber was cited in Holmes, Booth & Haydens v. Willard, 125 N. Y. 75, 11 L.R.A. 170, 25 N. E. 1083, holding that where officers engage in ultra vires business for benefit of corporation, and it receives benefit thereof and such business carried on with acquiescence of stockholders, corporation cannot bring action against officers for damage suffered by business; Thomas v. West Jersey R. Co. 37 Phila. Leg. Int. 185, on ratification of acts of directors by shareholders.

Charter of a corporation or other law as determining the limits of its powers.

Cited in Central Trust Co. v. Columbus, H. Valley & T. R. Co. 87 Fed. 815, holding that a corporation may exercise all the means reasonably adapted to the end authorized by the law under which it is organized unless clearly limited by its charter; Byrne v. Schuyler Electric Mfg. Co. 65 Conn. 336, 28 L.R.A. 304, 31 Atl. 833, holding that transfer of all its property by insolvent corporation, for purpose of keeping company in nominal existence, is void as against

nonassenting stockholders in absence of express power in charter; Bowman Dairy Co. v. Mooney, 41 Mo. App. 665, holding that business corporation had no power to sell oysters under charter "to buy and sell dairy products;" Franklin Bank v. Commercial Bank, 36 Ohio St. 350, 38 Am. Rep. 594, holding that a corporation is limited to the exercise of such powers as are expressly granted, and those incidentally necessary to carry those granted into effect; First Nat. Bank v. American Nat. Bank, 173 Mo. 153, 72 S. W. 1059; Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co. 86 Tex. 143, 22 L.R.A. 802, 24 S. W. 16,—on the powers of a corporation as being restricted to those expressly granted or incidental thereto; Bowman Dairy Co. v. Mooney, 41 Mo. App. 665, holding that any business prosecuted by a corporation must in some way be necessary to the business authorized by its charter; Kilbreth v. Bates, 38 Ohio St. 187, holding that discounting bill of exchange at higher rate of interest than allowed by charter of trust company, rendered bill void in company's hands; New York Trust & Loan Co. v. Helmar, 12 Hun, 35, holding that a corporation which by its charter was made subject to the laws of the state, could not carry on a business in plain violation of that statute; Thomas v. West Jersey R. Co. 9 W. N. C. 65, holding that powers of corporations are such as are conferred by their charters, whether express or fairly implied; Lynch v. William Richards Co. 38 N. B. 160, holding that corporations empowered to collect tolls for driving lumber could not make contract with individual to do driving and collect tolls; Ontario Bank v. McAllister, 43 Can. S. C. 338 (dissenting opinion), on power of corporation as limited by statute under which it is created; Shawinigan Water & Power Co. v. Chawinigan Falls, Rap. Jud. Quebec, 19 B. R. 546, holding that where statute confers powers in general terms, and provides special means of exercising them, such means must be adopted and no other; Atty. Gen. ex rel. Hobbs v. Niagara Falls, W. P. & C. Tramway Co. 19 Ont. Rep. 624, holding that under charter to operate railroad on all days except Sundays, information to restrain operating railway on Sunday would not lie because act did not prohibit running cars on Sunday; Ooregum Gold Min. Co. v. Roper, 7 E. R. C. 645, [1892] A. C. 125, 61 L. J. Ch. N. S. 337, 66 L. T. N. S. 427, 41 Week. Rep. 90, holding that company limited by shares, formed under Companies Acts, has no power to issue shares as fully paid up, for less than their nominal value.

Cited in Hollingsworth, Contr. 89, on restrictions placed on corporation by power creating it.

Distinguished in Re South Durham Brewery Co. L. R. 31 Ch. Div. 261, 55 L. J. Ch. N. S. 179, 53 L. T. N. S. 928, 34 Week. Rep. 126, holding that where the corporation had power under its charter to increase its stock but no mention was made of preferred shares, being issued, it could increase its stock by the issuance of preferred stock, if authorized by subsequent by-laws.

Limited in Att.-Gen. v. Great Eastern R. Co. L. R. 11 Ch. Div. 449, L. R. 5 App. Cas. 473, 49 L. J. Ch. N. S. 545, 42 L. T. N. S. 810, 28 Week. Rep. 769, 22 Eng. Rul. Cas. 114, holding that not only are those powers which are granted to a corporation by its charter, alone to be exercised by it, but all such powers as are incidentally necessary to carry out those granted.

The decision of the Court of Exchequer Chamber was cited in Corbett v. South Eastern & C. R. Co. [1906] 2 Ch. 12, 75 L. J. Ch. N. S. 489, 94 L. T. N. S. 748, 22 Times L. R. 550, holding a contract outside the purposes expressed in the act of incorporation was ultra vires; Welsh v. Ferd Heim Brewing Co. 47 Mo. App. 608, holding that, in order, in collateral proceeding to declare ultra vires acts of trading corporation void, charter must declare such acts void; Bernardin

v. North Dufferin, 19 Can. S. C. 581, holding that municipal corporation is liable on executed contract for performance of work for which it was created and of which work it has received benefit, though contract was not made under seal; Re Bronson, 1 Ont. Rep. 415, holding that municipal corporation may convey property owned by it, unless such power is expressly or impliedly taken away by act under which it was constituted.

— "Memorandum" of association as limitation of powers.

Cited in Re German Date Coffee Co. L. R. 20 Ch. Div. 169, 51 L. J. Ch. N. S. 564, 46 L. T. N. S. 327, 30 Week. Rep. 717, 7 Eng. Rul. Cas. 564, on the effect of the memorandum of association as a limitation of the powers of the corporation; Guinness v. Land Corp. L. R. 22 Ch. Div. 349, 52 L. J. Ch. N. S. 177, 47 L. T. N. S. 517, 31 Week. Rep. 341, holding that a corporation could not extend the powers conferred by its memorandum of association by provisions in its articles of association; Andrews v. Gas Meter Co. 66 L. J. Ch. 246, [1897] 1 Ch. 361, 76 L. T. N. S. 132, 45 Week. Rep. 321, on the memorandum of association as fixing the powers of the corporation.

Doctrine of ultra vires.

Cited in 2 Page, Contr. 1693, on reasons underlying doctrine of ultra vires of corporate contracts; 1 Elliott, Railr. 2d ed. 527, on definition of ultra vires contracts.

Estoppel of corporation to set up defense of ultra vires.

Cited in Timberlake v. Supreme Commandery, U. O. G. C. 208 Mass. 411, 36 L.R.A.(N.S.) 597, 94 N. E. 685, holding that foreign fraternal organization which illegally took over domestic society and assumed its liabilities to members cannot defend action on benefit certificate on ground that insured failed to perform formal acts for becoming member of foreign company.

Cited in note in 20 L.R.A. 770, 771, on estoppel of corporation to set up plea of ultra vires.

Cited in 1 Elliott, Railr. 2d ed. 532, on estoppel of corporation to set up defense of ultra vires.

The decision of the Exchequer Chamber was cited in Forman v. Bigelow, 4 Cliff. 508, Fed. Cas. No. 4,934, holding that corporation having power to issue stock is estopped from setting up defense that shares held by innocent party for value are void.

Ratification of acts of agent by principal generally.

The decision of the Exchequer Chamber was cited in Canada C. R. Co. v. Murray, 8 Can. S. C. 313 (dissenting opinion), on necessity of full knowledge of facts in order to bind principal by ratification of act of agent; Pickles v. Western Assur. Co. 40 N. S. 327, holding that principal can ratify contract made by assumed agent after principal has repudiated it.

Powers of a corporation organized for specific purpose as limited to those specified, or incidental thereto.

Cited in Gray v. McCallum, 5 B. C. 462, on the recital of the objects for which the company was organized, in the articles of association, as limiting its powers; Enniskillen Loan Fund Soc. v. Green [1898] 2 Ir. Ch. 103; Grimmer v. Gloucester, 35 N. B. 255; Whitby v. Grand Trunk R. Co. 1 Ont. L. Rep. 480; Charlebois v. Delap, 26 Can. S. C. 221; Earle v. Burland, 27 Ont. App. Rep. 540,—holding that the powers of a corporation created by statute are those only, which are conferred upon it by the statute, or incidental thereto; Winnipeg Street R. Co. v. Winnipeg Electric Street R. Co. 9 Manitoba L. Rep. 219,

holding same as to municipalities; Canada Southern R. Co. v. Niagara Falls, 22 Ont. Rep. 41, holding that where a corporation is created for a specific purpose, with specified powers only, it prohibits the exercise of powers not specified; Canadian P. R. Co. v. Ottawa F. Ins. Co. 39 Can. S. C. 405 (dissenting opinion); Maple Leaf Rubber Co. v. Brodie, Rap. Jud. Quebec, 18 C. S. 352,—on the restricted powers of a corporation organized under a general law for specified purposes; Wenlock v. River Dee Co. L. R. 10 App. Cas. 354, 54 L. J. Q. B. N. S. 577, 53 L. T. N. S. 62, 49 J. P. 773, holding that whenever a corporation was created by the legislature for a particular purpose it has only such powers as are conferred on it for that purpose or incidental thereto.

— As to contracts, mortgages or debts or similar agreements.

Cited in Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co. 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094, holding that unless specially authorized by its charter or aided by legislative action a railroad company cannot lease its franchises and right to operate the railroad; Presbyterian Mut. Assur. Fund v. Allen, 106 Ind. 593, 7 N. E. 317; Mason v. Mason, 160 Ind. 191, 65 N. E. 585,—holding that a contract must be one authorized by the corporate charter and in the mode prescribed by it; Ehrman v. Union Cent. L. Ins. Co. 35 Ohio St. 324 (dissenting opinion),—on authority of insurance corporation to make contract for sale of its property; Bickford v. Grand Junction R. Co. 1 Can. S. C. 696, holding that every corporation has power to mortgage without enabling power being granted; Exchange Bank v. Fletcher, 19 Can. S. C. 278, holding a contract which was permitted to be made by the corporation was not ultra vires even though made contrary to a statute forbidding it; United Trust Co. v. Chilliwack, 5 B. C. 128; Paisley v. Chilliwack, 5 B. C. 132,—holding that where a municipality was imperatively bound to enter into a contract in a particular mode, they could not do so in another; Winnipeg & H. Bay R. Co. Mann, 7 Manitoba L. Rep. 81, holding that the company's right to mortgage its property was regulated by the statute fixing its powers of borrowing money; Re Lockwood Electric Div. Agri. Soc. 12 Manitoba L. Rep. 655, holding that a corporation had no power to mortgage its property unless authorized by the statute creating it; Grand Junction R. Co. v. Bickford, 23 Grant Ch. (U. C.) 302, on the right to mortgage a part of a track and right of way between two points, without any express authority to mortgage being granted; Howard v. Patent Ivory Co. L. R. 38 Ch. Div. 156, 57 L. J. Ch. N. S. 878, 58 L. T. N. S. 395, 36 Week. Rep. 801, holding that the company being authorized to mortgage all or any part of the company's properties and rights, it could mortgage the capital of the company then being uncalled.

Cited in notes in 6 E. R. C. 75, 78, on capacity of corporations to contract; 22 E. R. C. 28, on right of trustees of public body to use corporate funds to oppose injurious legislation.

Cited in 1 Elliott, Railr. 2d ed. 539, as to what contracts of corporation are ultra vires; 1 Elliott, Railr. 2d ed. 548, on right of railroad company to enter into illegal contract; 1 Nellis, St. Rys. 2d ed. 155, on validity of sale or lease of street railway franchise.

Distinguished in Stobart v. Forbes, 13 Manitoba L. R. 184, holding that a trading corporation has power to take an assignment of a chose in action and collect it for the benefit of the assignor; Whiting v. Hovey, 13 Ont. App. Rep. 7, holding that a trading company could make an assignment for the benefit of creditors without the consent of its shareholders.

— Holding stock or interest in other companies.

Cited in Cree v. Somervail, L. R. 4 App. Cas. 648; Re Dronfield Silkstone Coal Co. L. R. 17 Ch. Div. 76, 50 L. J. Ch. N. S. 387, 44 L. T. N. S. 361, 29 Week. Rep. 768; Trevor v. Whitworth, L. R. 12 App. Cas. 409, 57 L. J. Ch. N. S. 28, 57 L. T. N. S. 457, 36 Week. Rep. 145,—holding that a corporation could not purchase its own shares, it not being by its charter authorized to do so, though it was by its articles of association; Hope v. International Financial Soc. L. R. 4 Ch. Div. 327, 46 L. J. Ch. N. S. 200, 35 L. T. N. S. 924, 25 Week. Rep. 203, holding same where not authorized by its articles or memorandum of association.

Acts ultra vires because of wrong method.

Cited in Merchants' Bank v. Hancock, 6 Ont. Rep. 285, on the method of business as pursued by a corporation as being ultra vires.

Enumeration of the powers of a corporation in the charter as negativing the exercise of those not named.

Cited in Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950, holding that the powers of a corporation organized under legislative charter are only such as the statute confers and the enumeration of them implies the exclusion of all others; Bank of Toronto v. Perkins, 8 Can. S. C. 603, on the enumeration of the powers of corporation in its charter as negativing the exercise of those not enumerated; Nelson Coke & Gas Co. v. Pellatt, 4 Ont. L. Rep. 481, holding that the creation of preferred and common stock in the corporation being authorized by the articles of association, the by-law providing therefor was valid; Re Farmers' Loan & Sav. Co. 30 Ont. Rep. 337, on the right of a corporation to mortgage its property without the power being expressly granted.

Distinguished in Atty. Gen. v. Niagara Falls, W. P. & C. Tramway Co. 18 Ont. App. Rep. 453 (affirming 19 Ont. Rep. 624), holding that where the defendants were chartered to operate a street railway on all days except Sunday there was no restriction against their operating the road on Sunday.

— Exercise of powers not enumerated as ultra vires.

Cited in Ellerman v. Chicago Junction R. & Union Stockyards Co. 49 N. J. Eq. 217, 23 Atl. 287, holding that corporations organized under general act are vested with powers conferred by general act and those contemplated by certificate, and such incidental powers as are necessary; La Campagnie De Villas Du Cap. Gibralter v. Hughes, 11 Can. S. C. 537 (reversing 3 Dorion, Q. B. 175), holding that a contract incidental to the purposes for which the corporation was organized was not ultra vires; London & N. W. R. Co. v. Price, L. R. 11 Q. B. D. 485, 52 L. J. Q. B. N. S. 754; Atty. Gen. v. Pontypridd Urban Dist. Council, [1906] 2 Ch. 12, W. N. 117,—holding that anything incidental to or consequential on, that which the legislature had authorized was not ultra vires.

Cited in note in 22 E. R. C. 129, on implied powers of corporation.

Distinguished in Livingston v. Temperance Colonization Soc. 17 Ont. App. Rep. 379, holding that where the company was not incorporated for a particular purpose, whatever is fairly incidental to its business is ultra vires.

— Contracts ultra vires because outside of, or contrary to purpose of corporation.

Cited in Davis v. Old Colony R. Co. 131 Mass. 258, 41 Am. Rep. 221, holding that the acts of a railroad company in guaranteeing the expenses of a musical festival where ultra vires; Safety Insulated Wire & Cable Co. v. Baltimore, 20 C. C. A. 453, 42 U. S. App. 64, 74 Fed. 363, on contracts which are foreign to the

purposes for which the corporations are organized as being ultra vires; Dow v. Northern R. Co. 67 N. H. 1, 36 Atl. 510, holding lease of corporate property for 99 years invalid where incompatible with existence or dissolution of corporation; Amalgamated Soc. v. Osborne, [1910] A. C. 87, 1 B. R. C. 56, 79 L. J. Ch. N. S. 87, 101 L. T. N. S. 787, 26 Times L. R. 177, 54 Sol. Jo. 215, 47 Scot. L. R. 613, holding that trade unions have not power under acts creating them to administer funds for political purposes.

Cited in note in 22 E. R. C. 28, on right of trustees of public body to use corporate funds to oppose injurious legislation.

Nonliability on ultra vires acts.

Cited in California Nat. Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831, on the application of the doctrine of ultra vires; National Home Bldg. & L. Asso. v. Home Sav. Bank, 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619, on the right of a corporation to urge ultra vires as a defense to an action on a contract; Greenville Compress & W. Co. v. Planters' Compress & W. Co. 70 Miss. 669, 35 Am. St. Rep. 681, 13 So. 879, holding that a contract ultra vires cannot be made the basis of an action, but, to the extent that the corporation has received a benefit and which cannot be returned a recovery may be had; Currier v. New York, W. S. & B. R. Co. 35 Hun, 355, holding that stockholder of insolvent corporation may maintain action against corporation and directors to rescind unlawful contract and compel wrongdoers to account, without making demand where corporation unable to act because of director's implication; Radford v. Merchants Bank, 3 Ont. Rep. 529; Lowson v. Canada Farmers' Ins. Co. 28 Grant Ch. (U. C.) 525,—holding that a contract made in violation of an express provision of the act creating the corporation is ultra vires, and absolutely void; Re Walker, 57 L. T. N. S. 763, holding that a contract ultra vires was not binding upon the corporation.

Cited in 1 Elliott Railr. 2d ed. 541, on nonenforceability by injunction of ultra vires contract of railroad company; 2 Beach Contr. 1246, on injunction against execution of ultra vires contract of corporation.

Distinguished in Bath Gaslight Co. v. Claffy, 151 N. Y. 24, 36 L.R.A. 664, 45 N. E. 390, holding that an ultra vires contract which is not illegal will, where it has been partially executed on one side not be available as a defense to a recovery for what has been done; Re Coltman, L. R. 19 Ch. Div. 64, 51 L. J. Ch. N. S. 3, 45 L. T. N. S. 392, 30 Week. Rep. 342, holding that where the contract was not made for an illegal purpose, but was simply unauthorized, the person sued on it could not avail himself of the defense that the contract was ultra vires; Balkis Consol. Co. v. Tomkinson, 63 L. J. Q. B. N. S. 134, [1893] A. C. 396, 1 Reports, 178, 69 L. T. N. S. 598, 42 Week. Rep. 204, holding that a company is authorized to pay damages for a wrong done.

—Effect of contracts ultra vires.

Cited in Carleton Branch R. Co. v. Grand Southern R. Co. 21 N. B. 339, on a contract ultra vires as working a forfeiture of the charter of the corporation.

The decision of the Exchequer Chamber was cited in Fergus Falls v. Fergus Falls Hotel Co. 80 Minn. 165, 50 L.R.A. 170, 81 Am. St. Rep. 249, 83 N. W. 54 (dissenting opinion), on invalidity of contracts of corporation which are illegal.

General words in a statute as limited in their application by special words which they follow.

Cited in American Manganese Co. v. Virginia Manganese Co. 91 Va. 272, 21 S.

E. 466, holding that where particular words in a statute are followed by general words, the general words are to be restricted to the general class designated by the particular words; Re Macfie, 12 Ont. Pr. 167, to the point that general words are confined to things and persons ejusdem generis with those enumerated, or of inferior quality.

Distinguished in London Financial Asso. v. Kelk, L. R. 26 Ch. Div. 107, 53 L. J. Ch. N. S. 1025, 50 L. T. N. S. 492, holding that where it is evident that the general words following particular ones are wholly different in themselves they are not so limited by those preceding.

Rights created by statute as carrying with them similar common-law rights.

Cited in New British & M. Fire & Life Ins. Co. v. Lambe, 1 Mont. L. Rep. 1 Q. B. 122, 4 Dorion Q. B. 112, on a statutory right as succeeding a common-law right when they are similar.

Rights of person not party to contract under it.

Cited in Hollingsworth Contr. 293, on acquiring rights under contract to which one was not a party.

2 E. R. C. 346, WATSON v. SWANN, 11 C. B. N. S. 756, 31 L. J. C. P. N. S. 210.

Ratifiable acts.

Cited in Pemberton v. Price & T. Piano Co. 144 Ky. 518, 139 S. W. 742, holding that one essential element for basis of ratification of unauthorized act by agent, is that contract must have been made in name of and in behalf of principal; Taliaferro v. First Nat. Bank, 71 Md. 200, 17 Atl. 1036, on the right to ratify the acts of a person unauthorized to act as agent; Fraser v. Sweet, 13 Manitoba L. Rep. 147, 2 B. R. C. 254, holding that no ratification of act can be effectual unless it has been done by agent on behalf of party who ratifies; Durant & Co. v. Robarts & K. M. & Co. [1900] 1 Q. B. 629, 69 L. J. Q. B. N. S. 382, 48 Week. Rep. 476, 82 L. T. N. S. 217, 16 Times L. R. 244, [1901] A. C. 240, 70 L. J. K. B. N. S. 662, 1 Brit. Rul. Cas. 351, 84 L. T. N. S. 777, 17 Times L. R. 527, holding that a person cannot sue upon a contract made by a third person, intending to contract in his behalf, where the person making it did not profess at the time of making it to be acting as an agent.

Cited in note in 2 B. R. C. 262, on attempted ratification as conferring right or imposing liability upon one not contemplated by agent as his principal.

Cited in Tiffany Ag. 57, on necessity of agent's designating principal; Tiffany Ag. 54, 55, on assumption of agency.

Distinguished in Saltmarsh v. Candia, 51 N. H. 71; Hamlin v. Sears, 82 N. Y. 327, holding that though the acts of one assuming to act as an agent may be ratified if unauthorized, if he does not assume to act as agent they cannot be.

Right of stranger to sue upon a contract.

Cited in Mitchell v. London F. Ins. Co. 12 Ont. Rep. 706 (dissenting opinion), on the right of a mortgagee to sue on an insurance policy taken out in the name of the mortgagor; Browning v. Provincial Ins. Co. L. R. 5 P. C. 263, 28 L. T. N. S. 853, 21 Week. Rep. 587, holding that contract of marine insurance entered into with underwriters by agent in his own name may be sued upon by principal.

Distinguished in Ebsworth v. Alliance Marine Assur. Co. L. R. 8 C. P. 596, 42 L. J. C. P. N. S. 305, 29 L. T. N. S. 479, 2 Asp. Mar. L. Cas. 125, 13 Eng. Rul.

Cas. 215, holding that where the consignees of goods insured them for the benefit of all those having an interest therein, they could recover on the policy, by alleging interest in themselves.

Open policies of insurance.

Cited in Strohn v. Hartford F. Ins. Co. 37 Wis. 625, 19 Am. Rep. 777, on what constitutes an open or running policy.

2 E. R. C. 351, RE NORTHUMBERLAND AVE. HOTEL CO. L. R. 33 Ch. Div. 16, 54 L. T. N. S. 777.

Binding effect of contracts made on behalf of corporation before its organization.

Cited in Halifax Street Carette Co. v. McManus, 27 N. S. 173, holding that notes given the promoters to pay for shares in a corporation not in existence, could not be enforced after its organization; Tuttle v. Tuttle, 101 Me. 287, 64 Atl. 496, 8 Ann. Cas. 260, holding that a corporation is not liable on a contract made by its promoters, unless it has subsequent to its organization adopted or ratified it, or has done so in its charter; Tygert-Allen Fertilizer Co. v. J. E. Tygert Co. 21 Pa. Co. Ct. 193, 7 Pa. Dist. R. 430, holding that agreement of promoters of corporation is not binding upon corporation, unless corporation after it is organized takes benefit under it; Re London Speaker Printing Co. 16 Ont. App. Rep. 508, holding that there can be no privity of contract between a party and a corporation not then in existence.

Cited in note in 26 L.R.A. 549, on liability of corporations on contracts of promoters.

— Ratification by corporation after organization.

Cited in Tygert-Allen Fertilizer Co. v. J. E. Tygert Co. 191 Pa. 336, 43 Atl. 224 (affirming 7 Pa. Dist. Rep. 430, 21 Pa. Co. Ct. 193), on the power of a corporation to ratify the contracts made in its behalf by its promoters; Dunsmuir v. Colonist Printing & Pub. Co. 9 B. C. 275, on the right of a corporation to ratify a contract made in its behalf before its organization; Coit v. Dowling, 4 Terr. L. Rep. 464, holding that a contract made on behalf of a corporation before its organization did not become binding afterward because some of its provisions were carried out; Bradford v. Metcalf, 185 Mass. 205, 70 N. E. 40; Ireland v. Globe Mill & Reduction Co. 20 R. I. 190, 38 L.R.A. 299, 38 Atl. 116; Re Hess Mfg. Co. 21 Ont. App. Rep. 66,—holding that a corporation cannot ratify an agreement made in its behalf by its promoters before its organization; Cass v. McCutcheon, 15 Manitoba L. Rep. 669, holding contract entered into by company not yet formed, or for principal not in existence at time of making contract cannot be binding upon or ratified by such company or principal; Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co. [1901] 1 Ch. 196, 70 L. J. Ch. N. S. 128, 49 Week. Rep. 265, 83 L. T. N. S. 667, 17 Times L. R. 117, [1902] 1 Ch. 146, 71 L. J. Ch. N. S. 158, 50 Week. Rep. 177, 85 L. T. N. S. 652, 18 Times L. R. 161, 19 Rep. Pat. Cas. 69, holding that by taking advantage of such an agreement, ratified it so as to become liable on it.

Distinguished in Howard v. Patent Ivory Mfg. Co. L. R. 38 Ch. Div. 156, 57 L. J. Ch. N. S. 878, 58 L. T. N. S. 395, 36 Week. Rep. 801, holding that where the corporation in effect entered into a new agreement with the party, which was to all intents the same as the original agreement the company was bound.

Power of corporation to ratify acts of agents.

Cited in 1 Elliott Railr. 2d ed. 513, on power of railroad company to ratify unauthorized act outside of corporate powers.

Relief when contract is performed under erroneous impression of its validity.

Cited in Hobbs v. Esquimalt & N. R. Co. 6 B. C. 228, on the relief to be granted when persons have acted under a contract entered into under a unilateral mistake.

Doctrine of part performance as enabling the recovery of damages at law.

Cited in Lavery v. Pursell, L. R. 39 Ch. Div. 508, 57 L. J. Ch. N. S. 570, 58 L. T. N. S. 846, 37 Week. Rep. 163, holding that the equitable doctrine of part performance cannot be made use of to avoid the statute of frauds to enable the party to recover damages on a contract at law.

Liability of subscriber to stock before incorporation.

Cited in Halifax Street Carette Co. v. McManus, 27 N. S. 173, holding that offer by subscriber to stock of proposed corporation, cannot be taken advantage of after incorporation although person making offer has not repudiated offer.

Liability of agent of non-existing principal.

Cited in Benjamin Sales, 5th ed. 262, on personal liability of agent for non-existing principal signing contract.

2 E. R. C. 358, WHITEHEAD v. TUCKETT, 15 East, 400, 13 Revised Rep. 509.

Who is a general agent.

Cited in Kilborn v. Prudential Ins. Co. 99 Minn. 176, 108 N. W. 861, holding that the mere fact that an agent's authority is limited to a particular business does not make his agency special, if he has general authority to perform all acts necessary to transact that business; Blake v. Domestic Sewing Mfg. Co. 64 N. J. Eq. 480, 38 Atl. 241, on the distinction between general and special agencies; Cox v. Hoffman, 20 (4 Dev. & B. L. 180) 319, holding that a wife may become an agent for her husband as inferred from conduct of her husband; London Sav. Fund. Soc. v. Hagerstown Sav. Bank, 36 Pa. 503, 78 Am. Dec. 390, holding that general agent is one whom man puts in his place to transact all his business of particular kind; Davis v. Cordon, 87 Va. 559, 13 S. E. 35, holding that agent employed to effect sale of only one parcel of land, in specified manner, is special agent.

— Authority of.

Cited in Reinhard Ag. 10, on authority of general agent; Tiffany Ag. 184, as to when principal is bound by apparent authority of agent independent of estoppel.

— Secret limitations of authority.

Cited in Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 191, holding that an agent who is held out as having general authority, cannot be limited in his authority by special instructions unknown to the party with whom he deals; Munn v. Commission Co. 15 Johns. 44, holding that principal is liable for acts of general agent, acting within general scope of authority, regardless of private instructions; Sanford v. Handy, 23 Wend. 260, holding that where a person is engaged in a particular department of business and is employed to do an act within his line, with special restrictions there the general powers will control and he will be held to possess such as his ordinary occupation fairly imports; Walker v. Skipwith, Meigs, 502, 33 Am. Dec. 161, holding that if a general factor sell for a less price than he is authorized to take the sale is valid.

Cited in Tiffany Ag. 190, on principal being bound by acts of general agent within scope of general authority although in violation of private instructions.

Distinguished in United States v. Williams, 1 Ware, 173, Fed. Cas. No. 16,724, holding that where the general agent is acting under special instructions which are known to the person with whom he is dealing, he cannot bind his principal by any act which violates the instructions; Cook v. Adams, 1 Bosw. 497, holding that while a sale by a factor having general authority to sell which is limited by special authority, is good though in violation of the instructions, mere possession of the goods is not evidence of general authority to sell.

Scope of agents' authority.

Cited in Scarborough v. Reynolds, 12 Ala. 252, holding that special authority conferred upon agent, in management of plantation, does not give agent power to execute note in name of principal; Gibbs v. Linsley, 13 Vt. 208, holding that where one delivers property, all of same kind, to merchant, acting as factor, who proceeds to sell same, owner cannot avoid such sale by showing that he only authorized sale of part of articles; H. W. Kastor & Sons Advertising Co. v. Coleman, 11 Ont. L. Rep. 262, holding that under contract for control and management of summer resort hotel, manager receiving one-half of profits for compensation, contract for advertising hotel was within scope of manager's authority.

Estoppel of principal to deny authority of agent.

Cited in Valiquette v. Clark Bros. Coal Min. Co. 83 Vt. 538, 34 L.R.A.(N.S.) 440, 138 Am. St. Rep. 1104, 77 Atl. 869, holding that recognition of authority in agent to draw drafts upon him is admission of obligation to accept them, and estops principal from repudiating liability on such drafts.

Loss by agent's act.

Cited in White v. Springfield Bank, 3 Sandf. 222, holding that where a loss occurs through the fraud of an agent the one employing him must bear the loss and not the one dealing with him; Jeffrey v. Bigelow, 13 Wend. 518, 28 Am. Dec. 476, holding that principal is liable in damages for act of agent in selling sheep with knowledge that they were diseased, although principal had no actual notice.

Cited in note in 17 Eng. Rul. Cas. 275, on master's liability for acts of servant.

— Liability of agent to principal.

Cited in Priestman v. Kendrick, 3 U. C. Q. B. 66, holding that person receiving horses to sell at certain price is liable in trover for difference, where he sold them for less price without authority.

2 E. R. C. 366, CHAPLEO v. BRUNSWICK BEN. BLDG. SOC. L. R. 5 C. P. Div. 331, 50 L. J. Q. B. N. S. 372, 44 L. T. N. S. 449, L. R. 6 Q. B. Div. 696, 29 Week. Rep. 529, 49 L. J. C. P. N. S. 796.

Duties of persons dealing with a corporation having a limited borrowing capacity.

Cited in Ex parte Watson, L. R. 21 Q. B. Div. 301, 57 L. J. Q. B. N. S. 609, 59 L. T. N. S. 401, 36 Week. Rep. 829, on the duty of persons dealing with a corporation having a limited borrowing capacity to enquire whether the limit is being exceeded.

— Rights of such persons.

Cited in Blackburn Ben. Bldg. Soc. v. Cunliffe, B. & Co. L. R. 22 Ch. Div. 61, 31 Week. Rep. 98, on the right of persons loaning money to a society to follow the same when expended for the purposes of the society.

Liability of unincorporated society for acts of its agents.

Cited in notes in 43 L.R.A. 422, on power of building association to issue

negotiable paper; 2 Eng. Rul. Cas. 343, nonliability of a society for money borrowed by its directors in excess of powers of the society.

Distinguished in Taff Vale R. Co. v. Amalgamated Soc. of Railway Servants [1901] A. C. 426, 1 Brit. Rul. Cas. 832, 70 L. J. K. B. N. S. 905, 85 L. T. N. S. 147, 50 Week. Rep. 44, 65 J. P. 596, 17 Times L. R. 698, holding that a trade union is liable for its agent's improper acts in carrying out the objects of the society, the same as if it were incorporated.

Personal liability of one representing that he is agent of another.

Cited in Conant v. Alvord, 166 Mass. 311, 44 N. E. 250, holding that person who represents that he is agent of another to accept draft, is liable to person who relying on such representation gave up security against drawer and received in place draft accepted by person making representation irrespective of fraud.

Estoppel to deny authority of agent.

Cited in note in 11 E. R. C. 92, on estoppel to deny authority of agent by conduct.

Right to alternative relief.

Cited in O'Keeffe v. Walsh [1903] 2 Ir. K. B. 681, on the right to grant alternative relief.

2 E. R. C. 391, RABONE v. WILLIAMS, 7 T. R. 360, note, 4 Revised Rep. 463, note.

Right of offset for claims against factor when sued by undisclosed principal.

Cited in Munroe & Co. v. Adamo, 136 Ky. 252, 124 S. W. 296, holding that where purchaser has notice that seller is mere agent of another, purchaser is not entitled to set off against him debt due from agent; Locke v. Lewis, 124 Mass. 1, 26 Am. Rep. 631; Chandler v. Drew, 6 N. H. 469, 26 Am. Dec. 704; Judson v. Stillwell, 26 How. Pr. 513; Nichols v. Martin, 35 Hun, 168; Montagu v. Forwood [1893] 2 Q. B. 350, 4 Reports, 69 L. T. N. S. 371, 42 Week. Rep. 124; Bannerman v. Quackenbush, 11 Daly, 529,—holding that where a factor sells to one who has no notice that he is agent, he may set off against the principal, when sued by him, a claim due from the agent; Delaume Bros. v. Agar, 1 McGloin (La.) 97, holding same as to every defense set off, or compensation, held against the factor; White v. Jaudon, 9 Bosw. 415 (dissenting opinion), on the person who deals with an agent, without knowledge of agency, to be entitled to the same rights when sued by the principal as if sued by the agent; Hogan v. Shorb, 24 Wend. 458, holding, that though the factor sold the goods for cash, the purchaser, not having notice of the agency, could off set a claim against the factor, when sued by the principal; Winslow Bros. & Co. v. Staton, 150 N. C. 264, 63 S. E. 950, holding that when principal sues for price of goods purchaser's equities against agent will prevail, when purchaser had no knowledge of fiduciary relations, or of circumstances which would put him on inquiry; Rider v. Johnson, 20 Pa. 190, on the right of a person dealing with a factor, without notice of the agency, to offset claims arising against the factor before notice, when sued by the principal; Wakefield v. Garrie, 5 U. C. Q. B. 159, holding that when a contract is made in the name of the agent without disclosing the principal, the defendant is left to all the equities he could have had if the action had been brought in the name of the agent; Cooke v. Eshelby, 12 App. Cas. 271, 56 L. J. Q. B. N. S. 505, 56 L. T. N. S. 673, 35 Week. Rep. 629, 2 Eng. Rul. Cas. 398, holding that the purchaser when buying from a factor, who holds himself out as the principal, can set off a claim against

the factor when sued for the purchase price, only when he believed from the factor's actions, that he was the principal.

Cited in notes in 28 L.R.A.(N.S.) 229, on right in action by undisclosed principal to set-off available in action by agent; 2 E. R. C. 408, on right of person dealing with agent to set off indebtedness of agent to him.

Cited in Reinhard Ag. 506, on third person's right to set off debt due from agent against undisclosed principal; Tiffany Ag. 309, 310, on how far undisclosed principal is subject to defenses against agent.

Distinguished in Bliss v. Bliss, 7 Bosw. 339, holding that a person dealing with a broker or commission merchant, is not entitled to set off in an action by the principal a debt due from the broker; Frazier v. Poindexter, 78 Ark. 241, 115 Am. St. Rep. 33, 95 S. W. 464, 8 Ann. Cas. 552; McLachlin v. Brett, 105 N. Y. 391, 12 N. E. 17,—holding same where the party had knowledge that factor was acting as such; Bernshouse v. Abbott, 45 N. J. L. 531, 46 Am. Rep. 789, holding that a purchaser from an agent of an undisclosed principal could not set off a claim against the agent in a suit by the principal, where the agent had not the possession of the property.

Right of undisclosed principal to sue on contract made by his agent.

Cited in New Zealand & A. Land Co. v. Ruston, L. R. 5 Q. B. Div. 474, 49 L. J. Q. B. N. S. 842, 43 L. T. N. S. 473, holding that the undisclosed principal may sue on a contract made by his agent, though made in the name of the agent.

2 E. R. C. 391, BARING v. CORRIE, 2 Barn. & Ald. 137, 20 Revised Rep. 383.

Who is a factor.

Cited in Little Rock v. Barton, 33 Ark. 436, holding that dealer in real estate is broker and city has power to require such to pay license for following occupation within her limits; American Sugar Ref. Co. v. McGhee, 96 Ga. 27, 21 S. E. 383; Haas v. Ruston, 14 Ind. App. 8, 56 Am. St. Rep. 288, 42 N. E. 298,—on the distinction between a broker and a factor; Delaume Bros. v. Agar, 1 McGloin (La.) 97, holding that a factor is one who receives goods from another, usually at a distance, with authority to sell them in his own name, and without disclosing his principal; Ladd v. Arkell, 5 Jones & S. 35, holding that a factor is one entrusted with the possesion, management and control of goods and authorized to buy and sell in his own name as well as that of his principal; Bryce v. Brooks, 26 Wend. 367, holding that one who purchases goods on commission, and receives them for another is a factor.

Powers of a broker.

Cited in Bragg v. Meyer, McAll. 408, Fed. Cas. No. 1,801, holding that though the broker was entrusted with the possession of the property he could not bind his principal by pledging the property for his own debt; Leverich v. Richards, 1 La. Ann. 348, holding that a principal is not bound by a contract of sale made by a broker in excess of his authority, without disclosing his principal's name; Parsons v. Webb, 8 Me. 36, 22 Am. Dec. 220, on the power of a broker to bind his principal, when acting beyond the scope of his authority; Kent v. DeCoppet, 149 App. Div. 589, 134 N. Y. Supp. 195, holding that relation of customer and broker in transactions upon exchange, is, in general, subject to ordinary rules and principles of agency; Dunn v. Wright, 51 Barb. 244, holding that a broker is authorized to make contracts for the sale and delivery of goods, but is not authorized to do so in his own name, or receive payment thereon.

Cited in Tiffany Ag. 222, 224, on scope of authority of factor as agent.

Right of setoff of claim against broker in suit on the contract by the undisclosed principal.

Cited in Saladin v. Mitchell, 45 Ill. 79, holding that if a broker sells without disclosing his principal, the latter is entitled to all the rights against the purchaser as he would have if his name had been used; Bernshouse v. Abbott, 45 N. J. L. 531, 46 Am. Rep. 792, holding that a purchaser from an agent having authority to sell, and selling in his own name as principal, cannot offset a claim against the agent in a suit by the undisclosed principal, where the agent has not the possession of the property; Nichols v. Martin, 35 Hun, 168, holding that a purchase made of a broker gives no right of set off against the principal for claim due from broker; Chandler v. Drew, 6 N. H. 469, 26 Am. Dec. 704; Bliss v. Bliss, 7 Bosw. 339; Hall v. Fay, H. & Co. 15 Pa. Dist. R. 207,—holding that one dealing with a broker cannot set off a claim against the broker when sued on the contract made, by the principal who was undisclosed; Parker v. Donaldson, 6 Watts & S. 132; Delafield v. Smith, 101 Wis. 664, 70 Am. St. Rep. 938, 78 N. W. 170,—on the right of a buyer to set off a claim against a broker where the latter made the sale in his own name.

Cited in note in 28 L.R.A.(N.S.) 232, on right in action by undisclosed principal to defenses available in action by agent.

Cited in Tiffany Ag. 312, 313, on how far undisclosed principal is subject to defenses against agent; Reinhard Ag. 382, 506, on right to set off debt due from agent against undisclosed principal.

Distinguished in Hogan v. Short, 24 Wend. 458, holding that where a factor sold goods for cash, as being his own, the vendee was entitled to set off a claim against the factor, when sued on the contract by the principal.

— As against a factor.

Cited in Atty. Gen. v. Continental L. Ins. Co. 89 N. Y. 571, holding that there is no such right of set off where the party knows or should have known that the factor acted for an undisclosed principal; Judson v. Stillwell, 26 How. Pr. 513, holding that where the purchaser knew that the factor was selling for another, or had such notice as should have led him to enquire he is not entitled to a set-off; Cook v. Eshelby, L. R. 12 App. Cas. 271, 56 L. J. Q. B. N. S. 505, 56 L. T. N. S. 673, 35 Week. Rep. 629, 2 E. R. C. 398, holding that the purchaser who buys from a factor, who holds himself out as the principal, can set off a claim against the factor, only when he believed from the factor's actions, that he was the principal.

Rights of broker upon contracts made by him.

Cited in Underhill v. Gibson, 2 N. H. 352, 9 Am. Dec. 82, on the right of an agent to sue in his own name; Fairlie v. Fenton, L. R. 5 Ex. Ch. 169, 39 L. J. Ex. Ch. N. S. 107, 22 L. T. N. S. 373, 18 Week. Rep. 700, holding that a broker has not the right to sell in his own name, and therefore cannot sue upon a contract of sale made by him as broker.

Duty of person dealing with broker to inquire as to his authority.

Cited in Bannerman v. Quackenbush, 11 Daly, 529; Bradlee v. Whitney, 16 W. N. C. 85, 42 Phila. Leg. Int. 121,—holding that where the circumstances were such that the parties dealing with the broker were put upon notice to inquire as to the real ownership of the property, and were held to have notice because they neglected to do so; Pearson v. Scott, L. R. 9 Ch. Div. 198, 47 L. J. Ch. N. S. 705, 38 L. T. N. S. 747, 26 Week. Rep. 796, holding that the party dealing with a broker will be held to have notice that he acts as such if they fail to make

any inquiries for information on the subject, knowing that he sometimes acted in such a capacity.

Acts of special agent beyond the scope of his authority as being binding upon the principal.

Cited in Chill v. Hornish, 4 Blackf. 454, holding that a transfer of property by an agent not in accordance with the scope of his authority passes no title.

Authority of agent to receive payment for goods sold.

Cited in Adams v. Fraser, 27 C. C. A. 108, 49 U. S. App. 481, 82 Fed. 211; Meyer v. Stone, 46 Ark. 210, 55 Am. Rep. 577,—holding that if an agent has possession of the goods, he has authority to collect the purchase price, but if he has not, he has no such authority; Higgins v. Moore, 34 N. Y. 417, holding that authority given a broker to sell property does not include authority to receive payment for the same; Higgins v. Moore, 6 Bosw. 344 (dissenting opinion), on the right of a broker to receive payment; Crosby v. Hill, 39 Ohio St. 100, holding that payment to a broker is not a bar to a recovery by the owner of the property from the vendee; McKindly v. Dunham, 55 Wis. 515, 42 Am. Rep. 740, 13 N. W. 485, holding that one who merely solicits orders for goods sending them to his principal to be filled has no implied authority to receive payment for such goods; Drakeford v. Piercy, 14 L. T. N. S. 403, 7 Best & S. 515, holding that though the broker sold the goods in his own name, and was paid for them, he having exceeded his authority, the principal could recover the purchase price from the vendee.

Cited in 2 Mechem Sales, 1246, on implied authority of agent to receive payment when agency is unknown; Benjamin Sales, 5th ed. 791, on factor as a general agent entitled to receive payment for goods sold.

Distinguished in Trainer v. Morrison, 78 Me. 160, 57 Am. Rep. 790, 3 Atl. 185, holding that a person authorized to contract for the sale of chattels has authority to contract for the payment to himself as a part of the same transaction, unless prohibited, which prohibition is known to the purchaser.

Liability of innocent party who made loss possible, to bear the loss.

Cited in Le Roy v. Beard, 8 How. 451, 12 L. ed. 1151, holding that where terms used in an instrument are ambiguous, the injurious consequences should fall on the party using them; Campbell v. Penn, 7 La. Ann. 371, holding that where one of several parties must suffer, the loss should fall on him who, by his imprudent confidence made the loss possible; White v. Springfield Bank, 3 Sandf. 222, holding that that party must bear the loss, who made it possible, where both are equally innocent of wrong.

Burden of proof in action by principal against purchaser from agent.

Cited in Chapman v. Prest, 45 N. S. 231, holding that in action for goods sold burden was on purchaser to show that he believed manager was principal or that plaintiff's conduct induced such belief in order to avail himself of set off against manager.

2 E. R. C. 398, COOKE v. ESHELBY, L. R. 12 App. Cas. 271, 56 L. J. Q. B. N. S. 505, 56 L. T. N. S. 673, 35 Week. Rep. 629.

Right to offset claim against broker when sued by undisclosed principal.

Cited in Kent v. De Coppet, 149 App. Div. 589, 134 N. Y. Supp. 195 (dissenting opinion), on right to set off prior debt of broker by one dealing with him, nominally as principal; Delafield v. Smith, 101 Wis. 664, 70 Am. St. Rep. 938, 78 N. W. 170, on the right of person dealing with a broker to offset a claim

against the broker, in an action by the undisclosed principal; Chapman v. Prest, 45 N. S. 231, holding that where a creditor takes over a debtor's lumber business but permits him to run the business without change of name or sign, one dealing with the debtor without notice of change of ownership may set off individual debt of agents in action by principal.

Cited in notes in 28 L.R.A.(N.S.) 232, on right in action by undisclosed principal pay to defenses available in action by agent; 1 Eng. Rul. Cas. 160, right to set-off in suit by undisclosed principal on contract made with agent; 2 E. R. C. 408, on right of person dealing with agent to set off indebtedness of agent to him.

Cited in Reinhard Ag. 506, on third person's right to set off debt due from agent against undisclosed principal; Tiffany Ag. 310, 312, on how far undisclosed principal is subject to defenses against agent.

Estoppel of principal to claim set off available to agent.

Cited in Benjamin Sales, 5th ed. 794, 795, on validity against principal by estoppel of set-off against agent.

Custom or usage as to rights of undisclosed principal on contract made by agent with third person.

Cited in Baker v. Davie, 211 Mass. 429, 97 N. E. 1094, holding that rule established by custom as to transfer of title to certificates of stock is exception to general rule, and does not apply to brokers or persons invested with possession not having instrument of transfer.

Cited in note in 6 Eng. Rul. Cas. 169, on requirement that custom be reasonable, not contrary to law, and well known.

Duty of person dealing with one known to be an agent, to inquire as to his authority.

Cited in Baxter v. Sherman, 73 Minn. 434, 72 Am. St. Rep. 631, 76 N. W. 211, holding that where a party dealing with one whom he knows sometimes acts as a factor, wishes to avail himself of a set-off against the factor, he must inquire as to whether the former is acting as a factor or principal; Bank of Nova Scotia v. Richards, 33 N. B. 412, holding that where an agent's authority is questioned and where the circumstances are such as to put the party on inquiry and he makes no inquiry, he will be held liable to the same extent as if he had inquired: dissenting opinion in Young v. MacNider, 25 Can. S. C. 272 (affirming Q. R. 3 Q. B. 539, which reverses Q. R. 4 S. C. 208, Rap. Jud. Quebec, 4 C. S. 208), on the duty of person dealing with agent to inquire as to his authority.

Right of brokers to commission.

Distinguished in Murphy v. Butler, 18 Manitoba L. Rep. 111, holding that under custom brokers may recover from principal for loss on contract for sale of grain for future delivery made without disclosing principal, where customer makes default in carrying out contract.

Power of broker to sell without disclosing name of principal.

Cited in Young v. MacNider, Rap. Jud. Quebec, 4 C. S. 208, holding that the broker to whom matured bonds were entrusted for safe keeping could not divest the owner's title by pledging them for his own debt: Sheffield v. London Joint Stock Bank, L. R. 13 App. Cas. 333, 57 L. J. Ch. N. S. 986, 58 L. T. N. S. 735, 37 Week. Rep. 33, 3 Eng. Rul. Cas. 661, holding that where a broker pledged negotiable securities indorsed in blank, in fraud of the owner, the pledgee having knowledge or reason to know that they did not belong to him, the latter got title subject to the owner's claims.

Distinguished in London Joint Stock Bank v. Simmons [1892] A. C. 201, 61

L. J. Ch. N. S. 723, 66 L. T. N. S. 625, 41 Week. Rep. 108, 56 J. P. 644, holding that where a broker pledged negotiable securities in fraud of the owner, the pledgee got good title.

Power of broker to receive payment.

Cited in Benjamin Sales, 5th ed. 791, on broker entitled to receive payment for goods sold where allowed by principal to sell them as his own.

Right of owner of property to follow same when transferred fraudulently by one to whom it is entrusted.

Distinguished in Duggan v. London & C. Loan & Agency Co. 18 Ont. App. Rep. 305, holding that where bonds were transferred in trust, the beneficiaries could follow them through the hands of the subsequent transferees.

Rights of purchaser from agent who wrongfully pledges or transfers property.

Cited in Young v. MacNider, Rap. Jud. Quebec, 4 S. C. 208, holding that a broker who takes after maturity securities wrongfully pledged by an agent of an estate as security for his individual debt has only the title of the transferer.

2 E. R. C. 410, HOLLINS v. FOWLER, 44 L. J. Q. B. N. S. 169, L. R. 7 H. L. 757, 33 L. T. N. S. 73, affirming the judgment of the Court of Exchequer Chamber, reported in 41 L. J. Q. B. N. S. 277, L. R. 7 Q. B. 616, 27 L. T. N. S. 168, 20 Week. Rep. 686.

What constitutes conversion.

Cited in Moore v. Hill, 38 Fed. 330 (dissenting opinion), on what constitutes conversion; Maine v. Haley, 2 Haskell, 354, Fed Cas. No. 8,977, holding that to establish conversion of chattels, there must be proof of wrongful possession, or of exclusion of the owner's right, or of unauthorized or injurious use, or of wrongful detention after demand; Arkansas City Bank v. Cassidy, 71 Mo. App. 186, holding that factor or agent becomes liable for conversion of property of third person, although they act in their capacity of agent or factor; Helt v. Boston & M. R. Co. 69 N. H. 139, 44 At. 910, holding that a refusal to deliver over goods upon demand does not constitute a conversion, if there is a reasonable doubt as to the person's title; Frome v. Dennis, 45 N. J. L. 515, holding that to constitute a conversion of goods, there must be some repudiation of the owner's right or some exercise of dominion over it inconsistent with such right; Bonaparte v. Clagett, 78 Md. 87, 27 Atl. 619; Turner v. Francis, 10 Manitoba L. Rep. 340,—holding that any wrongful assumption of property by a person in goods that was inconsistent with the special property of the owner amounted to conversion; Pease v. Smith, 61 N. Y. 477, holding that it is not necessary to maintenance of action for conversion by reason of wrongful sale of plaintiff's goods, to show that defendant exercised control over property with knowledge of plaintiff's rights; Hoopes & T. Co. v. Ebel, 16 Pa. Dist. R. 271, to the point that one who obtains possession of another's goods, who has been wrongfully deprived of them, and disposes of them, is guilty of conversion: Troop v. Everett, 32 N. B. 147, as to whether a demand and refusal was necessary to constitute conversion; McIntosh v. Pt. Huron Petrified Brick Co. 27 Ont. App. Rep. 262, holding that the removal of a chattel to a foreign country by one co-owner, gave an action for conversion to the other co-owner, where done without his consent; Black v. Imperial Book Co. 8 Ont. L. Rep. 9, holding that where the copyright law made all books unlawfully imported or printed, the property of the owner of the copyright, the sale after

importation of such books by the importer amounted to a conversion; Gowans v. Barnet, 12 Ont. Pr. Rep. 330, to the point that one to whom goods are transferred for purpose of defrauding creditors is guilty of conversion in turning them over to another; Stimson v. Block, 11 Ont. Rep. 96, holding that where one person had possession of the goods of another and refused to allow the latter to take them until it suited the former's convenience, the former was guilty of conversion: Gowans v. Barnet, 12 Ont. Pr. 330, to the point that person having claim on goods might maintain conversion against solicitor of judgment debtor who had absconded, for selling and delivering such goods to another; Ganly v. Ledwidge, Ir. Rep. 10 C. L. 33; Delaney v. Wallis, 15 Cox, C. C. 525,—holding that salesmaster was liable for conversion of stolen animals sold by him in market in ignorance of facts; Didisheim v. London & W. Bank, 69 L. J. Ch. N. S. 442 [1900] 2 Ch. 15, 82 L. T. N. S. 738, 48 Week. Rep. 501, 16 Times L. R. 311, to the point that under old practice in action of detinue or trover, defendants could, under general issue give in evidence facts excusing delivery to person rightfully entitled, but whose title was not such as defendants could rightfully recognize; New York Breweries Co. v. Atty.-Gen. [1899] A. C. 62, 68 L. J. Q. B. N. S. 135, 79 L. T. N. S. 568, 48 Week. Rep. 32, 63 J. P. 179, 15 Times L. R. 93, on whether innocence from wrongful intent released liability for conversion; Winter v. Baneks, 84 L. T. N. S. 504, 49 Week. Rep. 574, 65 J. P. 468, 17 Times L. R. 446, 19 Cox, C. C. 687, holding that police officer who refused to turn over to owner lost gig found in his possession after conviction of person in whose possession it was found was liable in trover, although acting under advice of superior officer.

Cited in notes in 18 L.R.A.(N.S.) 495, on liability for conversion by accepting goods for transportation from one not the owner; 50 L.R.A. 651–654, on liability of servant or agent for conversion, trespass, or other positive tort against third parties under orders; 3 Eng. Rul. Cas. 585, on what constitutes a conversion; 25 E. R. C. 170, on what constitutes a conversion and liability therefor.

Cited in Benjamin Sales, 5th ed. 257, 260, on what constitutes a conversion by purchaser without notice from broker holding himself out as principal.

Distinguished in Centre Star Min. Co. v. Rossland-Kootenay Min. Co. 11 B. C. 231, holding that where there was no exercise of dominion over the property inconsistent with the owner's right, so as to repudiate that right, there was no conversion; Gaughan v. St. Lawrence & O. R. Co. 3 Ont. App. Rep. 392, holding that the possession or detention, which is a mere custody or mere asportation made without reference to the question of property in the chattels is not conversion; Dickey v. McCaul, 14 Ont. App. Rep. 166, holding that an absolute denial of the owner's right of property by one not in possession or in a position to enforce such denial does not amount to conversion.

The decision of the Court of the Exchequer Chamber was cited in McCormick v. Pennsylvania C. R. Co. 37 Phila. Leg. Int. 237, 80 N. Y. 353, on the point that no conversion by a carrier of baggage is established by a demand and refusal to deliver it where there was no assertion of dominion over the property nor any act inconsistent with the rights of the passenger.

The decision of the Exchequer Chamber was distinguished in England v. Cowley, L. R. 8 Exch. 126, 42 L. J. Exch. N. S. 80, 28 L. T. N. S. 67, 21 Week. Rep. 337, holding that the prevention by the use of force of a person in removing household furniture which he owned, would not amount to a conversion; McCormick v. Pennsylvania C. R. Co. 80 N. Y. 353, 37 Phila. Leg. Int. 237, holding that where there was no assertion of dominion over the property and no act inconsistent with the right of the plaintiff there was no conversion.

— Possession by fraudulent or simulated purchase.

The decision of the Exchequer Chamber was cited in Cloutier v. Georgeson, 13 Manitoba L. R. 1, holding that an uncompleted sale of chattels could not amount to a conversion, where there were no other acts of dominion.

Cited in Benjamin Sales, 5th ed. 93, on passing of title to goods sent to one fraudulently ordering in name of another person; 1 Page Contr. 125, on mistakes as to identity of adverse party.

— Purchase from possessor having no title.

Cited in Fort v. Wells, 14 Ind. App. 531, 56 Am. St. Rep. 316, 43 N. E. 155, holding that brokers who sell cattle for thief are liable to true owner for conversion; Flannery v. Harley, 117 Ga. 483, 43 S. E. 765, holding that factor who sells cotton delivered by planter to commission merchant "on cash sale" is chargeable with conversion if he disposes of it at instance of commission merchant; Levi v. Booth, 58 Md. 305, 42 Am. Rep. 332; Woods v. Nichols, 21 R. I. 537, 48 L.R.A. 773, 45 Atl. 548,—holding that the sale by a purchaser having no title to the property, though innocent of wrongful intention, is a conversion as against the true owner; Hamet v. Letcher, 37 Ohio St. 356, 41 Am. Rep. 519, holding that one purchasing goods from another who had secured their possession by fraud and had no title, was guilty of conversion as against the true owner, though innocent of wrongful intention; Faulkner v. Greer, 16 Ont. L. Rep. 123, holding that owner of land could recover from purchaser of timber cut and carried away without his knowledge; Johnson v. Lounsbury, 32 N. B. 86, holding where a chattel was sold on a conditional sale contract and the vendee sold it to another, and the contract not being fulfilled the vendor demanded it of the subsequent vendee, who refused, that it amounted to a conversion; Faulkner v. Greer, 16 Ont. L. Rep. 123, holding that purchaser of timber wrongfully cut and carried away cannot hold it as against owner; Power v. Foley, Newfoundland Rep. (1897-1903) 540, holding that where the purchaser from a mortgagee under a void foreclosure sale entered upon the land and removed the houses covered by the mortgage, he was liable for conversion.

Cited in 2 Cooley Torts, 3d ed. 867, on purchaser's duty to ascertain ownership of property bought.

Distinguished in Lindsay v. Cundy, L. R. 1 Q. B. Div. 348, 45 L. J. Q. B. N. S. 381, 34 L. T. N. S. 314, holding that where the property was legally the property of the party selling, though the sale was liable to be set aside for fraud, there was no conversion, if he again sold it before the sale was avoided.

Powers, duties, and authority of broker.

Cited in Benjamin Sales, 5th ed. 283, 284, on the powers of a broker; Benjamin Sales, 5th ed. 99, on offer or acceptance addressed to one as agent as being deemed addressed to him personally.

Effect of fraud in obtaining contract.

Cited in Brighton Packing Co. v. Butchers' Slaughtering & Melting Asso. 211 Mass. 398, 97 N. E. 780, holding that the assignee of the assets and business of a corporation including a lease cannot enforce a specific performance of a modification of the lease surreptitiously and fraudulently procured and executed in the name of its assignor, and assigned to it.

Cited in notes in 6 E. R. C. 228, on effect of fraud inducing execution of contract; 11 E. R. C. 98, on estoppel by conduct.

Cited in Benjamin Sales, 5th ed. 462, on fraud of purchaser nullifying seller's assent to contract.

Liability of agent for conversion committed in course of employment.

Cited in Robinson v. Bird, 158 Mass. 357, 35 Am. St. Rep. 495, 33 N. E. 391; Cochrane v. Rymill, 40 L. T. N. S. 744, 27 Week. Rep. 776; Barker v. Furlong [1891] 2 Ch. 172, 60 L. J. Ch. N. S. 368, 64 L. T. N. S. 411, 39 Week. Rep. 621; Consolidated Co. v. Curtis & Son [1892] 1 Q. B. 495, 61 L. J. Q. B. N. S. 325, 40 Week. Rep. 426, 25 Eng. Rul. Cas. 162; Kearney v. Clutton, 101 Mich. 106, 45 Am. St. Rep. 394, 59 N. W. 419,—holding that the auctioneer who sells property and pays over the proceeds less his commission to the party holding the property, is guilty of conversion as against the true owner, if the vendor was not entitled to sell; Driffill v. McFall, 41 U. C. Q. B. 313, holding that where notes were delivered to a person by another who had no title to them, and the former disposed of them for the latter's benefit, the former was guilty of conversion as against the true owner; Iredale v. Kendall, 40 L. T. N. S. 362, on the liability of a person for knowingly and intentionally assisting in the wrongful transfer of property; McEntire v. Potter, L. R. 22 Q. B. Div. 438, 60 L. T. N. S. 600, 37 Week. Rep. 607, holding that where the act of the agent is obviously wrongful, if the principal is not the true owner or has not his authority, the agent is not protected, but if the act of an innocent agent is not obviously wrongful, if the principal is not the owner and has not his authority, the agent is protected.

Cited in note in 50 L.R.A. 651-654, on liability of servant or agent for conversion, trespass, or other positive tort against third parties under orders.

Cited in Tiffany Ag. 380, on liability of agent to third persons for misfeasance; 1 Mechem Sales, 254, on invalidity of sale to assumed agent who has no authority to purchase.

Distinguished in Glyn v. East & W. I. Dock Co. L. R. 5 Q. B. Div. 129, 50 L. J. Q. B. N. S. 62, L. R. 6 Q. B. Div. 475, 43 L. T. N. S. 584, holding that where the warehousemen exercised dominion over the property wholly inconsistent with the owner's right they were guilty of conversion; Turner v. Hockey, 56 L. J. Q. B. N. S. 301, holding that an auctioneer who, in the ordinary course of business, sells by public auction for one person goods ostensibly belonging to that person, but really belonging to another is not guilty of conversion.

The decision of the Exchequer Chamber was cited in City Bank v. Babcock, Holmes, 180, Fed. Cas. No. 2,741, on the liability of an agent for conversion committed while carrying out principal's instructions; Flannery v. Harley, 117 Ga. 483, 43 S. E. 765, holding that where a factor who holds cotton, sells the same at the instance of the buyer, he is liable for conversion, though he does not know that the seller has retained title; La Fayette County Bank v. Metcalf, 40 Mo. App. 494, holding that an agent who, without notice, sells and delivers property which has been wrongfully had of the true owner, is liable for conversion; Donahue v. Shippee, 15 R. I. 453, 8 Atl. 541, holding that where a servant of one person cut grass belonging to another through a mistake as to boundary, the servant was guilty of conversion when he removed the cut grass.

Liability of a common carrier for carrying chattels wrongfully committed to it.

Cited in note in 18 L.R.A.(N.S.) 495, on liability for conversion by accepting goods for transportation from one not the owner.

The decision of the Exchequer Chamber was cited in Shellnut v. Central R. Co. 131 Ga. 404, 18 L.R.A.(N.S.) 494, 62 S. E. 294, holding that common carrier of goods is not liable for conversion for taking and delivering goods to consignee, although goods are not property of shipper, unless such carrier had notice; Nanson v. Jacob, 93 Mo. 331, 3 Am. St. Rep. 531, 6 S. W. 246, affirming 12 Mo.

App. 125, holding that common carrier is not guilty of conversion, although he receive property from one not rightfully entitled to possession, and deliver it to consignee before he has notice of true owner's rights; Robert C. White Live Stock Commission Co. v. Chicago, M. & St. P. R. Co. 87 Mo. App. 330, holding that a common carrier was not liable for conversion if the true owner does not intervene before the goods are delivered and demand them.

Measure of damages for conversion.

Cited in Greer v. Faulkner, 40 Can. S. C. 399 (affirming 16 Ont. L. Rep. 123), holding that the measure of damages for timber wrongfully cut, is the actual value in the hands of the person upon whom the demand for it was made.

Effect of special findings of the jury.

Cited in Balfour v. Toronto R. Co. 5 Ont. L. Rep. 735, holding that if any effect be given to the reasons of the jury added to their general finding, such reasons must be interpreted by the evidence, the judge's charge and the general finding; St. Denis v. Baxter, 13 Ont. Rep. 41, holding the judgment is to be entered in accordance with the findings of the jury; Moore v. Connecticut Mut. L. Ins. Co. 41 U. C. Q. B. 497, holding that the answers of the jury to specific questions asked them are to be taken to be the true inferences to be drawn from the facts involved in the questions.

Bill of lading as entitling owner to possession of goods covered by it.

Cited in People's Nat. Bank v. Stewart, 19 N. B. 268, on the bill of lading as carrying with it the right to the possession of the goods.

Right to waive tort and sue ex contractu.

Cited in Arnold v. Cheque Bank, L. R. 1 C. P. Div. 578, 45 L. J. C. P. N. S. 562, 34 L. T. N. S. 729, 24 Week. Rep. 759, on the right to waive the tort and recover the value of property converted in an action for money had and received.

Liability of agents for larceny.

The decision of the Exchequer Chamber was cited in State v. Ross, 55 Or. 450, 42 L.R.A.(N.S.) 601, 104 Pac. 596, holding that officers of trust company whose acts result in conversion of state funds deposited with it are under statute indictable for larceny although money could not have been deposited with them individually but only as officers.

When nonsuit should be granted.

Distinguished in Moore v. Connecticut Mut. L. Ins. Co. 6 Can. S. C. 634, holding that nonsuit can be granted only where it can be said that there is not any evidence in support of plaintiff's case.

2 E. R. C. 437, JOLLY v. REES, 15 C. B. N. S. 628, 10 Jur. N. S. 319, 33 L. J. C. P. N. S. 177, 10 L. T. N. S. 298.

Power of wife to pledge husband's credit.

Cited in Compton v. Bates, 10 Ill. App. 78; Dolan v. Brooks, 168 Mass. 350, 47 N. E. 408,—holding that it is only in cases of necessity that the law constitutes the wife, the husband's agent with authority to pledge his credit; Johnson v. Briscoe, 104 Mo. App. 493, 79 S. W. 498, holding that in the absence of express authority, the wife has no power to pledge the husband's credit, where they are living together and he is providing for her wants and comforts; Jones v. Gutman, 88 Md. 355, 41 Atl. 792; Clark v. Cox, 32 Mich. 204; Wallis v. Biddick, 22 Week. Rep. 76; Debenham v. Mellon, L. R. 5 Q. B. Div. 394, L. R. 6 App. Cas. 24, 49 L. J. Q. B. N. S. 497, 42 L. T. N. S. 577, 28 Week. Rep. 50, 2 Eng. Rul. Cas. 441,—holding that the wife has no authority to pledge the husband's credit unless the

husband is neglecting to discharge his duty to furnish necessaries; Scott v. Allen, 26 Ont. L. Rep. 571, holding that presumption that wife living with husband may pledge his credit for necessaries exists until rebutted; Scott v. Allen, 5 D. L. R. 767, holding that it is presumption of law that wife living with husband has implied authority to pledge his credit for necessaries, but presumption may be rebutted.

Cited in note in 65 L.R.A. 537, 539, 540, 542, 545, 546, on liability of husband for necessaries furnished wife while living with him.

Cited in Hollingsworth Contr. 65, on liability of husband on wife's contracts.

— Where wife living separate.

Cited in Meuschke v. Riley, 159 Mo. App. 331, 140 S. W. 639, holding that a husband living apart from his wife who limits his wife's purchases of necessaries to certain merchants and publishes a notice in a local newspaper that he would not pay any bills except accompanied by his written order is not liable for debts contracted by her with another merchant; Zealand v. Dewhurst, 23 U. C. C. P. 117, holding that husband was not liable for purchase price of valuable silks and shawls where she was at time not living with him to plaintiff's knowledge.

— Where he has forbidden credit.

Cited in Powell v. Smith, 23 N. S. 283, on the right of the wife to pledge the husband's credit after he had published notice forbidding credit to his wife.

Distinguished in Beale v. Arabin, 36 L. T. N. S. 249, holding that where the husband and wife were living apart, he allowing her certain amounts, and she incurred certain medical expenses made necessary by his cruelty, he was liable, though he had forbidden her to pledge his credit.

Where wife has separate income.

Cited in Morel Bros. v. Westmoreland [1903] 1 K. B. 64, 72 L. J. K. B. N. S. 66, 87 L. T. N. S. 635, 51 Week. Rep. 290, 19 Times L. R. 43, holding that where the husband and wife both having an annual income made an agreement whereby he was to pay a certain amount annually for household expenses, she to keep her income, the wife's authority to pledge the husband's credit was revoked.

— Presumption as to.

Cited in Harrison v. Grady, 13 L. T. N. S. 369, 12 Jur. N. S. 140, 14 Week. Rep. 139, holding that it is a presumption of fact that the wife has the power to pledge the husband's credit, where they are living together.

Distinguished in Vusler v. Cox, 53 N. J. L. 516, 22 Atl. 347, holding that where the husband and wife live apart the presumption is against the wife's power to bind the husband by contract.

2 E. R. C. 441, DEBENHAM v. MELLON, L. R. 6 App. Cas. 24, 50 L. J. Q. B. N. S. 155, 29 Week. Rep. 141, 43 L. T. N. S. 673, 45 J. P. 252, affirming decision of Court of Appeal, reported in L. R. 5 Q. B. Div. 394, 49 L. J. Q. B. N. S. 497.

Power of wife to pledge husband's credit.

Cited in Jones v. Gutman, 88 Md. 355, 41 Atl. 792, holding that where she is properly maintained the wife has no implied authority to pledge the husband's credit; Dolan v. Brooks, 168 Mass. 350, 47 N. E. 408, holding that only in cases of necessity will the law constitute the wife the husband's agent and give her authority to pledge his credit; Johnson v. Briscoe, 104 Mo. App. 493, 79 S. W. 498, holding that in the absence of express authority, the wife has no power to pledge the husband's credit, where they are living together and he is providing

for her wants and comforts; Wilder v. Brokaw, 141 App. Div. 811, 126 N. Y. Supp. 932, holding that wife living apart from husband may contract in her own name for lodging and board and become personally liable therefor; Vusler v. Cox, 53 N. J. L. 516, 22 Atl. 347, holding that where the husband and wife are living apart the presumption is against the power of the wife to pledge the husband's credit, except in cases of necessity; Morel Bros. v. Westmoreland [1903] 1 K. B. 64, 72 L. J. K. B. N. S. 66, 51 Week. Rep. 290, 87 L. T. N. S. 635, 19 Times L. R. 43, [1904] A. C. 11, 73 L. J. K. B. 93, 52 Week. Rep. 353, 89 L. T. N. S. 712, 20 Times L. R. 38, holding that the presumption that the wife has authority to pledge the husband's credit, may be rebutted by proof of a sufficient allowance to her though the fact may not be known to the person dealing with her.

Cited in Hollingsworth Contr. 74, on implied authority of wife as agent of her husband to purchase necessaries; 1 Cooley Torts, 3d ed. 44, on right of wife to reasonable support from husband.

The decision of the Court of Appeals was cited in Price v. Price, 21 Ont. L. Rep. 454, holding that wife living with husband has right to pledge husband's credit for necessaries; Scott v. Allen, 26 Ont. Law Rep. 571, 5 D. L. R. 767, holding that it is presumption of law that wife living with husband has implied authority to pledge his credit for necessaries, but presumption may be rebutted.

— Liability of husband for support of the wife.

Cited in Meuschke v. Riley, 159 Mo. App. 331, 140 S. W. 639, holding that a husband living apart from his wife who limits his wife's purchases of necessaries to certain merchants and publishes a notice in a local newspaper that he would not pay any bills of his wife except those accompanied by his written order, is not liable for debts contracted by her with another merchant; Clothier v. Sigle, 73 N. J. L. 419, 63 Atl. 865, holding that the husband is liable for necessaries furnished the wife after his wrongful desertion of her; Wanamaker v. Weaver, 176 N. Y. 75, 65 L.R.A. 529, 98 Am. St. Rep. 621, 68 N. E. 135, holding that the husband is not liable for goods sold the wife where he furnishes her all necessaries and a liberal allowance, unless he expressly makes her his agent; Constable v. Rosener, 82 App. Div. 155, 81 N. Y. Supp. 376, holding that the husband is not liable for necessaries furnished the wife, while living apart from him without just cause, and refuses his offer to support her if she will return; Oatman v. Watrous, 120 App. Div. 66, 105 N. Y. Supp. 174, holding that a husband is not liable to a third party for necessaries furnished the wife where he makes an ample allowance to her; Bouck v. Enos, 61 Wis. 660, 21 N. W. 825, holding that one person may so hold out another to world as his agent as to render himself liable for acts of latter within scope of apparent authority although no agency in fact exists; Parkin v. Parkin, 1 Sask. L. R. 206, holding that where husband deserts wife without properly providing for her debts for necessaries contracted by her are liquidated demands as against husband.

Cited in notes in 65 L.R.A. 532, 539, 540, 542, 545–547, on liability of husband for necessaries furnished wife while living with him; 6 E. R. C. 50, on liability of husband for support of wife.

Cited in Hollingsworth Contr. 64, on liability of husband on wife's contracts; Hollingsworth Contr. 75, on revocation of agent's authority by notice.

Distinguished in Anthony v. Phillips (Cowell v. Phillips) 17 R. I. 188, 11 L.R.A. 182, 20 Atl. 933, holding that a husband is bound to pay for goods furnished the wife after a separation, by a tradesman whom he had authorized her to deal with where the tradesman had no notice of the separation.

The decision of the Court of Appeals cited in Powell v. Smith, 23 N. S. 283,

holding that where husband gave all his earnings to wife and published notice against traders trusting her new trial should be granted in action for price of goods for purpose of determining whether he knew goods were furnished.

2 E. R. C. 457, CALDER v. DOBELL, 40 L. J. C. P. N. S. 89, 224, L. R. 6 C. P. 486, 25 L. T. N. S. 129, 19 Week. Rep. 978, affirming the decision of the Court of Common Pleas, reported in 19 Week. Rep. 409.

Parties bound where agent contracts in his own name.

Cited in Brown v. Bradlee, 156 Mass. 28, 15 L.R.A. 509, 32 Am. St. Rep. 430, 30 N. E. 85, holding the promise contained in the body of the paper may bind two parties—the agent whom the paper purports to bind and the principal who adopts agent's name as his own; Halpenny v. Pennock, 33 U. C. Q. B. 229, holding where wife executed a mortgage as agent in her own name, the principal also is bound by the contract; Mail Printing Co. v. Devlin, 17 Ont. Rep. 15, holding where contract is made by agent for the principal, the contract may be treated as made on behalf of both; Bridgewater Cheese Factory Co. v. Murphy, 26 Ont. Rep. 327, holding a principal is not so bound he cannot shew the real transaction just as he may shew an undisclosed agency though the agent cannot; Armour v. Dinner, 4 Terr. L. Rep. 30 (dissenting opinion), on liability of the principal on the agent's contract; Browning v. Provincial Ins. Co. L. R. 5 P. C. 263, 28 L. T. N. S. 853, 21 Week. Rep. 587, holding undisclosed principal might sue on marine insurance contract.

— Where instrument is under seal.

Cited in Porter v. Pelton, 33 Can. S. C. 449, holding the agent cannot bind others by executing a deed under seal.

Right to charge an undisclosed principal.

Cited in McClung v. McCracken, 3 Ont. Rep. 596; Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617,—holding a principal may be charged upon a written parol executory contract entered into by an agent in his own name although principal's name is not disclosed; Moline Malleable Iron Co. v. York Iron Co. 27 C. C. A. 442, 53 U. S. App. 580, 83 Fed. 66, on parties bound by written contract executed in the name of the agent; Fleet v. Murton, L. R. 7 Q. B. 126, 41 L. J. Q. B. N. S. 49, 26 L. T. N. S. 181, 20 Week. Rep. 297, holding fact that agent is liable is no answer and no reason why the principal also should not be responsible.

Cited in Tiffany Ag. 236, on liability of undisclosed principal on negotiable instrument.

— Disclosed principal where contract is in agent's name.

Cited in Byington v. Simpson, 134 Mass. 169, 45 Am. Rep. 314, holding fact that party knew when entering in a contract that party signing was acting as agent for another will not prevent a suit against principal; Fairchild v. Ferguson, 21 Can. S. C. 484, holding the rule of liability equally applies when the principal is known.

Cited in note in 35 L.R.A.(N.S.) 76, on payment by commercial paper.

Cited in 2 Page Contr. 931, on effect of knowledge of identity of principal: Tiffany Ag. 364, 365, on agent only being bound when credit is given to him.

Disapproved in Chandler v. Coe, 54 N. H. 561, holding a disclosed principal is not liable to suit or entitled to sue where the agent makes the contract in his own name.

Discharge of principal by looking to agent.

Cited in Ames Packing & Provision Co. v. Tucker, 8 Mo. App. 95, holding the act of a creditor in taking agent's note with knowledge of principal's liability is equivalent to a discharge of principal; Curtis v. Williamson, L. R. 10 Q. B. 57, 44 L. J. Q. B. N. S. 27, 31 L. T. N. S. 678, 23 Week. Rep. 236, holding the filing of proofs by creditor upon estate of insolvent agent is not such an election as to preclude action against the undisclosed principal.

Distinguished in Jones v. Johnson, 86 Ky. 530, 6 S. W. 582; Hoffman v. Anderson, 112 Ky. 893, 67 S. W. 49,—holding where creditor, with a knowledge of the facts and liability of the principal, elects to proceed against the agent he cannot then proceed against the principal.

Jury questions as to agency.

Cited in Kenny v. Harrington, 31 N. S. 290, holding that it is always a question for jury as to whether credit was given to agent or to principal where principal claims credit was given exclusively to agent; Creighton v. Janes, 40 U. C. Q. B. 372, holding that whether the contract was different from that agent was authorized to make and whether it had been ratified, were questions for the jury.

Cited in note in 2 E. R. C. 455, on question of fact as to authority of wife to pledge credit of husband for necessaries where she has separate property of her own.

Question of election to sue principal.

Cited in Brown v. Howland, 9 Ont. Rep. 48, holding, in general, the question of election can be properly treated as a question of fact for the jury; Longman v. Hill, 7 Times L. R. 639, on election to sue agent or principal as fact question.

Cited in Tiffany Ag. 238, on right to elect to resort to agent signing negotiable instrument in his own name; Reinhard Ag. 337, as to how question of election by third party is determined in case of agent's failure to disclose principal.

Admissibility of parol evidence to show principal.

Cited in New York & C. S. S. Co. v. Harbison, 16 Fed. 688, holding it is always competent to ascertain by evidence dehors the instrument, who is the principal; Dunn v. Mayo Mills, 67 C. C. A. 450, 134 Fed. 804, holding parol evidence is admissible to identify party signing writing by his surname only, and it does not open the door to evidence to add to or vary terms of writing; Barbre v. Goodale, 28 Or. 465, 43 Pac. 378, holding that parol testimony is admissible to show that contract which is not negotiable instrument, and not required to be under seal, executed in name of agent, is contract of principal, although principal is known at date of contract; Morgan v. Johnson, 4 D. L. R. 643, holding that it is competent to show that one or both of contracting parties were agents for other persons whether agreement be or be not required to be in writing by statute of frauds.

Cited in notes in 2 Eng. Rul. Cas. 724, on extrinsic evidence as to intention of parties to ambiguous instrument; 8 E. R. C. 356, on right to contradict terms of express contract by custom or otherwise; 14 E. R. C. 668, on parol evidence as to usage in interpretation of written contracts; 15 E. R. C. 555, on effect of custom as effecting interpretation of contracts.

Cited in Tiffany Ag. 235, on parol evidence to change real principal where written contract is made in name of agent.

Distinguished in David Belasco Co. v. Klaw, 48 Misc. 597, 97 N. Y. Supp. 712, holding in action to dissolve a partnership and for an accounting, parol evidence is inadmissible to show parties not named in partnership articles were principals of one copartner.

2 E. R. C. 471, ARMSTRONG v. STOKES, 41 L. J. Q. B. N. S. 253, L. R. 7 Q. B. 598, 26 L. T. N. S. 872, 21 Week. Rep. 52.

Liability of undisclosed principal of buyer of goods.

Cited in The Suliote, 23 Fed. 919, holding unknown shipowners not liable in personam for supplies furnished by collecting and disbursing agents who had funds at the time and were looked to alone for payment; Eastman v. Clark, 53 N. H. 276, 16 Am. Rep. 192, 6 Legal Gaz. 412; Chaffraix v. Lafitte, 30 La. Ann. 631 (dissenting opinion),—on right of vendor to hold undisclosed principal; Kayton v. Barnett, 22 Jones & S. 78, holding that there can be no recovery of price of goods against parties as undisclosed principals, with whom vendors at time of sale expressly refused to contract; Hutchings v. Adams, 12 Manitoba L. Rep. 118, holding the undisclosed principal liable for purchase price of goods ordered by the agent where goods were such as would reasonably be required in the business; Irvine v. Watson, L. R. 5 Q. B. Div. 102, 414, 49 L. J. Q. B. N. S. 531, 42 L. T. N. S. 800, holding where agent discloses the existence of principal but does not give his name seller may hold principal though payment has been made to agent unless seller's conduct has been such as to show he looked to agent alone for payment.

Cited in Hollingsworth Contr. 79, on rights and liabilities on contract entered into by agent without disclosing principal.

Right of foreign principal under agents contract.

Cited in Murphy v. Butler, 18 Manitoba L. Rep. 111, to the point that presumption is against right of agent to bind foreign principal unless expressly authorized; Elbinger Actien-Gesellschaft v. Claye, L. R. 8 Q. B. 313, 42 L. J. Q. B. N. S. 151, 28 L. T. N. S. 405, holding the foreign principal cannot sue for breach of contract entered into by the agent; Kaltenbach v. Lewis, L. R. 24 Ch. Div. 54, L. R. 10 App. Cas. 617, 55 L. J. Ch. N. S. 58, 53 L. T. N. S. 787, 34 Week. Rep. 477, holding the foreign principal entitled to goods consigned to agent and in possession of factors employed by agent and unsold at time of agent's death; Maspons v. Mildred, L. R. 9 Q. B. Div. 530, 51 L. J. Q. B. N. S. 604, 47 L. T. N. S. 318, 30 Week. Rep. 862, holding where goods are consigned by foreign principal to a party through an agent who alluded to a third party he is acting for but who is not named, the principal may claim insurance taken out on goods free from any set-off against the agent; Hutton v. Bullock, L. R. 8 Q. B. 331, L. R. 9 Q. B. 572, 30 L. T. N. S. 648, 22 Week. Rep. 956 (affirming L. R. 8 Q. B. 331), on right of undisclosed foreign principal to be made party to contract of sale by agent.

Cited in Benjamin Sales, 5th ed. 251, on right of foreign principal to sue on contract entered into by agent.

Distinguished in Webb v. Sharman, 34 U. C. Q. B. 410, holding foreign principals may sue on contract entered into by an agent in their behalf where defendants dealt with the agent as such.

Effect of payment to agent by principal before fact of agency became known as releasing principal.

Cited in Bradley v. Hyland, 37 Fed. 49, 2 L.R.A. 749, holding that where agent authorized to purchase for cash only, purchases on credit of his own from seller who supposes him to be buying for himself only and principal settles with agent in good faith, he is not liable again to seller for price of goods; Chaffraix v. Price, 29 La. Ann. 176, holding the fact of payment by the undisclosed principal to his agent, before the seller knew there was a principal is decisive on

liability of principal; Laing v. Butler, 37 Hun, 144, holding where principal puts money in agent's hands to purchase goods and agent purchases in his own name without revealing the agency the principal is not liable.

Cited in Tiffany Ag. 241, 243, on effect of settlement by undisclosed principal with agent.

Disapproved in Arbuthnot v. Dupas, 15 Manitoba L. Rep. 634, holding payment of agent by the undisclosed principal before disclosure of facts of agency will not relieve the principal from liability.

— Estoppel by conduct.

Cited in Schepflin v. Dessar, 20 Mo. App. 569, holding that acts of creditor which lead principal to believe that agent alone will be held liable, estop him from asserting demand against principal, after latter has accounted to agent for amount.

Effect of delay in pursuing agent on principals' liability.

Cited in Davison v. Donaldson, L. R. 9 Q. B. Div. 623, 31 Week. Rep. 277, 4 Asp. Mar. L. Cas. 601, holding mere delay in pressing the agent will not discharge the principal.

Right of agent to indemnity from principal.

Cited in Hood v. Stallybrass, L. R. 3 App. Cas. 880, 38 L. T. N. S. 826, 27 Week. Rep. 1, on right of a commission agent to indemnity.

Liability of agent of foreign principal.

Cited in Tiffany Ag. 366, on liability to third person of agent of foreign principal on contract not sealed or negotiable; Hollingsworth Contr. 78, on liability of agent acting for foreign principal.

Ratification of acts of corporation.

Cited in note in 35 L. ed. U. S. 60, on acts and contracts of corporation ultra vires in limited sense being capable of ratification.

2 E. R. C. 484, COLLEN v. WRIGHT, 8 El. & Bl. 647, 4 Jur. N. S. 357, 6 Week. Rep. 123, 27 L. J. Q. B. N. S. 215, affirming the decision of the Court of Queen's Bench, reported in 7 El. & Bl. 301, 26 L. J. Q. B. N. S. 147.

Actionable deceit or warranty in signing contract.

Cited in Bank of Ottawa v. Harty, 12 Ont. L. Rep. 218, holding one who leaves an indorsed check for collection and signs his name as witness to the indorsement, but signed, "without any recourse to me" is liable on an implied warranty to pay the amount where indorsement was forged.

Cited in note in 12 E. R. C. 292, on what constituted fraud and liability therefor.

The decision of the Court of Queen's Bench was cited in 1 Thompson Neg. 764, on liability for vending article inherently dangerous.

Liability of agent contracting without competent authority.

Cited in McCormick v. Seeberger, 73 Ill. App. 87, holding that person who assumes to contract in name of corporation, without power so to do, may be held liable to party with whom contract is attempted to be made: Mantz v. Maguire, 52 Mo. App. 136 (dissenting opinion), on liability of agent who assumes to execute contract in name of another without authority; McRory v. Henderson, 14 Grant Ch. (U. C.) 271, holding the purchaser, upon failure of title of property brought from an attorney who was the apparent owner, may recover his payments and costs from vendor; Johnson v. Provincial Ins. Co. 27 U. C. C. P. 464, on liability of agent for deception as to extent of his authority: McManus v. Porter, 3

Sask. L. R. 335, holding that agent is liable for damages caused by misrepresentation as to extent of his authority to person entering into contract with him; Coit v. Dowling, 4 Terr. L. Rep. 464, holding one who enters into a contract as agent is liable to make good to the contracting party all loss by reason of nonexistence of the authority to so act; Xenos v. Wickham, 13 E. R. C. 422, 33 L. J. C. P. N. S. 13, 36 L. J. C. P. N. S. 313, 14 C. B. N. S. 452, L. R. 2 H. L. 296, to the point that agent not having authority to cancel insurance policy is liable to principal for loss.

Cited in note in 42 L.R.A.(N.S.) 29, on liability of one signing contract in representative capacity.

Cited in Reinhard Ag. 307, on nature of liability of agent acting without authority.

Distinguished in Bank of Ottawa v. Harrington, 28 U. C. C. P. 488, holding fact that club was not authorized to make certain notes would not render the president of the club personally liable for attaching his name to notes; Nickle v. Kingston & P. R. W. Co. 12 Ont. L. Rep. 349, holding the secretary-treasurer of a company is not liable for his authorized act in accepting a draft for the company.

The decision of the Court of Queen's Bench was cited in McDonald v. McMillan, 17 U. C. Q. B. 377, holding the agent is not liable for his act where the principal is not legally bound on the contract for want of the corporate seal.

— Sealed agreements.

Distinguished in Calvin v. Davidson, 31 U. C. Q. B. 396, holding a plea bad that the nonliability of the principal was want of a corporate seal the assumed authority being such that if it had existed the principal must have been compelled to affix its seal.

— Implied warranty of authority as ground of liability.

Cited in Conant v. Alvord, 166 Mass. 311, 44 N. E. 250, holding irrespective of the question of fraud on part of agents a cause of action for injuries caused by the breach will lie; Cowley v. Smyth, 46 N. J. L. 380, 50 Am. Rep. 432, holding the liability rests on the ground of an implied warranty of authority; Dung v. Parker, 52 N. Y. 494; Baltzen v. Nicolay, 53 N. Y. 467,—holding it rests upon an implied warranty of authority to make it, and the remedy is by an action for its breach; White v. Madison, 26 N. Y. 117, 26 How. Pr. 483, holding that liability of agent who acts without authority in making contract rests on ground he warrants his authority, and not that contract is his own; Parker v. Knox, 60 Hun, 550, 15 N. Y. Supp. 256 (dissenting opinion), on the ground and form of liability; Oliver v. Morawetz, 97 Wis. 332, 72 N. W. 877, holding the liability, when the contract is made in the name of the principal, rests upon the implied warranty of authority to make it; Austin v. Real Estate Exch. 2 D. L. R. 324, holding that real estate exchange, though acting in good faith, is liable to subscriber for breach of warranty, where he made sale of property which could not be carried out because exchange did not have property listed; Selkirk v. Windsor Essex & L. S. Rapid R. Co. 20 Ont. L. Rep. 290, holding that president and secretary of corporation were liable to person relying upon representation as to facts in relation to organization of company, where corporation was unable to carry out contract made with him because of manner of organizing it; Crane v. Lavoie, 4 D. L. R. 175, holding that persons who sign promissory note as president and manager of nonexisting company are liable upon implied warrant of its actual existence, for full value of note; Outram v. Doyle, 13 N. S. 1, on liability of an agent on breach of implied warranty of authority to act; Wark v. Curtis, 10 Manitoba

L. Rep. 201; Mancer v. Sanford, 15 Manitoba L. Rep. 181,—holding when one pretends to act on behalf of others, he impliedly promises that he is what he represents himself to be, and he must answer for any damages resulting.

Cited in notes in 34 L.R.A.(N.S.) 532, 534, 536, 537, 540, on liability of one assuming without authority to contract as agent; 11 E. R. C. 92, on estoppel by conduct; 2 E. R. C. 493, on implied warranty of authority by agent.

Cited in Tiffany Ag. 370, 371, on doctrine of implied contract or warrant of authority of agent.

The decision of the Court of Queen's Bench was cited in Thomson v. Feeley, 41 U. C. Q. B. 229, holding if there be a principal the agent is liable only for a breach of warranty of authority to act as agent; Kent v. Addicks, 60 C. C. A. 660, 126 Fed. 112, holding where the undertaking on its face is that of the supposed principal, the agent is liable only on the implied warranty that he had the right to make it; Seeberger v. McCormick, 178 Ill. 404, 53 N. E. 340 (affirming 73 Ill. App. 87), holding an action ex contractu upon an implied warranty of power may be brought against directors of a bank upon a lease they had no authority to make as directors; Johnston v. Barker, 20 U. C. C. P. 228, holding where a nonresident assignee sells property believing he has a right to sell and title fails he is liable to the purchaser on his warranty of title.

Damages recoverable from agent for want of authority.

Cited in note in 15 E. R. C. 540, on tenant's duty to deliver up possession at expiration of term.

Cited in Tiffany Ag. 374, on measure of damages for agent's breach of warrant of authority.

Distinguished in Parker v. McDonald, 11 U. C. C. P. 478, holding charges of a solicitor engaged by purchaser, made a party to a suit by a mortgagee against the mortgagor, cannot be recovered in an action later brought against the mortgagor, for breach of his covenant.

The decision of the Court of Queen's Bench was cited in Hunter v. Johnson, 14 U. C. C. P. 123, holding costs of defending dower suit on the ground that certificate on back of deed showed release of dower was properly a question for the jury; Farmers' Co-op. Trust Co. v. Floyd, 47 Ohio St. 525, 12 L.R.A. 346, 21 Am. St. Rep. 846, 26 N. E. 110, holding the damages may include the costs and expenses of an unsuccessful action against the principal to enforce the contract.

Liability of agent to third person.

Cited in Taylor v. Robertson, 31 Can. S. C. 615, holding a solicitor whose principal was known from the beginning to the end of litigation is not liable to a sheriff unless some express indemnity was given by him; Sheffield v. Ladue, 16 Minn. 388, 10 Am. Rep. 145, Gil. 346, holding that one who without authority executes instrument in name of another whose name he puts to it, and adds his own name only as agent, cannot be treated as party to instrument and sued upon it, unless it be shown he was real principal.

Cited in note in 4 E. R. C. 283, on liability of one signing bill or note as agent.

Fraud necessary to recovery for a false representation.

Cited in Bennett v. Tregent, 24 U. C. C. P. 565, holding there can be no recovery for a false representation, where no imputation of fraud is shown.

Liability of principal for acts of agent.

Distinguished in Dickson v. Reuter's Teleg. Co. 24 E. R. C. 774, L. R. 3 C. P. Div. 1, 47 L. J. C. P. N. S. 1, 37 L. T. N. S. 370, 26 Week. Rep. 23, holding that no action will lie by receiver of telegraph message against telegraph company for mistake of their agents in message delivered.

2 E. R. C. 497, TYRRELL v. BANK OF LONDON, 8 Jur. N. S. 849, 10 H. L. Cas. 26, 31 L. J. Ch. N. S. 369, 6 L. T. N. S. 1, 10 Week. Rep. 359.

Accountability for profits made from trust relationship.

Cited in Loudenslager v. Woodbury Heights Land Co. 58 N. J. Eq. 556, 43 Atl. 671, holding one in a fiduciary capacity will not be permitted to retain a profit inequitably obtained; Bent v. Priest, 10 Mo. App. 543, holding a director of a corporation accountable for all profits secretly made out of his relation as such; Krohn v. Williamson, 62 Fed. 869, holding before there can be a binding settlement between trustees and beneficiary there must be a full disclosure of what the trustees have done as trustees; Williamson v. Krohn, 13 C. C. A. 668, 31 U. S. App. 325, 66 Fed. 655, holding the trustee must act in strict fidelity to his principal; Orgill's Case, 21 L. T. N. S. 221, on the wisdom of applying the rule to any agent or trustee profiting in matters of trust.

Cited in notes in 2 E. R. C. 518, on right of principal to profits made and advantages gained by agent in execution of agency; 14 Eng. Rul. Cas. 574, on liability of trustee for interest.

Distinguished in Bent v. Priest, 86 Mo. 475, holding one receiving bonds while acting in the capacity of director of a corporation, must be held to have received them in his capacity as director and is accountable as such; Donnelly v. Cunningham, 58 Minn. 376, 59 N. W. 1052, holding where one tenant in common while acting as agent to purchase property for another sells him the common property without disclosing his interest, the principal may rescind only as to the interest of the agent.

— Right of contribution from co-trustee.

Cited in Bigelow v. Old Dominion Copper Min. & Smelting Co. 74 N. J. Eq. 457, 71 Atl. 153, holding that equity does not recognize any right of contribution between joint trustees who are together guilty of intentional wrong-doing in respect of trust.

— Where relationship of principal and agent exists.

Cited in Warren v. Burt, 7 C. C. A. 105, 12 U. S. App. 591, 58 Fed. 101, holding an agent of a vendor who intentionally becomes interested as a purchaser in the subject matter of his agency, is liable to his principal for all the profits he makes by his purchase; Dorris v. French, 4 Hun, 292, holding that agent employed to purchase will not be permitted to make profit out of transaction, in absence of agreement with principal; Pittsburg Min. Co. v. Spooner, 74 Wis. 307, 17 Am. St. Rep. 149, 42 N. W. 259, holding where trustees and agents of a corporation sell property to the corporation which has been bought so as to make a profit to themselves an implied trust for the benefit of the corporation will be declared; Kimber v. Barber, L. R. 8 Ch. 56, 27 L. T. N. S. 526, 21 Week. Rep. 65, holding where party solicits an agency to procure property for another at a certain price and thereafter sells the property which he himself owns at an advance over the price he paid the principal can recover such profits from the agent.

— Attorney and client.

Cited in Boyle v. Read, 138 Ill. App. 153, holding a contract between attorney and client for an interest in the property in litigation as compensation for legal services is presumptively fraudulent; Hughes v. Willson, 128 Ind. 491, 26 N. E. 50, holding the attorney who bought in an outstanding title while the rights under an execution sale were still unsettled was a trustee; Buckley v. Rion, Rap. Jud. Quebec 20 B. R. 168, holding that contract of solicitor with client is illegal because it stipulates that client cannot settle suit; Knock v. Owen, 35 Can. S. C. 168, holding the solicitor entitled only to reasonable counsel fees and necessary

disbursements for his services; Re Kensington & O. Turnp. Road Co. 12 Phila. 611, 35 Phila. Leg. Int. 152, holding that counsel must look to client for compensation he cannot recover it from his opponent, where such opponent is under no legal obligation to pay; Albert R. Co. v. Peck, 26 N. B. 191, on recovery of remuneration over and above salary as solicitor.

Cited in Weeks Attys. 2d ed. 549, on attorney's duty to account to client for all profits of professional transaction between client and himself; Weeks Attys. 2d ed. 561, on unfairness of terms of contract between attorney and client as evidence of constraint.

— Promoter or member and corporation.

Cited in Northrup Min. Co. v. Dimock, 27 N. S. 112, holding a member and chief promoter of a syndicate cannot retain the money paid to him over and above the price he agreed to pay for property turned over to the syndicate; Lindsay Petroleum Oil Co. v. Hurd, 16 Grant Ch. (U. C.) 158, holding where owner without disclosing his interest advised intended subscribers to a company to be formed to take over the property he is jointly liable with other owners for whole purchase price; Imperial Mercantile Credit Asso. v. Coleman, L. R. 6 Ch. 558, 40 L. J. Ch. N. S. 262, 22 L. T. N. S. 257, 24 L. T. N. S. 290, 19 Week. Rep. 481, on liability of a director to account for profits on sale made to company.

Distinguished in New Sombrero Phosphate Co. v. Erlanger, L. R. 5 Ch. D. 73, 46 L. J. Ch. N. S. 425, 36 L. T. N. S. 222, 25 Week. Rep. 436, holding purchase of property with the view of formation of a company does not oblige the purchaser to sell the subject of the purchase at the price he paid for it.

— Partnership.

Cited in Burn v. Strong, 14 Grant Ch. (U. C.) 651, holding partner entitled to share in profits made by copartner in enterprise conducted in his own name.

— Mode of adjusting balances and profits.

Cited in Parker v. Nickerson, 137 Mass. 487, holding the profits are the difference between what the agent paid for the coal and what he received from the company, less necessary intervening expenses; Hare v. De Young, 39 Misc. 366, 79 N. Y. Supp. 868, holding where an attorney of an estate acted also as purchaser of a judgment against the estate at a discount, the estate should not be required to pay more than the judgment was purchased for with interest; Lindsay Petroleum Oil Co. v. Hurd, 17 Grant Ch. (U. C.) 115, holding where agent entered into an arrangement with landowners to affect a sale to a company to be formed and real prices were concealed for purpose of getting an advance price, the company can recover the agent's profits from the land owners in case of default in payment by agent.

Distinguished in Re Cape Breton Co. L. R. 29 Ch. D. 795, 54 L. J. Ch. N. S. 822, holding where agent has bought his own property on behalf of his principal the principal retaining the property cannot charge the agent with the difference between price agent paid and price paid by principal.

2 E. R. C. 519, LACEY v. HILL, L. R. 18 Eq. 182, 43 L. J. Ch. N. S. 551, 30 L. T. N. S. 484, 22 Week. Rep. 586.

Right to indemnity where losses result in execution of a trust or agency.

Cited in Central Trust Co. v. Louisville Trust Co. 87 Fed. 23, holding a trustee for bond holders who was directed to foreclose mortgage to secure bonds, is entitled to attorney's fees and costs of litigation; Boyd v. Robinson, 20 Ont. Rep.

404, holding that person indemnified against loss is not obliged to wait until he has suffered and perhaps been ruined before having recourse to judicial aid; Re Blundell, L. R. 40 Ch. Div. 370, 57 L. J. Ch. N. S. 730, 58 L. T. N. S. 933, 36 Week. Rep. 779, holding a trustee may in the first instance resort to the trust estate, and pay a solicitor properly employed for his services.

Cited in notes in 25 E. R. C. 335, on liability of trustee for losses; 12 E. R. C. 837, on right of person whose liability is ascertained to judgment for indemnity or contribution.

Cited in Tiffany Ag. 457, on principal's duty to indemnify agent.

— Where losses result from brokerage contract.

Cited in Williams-Pinckard & Co. v. Aroni, 35 La. Ann. 1115, holding a party, employing a broker to deal in cotton for future delivery, who is sold out under the rules of the Cotton Exchange by failure of broker, is bound to make good the losses under the brokers contract; Sanders v. Frankfort Marine Acci. & Plate Glass Ins. Co. 72 N. H. 485, 101 Am. St. Rep. 688, 57 Atl. 655, on performance of a contract of indemnity; Murphy v. Butler, 18 Manitoba L. Rep. 111, holding that under custom brokers may recover from principal for loss on contract for sale of grain for future delivery made without disclosing principal, where customer makes default in carrying out contract; 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 the broker is not entitled to indemnity for loss resulting from an unauthorized sale contrary to agreement.

Extent of recovery under indemnity contract.

Cited in Mewburn v. Mackelcan, 19 Ont. App. Rep. 729, holding under a contract "to indemnify and save harmless from all payment of all liability" must be included all costs incurred or put to in connection with the liability; Palmer v. Jones, 1 Ont. L. Rep. 382, holding upon breach of covenant to save harmless in right of ingress and egress to street a recovery may be had for full amount covenantee agrees to pay although the entire amount is still unpaid; Williams Torrey & Co. v. Knight [1894] P. 342, 64 L. J. Prob. N. S. 15, 71 L. T. N. S. 92, 7 Asp. Mar. L. Cas. 500, 11 Reports, 736, holding that an agent who agreed to keep a tug insured and to be responsible for return in good repair was not obliged to sue on the policies or to pay above the uninsured damage.

Distinguished in Sutherland v. Webster, 21 Ont. App. Rep. 228, holding assignees of a covenant by incoming partner to indemnify an outgoing member cannot sue for unliquidated damages, the liability for and amount of which has not yet become established.

Payment by indemnitor direct to creditor.

Cited in Thompson v. Warwick, 21 Ont. App. Rep. 637, holding where a defendant is bound by covenant to pay off two mortgages and to indemnify the plaintiff, against loss by reason of them, it is an appropriate method of administering the relief to order a payment direct to the mortgagees; Campbell v. Morrison, 24 Ont. App. Rep. 224, holding the mortgagor, as soon as the debt is due may bring an action to compel the purchaser to pay, and having assigned his right to mortgagee the action may be brought by mortgagee in his own name.

Distinguished in Wolmershausen v. Gullick [1893] 2 Ch. 514, 62 L. J. Ch. N. S. 773, 68 L. T. N. S. 753, 12 Eng. Rul. Cas. 823, 21 Eng. Rul. Cas. 634, holding where principal creditor is not a party a prospective order may be made directing the cosurety to indemnify to the extent of his own share.

2 E. R. C. 527, MURRAY v. CURRIE, 7 Car. & P. 584.

Performance of contract by sales agent to earn commissions.

Cited in Babcock v. Merritt, 1 Colo. App. 84, 27 Pac. 882; Lawrence v. Weir, 3 Colo. App. 401, 33 Pac. 646,—holding he must find a purchaser and the sale must proceed from his efforts acting as broker; Armstrong v. Wann, 29 Minn. 126, 12 N. W. 345, holding the agent must be the procuring cause of the sale; Keener v. Harrod, 2 Md. 63, 56 Am. Dec. 706, holding the legal import of an agreement to procure a purchaser, binds the party to name a person who ultimately buys the property; Wylie v. Marine Nat. Bank, 61 N. Y. 415, holding the broker must be the efficient agent or the procuring cause of the sale to be entitled to the commission; Stillman v. Mitchell, 2 Robt. 523, holding if action of agent drew attention of navy to ship for sale and led to negotiations resulting in the purchase he has earned commission; Lynch v. McKenna, 58 How. Pr. 42, holding delay between time of beginning negotiations and ending them does not detract from broker's right to brokerage; Lincoln v. McClatchie, 36 Conn. 136, holding where purchaser obtains information through a third party who calls upon an agent who has the property listed for sale and a sale results, the agent is still entitled to his commission; Peckham v. Ashhurst, 18 R. I. 376, 28 Atl. 337, holding where agent at instance of principal communicated to purchaser the principal's desire to reopen negotiations, the agent is entitled to his commission, though another agent was also employed; Riggs v. Turnbull, 105 Md. 135, 8 L.R.A.(N.S.) 824, 66 Atl. 13, 11 Ann. Cas. 783, holding where purchaser fails to pay the price, though a contract of sale is affected, the agent has not earned his commission; Walker v. Rogers, 24 Ind. 237 (dissenting opinion); Chilton v. Butler, 1 E. D. Smith, 150,—holding that in action by brokers for commissions he must show that he was procuring cause of sale; Bellesheim v. Palm, 54 App. Div. 77, 66 N. Y. Supp. 273, on duty of agent in earning commission; Re Richardson, 3 Ch. Chamb. Rep. (Ont.) 144, holding that an agent, whether solicitor or not, who is instructed to sell or rent real estate of another is entitled to a commission where he effects sale.

Cited in notes in 44 L.R.A. 322, 323, as to when real estate broker is considered as procuring cause of sale or exchange; 44 L.R.A. 598, on performance by real-estate broker of contract to find purchaser or effect exchange.

Cited in Walkers Real Est. Agency, 280, on right of broker who is procuring cause of sale to commission; Walkers Real Est. Agency, 530, as to whether broker was procuring cause of transaction; Walkers Real Est. Agency, 274, on right of first broker who succeeds to commission.

Right to commission where sale is made by principal.

Cited in Wolf v. Tait, 4 Manitoba L. R. 59, holding a verdict for whole amount of commissions though the owner assisted in the negotiations will not be disturbed.

Distinguished in Boydell v. Snarr, 6 U. C. C. P. 94, holding where agent employed to purchase lumber and attend shipment could not agree on terms, he is not entitled to commissions on sale later made by principal after former negotiations had been entirely dropped; Hubachek v. Hazzard, 83 Minn. 437, 86 N. W. 426, holding the principal cannot escape liability for commissions by selling at a less figure than that given the agent, after refusing to sell at first figures.

2 E. R. C. 529, WILKINSON v. MARTIN, 8 Car. & P. 1.

Broker's right to commission on sale made.

Cited in Lawrence v. Weir, 3 Colo. App. 401, 33 Pac. 646, holding that before broker can recover commissions, he must produce purchaser who is ready, willing and able to purchase upon terms and price designated; Winsor v. Dillaway, 4 Met. 221, on effect of introducing a person as purchaser; Armstrong v. Wann, 29 Minn. 126, 12 N. W. 345, holding all the agent has to do to earn his commission is to procure a purchaser ready and willing to buy upon the employer's terms; Vreeland v. Vetterlein, 33 N. J. L. 247, holding in cases of dispute as to right to commissions the question always is as to whether agent was the efficient cause of the sale; Bellesheim v. Palm, 54 App. Div. 77, 66 N. Y. Supp. 273, holding that in order for broker to recover commissions upon sale of real estate, it must appear that he procured purchaser, although owner laboring under mistake in that regard agreed to pay commission at time of sale; Wylie v. Marine Nat. Bank, 61 N. Y. 415, holding that owner is not liable to broker for commissions where broker opens negotiations, but failing to bring customer to specified terms abandons them, and employer subsequently sells to same person at price fixed; Chilton v. Butler, 1 E. D. Smith, 150, holding he must show his agency was the procuring case of the sale; Stillman v. Mitchell, 2 Robt. 523, holding it necessary the action of agent drew the attention of purchaser to the ships and led to negotiations resulting in the purchase; Roberts v. Markham, 26 Okla. 387, 109 Pac. 127, holding that if after lot or realty is placed in agent's hands for sale, it is brought about and procured by his advertisements or exertions, he will be entitled to his commissions; Stratton v. Vachon, 44 Can. S. C. 395, holding that broker was entitled to commissions where steps taken by him brought owner into relation with person who finally became purchaser; Singer v. Russell, 25 Ont. L. Rep. 444, holding that where claim is made for commissions on sale of land slight service in bringing parties together is sufficient; Vachon v. Straton, 3 Sask. L. R. 286 (dissenting opinion), on right of broker to commissions on sale of land where he introduced parties; Imrie v. Wilson, 3 D. L. R. 883, holding that broker cannot recover commissions, where proposed purchaser does not purchase, but introduces actual purchaser to owner; Travis v. Coates, 5 D. L. R. 807, holding that broker cannot recover commissions if, notwithstanding original introduction of purchaser by him, his act is not real and efficient cause of sale; Deady v. Goodenough, 5 U. C. C. P. 163, holding where party commenced and concluded the sale as broker he was entitled to brokerage fees.

Cited in notes in 44 L.R.A. 322–324, 326, 333, as to when real estate broker is considered as procuring cause of sale or exchange; 44 L.R.A. 613, on performance by real-estate broker of contract to find purchaser or effect exchange; 43 L.R.A. 608, on real-estate broker's commissions as affected by negligence, fraud, or default of principal, and defective title.

Cited in Tiffany Ag. 446, on agent's right to remuneration for services performed.

— Purchaser disclosed by third person.

Cited in Lincoln v. McClatchie, 36 Conn. 136, holding owner cannot escape payment of commissions though a third party sought the information from the broker as to property and so brought purchaser in touch with owner; Jones v. Frost, 24 Misc. 208, 53 N. Y. Supp. 573, holding a broker is not entitled to a commission on stock sold, where a party he tried to make sale to, mentioned to another who finally purchased from owner, that the stock was for sale.

— Breaking of bargaining and sale by principal.

Cited in Babcock v. Merritt, 1 Colo. App. 84, 27 Pac. 882, holding that broker who is authorized to sell property for $7,500 or $7,000 net, cannot recover commissions from owner who sold property for $7,000 to purchaser who was introduced by agent; Keener v. Harrod, 2 Md. 63, 56 Am. Dec. 706, holding where it appears the introduction or disclosure was foundation of negotiations and sale, the parties cannot afterward deal so as to deprive broker of his commission; Aikins v. Allan, 14 Manitoba L. Rep. 549, holding the owner could not go to the intended purchasers introduced by the brokers, and complete the transaction, in same or other terms, and deprive the brokers of their commission; Boydell v. Snarr, 6 U. C. C. P. 94, holding where an agreement as to terms could not be reached and negotiations were broken off the agent has no right to commission if sale is later made to same party; Hubachek v. Hazzard, 83 Minn. 437, 86 N. W. 426, holding the agent is not the procuring cause in bringing parties together, if owner refuses to sell at figure given the agent, drops all proceedings, and afterwards from some other cause opens negotiations anew; Singer v. Russell, 1 D. L. R. 646, holding that broker is entitled to commission where prospective purchaser with whom broker was negotiating, went to owner and purchased property for price lower than quoted to broker; Holmes v. Lee Ho, 16 B. C. 66, holding that broker was not entitled to commission where property was sold by owner to one introduced by broker but at price less than that mentioned in agreement; Bridgman v. Hepburn, 13 B. C. 389, holding pursuance of negotiations by principal was upon the facts a continuance of the original introduction and commissions were earned.

Contract of brokerage shown by proof of usage.

Cited in McCarthy v. Loupe, 62 Cal. 299, holding independent of civil code the contract of brokerage in real estate might be supplied by proof of usage; Cook v. Welch, 9 Allen, 350, holding in absence of an express contract proof of a usage regulating ship broker's contracts is admissible.

2 E. R. C. 533, GROGAN v. SMITH, 7 Times L. R. 132, reversing the decision of the High Court of Justice, reported in 6 Times L. R. 427.

Broker's commissions where bargain falls through.

Cited in Bagshawe v. Rowland, 13 B. C. 262, holding agent must show he was procuring cause of purchase or that principal prevented success.

2 E. R. C. 535, FREEMAN v. EAST INDIA CO. 5 Barn. & Ald. 617, 1 Dowl. & R. 234, 24 Revised Rep. 497.

Power of master to sell his ship.

Cited in The Henry, 1 Blatchf. & H. 465, Fed. Cas. No. 6,372, holding the master may, by maritime law, sell his vessel in case of wreck or irreparable disaster; Fitz v. Amelie, 2 Cliff. 440, Fed. Cas. No. 4,838, holding in case of extreme necessity the master may sell the ship for the benefit of the owners or of all concerned; Pope v. Nickerson, 3 Story, 465, Fed. Cas. No. 11,274, holding the master had no right to sell the vessel, unless in a case of necessity, to prevent a greater loss to the shippers; The Raleigh, 37 Fed. 125, holding the purchaser of a wrecked vessel who seeks to devest pre-existing liens for repairs must prove that the master was justified in making the sale by adequate necessity; Everett v. Saltus, 15 Wend. 474, holding no title will pass to the purchaser, if the transfer is not required by the circumstances in which the master is placed.

— Ships' cargo.

Cited in The Fortitude, 3 Sumn. 228, Fed. Cas. No. 4,953, holding there must be an apparent necessity for a sale of the cargo, or any part of it to confer title upon the purchaser; Bryant v. Commonwealth Ins. Co. 13 Pick. 543, holding acting merely in good faith and for the interest of all concerned will not exempt the sale of goods from the character of a tortious conversion; Harper v. Carson, 20 N. J. L. 674, holding nothing but extreme necessity will justify sale of cargo by master; American Ins. Co. v. Coster, 3 Paige, 323, holding that master in foreign port may, in case of necessity, sell part or hypothecate whole of cargo to repair ship; Butler v. Murray, 30 N. Y. 88, 86 Am. Dec. 355; Saltus v. Everett, 20 Wend. 267, 32 Am. Dec. 541,—holding that mere shipment of goods does not confer upon master of vessel authority to dispose of goods, unless in case of necessity; Stillman v. Hurd, 10 Tex. 109, holding that possession of cargo, by master of vessel, gives him no authority to sell, except in cases recognized by mercantile law; Thomas v. St. John's Marine Ins. Co. N. F. (184–64) 130, to the point that nothing but extreme necessity will justify master in disposing of cargo.

Cited in notes in 25 L.R.A.(N.S.) 781, on right of one leaving chattels in another's possession as against latter's vendees or creditors; 1 Eng. Rul. Cas. 69, on right to claim partial loss under marine policy.

Cited in 2 Hutchinson Car. 3d ed. 872, on absolute necessity as justifying sale of goods by master; 2 Hutchinson Car. 3d ed. 874, on sale of goods by master when unnecessary as a conversion; Benjamin Sales, 5th ed. 40, on right of master of ship to transfer property in goods in his possession.

Distinguished in Cammell v. Sewell, 5 E. R. C. 891, 29 L. J. Exch. N. S. 350, 5 Hurlst. & N. 728, holding that cargo sold by master in accordance of law of place will pass good title.

— Distinction between an "apparent necessity" and an "absolute necessity."

Cited in Prince v. Ocean Ins. Co. 40 Me. 481, 63 Am. Dec. 676, holding an instruction that there must be an apparent necessity conveys the same idea as an absolute necessity.

Mala fides as a necessary element in conversion.

Cited in Hampson v. Boulton, 5 U. C. Q. B. O. S. 23, on conversion by receipt of property without mala fides.

2 E. R. C. 542, ARTHUR v. BARTON, 9 L. J. Exch. N. S. 187, 6 Mees. & W. 138.

Power of master to bind the ship owners for repairs.

Cited in Mitchell v. Chambers, 43 Mich. 150, 38 Am. Rep. 167, 5 N. W. 57, holding it is not to be assumed from fact that repairs were necessary that the transaction was such as to bind part owners of the vessel as personal debtors; Symes v. The City of Windsor, 4 Can. Exch. 362, holding that master of ship entitled to credit for expenditures for necessaries and for repairs of ship where unable to communicate satisfactorily with owner; Gunn v. Roberts, L. R. 9 C. P. 331, 43 L. J. C. P. N. S. 233, 30 L. T. N. S. 424, 22 Week. Rep. 652, 2 Asp. Mar. L. Cas. 250, holding it necessary to entitle the captain to hypothecate the ship that neither the owner or an authorized agent be at hand.

Cited in Tiffany Ag. 221, on scope of authority of ship master as agent.

Distinguished in Provost v. Patchin, 9 N. Y. 235, holding the master has power to bind owners for necessary repairs contracted for in the home port; The Under-

writer, 119 Fed. 713, holding a vessel liable for her repairs and supplies except where it is known the owner declines to allow the lien.

— To borrow money.

Disapproved in McCready v. Thorn, 51 N. Y. 454, holding when circumstances are such as to justify the master, or part owner to purchase supplies upon the credit of the owners the same circumstances will justify them to borrow money to pay cash for the articles.

Liability of owner for seamen's wages.

Cited in Third Nat. Bank v. Symes, 4 Can. Exch. 400; Symes v. The City of Windsor, 4 Can. Exch. 362,—holding the master entitled to a lien for wages and disbursements on the ship where liabilities were incurred when owner was at a distance.

Distinguished in Force v. Providence Washington Ins. Co. 35 Fed. 767, holding the German Code provides for the personal responsibility of the owner for seamen's wages.

Agency to do particular thing as jury question.

Cited in St. Louis Gunning Advertising Co. v. Wanamaker & Brown, 115 Mo. App. 270, 90 S. W. 737, holding the question, where agents act was such as to raise the presumption of incidental authority to make contract, was for the jury.

— Agency from necessity.

Cited in Stearns v. Doe, 12 Gray, 482, 74 Am. Dec. 608, holding question, whether money was necessary to vessel at time of loan and whether master's position was such as authorize agent to borrow, was properly for the jury's consideration; Pentz v. Clarke, 41 Md. 327, holding that captain, as such, has no authority to pledge credit of owner of ship for necessary repairs made at home port, where owner resides and can be consulted; May v. Hurley, 77 N. J. L. 611, 134 Am. St. Rep. 796, 71 Atl. 913, 18 Ann. Cas. 874, holding that authority of master of ship to pledge the owner's credit is based upon necessity and may not be availed of where the master is within easy communication; Wallace v. Fielden, C. R. 2 A. C. 44, holding that power to raise money by bottomry is vested in master, although owner resides in same country, provided there is no means of communication with owner and exigency of case require it; Orange v. McKay, 5 N. S. 444, holding the necessity for a sale of a stranded vessel is a question of fact for the jury; Giovanni v. Rorke, Newfoundl. Rep. (1884–96) 578, holding it a question of fact for the jury to answer where there existed an apparent necessity for furnishing the supplies, also whether master's position was such as to authorize the pledging of owner's credit.

Cited in Tiffany Ag. 42, on agency from necessity.

New trial on verdict below 20£.

Cited in Cleaver v. Blanchard, 4 Manitoba L. Rep. 464, refusing new trial on evidence where verdict was below 20£.

2 E. R. C. 547, CHAPMAN v. ALLEN, Cro. Car. 271.

Right of agister to a lien for services.

Cited in Kelsey v. Layne, 28 Kan. 218, 42 Am. Rep. 158, holding that under statute farmer is entitled to lien on cattle pastured and fed for three or four years; Goodrich v. Willard, 7 Gray, 183, holding an agister of cattle has no lien upon them for their keeping; Miller v. Marston, 35 Me. 153, 56 Am. Dec. 694, holding same in case of livery stable keeper, for the boarding and doctoring of horses; Cross v. Wilkins, 43 N. H. 332, holding an innkeeper had no lien on the

horse of a traveller for the keep of the horse; Grinnell v. Cook, 3 Hill, 485, 38 Am. Dec. 663, holding an innkeeper had no lien on a horse left with him for the purpose of being fed and kept; Crommelin v. New York & H. R. Co. 1 Abb. App. Dec. 472, 4 Keyes, 90; Neff v. Thompson, 8 Barb. 213,—on person, in absence of special agreement, as having no lien for the keeping of animals; Ingalsbee v. Wood, 36 Barb. 452, to the point that innkeeper may detain horse of guest until payment of guest's bill.

Cited in note in 2 Eng. Rul. Cas. 550, on agister's right to detain animals until payment for keep.

Disapproved in Kelsey v. Layne, 28 Kan. 218, 42 Am. Rep. 158, holding a farmer keeping, feeding and caring for a neighbor's stock for a number of years had a lien upon the stock for his feed and care.

Right of lien for services rendered.

Cited in State v. Ayer, 23 N. H. 301, holding a shoemaker had a lien on leather furnished him to be manufactured into shoes, for his labor; White v. Smith, 44 N. J. L. 105, 43 Am. Rep. 347, holding a wheelwright had a lien on a wagon for repairs made thereon although owned by the wife of the man bringing it to be repaired; Drummond Carriage Co. v. Mills, 54 Neb. 417, 40 L.R.A. 761, 69 Am. St. Rep. 719, 74 N. W. 966, holding the defendant company making repairs on a buggy at the request of the mortgagor thereof who retained possession had a lien therefor superior to the lien of the mortgagee; Everett v. Coffin, 6 Wend. 603, 22 Am. Dec. 551, holding that lien of master of vessel on cargo for freight may be assigned, and action of trover for cargo cannot be maintained against assignee, unless, before suit lien be discharged; Cochrane v. Schryver, 12 Daly, 174, holding that keeper of lodging place who does not supply meals has no lien upon property of persons to whom he lets rooms; Crommelin v. New York C. R. Co. 4 Keyes, 90, holding that common carrier has no lien upon goods for damages arising from neglect of consignee to take them away within reasonable time after notice to him of their arrival; M'Intyre v. Carver, 2 Watts & S. 392, 37 Am. Dec. 519, holding a carpenter employed in making doors for a house had a lien thereon for his services; Terril v. Rogers, 3 Hayw. (Tenn.) 203, on employee as having lien for services rendered.

Liability of agister.

Cited in Pearce v. Sheppard, 24 Ont. Rep. 167, on degree of care required of an agister with regard to animals in his care.

Liability of innkeeper.

Cited in Ingalsbee v. Wood, 36 Barb. 452, holding an innkeeper was under no liability but that of a bailee as to a horse of a traveller.

2 E. R. C. 548, JACKSON v. CUMMINS, 3 Jur. 436, 8 L. J. Exch. N. S. 265, 5 Mees. & W. 342.

Right of agister to lien for services.

Cited in Goodrich v. Willard, 7 Gray, 183, holding an agister of cattle has no lien upon them for their keeping; Grinnell v. Cook, 3 Hill, 485, 38 Am. Dec. 663; Wright v. Sherman, 3 S. D. 290, 17 L.R.A. 792, 52 N. W. 1093; Sullivan v. Clifton, 55 N. J. L. 324, 20 L.R.A. 719, 39 Am. St. Rep. 652, 26 Atl. 964,—on an agister as having no lien for his services.

Cited in notes in 2 E. R. C. 550, on agister's right to detain animals until payment for keep; 9 E. R. C. 673, on what may be distrained for rent; 16 Eng. Rul. Cas. 130, on right to claim lien so as to interrupt performance of actual contract between the parties.

Right to have a lien for services rendered in the care of animals.

Cited in Hickman v. Thomas, 16 Ala. 666, holding an innkeeper who furnished a mail contractor with a stable and feed for his horses and cared for them for a number of years had no lien for his services; Miller v. Marston, 35 Me. 153, 56 Am. Dec. 694, holding a livery stable keeper had no lien for the boarding and doctoring of horses; Fishell v. Morris, 57 Conn. 547, 6 L.R.A. 82, 18 Atl. 717, on no lien existing at common law for services rendered in the care of animals; Mauney v. Ingram, 78 N. C. 96, holding that bailee of horse has no lien upon animal for expenses incurred in feeding and taking care of it; Dye v. Com. 7 Gratt. 662 (dissenting opinion), on right to have a lien for the feeding and care of animals.

Right of mechanic to lien for services.

Cited in White v. Smith, 44 N. J. L. 105, 43 Am. Rep. 347, holding a wheelwright had a lien for his services in repairing a wagon; Drummond Carriage Co. v. Mills, 54 Neb. 417, 40 L.R.A. 761, 69 Am. St. Rep. 719, 74 N. W. 966, holding a mechanic repairing a buggy has a lien for his services; M'Intyre v. Carver, 2 Watts & S. 392, 37 Am. Dec. 519, holding that person who makes doors for house from material furnished by owner has lien on doors for work.

Right to a lien for services rendered.

Cited in Ward v. Wordsworth, 1 E. D. Smith, 598; Robinson v. Kaplan, 21 Misc. 686, 47 N. Y. Supp. 1083,—on lien existing at common law where the services performed enhanced the value of the property; Ward v. Syme, 9 How. Pr. 16, holding an attorney has a lien upon the judgment obtained for his costs; Trust v. Pirsson, 1 Hill. 292, holding plaintiff had no lien for the storage of defendant's piano; DeVinne v. Rianhard, 9 Daly, 406, holding plaintiff had no lien for printing upon the type which belonged to defendants and which was not distributed but remained set up to be used for new editions of the publication; Podmore v. Seamen's Bank for Sav. 35 Misc. 379, 71 N. Y. Supp. 1026, holding that accountants who have done nothing to books of account beyond examining them have no lien thereon for their services; Crommelin v. New York & H. R. Co. 1 Abb. App. Dec. 472, holding a railroad company had no lien for a claim for demurrage where goods were left in their cars on side tracks for an unreasonable time; Hartshorne v. Seeds, 1 Chester Co. Rep. 460, holding that keepers of livery stables have no lien for care and storage of wagons and harness; Gurney v. Mackay, 37 U. C. Q. B. 324, holding plaintiff had no lien for expenses incurred in raising the hull and engine of a wrecked vessel.

Disapproved in Steinman v. Wilkins, 7 Watts & S. 466, 42 Am. Dec. 519, holding a warehouseman has a lien for his services.

Possession as essential to a lien for services.

Cited in Smith v. O'Brien, 46 Misc. 325, 94 N. Y. Supp. 673, holding it is essential that one claiming a lien for repairs made on personalty, have the possession of the property; Reilly v. McIllmurray, 29 Ont. Rep. 167, holding a trainer could not claim any lien on a horse for his services where he had delivered up possession; Hanchett v. Chicago First Nat. Bank, 25 Ill. App. 274, on the lien of a public warehouseman for storage as being personal in nature.

2 E. R. C. 551, SMITH v. COOK, 45 L. J. Q. B. N. S. 122, L. R. 1 Q. B. Div. 79, 24 Week. Rep. 206, 33 L. T. N. S. 722.

Liability of agister for the safety of property entrusted to his care.

Cited in Adams v. Cost, 62 Md. 264, 50 Am. Rep. 211, on the liability of a livery

stable keeper for a horse entrusted to his care and keeping; Pearce v. Sheppard, 24 Ont. Rep. 167, holding an agister was liable for the death of plaintiff's mare by falling through the covering of a well in a yard adjoining the pasture and which the animals had access to; McAlpine v. Grand Trunk R. Co. 38 U. C. Q. B. 446, on the liability of an agister for the safety of an animal pastured on his property.

Cited in note in 3 Eng. Rul. Cas. 114, 117, on liability for injury inflicted by mischievous animal.

Cited in 1 Thompson Neg. 776, on liability of keeper of animals for injury by them.

2 E. R. C. 559, ALDRED'S CASE, 9 Coke, 57b.

Acquirement of title to light and air.

Cited in McCready v. Thomson, Dud. L. 131; Gerber v. Grabel, 16 Ill. 217,—holding an action for obstructing air and light to windows in a house will be sustained where there has been an uninterrupted and continuous enjoyment thereof for over twenty years; Guest v. Reynolds, 68 Ill. 478, 18 Am. Rep. 570, holding no action would lie for damages to defendant's light and air by the erection by defendant of a fence on his own land where the plaintiff failed to show he had acquired a proscriptive right in such light and air; Keiper v. Klein, 51 Ind. 316, holding a conveyance of land with a building thereon depending for light and air from windows overlooking adjoining land belonging to grantor, does not include any right of light or air in the absence of express grant; Mahan v. Brown, 13 Wend. 261, 28 Am. Dec. 461, holding that action on case does not lie against person for erecting fence on his own land whereby he obstructs lights of neighbor, if lights be not ancient lights or his neighbor has not acquired right by grant, occupation and acquiescence; Napier v. Bulwinkle, 5 Rich. L. 311, holding a grant of light and air to plaintiff's windows over defendant's lot cannot be presumed from the mere unobstructed enjoyment thereof for many years; Cunningham v. Dorsey, 3 W. Va. 293, holding that adverse enjoyment of lights for time which must have exceeded thirty years, does not give right to maintain action for obstructing them; Colls v. Home & Colonial Stores [1904] A. C. 179, 73 L. J. Ch. N. S. 484, 53 Week. Rep. 30, 90 Times L. R. 687, 20 Times L. R. 475; Warren v. Brown [1900] 2 Q. B. 722; Clawson v. Primrose, 4 Del. Ch. 643,—on the acquirement of title in light and air over land of another by user thereof: Aldin v. Latimer Clark, M. & Co. [1894] 2 Ch. 437, 63 L. J. Ch. N. S. 601, 8 Reports, 352, 71 L. T. N. S. 119, 42 Week. Rep. 553; Chastey v. Ackland [1895] 2 Ch. 389, 64 L. J. Q. B. N. S. 523, 12 Reports, 420, 72 L. T. N. S. 845, 43 Week. Rep. 627,—on right to acquire access to air over land of another by user.

Obstruction of view as grounds for relief.

Cited in F. S. Webster Co. v. Frank, 1 Ill. C. C. 530, holding that injunction will not lie to prevent interference with view or outlook, in absence of contract: Philadelphia v. Carmany, 18 W. N. C. 152; Garrett v. Janes, 65 Md. 260, 3 Atl. 597,—holding that there is no remedy apart from contract, for mere interference with prospect or view, it not being incident of estate; Harwood v. Tompkins, 24 N. J. L. 425, holding no action would lie for obstructing a view in the absence of an express covenant; Wormser v. Brown, 149 N. Y. 163, 43 N. E. 524, holding the interferenee with the view from plaintiff's windows was not grounds for enjoining defendants from maintaining bay windows projecting into street; Clark v. Providence, 16 R. I. 337, 1 L.R.A. 725, 15 Atl. 763; Bowden v. Lewis, 13 R. I. 189, 43 Am. Rep. 21,—on no action lying for obstructing a view; Brummell v. Wharin,

12 Grant Ch. (U. C.) 283, holding that a tenant of an adjoining room leased from a common proprietor might be enjoined from obstructing the view of a window of another tenant from the street where such privilege was exercised, before the execution of either lease and plaintiff's lease contained a provision entitling him to the privileges and appurtenances belonging to and used with the premises.

Acquirement of easement by prescription.

Cited in Dalton v. Angus, L. R. 6 App. Cas. 740, 10 Eng. Rul. Cas. 98, holding a right to lateral support from adjoining land may be acquired by twenty years' uninterrupted possession thereof.

Nuisance, what may constitute.

Cited in Burnham v. Hotchkiss, 14 Conn. 311, considering what may constitute a nuisance; Bates v. District of Columbia, 1 MacArth. 433, defining what a nuisance may consist in; State v. Mott, 61 Md. 297, 48 Am. Rep. 105, holding that burning of lime is not nuisance per se, irrespective of location; Adams v. Michael, 38 Md. 123, 17 Am. Rep. 516, on any act which materially pollutes the air, done without authority or justification as constituting a nuisance; Kelcham v. Cohn, 2 Misc. 427, 22 N. Y. Supp. 181, to the point that man cannot erect nuisance on his own land to annoyance of adjoining owner even for purpose of lawful trade; Shaw v. Kennedy, 4 N. C. (Term. Rep.) 158, on what will make hog sty a nuisance; State v. Purse, 4 M'Cord. L. 472, on the erection of a building emitting offensive and unwholesome odors as being a nuisance; Howell v. M'Coy, 3 Rawle, 256, on the point the erection of anything in the upper part of a stream which poisons, corrupts, or renders it offensive and unwholesome is actionable; Burditt v. Swenson, 17 Tex. 489, 67 Am. Dec. 665, holding on the facts of the case a livery stable constituted a nuisance; Tod-Heatley v. Benham, L. R. 40 Ch. Div. 80, 58 L. J. Ch. N. S. 83, 60 L. T. N. S. 241, 37 Week. Rep. 38, holding the establishment of an out-door hospital for the treatment of particular disease was such a nuisance as to operate as a breach of covenant in lease against using premises for any purpose amounting to a nuisance; Crowhurst v. Amersham Burial Board, L. R. 4 Exch. Div. 5, 48 L. J. Exch. N. S. 109, 27 Week. Rep. 95, 39 L. T. 355, holding the planting of yew trees so as to extend over onto adjoining property constituted such a nuisance as to render defendants liable where cattle on adjoining land were poisoned by eating the leaves thereof.

Cited in 2 Farnham Waters, 1690, on riparian owner's right to pollute water of stream.

Liability for damages resulting from maintenance of a nuisance.

Cited in Rudder v. Koopman, 116 Ala. 332, 37 L.R.A. 489, 22 So. 601, holding the storing of large quantities of gunpowder and dynamite in a wooden building within the corporate limits of a town constitutes such a nuisance as to render the owner liable for damages caused by the explosion thereof; Whitney v. Bartholomew, 21 Conn. 213, holding defendant would be liable as for a nuisance where the chimneys of his blacksmith shop were so erected as to throw such large quantities of cinders, ashes and smoke on plaintiff's premises as to render it untenable; Hay v. Cohoes Co. 2 N. Y. 159, 51 Am. Dec. 279; Scott v. Bay, 3 Md. 431,—holding same where blasting operations cast large quantities of rock and stones on plaintiff's premises, breaking the windows and doors; Henry Hall Sons' Co. v. Sundstrom & S. Co. 138 App. Div. 548, 123 N. Y. Supp. 390, holding that one blasting rock on his own land is not liable for injury to adjoining premises resulting from vibration but is liable for injury from stones or dirt thrown upon such premises; Pixley v. Clark, 32 Barb. 268, holding that banks

of stream may be used for purpose of erecting dam and owner of dam is not liable, in absence of unskillfulness or negligence for injury to adjacent owners from percolation; Carhart v. Auburn Gaslight Co. 22 Barb. 297, holding that gas works are, whenever they create special injury, private nuisance for which action will lie in favor of person injured; Fish v. Dodge, 4 Denio, 311, 47 Am. Dec. 254, holding the occupant of land adjoining an establishment furnishing steam boilers, may maintain an action for damages where annoyed by the noise and dust therefrom: Relyea v. Beaver, 34 Barb. 547; Smith v. Humbert, 4 N. B. 602; Heeg v. Licht, 80 N. Y. 579, 8 Abb. N. C. 355, 36 Am. Rep. 654,—on right to maintain action for damages resulting from the maintenance of a nuisance; Holsman v. Boiling Spring Bleaching Co. 14 N. J. Eq. 335, holding that if adjoining owner corrupts water of stream which flows through plaintiff's land action on case lies for injury.

Cited in note in 1 E. R. C. 267, on liability for injury by water, etc., escaping from place where it is stored.

Cited in 2 Cooley Torts, 3d ed. 1215, on liability for fouling water of stream: 1 Cooley Torts, 3d ed. 142, on liability for damage from lawful exercise of rights; 2 Cooley Torts, 3d ed. 1413, on liability for negligence in performance of duty.

Right to enjoin the maintenance of a nuisance.

Cited in Camfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864, on no right as existing to maintain a nuisance on one's own land; United States v. Luce, 141 Fed. 385, holding the odors emanating from a fish fertilizer factory created such a nuisance as gave rise to a cause of action for its enjoinment; Central Iron & Coal Co. v. Vandenheuk, 147 Ala. 546, 6 L.R.A. (N.S.) 570, 119 Am. St. Rep. 102, 41 So. 145, 11 Ann. Cas. 346, holding the continuous throwing of rocks upon complainant's land by blasting on adjoining premises may be enjoined; Baltimore v. Warren Mfg. Co. 59 Md. 96, holding a bill would lie restraining the pollution of a stream used to supply water for a city if such a pollution was an unreasonable use of the stream by defendants; Hayden v. Tucker, 37 Mo. 214, holding the keeping and standing of jacks within the immediate view of a private dwelling is such a nuisance that it may be enjoined; Farrand v. Marshall, 21 Barb. 419, holding the excavation of land may be enjoined where done in such a way as to threaten a cave-in of the land of adjoining owner; Hutchins v. Smith, 63 Barb. 251, holding that adjacent owners may enjoin operation of lime kilns where operation of such kilns pollutes air and disturbs comfortable occupation of dwelling.

Estoppel by conduct.

Cited in Beaver v. Reed, 9 U. C. Q. B. 152, on estoppel by conduct of upper riparian owner in orally licensing erection of dam by lower riparian owner and permitting erection of a mill at a great expense, to maintain action for damages against vendee of licensee for damage due to overflowing of his land.

"Land" defined.

Cited in Ex parte Leland, 1 Mott. & M'c. 460, on what comprehendeth within the meaning of the term "land."

2 E. R. C. 562, BASS v GREGORY, 59 L. J. Q. B. N. S. 574, L. R. 25 Q. B. Div. 481, 55 J. P. 119.

Presumption of lost grant.

Cited in Boyce v. Missouri P. R. Co. 168 Mo. 583, 58 L.R.A. 442, 68 S. W. 920, holding the adverse user of an easement for a period having actions for the re-

covery of land is a conclusive presumption of a proscriptive right by a "lost grant;" Re Cockburn, 27 Ont. Rep. 450, on when a "lost grant" of an easement would be inferred; Crowe v. Cabot, 40 N. S. 177, holding that any inference of grant of right to light that can be drawn from twenty years' enjoyment of such easement may be disproved.

Right of access of air.

Cited in Chastey v. Ackland [1895] 2 Ch. 389, 64 L. J. Q. B. N. S. 523, 12 Reports, 420, 72 L. T. N. S. 845, 43 Week. Rep. 627 (separate opinion), on right to access of air; Aldin v. Clark [1894] 2 Ch. 437, 63 L. J. Ch. 601, 8 Reports 352, 71 L. T. N. S. 119, 42 Week. Rep. 453, on how a right of access of air is acquired; Wheaton v. Maple [1893] 3 Ch. 48, on how easement of light and air acquired.

Cited in note in 2 E. R. C. 566, on easement of air and light.

2 E. R. C. 575, CALVIN'S CASE, 7 Coke, 1.

Disabilities of aliens.

Cited in People v. Folsom, 5 Cal. 373, on the disability of aliens to take by inheritance.

Cited in note in 8 E. R. C. 166, on escheat to government of land of alien.

Change of sovereignty affecting aliens of country affected.

Cited in Terrett v. Taylor, 9 Cranch, 43, 3 L. ed. 650, holding that division of empire creates no forfeiture of previously vested rights of property; Den ex dem. Martin v. Brown, 7 N. J. L. 305, holding declaration of independence did not operate so completely to disunite United States from England as to subject British antinati to disabilities of alienage; their rights continued until acknowledgment of independence; Munro v. Merchant, 28 N. Y. 9, to the point that independence of former colonies of Great Britain would set apart former treaties, have divested title to lands which individuals in either of separated nations held within territory of others; Kelly v. Harrison, 2 Johns. Cas. 29, 1 Am. Dec. 154, holding that the division of the British empire after the Revolution did not affect the pre-existing right of dower of an alien widow; Read v. Read, 5 Call (Va.) 160, holding a British subject born before the Revolution could not inherit lands in this country before the treaty of seventeen hundred and ninety-four; Inglis v. Sailor's Snug Harbor, 3 Pet. 99, 7 L. ed. 617, holding a person born here either before or after the declaration of independence whose father remained loyal to Great Britain and who left when the British did, was never a citizen of this country.

Distinguished in Jackson v. Lunn, 3 Johns. Cas. 109, holding the title to land acquired prior to the Revolution may pass by descent to an alien heir.

Rights of aliens.

Cited in Stemple v. Herminghouser, 3 G. Greene, 408, holding that nonresident foreigner cannot inherit estate of his resident parent; Jackson ex dem. Smith v. Adams, 7 Wend. 367, holding that land held by alien under acts of 1802 and 1808, descend to heirs, although they be aliens; People v. McLeod, 25 Wend. 483, 37 Am. Dec. 328, 1 Hill, 377, on jurisdiction of persons engaged in war against nation where contest is between private persons on one side and nation on other; Marshall v. Lovelass, 1 N. C. pt. 2 p. 325 (Conference 217), holding that lands held by one, who ceased to be citizen by revolution, in trust for Unitas Fratrum, were not confiscated by confiscation act; Low v. Routledge, L. R. 1 Ch. 42, 35 L. J. Ch. N. S. 114, 11 Jur. N. S. 939, 13 L. T. N. S. 421, 14 Week. Rep. 920,

holding an alien friend temporarily residing in the realm may acquire a copyright on a work published during such time.

Cited in note in 9 E. R. C. 288, on right of alien to take property by descent.

Right of alien to maintain actions.

Cited in Heirn v. Bridault, 37 Miss. 209, holding that all alien enemies (except such as are specially permitted) are incapable of acquiring any right to property or maintaining action; Palmer v. DeWitt, 47 N. Y. 532, 7 Am. Rep. 480, holding that courts of state are open to alien friend pursuing his property and seeking to recover it from wrongdoer; Bradstreet v. Oneida County, 13 Wend. 546, holding an alien friend might maintain an action for the recovery of realty.

Jurisdiction over alien in criminal case.

Cited in R. v. Keyn, L. R. 2 Exch. Div. 236, 46 L. J. Mag. Cas. N. S. 17, 13 Cox, C. C. 403, holding the killing of a person by a foreign ship commanded by a foreign officer as a result of a marine collision within three miles from shore, was not within general criminal jurisdiction.

Definition of alien.

Cited in Ex parte Dawson, 3 Brad. 130, on who is an alien.

Citizenship by birth.

Cited in United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456, holding a child born in this country of parents of Chinese descent, who are subjects of China at the time, but having a permanent domicil in this country, is a citizen of the United States; New Hartford v. Canaan, 54 Conn. 39, 5 Atl. 360, holding a child born in the United States acquired a citizenship therein, although at time the father was an alien; Ludlam v. Ludlam, 31 Barb. 486, holding that son of American citizen by alien mother, born in foreign country while her father was temporarily resident there, was citizen of United States: Ludlam v. Ludlam, 26 N. Y. 356, 84 Am. Dec. 193, affirming 31 Barb. 486, holding a child of a citizen of the United States born abroad of a wife native of a foreign country is a citizen of the United States; United States v. Rhodes, 1 Abb. (U. S.) 28, Fed. Cas. No. 16, 151, holding free persons of color born within the allegiance of the United States are citizens thereof; De Geer v. Stone, L. R. 22 Ch. Div. 243, 52 L. J. Ch. N. S. 57, 47 L. T. N. S. 434, 31 Week. Rep. 241, holding a child of a British subject born abroad of a wife of a foreign nation took the status of a British subject; Isaason v. Durant, L. R. 17 Q. B. D. 54, 55 L. J. Q. B. N. S. 331, 54 L. T. N. S. 684, 34 Week. Rep. 547, holding persons born in Hanover before the accession of Victoria are, though residents of the United Kingdom, aliens; Re Johnson [1903] 1 Ch. 821, 72 L. J. Ch. N. S. 682, 88 L. T. N. S. 161, 51 Week. Rep. 444, 19 Times, L. R. 309, on how citizenship may be acquired.

Infidel as enemy.

Cited in Greenwood v. Curtis, 6 Mass. 358, 4 Am. Dec. 145, on the point that infidels are public enemies; Atwood v. Melton, 7 Conn. 66 (dissenting opinion), on infidels as perpetual enemies; Hale v. Everett, 53 N. H. 9, 16 Am. Rep. 82, to the point that all infidels are, in law, perpetual enemies.

Pleading.

Cited in Coxe v. Gulick, 10 N. J. L. 328, holding that plea of alienage ought to contain direct averment that person is alien, and that he was born out of allegiance of state, and within allegiance of foreign state.

Extension of sovereignty by conquest, cession, or division.

Cited in Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; Chew v.

Calvert, Walk. (Miss.) 54,—holding that ancient laws of conquered, or ceded countries, remain unchanged, until actually abrogated by new government; Kilpatrick v. Sisneros, 23 Tex. 113, holding that revolution effected no change in previously vested rights of property except in so far as new political society may see proper to declare and effect change by direct exercise of sovereign power; Jephson v. Reira, 3 St. Tr. N. S. 591, on the law of country conquered as being that of the conqueror.

Vested rights as not affected by subsequent acts.

Cited in Martindale v. Moore, 3 Blackf. 275, holding a statute providing that no mispleading should thereafter render any executor or administrator personally liable had no application to a judgment previously rendered.

Common law.

Cited in Henfield's Case, Fed. Cas. No. 6,360, on the growth and development of the common law.

Land governed by law of country or state in which situated.

Cited in Binney's Case, 2 Bland, Ch. 99, holding that estate in canal, being in its nature, fixed realty, though declared to be personalty, must be governed by law of state in which canal is.

2 E. R. C. 632, DOE EX DEM. THOMAS v. ACKLAM, 2 Barn. & C. 779, 4 Dowl. & R. 394, 2 L. J. K. B. 129, 26 Revised Rep. 544.

Alienage or citizenship affected by change of sovereignty.

Cited in Inglis v. Sailor's Snug Harbor, 3 Pet. 99, 7 L. ed. 617, holding a person born in this country before the Declaration of Independence, and leaving with his parents on the evacuation of the British troops and never returning, was a British subject; State ex rel. Phelps v. Jackson, 79 Vt. 504, 8 L.R.A.(N.S.) 1245, 65 Atl. 657, holding that one who continued to reside in this country, after Declaration of Independence, giving his allegiance to new government, will be deemed to have become American citizen; Doe ex dem. Hay v. Hunt, 11 N. C. Q. B. 367, holding the son of a natural born British subject who lived abroad and so continued to reside until his death, was not an alien, although born in a foreign country; Williams v. Myers, 8 N. S. 157, on fact of birth in a foreign country as not necessarily rendering a person an alien; Isaacson v. Durant, L. R. 17 Q. B. Div. 54, 55 L. J. Q. B. N. S. 331, 54 L. T. N. S. 684, 34 Week. Rep. 547, holding a person born in Hanover before the accession of Victoria and not naturalized, are, though residents of the United Kingdom, aliens; Trimble v. Harrison, 1 B. Mon. 140, holding a person born a subject of Great Britain but a resident of this country at the time of the Revolution and after, would be protected in his right to hold lands; Calais v. Marshfield, 30 Me. 511, holding the residence of a person in the United States at the time of the Revolution and after conferred citizenship on him and minor children living in the family; Young v. Peck, 21 Wend. 389, holding a son although born abroad was a citizen where the father was a resident here at the time of the Revolution and thereafter until his death; Salter v. Hughes, 5 N. S. 409, holding children of a British subject born in the United States before the end of the Revolution and remaining there, afterwards became citizens of the United States; Montgomery v. Graham, 31 U. C. Q. B. 57, on a person remaining in country after its separation from the mother country as electing to become a citizen of such new government.

Citizenship by birth or relationship.

Cited in Ludlam v. Ludlam, 31 Barb. 486, holding the son of an American

citizen by an alien mother, born abroad during a temporary sojourn of the father abroad, was a citizen of the United States; Lynch v. Clarke, 1 Sandf. Ch. 583, holding that by common, children born abroad of English parents were subjects of Crown.

Disabilities of aliens.

Cited in Montgomery v. Dorion, 7 N. H. 475, on an alien as not able to take real estate by descent.

Cited in note in 32 L.R.A. 183, on effect of treaties upon alien's right to inherit.

Weight to be given argument of inconvenience.

Cited in Weeks v. New York, N. H. & H. R. Co. 72 N. Y. 50, 28 Am. Rep. 104, on arguments in doubtful cases drawn from inconvenience as being of great weight.

2 E. R. C. 649, BRANDON v. NESBITT, 6 T. R. 23, 3 Revised Rep. 109.

Right of alien to maintain action in the courts.

Cited in Johnson v. Thirteen Bales, 2 Paine, 639, Fed. Cas. No. 7,415, holding an alien enemy could not be heard in the trial court although the claims were brought by an agent; Clarke v. Morey, 10 Johns. 69, holding an alien a resident of this country at the time of the breaking out of war may maintain an action on a promissory note; Hutchison v. Brock, 11 Mass. 119; Ex parte Quarrier, 2 W. Va. 569; Fairfax v. Hunter, 7 Cranch, 603, 3 L. ed. 453,—on alien enemies as having no rights to sue in the courts.

Distinguished in The Dart, Stewart, Vice-Adm. Rep. 301, holding wherever alien enemy is under protection of king he may sue in his courts.

Validity of contracts with subjects of belligerents.

Cited in Coppell v. Hall, 7 Wall. 542, 19 L. ed. 244, holding a contract between the consul of a neutral power with a citizen of a belligerent state that he will protect with his neutral name, from capture, merchandise which such citizen has within the enemies' lines, is void as against public policy; Griswold v. Waddington, 16 Johns. 438, holding no action could be maintained on a contract with an alien where such contract was entered into at a time where the nations were at war; United States v. The Ohio, 29 Phila. Leg. Int. 252, Fed. Cas. No. 15,915, 9 Phila. 448, in reviewing statutes prohibiting commercial intercourse with enemies; Furtado v. Rogers, 14 E. R. C. 125, 3 Bos. & P. 191, 6 Revised Rep. 752, holding that insurance effected in England on French ship previous to commencement of hostilities between said countries does not cover loss by British capture.

Cited in Benjamin Sales, 5th ed. 508, on invalidity of sale to an alien enemy; Parsons Partn. 4th ed. 26, on partnership with an alien enemy.

Pleading defense of alien enemy.

Cited in Russell v. Shipwith, 6 Binn. 241, holding a plea of alien enemy must set forth that the plaintiff is himself an enemy or adhering to the enemy.

Validity of contract of insurance against capture.

Distinguished in Merchants Ins. Co. v. Edward & Co. 17 Gratt. 138, holding an insurance company insuring a cargo belonging to a citizen is liable on such policy although the cargo is captured by a United States vessel.

2 E. R. C. 654, POTTS v. BELL, 8 T. R. 548, 5 Revised Rep. 452.

Commercial intercourse with a public enemy as being unlawful.

Cited in The Joseph, 8 Cranch, 451, 3 L. ed. 621, holding that trade with enemy

is not excused by necessity of obtaining funds to pay expenses of ship; Coppell v. Hall, 7 Wall. 542, 19 L. ed. 244, holding a contract made by a consul of a neutral power with the citizen of a belligerent state to protect his property within the enemies' lines was void; The Alexander, 1 Gall. 532, Fed. Cas. No. 164, holding an American vessel going into an English port and taking a cargo after knowledge of the war is liable to confiscation for trading with the enemy; The Tulip, 3 Wash. C. C. 181, Fed. Cas. No. 14,234, holding same where the vessel carried dispatches for the enemy; Tait v. New York L. Ins. Co. 1 Flipp. 288, Fed. Cas. No. 13,726, holding a policy of insurance to indemnify a public enemy in time of war is unlawful; The St. Lawrence, 1 Gall. 467, Fed. Cas. No. 12,232, holding property may be confiscated for illegal trading where a person with knowledge of the war attempts to bring it away from the enemies' country without the license of his government; Chauncey v. Yeaton, 1 N. H. 151, holding the voyage of a ship carrying a cargo to the port of an enemy was illegal, the cargo being sold to persons in open hostility to the United States; Beach v. Kezar, 1 N. H. 184, holding one could not maintain an action for the keep of cattle where they were being procured for the enemy's troops and plaintiff knowingly gave his aid; Hanger v. Abbott, 6 Wall. 532, 18 L. ed. 939; Burbank v. Conrad, 96 U. S. 291, 24 L. ed. 731 (dissenting opinion); Philips v. Hatch, 1 Dill, 571, Fed. Cas. No. 11,094; Cohen v. New York Mut. L. Ins. Co. 50 N. Y. 610, 10 Am. Rep. 522; Amory v. M'Gregor, 15 Johns. 24; Bulkley v. Derby Fishing Co. 1 Conn. 571,—on commercial intercourse with a public enemy as being unlawful; Shacklett v. Polk, 51 Miss. 378, on commerce between citizens of the rebel states and those of the other states as being unlawful; Stanton v. Allen, 5 Denio, 434, 49 Am. Dec. 282, on grounds for holding contracts with alien enemies void; The Parkhill, Fed. Cas. No. 10,755a; United States v. The Ohio, 29 Phila. Leg. Sup. 252, Fed. Cas. No. 15,915, 9 Phila. 448,—on the invalidity of commercial intercourse with a public enemy; The Rapid, 1 Gall. 295, Fed. Cas. No. 11,576, holding all trade with the enemy interdicted during war save by sovereign permission; Furtado v. Rogers, 14 E. R. C. 125, 3 Bos. & P. 191, 6 Revised Rep. 752, holding that insurance effected in England on French ship previous to commencement of hostilities, does not cover loss by British capture; Esposito v. Bowden, 24 E. R. C. 399, 7 El. & Bl. 763, 3 Jur. N. S. 1209, 27 L. J. Q. B. N. S. 17, 5 Week. Rep. 732, holding that contract of affreightment is dissolved by declaration of war, so far as relates to any other performance by subject of one of belligerents.

Cited in notes in 13 E. R. C. 557, 558, 562, on invalidity of insurance on ship or goods for illegal voyage; 13 E. R. C. 567, on validity of insurance on goods engaged in trade with alien enemy; 14 E. R. C. 136, on loss by capture under hostilities subsequently arising as risk not insured against; 14 E. R. C. 539, on right to return of premium where insurance is illegal.

Cited in Parsons Partn. 4th ed. 26, on partnership with an alien enemy; Hollingsworth Contr. 242, on contracts against public policy which prejudice the state in its relation to foreign powers; Benjamin Sales, 5th ed. 508, on invalidity of sale to an alien enemy.

Distinguished in Kershaw v. Kelsey, 100 Mass. 560, 1 Am. Rep. 142, 97 Am. Dec. 124, holding a lease of a plantation in a state within rebel territory during the Civil War by a citizen of that state to a citizen of this state was not invalid.

Right to sue on contract with a public enemy.

Cited in Griswold v. Waddington, 16 Johns. 438, holding no action could be maintained on an alleged contract entered into with a public enemy.

Who may be treated as public enemies.

Cited in The William Bagaley, 5 Wall. 377, 18 L. ed. 583, on neutral friends or citizens remaining in enemies' country after declaration of war as having impressed upon them the character of enemies.

2 E. R. C. 669, MASTER v. MILLER, 2 H. Bl. 140, 5 T. R. 367, 1 Anstr. 225, 2 Revised Rep. 399, affirming the decision of the Court of King's Bench, reported in 4 T. R. 320.

Alteration of negotiable instruments.

Cited in Haines v. Dennett, 11 N. H. 180; Bank of Ohio Valley v. Lockwood, 13 W. V. 392, 31 Am. Rep. 768,—holding any material alteration after execution and delivery to payee avoids the instrument except as to parties consenting thereto; Suffel v. Bank of England, L. R. 9 Q. B. Div. 555, 51 L. J. Q. B. N. S. 401, 47 L. T. N. S. 146, 30 Week. Rep. 932, 3 Eng. Rul. Cas. 640 (reversing 7 Q. B. Div. 270), holding erasure of numbers upon notes of Bank of England alteration which avoided the same; Com. v. Emigrant Industrial Sav. Bank, 98 Mass. 12, 93 Am. Dec. 126, holding immaterial alteration in negotiable bond did not avoid it; Montgomery R. Co. v. Hurst, 9 Ala. 513, holding the addition of two names as makers of a note, placed there without the consent of the maker, will not avoid it unless put there for a fraudulent purpose; Aldous v. Cornwell, L. R. 3 Q. B. 573, 37 L. J. Q. B. N. S. 201, 9 Best. & S. 607, 16 Week. Rep. 1045, as to rule in relation to alteration of deeds applying to promissory notes.

— Alterations by strangers.

Cited in Inglish v. Breneman, 5 Ark. 377, 41 Am. Dec. 96, holding it immaterial who makes alteration.

Cited in Joyce Defenses Com. Pap. 168, on alteration of commercial paper by a third party as a defense.

— Materiality of alteration.

Cited in Collins v. Collins, 51 Miss. 311, 24 Am. Rep. 632, holding that interlineations made in record of deed of trust after it was delivered and placed on record, did invalidate original deed; Jones v. State, 5 Sneed, 342, holding that where note executed by two or more obligors is altered by one of them by procurement of payee and without consent of other obligors, latter are released; Harper v. Stroud, 41 Tex. 367, holding that fraudulent addition of name to note by holder after death of one of makers, and after administrator has allowed claim, may be urged by administrator against approval of such note as claim against estate; Glover v. Robbins, 49 Ala. 219, 20 Am. Rep. 272, holding that unauthorized insertion in a note of the words "with interest at four per cent" is material alteration, discharging surety; Holland v. Hatch, 11 Ind. 497, 71 Am. Dec. 363, holding that insertion of clause in bill of exchange waiving appraisement laws rendered bill void; Lisle v. Rogers, 18 B. Mon. 528, holding that to change time of payment of note from 4th to 10th of same month, renders note void as to surety; Farmer v. Rand, 14 Me. 225, holding if a note be altered by a waiver of notice and protest without consent of the party to be affected by it; Chadwick v. Eastman, 53 Me. 12, holding insertion of words reducing maker to agent for another was material; Wheelock v. Freeman, 13 Pick. 165, 23 Am. Dec. 674, holding that detaching a memorandum from a note altered and avoided it; People v. Brown, 2 Dougl. (Mich.) 9, holding bond invalidated by approving officers reducing penalty after signature.

Cited in note in 4 E. R. C. 207, on materiality of alteration of note.

Cited in Hollingsworth Contr. 577, on discharge of contract by alteration or loss of written instrument.

— Alterations in date.

Cited in Low v. Merrill, 1 Pinney (Wis.) 340, Burnett (Wis.) 185, holding alteration in date of promissory note without maker's consent vitiates it; Wood v. Steele, 6 Wall. 80, 18 L. ed. 725, holding that alteration of date of commercial paper, although it delay time of payment, extinguishes liability of maker; Stephens v. Graham, 7 Serg. & R. 505, 10 Am. Dec. 485, holding alteration of date material; Bodine v. Berg, 82 N. J. L. 662, 40 L.R.A.(N.S.) 65, 82 Atl. 901, Ann. Cas. 1913D, 721, holding that at common law the alteration of the date of a promissory note is a material alteration, and when made by one not a stranger to the obligation, will avoid it as to all parties not consenting thereto; Meredith v. Culver, 5 U. C. Q. B. 218, holding it fatal to materially alter note to later maturity; Hirschman v. Budd, L. R. 8 Exch. 171, 42 L. J. Exch. N. S. 113, 28 L. T. N. S. 602, 21 Week. Rep. 582, holding an alteration in the date of a bill of exchange payable at a specified period after date is a material alteration, and where the bill is declared upon with its altered date the defense is available to the acceptor under a traverse of acceptance.

Cited in Joyce Defenses Com. Pap. 177, on effect of alteration of date of commercial paper.

— Legal effect of alteration.

Cited in People v. Graham, 6 Park. Crim. Rep. 135, 1 Sheldon, 151, as to its constituting forgery; Queen v. Molloy, Newfoundl. Rep. (1864–74) 127 (dissenting opinion); Vanauken v. Hornbeck, 14 N. J. L. 178, 25 Am. Dec. 509; Gerrish v. Glines, 56 N. H. 9,—as to effect of alteration to avoid the note or bond; People v. Fitch, 1 Wend. 198, 19 Am. Dec. 477, as to it constituting forgery; Smith v. Mace, 44 N. H. 553; Meyer v. Huneke, 55 N. Y. 412; Martendale v. Follet, 1 N. H. 95,—holding when a note is made void by an alteration, the promisee is not at liberty to prove the contract by other evidence; Wood v. Steele, 6 Wall. 80, 18 L. ed. 725; Hall v. McHenry, 19 Iowa, 521, 87 Am. Dec. 451; Brown v. Straw, 6 Neb. 536, 29 Am. Rep. 369; Hunt v. Gray, 35 N. J. L. 227, 10 Am. Rep. 232; Crawford v. West Side Bank, 17 Jones & S. 68; Chappell v. Spencer, 23 Barb. 584; Wallace v. Jewell, 21 Ohio St. 163. 8 Am. Rep. 48; Bigelow v. Stilphen, 35 Vt. 521; Hebert v. La Banque Nationale, 40 Can. S. C. 458; Brown v. Jones, 3 Port. (Ala.) 420,—holding material alteration avoids instrument; Merchants' Nat. Bank v. Baltimore, C. & R. S. B. Co. 102 Md. 573, 63 Atl. 108, on avoidance by alteration of bill or note; Ruby v. Talbott, 5 N. M. 251, 3 L.R.A. 724, 21 Pac. 72 (dissenting opinion), on same rule as applied to all obligatory writings; Johnson v. Bank of United States, 2 B. Mon. 310, as to effect of alteration; Plyler v. Elliott, 19 S. C. 257 (dissenting opinion); Douglass v. Scott, 8 Leigh, 43; Bank of Ohio Valley v. Lockwood, 13 W. Va. 392, 31 Am. Rep. 768; Stack v. Dowd, 15 Ont. L. Rep. 331; Bank of United States v. Sill, 5 Conn. 106) 13 Am. Dec. 44,—as to the effect of alteration.

Cited in Benjamin Sales, 5th ed. 298, on effect of material alteration of sold note.

The decision of the Court of King's Bench was distinguished in Bowers v. Jewell, 2 N. H. 543, holding it for jury whether alteration was in fraud or to correct mistake.

— As against bona fide takers or debtors.

Cited in Wade v. Withington, 1 Allen, 561, holding the fraudulent alteration of a promissory note, by the insertion of words which make it appear to be for a greater sum than that for which it was originally given, avoids the note in the hands of a bona fide indorsee for a valuable consideration although the alteration cannot be detected on a careful scrutiny; Maxon v. Irwin, 15 Ont. L. Rep. 81, holding under statute where a bill has been materially altered but the alteration is not apparent and the bill is in the hands of a bona fide holder, such holder may avail himself of the bill, as if it had not been altered, and may enforce payment according to its original tenor; Key v. Knott, 9 Gill & J. 342, holding the holder of negotiable paper whose name is forged in the indorsation of it, does not lose his right to the money secured by it and no title can be made through the medium of such forgery; Bogart v. Nevens, 6 Serg. & R. 361, as to effect on indorsers; Waterman v. Vose, 43 Me. 504, holding the alteration of a note of hand by the maker after it is indorsed, by adding the words "with interest" is material, and if made without the consent of the indorser he is not liable as such, although the alteration be made before delivery; Smith v. South Royalton Bank, 32 Vt. 341, 76 Am. Dec. 179, on avoidance against innocent purchaser.

Cited in note in 35 L.R.A. 465, on alteration of note as affecting bona fide holders.

— Recovery on original debt.

Cited in Matteson v. Ellsworth, 33 Wis. 488, 14 Am. Rep. 766; Merrick v. Boury, 4 Ohio St. 60,—holding alteration of note without fraudulent intent did not preclude recovery upon original indebtedness; Matteson v. Ellsworth, 33 Wis. 488, 14 Am. Rep. 766, holding that authorized alteration of note for money loaned, after delivery, rendering it invalid, will not prevent recovery of money loaned.

Burden of proof as to altered papers.

Cited in Warren v. Layton, 3 Harr. (Del.) 404, holding a party cannot recover on an altered note without explaining the alteration; White v. Hass, 32 Ala. 430, 70 Am. Dec. 548, holding the alteration of a note after its delivery to the payee, by the erasure of the place at which it was made payable, is presumed to have been made by the payer, and unless assent of maker is proved, renders the note void.

— Parol rebuttal.

Distinguished in Howell v. Maas, 13 Daly, 221, where there was a sold note for "about 250 cases" and evidence that there were 240 cases in fact.

Disapproved in Spackman v. Byers, 6 Serg. & R. 316 (dissenting opinion), on parol to rebut material alteration.

Material alteration of contracts.

Cited in Holden v. Rutland R. Co. 73 Vt. 317, 50 Atl. 1096, holding unauthorized insertion of name of person by purchaser of mileage book for purpose of enabling such person to ride on the coupons of the book, a material and fraudulent alteration of contract and discharges it; Pearson v. O'Brien, 4 D. L. R. 413, holding that change of place of payment of purchase money in land contract by vendee is material alteration avoiding contract; Stadicona Ins. Co. v. Hodgson, 2 Has. & War. (Pr. Edw. Isl.) 480; Getty v. Shearer, 20 Pa. 12,—holding material alteration by party renders contract void; Trow v. Glen Cove Starch Co. 1 Daly, 280, holding a material alteration of a written contract by one of the parties to it, without the knowledge or consent of the other, not only discharges the latter

from all liability upon it, but if fraudulently made will release him from all liability upon the consideration for which it was made.

Cited in Joyce Defenses Com. Pap. 163, on availability of alteration of commercial paper as a defense; 2 Morse Banks, 4th ed. 867, on right of bank paying certified check which has been altered after certification.

— Of deeds and bonds; mortgages.

Cited in Newell v. Mayberry, 3 Leigh, 250, 23 Am. Dec. 261, holding there is no distinction between deeds and other instruments; Sharpe v. Orme, 61 Ala. 263, holding that innocent alteration made by grantor, after delivery of deed, to cure his own inadvertance, and make instrument accord with purpose will not devest title vested by deed; Kirtland v. Hoey, 2 Luzerne Leg. Reg. 47, holding that stranger cannot object to deed which parties have vitiated and affirmed, although material alterations therein were made; Bank of Upper Canada v. Widmer, 2 U. C. Q. B. (O. S.) 275, as to effect of tearing seal from bond or deed; United States v. Spalding, 2 Mason, 478, Fed. Cas. No. 16,365, holding if an obligee tear off the seal, or cancel a bond in consequence of fraud and imposition practised by the obligor, he may declare upon such mutilated bond as the deed of the party, and set forth the special facts in the profert; Arrison v. Harmstead, 2 Pa. St. 191; Wallace v. Harmstad, 15 Pa. 462, 53 Am. Dec. 603,—holding a deed fraudulently altered by grantor after execution and delivery is thereby rendered utterly void as it respects the covenants in favor of the grantor; Woolley v. Constant, 4 Johns. 54, 4 Am. Dec. 246, holding deed may be altered in material part with consent of the parties without affecting its validity; Smith v. Williams, 5 N. C. (1 Murph.) 426, 4 Am. Dec. 564; Smith v. McGowan, 3 Barb. 404, 1 N. Y. Code Rep. 27, as to effect of alteration on deed; Adams v. Frye, 3 Met. 103, holding if after execution and delivery of an unattested bond, the obligee, without the knowledge and assent of the obligor, fraudulently procures a person who was not present at the execution of the bond, to sign his name thereto as an attesting witness the bond is thereby avoided and the obligor discharged; Richmond Mfg. Co. v. Davis, 7 Blackf. 412, holding alteration made in bond or deed with consent of parties does not avoid it; Bowser v. Cole, 74 Tex. 222, 11 S. W. 1131, holding that alteration of mortgage after execution by insertion therein of additional property to secure debt, without consent of mortgagor, destroys validity of instrument.

Cited in note in 32 L.R.A.(N.S.) 287, on alteration of deed after delivery.

— Warrants, commitments.

Cited in Rex v. Graves, 21 Ont. L. Rep. 329, holding that commitment was not bad because word "liquor" was interlined in recital of conviction of defendant for having "unlawfully sold liquor without license," etc.

— Wills.

Cited in Smith v. Fenner, 1 Gall. 170, Fed. Cas. No. 13,046, holding an alteration of a pecuniary legacy in the will, by the legatee or a stranger does not avoid the will as to other bequests; Haynes v. Haynes, 33 Ohio St. 598, 31 Am. Rep. 579, holding that if it appears that change in will was made before execution, then paper writing as it appears after such alteration is will.

— Made by a stranger.

Cited in Cutts v. United States, 1 Gall. 69, Fed. Cas. No. 3,522, as to effect of; Rees v. Overbaugh, 6 Cow. 746, holding a stranger tearing off the seal will not vitiate a deed; Lee v. Alexander, 9 B. Mon. 25, 48 Am. Dec. 412, holding that alteration of deed by stranger does not render it invalid.

Distinguished in Terry v. Hazlewood, 1 Duv. 104; Nichols v. Johnson, 10 Conn.

192, holding an alteration of a written instrument by a stranger, though material, will not render such instrument inoperative.

— Persons affected by alteration.

Cited in United States Glass Co. v. West Virginia Flint Bottle Co. 81 Fed. 993, holding alteration of contract discharged sureties; Smith v. United States, 2 Wall. 219, 17 L. ed. 788; United States Glass Co. v. West Virginia Flint Bottle Co. 81 Fed. 993, holding alteration of contract discharged sureties.

— Presumption as to when and how made.

Cited in Chesley v. Frost, 1 N. H. 145, holding a material alteration of a deed of land while in possession of the grantee is prima facie fraudulent, and is presumed to have been made by grantee himself; Printup v. Mitchell, 17 Ga. 558, 63 Am. Dec. 258, holding the court, upon the usual proof of the execution of the instrument will admit it in evidence, without reference to the character of any alteration upon it, about which the court will presume nothing; Bailey v. Taylor, 11 Conn. 531, 21 Am. Dec. 321, holding where there is an alteration in an instrument under which a party denies his title, apparently against the interest of that party the law does not so far presume that it was improperly made as to throw upon him the burden of accounting for it.

— Rebuttal of presumption of execution of instrument on date stated.

Cited in 1 Underhill Land. & T. 343, on rebuttal of presumption of executing and writing lease on date stated by showing erroneous.

Mutilation of instruments.

Cited in McCulloch v. Smith, 24 Ind. App. 536, 79 Am. St. Rep. 281, 57 N. E. 143, holding a statement of a claim against a decedent's estate based upon a promissory note which was so mutilated and torn that signature of decedent did not appear thereon, must show that claimant was innocent of the mutilation; Elbert v. McClelland, 8 Bush, 577, holding that where question is mutilation or no mutilation, fact of mutilation would be circumstance to be considered by jury as to whether mutilation had been made or not.

Partial invalidity of contract.

Cited in Compton v. Compton, 5 La. Ann. 615, on validity of principal contract despite reservation of usury.

Variance shown by profert.

Cited in Austin v. Whitlock, 1 Munf. 487, 4 Am. Dec. 550, holding profert of deed without a seal will not support allegation of deed with a seal; Corlies v. Vannote, 16 N. J. L. 324, holding where there is a profert of a deed the deed or profert must agree with that stated in the declaration, or the party offering it fails.

Authority to fill up blanks in instrument.

Cited in Wiley v. Moore, 17 Serg. & R. 438, 17 Am. Dec. 696, holding where the obligors wrote their names and affixed their seals to a piece of paper and left it with the judge of the court with instruction to fill it up as a bond conditional to take the benefit of the insolvent act, the bond was valid; White v. Vermont & M. R. Co. 21 How. 575, 16 L. ed. 221; Cribben v. Deal, 21 Or. 211, 28 Am. St. Rep. 746, 27 Pac. 1046, holding parol authority to fill blank in deed, valid; Duncan v. Hodges, 4 M'Cord, L. 239, 17 Am. Dec. 734, holding a deed executed with blanks, and afterwards filled up and delivered by agent of the party is good; Chauncey v. Arnold, 24 N. Y. 330, as to validity of parol authority; Boyd v. Kennedy, 38 N. J. L. 146, 20 Am. Rep. 376, holding where bond is issued with blank for name of payee the authority for a subsequent bona fide holder to write

his own name in the blank space is implied; Gibbs v. Frost, 4 Ala. 720, holding an authority to fill up and perfect bond is an authority to redeliver also.

Disapproved in Burns v. Lynde, 6 Allen, 305, holding filling up a blank form of a deed by parol authority of one who has signed and sealed it will not make it a valid conveyance of land, unless the instrument is redelivered after being completed in form.

Ratification under seal.

Cited in Drumright v. Philpot, 16 Ga. 424, 60 Am. Dec. 738, as to the necessity of, to give validity to instrument as deed of party.

Cited in note in 8 Eng. Rul. Cas. 633, on necessity of ratification of unauthorized deed under seal.

What constitutes a deed.

Cited in 1 Devlin Deeds, 3d ed. 8, on deed as simply instrument under seal.

Fraud.

Cited in Lehman v. Kester, 18 Ont. L. Rep. 395, as to its effect on contracts; Smith v. Babcock, 2 Woodb. & M. 246, Fed. Cas. No. 13,009, on the point that fraud vitiates all contracts tainted by it; Fairbanks v. Snow, 145 Mass. 153, 1 Am. St. Rep. 446, 13 N. E. 596, holding unknown fraud of stranger will not avoid contract; Mason v. Evans, 1 N. J. L. 182; Eldridge v. Bush, Smith (N. H.) 288,—as to fraud vitiating everything.

Assignability of choses in action.

Cited in Hudson v. Weir, 29 Ala. 294, holding that contract for sale of note, at price not exceeding $200, may be made so as to vest equitable title in purchaser without writing, or delivery at time of sale or payment of part of purchase price at such time; Sanborn v. Little, 3 N. H. 539, holding the equitable interest of an assignee of a chose in action will be protected by courts of law, against all interference of the original parties, after notice of the assignment; Rogers v. Omaha Hotel Co. 4 Neb. 54, holding under statute a mechanic's lien is assignable, and the assignee thereof may maintain an action to foreclose the lien; Tuttle v. Bebee, 8 Johns. 152, holding courts of law will take notice of trust created by equitable assignment; Bayard v. McLane, 3 Harr. (Del.) 139; Sheftall v. Clay, T. U. P. Charlt. (Ga.) 227; Fitzpatrick v. Beatty, 6 Ill. 454; Crocker v. Whitney, 10 Mass. 316; Mowry v. Todd, 12 Mass. 281; Clark v. Parker, 4 Cush. 361; Pitts v. Holmes, 10 Cush. 92; Gibson v. Cooke, 20 Pick. 15, 32 Am. Dec. 194; Sloan v. Sommers, 14 N. J. L. 509; Burke v. Allen, 3 Yeates, 351; Parker v. Kennedy, 1 Bay, 398; M'Laughlin v. Rutherford, 1 Yerg. 169; Dunn v. Price, 11 Leigh, 203; Gerrie v. Rutherford, 3 Manitoba L. R. 291; Black v. Ellis, 34 U. C. Q. B. 466; Camp v. Tompkins, 9 Conn. 545,—holding chose in action assignable; Colbourn v. Rossiter, 2 Conn. 503, on policy of allowing assignments of choses in action; Boyd v. Anderson, 1 Overt. 438, 3 Am. Rep. 762, on history of assignability of non-negotiable paper; Shaver v. Western U. Teleg. Co. 57 N. Y. 459 (dissenting opinion); Dunlop v. Silver, 1 Cranch App. 367, 2 L. ed. 139; Roberts v. Corbin, 26 Iowa, 315, 96 Am. Dec. 146; Varney v. Hawes, 69 Me. 442; Cutts v. Perkins, 12 Mass. 206; Bouvier v. Baltimore & N. Y. R. Co. 67 N. J. L. 281, 60 L.R.A. 750, 51 Atl. 781; Scoby v. Blanchard, 3 N. H. 170; Coleman v. Bresnahan, 54 Hun, 619, 8 N. Y. Supp. 158; Harris v. Clark, 3 N. Y. 93, 51 Am. Dec. 352; Munger v. Shannon, 61 N. Y. 251; Colbourn v. Rossiter, 2 Conn. 503,—as to the assignability of choses in action.

Rights on assignment of chose in action.

Cited in Reed v. Ingraham, 4 Dall. 169, 1 L. ed. 786, holding that action may

be brought in name of assignee of stock contract promising to secure transfer from J. B. or order; United States v. Cutts, 1 Sumn. 133, Fed. Cas. No. 14,912, as to draft drawn by creditor upon debtor being an equitable assignment of the fund; Hudson v. Weir, 29 Ala. 294, holding that sale of notes at price not exceeding $200, may be made, without writing, without delivery of notes, and without payment of any part of price so as to vest equitable title; Pates v. St. Clair, 11 Gratt. 22, holding courts will not permit nominal plaintiff to dismiss suit or release the action; Buchanan v. Taylor, Addison (Pa.) 154, holding assignment vests equitable interest in assignee; Wardell v. Eden, 2 Johns. Cas. 258; Williams v. Irving, 47 How. Pr. 440,—as to necessity of notice of assignment; Conway v. Cutting, 51 N. H. 407, holding a written order by a creditor upon his debtor, requesting him to pay to a third person is an equitable assignment of a chose in action; Garland v. Harrington, 51 N. H. 409, holding it is not necessary in case of the assignment of a debt, that the debt should be due at the time of the assignment in order to protect the rights of the assignee from an attachment against the assignor; Johnson v. Bloodgood, 1 Johns. Cas. 49, 1 Am. Dec. 93; Thompson v. Emery, 27 N. H. 269,—holding the equitable interest of assignee will be protected against all persons having notice of the assignment.

Cited in note in 35 L.R.A.(N.S.) 732, on maintenance of action on assigned chose in action by person in interest.

— Maintenance of action by party in interest.

Cited in Ruan v. Gardner, 1 Wash. C. C. 145, Fed. Cas. No. 12,100, holding that an action on a policy of insurance effected in name of an agent might be maintained in the name of the principal even if not mentioned in the policy.

— In laws courts.

Cited in Bulkley v. Landon, 3 Conn. 76, holding the necessity of suing in the promisee's name is no longer questionable; Campbell v. Hamilton, 4 Wash. C. C. 92, Fed. Cas. No. 2,359; Sanford v. Nichols, 14 Conn. 324,—holding an action at law can be sustained by him only in whom the legal interest is vested; Henry v. Brown, 19 Johns. 49, on recognition of assignee in law courts; Farnsworth v. Sweet, 5 N. H. 267, to the point that where note or obligation is taken in name of one person for use of another, courts of law recognize interest of real creditor; Belton v. Gibbon, 12 N. J. L. 76, holding court of law will for certain purposes, notice the assignment, consider it valid, permit the assignee to prosecute an action in the name of the assignor, but for his own use, and will protect his interests from the interference or control of the assignor; Sprague v. Baker, 17 Mass. 586, holding them not assignable at common law.

Cited in 3 Page Contr. 1934, on ineffectiveness of assignment at common law.

Champerty and maintenance.

Cited in Lytle v. State, 17 Ark. 608, holding an attorney at law may purchase of his client an interest in the subject matter of the suit in consideration of his services; Gilman v. Jones, 87 Ala. 691, 4 L.R.A. 113, 5 So. 785, as to the doctrine being absolete; Ross v. Ft. Wayne, 12 C. C. A. 627, 24 U. S. App. 506, 64 Fed. 1006, holding one who, having an interest in the subject-matter of a suit, buys up the interest of the plaintiff pending suit and thereafter prosecutes the suit himself, is not guilty of maintenance; Sherley v. Riggs, 11 Humph. 53, holding a party acting in good faith may lawfully employ an unprofessional agent to aid in conducting a suit against him and if the latter, upon sufficient consideration, undertakes to stand the suit and in case of judgment against the principal to "pay all costs and damages," and keep the principal harmless, it is not maintenance,

and a recovery upon the undertaking will be sustained; Duke v. Harper, 2 Mo. App. 1, holding that agreement between attorney and client that attorney shall prosecute suit for recovery of property, attorney to receive portion of property as compensation is valid; Brown v. Bigne, 21 Or. 260, 14 L.R.A. 745, 28 Am. St. Rep. 752, 28 Pac. 11, holding a fair bona fide agreement by a layman to supply funds to carry on a pending suit in consideration of having a share of the property in controversy is not per se void; Thallhimer v. Brinckerhoff, 3 Cow. 623, 15 Am. Dec. 308, holding a husband whose wife may, by possibility, be heir of one who claims land, may maintain the suit of the claimant, brought to recover the land, upon an agreement to have part of the land; Thalimer v. Brinkerhoff, 20 Johns. & R. 386, holding contract whereby one having no interest in land in controversy was to advance money to prosecute ejectment actions for part of the land, champertous; Richardson v. Rowland, 40 Conn. 565; Schomp v. Schenck, 40 N. J. L. 195, 20 Am. Rep. 219,—holding law of maintenance and champerty does not prevail in New Jersey; Bartholomew County v. Jameson, 86 Ind. 154, holding one having an interest in the result of a suit as a guarantor may lawfully assist in its prosecution; Chicago City R. Co. v. General Electric Co. 74 Ill. App. 465, holding absence of legal or equitable interest essential to constitute maintenance; Dunne v. Herrick, 37 Ill. App. 180; Stotsenburg v. Marks, 79 Ind. 193; Sedgwick v. Stanton, 14 N. Y. 289; Reece v. Kyle, 49 Ohio St. 475, 16 L.R.A. 723, 31 N. E. 747; Newkirk v. Cone, 18 Ill. 449,—holding contingent fee contracts are not against law or public policy; Bradlaugh v. Newdigate, L. R. 11 Q. B. D. 1, 52 L. J. Q. B. N. S. 454, 31 Week. Rep. 792, holding person having no interest in action guilty of maintenance in contracting for an interest in result thereof.

Cited in Reinhard Ag. 246–248, on criticism of harshness of common-law doctrine of champerty.

Recovery by indorser of note on money counts.

Cited in Eagle Bank v. Smith, 5 Conn. 71, 13 Am. Dec. 37, holding it may be maintained against the maker or indorser; Chase v. Burnham, 13 Vt. 447, 37 Am. Dec. 602, holding an indorsee for collection may recover from maker of a negotiable note on the common counts.

Law merchant.

Cited in Sherman v. Dill, 4 Yeates, 295, 2 Am. Dec. 408, as to construction of contracts under; Lennig v. Ralston, 23 Pa. 137; Beall v. Fox, 4 Ga. 403, as to its nature and foundation; Bradford v. Terrand [1902] 2 Ch. 655, 2 B. R. C. 980, 71 L. J. Ch. N. S. 859, 51 Week. Rep. 122, 87 L. T. N. S. 388, 18 Times L. R. 830, 67 J. P. 21, to the point that law merchant is system of equity founded on rules of equity and governed in all parts by equity and good faith.

Action for money paid by acceptor of forged bill to bona fide indorser.

Cited in Ritchie v. Summers, 3 Yeates, 531, as to whether there can be a recovery of.

Extinguishment of civil injury by felony.

Cited in Hyatt v. Adams, 16 Mich. 180, holding that at common law no civil action can be maintained for death of human being as civil remedy is suspended on ground of public policy until trial of public offense; Story v. Hammond, 4 Ohio, 376, on the point as to merger by felony of a civil action; Piscataqua Bank v. Turnley, 1 Miles (Pa.) 312, as to whether felony extinguishes the civil injury.

Cited in 1 Cooley Torts, 3d ed. 152, on suspension of private remedy for felony until public justice is satisfied.

"Month" as meaning calendar month.

Cited in Wagner v. Kenner, 2 Rob. (La.) 120, on "month" in commercial paper as meaning calendar month.

Written contracts as evidence against parties thereto.

Cited in Miller v. Spencer, 4 N. C. (1 Car. Law Repos.) 264 note, holding that all written contracts are intended to be standing evidence against parties entering into them.

2 E. R. C. 696, PARKINSON v. POTTER, 55 L. J. Q. B. N. S. 152, L. R. 16 Q. B. Div. 152, 53 L. T. N. S. 818, 34 Week. Rep. 215, 50 J. P. 470.

2 E. R. C. 707, SAUNDERSON v. PIPER, 2 Arnold, 58, 5 Bing. N. C. 425, 7 Dowl. P. C. 632, 3 Jur. 773, 8 L. J. C. P. N. S. 227, 7 Scott, 408.

Parol evidence of meaning of written instrument.

Cited in Crooks v. Whitford, 47 Mich. 283, 11 N. W. 159, holding that parol evidence is not admissible to show description of land intended to be devised in will but omitted therefrom; Peacher v. Strauss, 47 Miss. 353, holding that parol evidence of county and state in which land mentioned in deed is situate, is admissible where deed is silent as to county and state; Crane v. Elizabeth Library Asso. 29 N. J. L. 302, holding parol evidence inadmissible to show that writing purporting to be a voluntary subscription for erection of library building was in fact a subscription for stock in a library corporation; Kupferschmidt v. Agricultural Ins. Co. 80 N. J. L. 441, 34 L.R.A.(N.S.) 503, 78 Atl. 225, holding that policy of insurance made payable to first mortgagee, cannot be altered by extrinsic evidence for purpose of establishing that intention was to include second mortgagee as party to contract; King v. New York & C. Gas Coal Co. 204 Pa. 628, 54 Atl. 477, holding that where description in written instrument is clear and unambiguous, parol evidence is inadmissible to show that the parties intended something different.

Cited in notes in 11 E. R. C. 225, on parol evidence to contradict written instrument; 14 E. R. C. 654, on rules for interpretation of written instruments.

Cited in Crowford Neg. Inst. L. 3d ed. 29, on construction of ambiguous negotiable instrument; 2 Morse Banks, 4th ed. 785, on right of bank to pay check according to drawer's intent notwithstanding clerical error.

Distinguished in Boardman v. Lake Shore & M. S. R. Co. 84 N. Y. 157, holding record of issue of stock admissible on question of liability on stock certificates, where the whole proceeding relative to the issue of stock constituted one transaction.

Force and effect of marginal figures in bills and notes.

Cited in Payne v. Clark, 19 Mo. 152, 59 Am. Dec. 333, holding that sum written in words in body of bill must control over figures in margin specifying the funds making up the amount; Borland v. Cotte, 10 B. C. 493, holding that written words control over figures in the description of property; R. v. Bail, 7 Ont. Rep. 228, holding that the alteration of the marginal figures in Canadian Dominion note constituted forgery.

—As controlling amount of acceptance.

Cited in Garrard v. Lewis, L. R. 10 Q. B. Div. 30, 31 Week. Rep. 475, 47 L. T. N. S. 408, holding acceptor of bill in blank, liable, to bona fide holder for value, for full amount inserted in body thereof, though the marginal figures existing at time of acceptance were fraudulently altered to correspond with amount inserted.

— Certificates of deposit.

Cited in Mears v. Graham, 8 Blackf. 144; Poorman v. Mills & Co. 39 Cal. 345, 2 Am. Rep. 451,—holding that words written in body of certificate of deposit, when plain, definite and certain, must control without regard to superscription in figures.

2 E. R. C. 718, DOE EX DEM. HISCOCKS v. HISCOCKS, 9 L. J. Exch. N. S. 27, 5 Mees. & W. 363.

Evidence to explain ambiguity in will.

Cited in Wiley v. Smith, 3 Ga. 551, holding parol testimony on the construction of a will inadmissible where will is unambiguous; Kurtz v. Hibner, 55 Ill. 514, 8 Am. Rep. 665, holding extrinsic evidence inadmissible to correct description of land in will, where such description is full and explicit but testator owned no such land as described; Hawhe v. Chicago & W. I. R. Co. 165 Ill. 561, 46 N. E. 240, holding that in construing will evidence of condition of testator's mind at time he executed will, whether he lived with his family, etc., is admissible to give court testator's situation, so that will may be read in light in which it was written; Crooks v. Whitford, 47 Mich. 283, 11 N. W. 159, holding parol evidence inadmissible to supply description of land where entirely omitted in the will; Warner v. Miltenberger, 21 Md. 264, 83 Am. Dec. 573; Hammond v. Hammond, 55 Md. 575,—holding extrinsic evidence admissible to show meaning of words used in will; Peet v. Peet, 229 Ill. 341, 13 L.R.A.(N.S.) 780, 82 N. E. 376, 11 Ann. Cas. 492; Baker v. Safe Deposit & T. Co. 93 Md. 368, 49 Atl. 623; Tuxbury v. French, 41 Mich. 7, 1 N. W. 904,—holding extrinsic evidence of surrounding circumstances admissible to place court in position of testator to aid in construing a will; Gass v. Ross, 3 Sneed, 211, holding parol evidence admissible to explain a latent ambiguity in will raised by the pleadings or by other evidence; American Bible Soc. v. Pratt, 9 Allen, 109, holding that parol evidence is inadmissible to show that testator had moneys on deposit in Dedham Institution for savings, and never had moneys on deposit in Dedham bank, where bequest was of all moneys on deposit in Dedham bank; Goodhue v. Clark, 37 N. H. 525, holding that proof of situation and circumstances of testator and his family, of his property and legatees, are always admissible to aid in construction of will; Hawkins v. Garland, 76 Va. 149, 44 Am. Rep. 158, holding that extraneous evidence is admissible, both to show existence of latent ambiguity, and to remove it and disclose testator's meaning; Brunn v. Schuett, 59 Wis. 260, 48 Am. Rep. 499, 18 N. W. 260, on inadmissibility of parol evidence as to unambiguous words in will; Hanner v. Moulton, 23 Fed. 5, holding that where testator devised certain lands when in fact he had no lands, parol evidence is inadmissible to show an intent to devise a certain land right certificate for the location of land to the same amount; Travers v. Casey, 36 N. B. 229, holding extrinsic evidence inadmissible where will devises property in clear and explicit terms, and such devise will not be affected by any previous recital in the will; Lawrence v. Ketchum, 28 U. C. C. P. 406, holding parol evidence inadmissible to show an intent contrary to the plain language of the will; Lindgren v. Lindgren, 5 L. J. Ch. N. S. 428, 9 Beav. 358, 10 Jur. 674; Findlater v. Lowe [1904] 1 Ir. K. B. 519,—holding that where latent ambiguity in will is raised by the pleadings or by evidence, other evidence is admissible to explain and aid in construing the will; Hart v. Tulk, 22 L. J. Ch. N. S. 649, 2 DeG. M. & G. 300, holding that intention of testator as gathered from the whole will and from the state of his property and family at the time the will was made must govern its construction; Allgood v. Blake, L. R. 8 Exch. 160, 42 L. J. Exch. N. S. 101, 29 L. T. N. S. 331, 21

Week. Rep. 599, on intention of testator as expressed by his words, under the circumstances surrounding him, as governing the construction of a will; Bunbury v. Doran, Ir. Rep. 8 C. L. 516, on admissibility of evidence of testator's religious views on question of construction of provision in will.

Cited in notes in 16 L.R.A. 321, on admissibility of parol evidence to correct mistake in description in will of land devised or personal property bequeathed; 6 L.R.A.(N.S.) 953, 956, 966, on correction of misdescription of land in will.

Distinguished in Re Wells, 113 N. Y. 396, 10 Am. St. Rep. 457, 21 N. E. 137, holding evidence of surrounding circumstances inadmissible where words in will are plain and explicit and no ambiguity is raised by the pleadings or evidence.

— To identify legatee or devisee.

Cited in Dunham v. Averill, 45 Conn. 61, 29 Am. Rep. 642; Tucker v. Seaman's Aid Soc. 7 Met. 188,—holding parol evidence to show legatee intended, inadmissible where a legatee is explicitly named in the will; Fairfield v. Lawson, 50 Conn. 501, 47 Am. Rep. 669, holding parol evidence of declarations of testator to scrivener inadmissible to identify legatee where no one answers the description in the will; Bodman v. American Tract Soc. 9 Allen, 447; Stokeley v. Gordon, 8 Md. 496,—holding parol evidence to identify devisee inadmissible where will named "A. M. G. wife of J. G." when in fact J. G.'s wife was C. G. but he had a daughter named A. M. G.; Trustees v. Sturgeon, 9 Pa. 321, holding parol evidence inadmissible to identify church society meant in will where only one society existed at the time the will took effect, though another had been formed subsequently; Thorne v. Fordham, 4 Rich. Eq. 222, holding that where words describing a legatee apply equally to two persons, parol evidence is admissible to identify the one intended; Ruthven v. Ruthven, 25 Grant Ch. (U. C.) 534, holding that where a will bequeathed a specified amount to each of the four "children" of his brother and there were in fact four daughters and one son, evidence of instruction to scrivener that testator wished to leave same amount to the children as in a prior will which gave the sum to each of 4 "daughters" is admissible; M'Eacheran v. Taylor, 6 N. B. 525 (dissenting opinion), on devise to "grandson" being construed according to the words used and the circumstances surrounding the making of the will; Sullivan v. Sullivan, Ir. Rep. 4 Eq. 457, holding parol evidence of circumstances, but not of testator's declarations, admissible to supply omission of part of designation of legatee in will; Re Feltham, 1 Kay & J. 528, holding that where legatee is named and described of a certain place, which was not the residence of the one named but of another, parol evidence is admissible to identify the legatee intended; Re Hubbock [1905] P. 129, 74 L. J. Prob. N. S. 58, 54 Week. Rep. 16, 92 L. T. N. S. 665, 21 Times L. R. 333, holding that where legatee is designated as "my granddaughter" with a blank following, evidence of testator's declarations is admissible to ascertain which granddaughter was intended; Doe ex dem. Allen v. Allen, 9 L. J. Q. B. N. S. 395, 12 Ad. & El. 451, 4 Perry & D. 320; Grant v. Grant, L. R. 5 C. P. 380, 727, 39 L. J. C. P. N. S. 140, 22 L. T. N. S. 233, 18 Week. Rep. 576,—holding that where words describing legatee are equally applicable to two persons, parol evidence is admissible to identify the one intended; Andrews v. Andrews, Ir. L. R. 15 Eq. 199, holding that where will gives a legacy to the "children" of a named person, extrinsic evidence is inadmissible to show that only certain of the children were intended; Doe ex dem. Gains v. Roast, 17 L. J. C. P. N. S. 108, 5 C. B. 422, holding that under devise to "my dear wife Caroline" Caroline takes though testator had a former lawful wife named Mary living and his marriage ceremony with Caroline was void.

Cited in note in 38 L.R.A.(N.S.) 92, on admissibility of testimony of solicitor

who prepared a will as to his instructions as being inadmissible to explain a latent ambiguity in name and description of a legatee.

Distinguished in Gillett v. Gane, L. R. 10 Eq. 29, 39 L. J. Ch. N. S. 818, 22 L. T. N. S. 58, 18 Week. Rep. 423, holding that under devise to "R. G. the fourth son," R. G. takes though he was in fact the third son and the fourth son was differently named.

Disapproved in Ex parte Hornby, 2 Bradf. 420, holding evidence of testator's declarations at time of making will admissible to identify legatee where no one exactly answers description given in the will.

— Declarations of testator.

Cited in Hill v. Felton, 47 Ga. 455, 15 Am. Rep. 643, holding evidence of declarations of testator to scrivener drawing the will inadmissible to vary the ordinary construction of words used therein; Cotton v. Smithwick, 66 Me. 360, holding that where the terms of the will can be applied to the subject-matter with legal certainty, evidence of testator's declarations is inadmissible; Lewis v. Douglass, 14 R. I. 604, holding evidence of declarations of testator inadmissible to explain conflicting provisions which appear on the face of the will; Boyd v. Satterwhite, 12 Rich. Eq. 487, holding declarations of testator as to his intention inadmissible in interpreting a provision in a will, which when interpreted is unambiguous; Wootton v. Redd, 12 Gratt. 196, holding declarations of testator as to disposition of property in his will, or of his intentions as to disposition, inadmissible on question of construction of will; Paton v. Ormerod [1892] P. 247, 61 L. J. Prob. N. S. 120, 66 L. T. N. S. 381, holding declarations of testator as to intention inadmissible where no ambiguity exists; Bernasconi v. Atkinson, 23 L. J. Ch. N. S. 184, 10 Hare, 345, 17 Jur. 128, 1 Week. Rep. 152; Charter v. Charter, L. R. 7 H. L. 364, 43 L. J. P. 73, affirming L. R. 2 Prob. Div. 315, 40 L. J. Prob. N. S. 41, 25 L. T. N. S. 38, 19 Week. Rep. 979,—holding declarations of testator as to his intentions in the disposal of his property inadmissible to identify devisee where description is not equally applicable to more than one person.

Distinguished in Doe ex dem. Shallcross v. Palmer, 16 Q. B. 747, 20 L. J. Q. B. 367, 15 Jur. 836, holding declarations of testator prior to execution of a will admissible on question whether certain alterations therein were made before or after its execution; Douglas v. Fellows, 23 L. J. Ch. N. S. 167, 1 Kay, 114, 2 Week. Rep. 654, holding declarations of testator inadmissible to identify legatee where the one intended can be ascertained from the will and from other evidence; Sugden v. St. Leonards, L. R. 1 Prob. Div. 154, 45 L. J. P. N. S. 49, 34 L. T. N. S. 372, 24 Week. Rep. 60, holding statements and declarations of testator admissible as evidence of contents of lost will.

Ambiguity in contracts, certificates, parol evidence.

Cited in Doe ex dem. Hughes v. Wilkinson, 35 Ala. 453, holding that party claiming under deed of husband and wife conveying lands, cannot be allowed to prove by parol testimony of justice by whom acknowledgment was taken that that acknowledgment was intended to apply to deed and not to relinquishment of dower in same lands appearing on paper; Nichols v. Turney, 15 Conn. 101, holding parol evidence admissible to explain latent ambiguity in deed; Hogan v. Wallace, 166 Ill. 328, 46 N. E. 1136, holding that where evidence shows that words in insurance policy fail to describe a beneficiary further evidence is admissible to identify the beneficiary intended; Crockett v. Green, 3 Del. Ch. 466, holding that parol evidence is admissible, in aid of written contracts, only for purpose of interpreting meaning of words used in writing and not in any case to supply deficiency of expression; Williams v. McIntyre, 8 Ga. 34, to the point that where intention cannot be clearly ascertained, by reason of patent ambiguity as to thing

bequeathed court will hear evidence to explain such ambiguity; Cook v. Babcock, 7 Cush. 526, holding parol evidence inadmissible to vary a plain and explicit description in a deed; Peacher v. Strauss, 47 Miss. 353, holding parol evidence of county and state in which land conveyed by a deed is situated admissible where deed is silent as to such location; Williams v. Carpenter, 42 Mo. 327, holding that parol evidence was admissible to prove identity of person to whom certificate of confirmation of land grant under act of Congress where recorder entered name of "Louis La Croix" instead of "Joseph La Croix" where evidence showed that Louis lived in different city; Bartlett v. Remington, 59 N. H. 364, holding that where fund deposited in savings bank in name of M. A. R. depositor "in trust for Sarah" beneficiary called "Sarah" may be identified by parol evidence; Sullivan v. Visconti, 68 N. J. L. 543, 53 Atl. 598, holding evidence of circumstances and surroundings of the parties admissible to identify subject-matter of written contract; Cleveland v. Burnham, 64 Wis. 347, 25 N. W. 407, holding parol evidence admissible to prove and correct mistake as to Christian name in contract; Bartels v. Brain, 13 Utah, 162, 44 Pac. 715 (dissenting opinion), on inadmissibility of declarations of parties as evidence to ascertain meaning of contract; Rowsell v. Hayden, 2 Grant Ch. 557, on admissibility of parol evidence to locate post from which boundaries in deed are described and to reject false descriptions by distances.

Cited in note in 6 E. R. C. 200, on effect of latent ambiguity in meaning of essential word of contract.

Distinguished in Bolton v. Bolton, 73 Me. 299, holding that where insurance policy is payable to the "widow" of insured, evidence dehors the written contract is inadmissible to show that he intended a woman, not his wife, with whom he cohabited.

2 E. R. C. 726, DOE EX DEM. GORD v. NEEDS, 6 L. J. Exch. N. S. 59, 2 Mees. & W. 129.

Evidence to explain ambiguity — In wills.

Cited in Hill v. Felton, 47 Ga. 455, 15 Am. Rep. 643, holding declarations of testator to scrivener inadmissible to show intention to dispose of property different from that shown by the language of the will in its ordinary construction; Lewis v. Douglass, 14 R. I. 604, holding declarations of testator to scrivener inadmissible to explain conflicting provisions appearing on the face of the will; Marshall v. Haney, 4 Md. 498, 59 Am. Dec. 92, on admissibility of parol evidence to explain latent ambiguity.

Cited in note in 6 L.R.A.(N.S.) 966, on correction of misdescription of land in will.

Distinguished in Wiley v. Smith, 3 Ga. 551, holding extrinsic evidence inadmissible where no ambiguity exists.

— In other instruments.

Cited in Doe ex dem. Hughes v. Wilkinson, 35 Ala. 453, holding parol evidence inadmissible to show what a word used in acknowledgment of deed referred back to; Fitzpatrick v. Fitzpatrick, 36 Iowa, 674, 14 Am. Rep. 538, holding that parol evidence is not admissible to show that by mistake, land was described as West ½ of N. E. ¼ instead of East ½ of S. W. ¼, although it appears that testator owned no land except E. ½ of S. W. ¼; Vancouver Lumber Co. v. Vancouver, 15 B. C. 432, holding that parol evidence is admissible to show property which is covered by a lease.

— To identify legatee or devisee.

Cited in Bodman v. American Tract Soc. 9 Allen, 447, holding extrinsic evidence, including declarations of testator, admissible to identify legatee where two persons both answer the description in the will; Billingslea v. Moore, 14 Ga. 370, on same point; Ruthven v. Ruthven, 25 Grant Ch. (U. C.) 534, holding evidence of instructions to scrivener admissible to identify legatees in will devising certain amount to each of his brother's four children when in fact the brother had four daughters and one son; M'Eacheran v. Taylor, 6 N. B. 525 (dissenting opinion), on admissibility of declarations of testator to identify legatee named as "grandson" where there were two answering the name, one legitimate and the other illegitimate.

Disapproved in Ex parte Hornby, 2 Bradf. 420, holding declarations of testator admissible to identify legatee where no one in existence answers the precise description in the will.

Patent ambiguities.

Cited in Marske v. Willard, 169 Ill. 276, 48 N. E. 290, on definition of patent ambiguity.

Title to property held in trust.

Cited in Nicoll v. Walworth, 4 Denio, 385, holding that legal estate vests in trustee, under trust for a particular purpose, only so long as the execution of the trust requires it; Smith v. Thompson, 2 Swan, 386, holding that title to personal property held by trustees for benefit of life tenant ceases upon the death of such life tenant and vests in the remainderman at that time; Fox v. Phelps, 20 Wend. 437, on trustees under implied trust taking only such estate as is necessary to satisfy the object of the trust.

2 E. R. C. 739, WALSH v. TREVANION, 15 Q. B. 733, 14 Jur. 1134, 19 L. J. Q. B. N. S. 458, answering question certified by the Vice Chancellor as reported in 12 Jur. 344, 16 Sim. 178.

Ambiguity as affected by recitals in the instrument.

Cited in Dunbar v. Aldrich, 79 Miss. 698, 31 So. 341, holding that where operative part of deed is expressed in unambiguous terms, it cannot be controlled by recitals or other parts of instrument; Sisson v. Donnelly, 36 N. J. L. 432, holding that words used will be controlled by an intention clearly expressed in the instrument; Bonnett v. Ritchie, 20 N. S. 228, holding that condition to save harmless in a bond of indemnity to a sheriff not controlled by words in the recital mentioning an instrument of a different date; Walker v. Tucker, 70 Ill. 527; Pallikelagatha Marcar v. Sigg, L. R. 7 Ind. App. 83; Burr v. American Spiral Spring Butt Co. 17 Hun, 188,—holding that recitals in contract cannot control over clear and unambiguous operative words therein; Finnell v. Burt, 2 Handy (Ohio) 202, on construction of statutes; Berridge v. Glassey, 16 W. N. C. 255, 42 Phila. Leg. Int. 256, holding that where habendum and recitals in deed are repugnant to the premises, the latter will control; Mills v. King, 14 U. C. C. P. 223, holding that, where deed is ambiguous, recitals therein and schedules attached, may be considered to ascertain its meaning; McDermott v. Keenan, 14 Ont. Rep. 687, on construction of deed containing repugnant and conflicting clauses; Rooke v. Kensington, 14 E. R. C. 723, on application of doctrine of ejusdem generis in interpretation of instruments.

Cited in note in 14 E. R. C. 774, on qualification of operative part of instrument by recital.

Chancery jurisdiction to correct instrument.

The decision of the Court of Chancery was cited in Rooke v. Kensington, 25 L.

J. Ch. N. S. 795, 2 Kay & J. 753, 2 Jur. N. S. 755, 4 Week. Rep. 829, on court of chancery correcting a settlement only when it is proven that it contains something inserted by mistake contrary to the intention of the parties.

2 E. R. C. 750, WINDHAM'S CASE, 5 Coke, 7a.

Construction of instrument as joint or several.

Cited in Burnett v. Pratt, 22 Pick. 556, holding that mortgage given to two persons to secure their several demands is several; Sharp v. Conklin, 16 Vt. 355; Gray v. Johnson, 14 N. H. 414,—holding that covenant with two or more jointly will be held to be several where the interests of the covenantees are several; Vreeland v. Van Ryper, 17 N. J. Eq. 133, holding that devise joint in terms will be held to be several where it would vest in devisees at different times; Conner v. Johnson, 2 Hill, Eq. 41, holding that under devise to a number of persons named, and to a class to be ascertained at a future time, the class takes a share equal to that of each of the named individuals; Bank of United States v. Beirne, 1 Gratt. 234, 42 Am. Dec. 551, construing power of attorney from several, to indorse notes, to authorize joint indorsement only, since their interests appeared to be joint and not several; Reynolds v. Hurst, 18 W. Va. 648, holding that in action against one on joint and several obligation, declaration need not refer to other obligors; Jewett v. Cunard, 3 Woodb. & M. 277, Fed. Cas No. 7,310, holding that party having a several interest as well as a joint one with others under a contract may maintain suit without joining his joint owners; Cowles Electric Smelting & Aluminum Co. v. Lowrey, 24 C. C. A. 616, 47 U. S. App. 531, 79 Fed. 331 (reversing 56 Fed. 488), holding that sale by two persons of all the patents they held or had applied for included patents applied for by each singly as well as those held jointly; Lowry v. Cowles Electric Smelting & Aluminum Co. 56 Fed. 488; Theberath v. Celluloid Mfg. Co. 5 Bann. & Ard. 577, 3 Fed. 143,—on question whether license to a number of named persons "respectively" constitutes a joint license to all or several licenses to each.

Construing ambiguous instrument against grantor or devisor.

Distinguished in Holmes v. Meynel, 25 E. R. C. 697, T. Jones, 172, T. Raym. 452, holding that a will must be construed according to the intent of the devisor; Holmes v. Meynel, 10 E. R. C. 822, T. Raym. 452, 1 T. Jones, 172, holding that in case of will of land construction thereof is to be made according to intent of testator.

Suspension of statute of limitations by war.

Cited in Wall v. Robson, 2 Nott. & M'C. 497, 10 Am. Dec. 623, holding that war suspends operation of statute of limitations between citizens of two countries for time which it continues.

2 E. R. C. 756, DANN v. SPURRIER, 3 Bos. C. P. 399, 7 Revised Rep. 97, certificate to chancellor in 3 Bos. & P. 442, 6 Revised Rep. 119.

Construction of contracts — In general.

Cited in Cocheco Mfg. Co. v. Whittier, 10 N. H. 305; Rogers v. Eagle Fire Co. 9 Wend. 611,—holding that deeds should be construed most strongly against the grantor, in cases of doubt.

Cited in 1 Beach Contr. 894, on construction of deeds.

— Alternative clauses and options.

Cited in Dow v. Abbott, 197 Mass. 283, 84 N. E. 96, holding that devise of estate for "five years, or longer" gives to devisee an estate for life; McManus v. Gregory, 16 Mo. App. 375, holding that where vendor at auction sale provides in

the contract of sale that he may redeem by the payment of a bonus from $7 to $30, the option as to amount rests with purchaser.

Distinguished in Dalye v. Robertson, 19 U. C. Q. B. 411, holding that devise to "R. for twenty-one years, or the term of his natural life from" a future date creates a life estate in R.

— Leases with options for renewal or termination.

Cited in Delashman v. Berry, 20 Mich. 292, 4 Am. Rep. 392, holding that party in possession under lease for one year with privilege of three, and who continues in possession after end of first year, elector to hold premises for three years; Lewis v. Effinger, 30 Pa. 281, holding that lease of land for mill-dam, for term of 100 years and for such further time as lessee, his heirs, etc., shall think proper, cannot be determined by lessor at expiration of term except by tender of compensation for improvements; Effinger v. Lewis, 32 Pa. 367, holding that lease for a term with provision that lessee, his heirs and assigns, might hold the premises at the same rent as long as they should desire is a valid perpetual lease at option of lessee; Brewster v. Lanyon Zinc Co. 72 C. C. A. 213, 140 Fed. 801, holding that lease for a defined term is not rendered a tenancy at will as to both parties though it provides that lessee may terminate it before expiration of the term; Hutchinson v. Boulton, 3 Grant Ch. (U. C.) 391, holding that under lease providing for renewal, or in default thereof payment for improvements, lessor has option to renew or pay; Nudell v. Williams, 15 U. C. C. P. 348, holding that under lease providing that lessor's failure to pay for improvements for one month should be a renewal, lessee had option to continue lease upon lessor's failure to pay; Delashman v. Merry, 20 Mich. 292, 4 Am. Rep. 392, holding that where lessee has option to continue lease, his occupation of the premises after expiration of term is an exercise of his option of renewal.

Cited in 1 Underhill Land. & T. 374, 376, on determinability of lease only at option of lessee.

Assignability of optional lease.

Cited in Wilde v. Smith, 8 Daly, 196, holding that option to continue lease passes by assignment thereof by lessee.

2 E. R. C. 763, HUNGERFORD'S CASE, Leon. pt. 1 p. 30.

Election under indeterminate grant.

Cited in Carstarphen v. Holt, 96 Ga. 703, 23 S. E. 904, holding that deed conveying fifty acres on the northeast corner of a certain lot is curable by election of grantee in locating the tract; Galbraith v. Bowen, 5 Pa. Dist. R. 352, holding that devise of ten acres, being part of a larger tract, gives devisee right to select any ten acres of the tract; Canning v. Pinkham, 1 N. H. 353, on election under grant of part of a tract of land without locating the part.

Cited in note in 7 E. R. C. 257, as to whether express words are necessary to create a crown grant.

Distinguished in Savill Bros v. Bethell [1902] 2 Ch. 523, 71 L. J. Ch. N. S. 652, 50 Week. Rep. 580, 87 L. T. N. S. 191, holding that exception in grant which requires an election in the future without limit as to time is void.

— Crown or public grants.

Cited in Inman v. Jackson, 4 Me. 237, holding that under grant of land by the state without locating the land, title passes only upon actual location of the lands by such grantees.

Cited in note in 8 E. R. C. 229, on strict construction of grant by government.

2 E. R. C. 768, BLACKAMORE'S CASE, 8 Coke, 156a.

Power of court as to amendments.

Cited in Den ex dem. Vanarsdalen v. Hull, 9 N. J. L. 277, holding that judge at circuit has no power to order amendment to be made in circuit record; Diamond v. Williamsburgh Ins. Co. 4 Daly, 494, holding that court may allow defendant to amend his answer by setting up a new defense at any time before trial; Fowlie v. Stronach, 2 N. B. 110, holding that where a writ of inquiry is ordered to be executed before a judge at Nisi Prius and the sheriff it is defective and error cannot be waived.

Of record after term.

Cited in Ex parte Lange, 18 Wall. 163, 21 L. ed. 872 (dissenting opinion),—on power of court to amend judgment after expiration of term; Wiggin v. Superior Ct. 68 Cal. 398, 9 Pac. 646; De Castro v. Richardson, 25 Cal. 49,—holding that power of court to amend record after adjournment of term only extends to correction of mere clerical errors; Judson v. Blanchard, 3 Conn. 579, holding that record of lower court cannot be amended in superior court after affirmance by it; Burnside v. Ennis, 43 Ind. 411, holding that during term at which judgment was rendered, court may for cause, modify or vacate judgment; Com. v. Winstons, 5 Rand. (Va.) 546, holding that clerical error in entry of judgment may be corrected by amendment upon motion at a succeeding term; Messenger v. Broom, 1 Pinney (Wis.) 630, holding that at common law all mistakes in record were amendable during term at which record was made; Hall v. Bank of Virginia, 15 W. Va. 323, holding that court of appeals cannot rehear a case upon its merits for the correction of errors at a subsequent term where no application for rehearing is made during term at which it was decided; Towner v. Lane, 9 Leigh, 262, on same point.

— Of process.

Cited in Com. v. Chauncy, 2 Ashm. (Pa.) 90, holding that where sheriff failed to sign his return to jury process, the court may on motion direct him to sign it, and the array of jurors need not be quashed; Chicago Planing Mill Co. v. Merchants' Nat. Bank, 97 Ill. 294, holding that after judgment court is only allowed to authorize sheriff to amend return of service on defendant in affirmance of judgment, and cannot prevent amendment to cause reversal of judgment; Fisher v. Crowley, 57 W. Va. 312, 50 S. E. 422, 4 Ann. Cas. 282, holding that summons cannot be amended in any substantial particular unless authority to amend is given by statute; Peddle v. Hollinshead, 9 Serg. & R. 277, holding that omission in levari facias of command to levy debt may be amended after error brought, by court above.

Effect of variance between writ or declaration or judgment.

Cited in Moss v. Moss, 4 Hen. & M. 293, holding that judgment will not be set aside for variance in that it is for sum greater than that in the writ but within the declaration; Wilson v. Berry, 2 Cranch, C. C. 707, Fed. Cas. No. 17,791, holding that variance between the capias ad respondendum and the declaration is not a ground for arrest of judgment.

Meaning of "process."

Cited in R. v. O'Rourke, 32 U. C. C. P. 388, on meaning of "process" and "procedure."

Sentencing criminal at subsequent or adjourned term.

Cited in Com. v. Murphy, 45 Pa. Super. Ct. 189, holding that person convicted at regular term of criminal court, may be sentenced at adjourned court.

Construction of statutes.

Cited in Binney's Case, 2 Bland. Ch. 99, holding that parol proof can be admitted to explain language of act of assembly.

Insertion of wrong middle name in instrument.

Cited in Schofield v. Jennings, 68 Ind. 232, holding that middle names or initials of person do not affect his legal name.

Admissibility of parol evidence to avoid instrument.

Cited in Johnson v. Cunningham, 1 Ala. 249, holding that party cannot be heard to avoid deed ab initio, by which he has granted and conveyed property.

2 E. R. C. 786, TILDESLEY v. HARPER, L. R. 10 Ch. Div. 393, 48 L. J. Ch. N. S. 495, 39 L. T. N. S. 552, 27 Week. Rep. 249, reversing the decision of Justice Fry, reported in 47 L. J. Ch. N. S. 263, 26 Week. Rep. 263, 38 L. T. N. S. 60, L. R. 7 Ch. Div. 403.

Amendment of pleadings.

Cited in Belcher v. McDonald, 9 B. C. 377; McPherson v. Edwards, 19 Manitoba L. Rep. 337,—holding that amendment of pleading will not be denied because of delay only partially accounted for by negotiations for settlement, when no injury will be caused except what can be compensated for by costs; Senecal v. La Compagnie Imprimiere de Quebec, 2 Dorion, Q. B. 57 (dissenting opinion), on permission to amend after jurisdiction of court has been declined; O'Keefe v. Williams, 11 C. L. R. (Austr.) 171, holding that amendment of pleading at trial should be allowed where proposed amendment was merely alternative statement of rights of parties, based upon admitted facts; Symonds v. Fishwick, 19 N. S. 437, holding that amendment to pleadings should be permitted unless a very strong case is presented why such right should be denied; Ross v. Robertson, 7 Ont. L. Rep. 464, holding that relief will be granted against failure to give notice of appeal in time where a bona fide intention to appeal has been shown; Clarke v. Langley, 10 Ont. Pr. Rep. 208; Standard Bank v. Frind, 15 Ont. Pr. Rep. 438 (dissenting opinion),—on right to amend pleadings where nature of action would not be changed thereby; Steward v. North Metropolitan Tramways Co. L. R. 16 Q. B. D. 178, 556, 55 L. J. Q. B. N. S. 157, 54 L. T. N. S. 35, 34 Week. Rep. 316, 50 J. P. 324, holding that amendment to pleading will not be allowed where the position of the adverse party would be prejudicially affected thereby; Claparede v. Commercial Union Asso. 32 Week. Rep.151, holding that amendment to pleadings will not be allowed where the adverse party would be seriously and irretrievably injured thereby; Re Trufort, 53 L. T. N. S. 498, 34 Week. Rep. 56, holding that amendment to pleadings will be allowed where application is bona fide.

Distinguished in Laird v. Briggs, 50 L. J. Ch. N. S. 260, L. R. 16 Ch. Div. 440, 43 L. T. N. S. 632, 29 Week. Rep. 197, holding that amendment which completely changes the defence will not be allowed.

The decision of Justice Fry was cited in Ritchie v. Hall, 20 N. S. 243, holding that amendment of the pleadings may be allowed in the appellate court.

Sufficiency of denial.

The decision of Justice Fry was cited in Schweiger v. Vineberg, 15 Manitoba L. Rep. 536; Jackson v. Jackson, 3 B. C. 149,—holding that where allegation is made with divers circumstances a denial thereof in connection with those circumstances is evasive and insufficient.